No. ____

IN THE
Supreme Court of the United States

In re MICHAEL BOWE,

Petitioner.

PETITION FOR A WRIT OF HABEAS CORPUS

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QUESTION PRESENTED

Federal habeas law divides prisoners seeking post-conviction relief into two groups. Those in *state* custody file "habeas corpus applications" under 28 U.S.C. § 2254. Those in *federal* custody file "motions to vacate" under 28 U.S.C. § 2255.

A separate statutory provision instructs district courts to dismiss any "claim presented in a second or successive *habeas corpus application under section 2254* that was presented in a prior application." 28 U.S.C. § 2244(b)(1) (emphasis added).

The question presented is:

Whether the bar in 28 U.S.C. § 2244(b)(1) applies to claims presented by federal prisoners in a second or successive motion to vacate under 28 U.S.C. § 2255.

RELATED PROCEEDINGS

The following proceedings are related under this Court's Rule 14.1(b)(iii):

- *In re Bowe*, No. 22-12278 (11th Cir. Aug. 3, 2022) (second order denying authorization to file a second 28 U.S.C. § 2255 motion based on *United States v. Davis*, 139 S. Ct. 2319 (2019));

- *In re Bowe*, No. 22-12211 (11th Cir. July 15, 2022) (order denying authorization to file a second 28 U.S.C. motion based on *United States v. Taylor*, 142 S. Ct. 2015) (2022));

- *In re Bowe*, No. 19-12989 (11th Cir. Aug. 23, 2019) (first order denying authorization to file a second 28 U.S.C. § 2255 motion based on *Davis*);

- *Bowe v. United States*, No. 17-14275 (11th Cir. Dec. 20, 2017) (order denying motion for certificate of appealability with respect to the denial of a first 28 U.S.C. § 2255 motion based on *Johnson v. United States*, 576 U.S. 591 (2015));

- *Bowe v. United States*, No. 16-cv-81002 (S.D. Fla. June 25, 2017) (order denying first 28 U.S.C. § 2255 motion based on *Johnson*);

- *United States v. Bowe*, No. 08-cr-80089 (S.D. Fla. Apr. 10, 2009) (amended judgment of conviction imposing 288-month term of imprisonment, including a mandatory consecutive 120 months on the 18 U.S.C. § 924(c) count).

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IN THE

Supreme Court of the United States

In re MICHAEL BOWE

PETITION FOR A WRIT OF HABEAS CORPUS

Michael Bowe is a federal prisoner in custody at Yazoo City U.S. Penitentiary in Yazoo City, MS. He respectfully petitions this Court for a writ of habeas corpus.

OPINIONS BELOW

The Eleventh Circuit's order of August 3, 2022 denying Petitioner's second request for authorization to file a second 28 U.S.C. § 2255 motion to vacate based on *United States v. Davis*, 139 S. Ct. 2319 (2019) is unreported but is reproduced as Appendix ("App.") A, 1a–4a. The Eleventh Circuit's order of July 15, 2022 denying Petitioner's request for authorization to file a second § 2255 motion based on *United States v. Taylor*, 142 S. Ct. 2015 (2022) is unreported but is reproduced as App. C, 32a–36a. The Eleventh Circuit's order of August 23, 2019 denying Petitioner's first request for authorization to file a second § 2255 motion to vacate based on *Davis* is unreported but is reproduced as App. D, 37a–41a.

JURISDICTION

The Eleventh Circuit denied Petitioner authorization to file a second 28 U.S.C. § 2255 motion to vacate his 18 U.S.C. § 924(c) conviction on August 23, 2019, July 15, 2022, and August 3, 2022. It also denied his petition for initial hearing en banc on August 3, 2022. This Court has jurisdiction under 28 U.S.C. §§ 1651 and 2241.

