No. 19-

IN THE
Supreme Court of the United States

EDWIN ARTHUR AVERY,
Petitioner,

v.

UNITED STATES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal law divides prisoners seeking post-conviction relief into two categories: those in state custody (covered under 28 U.S.C. § 2254) and those in federal custody (covered under 28 U.S.C. § 2255). A separate provision, 28 U.S.C. § 2244(b)(1), provides that "[a] claim presented in a second or successive application under section 2254 that was presented in a prior application shall be dismissed."

The question presented is:

Whether 28 U.S.C. § 2244(b)(1) applies to federal prisoners seeking relief under 28 U.S.C. § 2255.

RELATED CASES

Pursuant to Supreme Court Rule 14.1(b)(iii), the following proceedings are directly related to this case:

In re Avery, No. 16-3566 (6th Cir. Sept. 29, 2016) (Dkt. No. 5-2). Ruling granting Avery's request to file a second or successive § 2255 motion.

United States v. *Avery*, No. 3:07-cr-00205 (S.D. Ohio Feb. 24, 2016) (Dkt. No. 46). Judgment entered on Avery's first motion to attack sentence under § 2255.

United States v. *Avery*, No. 08-4271 (6th Cir. Aug. 21, 2006) (Dkt. No. 39-1). Judgment entered on Avery's direct appeal of federal conviction.

United States v. *Avery*, No. 3:07-cr-00205 (S.D. Ohio Sept. 10, 2008) (Dkt. No. 29). Judgment entered on Avery's federal conviction.

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PETITION FOR A WRIT OF CERTIORARI

Edwin Arthur Avery respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Sixth Circuit.

INTRODUCTION

In interpreting a statute, courts "presume … 'that the legislature says what it means and means … what it says.'" *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017). This case involves the application of that basic principle to the interrelationship between three federal statutes that govern post-conviction relief for prisoners.

Federal prisoners generally seek post-conviction relief by filing a motion under 28 U.S.C. § 2255. State

prisoners seek it by filing a petition under 28 U.S.C. § 2254, which places significant "restrictions on the power of federal courts to grant writs of habeas corpus to state prisoners" in order to "'further the principles of comity, finality, and federalism.'" *See Miller-El* v. *Cockrell*, 537 U.S. 322, 337 (2003). A third statute, 28 U.S.C. § 2244, lays out procedures for second or successive applications.

As relevant here, § 2244(b)(1) provides that "[a] claim presented in a second or successive habeas corpus application *under section 2254* that was presented in a prior application shall be dismissed." 28 U.S.C. § 2244(b)(1) (emphasis added). Six circuits—as well as the panel decision below—have read § 2244(b)(1) expansively, holding that it applies to applications filed under both § 2254 and § 2255 despite the fact that the plain language of § 2244(b)(1) refers only to § 2254.

The Sixth Circuit, in contrast, has now rejected the other circuits' flawed interpretation of § 2244(b)(1) and held that the statute applies only to § 2254 applications. *See Williams* v. *United States*, 927 F.3d 427 (6th Cir. 2019). The Sixth Circuit explained that the other circuits' reading of that statute cannot be squared with its plain text or basic rules of statutory interpretation. The United States has agreed, conceding in the briefing below in this case that "the better reading of the statute" is that it applies only to applications filed by state prisoners under § 2254. *See* Gov. Response to Petition for Rehearing 3-4 n.1 (C.A. Dkt. 51); *see also* Gov. Br. 16 (C.A. Dkt. No. 30) ("[T]he United States is now of the view that § 2244(b)(1) does not apply to federal prisoners."). The Sixth Circuit did not give Avery the benefit of that ruling, however, because the panel in

this case had already issued its unpublished decision two weeks before *Williams*.

Certiorari is warranted to resolve the circuit conflict over the proper interpretation of an important federal statute. Section 2255 poses a significant and recurring procedural hurdle that can preclude relief even where relief is warranted, and the statute should therefore not be stretched beyond the scope Congress specifically provided. Leaving the issue undecided, moreover, would raise significant fairness concerns. For example, it would bar a second or successive § 2255 motion in Alabama or Wisconsin that would be permitted in Tennessee or Michigan.

This case presents a good vehicle to resolve the question presented. The panel's ruling below rested solely on its holding that § 2244(b)(1) applies to federal prisoners like Avery. And if this Court were to hold that § 2244(b)(1) does not apply here, Avery would be entitled to have his 15-year mandatory-minimum sentence reduced by at least 5 years—a ruling that would result in his release.

OPINIONS BELOW

The court of appeals' opinion (App. 1a-4a) is reported at 770 F. App'x 741. The court of appeals' order denying rehearing (App. 47a-48a) is unreported.

