No. 16-6795 (CAPITAL CASE)

IN THE

Supreme Court of the United States

CARLOS MANUEL AYESTAS,
Petitioner,

v.

LORIE DAVIS, Director, Texas Department of Criminal Justice (Institutional Division),
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The reasonable-necessity standard governing access to services under 18 U.S.C. § 3599(f) supports the statutory guarantee of "representation" by providing the opportunity to develop claims and defenses. As the statute's text, structure, history, and purpose establish, indigent individuals seeking services under § 3599(f) must satisfy the reasonable-attorney standard that Congress incorporated from the Criminal Justice Act ("CJA"), not the Fifth Circuit's atextual substantial-need test. The Director does not attempt to defend the substantial-need test using traditional tools of statutory interpretation. She merely argues that substantiality requirements from unrelated habeas rules should be grafted onto § 3599(f). But courts do not rewrite statutes. Section 3599(f) means what it says: courts should authorize services when they are reasonably—not substantially—necessary for the representation.

The Director devotes little attention to the question actually presented in this case, focusing instead on peripheral issues that she never raised below. First, she asks this Court to hold that 28 U.S.C. § 2254(e)(2) bars the introduction of any evidence discovered using § 3599(f) services. The argument is both wrong and misplaced. A claimant with a *Martinez* excuse is not at fault for the failure to develop his claim's factual basis. And, as a general matter, a court should not prematurely resolve the application of § 2254(e)(2) on a § 3599(f) motion, before claims are developed. Second, the Director contends that Article III bars appellate review of the district court's reasonable-necessity determination. The

Court's Article III jurisprudence forecloses her argument. A district court's reasonable-necessity ruling bears the hallmarks of judicial decision-making. It is reviewable on appeal.

The Director's arguments should be rejected, and the judgment below reversed.

ARGUMENT

I. THE LOWER COURTS DENIED MR. AYESTAS § 3599(f) SERVICES BASED ON AN INDEFENSIBLE READING OF THE STATUTE

A. The Substantial-Need Standard Is Not A Valid Construction Of § 3599(f)

1. The substantial-need test contravenes Congress's purpose in § 3599(f) to *enhance* the representations of those facing capital punishment. *Martel v. Clair*, 565 U.S. 648, 659-60 (2012). The statute's plain language excludes a substantial-necessity requirement. So does the statute's structure: the "representation" provided by § 3599 encompasses the identification and development of *possible* claims. *See McFarland v. Scott*, 512 U.S. 849, 858 (1994). Congress borrowed § 3599(f)'s language from the CJA, under which "reasonable necessity" had a settled interpretation authorizing services when a reasonable attorney would seek them, not just when the underlying claim was fully developed. The statute itself forecloses the substantial-need test's requirement that a § 3599(f) movant definitively establish the merit and viability of the constitutional claim being developed. *See* Pet. Br. 23-43.

The Director does not seriously dispute that the substantial-need test fails scrutiny under the usual interpretive rules. She does not even contend that the substantial-need test can apply throughout the § 3599 representation. She instead argues that the test is a "permissible" reading of the statute when applied in habeas proceedings, particularly those involving *Martinez*. Opp. 17, 44-51. But the statute uses a single degree of necessity—reasonable—for all phases of a capital representation, even though the needs in any particular phase may vary. Pet. Br. 39-41. The Court presumes that Congress intended to give § 3599's language a single meaning in all contexts to which it applies. *See Martel*, 565 U.S. at 663. The Fifth Circuit's habeas-specific use of the substantial-need test is not a virtue—it confirms that the test is wrong. *See* Pet. Br. 39-41.

The Director's rationale for a substantial-need test unique to habeas proceedings also fails on its own terms. The Director contends that because a procedurally defaulted IATC claim must be "substantial" under AEDPA's appellate-review provision and *Martinez*, it follows that the need for services must likewise be "substantial." Opp. 17, 46. The argument is logically unsound. It also ignores that the AEDPA and *Martinez* substantiality requirements operate *after* an inmate has had the opportunity to develop his claims.[1] The § 3599(f)

[1] *Martinez* contemplates that a petitioner may lack substantiation for his IATC claim when he arrives in federal court not because the claim is meritless, but because he has never had effective counsel to develop it. *Infra* at 13-14.

analysis, by contrast, necessarily occurs *before* claims have been fully identified and developed. The substantial-need test invites a court to prematurely resolve a habeas claim's merit and viability before it has been developed and pleaded with the benefit of the § 3599 representation, contrary to the statute's design. *Cf. McCleskey v. Zant*, 499 U.S. 467, 498 (1991) (habeas counsel "must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief").

