No. 10-895

In the Supreme Court of the United States

RAFAEL ARRIAZA GONZALEZ, PETITIONER

v.

RICK THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE , CORRECTIONAL INSTITUTIONS DIVISION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

The United States will address the following question:

Whether the court of appeals had jurisdiction to issue a certificate of appealability under 28 U.S.C. 2253(c) and to adjudicate petitioner's appeal.

TABLE OF CONTENTS

Table of Contents—Continued: Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes and rules:

Statutes and rules—Continued: Page

Miscellaneous:

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INTEREST OF THE UNITED STATES

The first question presented concerns the jurisdictional status of the certificate-of-appealability (COA) requirement imposed by 28 U.S.C. 2253(c) in federal habeas corpus cases. Although this case arises on federal habeas review of a state conviction under 28 U.S.C. 2254 (2006 & Supp. III 2009), the COA requirement also applies to appeals by federal prisoners challenging the legality of their detention under 28 U.S.C. 2255 (2006 & Supp. III 2009). See 28 U.S.C. 2253(c)(1)(B). The United States therefore has a substantial interest in the Court's resolution of the first question presented. In addition, as the most frequent litigant in the federal

courts, the United States also has a substantial interest in the sound and consistent application of rules governing whether certain statutory requirements are jurisdictional limitations on the adjudicatory authority of the federal courts, as opposed to mandatory but non-jurisdictional claim-processing rules. The United States has previously participated as *amicus curiae* in cases raising similar issues. See, *e.g.*, *Reed Elsevier, Inc.* v. *Muchnick*, 130 S. Ct. 1237 (2010); *Bowles* v. *Russell*, 551 U.S. 205 (2007); *Kontrick* v. *Ryan*, 540 U.S. 443 (2004).

STATEMENT

1. a. Since 1908, Congress has required state prisoners to obtain certification before pursuing an appeal of a final decision in a habeas corpus action. When Congress enacted the first certification requirement in 1908, state prisoners were authorized to appeal the denial of a habeas petition directly to the Supreme Court. Act of Mar. 3, 1891, ch. 517, § 5, 26 Stat. 827; *Santiago Salgado* v. *Garcia*, 384 F.3d 769, 771 (9th Cir. 2004), cert. denied, 544 U.S. 931 (2005). The 1908 statute barred a state prisoner from appealing such a decision unless the district court or a justice of this Court "shall be of the opinion that there exists probable cause for an appeal, in which event, on allowing the same, the said court or justice shall certify that there is probable cause for such allowance." Act of Mar. 10, 1908, ch. 76, 35 Stat. 40.

In 1925, Congress broadened the jurisdiction of the courts of appeals to include appeals of final decisions in habeas actions, and it concomitantly expanded the so-called "certificate of probable cause" (CPC) requirement to proceedings in the courts of appeals. Act of Feb. 13, 1925, ch. 229, § 6, 43 Stat. 940. In 1948, as part of its codification of the federal code, Congress reaffirmed the

CPC requirement by enacting 28 U.S.C. 2253, which provided that a state prisoner could not appeal the denial of a habeas petition "unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause." Act of June 25, 1948, ch. 646, § 2253, 62 Stat. 967.

Although the CPC requirement had existed since 1908, Congress did not provide a statutory standard for gauging whether a prisoner's application presented probable cause justifying the issuance of a CPC. The Court addressed that issue in *Barefoot* v. *Estelle*, 463 U.S. 880 (1983), explaining that an applicant has demonstrated probable cause to justify the issuance of a CPC if he "make[s] a 'substantial showing of the denial of [a] federal right.'" *Id.* at 893 (citation omitted).

b. In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1217, which contains the present-day certification requirement. App., *infra*, 1a. AEDPA amended the certification requirement in a number of relevant respects. First, Congress changed the name of the certificate to a "certificate of appealability" (COA). 28 U.S.C. 2253(c)(1). Second, Congress applied the certification requirement for the first time to appeals from federal prisoners. 28 U.S.C. 2253(c)(1)(B). Third, Congress codified this Court's holding in *Barefoot* that a certificate may issue only upon a "substantial showing" of the denial of a right. 28 U.S.C. 2253(c)(2). Congress further specified, however, that the right must be "constitutional" in nature, not simply a "federal" right. *Ibid.* Finally, Congress specified that the COA must identify the specific issues satisfying the "substantial showing" standard. 28 U.S.C. 2253(c)(3). This abrogated pre-AEDPA circuit court precedent that denied district

courts the authority to limit certificates to specific issues or otherwise circumscribe the issues that the court of appeals could consider once a certificate had been issued. See, *e.g.*, *Smith* v. *Chrans*, 836 F.2d 1076, 1079-1080 (7th Cir. 1988) (per curiam).

In *Slack* v. *McDaniel*, 529 U.S. 473 (2000), the Court explained the operation of Section 2253(c)(2)'s "substantial showing" requirement when a district court denied a habeas petition on procedural grounds. In those circumstances, a COA "should issue (and an appeal of the district court's order may be taken) if the prisoner shows * * * that jurists of reason" both (1) "would find it debatable whether the petition states a valid claim of the denial of a constitutional right," and (2) "would find it debatable whether the district court was correct in its procedural ruling." *Id.* at 478.

2. a. On June 2, 1995, Roberto Velasquez was shot and killed near an apartment complex in Irving, Texas. J.A. 107. Two eyewitnesses identified petitioner as the shooter. *Ibid.* One of the eyewitnesses was Velasquez's sister, Luz Del Cid, who told police that petitioner and Velasquez had grown up together in Morazan, Guatemala. *Ibid.*

On June 28, 1995, petitioner was indicted for Velasquez's murder. Law enforcement authorities, however, were unable to locate petitioner to arrest him. J.A. 107-108. In August 1995, Del Cid informed police that she had received a phone call from her mother in Morazan informing Del Cid that petitioner was in Guatemala. J.A. 108. Local police pursued several leads into 1996, but they learned nothing further about petitioner's whereabouts until he was incarcerated in Guatemala for three unrelated murders in March 2001. J.A. 108-109. After delays due to diplomatic issues and petitioner's

appeals in the Guatemala courts, in July 2004, petitioner was extradited to the United States. J.A. 109-110.

b. Petitioner moved to dismiss the state-court murder indictment on the grounds that the nearly ten-year delay between his indictment and trial violated his Sixth Amendment right to a speedy trial. J.A. 110-111. The state trial court denied the motion. J.A. 111. Following a jury trial, petitioner was convicted of murder, and the trial court sentenced petitioner to 30 years of imprisonment. J.A. 106, 110-111.

c. On July 12, 2006, the Texas Court of Appeals affirmed petitioner's conviction. J.A. 106-124. Under Texas law, petitioner had 30 days from the entry of judgment—until August 11, 2006—to petition the Texas Court of Criminal Appeals for discretionary review. See Tex. R. App. P. 68.2(a). Petitioner did not seek discretionary review, Pet. App. 12a, and the Texas Court of Appeals issued its mandate on September 26, 2006. J.A. 151.

d. In 2007, petitioner filed two separate petitions for writs of habeas corpus in the Texas Court of Criminal Appeals. Pet. App. 2a. The first petition was dismissed for failure to comply with the Texas Appellate Rules. *Ibid.* The second petition was denied. J.A. 133.