The magistrate judge's report and recommendations on Avery's second § 2255 motion (App. 25a-42a) is unreported. The magistrate judge's decision on Avery's objections to the report and recommendations (App. 9a-23a) is also unreported but available at 2017 WL 784813. The district court's order adopting the magistrate judge's ruling (App. 5a-7a) is unreported but available at 2017 WL 1787542.

JURISDICTION

The court of appeals issued its decision on May 28, 2019. App. 1a-4a. The court denied petitioner's request for rehearing and rehearing en banc on September 4, 2019. App. 47a-48a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Pertinent portions of the following statutes are reproduced in the appendix to this petition: 28 U.S.C. §§ 2244, 2254, and 2255 (App. 49a-59a).

STATEMENT

A. The Post-Conviction Statutory Scheme

Federal law protects the right of all prisoners to seek post-conviction relief when their convictions or sentences violate the U.S. Constitution or the laws of the United States. *See* 28 U.S.C. §§ 2254, 2255. As a general matter, however, the procedures governing post-conviction proceedings differ depending on whether a prisoner is being held in state custody or federal custody.

Post-conviction challenges by federal prisoners are generally governed by 28 U.S.C. § 2255, entitled "Federal custody; remedies on the motion attacking sentence." As relevant here, only one provision of § 2255—subsection (h)—places limits on whether a federal prisoner may file second or successive § 2255 motion. That subsection provides that such a motion "must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain" either (1) "newly discovered evidence that … would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty" or

(2) a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h).

Post-conviction challenges by state prisoners, in contrast, are governed by § 2254, entitled "State custody; remedies in Federal courts." Section 2254's requirements are significantly more restrictive than those in § 2255. For example, if a state court has adjudicated the merits of a prisoner's claim, a federal court can grant relief only if a deferential standard of review is satisfied. *See* 28 U.S.C. § 2254(d). This is by design—both for federalism reasons, *Miller-El* v. *Cockrell*, 537 U.S. 322, 337 (2003), and because "[o]ur system affords a defendant convicted in state court numerous [other] opportunities to challenge the constitutionality of his conviction," including on direct appeal and in state post-conviction proceedings, *Daniels* v. *United States*, 532 U.S. 374, 381 (2001).

Section 2244 lays out procedures related to second or successive applications for post-conviction relief. Several of its provisions do not distinguish between applications filed under § 2254 and § 2255. For example, § 2244(b)(3) provides that any prisoner seeking to file a second or successive application for relief must first receive permission from a three-judge panel of the "appropriate court of appeals," which may in turn authorize the second or successive application only if the prisoner makes a "prima facie" showing that he satisfies the necessary requirements. *See* 28 U.S.C. § 2244(b)(3)(A)-(C). Subsection (b)(3) does not expressly reference either § 2254 or § 2255. The relevant Federal Rules, however, separately instruct that (b)(3) applies to § 2254, *see* Rules Governing Section 2254 Cases In The United States District Courts Rule 9, and courts

have construed it to apply to § 2255 as well, *see*, *e.g.*, *In re Clark*, 837 F.3d 1080, 1083 & n.3 (10th Cir. 2016) (collecting cases).

Section 2244 also provides—again, without specifically referencing § 2254 or § 2255—that the court of appeals panel must rule on the second or successive request "not later than 30 days after" its filing and that "[t]he grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable." 28 U.S.C. § 2244(b)(3)(D)-(E). Even if the court of appeals authorizes a second or successive request, moreover, a district court is required to dismiss it "unless the applicant shows that the claim satisfies" the requirements for second or successive review. *Id.* § 2244(b)(4).

While §§ 2244(b)(3) and (b)(4) do not distinguish between state and federal prisoners, other subsections of § 2244 expressly cross-reference § 2255 or § 2254 or mention state prisoners. For example, § 2244(a) bars consideration of a federal prisoner's second or successive petition that has already been ruled on by a federal judge "except as provided in section 2255."

In contrast, §§ 2244(b)(1) and (b)(2) specifically refer to petitions filed by state prisoners under § 2254. Subsection (b)(1) provides that "[a] claim presented in a second or successive habeas corpus application *under section 2254* that was presented in a prior application shall be dismissed." 28 U.S.C. § 2244(b)(1) (emphasis added). Subsection (b)(2) provides that "[a] claim presented in a second or successive habeas corpus application *under section 2254* that was not presented in a prior application shall be dismissed unless" one of two conditions is met. *Id.* § 2244(b)(2) (emphasis added); *see*

also id. § 2255(h) (equivalent provision for federal prisoners).

