No. 98-6322

IN THE SUPREME COURT OF THE UNITED STATES

ANTONIO SLACK,
Petitioner,

v.

E.K. McDANIEL, Warden, Ely (Nevada) State Prison,
and FRANKIE SUE DEL PAPA, Attorney General of
The State of Nevada,
Respondents.

BRIEF AMICI CURIAE STATES OF CALIFORNIA, ALABAMA, FLORIDA, IDAHO, KANSAS, MISSISSIPPI, MONTANA, NEBRASKA, NEW MEXICO, NORTH CAROLINA, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, VIRGINIA, AND WASHINGTON IN SUPPORT OF RESPONDENTS

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MICHAEL F. EASLEY
Attorney General of North Carolina
Department of Justice
P.O. Box 629
Raleigh, NC 27602-0629

W.A. DREW EDMONDSON
Attorney General of Oklahoma
2300 N. Lincoln Boulevard, Suite 112
Oklahoma City, OK 73105-4894

D. MICHAEL FISHER
Attorney General of Pennsylvania
16th Floor, Strawberry Square
Harrisburg, PA 17120

CHARLES M. CONDON
Attorney General of South Carolina
P.O. Box 11549
Columbia, SC 29211

MARK BARNETT
Attorney General of South Dakota
500 East Capitol Avenue
Pierre, SD 57501-5070

PAUL G. SUMMERS
Attorney General and Reporter of Tennessee
425 Fifth Avenue North
Nashville, TN 37243

MARK L. EARLEY
Attorney General of Virginia
900 East Main Street
Richmond, VA 23219

CHRISTINE O. GREGOIRE
Attorney General of Washington
1125 Washington Street
P.O. Box 40100
Olympia, WA 98504-0100

QUESTION PRESENTED

If a person's petition for habeas corpus under 28 U.S.C. § 2254 is dismissed for failure to exhaust state remedies and he subsequently exhausts his state remedies and refiles the § 2254 petition, are claims included within that petition that were not included within his initial § 2254 filing 'second or successive' habeas applications?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

No. 98-6322

ANTONIO T. SLACK, *Petitioner*,

v.

E.K. MCDANIEL, Warden, Ely Nevada State of Prison, et al.,
Respondents.

INTEREST OF AMICI CURIAE

All decisions by this Court concerning habeas corpus applications filed pursuant to Section 2254[1] of Title 28 of the United States Code are of interest to amici, as amici are responsible for defending presumptively valid state court judgments against federal habeas corpus challenges. In addition to the specific "second or successive" habeas application issue set forth in the order granting the writ of certiorari, this case presents threshold jurisdictional and previously unaddressed retroactivity-related questions, the resolution of which will have a substantial impact on Section 2254 cases throughout the country. Amici's interests would therefore be served by a resolution of those threshold issues, as well as the substantive question presented.[2]

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1. All further references to "sections" are to sections of Title 28 of the United States Code, unless otherwise specified.

2. This brief is submitted in support of respondents by amici

SUMMARY OF ARGUMENT

Petitioner Slack may not challenge the denial of his habeas corpus petition by invoking the statutory certiorari jurisdiction of this Court. His "case" was never properly "in" the court of appeals. Under the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter AEDPA or the Act), which applies to Slack's dismissed claims because he first asserted them and sought to appeal their dismissal after the statute's enactment, Slack could bring his case to the court of appeals only if he made a substantial showing of the denial of a constitutional right. But, here, he sought to appeal the non-constitutional ruling that five of his claims were "second or successive" and that he abused the writ.

Section 1254 provides that this Court may exercise certiorari review power only over "cases" that were "in" the court of appeals. In order for Slack's "case" to have been "in" the court of appeals, that lower reviewing court must have had jurisdiction over the case. And this Court must satisfy itself of this point before it may proceed to decide the merits of Slack's claim. *Nixon v. Fitzgerald*, 457 U.S. 731, 743 (1982).

Here, the United States Court of Appeals for the Ninth Circuit lacked jurisdiction over Slack's intended appeal. Before a petitioner in a Section 2254 case can appeal a district court decision, permission to appeal must

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through their respective Attorneys General in accordance with Rules 37.2 and 37.5 of the Rules of the Supreme Court of the United States. Amici are confident that the "second or successive" petition question will be thoroughly addressed in the brief filed on behalf of Warden McDaniel by the Nevada Attorney General. Therefore, amici's brief is limited to certain threshold jurisdictional and retroactivity-related issues that must be resolved prior to the resolution of the "second or successive" habeas corpus application question. *See* Rule 37.1 of the Rules of the Supreme Court of the United States.

first be obtained. Specifically, the petitioner first must obtain from the district court, the court of appeals, or a circuit justice, a certificate of appealability, as required by Section 2253(c), as amended by the AEDPA. In order to obtain such a certificate, the petitioner must make a "substantial showing of the violation of a *constitutional* right." *Id.* (emphasis added).