3. a. On January 24, 2008, petitioner filed an application for a writ of habeas corpus in federal district court under 28 U.S.C. 2254 (2006 & Supp. III 2009). J.A. 134-136; Pet. App. 2a. In the application, petitioner asserted four grounds for relief: (1) the delay between his indictment and trial violated his Sixth Amendment rights to a speedy trial and effective assistance of counsel; (2) the inconsistencies in witness testimony and faulty witness recollections violated his due process rights; (3) the state violated his due process rights by refusing

to provide him with copies of various records; and (4) the courts below commented on his decision to invoke his Fifth Amendment privilege against compelled self-incrimination. J.A. 142-145.

A magistrate judge recommended that the district court dismiss the petition as time-barred because it was filed more than one year after petitioner's conviction became final within the meaning of 28 U.S.C. 2244(d)(1). Pet. App. 11a-21a. The magistrate judge reasoned that, under *Roberts* v. *Cockrell*, 319 F.3d 690 (5th Cir. 2003), the one-year clock began to run on August 11, 2006, the deadline for petitioner to seek discretionary review in the Texas Court of Criminal Appeals. Pet. App. 14a-15a. Petitioner objected to the magistrate judge's recommendation on the grounds that the one-year limitation period should have commenced on the date that the state appellate court's mandate issued, which would have made his federal habeas petition timely. J.A. 332-335. The district court overruled petitioner's objection and dismissed the petition as time-barred. Pet. App. 9a-10a.

b. Petitioner signed and provided to prison authorities a copy of a document for filing entitled "Timely Notice of Appeal With Pro-Se Petition for Certificate of Appealability." J.A. 155-158. The document identified four "Questions at Issue," the first two of which related to the district court's timeliness determination, and the last two of which related to petitioner's access-to-records claims. J.A. 156-158. The district court denied petitioner's request for a COA, J.A. 162-164, stating in a written order that "[p]etitioner has failed to demonstrate that reasonable jurists would find it debatable whether the district court was correct in finding that the habeas corpus petition is barred by the statute of limitations," J.A. 164 (citing *Slack*, 529 U.S. at 484-485).

Petitioner next asked the court of appeals for a COA allowing him to appeal (1) whether his Section 2254 petition was timely, and (2) whether his Sixth Amendment speedy-trial rights were violated. J.A. 175. With respect to the timeliness issue, petitioner argued that the district court had erred in relying on the Fifth Circuit's interpretation of Section 2244(d)(1)(A) in *Roberts* because that decision had been abrogated by *Lawrence* v. *Florida*, 549 U.S. 327 (2007). J.A. 176. Judge Garza entered an order granting a COA. J.A. 346-347. The order stated that "[a] COA is GRANTED as to the question whether *Roberts* has been overruled by *Lawrence*, and, if so, whether the habeas application was timely filed because Gonzalez's conviction became final, and thus the limitation period commenced, on the date the intermediate state appellate court issued its mandate." J.A. 347.

4. The court of appeals affirmed. Pet. App. 1a-8a. The court held that petitioner's appeal became final when the time for seeking direct review expired. As a result, the court concluded, petitioner's Section 2254 petition was untimely and had been properly dismissed. *Id*. at 5a-8a. The court observed that petitioner had also argued on appeal that his right to a speedy trial was violated, that his trial counsel was ineffective, that the trial court had admitted tainted evidence, and that the state violated his due process rights by failing to provide him with court records. *Id.* at 3a n.1. The court explained, however, that "[b]ecause COAs were not granted on these issues, we lack jurisdiction to consider these claims." *Ibid*. (citation omitted).

5. Petitioner filed a petition for a writ of certiorari seeking review of the question whether his federal habeas petition was timely. Pet. i. The State's brief in

opposition defended the court of appeals' decision on the merits, and it further asserted that the court of appeals had lacked jurisdiction over the appeal because the COA identified only a procedural issue for appellate review, without also certifying a specific issue for which petitioner had "made a 'substantial showing of the denial of a *constitutional* right,'" as required by 28 U.S.C. 2253(c)(2) and (3). Br. in Opp. 3 (emphasis added). The State acknowledged that it had not objected to the defective COA in the court of appeals and that the court of appeals had decided the timeliness question without discussing whether the COA had been properly issued on that nonconstitutional claim. *Id.* at 3, 16-17.

The Court granted the petition for a writ of certiorari on the question whether petitioner's Section 2254 petition was timely (the second question presented). The Court added *sua sponte* the additional issue identified in the State's brief in opposition (the first question presented): "Was there jurisdiction to issue a certificate of appealability under 28 U.S.C. § 2253(c) and to adjudicate petitioner's appeal?"

SUMMARY OF ARGUMENT

A. A statutory prescription is a jurisdictional limitation on a court's adjudicatory authority if Congress provides a "'clear' indication that [it] wanted the rule to be 'jurisdictional.'" *Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1203 (2011). Congress's intent is determined by examining the text, context, relevant historical treatment, and purpose of the statutory provision. Those factors reveal that Congress intended Section 2253(c) to embody jurisdictional requirements. If a COA does not comply with those requirements, the court of appeals lacks jurisdiction to adjudicate the appeal.