STATUTORY PROVISIONS INVOLVED

Section 2255(h) of Title 28 of the U.S. Code provides:

> A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—
>
> **(1)** newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> **(2)** a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

Sections 2244(b) of Title 28 of the U.S. Code provides:

> **(1)** A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> **(2)** 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—
>
> **(A)** the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> **(B)**
>
> **(i)** the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> **(ii)** the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.
>
> **(3)**
>
> **(A)** Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

STATEMENT PURSUANT TO RULE 20.4(a) & 28 U.S.C. § 2242

Pursuant to Rule 20.4(a), Petitioner states he cannot file a habeas corpus petition in "the district court of the district in which [he] is held," Sup. Ct. R. 20.4(a) (quoting 28 U.S.C. § 2242), as he has no legal avenue for doing so. By statute, a federal prisoner may file a 28 U.S.C. § 2241 habeas petition in the district court only where a 28 U.S.C. § 2255 motion to vacate would be "inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). In *Jones v. Hendrix*, __ S. Ct. __, 2023 WL 4110233 (June 22, 2023), this Court "h[e]ld that § 2255(e)'s saving clause does not permit a prisoner asserting an intervening change in statutory interpretation to circumvent AEDPA's restrictions on second or successive § 2255 motions by filing a § 2241 petition" in the district court." *Id*. at *5; *see id*. at *4, *7–*9. In light of *Jones v. Hendrix*, Petitioner is barred from seeking § 2241 habeas relief in the district court.

INTRODUCTION

Section 2244(b)(1) provides in full: "A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." All agree that only *state* prisoners file "habeas corpus application under section 2254." By contrast, *federal* prisoners file "motions to vacate" under 28 U.S.C. § 2255. Although § 2244(b)(1)'s text applies only to state-prisoner habeas corpus applications filed under § 2254, six circuits have held that § 2244(b)(1)'s bar also applies to federal-prisoner motions to vacate filed under § 2255.

In 2019, the Sixth Circuit broke from those six circuits. In *Williams v. United States*, 927 F.3d 427, 434–36 (6th Cir. 2019), that court followed the plain text of the statute and rejected the policy-based decisions of the six other circuits. The Sixth Circuit's decision was so persuasive that, shortly thereafter, the government itself agreed in a filing in this Court. *Avery v. United States*, U.S. Br. in Opp., 2020 WL 504785, at *10, 13 (No. 19-633) (Jan. 29, 2020). That led Justice Kavanaugh to opine that, in an appropriate case, he would grant review in light of § 2244(b)(1)'s plain text, the circuit conflict, and the government's concession that the majority view was wrong. *Avery v. United States*, 140 S. Ct. 1080, 1080–81 (2020) (Kavanuagh, J., respecting the denial of certiorari). Since Justice Kavanaugh's opinion, the Fourth and Ninth Circuits have expressly joined the Sixth Circuit, holding that § 2244(b)(1)'s bar does not apply to § 2255 motions filed by federal prisoners and rejecting the majority view. *In re Graham*, 61 F.4th 433, 438–41 (4th Cir. 2023); *Jones v. United States*, 36 F.4th 974, 981–84 (9th Cir. 2022). At present, then, the circuit split is 6–3.

This case provides an excellent vehicle to resolve that deep and acknowledged conflict. Petitioner is serving a mandatory, consecutive ten-year sentence for a 18 U.S.C. § 924(c) conviction that is now plainly invalid in light of *United States v. Davis*, 139 S. Ct. 2019 (2019). After *Davis*, the Eleventh Circuit denied him authorization to file a second § 2255 motion. It reasoned that his § 924(c) conviction was predicated in part on attempted Hobbs Act robbery, which remained a qualifying "crime of violence" under circuit precedent. But then *United States v. Taylor*, 142 S. Ct. 2015 (2022) abrogated that precedent. So Petitioner returned to the Eleventh Circuit and again sought authorization to file a § 2255 motion based on *Davis*. But the court again denied his request—this time based solely on § 2244(b)(1). It held that § 2244(b)(1) barred his *Davis* claim because he had previously sought to present that claim. No matter that the Eleventh Circuit had denied that claim under erroneous, pre-*Taylor* precedent. In short: Petitioner did everything right; his § 924(c) conviction is plainly invalid; and, but for the misapplication of § 2244(b)(1), he would now be a free man.