The certificate of appealability requirement applies in this case because Slack's intended appeal involved only habeas claims asserted *after* April 24, 1996, the day the AEDPA was enacted, and because his request to appeal was not filed until after that date. These facts take this case outside the confines of this Court's holding in *Lindh v. Murphy*, 521 U.S. 320 (1997), "that the new provisions of chapter 153 generally apply only to cases filed after the Act became effective." *Id.*, at 336. *Lindh* did not define what constituted a "case filed" for purposes of its decision. Defining such a "case" in terms of when the subject *claims* for relief were actually asserted, rather than in terms of other possible events, better reflects Congress' intent in enacting the AEDPA and avoids pernicious results.

In this case, there is no possible way Slack could meet the certificate of appealability requirement of showing the violation of a constitutional right. Slack sought, and still seeks, review of the district court's denial of five of his claims on second or successive petition / abuse of the writ grounds. Whether a petition, or a claim in a petition, is second or successive is not a constitutional question, let alone a "substantial" one. Instead, those questions involve policy limitations set by statute or rule concerning the availability of habeas corpus relief.

Because Slack could not have properly obtained a certificate of appealability, the Court of Appeals for the Ninth Circuit did not have jurisdiction over the appeal. As a result, the "case" was never "in" the court of appeals within the meaning of Section 1254, and therefore may not be reviewed by this Court now.

ARGUMENT

I.

Because Slack Could Not Meet The AEDPA'S Criteria For A Certificate Of Appealability, This Court Lacks Statutory Certiorari Jurisdiction To Review Slack's Appeal

Introduction

This Court's statutory certiorari review power is limited to "cases" that were "in" the court of appeals. 28 U.S.C. § 1254(1) (West 1999). In order for a case to have been in the court of appeals, the circuit court must have had jurisdiction over the case. *Nixon v. Fitzgerald*, 457 U.S. 731, 743 (1982).

Before a federal habeas corpus petitioner can pursue an appeal from a district court's denial of relief in a Section 2254 case, the petitioner must first obtain permission. *See* 28 U.S.C. § 2253(c) (West 1999); Fed. R. App. P. 22 (West 1999). Here, the provisions of chapter 153 of the Judicial Code (28 U.S.C. §§ 2241-2255), as amended by the AEDPA, apply to this case, at least with respect to the five claims that were dismissed as abusive, because those claims were first asserted, and permission to appeal first sought, after the AEDPA was signed into law in April 1996. Under the new AEDPA provisions of chapter 153, Slack was required to request, and obtain, a "certificate of appealability." To obtain such a certificate, Slack was obligated to make "a substantial showing of the denial of a *constitutional* right." 28 U.S.C. § 2253(c)(2) (emphasis added).

The specific issue on which Slack sought review in the Court of Appeals concerns the correctness of the district court's dismissal of five of his claims on second or successive petition / abuse of the writ grounds. Whether a habeas corpus application is second or successive is not a constitutional question. *See Felker v. Turpin*, 518 U.S. 651, 664 (1996) (application of abuse of the writ doctrine as delineated by case law and later tightened by statute does not infringe on the Constitution); *see also McCleskey v. Zant*, 499 U.S. 467, 479-89 (1991) (demonstrating that the doctrines of second or successive petition and "abuse of the writ refers to a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions," but not by constitutional mandate). Because Slack's intended appeal did not even involve a constitutional issue, let alone one of a "substantial" nature, the Court of Appeals could not have issued a certificate of appealability, and therefore lacked jurisdiction over any appeal. Since the Court of Appeals lacked jurisdiction over the case, the second or successive application question was never "in" that court, and may therefore not be reviewed by this Court now.

A. Section 2253(c), As Amended By The AEDPA, Governed Slack's Request To Appeal From The District Court's Denial Of Five Claims On Second Or Successive Petition/Abuse Of The Writ Grounds

1. The Post-AEDPA Provisions Of Chapter 153, Which Include Section 2253(c), Apply To Any Claims Asserted After The Enactment Date Of The Act, Whether Those Claims Are Asserted In A New Habeas Corpus Petition Or By The Amendment Of An Already Existing Petition

In *Lindh v. Murphy*, 521 U.S. 320 (1997), this Court held "that the new provisions of chapter 153 generally apply only to cases filed after the Act became effective." *Id.*, at 336. The basis of this holding was the negative implication of Section 107(c) of the AEDPA, which explicitly stated that chapter 154 of the Judicial Code, exclusive to death penalty proceedings, applied to "pending" cases, where no such express congressional intention appeared with respect to chapter 153. Therefore, the *Lindh* majority determined that Congress intended for chapter 153 to apply only to "cases filed" after April 24, 1996, the day the Act became effective. *Id.*

In the instant case, Slack filed a habeas corpus petition prior to April 24, 1996. However, he amended that petition three times after the enactment of the AEDPA.[3/] With respect to the amendments after April

3. Slack filed a first amended petition in October 1996, a second amended petition in June 1997, and a third amended petition in December 1997. The second and third amended petitions were filed on Slack's behalf by counsel who was appointed in February 1997.

24, 1996, several new claims were added, including all five of the claims ultimately dismissed as abusive.