1. The text of Section 2253(c) indicates that the COA requirement is jurisdictional. Section 2253(c)(1) says that an appeal "may not be taken" without a COA, and Section 2253(c)(2) and (3) set forth the substantive requirements governing when a COA may be issued and what information it must contain. Section 2253(c)(2)'s requirement that a COA may issue only upon the applicant's "substantial showing of the denial of a constitutional right" calls for a preliminary inquiry similar to the inquiry that a federal court would undertake to evaluate the existence of federal question jurisdiction. It requires the court to determine whether a petitioner's appeal falls within the class of cases that the court of appeals has authority to adjudicate—those that raise debatable constitutional questions. Section 2253(c)(3)'s requirement that a COA must indicate the "specific issue or issues" meeting that standard requires the court to state, in writing, what specific constitutional issue or issues satisfy the criteria for appellate review. A properly issued COA is a prerequisite to the appeal on the merits.

2. The placement of the COA requirement within the habeas statutes further supports Section 2253(c)'s status as a jurisdictional requirement. 28 U.S.C. 2253 is a provision entitled "Appeal," and Subsection (a) states that a final order denying habeas relief "shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held." Section 2253(a) grants jurisdiction in habeas cases, and Section 2253(c) limits that jurisdiction to cases that have been certified to contain a substantial constitutional claim. The inclusion of the COA requirement in a jurisdiction-granting provision is a strong contextual signal that a compliant COA is a jurisdictional requirement.

3. The historical backdrop against which AEDPA was enacted further confirms that the COA requirement is jurisdictional. Since Congress enacted the first certification requirement in 1908, this Court and the courts of appeals have treated the absence of a CPC or COA as a jurisdictional defect. Thus, when Congress codified the certification requirement and added further restrictions to it through AEDPA in 1996, it understood the COA requirement to have jurisdictional consequences.

4. The text, structure, and history of Section 2253(c) reveal that the purpose of the COA requirement, and Congress's amendments to it in 1996, is to limit the jurisdiction of the courts of appeals over district court orders denying habeas relief to those cases raising substantial constitutional questions. When Congress added Sections 2253(c)(2) and (3) to the COA requirement in 1996, that requirement had long been viewed as jurisdictional. The new limitations on issuance of a COA were intended to narrow appellate review from cases involving any federal right to only cases involving constitutional rights, 28 U.S.C. 2253(c)(2), and from all issues a habeas petitioner raised to only those issues specified in the COA, 28 U.S.C. 2253(c)(3).

B. 1. Although the jurisdictional status of Section 2253(c) means that an appeal may sometimes be dismissed after briefing when the parties and the court do not timely realize that the COA was erroneously issued, that result occurs any time a jurisdictional defect is noticed after litigation is underway. The courts, however, cannot exercise jurisdiction Congress has not conferred. Congress has set forth specific requirements that must be satisfied before an appeal "may be taken" from the denial of habeas relief, and the courts of appeals lack

statutory authority to adjudicate appeals when those requirements are not satisfied.

2. Concluding that the requirements of Section 2253(c) are jurisdictional would not be inequitable to habeas petitioners who have no role in drafting COAs. If the court of appeals makes an error in drafting a COA in a case where the prisoner has made the required showing of the denial of a constitutional right, a court of appeals can amend the COA to encompass review of that claim. If a COA is erroneously issued in the absence of the statutory requirements, it is not inequitable to the prisoner for his case to be dismissed. And the COA requirement as a whole promotes the efficient allocation of judicial resources because it ensures that appeals do not proceed unless they meet the congressionally established criteria. Treating the COA requirement as jurisdictional encourages all concerned to be vigilant about compliance and thus reduces the volume of improper appeals.

C. Because the COA in this case did not comply with the requirements set forth in Section 2253(c), the judgment of the court of appeals must be vacated. The COA certified only a procedural question, and it failed to identify any substantial constitutional issue for review. Because the COA failed to comply with the requirements set forth in Section 2253(c), the court of appeals lacked jurisdiction to resolve the procedural question certified for review.

Although Justices of this Court are authorized by Section 2253(c) to issue COAs, none should issue here. Petitioner has not applied to any Justice of this Court for a COA, nor has any party sought review or modification of Judge Garza's order granting a COA limited to a procedural statute-of-limitations issue. Even if a circuit

justice were now inclined to issue a COA identifying a constitutional issue for review, the Court could not review the merits of a procedural issue that the court of appeals lacked jurisdiction to decide.

ARGUMENT

A CERTIFICATE OF APPEALABILITY THAT FAILS TO CONFORM TO THE REQUIREMENTS OF 28 U.S.C. 2253(c) DOES NOT CONFER JURISDICTION ON THE COURT OF APPEALS TO REVIEW THE DENIAL OF FEDERAL HABEAS CORPUS RELIEF

A. Section 2253(c) Prescribes A Statutory Limitation On The Adjudicatory Authority Of The Courts Of Appeals

In recent years, the Court has cautioned against imprecise use of the "jurisdictional" label, which can elide "the 'critical difference[s]' between true jurisdictional conditions and nonjurisdictional limitations on causes of action." *Reed Elsevier, Inc.* v. *Muchnick*, 130 S. Ct. 1237, 1244 (2010) (alteration in original; citation omitted). To reinforce these critical differences, the Court has encouraged courts and litigants to use the label "jurisdictional" "not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." *Kontrick* v. *Ryan*, 540 U.S. 443, 454-455 (2004). Claim-processing rules, in contrast, "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1203 (2011).

To determine whether a statutory prescription is a jurisdictional limitation on a court's adjudicatory authority, courts must "look to see if there is any 'clear' indication that Congress wanted the rule to be 'jurisdic-

tional.'" *Henderson*, 131 S. Ct. at 1203 (citation omitted). That indication, however, does not turn on Congress's use of "magic words." *Ibid.* This Court has explained that Congress's intent must be determined through traditional tools of statutory construction by examining the "text, context, and relevant historical treatment" of the limitation at issue, *Reed Elsevier*, 130 S. Ct. at 1246 (citation omitted), and "what they reveal about the purposes [the limitation] is designed to serve," *Dolan* v. *United States*, 130 S. Ct. 2533, 2538 (2010).

The text, context, and historical treatment of the COA requirement demonstrate that Congress intended Section 2253(c) to embody jurisdictional requirements. Because the COA in this case failed to satisfy those requirements, the court of appeals lacked authority to resolve the procedural issue that was certified for review.

1. The text of Section 2253(c) makes clear that a properly issued COA is a jurisdictional requirement

a. The plain text of Section 2253(c) demonstrates that the COA requirement is not simply a rule that "seek[s] to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Henderson*, 131 S. Ct. at 1203. Rather, the COA statute is a "prescription[] delineating the classes of cases (subject-matter jurisdiction) * * * falling within a court's adjudicatory authority." *Kontrick*, 540 U.S. at 455.