This case also presents a rare opportunity for the Court to resolve the circuit conflict. Despite the well-publicized split, and despite the recurring nature of the question presented, not a single cert. petition has come to the Court presenting the § 2244(b)(1) question in the four years since *Williams*. That is so due to a unique combination of circumstances. In circuits adopting the majority view, the court of appeals will apply § 2244(b)(1) and deny authorization to file a second or successive § 2255 motion where the claim was previously presented. Critically, however, § 2244(b)(3)(E) prevents prisoners from seeking certiorari review of such a ruling. So

the question cannot come to this Court in that manner. Meanwhile, in circuits adopting the minority (correct) position, the court of appeals will allow the claim to proceed to the district court. Critically, however, the government now agrees that § 2244(b)(1) does not apply. So the question will not come to this Court by way of a government appeal. Thus, barring unusual circumstances that may never arise, the § 2244(b)(1) question will not come to this Court by way of a traditional cert. petition.

Under these circumstances, then, the Court should use an extraordinary writ to resolve the conflict. The stakes are too high to wait for a unicorn cert. petition that may never come. And this case vividly demonstrates the urgent need for the Court's intervention: an a-textual misapplication of § 2244(b)(1) is the only thing standing between Petitioner and freedom. Moreover, this Court recognized in *Felker v. Turpin*, 518 U.S. 651 (1996) that the continued availability of extraordinary writs is precisely what saved § 2244(b)(3)(E)'s bar on certiorari review from violating the Constitution.

Finally, this Court's intervention is necessary to vindicate AEDPA. That statute embodies Congress's careful policy judgment about how to balance finality, federalism, and justice. Where lower federal courts depart from AEDPA by *granting* habeas relief where the plain text forbids it, this Court refuses to tolerate such intransigence; rather, it acts swiftly to ensure adherence to the text. The same course is warranted here. After all, § 2244(b)(1) is a key provision in AEDPA, and six circuits are flouting its text. That they are doing so to improperly *deny* rather than improperly *grant* habeas relief should not matter. What matters is that lower courts are usurping Congress's policy choices in this sensitive area by rewriting the plain text of AEDPA.

STATEMENT OF THE CASE

A. Statutory Background

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), prisoners in state custody are generally required to seek post-conviction relief by filing an application for a writ of habeas corpus under 28 U.S.C. § 2254. Meanwhile, prisoners in federal custody are generally required to seek post-conviction relief by filing a motion to vacate under 28 U.S.C. § 2255. AEDPA limits the ability of state and federal prisoners to file second/successive § 2254 petitions and § 2255 motions, respectively.

For state prisoners, those limits are codified in 28 U.S.C. § 2244(b). Subsection (b)(1)—the provision at issue here—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." Subsection (b)(1) says nothing about § 2255 motions.

Subsection (b)(2) prescribes the substantive criteria that state prisoners must satisfy. Paraphrased, their successive application must involve a new rule of constitutional law made retroactive by this Court, § 2244(b)(2)(A), or newly discovered evidence of innocence, § 2244(b)(2)(B). Subsection (b)(3) then sets out a series of procedural requirements: a three-judge panel of the court of appeals must certify any second or successive § 2254 petition, § 2244(b)(3)(A)–(B); the state prisoner must make a "prima facie showing" that his petition satisfies the substantive criteria in subsection (b)(2), § 2244(b)(3)(C); the court of appeals must rule within 30 days, § 2244(b)(3)(D); and that ruling is not subject to a petition for rehearing or certiorari, § 2244(b)(3)(E). Finally, subsection (b)(4) directs district courts to dismiss any claim

presented in a second or successive petition "unless the applicant shows that the claim satisfies the requirements of this section" (not just as a "prima facie" matter).

For federal prisoners seeking to file a second or successive § 2255 motion to vacate, they must satisfy § 2255(h). As a relevant here, that subsection provides: "A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain" newly discovered evidence of innocence, § 2255(h)(1), or a new rule of constitutional law made retroactive by this Court, § 2255(h)(2). Six circuits, including the Eleventh Circuit, have held that § 2255(h)'s cross-reference to § 2244 incorporates the bar in § 2244(b)(1), even though § 2244(b)(1) itself refers only to state-prisoner § 2254 petitions. That holding was dispositive here.