At bottom, the Director argues that § 3599(f) should be narrowly construed in habeas proceedings because of AEDPA's restrictive purposes. But the provision at issue here traces to a statute designed to "enhance[] rights of representation." *Martel*, 565 U.S. at 659; *see* Pet. Br. 8-9. And Congress expressly reenacted the provision in AEDPA itself, Pet. Br. 8-9—confirming that Congress did not intend to narrow the scope of capital representations even as it narrowed access to relief in other ways.[2]

2. The Director's attack on the reasonable-attorney standard ignores the statutory history by

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[2] The Director argues that a technical amendment made in AEDPA to § 3599(f)'s predecessor—providing that courts "may" award reasonably necessary services—increased courts' discretion to deny § 3599(f) motions. Opp. 45. Even if this amendment could be construed as non-technical, it did not affect the meaning of reasonable necessity. *See Smith v. Dretke*, 422 F.3d 269, 289 (5th Cir. 2005). A court lacks discretion to base its ruling on a legally erroneous interpretation of a statute, or a rationale at cross-purposes with it. *See, e.g.*, *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1748 (2014); *see also* Pet. Br. 43.

which it was incorporated into § 3599(f). *See* Pet. Br. 30-35. The Director simply argues that the standard should be rejected because it is "limitless." Opp. 49-50. But the reasonable-attorney standard is inherently bounded: reasonable attorneys do not deploy client resources for futile investigations. And after nearly *a half century* of experience with the standard, courts have developed workable, common-sense limitations. Courts reject frivolous requests and "fishing expeditions," for example, and they require the movant to demonstrate a reasonable basis for believing that the requested services may lead to the development of a plausible claim or defense. *See* Pet. Br. 42-43.

B. Mr. Ayestas Established A Reasonable Need For Investigative Services

The request here easily satisfies the reasonable-necessity standard. A reasonable attorney would devote the requested resources to Mr. Ayestas's *Wiggins* claim, based on what the existing record discloses about trial counsel's deficiency and the prejudice it likely caused.

1. The Director disputes that Mr. Ayestas has made a showing of deficiency worth investigating. The Fifth Circuit, however, justifiably assumed that Mr. Ayestas's trial counsel were deficient. After waiting almost a year and a half—until the eve of trial—to begin work on the case, trial counsel ignored red flags for substance abuse and mental illness, did not have Mr. Ayestas evaluated by a mental health professional, and otherwise failed to meaningfully investigate Mr. Ayestas's background

and social history. *See* Pet. Br. 10-13. As the Director concedes, the jury therefore heard *no* mitigating evidence during defense counsel's two-minute sentencing presentation, save for three two-sentence letters stating that Mr. Ayestas was attentive in his prison English course. *See* Pet. Br. 13; Opp. 4-5. Mr. Ayestas's federal habeas counsel reasonably questioned what evidence the threadbare trial investigation kept from the jury.[3]

2. The Director's arguments regarding prejudice are equally unavailing. The Director primarily argues that the brutality of the crime and Mr. Ayestas's criminal history would have neutralized the mitigating impact of mental-health and substance-abuse evidence for every juror. Opp. 56-57. But this Court's precedents consistently analyze—and often find—prejudice even in cases involving exceedingly brutal crimes. Pet. Br. 48. The focus in those cases

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[3] The Director raises two objections related to trial counsel's deficiency. First, she objects that the investigative report prepared for trial counsel, which documented several red flags, "was not introduced into evidence." Opp. 11. Mr. Ayestas has not yet had an opportunity to introduce *anything* into evidence, however—he is necessarily proceeding on allegations described in his papers, as the courts below each accepted. *See* JA 360-61, 379. Second, the Director argues that no evidence from Mr. Ayestas's Honduran family members can be considered because that evidence was not in the record before the state court when it rejected a different IATC claim. Opp. 54. That argument misapprehends the requested services, which concern *different* individuals. And it misconstrues *Cullen v. Pinholster*, 563 U.S. 170, 182-83 (2011), which restricts evidence on claims a state court decided on the merits. *Pinholster* is inapplicable to the new *Wiggins* claim at issue here, the merits of which the state court never decided.

is on the quality of the mitigating evidence, not the aggravating factors that the mitigation would counteract. *See* Capital Punishment Ctr. Br. 6-14.