Section 2253(c)(1) states that, "[u]nless a circuit justice or judge issues a certificate of appealability, *an appeal may not be taken*" from a final order denying habeas relief. 28 U.S.C. 2253(c)(1) (emphasis added). In *Miller-El* v. *Cockrell*, 537 U.S. 322 (2003), the Court

concluded based on this statutory language that the issuance of a COA is "a jurisdictional prerequisite" to an appeal, and that "until a COA has been issued[,] federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners." *Id.* at 336.

As amended in 1996, Section 2253(c) no longer authorizes appellate jurisdiction based merely on the issuance of an unadorned certificate. The statute provides that a COA "may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right," and the statute further specifies that the COA "shall indicate which specific issue or issues satisfy the showing required by paragraph (2)." 28 U.S.C. 2253(c)(2)-(3). Given those explicit cross-references to the provision stating that an appeal "may not be taken" without a COA, 28 U.S.C. 2253(c)(1), the subsections setting forth the required content of the COA are subsumed by that jurisdictional language.

b. Petitioner concedes (Br. 14) that the COA requirement set forth in Section 2253(c)(1) is "a jurisdictional precondition to appellate review." Petitioner contends (Br. 21-29), however, that the substantive COA requirements set forth in Subsections (c)(2) and (3) should be treated differently. Petitioner's effort to separate Section 2253(c)'s three interlinked requirements is unpersuasive.

i. Petitioner attempts (Br. 22-23) to differentiate Subsection (c)(2) from Subsection (c)(1) by noting that Subsection (c)(1) refers to what a circuit judge or justice must do, while Subsection (c)(2) "speaks in terms of what [an applicant] must 'show.'" Based on that distinction, petitioner contends (Br. 22) that Subsection (c)(2) is analogous to a nonjurisdictional pleading requirement like those contained in Federal Rules of Civil Procedure

8(a) and 12(b)(6), or to the statutory requirement that a copyright holder must register his work before suing for copyright infringement, which this Court has held is "a precondition to filing a claim that does not restrict a federal court's subject matter jurisdiction," *Reed Elsevier*, 130 S. Ct. at 1241.

Petitioner misreads Subsection (c)(2). Although Subsection (c)(2) references the showing that the applicant must make in support of a COA, the statute is explicitly aimed at the court responsible for granting or denying the application. It states that a justice or judge may issue a COA "under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2); see *Miller-El*, 537 U.S. at 336-337 (referring both to showing that the prisoner must make and to inquiry that court must conduct). The "showing" referred to in Subsection (c)(2) is thus not analogous to a procedural step that an applicant is required to take without impairing the court's authority to adjudicate the case on the merits when the party fails to take that step. See *Reed Elsevier*, 130 S. Ct. at 1241. Rather, the "substantial showing" requirement is an inquiry that a judge must conduct to determine whether "an appeal may * * * be taken," 28 U.S.C. 2253(c)(1), which petitioner acknowledges is a jurisdictional inquiry.

Nor is the certification requirement similar to a pleading requirement in the Federal Rules of Civil Procedure. The federal rules provide procedures for courts with subject matter jurisdiction over a claim to dismiss the claim on the merits at the pleading stage. The COA statute, in contrast, states that an appeal "may not be taken" without a COA, 28 U.S.C. 2253(c)(1), and that a COA may issue "only if the applicant has made a sub-

stantial showing of the denial of a constitutional right," 28 U.S.C. 2253(c)(2). If the applicant does not make that initial showing, the court of appeals may not hear the appeal.

In this respect, the limited inquiry into the merits of petitioner's claim under Section 2253(c)(2) to determine whether the appeal presents a debatable constitutional question is no different than a threshold inquiry that a federal court would conduct to determine whether a case presents a federal question under 28 U.S.C. 1331. See *Grable & Sons Metal Products, Inc.* v. *Darue Eng'g*, 545 U.S. 308, 316-319 (2005). Indeed, the screening function performed by Section 2253(c)(2) is comparable to the inquiry under 28 U.S.C. 1331. "A claim invoking federal-question jurisdiction under 28 U.S.C. 1331 * * * may be dismissed for want of subject-matter jurisdiction if it is not colorable, *i.e.*, if it is * * * 'wholly insubstantial and frivolous.'" *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 513 n.10 (2006) (quoting *Bell* v. *Hood*, 327 U.S. 678, 682-683 (1946)). A judge considering an application for a COA does not resolve the merits of an appeal. *Miller-El*, 537 U.S. at 336. Rather, Section 2253(c) requires the court to take a preliminary look at the petitioner's claim to determine its substantiality—the condition that must be met to fall within the class of cases that the court of appeals has authority to adjudicate. *Ibid.*[1]

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[1] The courts of appeals have used this approach to evaluate subject matter jurisdiction under other federal statutes and jurisdictional doctrines. See, *e.g.*, *Stella* v. *Kelley*, 63 F.3d 71, 75 (1st Cir. 1995) (to determine whether court of appeals has jurisdiction over an interlocutory appeal of a district court order rejecting a qualified immunity defense, court must determine whether appeal involves "the existence *vel non* of a constitutional right," as opposed to "the fact-based question of what

ii. Petitioner further contends (Br. 25) that Congress's use of the word "indicate" to describe how the court must identify the issues that satisfy the "substantial showing" requirement demonstrates that Section 2253(c)(3) is not jurisdictional. According to petitioner (Br. 25-26), "[t]o 'indicate' is a less stringent statutory directive than to identify or specify, and commonly means to 'point to or toward with more or less exactness.'" Petitioner contends (Br. 26) that because the word "indicate" "lacks * * * precision and specificity," a COA that does not identify a constitutional question for review should be considered compliant if "the record as a whole" reveals one or more constitutional claims that satisfy the statutory standard set forth in Section 2253(c)(2).