B. Proceedings Below

In 2009, Michael Bowe pleaded guilty in the Southern District of Florida to three federal crimes: conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) (Count One); attempt to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) (Count Two); and discharging a firearm during and in relation to a "crime of violence"—specifically, Counts One and Two—in violation of 18 U.S.C. § 924(c) (Count Three). (Dist. Ct. No. 08-cr-80089, ECF Nos. 18, 76). The district court sentenced him to 168 months on Counts One and Two, plus a mandatory consecutive sentence of 120 months (10 years) on the § 924(c) count. (Dist. Ct. ECF No. 76 at 2).

In 2016, Petitioner moved to vacate his § 924(c) conviction under 28 U.S.C. § 2255 in light of *Johnson v. United States*, 576 U.S. 591 (2015). (Dist. Ct. No. 16-cv-81002). In *Johnson*, this Court invalidated the residual clause "violent felony"

definition in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii). The district court denied the § 2255 motion because, even assuming that *Johnson* invalidated the similar residual clause "crime of violence" definition in § 924(c)(3)(B), Petitioner's § 924(c) conviction remained valid. That was so because it was predicated in part on attempted Hobbs Act robbery. And, under existing circuit precedent, that offense remained a "crime of violence" under the elements clause definition in § 924(c)(3)(A). (Dist. Ct. ECF No. 20, 22). The district court and the Eleventh Circuit Court denied Petitioner a certificate of appealability, and this Court denied certiorari in 2018.

The following year, this Court in *United States v. Davis*, 139 S. Ct. 2319 (2019) invalidated the residual clause definition in § 924(c)(3)(B). Shortly thereafter, the Eleventh Circuit held that, for purposes of the substantive gatekeeping criteria in § 2255(h)(2), *Davis* announced a new rule of constitutional law made retroactive by this Court. *In re Hammoud*, 931 F.3d 1032, 1037–39 (11th Cir. 2019). That meant some federal prisoners could file second or successive § 2255 motions based on *Davis*.

Petitioner diligently sought authorization from the Eleventh Circuit to file a second § 2255 motion based on *Davis*. (11th Cir. No. 19-12989). The Eleventh Circuit denied his request, concluding that his § 924(c) offense still remained valid even without the residual clause. While there was no circuit precedent on whether Hobbs Act conspiracy remained a "crime of violence" under the elements clause in § 924(c)(3)(A), Petitioner's § 924(c) offense was also predicated on attempted Hobbs Act robbery. And again, under circuit precedent, attempted Hobbs Act robbery

qualified as a "crime of violence" under the elements clause in § 924(c)(3)(A). Pet. App. 41a (citing *United States v. St. Hubert*, 909 F.3d 335, 351–52 (11th Cir. 2018)).

After that denial, there were two key legal developments. First, the Eleventh Circuit confirmed that Hobbs Act conspiracy was not a "crime of violence" under the elements clause in § 924(c)(3)(A). *Brown v. United States*, 942 F.3d 1069, 1075–76 (11th Cir. 2019). And, second, this Court in *United States v. Taylor*, 142 S. Ct. 2015 (2022) held that attempted Hobbs Act robbery was also not a "crime of violence" under the elements clause in § 924(c)(3)(A). In light of those holdings, Petitioner's § 924(c) conviction is now plainly invalid; it is not predicated on a "crime of violence."