The Director does not deny that *mental-health* evidence would be mitigating, which alone defeats the suggestion that any investigation is futile. And the Director's attack on the substance-abuse evidence is unsound. She argues that this evidence could have undermined the case for mitigation. Opp. 53, 57. She cannot argue, however, that *no* juror would have been moved by it, particularly since the State emphasized the *absence* of such evidence at the closing of the sentencing phase. *See* Pet. Br. 13. Evidence of Mr. Ayestas's substance abuse would have been uniquely effective alongside mental-health mitigation, as drug use is often tied to mental illness. *See* Pet. Br. 15. Indeed, *any* mitigating evidence would have made for a better sentencing-phase case than the one that trial counsel actually presented.

The Director's arguments about prejudice come to nothing, but the foregoing exercise illustrates the folly of debating the merits of a claim before each party has developed and presented its case. Congress structured § 3599 to avoid this exercise. Section 3599(f) movants are not required to prove up the claim they are trying to develop; it is sufficient here that Mr. Ayestas has made a showing of potential prejudice that a reasonable attorney would pursue. *Supra* at 2.

3. The Director further contends that state habeas counsel's failure to investigate Mr. Ayestas's mental health was "a reasonable strategic decision"

that forecloses his *Martinez* excuse. Opp. 55-56. The Fifth Circuit did not take this view: it held that state habeas counsel was adequate only because it concluded that the underlying IATC claim was frivolous. *See* JA 390, 399. State habeas counsel inexplicably failed to perform the mitigation investigation that his own investigator recommended when she learned that trial counsel had conducted "no social history investigation" and no investigation of "mental health, possible mental illness, [and] substance abuse history." JA 81. Mr. Ayestas alleged that state habeas counsel's failure to pursue that investigation was a non-strategic omission. It is impossible to make a contrary finding now, on this § 3599(f) motion, before Mr. Ayestas has even had the opportunity to develop and present evidence about state habeas counsel's performance.

C. 28 U.S.C. § 2254(e)(2) Does Not Bar Mr. Ayestas's Request For § 3599(f) Services

The Director's principal defense of the Fifth Circuit's decision is an argument neither raised nor decided below: that it is *never* reasonably necessary to conduct an investigation to develop allegations in support of a defaulted IATC claim, because 28 U.S.C. § 2254(e)(2) will bar admission of any discovered evidence. The Court need not and should not reach that argument here: it is forfeited; it would benefit from development in the lower courts; and it is premature.

The argument is also wrong; no appeals court has adopted it. Under *Martinez* and *Trevino*, a prisoner who never received adequate representation in state

court is not at fault for state habeas counsel's deficiencies, including any "failure to develop the factual basis" of his claims. Section 2254(e)(2) therefore would not prevent a court from considering the evidence that § 3599(f) services produce here.

1. This case is not a suitable vehicle for exploring the interplay between § 2254(e)(2) and § 3599(f)'s reasonable-necessity standard, for multiple reasons.

First, the Director never argued below that § 2254(e)(2) should factor into the reasonable-necessity determination. She has therefore forfeited the argument. *See OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 398 (2015).

Second, this is precisely the sort of question that the lower courts can and should consider in the first instance. *See, e.g.*, *Glover v. United States*, 531 U.S. 198, 205 (2001) (declining to consider arguments "neither raised in nor passed upon by the Court of Appeals" and reserving for lower courts the questions "[w]hether these issues remain open, and if so whether they have merit"). The degree to which § 2254(e)(2) could affect the use of evidence uncovered through § 3599(f) services, and the question whether there is a need for § 3599(f) services in a given case notwithstanding the potential unavailability of an evidentiary hearing, involve context-specific analyses that the lower courts should undertake first.