As an initial matter, petitioner overlooks the common meaning of the word "indicate," which is "to state or express * * * brief[ly]" or to "state or express without going into great detail." *Webster's Third New International Dictionary* 1150 (1993). That definition, when combined with the neighboring term "specific," signal Congress's intent that the COA list the particular issues certified for review. See 28 U.S.C. 2253(c)(3) (requiring the court issuing a COA to "indicate which *specific issue or issues*" satisfy the "substantial showing" requirement) (emphasis added). Petitioner's contrary reading is untenable because it effectively reads out of the stat-

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the evidence does (or does not) show"); *Horizon Air Indus., Inc.* v. *National Mediation Bd.*, 232 F.3d 1126, 1132 (9th Cir. 2000) (court of appeals "take[s] * * * a 'peek at the merits'" to determine whether a National Mediation Board (NMB) decision involves allegations that NMB acted unconstitutionally or outside of its authority, which are the only categories of NMB decisions that federal courts have authority to review), cert. denied, 533 U.S. 915 (2001).

ute the word "specific." See *Moskal* v. *United States*, 498 U.S. 103, 109-110 (1990) ("[A] court should give effect, if possible, to every clause and word of a statute.") (citation omitted).

The specificity demanded by the text of Section 2253(c)(3) would be meaningless if, as petitioner proposes (Br. 26-27), courts simply presumed that the COA encompassed any "constitutional issue for which the petitioner made a 'substantial showing' in his application." Even if that presumption could provide some measure of specificity on the facts of this case given that petitioner pressed only one constitutional issue in the application for a COA that he submitted to the court of appeals, see NACDL Br. 14-15, petitioner does not explain how that presumption would provide any specificity in the common scenario where a prisoner alleges numerous constitutional claims for appeal. Allowing an order that certifies only a procedural issue to authorize the court of appeals to exercise jurisdiction does not honor Congress's explicit command that the judge issuing the COA must indicate the "specific issue or issues" for which the petitioner has made the required showing of the denial of a *constitutional* right. 28 U.S.C. 2253(c)(2) and (3).

2. The placement of Section 2253(c) within the federal habeas statutes demonstrates that the provision sets forth a jurisdictional requirement

In addition to the statutory text, the placement of the COA requirement within the statutory scheme for habeas proceedings further demonstrates Section 2253(c)'s status as a jurisdictional requirement. See, *e.g.*, *Henderson*, 131 S. Ct. at 1205 (context and place-

ment of a statutory requirement within a statutory scheme are relevant to jurisdictional status).

a. When the Court has concluded that certain statutory requirements are not jurisdictional limitations on a court's adjudicatory authority, it has emphasized Congress's placement of the restriction in a provision separate from the provisions governing subject-matter jurisdiction. In *Arbaugh* v. *Y & H Corp.*, for example, the Court explained that the provision in Title VII limiting the statute's coverage to companies of 15 or more employees was located in a "Definitions" section of the statute separate from the grants of jurisdiction under the federal-question statute (28 U.S.C. 1331) and Title VII itself. 546 U.S. at 505-506. The Court determined that the employee-numerosity requirement was an element of the plaintiffs' claim, rather than a jurisdictional limitation on the power of the courts to adjudicate Title VII claims, reasoning that "the 15-employee threshold appears in a separate provision that 'does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.'" *Id.* at 515 (quoting *Zipes* v. *Trans World Airlines*, 455 U.S. 385, 394 (1982)).

The Court reached the same conclusion in *Reed Elsevier*, where the pre-litigation registration requirement in the Copyright Act was "located in a provision 'separate' from those granting federal courts subject-matter jurisdiction over" copyright-infringement claims. 130 S. Ct. at 1245-1246. Most recently, in *Henderson*, the Court concluded that the 120-day statutory period for appealing the denial of veterans benefits is not jurisdictional in part based on Congress's placement of the time limit in a portion of the statute "entitled 'Procedure,'" rather than the "subchapter entitled 'Organization and Jurisdiction.'" 131 S. Ct. at 1205; see *Union*

Pacific R.R. Co. v. *Brotherhood of Locomotive Eng'rs and Trainmen Gen. Comm. on Adjustment*, 130 S. Ct. 584, 597 (2009) (the placement of the procedural rule at issue in a statutory section different from the one establishing the "powers" of the grievance board supported nonjurisdictional treatment).

b. Section 2253, in contrast, is a provision of the habeas statutes entitled "Appeal." Subsection (a) provides that a final order denying habeas relief "shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held." 28 U.S.C. 2253(a). Subsection (b) clarifies that there is no right to appeal a final order in a habeas proceeding challenging detention under a federal warrant of removal. Courts of appeals have understood Section 2253(a) as a general grant of appellate jurisdiction in habeas cases, see, *e.g.*, *Rountree* v. *Balicki*, 640 F.3d 530, 536 (3d Cir. 2011), and Section 2253(b) as a limit on that jurisdiction, see *United States* v. *Brooks*, 245 F.3d 291, 293 (3d Cir. 2001) (collecting cases). The COA requirement in Section 2253(c) is likewise a limitation on, or precondition to, the exercise of appellate jurisdiction under Section 2253(a). The inclusion of the COA requirement in a provision whose other subsections grant and withdraw jurisdiction is a strong contextual signal that it is a jurisdictional requirement.

In this structural sense, Section 2253(c) resembles the statutory provisions that this Court found to establish jurisdictional limitations in *Bowles* v. *Russell*, 551 U.S. 205, 208-214 (2007), and *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312 (1988). *Bowles* involved the 30-day period for filing a notice of appeal in a civil case. Although carried into practice by the Federal Rules of Appellate Procedure, see Fed. R. App. P. 4(a), that 30-

day period—and the availability of a 14-day extension of it, Fed. R. App. P. 4(a)(6)—are prescribed by subsections of the same statute, 28 U.S.C. 2107(a); 28 U.S.C. 2107(c) (2006 & Supp. III 2009). *Bowles*, 551 U.S. at 208. The Court concluded in *Bowles* that the 30-day period in Section 2107(a) established a jurisdictional time limit, and because the maximum 14-day extension was set forth as a subsection of the same statute, 28 U.S.C. 2107(c) (2006 & Supp. III 2009), the Court held that it too was a jurisdictional limitation. 551 U.S. at 213.

Similarly, in *Torres*, the Court held that the requirement in Federal Rule of Appellate Procedure 3(c) that a notice of appeal must specify the parties taking the appeal was "a jurisdictional prerequisite." 487 U.S. at 318. In so concluding, the Court relied on an Advisory Committee Note that treated the requirements of Rules 3 and 4—the latter governing the timing of the notice of appeal—"as a single jurisdictional threshold." *Id.* at 315. Noting that the time limit in Rule 4 was jurisdictional and could not be extended, the Court declined to treat Rule 3's naming requirement differently. "Permitting courts to exercise jurisdiction over unnamed parties after the time for filing a notice of appeal has passed," the Court explained, would be "equivalent" to allowing courts to exercise the prohibited power of "extend[ing] the time for filing a notice of appeal." *Ibid.*[2]

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[2] The 1993 amendments to Fed. R. App. P. 3 abrogated the specific holding in *Torres* that failing to specify the exact name of an appealing party is a jurisdictional defect. See Fed. R. App. P. 3(c) advisory committee's note (1993) (Amendments). Although some courts have stated that the 1993 amendment "overrul[ed] *Torres*," *Bailey* v. *United States Dep't of the Army Corps of Engineers*, 35 F.3d 1118, 1119 n.3 (7th Cir.

