

## RECENT CASES

CRIMINAL PROCEDURE — HABEAS CORPUS — NINTH CIRCUIT HOLDS THAT D.C. SUPERIOR COURT IS NOT A “STATE COURT” FOR PURPOSES OF 28 U.S.C. § 2253. — *Eldridge v. Howard*, 70 F.4th 543 (9th Cir. 2023).

From the frequent national debate over the issue,<sup>1</sup> and from the fact that their license plates read “Taxation Without Representation,”<sup>2</sup> it is clear that residents of the District of Columbia, and of the country more generally, are aware that Washington, D.C. is not a state. Although ultimate authority in the District lies with Congress,<sup>3</sup> the federal government has delegated certain powers to the District’s home rule government, including much of the administration of the local courts.<sup>4</sup> While these Article I courts function similarly to state courts for most purposes, their quasi-federal, quasi-local nature can sometimes cause confusion. Recently, in *Eldridge v. Howard*,<sup>5</sup> the Ninth Circuit ruled that the D.C. Superior Court is not a “State court” under 28 U.S.C. § 2253(c)(1)(A), which details when a certificate of appealability (COA) is required to appeal the denial of a petition for habeas corpus.<sup>6</sup> Although the *Eldridge* court argued that textualist concerns counseled in favor of disregarding the D.C. Circuit’s prior decision on this issue,<sup>7</sup> it made two questionable analytical moves that limit the persuasiveness of the opinion.

In 1984, Clinton T. Eldridge pleaded guilty to nine counts, including burglary and rape, in the D.C. Superior Court, for which he was sentenced to a term of incarceration of 40 to 120 years.<sup>8</sup> On April 17, 2020, Eldridge, then incarcerated at United States Penitentiary-Tucson, “filed a pro se Petition for Writ of Habeas Corpus in the United States District

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<sup>1</sup> See, e.g., Jenna Portnoy, *McConnell Seems to Call the Prospect of D.C. Statehood “Full-Bore Socialism,”* WASH. POST (June 18, 2019, 7:52 PM), <https://www.washingtonpost.com/local/dc-politics/mcconnell-seems-to-call-the-prospect-of-dc-statehood-full-bore-socialism/2019/06/18/2c3e0fd4-9216-11e9-b570-6416efdco803> [<https://perma.cc/BPS5-NA9M>].

<sup>2</sup> See John Kelly, *The Story Behind the District’s “Taxation Without Representation” License Plates*, WASH. POST (July 3, 2021, 6:18 PM), <https://www.washingtonpost.com/local/dc-license-plates/2021/07/03/2a87418a-db64-11eb-9bbb-37c30dcf9363> [<https://perma.cc/79N6-J9X7>].

<sup>3</sup> U.S. CONST. art. I, § 8, cls. 1, 17 (“The Congress shall have power . . . [t]o exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may . . . become the Seat of the Government of the United States . . .”).

<sup>4</sup> See District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473 (codified as amended at D.C. CODE §§ 11-101 to -1747 (2013)).

<sup>5</sup> 70 F.4th 543 (9th Cir. 2023).

<sup>6</sup> *Id.* at 546, 551.

<sup>7</sup> *Id.* at 551; see *Madley v. U.S. Parole Comm’n*, 278 F.3d 1306, 1308–09 (D.C. Cir. 2002).

<sup>8</sup> *Eldridge*, 70 F.4th at 545.

Court for the District of Columbia.”<sup>9</sup> In his petition, Eldridge claimed that the U.S. Parole Commission — which assumed responsibility for parole decisions for D.C. Code offenders under the National Capital Revitalization and Self-Government Improvement Act of 1997<sup>10</sup> — had applied incorrect parole guidelines at four of his five parole hearings, and that the Commission had therefore improperly calculated the amount of time between his parole hearings.<sup>11</sup>