Third, it is inappropriate to resolve possible downstream procedural bars on a § 3599(f) motion. Section 2254(e)(2)'s applicability in a given case—including the applicability of its subsections—will

depend on a petitioner's investigation, which in turn will depend on whether he has the resources to conduct it. As this Court has recognized, § 3599 rights to representation do not dissolve simply because the petitioner's claims may later encounter procedural hurdles. *See Christeson v. Roper*, 135 S. Ct. 891, 895-96 (2015) (petitioner who would "face[] a host of procedural obstacles to having a federal court consider his habeas petition" should "have th[e] opportunity [to overcome them], and is entitled to the assistance of … counsel in doing so").

Fourth, this case does not provide an opportunity to test the Director's interpretation of § 2254(e)(2). An investigation can be reasonably necessary to the "representation" for reasons that do not implicate § 2254(e)(2). Most basically, a § 3599 representation encompasses the research and identification of "possible claims and their factual bases." *McFarland*, 512 U.S. at 855; *see* Pet. Br. 9. That effort may establish that the underlying constitutional grievance is sufficiently "substantial" to warrant an appeal. *See* 28 U.S.C. § 2253(c); *Slack v. McDaniel*, 529 U.S. 473 (2000). Or it may reveal that the federal proceedings should be held in abeyance for exhaustion of an identified claim. *See Rhines v. Weber*, 544 U.S. 269 (2005).

In this case, the requested services are reasonably necessary to the development not only of Mr. Ayestas's underlying claim, but also of an excuse to its procedural default. As the Director concedes, Mr. Ayestas may present new evidence to establish the *Martinez* excuse—the ineffectiveness of state habeas counsel and the substantiality of the underlying

IATC claim—even if that claim is ultimately submitted based on the state record. Opp. 40 n.18; *see Detrich v. Ryan*, 740 F.3d 1237, 1247 (9th Cir. 2013) (en banc) ("If the district court holds an evidentiary hearing before ruling on the *Martinez* motion, evidence received at that hearing is not subject to the usual habeas restrictions on newly developed evidence."); *Henry v. Warden, Ga. Diagnostic Prison*, 750 F.3d 1226, 1231-32 (11th Cir. 2014) ("When a petitioner asks for an evidentiary hearing on cause and prejudice, neither section 2254(e)(2) nor the standard of cause and prejudice that it replaced apply.").

2. If it were appropriate to reach the Director's new argument, it would have to be rejected.[4] No court of appeals has adopted the Director's proposed construction of the opening clause of § 2254(e)(2), because *Martinez* and *Trevino* recognize that a prisoner who has never had adequate state representation is not "at fault" for a forfeited IATC claim. Since § 2254(e)(2) is a fault-based restriction, it does not preclude the use of facts developed in a federal habeas proceeding—including through § 3599(f) services—to support a faultless prisoner's constitutional claims. The Director's interpretation cannot be reconciled with *Martinez*, *Trevino*, or the unbroken line of authority confirming that a prisoner whose lack of fault excuses a procedural default also lacks fault for

[4] Mr. Ayestas does not in this brief argue that he would satisfy the exceptions specified in the subsections of § 2254(e)(2), but reserves the right to argue that he does if discovered facts support that position.

"fail[ing] to develop" a claim within the meaning of § 2254(e)(2).

The opening clause of § 2254(e)(2) limits the availability of evidentiary hearings only when a habeas petitioner "has failed to develop the factual basis of a claim in State court proceedings." In *Williams v. Taylor*, 529 U.S. 420 (2000), the Court explained that "failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Id.* at 432. Before AEDPA, *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), equated the fault-based standard for excusing procedural default with the fault-based standard used to determine the availability of evidentiary hearings. Interpreting AEDPA in *Williams*, the Court found "no basis in the text of § 2254(e)(2) to believe Congress used 'fail' in a different sense than the Court did in *[Tamayo-Reyes]*," *Williams*, 529 U.S. at 433, and "s[aw] no indication that Congress … intended to remove the distinction between a prisoner who is at fault and one who is not," *id.* at 435. *Williams*, in short, reaffirmed the longstanding alignment between the excuse of a procedural default and the opportunity to receive a hearing on the merits in federal court: each turns on the absence of fault. *See, e.g.*, *Barrientes v. Johnson*, 221 F.3d 741, 771 (5th Cir. 2000) (recognizing that *Williams* "linked the 'failure to develop' inquiry with the cause inquiry for procedural default," and holding that petitioner who establishes cause has also shown he did not "fail to develop" the record).