B. Avery's Conviction And § 2255 Petitions

Petitioner Edwin Arthur Avery is a federal prisoner. In 2008, he was charged in federal court with being a felon in possession of a firearm and pleaded guilty. *See* 18 U.S.C. § 922(g)(1). The district court calculated that the normal guidelines range for Avery's offense would have been 100 to 125 months (a little over 8 to 10 years). But Avery had three prior state-law convictions, including one conviction for felonious assault under Ohio law, *see* Ohio Revised Code § 2903.11(A)(1), which qualified as a violent felony under the residual clause of the Armed Career Criminal Act ("ACCA"), *see* 18 U.S.C. § 924(e)(2)(B)(ii). Accordingly, federal law required the district court to impose a mandatory minimum sentence of fifteen years. Avery's current release date is January 7, 2022.

In June 2015, this Court issued its decision in *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), invalidating the ACCA's residual clause on due-process grounds. Avery filed a motion for post-conviction relief under § 2255, before *Johnson* had been held to apply retroactively. When this Court later held that *Johnson* applied retroactively to cases on collateral review, *see Welch* v. *United States*, 136 S. Ct. 1257, 1268 (2016), Avery sought permission to file a second § 2255 motion making the same *Johnson* claim. A Sixth Circuit panel granted the request, noting that "the government does not dispute that Avery has made a *prima facie* showing that he is entitled to relief from his ACCA sentence based on *Johnson*." App. 44a.

Avery's second motion raised several arguments for relief. Among them, he contended that his Ohio felonious-assault conviction could no longer constitute a valid ACCA predicate after *Johnson* because it had only qualified as a violent felony under the now-invalid residual clause. Because this would mean that Avery had not committed the three predicate crimes required for a mandatory minimum 15-year sentence, his sentence would have to be reduced by at least five years. The magistrate judge rejected this argument, concluding that it was foreclosed by *United States* v. *Anderson*, 695 F.3d 390 (6th Cir. 2012), which had held that an Ohio felonious-assault convictions constitutes an ACCA predicate under the elements clause. *See* App. 16a-17a. In doing so, however, the magistrate judge also rejected the government's argument that § 2244(b)(1) barred Avery's appeal. *See* App. 32a ("Mr. Avery is correct that § 2244(b)(1) applies only to petitions for writ of habeas corpus under § 2254.").

C. The Panel Decision

On appeal, Avery continued to press his felonious-assault argument, noting that the same issue—whether the Ohio felonious assault statute still qualifies as a valid ACCA predicate after *Johnson*—was then pending before the en banc Sixth Circuit. The government argued that Avery was not entitled to relief on the felonious-assault theory. It conceded, however—in a reversal from its position in the district court—that 28 U.S.C. § 2244(b)(1) does not apply to federal prisoners seeking § 2255 relief. Gov. Br. 16 (C.A. Dkt. No. 30) ("[T]he United States agrees with the district court's determination that '§ 2244(b)(1) applies only to petitions for writ of habeas corpus under § 2254.'").

While Avery's appeal was pending, the en banc Sixth Circuit held that felonious assault under Ohio Rev. Code § 2903.11(A)(1) does not constitute an ACCA predicate under the ACCA's enumerated-crimes clause or elements clause. *See United States* v. *Burris*, 912 F.3d 386, 399-400, 406-407 (6th Cir. 2019) (en banc) (principal op.); *see also id.* at 418 (C.J. Cole, concurring in part and dissenting in part). The en banc court subsequently confirmed—in an appeal involving a second or successive motion by a federal prisoner—that *Burris* had "overruled *Anderson* and held that a conviction for Ohio felonious assault no longer categorically qualifies as a violent felony predicate under the ACCA's elements clause." *Williams* v. *United States*, 924 F.3d 922, 923 (6th Cir. 2019) (en banc) (per curiam).

Avery brought both of these decisions to the panel's attention in his pending appeal. He explained that they established his entitlement to relief because, as the en banc court had made clear, his felonious-assault conviction could only have qualified as an ACCA predicate under the now-invalid residual clause.

Nonetheless, two weeks after the *Williams* en banc decision issued, a two-judge panel issued an unpublished ruling that ordered the district court to dismiss Avery's appeal as barred under § 2244(b)(1). App. 4a.[1] The panel cited no other ground for its ruling, which adopted an interpretation of § 2244(b)(1) that Avery, the government, and the district court had all rejected.[2]

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[1] The third member of the panel, the Honorable Damon J. Keith, passed away before the opinion issued.