After the case was transferred to the District of Arizona, the district court dismissed Eldridge’s petition.<sup>12</sup> The court construed Eldridge’s filing as a petition for habeas corpus under 28 U.S.C. § 2241, and found that his petition was a “second or successive” petition barred under 28 U.S.C. § 2244(a).<sup>13</sup> Because Eldridge had “previously raised the claims in the Amended Petition in other habeas corpus proceedings in other federal courts,” and “ha[d] not sought or obtained authorization from the Ninth Circuit Court of Appeals for [the district court] to consider a second or successive § 2241 Petition” as required by 28 U.S.C. § 2244(b)(3)(A), the district court easily disposed of Eldridge’s petition.<sup>14</sup> The district court also declined to grant Eldridge a COA because “reasonable jurists would not find the Court’s procedural ruling debatable.”<sup>15</sup>

The Ninth Circuit reversed.<sup>16</sup> Writing for the panel, Judge Schreier, sitting by designation,<sup>17</sup> first addressed the question of whether Eldridge in fact required a COA to bring his appeal.<sup>18</sup> Because Eldridge brought his habeas petition under § 2241, he would require a COA if his detention “ar[ose] out of process issued by a *State* court.”<sup>19</sup> Noting that neither the Antiterrorism and Effective Death Penalty Act of 1996<sup>20</sup> (AEDPA), which outlines the procedures for modern federal habeas law, nor the Dictionary Act<sup>21</sup> gave a definition of “State court” or “State,” the court reasoned that the inquiry must begin with “the ordinary meaning

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<sup>9</sup> *Eldridge v. Von Blanckensee*, No. CV-21-00081, 2021 WL 11442966, at \*1 (D. Ariz. Feb. 24, 2021). The National Capital Revitalization and Self-Government Improvement Act of 1997, Pub. L. No. 105-33, 111 Stat. 712 (codified as amended in scattered sections of the U.S. Code), closed the Lorton Correctional Complex, where those sentenced for felony convictions under the D.C. Code had previously been incarcerated, and transferred responsibility for the incarceration of those prisoners to the Federal Bureau of Prisons. *Id.* § 11201. This is why Eldridge, who was convicted in D.C. Superior Court, was in custody at a federal penitentiary.

<sup>10</sup> Pub. L. No. 105-33, 111 Stat. 712 (codified as amended in scattered sections of the U.S. Code); *see also id.* § 11231.

<sup>11</sup> *See Eldridge*, 2021 WL 11442966, at \*1-2.

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

<sup>13</sup> *Id.* at \*2 (citing *Moore v. Reno*, 185 F.3d 1054, 1055 (9th Cir. 1999)).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at \*3 (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

<sup>16</sup> *Eldridge*, 70 F.4th at 554.

<sup>17</sup> *Id.* at 544. Judge Schreier was joined by Judge Wardlaw.

<sup>18</sup> *Id.* at 546.

<sup>19</sup> *Id.* (quoting 28 U.S.C. § 2253(c)(1)(A)).

<sup>20</sup> Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code).

<sup>21</sup> 1 U.S.C. § 1-8.

of the term ‘State court’ and ‘state.’”<sup>22</sup> Obviously, “[t]he ordinary meaning of the word ‘state’ does not — and did not at the time § 2254 [sic] was enacted — include the District of Columbia.”<sup>23</sup> The court also noted that elsewhere in Title 28, the term “State” is explicitly defined to include D.C. when appropriate, suggesting that “State” used alone does not include D.C.<sup>24</sup>

The *Eldridge* court also found that the Supreme Court’s decision in *Palmore v. United States*<sup>25</sup> strongly supported its interpretation.<sup>26</sup> There, the Court noted that, although Congress had explicitly provided that the D.C. Court of Appeals should be treated as the “highest court of a State,”<sup>27</sup> the statute was silent about the status of the D.C. Code.<sup>28</sup> This silence, the *Palmore* Court concluded, indicated that Congress had “legislated with care,” and had not intended for the D.C. Code to be treated as a state statute.<sup>29</sup> Similarly, the *Eldridge* court reasoned, “[i]f Congress meant for ‘State court’ to include the District of Columbia Superior Court, it could have easily said so.”<sup>30</sup>