When *Williams* was decided, habeas claimants were always vicariously faulted for state habeas counsel's deficiency. *Williams*, 529 U.S. at 432; *see Coleman v.* Thompson, 501 U.S. 722, 754 (1991). *Martinez* revised that rule, however, explicitly "qualif[ying] *Coleman* by recognizing a narrow exception: Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of [an IATC claim]." *Martinez v. Ryan*, 566 U.S. 1, 9 (2012); *see also Davila v. Davis*, 137 S. Ct. 2058, 2065 (2017) (describing *Martinez* as an exception to the rule that "[a]ttorney error that does not violate the Constitution … is attributed to the prisoner"). Because a prisoner with a *Martinez*-postured claim is not at "fault" for the procedural default, he has not "failed to develop" his claim for purposes of § 2254(e)(2).

Martinez and *Trevino* themselves clearly contemplate fact development that would be impossible if § 2254(e)(2) operated as the Director claims. *Martinez* addresses the problem that prisoners deprived of adequate state post-conviction counsel are "in no position to *develop the evidentiary basis* for a claim of ineffective assistance." 566 U.S. at 12 (emphasis added). Martinez himself needed to present new evidence in federal court for his challenge to trial counsel's failure to use a rebuttal expert. *Id.* at 7. *Trevino*, which involved the same type of forfeited *Wiggins* claim at issue here, is even clearer on this point. The Court not only listed the wealth of new evidence that would have to be considered if Trevino's claim were not treated as defaulted, *Trevino v. Thaler*, 133 S. Ct. 1911, 1916 (2013), but also more broadly rec-

ognized that a lawyer undertaking *Wiggins* litigation must "investigate [a claimant's] background, determine whether trial counsel had adequately done so, and then develop evidence about additional mitigating background circumstances," *id.* at 1919. The Director's reading of § 2254(e)(2) would ensure that "no court will review" many potentially meritorious claims, *Martinez*, 566 U.S. at 10-11—exactly the result that *Martinez* and *Trevino* are supposed to prevent.

The Director insists that her view of § 2254(e)(2) is necessary to give effect to *Williams*'s observation that AEDPA "raised the bar" for federal habeas petitioners. Opp. 41. But § 2254(e)(2) "raises the bar" regardless. It altogether forecloses hearings in circumstances that previously would have permitted them. *See* Hertz & Liebman, 1 *Federal Habeas Corpus Practice and Procedure* § 20.2[b], at 1036 & n.24 (6th ed. 2011). When fault is properly attributable to the inmate, § 2254(e)(2) requires the inmate to show more to secure a hearing than was required under pre-AEDPA law. *Id.* at 1036. The Director's reading of § 2254(e)(2) is untenable and unnecessary. Only Mr. Ayestas's interpretation is faithful to Congress's intent and the Court's cases effectuating it.

II. APPELLATE COURTS HAVE JURISDICTION TO REVIEW A DISTRICT COURT'S DENIAL OF SERVICES UNDER § 3599(f)

The Director devotes much of her brief to renewing her argument—offered in opposing certiorari but not below—that courts lack appellate jurisdiction to

review a reasonable-necessity ruling that withholds § 3599(f) services. *See* Cert. Opp. 27-28. The argument is meritless, as the Court presumably concluded in granting certiorari.

No federal circuit refuses appellate jurisdiction to review a reasonable-necessity determination withholding § 3599(f) services. To the contrary, the courts of appeals regularly exercise jurisdiction to review such determinations. *See, e.g.*, *Ward v. Stephens*, 777 F.3d 250, 265-66 (5th Cir. 2015); *Edwards v. Roper*, 688 F.3d 449, 462 (8th Cir. 2012); *Fautenberry v. Mitchell*, 572 F.3d 267, 268-69 (6th Cir. 2009). They likewise routinely reviewed orders withholding services under § 3599(f)'s predecessor provision in the CJA. *See, e.g.*, *United States v. Theriault*, 440 F.2d 713 (5th Cir. 1971); *United States v. Schultz*, 431 F.2d 907 (8th Cir. 1970). This long line of appellate decisions is faithful to well-established jurisdictional principles, which confirm appellate jurisdiction here.