[2] The government had argued one other procedural bar—namely, that Avery's *Johnson* claim was not "previously unavaila-

The panel reasoned that § 2255(h) states that a federal prisoner's second or successive petition "'must be certified as provided in section 2244.'" App. 3a. Because § 2244 includes § 2244(b)(1), the panel explained, federal prisoners were necessarily subject to (b)(1)'s bar. *Id.* The panel also observed that "every circuit to consider the issue has concluded that § 2255 incorporates § 2244(b)(1)," citing decisions from the Seventh, Eleventh, and Second Circuits. App. 4a.

The panel did acknowledge that § 2244(b)(1) only "explicitly references § 2254." App. 4a. The panel, however, declined to grapple with the plain text of the statute because it believed that it was "bound" by prior precedent "teach[ing] that [§ 2244(b)(1)'s] bar on repetitive filings extends to federal prisoners' § 2255 motions." *Id.* (citing, *inter alia*, *Charles* v. *Chandler*, 180 F.3d 753, 758 (6th Cir. 1999) (per curiam)).

D. Proceedings On Rehearing

After the panel issued its unpublished ruling in this case, a different panel of the Sixth Circuit held in a published decision that § 2244(b)(1) does not apply to federal prisoners. *Williams* v. *United States*, 927 F.3d 427, 434-436 (6th Cir. 2019). The *Williams* panel explained that the proper interpretation of § 2244(b)(1) "start[s] and end[s] with the text"—its "statutory language makes clear that it does not apply to federal prisoners who are seeking relief under § 2255." *Id.* at 434-435. The panel relatedly noted that the First, Fourth, and Tenth Circuits "have at least gestured" that they agree that § 2244(b)(1) applies only to state

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ble," *see* 28 U.S.C. § 2255(h)(2)—and contested the merits of Avery's substantive arguments for relief, but the panel declined to address either point.

prisoners. *Id.* at 435. Finally, the *Williams* panel rejected the expansive interpretation adopted by other circuits (and the panel in this case), explaining that "such a reading is an unjustifiable contravention of plain statutory text." *Id.* at 436.[3]

Avery filed a petition for panel rehearing or rehearing en banc in light of *Williams*, which would ordinarily govern over a conflicting unpublished decision like the one the panel issued here. The court called for a response, but denied rehearing. App. 47a.

REASONS FOR GRANTING THE PETITION

I. THERE IS AN ACKNOWLEDGED CIRCUIT SPLIT OVER THE SCOPE OF § 2244(b)(1)

The question whether § 2244(b)(1) applies to second or successive § 2255 motions has arisen repeatedly and in almost every circuit. The courts of appeals that have addressed the issue fall into three groups.

Six circuits—the Second, Third, Fifth, Seventh, Eighth, and Eleventh—have held in published opinions that § 2244(b)(1) applies to both state and federal prisoners, often with little-to-no reasoning.[4]

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[3] The *Williams* panel also held that the Sixth Circuit's prior statements on the scope of § 2244(b)(1) were unreasoned dicta. *See* 927 F.3d at 435-436 (discussing *Charles* v. *Chandler*).

[4] *See, e.g.*, *Gallagher* v. *United States*, 711 F.3d 315, 315 (2d Cir. 2013) (per curiam) ("We must dismiss a claim that was presented in a prior motion under § 2255. *See* 28 U.S.C. § 2244(b)(1)."); *United States* v. *Winkelman*, 746 F.3d 134, 135-136 (3d Cir. 2014) (holding, in a case involving a § 2255 motion, that "AEDPA directs us to dismiss any claim presented in a second or successive petition that the petitioner presented in a previous application. 28 U.S.C. § 2244(b)(1)."); *In re Bourgeois*, 902 F.3d 446, 447 (5th Cir. 2018) ("We have held … § 2244(b)(1)'s strict relitiga-

One circuit—the Sixth—has held that § 2244(b)(1) does not apply to federal prisoners. *See Williams* v. *United States*, 927 F.3d 427, 434-436 (2019); *see also In re Clayton*, 829 F.3d 1254, 1266 (11th Cir. 2016) (Martin and Pryor, JJ., concurring in the result) (advocating for this interpretation). Notably, the United States has agreed that the Sixth Circuit's reading is the "better" interpretation, both in filings before the Sixth Circuit and before this Court. *See supra* pp. 2, 8; *see also* Brief in Opp. 14, *Webster* v. *United States of America*, No. 10-50 (U.S. Oct. 29, 2010) ("[T]hroughout Section 2244, when Congress intended to refer to a state prisoner's petition for a writ of habeas corpus, it said so specifically. *See* 28 U.S.C. 2244(b)(1).… When Congress intended to refer only to a federal prisoner's petition, it said so.").