Lindh did not have occasion to address the issue of whether the Act should apply to claims added to a petition, via amendment, *after* the enactment date of the AEDPA. Likewise, *Lindh* did not have occasion to determine whether the date a request to appeal, or notice of appeal, is filed, as opposed to the date the petition was filed in the district court, should dictate whether the certificate of appealability or certificate of probable cause standard should govern. In short, *Lindh* did not explicitly define when a "case" is "filed" with respect to post-AEDPA claims and appeals. This Court must resolve these issues before it may exercise jurisdiction over the merits of Slack's appeal.

The absence of a controlling definition has resulted in a split in the circuit courts with respect to when a habeas corpus "case" is "filed" for purposes of applying the provisions of the AEDPA. Some courts have held that a "case" commences upon the filing of a petition. *See Gosier v. Welborn*, ___ F.3d ___, 1999 WL 228890, *1 (7th Cir. 1999); *Williams v. Coyle*, 167 F.3d 1036, 1039-40 (6th Cir. 1999); *Davis v. Johnson*, 158 F.3d 806, 810 (5th Cir. 1998); *see also Calderon v. United States District Court for the Central District of California (Beeler)*, 128 F.3d 1283, 1287 n.3 (9th Cir. 1997); *see also Tiedman v. Benson*, 122 F.3d 518, 520-21 (8th Cir. 1997) (for purposes of applying appellate provisions of the AEDPA, the "case" is filed when the application for a certificate of appealability, or a notice of appeal, is filed, regardless of when the actual Section 2254 petition was filed). Other courts have held, though, that the mere filing of a request for counsel in a death penalty case initiates a "case" for purposes of determining whether the AEDPA applies. *See Calderon*

All three of these petitions are in the record.

v. United States District Court for the Central District of California (Kelly), 163 F.3d 530, 540 (9th Cir. 1998) (en banc) (overruling *Beeler*). Amici submit that the courts fixing the date the petition was filed as the operative date for determining when the "case" commenced are closer to the mark. However, even the "petition filed" standard is not specific enough for purposes of determining whether the AEDPA applies to "claims" filed after April 24, 1996.

The spirit of the *Lindh* holding, prior decisions of this Court, and common sense all demonstrate that a Section 2254 "case" in the district court must be the equivalent of a "habeas corpus petition containing specific claims for relief." Based on this Court's reasoning in *Lindh*, it is a fair conclusion that Congress did not intend the new provisions of chapter 153 to apply to *claims for relief* asserted in habeas petitions which had been filed prior to the enactment of the AEDPA. But there is nothing in *Lindh*, nor anything in the Act itself, that shows a congressional intent to forgo application of the new law to claims asserted after April 24, 1996, whether by filing a new petition or by amending one that was already in existence.

Lindh should not be read to mean that, as long as a "case," given its broadest definition, was pending prior to the enactment of the AEDPA, the case will be governed for all purposes by habeas law as it existed prior to April 24, 1996. To the contrary, for purposes of determining which law to apply to resolve the claims asserted for relief, *Lindh* should be read to construe "case" in a narrower claim-specific fashion. Failure to read *Lindh* in such a manner would lead to results that are both absurd and contrary to congressional intent.

An example illustrates this point: If on April 23, 1996, the day prior to the enactment of the AEDPA, a state inmate filed a Section 2254 petition comprised of a single claim for relief, the "case" would be litigated in accordance with pre-AEDPA habeas law per *Lindh*. If, however, one

month after filing that single-claim petition, the state inmate filed a first amended petition that included five new claims, and then deleted the single claim that was in the initial petition, the "case" would be comprised solely of five claims for relief, all of which were asserted *after* April 24, 1996. There is no logical reason to infer that Congress intended that those five claims would not be subject to the provisions of the AEDPA.

As another example, a habeas petitioner might have filed a petition containing only a single unexhausted claim for relief on the day prior to the AEDPA's enactment. *Rose v. Lundy*, 455 U.S. 509 (1982), mandates that such a petition be dismissed without prejudice. But if, sometime after April 24, 1996, the petitioner amended the petition to purge it of the unexhausted claim, and then added a fully exhausted claim in its place, dismissal could be avoided. *See, e.g., Calderon v. United States District Court (Taylor)*, 134 F.3d 981, 986 (9th Cir. 1998). Under an unduly broad interpretation of "case," pre-AEDPA habeas law would again apply. This fictional habeas petitioner would therefore be in a better position than a petitioner who did not file a petition until April 25, 1996, but did so in a procedurally correct manner by asserting only exhausted claims. In other words, the petitioner in the foregoing hypothetical situation would have evaded the AEDPA by filing a procedurally defective petition subject to dismissal in its entirety. Congress could not possibly have intended such a result.

Amici acknowledge that, in both of the foregoing hypothetical scenarios, the filing of first amended petitions technically did not institute new "cases," at least for some purposes. *See Missouri, Kansas & Texas Ry. Co. v. Wulf*, 226 U.S. 570, 73-76 (1913) (holding that an amendment to a complaint was not equivalent to the commencement of a new action). In some sense, the "cases" were pending prior to the enactment date of the AEDPA. But it is implausible to conclude that Congress would have

intended or desired to elevate form over substance in this way in prescribing the reach of the AEDPA, especially given its presumed prior knowledge of both this Court's retroactivity jurisprudence and of the federal habeas corpus process.