Moreover, Judge Schreier declined to follow either the Ninth Circuit’s earlier unpublished opinion<sup>31</sup> or the D.C. Circuit’s opinion<sup>32</sup> that the D.C. Superior Court is a “State court” for purposes of 28 U.S.C. § 2253(c)(1)(A). In the pre-AEDPA decision of *Garris v. Lindsay*,<sup>33</sup> the D.C. Circuit had concluded that “District of Columbia prisoners [were] ‘state’ prisoners” for the purposes of a substantially similar provision that required prisoners to obtain a certificate of “probable cause.”<sup>34</sup> Returning to this issue after the enactment of AEDPA in *Madley v. U.S. Parole Commission*,<sup>35</sup> the D.C. Circuit reasoned that, because Congress “made no effort to disapprove *Garris*” when the statute was amended, the passage of AEDPA effectively ratified *Garris*’s holding on this point.<sup>36</sup>

Judge Schreier, however, rejected this line of reasoning. In her view, *Garris*’s holding was not so well established as to be considered part of the backdrop against which Congress legislated: it “declared its view in a single footnote,” and the meaning of “State court” was “far from the

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<sup>22</sup> *Eldridge*, 70 F.4th at 547 (citing *Wooden v. United States*, 142 S. Ct. 1063, 1069 (2022); *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020)).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 547–48 (citing 28 U.S.C. §§ 1257, 1332(e), 1451(1)).

<sup>25</sup> 411 U.S. 389 (1973).

<sup>26</sup> *Eldridge*, 70 F.4th at 548.

<sup>27</sup> See 28 U.S.C. § 1257(b).

<sup>28</sup> *Eldridge*, 70 F.4th at 548 (citing *Palmore*, 411 U.S. at 395).

<sup>29</sup> *Id.* (quoting *Palmore*, 411 U.S. at 395).

<sup>30</sup> *Id.* at 548–49.

<sup>31</sup> See *Johnson v. Clay*, 539 F. App’x 748, 748 (9th Cir. 2013).

<sup>32</sup> See *Madley v. U.S. Parole Comm’n*, 278 F.3d 1306, 1308–09 (D.C. Cir. 2002).

<sup>33</sup> 794 F.2d 722 (D.C. Cir. 1986) (per curiam).

<sup>34</sup> *Eldridge*, 70 F.4th at 550 (quoting *Garris*, 794 F.2d at 724 n.8).

<sup>35</sup> 278 F.3d 1306.

<sup>36</sup> *Id.* at 1309.

central focus of the case.”<sup>37</sup> Still, even if *Madley*’s presumption were valid, the court reasoned, “that presumption must yield to the ‘cardinal canon’ that ‘courts must presume that a legislature says in a statute what it means and means in a statute what it says there.’”<sup>38</sup> Therefore, the court held that “State court,” as used in 28 U.S.C. § 2253(c)(1)(A), does not include the D.C. Superior Court.<sup>39</sup>

Having surpassed the jurisdictional hurdle, the court then addressed whether Eldridge’s petition was properly dismissed as an abuse of the writ.<sup>40</sup> Because Eldridge challenged his 2019 parole denial, and his earlier habeas petitions had been filed before 2019, the court found that he could not have raised his claims in an earlier petition.<sup>41</sup> No district court had yet addressed Eldridge’s set-off claim on the merits, and therefore, Eldridge had not abused the writ by filing a successive habeas petition.<sup>42</sup> The court remanded to the district court to decide Eldridge’s petition on the merits.<sup>43</sup>

Judge Bumatay dissented.<sup>44</sup> Noting that “[e]very circuit court to consider [the] question” of whether the D.C. Superior Court was a “State court” for the purposes of 28 U.S.C. § 2253(c)(1)(A) had answered it in the affirmative,<sup>45</sup> Judge Bumatay argued that the panel should have done the same.<sup>46</sup> While acknowledging that the plain meaning of the statute supported the majority’s reading, he argued that “sometimes, adhering only to ordinary meaning — without understanding legal context — may cross into literalism and blind us to the best reading of a statute.”<sup>47</sup> In Judge Bumatay’s view, the prior-construction canon should have held more weight in the analysis.<sup>48</sup>

Judge Bumatay also pointed to the “significant judicial consensus” that D.C. courts should be treated as state courts.<sup>49</sup> Finally, Judge Bumatay would have looked to other statutes “closely related in time and subject matter” and applied the *in pari materia* canon, which

<sup>37</sup> *Eldridge*, 70 F.4th at 550.