1. Article III "extend[s]" the federal courts' "judicial power" to certain "cases" and "controversies." U.S. Const., art. III, § 2, cl. 1. Exercising its Article III judicial power over Mr. Ayestas's habeas "case," the district court resolved his § 3599(f) motion against him. Every feature of the § 3599(f) determination confirms that it was part of the "case," made part of the final judgment by the district court, and not a separate administrative order. The § 3599(f) ruling appears under the caption and on the docket assigned to Mr. Ayestas's habeas case; it was made in the name of the court, as part of the same "Memorandum and Order" resolving Mr. Ayestas's claims

on the merits, which was the basis for the January 26, 2011 final judgment; and it involved the interpretation and application of the same constitutional provisions and federal statutes that govern relief on the underlying *Wiggins* claim. The § 3599(f) order was part of one judicial proceeding, throughout which the district court exercised judicial power.

Because the § 3599(f) determination was part of the final decision in Mr. Ayestas's case, the Fifth Circuit had appellate jurisdiction to review it. Federal courts of appeals have jurisdiction to review "all final decisions of the district courts of the United States." 28 U.S.C. § 1291; *see also id.* § 1254 (providing for Supreme Court review of "[c]ases in the courts of appeals"). Their jurisdiction encompasses the review of "claims of district court error at any stage of the litigation." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994). Article III likewise permits appellate review of all district court orders entered in the "case." *See In re Summers*, 325 U.S. 561, 565-66 (1945) (Article III permits appellate jurisdiction where there is a "judgment in a judicial proceeding which involves a case or controversy"). There is thus no constitutional or statutory impediment to this Court's exercise of jurisdiction here.

2. The Director asserts that there is no appellate power to review the reasonable-necessity determination made in the district court proceeding because, she says, a district court making such a determination acts in a purely administrative capacity. Opp. 18-28. That contention is unsupportable.

a. The Director starts from an incorrect premise: that individual rulings may be splintered from a judicial proceeding and examined for indicia of judicial decision-making.

Constitutionally significant adverseness is a property of a case, not an issue, as the Director's decisions confirm. *See*, *e.g.*, *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 755 (1976) (parties in class action remained adverse and case justiciable even though named class member was no longer entitled to relief against defendant); *Muskrat v. United States*, 219 U.S. 346, 361 (1911) (suit to invalidate a federal land grant non-justiciable when not instituted against party with the adverse ownership claim); *United States v. Ferreira*, 54 U.S. (13 How.) 40, 45, 47 (1852) (proceeding in which treaty claims were decided entirely *ex parte* in an Article I tribunal, the rulings of which were subject to the Treasury Secretary's review); *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 409-10 & n.* (1792) (proceeding in which courts set pensions for disabled Revolutionary War veterans in wholly *ex parte* proceedings that were reviewable by a Secretary of War). When a district court makes a ruling in an Article III case, it is part of the final decision in that case and the question acted on is "presented in an adversary context." *Franks*, 424 U.S. at 755.

The Director also cites cases involving review by the executive and legislative branches to argue that reasonable-necessity decisions are non-judicial acts. That precedent addresses scenarios in which the *final judgment in the case* can be revised outside the Article III hierarchy. *See, e.g.*, *Miller v. French*, 530 U.S. 327, 342 (2000) ("Article III gives the Federal

Judiciary the power, not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article III hierarchy" (quotation omitted)); *cf. Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 891 (1991) (proceeding before Article I Tax Court involved exercise of "judicial power" in part because final judgment reviewable only by Article III courts); *Postum Cereal Co. v. Cal. Fig Nut Co.*, 272 U.S. 693, 698-99 (1927) (proceeding under Article I jurisdiction of D.C. Court of Appeals to review decision of Patent Commissioner not a "final judgment," because it could be overridden via a bill in equity brought in district court). That precedent is inapplicable here, where the non-judicial branches have no power over the final judgment in Mr. Ayestas's habeas case (or even over the reasonable-necessity ruling, as explained *infra* at 20-21). *Compare Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1995) (legislative revision); *Ferreira*, 54 U.S. (13 How.) at 45, 47 (revision by Treasury Secretary); *Hayburn's Case*, 2 U.S. (2 Dall.) at 410 n.* (revision by War Secretary).