The three subsections of Section 2253(c) similarly establish "a single jurisdictional threshold." See *Torres*, 487 U.S. at 315. If the issuance of a COA under Section 2253(c)(1) is jurisdictional (as petitioner concedes), it makes little sense to treat differently the substantive requirements of the COA set forth in Subsections (c)(2) and (c)(3). Differential treatment would have the anomalous result of giving courts of appeals the power to adjudicate habeas appeals that do not involve debatable constitutional claims, which Congress specifically meant to preclude.

3. The historical treatment of the COA requirement makes clear that Section 2253(c) prescribes a jurisdictional requirement for taking an appeal

The historical backdrop against which AEDPA was enacted further confirms the jurisdictional status of the COA requirement. *Reed Elsevier*, 130 S. Ct. at 1247-1248 ("[I]nterpretation of similar provisions in many years past[] is relevant to whether a statute ranks a requirement as jurisdictional.").

As explained above, pp. 2-3, *supra*, a certification requirement has existed since 1908 when Congress conditioned a state prisoner's appeal to this Court on the issuance of a CPC. Act of Mar. 10, 1908, ch. 76, 35 Stat. 40. In giving effect to the 1908 statute, this Court treated the absence of a CPC as a jurisdictional bar, dismissing "for want of jurisdiction" prisoner appeals in which a CPC had not been issued. See *Ex Parte Pat-*

1994) (citing *Garcia* v. *Walsh*, 20 F.3d 608, 609 (5th Cir. 1994)), the amendment did not affect this Court's jurisdictional analysis. In *Bowles*, the Court cited *Torres* with approval in reaffirming that the time limit treated as jurisdictional in *Torres* remained so. 551 U.S. at 209-210; see *Becker* v. *Montgomery*, 532 U.S. 757, 767 (2001).

rick, 212 U.S. 555 (1908); *Bilik* v. *Strassheim*, 212 U.S. 551 (1908); see also *Jeffries* v. *Barksdale*, 453 U.S. 914, 915 (1981) (Rehnquist, J., dissenting from denial of certiorari on grounds that writ should have instead been dismissed for lack of jurisdiction because no CPC had issued).

After Congress extended habeas jurisdiction and the CPC requirement to the courts of appeals in 1925, Act of Feb. 13, 1925, ch. 229, §§ 6(d), 13, 43 Stat. 940-942, the courts of appeals followed the same course and treated a CPC as a "statutory jurisdictional requirement." *Millslagle* v. *Olson*, 130 F.2d 212, 213 (8th Cir. 1942) (per curiam). The courts regularly dismissed for lack of jurisdiction appeals taken in the absence of a CPC. See *Gebhart* v. *Amrine*, 117 F.2d 995, 996 n.1 (10th Cir. 1941) (citation omitted) ("[T]here was no finding that probable cause exists for an appeal. In the absence of such a finding, we have no jurisdiction."); see also, *e.g.*, *Wilson* v. *Lanagan*, 79 F.2d 702, 702 (1st Cir. 1935) (per curiam); *United States* v. *Baldwin*, 49 F.2d 262, 263 (7th Cir. 1931) (per curiam); *Schenk* v. *Plummer*, 113 F.2d 726, 727 (9th Cir. 1940). Thus, when Congress codified the CPC requirement in 1948, and when it amended the certification requirement in AEDPA, Congress understood the requirement to have jurisdictional consequences. See, *e.g.*, *Ankenbrandt* v. *Richards*, 504 U.S. 689, 700-701 (1992) (applying presumption that Congress adopted historical construction of jurisdictional statute when it amended statute without altering jurisdictional provision).

This Court's post-AEDPA cases have continued to treat the COA requirement as jurisdictional. For example, in *Hohn* v. *United States*, 524 U.S. 236 (1998), the Court described "the issuance of a [COA]" as "a thresh-

old prerequisite for court of appeals jurisdiction." *Id.* at 248. And in *Miller-El*, the Court expressly stated that a COA is "a jurisdictional prerequisite," absent which "federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners." 537 U.S. at 336.[3] "When a long line of this Court's decisions left undisturbed by Congress has treated a * * * requirement as jurisdictional, [the Court] will presume that Congress intended to follow that course." *Henderson*, 131 S. Ct. at 1203 (citations omitted). The uninterrupted historical treatment of Section 2253(c) and its predecessor statutes as a jurisdictional requirement confirms the jurisdictional status of Section 2253(c).[4]

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[3] Although the decisions in *Hohn* and *Miller-El* predate this Court's recent cases discussing the term "jurisdictional," the Court's statements cannot be viewed as "'drive-by jurisdictional rulings.'" See *Arbaugh*, 546 U.S. at 511. The Court in *Miller-El* characterized Section 2253(c)(1) as jurisdictional based on the statutory text, 537 U.S. at 336, which the Court has often found determinative of jurisdictional status. See *Reed Elsevier*, 130 S. Ct. at 1244. The description of the COA requirement in *Hohn* was central to the Court's conclusion that an application for a COA is a case "in" the court of appeals such that the Court has jurisdiction under 28 U.S.C. 1254(1) to review the denial of a COA. 524 U.S. at 247-248.

[4] In *Medellin* v. *Dretke*, 544 U.S. 660 (2005) (dismissing writ of certiorari as improvidently granted), Justice O'Connor expressed a view that if no objection had been made, a COA issued on a nonconstitutional claim would authorize appellate jurisdiction over that claim. *Id.* at 678-679 (O'Connor, J., dissenting). The majority, however, stated that one reason the writ of certiorari should be dismissed as improvidently granted was that the petitioner would need to show in later proceedings that a treaty-based claim could satisfy the COA standard, even though the State had never objected to the issuance of a COA on that ground. *Id.* at 666 (per curiam).