<sup>38</sup> *Id.* at 551 (quoting *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992)).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 552.

<sup>42</sup> *Id.* at 554.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* (Bumatay, J., dissenting).

<sup>45</sup> *Id.* (citing *Madley v. U.S. Parole Comm’n*, 278 F.3d 1306, 1310 (D.C. Cir. 2002); *Wilson v. U.S. Parole Comm’n*, 652 F.3d 348, 351–52 (3d Cir. 2011); *Terry v. Deeboo*, 473 F. App’x 282, 283 (4th Cir. 2012) (per curiam); *Sanchez-Rengifo v. Caraway*, 798 F.3d 532, 535 (7th Cir. 2015); *Eldridge v. Berkebile*, 791 F.3d 1239, 1243–44 (10th Cir. 2015)).

<sup>46</sup> *See id.* at 555.

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

<sup>48</sup> *Id.* at 556–57. The prior-construction canon says that “[i]f a word or phrase . . . has been given a uniform interpretation” by the courts construing it, “a later version of that act perpetuating the wording is presumed to carry forward that interpretation.” ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 322 (2012).

<sup>49</sup> *Eldridge*, 70 F.4th at 558 (Bumatay, J., dissenting).

assumes consistent meaning of identical terms across the corpus juris.<sup>50</sup> In the end, although Judge Bumatay found the question “concededly a close one,” he thought that the court “should have declined to open a circuit split.”<sup>51</sup> Finding that Eldridge should have been required to obtain a COA before his appeal could be heard, Judge Bumatay would have declined to issue one.<sup>52</sup>

Two of the analytical moves made by the *Eldridge* majority stand out as targets for critique. The first is the opinion’s textual analysis of 28 U.S.C. § 2253(c)(1)(A). By focusing on the plain meaning of the word “state,” rather than “State court,” the *Eldridge* court was able to answer an easy question — is the District of Columbia a state? — rather than the relevant, more difficult question — are territorial courts that do not exercise “the judicial Power of the United States”<sup>53</sup> effectively analogous to state courts? The second questionable analytical move is the *Eldridge* court’s failure to appropriately weigh factors against creating a circuit split. The large number of circuits that had ruled the other way, the longevity of those precedents, and the need for geographical conformity on prisoners’ issues all should have received more than the cursory treatment the court gave them.

First, the *Eldridge* court began its plain meaning analysis in the wrong place. Courts addressing this issue have been inconsistent with whether they primarily look to the meaning of “State” — where D.C. would not be included — or to the meaning of “State court” — where there is a much more colorable argument for D.C.’s inclusion. The *Eldridge* court defined its method as “look[ing] to the ordinary meaning of the term ‘State court’ and ‘state,’”<sup>54</sup> but then rested its ultimate conclusion solely on the meaning of the term “state.”<sup>55</sup> Contrast this with *Madley*, which framed the question as “whether a court of the District is a section 2253(c) ‘State court’ for purposes of that act,” and did not analyze the plain meaning of the term “state” in isolation.<sup>56</sup> The goal of a textualist is to interpret the plain meaning of the statute, rather than just this or that discrete term.<sup>57</sup> It seems clear, then, that the meaning of “State court” should be what matters, because the word “State”

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<sup>50</sup> *Id.* at 558–59.

<sup>51</sup> *Id.* at 560.

<sup>52</sup> *Id.* at 560–62.

<sup>53</sup> U.S. CONST. art. III, § 1.

<sup>54</sup> 70 F.4th at 547 (citing *Wooden v. United States*, 142 S. Ct. 1063, 1069 (2022); *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020)).

<sup>55</sup> See *id.* at 551 (“Because the plain meaning of the word ‘state’ does not include the District of Columbia, and because Congress has expressly defined ‘state’ to include the District of Columbia as a state in other contexts, we hold that § 2253(c)’s language . . . does not include the District of Columbia Superior Court.”).