True retroactivity situations involve the enactment of a new law, and its application to claims for relief that were pending at the time of enactment. *See, e.g., Landgraf v. USI Film Products*, 511 U.S. 244 (1994). Because of the inherent inequities associated with resolving claims by reference to a law that did not exist at the time the relevant conduct or event occurred, new laws are applied retroactively only under very narrow circumstances. *Id.* But, it is only if the pertinent conduct or event actually occurred prior to the enactment of the new law that a retroactivity question arises.

Justice Scalia explained in his concurring opinion in *Landgraf* that a critical means for ascertaining whether a statute can be deemed even to have some sort of retroactive effect on a case involves looking to the relevant activity regulated by the statutory provision, and then determining if that activity occurred before or after enactment of the statutory provision. *Id.*, at 291 (Scalia, J., concurring). As Justice Scalia observed in a highly pertinent passage:

> Most statutes are meant to regulate primary conduct, and hence will not be applied in trials involving conduct that occurred before their effective date. *But other statutes have a different purpose and therefore a different relevant retroactivity event.* A new rule of evidence governing expert testimony, for example, is aimed at regulating the conduct of trial, and the event relevant to retroactivity of the rule is the introduction of the testimony.

Id., at 291-92 (emphasis added).

The approach taken by the *Landgraf* majority with respect to focusing on the pertinent retroactivity event to determine whether a statute has a retroactive effect parallels in substantial ways the critical inquiry adopted by Justice Scalia's concurring opinion. As the *Landgraf* majority explained,

> [a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment, [citation omitted], or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to the *events* completed before its enactment.

Id., at 269-70 (emphasis added).

Thus, to determine when a "case" is "filed" under *Lindh*, the relevant retroactivity "event" must be the presentation of a specific claim or claims for habeas corpus relief, either by filing a petition, or by amending an already existing petition. Realistically, a habeas corpus "petition" is nothing but the vehicle for presenting "claims" for habeas relief. For a pleading to qualify as a Section 2254 habeas corpus petition, it must contain the "claim" or "claims" upon which the petitioner relies in support of his assertion that he is being held in state custody in violation of his constitutional rights. Rules Governing Section 2254 Cases In United States District Courts, Rule 2(c), 28 U.S.C. foll. § 2254 (West 1999) (a habeas corpus petition "shall specify all the grounds for relief which are available to the petitioner and of which he has or by the exercise of reasonable diligence should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified therein").

The AEDPA itself contains several provisions that all emphasize the importance and relevance of the habeas corpus claims that comprise the petition, as opposed to the "petition" itself. *See* 28 U.S.C. § 2244(b)(1) (West

1999) ("a *claim* presented in a second or successive habeas corpus application under Section 2254 that was presented in a prior application shall be dismissed") (emphasis added); § 2254(d) (West 1999) ("An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any *claim* that was adjudicated on the merits in State court proceedings. . . .") (emphasis added); § 2264(a) (West 1999) ("Whenever a State prisoner under capital sentence files a petition for habeas corpus relief to which this chapter applies, the district court shall only consider a *claim or claims* that have been raised and decided on the merits in the State courts. . . .") (emphasis added). Additionally, the procedural rules governing habeas corpus actions focus on the allegations of error made in a petition, rather than on the petition itself. *See* Rules 2, 5-9, Rules Governing Section 2254 Cases In United States District Courts, 28 foll. U.S.C. § 2254. Hence, the focus for determining how to resolve claims, and what law should be applied in that regard, necessarily requires the actual existence of claims for relief.

The provisions of chapter 153, as amended by the AEDPA, therefore should apply to any claim for relief asserted in a Section 2254 petition after the enactment date of the AEDPA because any such application is inherently prospective in nature. Applying the AEDPA in the manner advocated herein presents no retroactivity concerns, and would in no way be contrary to or inconsistent with this Court's decision in *Lindh*.

Therefore, the provisions of the AEDPA, including the certificate of appealability requirement of Section 2253(c), should apply with respect to every claim Slack asserted after April 24, 1996. Those claims include each and every claim ultimately dismissed by the district court on second or successive petition grounds. Slack's proposed appeal concerned only the correctness of the

district court's dismissal of these five abusive claims. Thus, the AEDPA's certificate of appealability provision governed Slack's intended appeal.[4] As will be argued below, *see* pp. 16-23, *infra*, Slack was unable to qualify for a certificate of appealability, depriving the Court of Appeals and this Court of jurisdiction over his case.