b. Even if issues within a case could be individually examined for indicia of judicial power, a district court's reasonable-necessity determination would unquestionably pass that test. The district court's § 3599(f) determination here turned on the court's application of the statutory standard to issues that were inextricably intertwined with Mr. Ayestas's underlying claim for habeas relief and energetically disputed by the parties. That "careful examination of the textual, structural, and historical evidence put forward by the parties regarding the nature of [a

federal claim] … is what [federal] courts do." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012); *see Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986).[5]

The Director argues that because § 3599(f) motions can be submitted *ex parte*, they are necessarily non-adverse and their resolution is insufficiently "judicial." Her argument would be incorrect even if the entire *proceeding* were *ex parte*. *See Forrester v. White*, 484 U.S. 219, 227 (1988) (the "*ex parte* nature of a proceeding has not been thought to imply that an act otherwise within a judge's lawful jurisdiction was deprived of its judicial character"); *compare Ferreira*, 54 U.S. (13 How.) at 46-47 (*ex parte* proceeding in Article I tribunal). But § 3599(f) determinations are not always made *ex parte*, as the Director concedes (Opp. 22)—the statute requires a judicial finding that confidentiality is necessary. And this case demonstrates that, even for those § 3599(f) requests that are resolved *ex parte*, the process is adversarial: the State frequently contests both *ex parte* treatment and the ultimate entitlement to services, as well as the underlying facts and law necessary to award relief. Indeed, the Director formally opposed Mr. Ayes-

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[5] The Director argues that finding facts and applying law is not necessarily an exercise of "Article III judicial power," relying on "public rights" cases where Congress had assigned an adjudicative function to a non-Article III entity. Opp. 20 & n.5; *see Stern v. Marshall*, 564 U.S. 462, 490 (2011); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 585-86 (1985); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 275, 280-81 (1855). Those cases are inapplicable to this appeal of an Article III court's decision in a federal habeas dispute, which is self-evidently not a "public rights" case.

tas's request for § 3599(f) services in the district court and continues to oppose it now. That request—even if it could properly be considered in isolation—was made "in an adversary context." *Flast v. Cohen*, 392 U.S. 83, 95 (1968); *see also Ake v. Oklahoma*, 470 U.S. 68, 82-83 (1985) (entitlement to a mental-health expert may be demonstrated through "an *ex parte* threshold showing to the trial court"); Opp. 26 n.11 (conceding *Ake* determination is appealable).

The Director also argues that a district court's decision to withhold § 3599(f) services is subject to review "outside the traditional Article III judicial hierarchy," and is therefore "administrative." Opp. 23. This argument would fail even if the reasonable-necessity determination could be excised from the case, *but see supra* at 17-18. The statutory predicate for the Director's argument, § 3599(g)(2), does not provide for chief circuit judge review of reasonable-necessity determinations. It only requires the chief judge to review any portion of funding awarded *above* $7,500, and even then only to confirm that the services those dollars would support are "for an unusual character or duration." The statute indicates that review of reasonable-necessity determinations proceeds under the ordinary rules of appellate jurisdiction: § 3599(f) itself provides that, if a motion is resolved *ex parte*, the relevant request and communications must be transcribed "and made a part of the record available for appellate review." Even if the Director were correct that § 3599(g)(2) somehow eliminates appellate review on the narrow funding-amount issue it actually addresses, the reasonable-

necessity determination would remain reviewable by the appellate courts.[6]

3. The Director's jurisdictional position is also at odds with appellate courts' well-established practice of reviewing decisions involving both § 3599's appointment-of-counsel provisions and the constitutional entitlement to a mental-health expert.

This Court has repeatedly exercised jurisdiction in appeals involving interpretation of § 3599's counsel-appointment provisions. *See*, *e.g.*, *Christeson*, 135 S. Ct. at 894; *Martel*, 565 U.S. at 658-59; *Harbison v. Bell*, 556 U.S. 180, 185-86, 194 (2009); *see also McFarland*, 512 U.S. at 854 (predecessor provision). The Director's only response is to assert that appointing counsel is "inherently" judicial. Opp. 29. She never explains what makes it so, except to note that courts have long performed that function. That line-drawing principle dooms her argument here: for over thirty years courts have been required to provide qualifying defendants with "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Ake*, 470 U.S. at 83; *see also McWilliams v. Dunn*, 137 S. Ct. 1790, 1799-800 (2017) ("overwhelming majority" of Ameri-