<sup>56</sup> See *Madley v. U.S. Parole Comm’n*, 278 F.3d 1306, 1308–09 (D.C. Cir. 2002).

<sup>57</sup> See Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2121 (2016) (book review) (“[C]ourts should seek the *best reading* of the statute by interpreting the words of the statute . . .”).

functions only as a modifier of “court” rather than having any independent meaning. For instance, *Black’s Law Dictionary* defines “state court” broadly, as “[a] court of the state judicial system, as opposed to a federal court.”<sup>58</sup> “Federal court,” in turn, is defined as “[a] court having federal jurisdiction, including the U.S. Supreme Court, circuit courts of appeals, district courts, bankruptcy courts, and tax courts”<sup>59</sup> — but not the courts of the District of Columbia or other territories. Thus, if one takes the definition of “State court” as “not a federal court,” there is a strong argument that the D.C. court system is captured by this term.<sup>60</sup>

This approach is often taken when considering the status of non-Article III courts. Particularly applicable are precedents related to territorial courts, as, like the D.C. Superior Court, these courts ultimately derive their authority from congressional grant.<sup>61</sup> Relying on similar reasoning to the D.C. Circuit in *Madley*, the Third Circuit has explicitly held that “a person in custody pursuant to the sentence of the Territorial Court of the Virgin Islands” seeking to appeal the denial of a habeas petition “must first obtain a [COA] from this Court.”<sup>62</sup> Habeas cases arising out of sentences issued by the local courts of Guam and the Northern Mariana Islands have indicated that a COA would be required for an appeal by debating whether or not they should issue such a certificate.<sup>63</sup> And, applying the pre-AEDPA “certificate of probable cause” requirement, the First Circuit held that such a certificate would be required to hear an appeal from Puerto Rico.<sup>64</sup> The status of tribal courts is less clear<sup>65</sup>: some district courts suggest that a COA would be required to appeal the denial of a habeas petition from a prisoner sentenced by a tribal court,<sup>66</sup> while others suggest that no certificate is required.<sup>67</sup>

<sup>58</sup> *State Court*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>59</sup> *Federal Court*, BLACK’S LAW DICTIONARY, *supra* note 58.

<sup>60</sup> Following Professor William Baude’s taxonomy, *not a federal court* might be more precisely stated as *not a court exercising the judicial power of the United States*. See William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1523–34 (2020).

<sup>61</sup> U.S. CONST. art. IV, § 3, cl. 2 (“The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory . . . belonging to the United States.”).

<sup>62</sup> *Walker v. Virgin Islands*, 230 F.3d 82, 89 (3d Cir. 2000).

<sup>63</sup> See *White v. Klitzkie*, 281 F.3d 920, 921 (9th Cir. 2002) (Guam); *Minto v. Mafnas*, 13-CV-00002, 2013 WL 12138667, at \*1–2 (D. N. Mar. I. July 30, 2013) (Northern Mariana Islands), *aff’d*, 585 F. App’x 712 (9th Cir. 2014).

<sup>64</sup> *Fernos-Lopez v. Figarella Lopez*, 929 F.2d 20, 21 (1st Cir. 1991) (per curiam).

<sup>65</sup> The statutory authority for a district court to grant a writ of habeas corpus for a person detained by order of an Indian tribe is also separate from that for a person in federal or state detention. Compare 28 U.S.C. § 2241, with 25 U.S.C. § 1303.

<sup>66</sup> See *Gilliland v. Barteaux*, No. 22-CV-0257, 2023 WL 3066122, at \*7 (N.D. Okla. Apr. 24, 2023); *Picard v. Colville Tribal Corr. Facility*, No. 20-CV-0427, 2021 WL 768137, at \*4 (E.D. Wash. Feb. 26, 2021); *Gray v. Tulalip Tribal Ct.*, No. C19-1623, 2020 WL 4004491, at \*3 (W.D. Wash. June 12, 2020).