2. Regardless Of When The Claims Were Asserted, The AEDPA's Certificate Of Appealability Requirement In Section 2253(c) Nevertheless Applies Any Time A Certificate Is Requested, Or Notice Of Appeal Is Filed, After The Enactment Date of The AEDPA

Even if this Court rejects amici's argument that the provisions of chapter 153, as amended by the AEDPA, generally apply to any claim asserted after the enactment date of that law, the Act's certificate of appealability requirement nevertheless should apply in any instance, like the case at bar, where an application for a certificate to appeal, or a notice of appeal, was filed after the

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4. Slack might argue that, even if amici's argument is correct, his post-AEDPA claims nevertheless "relate back" to his petition that was on file prior to the AEDPA's enactment, making all of his claims subject to the law that existed prior to April 24, 1996. Such an argument would be specious, as the relation back doctrine of Federal Rule of Civil Procedure 15(c) is completely inapplicable outside the statute of limitations context. That intended application is confirmed by the plain language of the rule, the Advisory Committee Notes to Rule 15(c), and by prior decisions of this Court. *See* Fed. R. Civ. P. Rule 15(c) Advisory Committee Notes ("Relation back is intimately connected with the policy of the statute of limitations"); *Schiavone v. Fortune*, 477 U.S. 21 (1986) (applying relation back doctrine to New Jersey statute of limitations for libel actions). In any event, the "relation back" doctrine does not apply to the Section 2244(d) one-year limitations period at all. But this Court need not address that issue here.

enactment date, regardless of when the actual Section 2254 petition was filed in district court. The United States Court of Appeals for the Eighth Circuit has so held, and this Court strongly implied in *Hohn v. United States*, ___ U.S. ___, 118 S. Ct. 1969 (1998) that the Eighth Circuit's assessment was correct.

In *Tiedman v. Benson*, a case decided subsequent to this Court's decision in *Lindh*, the Court of Appeals for the Eighth Circuit ruled that the *Lindh* holding was not applicable to Section 2253(c), as amended by the AEDPA, for two main reasons. First, both the court and the parties agreed that the certificate of appealability requirement was purely procedural.[5] *Tiedman*, 122 F.3d at 520-21. But more important, the Eighth Circuit observed that there was

> no reason why a new provision exclusively directed towards appeal procedures would depend for its effective date on the filing of a case in a trial court, instead of on the filing of a notice of appeal or similar document.

Id., at 521.

In other words, unless a request for a certificate of probable cause or notice of appeal had been filed, or there was an actual appeal pending when the AEDPA was enacted, as was the case in *Lindh*, there is no retroactivity concern with respect to the certificate of appealability requirement of Section 2253(c). The long-standing gatekeeping function of requiring habeas corpus petitioners to obtain permission to file an appeal is not implicated until such time as a request for permission is actually made. If that request is not made until some time after the enactment of the AEDPA, applying the

5. "The parties to this case agree that the new provisions with respect to certificates of appealability made no substantive change in the standards by which applications for such certificates are governed." *Tiedman*, 122 F.3d at 521.

certificate of appealability requirement would constitute a prospective application of that law.

Like the Eighth Circuit, this Court in *Hohn v. United States* strongly indicated that if the request to file an appeal, or a notice of appeal, was filed after the enactment date of the AEDPA, the new certificate of appealability requirement applied. In *Hohn*, following convictions in federal court for drug offenses and a related firearm offense, Hohn filed a motion under Section 2255 in the district court in relation to the firearm conviction. While the motion was pending, the AEDPA was enacted. Hohn's motion was denied, and in July 1996, three months after the enactment of the AEDPA, he filed a notice of appeal. The Eighth Circuit treated the notice of appeal as a request for a certificate of appealability, and denied the request based on its belief that the claim Hohn wanted reviewed was not grounded in the Constitution. Hohn petitioned this Court for a writ of certiorari. The writ of certiorari was granted solely on the question of whether this "Court has jurisdiction to review decisions of the courts of appeals denying applications for certificates of appealability." *Hohn*, 118 S. Ct. at 1971-72.

The precise holding in *Hohn* was, "We hold this Court has jurisdiction under § 1254(1) to review denials of *applications for certificates of appealability* by a circuit judge or a panel of a court of appeals." *Id.*, at 1978 (emphasis added). The holding necessarily implies that the Eighth Circuit properly required Hohn to request a certificate of appealability.[6] This is significant in light of the fact that Hohn's Section 2255 motion was pending at the time the AEDPA was enacted, and *Lindh* held that chapter 153, which includes Section 2255, does not generally apply to "cases filed" prior to the enactment of

6. If the certificate of appealability requirement was not applicable in Hohn's case, then the issue actually decided by this Court in *Hohn* would not have been ripe for review.

the AEDPA. *Lindh*, 521 U.S. at 336. Under the law applicable prior to the enactment of the AEDPA, an individual seeking relief pursuant to Section 2255, like Hohn, was not required to obtain any type of permission whatsoever prior to appealing a district court's denial of relief. *See* 28 U.S.C. § 2253 (pre-AEDPA version). Hence, this Court's holding in *Hohn* necessarily incorporates the ruling that, so long as the request to appeal, or notice of appeal, was filed after the enactment date of the AEDPA, regardless of when the Section 2255 motion or Section 2254 petition was filed, the AEDPA's certificate of appealability requirement applies.

As additional grounds for the conclusion that the *Hohn* holding supports the application of the certificate of appealability requirement in any case where the request for a certificate, or a notice of appeal, was filed after the enactment date of the AEDPA, amici point to this Court's reliance on post-AEDPA circuit rules in support of the express *Hohn* holding that the filing of a request for a certificate of appealability constitutes a "case" for purposes of review under Section 1254(1). Specifically, this Court "dr[e]w guidance from the fact that every Court of Appeals except the Court of Appeals for the District of Columbia Circuit has adopted Rules to govern the disposition of certificate applications," and then cited to those rules, all of which were enacted in 1998, well after the enactment of the AEDPA. *Hohn*, 118 S. Ct. at 1973.