Three circuits—the First, Fourth, and Tenth—have (in the Sixth Circuit's terminology) "at least gestured" toward the Sixth Circuit's plain-text interpretation without squarely adopting it. *Williams*, 927 F.3d at 435. For example, the Fourth Circuit has noted that although some circuits have applied § 2244(b)(1) to § 2255 applications, (b)(1) "'is limited by its terms to § 2254 applications.'" *See United States* v. *MacDonald*, 641 F.3d 596, 614 n.9 (4th Cir. 2011). The First and Tenth Circuits have made similar statements. *See*

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tion bar [is incorporated] into § 2255(h)'s scheme."); *Taylor* v. *Gilkey*, 314 F.3d 832, 836 (7th Cir. 2002) ("Although § 2244[(b)(1)] refers to § 2254 rather than § 2255, we have held that … it is equally applicable to § 2255 motions."); *Winarske* v. *United States*, 913 F.3d 765, 768-769 (8th Cir. 2019) (following rule of "applying § 2244(b)(1) to successive § 2255 motions"); *In re Baptiste*, 828 F.3d 1337, 1340 (11th Cir. 2016) ("[W]e hold that § 2244(b)(1)'s mandate applies to applications for leave to file a second or successive § 2255 motion[.]").

Moore v. *United States*, 871 F.3d 72, 78 (1st Cir. 2017) (noting that other courts have interpreted § 2244(b)(1)-(2) to apply to § 2255 petitions "even though those subsections only appear to apply to § 2254 motions by their terms."); *Stanko* v. *Davis*, 617 F.3d 1262, 1269 n.5 (10th Cir. 2010) ("Subsection 2244(b)(1) describes second or successive applications that are not permitted[. This] subsection[] concern[s] only 'habeas corpus application[s] under section 2254.'").[5]

This Court's intervention is required to resolve the split. The Sixth Circuit considered the other circuits' expansive interpretation of § 2244(b)(1) in *Williams* and rejected it. 927 F.3d at 435-436. And it has declined to take up the issue en banc. *See supra* p. 11. Courts on the other side of the split, such as the Seventh Circuit, are likewise entrenched.[6] Indeed, the

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[5] Neither the D.C. Circuit nor the Ninth Circuit appears to have addressed the issue in a published opinion. In a brief per curiam opinion, the Ninth Circuit stated that a "successive § 2255 motion" was barred under § 2244(b)(1) and (2). *See Moore* v. *Reno*, 185 F.3d 1054, 1055 (9th Cir. 1999) (per curiam). This, however, appears to be a citation error, as the panel discussed only the requirements of § 2244(b)(2) rather than (b)(1)'s bar on repeat claims. *Compare Moore*, 185 F.3d at 1055 ("Moore has not demonstrated that he is relying on a new rule of constitutional law that has been made retroactive to habeas corpus or that he has evidence that could not have previously been discovered by due diligence.") *with* 28 U.S.C. § 2244(b)(2)(A)-(B). One subsequent unpublished decision has cited *Moore* for the proposition that "[t]he strictures of § 2244(b)(1) apply to § 2255," but did not provide any independent analysis. *See United States* v. *Shetty*, 543 F. App'x 675, 676 n.5 (9th Cir. 2013).

[6] *See, e.g.*, *Taylor*, 314 F.3d at 836; *White* v. *United States*, 371 F.3d 900, 901 (7th Cir. 2004); *Simpson* v. *United States*, 721 F.3d 875, 876 (7th Cir. 2013); *Dawkins* v. *United States*, 829 F.3d 549, 550 (7th Cir. 2016) (per curiam).

Eleventh Circuit has declined to take the issue en banc despite vigorous opinions from two judges advocating for the Sixth Circuit's interpretation. *See Clayton*, 829 F.3d at 1266; *see also Ovalles* v. *United States*, 905 F.3d 1231, 1274 (11th Cir. 2018) (Martin, J., dissenting).

II. THE INTERPRETATION OF § 2244(b)(1) IS A QUESTION OF NATIONAL IMPORTANCE

Certiorari should also be granted because the question presented raises an important question of federal law—the proper interpretation of an often-invoked federal statute.

Thousands of federal prisoners file § 2255 motions each year. The question presented here recurs in every such case that involves a second or successive motion, including those that present meritorious claims that a prisoner has been incarcerated under an unconstitutional conviction or sentence. In those cases, an improperly expansive reading of § 2244(b)(1) would bar relief for those prisoners who are otherwise entitled to it. But even if the expansive interpretation of § 2244(b)(1) were correct, a ruling from this Court clarifying that point would be significant to prisoners, the criminal bar, and law enforcement alike, as it would put an end to the circuits' inconsistent application of the law and allow all parties to conform to the proper interpretation.