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[6] The Director argues that Congress may have wished to preserve the § 3599(f) record for review of issues other than the § 3599(f) determination. Opp. 30-31. The Director's construction would not help her even if it were plausible, because she identifies nothing in the statute vesting review of reasonable-necessity determinations outside the Article III hierarchy—the very basis for her argument that some judge-made decisions are non-reviewable.

can jurisdictions provide "a qualified expert retained specifically for the defense"). And like the appointment of counsel, determining whether § 3599(f) services are reasonably necessary is indispensable to the client "representation," which in turn protects constitutional rights and prevents unjust punishment.[7]

The Director thus gains nothing by highlighting the "constitutional basis" of an *Ake* determination—the appealability of which she concedes—as a reason for distinguishing it. Opp. 26 n.11. A litigant seeking reasonably necessary services under § 3599(f) seeks a judicial determination of the same fundamental nature as one seeking services under *Ake*. The judicial quality of a decision does not turn on whether the law requiring it is statutory or constitutional—it turns on the nature of the activity itself. *See Hohn v. United States*, 524 U.S. 236, 245 (1998).

4. Finally, the Director cites two Tenth Circuit cases which, she says, show that the lower courts have "unanimously" held that § 3599(f) determinations are unreviewable. Opp. 26-27. Again, the Director is wrong.

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[7] The Director's characterization of § 3599(f) as a "public benefit program" for attorneys (Opp. 21, 27) is legally meaningless. By the Director's own analysis, the judicial character of a decision to provide § 3599(f) services is no less "inherent" than that of a decision to appoint counsel—they are both explicit components of the statutory "representation." The label is also particularly inapt here, given that attorneys neither perform nor are compensated for services authorized under § 3599(f).

The cited cases involved challenges to the *amount* of funding awarded; they do not establish a jurisdictional rule for determinations *whether* § 3599(f) services are reasonably necessary. *See Rojem v. Workman*, 655 F.3d 1199, 1202 (10th Cir. 2011) (holding no jurisdiction to review ruling on § 3599(f) request that "boil[ed] down to a dispute about the district court's decision to award an amount less than the requested amount for representation"); *United States v. French,* 556 F.3d 1091, 1094 (10th Cir. 2009) (holding, in CJA attorneys-fees context, that court lacked appellate jurisdiction over dispute about "the amount of payment"). As the Tenth Circuit itself recognizes, the decision to deny services on the ground that they are not reasonably necessary (and, under the CJA, the decision not to compensate counsel) *is* reviewable on appeal. *Hooper v. Jones*, 536 F. App'x 796, 798-99 (10th Cir. 2013). It is "a mistake," the Tenth Circuit has explained, "to equate" the "decision *whether* to compensate counsel" with "the ad hoc administrative act of signing off on the amount requested in a particular CJA voucher." *Id.* at 798 (emphasis added). The "whether" decision involves "interpretation and application of statutory directives," which "is the very essence of district court decision-making routinely reviewable under § 1291." *Id.*; *see Wilkins v. Davis*, 832 F.3d 547, 559 (5th Cir. 2016); *Clark v. Johnson*, 278 F.3d 459, 460-61 (5th Cir. 2002).

The Tenth Circuit authority the Director cites, moreover, is rooted in cases involving requests for attorneys' fees made *after* the underlying proceedings had concluded. *See Rojem*, 655 F.3d at 1201-02

(relying on *French*); *French*, 556 F.3d at 1093 (holding no jurisdiction to review CJA attorneys-fee awards and citing cases). In that context, the funding request is a separate proceeding outside the original "case." The attorneys-fees cases therefore had to confront the question whether there was a judicial proceeding producing an appealable final decision within the meaning of 28 U.S.C. § 1291 at all. *See, e.g.*, *United States v. Smith*, 633 F.2d 739, 741 (7th Cir. 1980) (noting that attorney-compensation requests are "usually made at the close of the court proceedings when the client's rights have been adjudicated" and looking for "indicia accompanying an adversary proceeding"). Section 3599(f) requests, by contrast, are made in an ongoing "case," a distinction the Tenth Circuit ignored in *Rojem*. Regardless, as explained, even the Tenth Circuit agrees that there is jurisdiction to review a reasonable-necessity determination. There is jurisdiction here.

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded for further proceedings.

Respectfully submitted,

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