<sup>67</sup> See *Lundy v. Balaam*, No. 21-CV-00267, 2021 WL 2904917, at \*14 n.15 (D. Nev. July 9, 2021) (“A certificate of appealability is not required in this context under 28 U.S.C. § 2253(c)(1)

Whether explicitly stated or not, courts finding that a COA was required held that these territorial courts counted as “State courts” for the purposes of § 2253(c), regardless of the fact that none of these territories or nations are actually “states.” Perhaps the *Eldridge* court implicitly considered the D.C. courts to be meaningfully distinct from territorial or tribal courts.<sup>68</sup> Still, both the *Eldridge* majority and dissent’s failure to engage with these precedents — including possibly binding Ninth Circuit precedent about Guam<sup>69</sup> — appears a fairly substantial oversight.

Second, the *Eldridge* court failed to give adequate consideration to the factors that weigh against opening a circuit split in this situation. While scholarly opinion is divided regarding the relative importance of circuit splits,<sup>70</sup> the existence of a circuit split seems particularly concerning in the context of laws affecting prisoners, who can be transferred between facilities in different circuits involuntarily.<sup>71</sup> For example, the Fourth Circuit recently held that federal inmates are not barred from filing a “second or successive” motion to vacate their conviction under AEDPA.<sup>72</sup> This decision further ossified a circuit split on the issue: the Sixth and Ninth Circuits had previously come to the same conclusion,<sup>73</sup> while the Second, Third, Fifth, Seventh, Eighth, and Eleventh Circuits have all found such motions barred by 28 U.S.C. § 2244(b)(1).<sup>74</sup> Even though the Solicitor General has agreed that the bar on second or

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because . . . neither the detention challenged arises out of state process nor is this a proceeding under 28 U.S.C. § 2255.” (citing *Forde v. U.S. Parole Comm’n*, 114 F.3d 878 (9th Cir. 1997); *Wilson v. Belleque*, 554 F.3d 816, 824–25 (9th Cir. 2009)); *Cantrell v. Jackson*, No. CV 16-33, 2016 WL 4537942, at \*2 (D. Mont. Aug. 5, 2016) (“A certificate of appealability does not appear to be required in this matter.” (citing 28 U.S.C. § 2253)).

<sup>68</sup> *But cf.* *Ortiz v. United States*, 138 S. Ct. 2165, 2176–78 (2018) (treating D.C. courts and territorial courts similarly as non–Article III courts whose decisions could be appealed to the Supreme Court).

<sup>69</sup> See *White v. Klitzkie*, 281 F.3d 920, 921 (9th Cir. 2002).

<sup>70</sup> As one might expect, the prevailing scholarly opinion is that circuit splits are problematic because the meaning of a statute or the reach of one’s constitutional rights should not vary based on geography. See, e.g., Mary Garvey Algero, *A Step in the Right Direction: Reducing Intercircuit Conflicts by Strengthening the Value of Federal Appellate Court Decisions*, 70 TENN. L. REV. 605, 608 (2003); Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 VAND. L. REV. 1137, 1139–40 (2012). Some scholars, however, question the normative value of uniformity in federal appellate decisions, and even suggest that there may be benefits that flow from allowing experimentation between circuits. See Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1570–72 (2008).

<sup>71</sup> See U.S. MARSHALS SERV., FACT SHEET: PRISONER TRANSPORTATION (2022), <https://www.usmarshals.gov/sites/default/files/media/document/2022-Prisoner-Transportation.pdf> [<https://perma.cc/WK9C-H86W>].

<sup>72</sup> *In re Graham*, 61 F.4th 433, 435 (4th Cir. 2023).

<sup>73</sup> *Id.* at 438 (citing *Williams v. United States*, 927 F.3d 427, 436 (6th Cir. 2019); *Jones v. United States*, 36 F.4th 974, 977 (9th Cir. 2022)).