More broadly, the public's faith in the judicial system rests on the even-handed application of the law, especially when an individual's liberty is at stake. Decisions like *Johnson* v. *United States* sought to avoid the very kind of "unpredictability and arbitrariness" in sentencing, 135 S. Ct. 2551, 2258 (2015), that public (and judicial) uncertainty over the meaning of § 2244(b)(1)

breeds. Without this Court's definitive interpretation of the statute, similarly situated litigants—even those sentenced for precisely the same crimes—will continue to receive different outcomes.

The juxtaposition between the prisoner in *Williams* and a similarly situated prisoner in another circuit is illustrative. Both are convicted of felonious assault. Both receive a mandatory minimum sentence under ACCA because of a felonious-assault conviction that qualified as an ACCA predicate only under the residual clause. Both file second or successive § 2255 motions in light of *Johnson* or *Welch*. Unless this Court steps in, however, only one can receive relief—due entirely to the circuits' conflicting interpretations of § 2244(b)(1).

III. THE PANEL'S DECISION CANNOT BE SQUARED WITH THE PLAIN TEXT OF § 2244(b)(1)

A. Section 2244(b)(1)'s Text, Context, And Purpose Demonstrate It Applies Only To State Prisoners

The expansive reading of § 2244(b)(1) adopted by the panel here is fundamentally flawed. It cannot be reconciled with the statute's plain text, basic tools of statutory interpretation, or the federalism concerns that support the careful distinction that Congress drew between federal prisoners who file under § 2255 and state prisoners who file under § 2254.

First, the plain language of the statute establishes that § 2244(b)(1) does not apply to motions filed by a federal prisoner under § 2255. As with "any case of statutory construction," the "analysis begins with 'the language of the statute' … [a]nd where the statutory language provides a clear answer, it ends there as

well." *See Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999). Here, the text is clear.

Section 2244(b)(1) states that "[a] claim presented in a second or successive habeas corpus application *under section 2254* that was presented in a prior application shall be dismissed." 28 U.S.C. § 2244(b)(1) (emphasis added). An application "under section 2254," *id.*, can be filed only by "a person in custody pursuant to the judgment of a State court," *id.* § 2254(a). Accordingly, § 2244(b)(1) does not apply to applications filed by federal prisoners under § 2255. Indeed, this Court indicated as much in *Magwood* v. *Patterson*, where in discussing the scope of § 2244(b)(1)-(2), it explained that "[t]he limitations imposed by § 2244(b) apply only to … an application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court,'" 561 U.S. 320, 332 (2010) (emphasis omitted). Because "the statute's language is plain," it must be "enforce[d] according to its terms." *See United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989).[7]

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[7] Leading treatises have reached the same textual conclusion. *See* 28 *Moore's Federal Practice – Criminal Procedure* § 672.09[2][a] (3d ed. 2019) ("[T]he better answer to th[e] question" of how to interpret § 2244(b)(1) is that it only applies to state prisoners); 2 Hertz & Liebman, *Federal Habeas Corpus Practice and Procedure* § 41.7[d] & n.32 (7th ed. 2018) ("For section 2255 movants [filing post-AEDPA], successive relief [is] … available for either previously raised or new claims, whereas state-prisoner successive petitions are limited to new claims."); Means, *Postconviction Remedies* § 27:4 (2019) ("Read literally, § 2255(h) provides that a second or successive § 2255 motion may be filed, regardless of whether a claim was presented in a prior motion, so long as the motion is certified by the court of appeals to satisfy one of two exceptions for newly discovered evidence or new rules of constitutional law.").

The statutory context further supports reading § 2244(b)(1) to apply only to petitions filed under § 2254. *See Henson* v. *Santander Consumer USA, Inc.*, 137 S. Ct. 1718, 1722 (2017) (considering both "the narrow statutory provision" and "the larger statutory landscape" when analyzing statutory text). Had Congress intended § 2244(b)(1) to apply to federal prisoners (or simply to all requests for post-conviction relief), it would have said so expressly. Congress demonstrated that it knew how to make this kind of cross-reference in other provisions of § 2244. *See, e.g.*, 28 U.S.C. § 2244(a) (expressly referring to § 2255); *id.* § 2244(b)(3)(A) (referring generally to any "second or successive application"); *see also supra* pp. 5-7. As this Court has explained, such "differences in language" across statutory subsections "are presumed to convey differences in meaning." *Henson*, 137 S. Ct. at 1723; *accord State Farm Fire & Cas. Co.* v. *United States ex rel. Rigsby*, 137 S. Ct. 436, 442 (2016) ("This Court adheres to the general principle that Congress' use of 'explicit language' in one provision 'cautions against inferring' the same limitation in another provision.").