In other words, this Court relied on the new manner in which the courts of appeals are handling requests for certificates of appealability to support its holding that the application for a certificate was a "case" that was "in" the "court of appeals." The fact that this Court specifically held that certificates of appealability were reviewable under Section 1254, and relied on various rules specifically adopted by the circuits to facilitate decisions with respect to applications for certificates of appealability, certainly implies that this Court believed the AEDPA's certificate

of appealability requirement was applicable under the procedural posture of *Hohn*.

The procedural posture of the instant case is the same as in *Hohn*. Slack requested permission to appeal after the AEDPA was enacted. So, even independent of the fact that his dismissed claims were first asserted after April 24, 1996, the certificate of appealability requirement applies in this case as it did in *Hohn* and *Tiedman*.

As amici will discuss next, Slack could not meet the certificate of appealability requirement. The merits of his "case" were never "in" the court of appeals. As a result, this Court lacks statutory certiorari jurisdiction over the present appeal.

B. A Federal Appellate Court Lacks Jurisdiction Over Any Appeal From The Denial Of Relief In A Section 2254 Or 2255 Case Unless The Petitioner Satisfies The Requirements Of Section 2253(c) And A Certificate Of Appealability Is Issued

The requirement in Section 2253(c) that a certificate of appealability be obtained prior to an appeal taking place in a Section 2254 (or 2255) case is a jurisdictional prerequisite. *See Hohn*, 118 S. Ct. at 1975-76 (treating Section 2253 as jurisdictional in nature and comparable to the jurisdictional prerequisite of filing a proper notice of appeal before the Court of Appeals may review the substance of a case); *id.*, at 1980 (Scalia, J. dissenting, joined by Rehnquist, C.J., O'Connor, J., and Thomas J.) (same); *see also Trevino v. Johnson*, 168 F.3d 173, 1999 WL 79738, *4 (5th Cir. 1999) ("We lack jurisdiction to consider the merits of a district court order denying habeas relief without issuing a COA"); *Gerlaugh v. Stewart*, 167 F.3d 1222, 1223 (9th Cir. 1999) ("An appeal may not be taken unless the applicant has made the substantial

showing of the denial of a constitutional right and a certificate of appealability is granted"). Hence, in order for the Court of Appeals to have had jurisdiction over Slack's intended appeal, Slack was required to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The two-judge Ninth Circuit panel refused Slack's request to pursue an appeal, indicating the Ninth Circuit's belief that it did not have jurisdiction over the intended appeal.[7]

Amici recognize that the Ninth Circuit's belief that it lacked jurisdiction does not mean that such was the case, or that its determination is not reviewable by this Court. This Court always has jurisdiction to determine its own jurisdiction. *See Rosado v. Wyman*, 397 U.S. 397, 403 n.3 (1970). In the *Hohn* decision, this Court held that it had jurisdiction under Section 1254(1) to review the denial of a request for a certificate of appealability by a circuit judge or court of appeals panel. 118 S. Ct. at 1978. Thus, this Court has statutory certiorari power to review the Ninth Circuit's denial of Slack's application to appeal the

7. In actuality, Slack requested, and was denied by both the district court and the two-judge Ninth Circuit panel, a certificate of probable cause, which was required prior to the enactment of the AEDPA. However, based on the circumstances of this case, the certificate of appealability requirement should have been applied. Regardless of whether the issue was raised below, there can be no avoiding the jurisdictional question posed by the certificate of appealability requirement. A federal reviewing court cannot obtain jurisdiction over the subject matter of the intended appeal absent the issuance of a certificate of appealability. 28 U.S.C. § 2253(c); *Trevino*, 1999 WL 79738, *4; *Gerlaugh*, 167 F.3d at 1223. An objection to subject matter jurisdiction cannot be waived, and may be raised at any time. *See, e.g., Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 377 n.21 (1978); *Sosna v. Iowa*, 419 U.S. 393, 398 (1975); *California v. LaRue*, 409 U.S. 109, 112 n.3 (1972); *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17-18, and n.17 (1951).

district court's dismissal of five of his claims on second or successive petition grounds.

However, in performing that review, this Court at first is limited to applying the certificate of appealability standard, and determining whether Slack met that standard. That is, before addressing the substantive second or successive petition issue briefed by the parties to this action, this Court must determine whether Slack has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c).

This Court's decision in *Hohn* does not answer the jurisdictional question presented here. The narrow holding in *Hohn* was only that this Court had statutory certiorari jurisdiction to review a court of appeals' denial of an application for a certificate of appealability. *Hohn*, 118 S. Ct. 1978. By no means did this Court say in *Hohn* that, simply because the certificate of appealability question was reviewable, the merits of the intended appeal, which were never adjudicated in the court of appeals, were also automatically reviewable. To the contrary, this Court has previously made clear in *Nixon v. Fitzgerald*, 457 U.S. at 741-43, that jurisdiction over a substantive question first must have existed in the court of appeals before the question is reviewable by this Court under section 1254.