4. The purpose of Section 2253(c) is to limit the authority of the courts of appeals to adjudicate appeals from the denial of habeas petitions

The text, structure, and history of Section 2253(c) reveal that the purpose of the COA requirement, and the 1996 amendments to it, is to limit the jurisdiction of the courts of appeals over final decisions denying habeas relief. See *Miller-El*, 537 U.S. at 337 (AEDPA "placed more, rather than fewer, restrictions on the power of federal courts to grant writs of habeas corpus to state prisoners").

When Congress enacted AEDPA in 1996, it added additional requirements to the COA statute—a statute that had long been viewed as jurisdictional. It did so by amending Section 2253, which is the jurisdictional provision authorizing appellate review of district court decisions denying habeas relief to prisoners. Specifically, it added the requirements as Subsections (2) and (3) after Section 2253(c)(1), which states in jurisdictional language that an appeal "may not be taken" without a COA.

The requirements Congress added to Section 2253 provide further restrictions on what the courts of appeals had previously been authorized to adjudicate. The "substantial showing" requirement of Subsection (c)(2) codified *Barefoot*'s holding that a certificate may issue only upon the applicant's substantial showing of the denial of a right, but it "substitut[ed] the word 'constitutional'" for the word "federal," *Slack* v. *McDaniel*, 529 U.S. 473, 483-484 (2000), thus ensuring that only prisoners with viable constitutional claims were entitled to appellate review of district court orders denying their habeas petitions.

Moreover, the issue-specification requirement in Subsection (c)(3) abrogated pre-AEDPA circuit court

precedent that denied district courts the authority to limit certificates to specific issues or otherwise circumscribe the issues that the court of appeals could consider once a certificate had been issued. See, *e.g.*, *Smith* v. *Chrans*, 836 F.2d 1076, 1079-1080 (7th Cir. 1988) (per curiam). Congress curtailed the court of appeals' exercise of such a broad adjudicatory authority by enacting Section 2253(c)(3). Ranking the issue-specification requirement as jurisdictional would give effect to Congress's purpose by requiring the courts of appeals to stay within the limits on their authority. Cf. *American Red Cross* v. *S.G.*, 505 U.S. 247, 263 (1992) (invoking "the canon of statutory construction requiring a change in language to be read, if possible, to have some effect").

B. The Practical Concerns Expressed By Petitioner Do Not Justify Treating Section 2253's Requirements As Nonjurisdictional.

1. Petitioner and his amici raise practical and equitable considerations that they say counsel against treating Sections 2253(c)(2) and (3) as jurisdictional. Echoing court of appeals decisions that treat as nonjurisdictional the substantial-showing and issue-specification requirements of Subsections (c)(2) and (3), amici (NACDL Br. 12) contend that jurisdictional status forces courts to "second-guess" COAs whose propriety is uncontested and thus "wastes judicial resources."

"Congress," however, "decides whether federal courts can hear cases at all, [and] it can also determine when, and under what conditions, federal courts can hear them." *Bowles*, 551 U.S. at 212-213. Congress has determined that judicial resources are best conserved—and finality interests best served—when habeas appeals are limited to cases where a petitioner can make a substantial showing of the denial of a constitu-

tional right. It would not accord with the habeas regime Congress established for a court of appeals to bypass this jurisdictional impediment and reach the merits of a purely procedural issue (or a statutory issue, or a state law issue for that matter), simply because the parties had already briefed it. *Kontrick*, 540 U.S. at 456 ("[A] court's subject-matter jurisdiction cannot be expanded to account for the parties' litigation conduct.").

Moreover, requiring courts and litigants to be mindful of jurisdictional requirements even after a judge has conducted a "substantial showing" analysis and issued a COA does not diminish the utility of that initial step. The certification process serves the important function of making sure that frivolous claims falling outside the courts of appeals' jurisdiction are not assigned to merits panels, thereby saving judicial resources. But that screening function does not relieve the litigants and the court from ensuring at every stage of the proceedings that the case was correctly certified as one that falls within the "class[] of cases," *Kontrick*, 540 U.S. at 454-455, that Congress authorized the court to hear. Indeed, the jurisdictional character of the substantial-showing and issue-specification requirements gives courts and parties an added incentive to pay close attention to those matters at the outset, in order to avoid the possible dismissal of an appeal later.

2. Petitioner (Br. 26-27 & n.6) and his amici (NACDL Br. 13-14) also suggest that it would be inequitable to penalize prisoners by dismissing habeas petitions based on errors made by a judge or court staff in preparing the COA itself. Petitioner's argument is based on the premise (Br. 15-20) that he in fact made a "substantial showing" of the denial of his Sixth Amendment right to a speedy trial and that the court of ap-

peals' failure to certify that issue was "an oversight in processing" his COA application. *Id.* at 12, 26.[5]

But if a prisoner has made the required showing that his constitutional rights have been violated, and the issuing judge overlooks it, the court of appeals can amend the COA to encompass review of that claim and clarify that the case actually belongs in the court of appeals. 28 U.S.C. 2253(c)(1). If, in contrast, a court of appeals mistakenly certifies a statutory or procedural issue in a case that does not also involve a debatable constitutional question, dismissing that case for lack of subject matter jurisdiction at some later point in the proceeding is not inequitable to the prisoner. His case does not fall within the "class[] of cases" that Congress has determined are "within [the court of appeals'] adjudicatory authority." *Kontrick*, 540 U.S. at 454-455. Congress's limitation of appellate review to cases that implicate constitutional rights, 28 U.S.C. 2253(c)(2), would be undermined if courts of appeals could review procedural or statutory issues merely because they (or the district courts) issued COAs certifying them.[6]

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[5] Here, petitioner briefed his speedy trial claim (along with several other constitutional claims) in the court of appeals, notwithstanding that none of those issues had been specifically identified in the COA. Pet. App. 3a n.1. The court had the opportunity to amend the COA, but instead it refused to address those issues, explaining that "[b]ecause COAs were not granted on these issues, we lack jurisdiction to consider the[m]." *Ibid.* That statement indicates that the court of appeals did not understand the COA to have implicitly included petitioner's speedy trial claim.