The statutory history similarly supports reading § 2244(b)(1) narrowly. Prior to the addition of the current language in 1996, § 2244(b) expressly referred to habeas petitions filed by "State" prisoners. *See* 28 U.S.C. § 2244(b) (1994) ("When … a person in custody pursuant to the judgment of a State court has been denied … [a] remedy on an application for a writ of habeas corpus, a subsequent application for writ of habeas corpus … need not be entertained … unless [it] is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ."). The 1996 amendments retained the same rule in § 2244(b)(1), replacing the mention of a "State" prisoner

with a cross-reference to the statutory section that governs post-conviction relief for state prisoners. And while the pre-1996 version of § 2255 instructed that a court "shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner," 28 U.S.C. § 2255 ¶ 5 (1994), the 1996 amendments simply deleted this provision, leaving second or successive motions to be governed solely by the requirements of § 2255(h).

Finally, applying § 2244(b)(1) only to state prisoners is "consistent with the general purpose" of the post-conviction statutes. *See Rigsby*, 137 S. Ct. at 443; *see also Henson*, 137 S. Ct. at 1725 (considering whether there is a "colorable" reason for a particular interpretation of a statute). Here, as the Sixth Circuit has explained, imposing a "marginally less restrictive regime for federal prisoners" makes sense because their requests for post-conviction relief do not "threaten [the] comity or federalism interests" at play when a federal court modifies a state judgment. *See Williams*, 927 F.3d at 436 & n.6; *see also Clayton*, 829 F.3d at 1266 n.15 (similar).

In contrast, Congress has generally made it more difficult for state prisoners to obtain federal habeas relief. *See supra* pp. 4-5 (comparing the requirements of § 2255 and § 2254). Section 2244(b)(1) is simply one more instance where Congress chose to impose a higher bar for state prisoners. *See Tyler* v. *Cain*, 533 U.S. 656, 661 (2001) (noting that AEDPA "greatly restricts the power of federal courts to award relief to state prisoners who file second or successive habeas corpus applications," and pointing to § 2244(b)(1)'s restriction as an example).

B. The Reasons Courts Have Proffered For Interpreting § 2244(b)(1) To Cover Federal Prisoners Are Atextual And Unpersuasive

The panel below and the circuits that have interpreted § 2244(b)(1) to apply to federal prisoners have relied on two basic arguments. Both are unpersuasive.

First, courts have suggested that § 2255 incorporates § 2244(b)(1)'s limitation on second or successive petitions based on § 2255(h)'s opening preamble. *See, e.g.*, *In re Bourgeois*, 902 F.3d at 448; *In re Baptiste*, 828 F.3d at 1339-1340; *Taylor*, 314 F.3d at 836. That preamble provides that a second or successive motion must be "certified as provided in section 2244 by a panel of the appropriate court of appeals" to contain either one of two threshold conditions. 28 U.S.C. § 2255(h); *see also* App. 3a.

This argument is doubly flawed. As an initial matter, it cannot be squared with this Court's precedent recognizing that second or successive motions under § 2255 are not governed by a regime "identical" to § 2254 applications. *See Gonzalez* v. *Crosby*, 545 U.S. 524, 529 n.3 (2005).

More broadly, it makes "no linguistic sense" to hold that a general reference to § 2244's certification procedures—which are located in § 2244(b)(3)—should be understood to incorporate the separate requirements of § 2244(b)(1), which have nothing to do with certification. *Williams*, 927 F.3d at 435. Rather, the most logical reading is that the language was simply intended "to direct a court to certify that" the "threshold conditions discussed in § 2255(h) … are met in accordance with the procedures laid out in § 2244(b)(3)." *Id.* Section 2255(h) cannot possibly incorporate every provi-

sion of § 2244 without rendering superfluous subsections (h)(1) and (h)(2). Both those subsections and § 2244(b)(2) cover the threshold conditions for filing a second or successive request for relief. If § 2244(b)(2) applied to both state and federal prisoners, (h)(1) and (h)(2) would serve no purpose. *See, e.g.*, *United States* v. *Jicarilla Apache Nation*, 564 U.S. 162, 185 (2011) ("'[W]e are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.'").[8]

Second, some courts have made the policy argument that "'it would be odd'" to apply § 2244(b)(1) to state prisoners, but not to federal prisoners. *E.g.*, App. 4a (quoting *White* v. *United States*, 371 F.3d 900, 901 (7th Cir. 2004)). Courts, however, cannot rewrite statutes simply because they find them "odd." They are required "to apply faithfully the law Congress has written," rather than "rewrit[ing] a constitutionally valid statutory text under the banner of speculation about what Congress might have done." *Henson*, 137 S. Ct. at 1725. And, as explained above, there is good reason to limit § 2244(b)(1) to state prisoners alone, as federal prisoners' cases do not present the same federalism and comity concerns as state prisoners' cases. *Supra* p. 18.