Nixon involved the issue of Presidential immunity. In the course of a civil lawsuit, the district court ruled that President Nixon was not entitled to complete immunity, and the President pursued a collateral order appeal from that ruling. In order to meet the jurisdictional prerequisite to pursue such an appeal, he had to demonstrate, among other things, that the appeal raised a "serious and unsettled question" of law. *Nixon*, 457 U.S. at 742, quoting *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 547 (1949). The United States Court of Appeals for the District of Columbia Circuit had dismissed the appeal for its lack of jurisdiction because the President

could not meet that *Cohen* requirement. *Nixon*, 457 U.S. at 742. Before addressing the merits of the immunity issue, following its granting of a writ of certiorari, this Court explained that it first was required to determine whether the "case" had properly been "in" the lower appellate court to start with, *id.*, at 741-43, even though the court of appeals had dismissed the appeal for lack of jurisdiction and therefore had never even addressed the substantive immunity issue.

Because this Court has the power to review a court of appeals' decision to dismiss for lack of jurisdiction,[8] the jurisdictional issue of whether the President had presented a "serious and unsettled" question was reviewable. The Court determined that the Court of Appeals' dismissal for lack of jurisdiction was erroneous because the Presidential immunity issue was the type of "serious and unsettled" question properly presented in a collateral order appeal. Therefore, President Nixon had presented an appealable question that invested the Court of Appeals with jurisdiction over his case. Because the Court of Appeals had jurisdiction over the substantive issue, it was one that was "in" the court of appeals and subject to Supreme Court review under Section 1254(1). *Nixon*, 457 U.S. at 743.

As *Nixon* makes clear, the determination of whether this Court has statutory certiorari jurisdiction over the merits of a particular issue first involves the examination of whether the lower appellate court had jurisdiction over that issue. In the context of this case, *Nixon* mandates that, prior to reviewing the actual second or successive

8. As this Court observed in *Nixon*, "There can be no serious doubt concerning our power to review a court of appeals' decision to dismiss for lack of jurisdiction -- a power we have exercised routinely. [Citation]. If we lacked authority to do so, decisions to dismiss for want of jurisdiction would be insulated from review by this Court." *Id.*, at 731 n.23.

petition issue, this Court must make sure that Slack met Section 2253(c)'s jurisdictional prerequisite of showing the substantial violation of a constitutional right that would warrant the issuance of a certificate of appealability. Such a ruling would mean the Ninth Circuit did have jurisdiction over Slack's intended appeal, and that the second or successive petition issue was actually "in" the Court of Appeals for purposes of Section 1254.

However, Slack could not, under any circumstances, satisfy the certificate of appealability requirement of showing the violation of a *constitutional* right. 28 U.S.C. § 2253(c)(2). Second or successive petition issues do not arise out of the Constitution. *See Felker*, 518 U.S. at 664 (application of abuse of the writ doctrine as delineated by case law and later tightened by congressional statute does not infringe on the Constitution); *see also McCleskey*, 499 U.S. at 479-89 (doctrines of second or successive petition and "abuse of the writ refer[ ] to a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions," but not by constitutional mandate). In the absence of an adequate showing of a constitutional violation, the Ninth Circuit lacked jurisdiction over Slack's intended appeal. In turn, this Court lacks jurisdiction over the second or successive petition issue now.

Prior to the enactment of the AEDPA, it was permissible to obtain appellate review of a district court's ruling like that in Slack's case. Under the pre-AEDPA version of Section 2253, a habeas corpus petitioner was still required to obtain permission to file an appeal by obtaining a certificate of probable cause. However, as this Court stated in *Barefoot v. Estelle*, to obtain the certificate of probable cause, a habeas corpus petitioner was required only to "make a 'substantial showing of the denial of [a] *federal* right.'" 463 U.S. 880, 893 (1983). While issues like exhaustion and second or successive petition certainly present federal *statutory* questions, 28 U.S.C. §§

2254(b)(1)(A), 2244(b), they do not present *constitutional* questions. As the United States Court of Appeals for the Seventh Circuit has aptly observed, "there is a gulf between a statutory and a constitutional error." *Young v. United States*, 124 F.3d 794, 799 (7th Cir. 1997), citing *Gilmore v. Taylor*, 508 U.S. 333, 342 (1993), *Pulley v. Harris*, 465 U.S. 37, 41 (1984), and *Smith v. Phillips*, 455 U.S. 209, 221 (1982).