[6] Further reducing the likelihood that the COA requirements will be a trap for the unwary are the procedural rules governing habeas proceedings, which are designed to ensure both that a COA is properly issued before a petitioner may proceed with his appeal and that a habeas petitioner will have a fair opportunity to comply with this statutory

C. Because The COA Did Not Comply With The Requirements Of Section 2253(c), The Court Of Appeals Did Not Have Jurisdiction Over Petitioner's Appeal

1. The COA in this case did not comply with the requirements of Section 2253(c). It was limited to a procedural question involving the statute of limitations, J.A. 346-347, and it failed to identify any "specific issue * * * [that] satisf[ied] the showing required by paragraph (2)," namely, a substantial showing of the denial of a constitutional right. 28 U.S.C. 2253(c)(2)-(3). Because Section 2253(c) establishes a jurisdictional limitation, and because the COA here failed on its face to comply with the requirements set forth in that provision, the court of appeals lacked jurisdiction to resolve the purely

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requirement. Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." App., *infra*, 2a. If a COA is issued, it must be accompanied by statement of "the specific issue or issues that satisfy the showing required by 28 U.S.C. 2253(c)(2)." *Ibid.* If a COA is denied, the petitioner "may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22." *Ibid.* Rule 11 also clarifies for the petitioner that "[a] timely notice of appeal must be filed even if the district court issues a certificate of appealability." *Ibid.*

Federal Rule of Appellate Procedure 22 further ensures that a COA has been properly issued by providing that if a habeas petitioner files a notice of appeal, "the district clerk must send to the court of appeals the certificate (if any) and the statement described in Rule 11(a) of the [Habeas Rules] (if any), along with the notice of appeal and the file of the district court proceedings." App., *infra*, 3a. Rule 22 reiterates that "if the district judge has denied the certificate, the applicant may request a circuit judge to issue it," *ibid.*, and it maximizes the petitioner's opportunity to obtain a COA by stating that "[if] no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals," *id.* at 4a.

procedural question certified for review.[7] The Court should therefore vacate the judgment of the court of appeals for lack of appellate jurisdiction.

2. Petitioner notes (Br. 30) that the Justices of this Court have statutory authority to issue a COA under 28 U.S.C. 2253(c), and he contends that the Court "could issue a corrected certificate for petitioner if that were deemed necessary to facilitate resolution of the important questions raised by his case." It is correct that Justices of this Court are authorized to issue COAs. 28 U.S.C. 2253(c)(1) (stating that COAs may be issued by "a circuit justice or judge"). Even if a "circuit justice" were inclined to issue a COA, however, doing so would not give this Court authority to decide the procedural question that petitioner has presented for review.

a. As an initial matter, petitioner has not submitted an application for a COA in this Court. See 28 U.S.C. 2253(c)(2) (referring to necessary showing by "applicant" for issuance of a COA); Sup. Ct. R. 22 ("An application addressed to an individual Justice shall be filed with the Clerk, who will transmit it promptly to the Justice concerned."). Nor has any party sought review or modification of Judge Garza's order granting a COA limited to the procedural statute-of-limitations question. J.A. 346-347.

Furthermore, even if the argument made in petitioner's brief (Br. 30) were construed as an application for a COA, a circuit justice's issuance of a COA could not retroactively confer jurisdiction on the court of appeals

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[7] The parties debate (Pet. Br. 16-20; Resp. Br. 31-34) whether petitioner made a substantial showing of a violation of his Sixth Amendment speedy-trial right. The Court need not resolve that question if it agrees with the disposition proposed in the text, and the United States takes no position on the issue.

by issuing a COA. Cf. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 569 n.4 (1992) ("[A] plaintiff cannot retroactively create jurisdiction based on post-complaint litigation conduct."). Section 2253(c)(1) states that unless a circuit judge issues a COA, "*an appeal may not be taken to the court of appeals*." (emphasis added). Even if a COA were now issued specifying a constitutional issue for review, the Court would not have jurisdiction to review the merits of the procedural issue that the court of appeals decided without jurisdiction. The judgment of the court of appeals should, in any scenario, be vacated.

b. Petitioner notes (Br. 30) that in *Slack*, after the Court concluded that a procedural issue could be resolved in a habeas appeal if a constitutional issue was also certified, the Court decided the procedural issue on the merits and remanded for a determination of whether the petitioner was "entitled to the issuance of a COA" based on the constitutional question. 529 U.S. at 473-474; see also *Jimenez* v. *Quarterman*, 555 U.S. 113, 118 & n.3 (2009) (deciding that court of appeals, which denied a COA, had erred in concluding that the petition was time-barred without deciding whether petitioner was entitled to a COA). These cases do not, however, demonstrate that this Court has jurisdiction to resolve the procedural issue in this case. In *Slack* and *Jimenez*, the courts of appeals had refused to issue COAs, and this Court exercised its certiorari jurisdiction to review those orders. See *Hohn*, 524 U.S. at 257. In contrast, the court of appeals in this case decided petitioner's appeal on the merits, but based on a defective COA. This Court could not use its certiorari jurisdiction to review, on the merits, a procedural ruling that the court of appeals lacked jurisdiction to decide. Furthermore, al-

though the Court in *Slack* and *Jimenez* decided the relevant procedural issues on the merits instead of simply concluding that the petitioners had satisfied Section 2253(c)(2)'s "substantial showing requirement," that does mean that the Court should similarly decide the procedural question here. "When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed." *Arizona Christian Sch. Tuition Org.* v. *Winn*, 131 S. Ct. 1436, 1448 (2011).

CONCLUSION

The judgment of the court of appeals should be vacated.

Respectfully submitted.

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APPENDIX

1. 28 U.S.C. 2253 provides:

Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

2. The Rules Governing Section 2254 Cases in the United States District Courts provide in pertinent part:

* * * * *

Rule 11. Certificate of Appealability; Time to Appeal

(a) Certificate of Appealability. The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.

(b) Time to Appeal. Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.

* * * * *

3. The Federal Rules of Appellate Procedure provide in pertinent part:

* * * * *

Rule 22. Habeas Corpus and Section 2255 Proceedings

(a) Application for the Original Writ. An application for a writ of habeas corpus must be made to the appropriate district court. If made to a circuit judge, the application must be transferred to the appropriate district court. If a district court denies an application made or transferred to it, renewal of the application before a circuit judge is not permitted. The applicant may, under 28 U.S.C. § 2253, appeal to the court of appeals from the district court's order denying the application.

(b) Certificate of Appealability.

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district clerk must send to the court of appeals the certificate (if any) and the statement described in Rule 11(a) of the Rules Governing Proceedings Under 28 U.S.C. § 2254 or § 2255 (if any), along with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue it.

(2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as

the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.

(3) A certificate of appealability is not required when a state or its representative or the United States or its representative appeals.

* * * * *