<sup>74</sup> *Id.* (citing *Gallagher v. United States*, 711 F.3d 315, 315 (2d Cir. 2013) (per curiam); *United States v. Winkelman*, 746 F.3d 134, 135 (3d Cir. 2014); *In re Bourgeois*, 902 F.3d 446, 447–48 (5th Cir. 2018); *Taylor v. Gilkey*, 314 F.3d 832, 836 (7th Cir. 2002); *Winarske v. United States*, 913 F.3d 765, 768–69 (8th Cir. 2019); *In re Baptiste*, 828 F.3d 1337, 1339 (11th Cir. 2016)).

successive petitions should not apply to federal prisoners,<sup>75</sup> binding precedent in six circuits says that these claims may not be heard. If the circuits are indeed to be viewed as Brandeisian laboratories for experimentation,<sup>76</sup> then prisoners are at risk of becoming unwitting test subjects.

The *Eldridge* court even acknowledged that, “as a general rule, we decline to create a circuit split unless there is a compelling reason to do so.”<sup>77</sup> The bar for a “compelling reason,” however, essentially just amounted to the majority’s view that these previous cases were wrongly decided.<sup>78</sup> This would mean, effectively, that nothing should constrain a circuit court that disagrees with a decision of one of its sister circuits, no matter how long-standing and well established that view. Instead, where, as here, the plain meaning alone arguably does not yield a definitive answer, the *Eldridge* court should have heeded its own words and declined to open a circuit split.

Time will tell how disruptive *Eldridge* is in practice, if at all. While exact numbers are difficult to come by, past analysis suggests that roughly 150 D.C. Code offenders are currently incarcerated at Federal Bureau of Prisons (BOP) facilities located within the Ninth Circuit.<sup>79</sup> Some unknown number of these prisoners are likely to file for habeas relief in a given year. If their petitions are initially denied, they will, at the very least, have the merits of their appeals considered by the Ninth Circuit. Will this decision mean that more prisoners successfully obtain habeas relief? If so, would this cause the BOP to intentionally move D.C. Code offenders to prisons located outside the Ninth Circuit? These questions are difficult to answer. What *Eldridge* does show, however, is that failure to give adequate consideration to D.C.’s unique political status as a quasi state can lead to undesirable outcomes.

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<sup>75</sup> See *Avery v. United States*, 140 S. Ct. 1080, 1080–81 (2020) (mem.) (Kavanaugh, J., statement respecting the denial of certiorari) (citing Brief for the United States in Opposition at 10, 13, *Avery*, 140 S. Ct. 1080 (No. 19-633)).

<sup>76</sup> Cf. *Logan*, *supra* note 70, at 1162 (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

<sup>77</sup> 70 F.4th at 549 n.10 (quoting *Padilla-Ramirez v. Bible*, 882 F.3d 826, 836 (9th Cir. 2017)); see also *Flores v. Garland*, 72 F.4th 85, 88 (5th Cir. 2023) (“We are always chary to create a circuit split . . .” (quoting *Gahagan v. U.S. Citizenship & Immigr. Servs.*, 911 F.3d 298, 304 (5th Cir. 2018))); *United States v. Tuggle*, 4 F.4th 505, 522 (7th Cir. 2021) (“[C]reat[ing] a circuit split . . . ‘generally requires quite solid justification; we do not lightly conclude that our sister circuits are wrong.’” (quoting *Andrews v. Chevy Chase Bank*, 545 F.3d 570, 576 (7th Cir. 2008))).

<sup>78</sup> *Eldridge*, 70 F.4th at 549 n.10 (noting that compelling reasons included “the ordinary meaning of the word ‘state’ and Congress’s omission of a clear indication that the term ‘State court’ includes the District of Columbia in § 2253(c)(1)(A)”).

<sup>79</sup> See D.C. POL’Y CTR., THE DISTRICT OF COLUMBIA’S CRIMINAL JUSTICE SYSTEM UNDER THE REVITALIZATION ACT 19 (2023), [https://dcpolicycenter.wpenginepowered.com/wp-content/uploads/2023/08/CJCC-report\\_corrected.pdf](https://dcpolicycenter.wpenginepowered.com/wp-content/uploads/2023/08/CJCC-report_corrected.pdf) [<https://perma.cc/B6KW-U7N9>]. Though this analysis reflects the 2022 data, there is little reason to think that it would vary significantly in 2024.