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[8] Again, a leading treatise has come to the same conclusion. *See Moore's Federal Practice* § 672.09[2][a] ("As it is absolutely clear that subsection [§ 2244](b)(2) is not incorporated into section 2255, because the latter has its own language addressing the same issues, there is no reason to believe that Congress intended to incorporate subsection (b)(1) into section 2255.").

IV. THIS CASE IS A GOOD VEHICLE TO RESOLVE THE QUESTION PRESENTED

Avery's case presents a strong vehicle to resolve the proper interpretation of 28 U.S.C. § 2244(b)(1) for two reasons.

First, the issue is cleanly presented. As discussed above, § 2244(b)(1)'s statutory bar was the only reason the panel identified for denying relief in this case. *See supra* pp. 9-10. The decision did not address—or even contemplate—any other grounds for ruling against Avery.

Second, a decision by this Court reversing the panel's ruling below would be dispositive in Avery's case. As discussed above, the en banc Sixth Circuit has already agreed with Avery's substantive argument that felonious assault under Ohio Revised Code § 2903.11(A)(1) is not a valid ACCA predicate after *Johnson*. *See supra* p. 9. This means that, but for the panel's interpretation of § 2244(b)(1), Avery would be entitled to sentencing relief. And because Avery has already served more than the maximum of 10 years he could have been sentenced to without the ACCA enhancement, he should be released.[9]

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[9] Below, the government argued in the alternative that Avery's *Johnson* claim was procedurally barred because it was not "previously unavailable" as required by § 2255(h)(2). *See* Gov. Br. 16-20 (C.A. Dkt. No. 30). Citing only *In re Watkins*, 810 F.3d 375 (6th Cir. 2015), the government contended that the Sixth Circuit had made *Johnson* retroactive on collateral review at the time of Avery's first § 2255 motion. That argument rested on an erroneous reading of *Watkins*. That case merely held that the prisoner seeking relief there had made the "showing of possible merit" required to warrant "a fuller exploration by the district court." 810 F.3d at 378-379. And a preliminary, inmate-specific § 2255(h)(2) ruling cannot conclusively resolve an issue like retroactivity, given

Moreover, even if there were other grounds for denying relief, that would not render this case a poor vehicle. This Court often takes cases to decide a particular legal issue and then remands to permit the lower courts to consider other issues, including alternative grounds for affirmance. This practice is particularly common in the post-conviction context. For example, the *Welch* v. *United States* Court resolved the important issue of whether *Johnson* applied retroactively to § 2255 applicants, and then remanded to allow the court of appeals to "determine [whether] the District Court was correct to deny Welch's motion to amend his sentence" "on other grounds," including whether one of Welch's state law convictions qualified as an ACCA predicate. 136 S. Ct. 1257, 1268 (2016). Similarly, the *Magwood* Court clarified the standard for determining whether a § 2254 petition is second or successive, then remanded for the court of appeals to address respondent's assertion that the petitioner's claim was procedurally defaulted. 561 U.S. at 342-343.

Deciding important post-conviction relief issues—even if there are other procedural or substantive issues in the case—is of particular importance in the context of a § 2244(b)(1) question. As the panel below indicated, courts have held that § 2244(b)(1) is jurisdictional. *See* App. 3a (collecting cases); *see also Panetti* v. *Quarterman*, 551 U.S. 930, 942 (2007) (suggesting that § 2244(b)(2) is jurisdictional). Courts accordingly must resolve whether the § 2244(b)(1) bar applies before ad-

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that it does not even bind the district court. As the Sixth Circuit has explained, even after a panel grants a request to file a second or successive motion under § 2255(h)(2), "[t]he statute … permits the district court to determine for itself whether the petitioner has met the gatekeeping requirements of § 2255(h)." *In re Embry*, 831 F.3d 377, 382 (6th Cir. 2016).

dressing any other underlying issues, meaning that in virtually all cases raising the question presented, some substantive or procedural issues will remain unresolved. If this Court considered the presence of such issues a barrier to review, it would be hard-pressed to find any adequate vehicle to take up the important question of whether § 2244(b)(1) applies to federal prisoners.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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