In ascertaining what Congress meant by substituting the word "constitutional" for the word "federal," this Court may resort to traditional instruments of statutory construction. Initially, a plain-language reading of Section 2253(c) indicates the showing required to obtain a certificate of appealability under the AEDPA is greater than the *Barefoot* "federal right" standard that governed certificates for probable cause. *Hubbard v. United States*, 514 U.S. 695, 708 (1995) (courts should attempt to give effect to the plain language of an Act of Congress when possible). Moreover, even without looking to the legislative history underlying the post-Act version of Section 2253, Congress is presumed to be aware of the contemporaneous law in existence at the time it chooses to enact a new statute. *See Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 382 n.66 (1982); *see also*, *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978). Based on that presumption, when Congress enacts a new law that incorporates language of a pre-existing law, Congress is presumed to have adopted that interpretation for purposes of the new law. *See Merrill Lynch*, 456 U.S. at 382 n.66; *Lorillard*, 434 U.S. at 580-81. It is also true, though, that when Congress, in enacting a new law, *changes* language of a pre-existing law, it seeks to alter the pre-existing interpretation. *See West Winds, Inc. v. M.V. Resolute*, 720 F.2d 1097, 1100 (9th Cir. 1983) ("All that can be said with certainty about the fact that a statute has been amended is that the amendment presumably changes legal rights under the statute"); *see also* 1A N. Singer,

Sutherland on Statutes and Statutory Construction § 22.30 at 266 (5th ed. 1992) ("any material change in the language of the original act is presumed to indicate a change in legal rights").

If it was simply Congress' intent to codify the "federal right" standard annunciated in *Barefoot v. Estelle*, Congress would have used that specific language in amending Section 2253. Congress instead intended to do more. Given Section 2253's inherent role as a gateway designed to reduce federal appeals from district court denials of habeas corpus relief, *Barefoot*, 463 U.S. at 893, Congress could have meant only to further reduce the class of district court habeas denials cognizable on appeal by eliminating appellate challenges to those denial orders resting entirely on non-constitutional grounds.

This textual interpretation of the post-AEDPA version of Section 2253(c) best fits the express general intent of the legislators in enacting the Act itself, namely to streamline and curtail the federal appellate process in habeas corpus cases. *See, e.g.*, 141 Cong. Rec. S4590-93 (daily ed. March 24, 1995) (statement of Sen. Specter, co-sponsor of the Act) (bill designed to address "one of the most serious aspects of the crime problem: the interminable appeals process that has made the death penalty more a hollow threat than an effective deterrent"); 141 Cong. Rec. H1400 (daily ed. Feb. 8, 1995) (statement of Rep. McCollum) (bill intended to "curtail [] the seemingly endless appeals of death row inmates" while maintaining "full constitutional protections"); *id.*, at H1402 (statement of Rep. Young) (bill intended to "create consistent and fair procedures for [death penalty] application and to streamline the current appeals process").

Moreover, the actual timing of the proposed changes to Section 2253(c) that ultimately were embodied in the Act also lends support to amici's contentions. When the AEDPA was originally submitted as H.R. 729 to the

House of Representatives, it expressly sought to codify *Barefoot* verbatim as to the showing required to obtain a certificate by using the word "federal" rather than "constitutional." *See* 141 Cong. Rec. H1400, H1404 (daily ed. Feb. 8, 1995) [H.R. 729, §§ 102, 103]; *id.*, at H1430-31 (statement of Rep. Smith); *id.*, at H1431-32 (statement of Rep. McCollum). However, when the provisions of what finally became the Act were introduced into the Senate that same year, the word "federal" was replaced with the word "constitutional." *See* 141 Cong. Rec. S4585-93 (daily ed. March 24, 1995) [S. 623, §§ 3, 4]. It was that version that became law. Simply put, Section 2253(c)'s recent amendment demonstrates Congress' intent to require a Section 2254 petitioner to make a higher showing before gaining access to the federal appellate courts.

"If the district court denies a petition based on a statutory issue, § 2253(c)(2) precludes an appeal." *Young*, 124 F.3d at 799. It is beyond dispute in the instant case that the district court's order denying petitioner habeas corpus relief rested on *non-constitutional* grounds -- namely, abuse of the writ. *See Felker*, 518 U.S. at 653-64; *see also McCleskey*, 499 U.S. at 479-89. There is, therefore, no possible way Slack could meet the requirement of Section 2253(c)(2) that he show the substantial violation of a constitutional right with respect to the issue for which he sought, and still seeks, review. The Court of Appeals for the Ninth Circuit could not have had jurisdiction over the non-constitutional issue raised by Slack. Consequently, this Court does not have statutory

certiorari jurisdiction over that issue now. *Nixon*, 457 U.S. at 743.

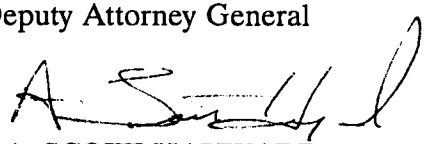
CONCLUSION

Accordingly, amici respectfully request that the writ of certiorari be dismissed for want of jurisdiction. *See, e.g., Jefferson v. City of Tarrant, Alabama*, __ U.S. __, ___, 118 S.Ct. 481, 487 (1997).

Dated: June 21, 1999.

Respectfully submitted,

BILL LOCKYER
Attorney General of California
DAVID P. DRULINER
Chief Assistant Attorney General
CAROL WENDELIN POLLACK
Senior Assistant Attorney General
DONALD E. DE NICOLA
Deputy Attorney General



* A. SCOTT HAYWARD
Deputy Attorney General
* Counsel of Record

Counsel for Amici Curiae