Accordingly, Petitioner, through counsel, returned to the Eleventh Circuit and again requested authorization to file a second § 2255 motion based on *Davis*. However, he recognized that, because the Eleventh Circuit had previously denied his *Davis*-based request in 2019, his new request presenting that same claim was subject to dismissal under 28 U.S.C. § 2244(b)(1), as interpreted by *In re Baptiste*, 828 F.3d 1337, 1339–40 (11th Cir. 2016) and *In re Bradford*, 830 F.3d 1273, 1277–78 (11th Cir. 2016). Therefore, along with his request for authorization, Petitioner also petitioned for initial hearing en banc, urging the Eleventh Circuit to reconsider and overrule its § 2244(b)(1) precedents. Pet. App. B. He emphasized that, since deciding *Baptiste* and *Bradford*, the Sixth and Ninth Circuits had issued published decisions holding that § 2244(b)(1) did not apply to federal prisoners, the United States had agreed with that position, and Justice Kavanaugh had indicated his agreement with that position in a separate opinion from the denial of certiorari. *See* Pet. App. 15a, 22a–24a.

The Eleventh Circuit denied Petitioner's request. Pet. App. A. After briefly summarizing his arguments, Pet. App. 3a, the court of appeals applied § 2244(b)(1)'s bar and dismissed the application based on *Baptiste* and *Bradford*, Pet. App. 4a. The court emphasized that it remained bound by those precedents unless and until they were overruled by the Supreme Court or the en banc court. Pet. App. 4a. In that regard, the court summarily denied Petitioner's request for en banc review. *Id.*[1]

Petitioner was precluded from seeking further review of the Eleventh Circuit's denial. Under 28 U.S.C. § 2244(b)(3)(E), he could not petition for rehearing en banc, and he could not seek certiorari review. As his only remaining option, he filed a *pro se* habeas corpus petition in the district of confinement, arguing that he could proceed under 28 U.S.C. § 2241 because he had satisfied the saving clause in § 2255(e). (Dist. Ct. No. 22-cv-515, ECF No. 1 (S.D. Miss. Sept. 7, 2022)). However, that contention is now foreclosed by this Court's recent decision in *Jones v. Hendrix*, __ S. Ct. __, 2023 WL 4110233 (June 22, 2023), which "h[e]ld that § 2255(e)'s saving clause does not permit a prisoner asserting an intervening change in statutory interpretation to circumvent AEDPA's restrictions on second or successive § 2255 motions by filing a § 2241 petition" in the district court." *Id.* at *5; *see id.* at *4, *7–*9. Accordingly, Petitioner has no available option but to seek an extraordinary writ in this Court.

[1] Petitioner also filed a *pro se* request for authorization to file a second § 2255 motion based on *Taylor*. The Eleventh Circuit denied that request because *Taylor* was a statutory (not a constitutional) decision, and thus did not satisfy the substantive criteria in § 2255(h)(2). Pet. App. 35a–36a. Still, the court of appeals went out of its way to state that, under § 2244(b)(1), Petitioner was *also* "barred from bringing any claim based on *Davis* . . . because he previously raised the same claim in his 2019 successive application, and we rejected it." *Id.* (citing *Baptiste* and *Bradford*).

REASONS FOR GRANTING THE PETITION

The circuits are deeply and openly divided on whether the bar in § 2244(b)(1) applies to federal prisoners. And the majority view embraced by six circuits—that § 2244(b)(1) *does* apply to federal prisoners—is contrary to the plain text of the statute. Indeed, even the federal government agrees. Because half the circuits are contravening the plain text of an important provision in AEDPA, this Court's intervention is warranted. And this case offers an ideal vehicle to resolve the conflict, cleanly illustrating why the Court cannot afford to remain idle. Finally, because the § 2244(b)(1) question will be unlikely to come to the Court via a traditional certiorari petition, the Court should use an extraordinary writ to resolve the circuit conflict.

I. The Circuits Are Deeply and Openly Divided

There is no doubt that the circuits are divided on the question presented.

1. In March 2020, Justice Kavanaugh surveyed the legal landscape in his opinion respecting the denial of certiorari in *Avery v. United States*, 140 S. Ct. 1080 (2020). He correctly observed that six circuits—the Second, Third, Fifth, Seventh, Eighth, and Eleventh—had all "interpreted [§ 2244(b)(1)] to cover applications filed by state prisoners under § 2254 and by federal prisoners under § 2255, even though the text of the law refers only to § 2254." *Id.* at 1080 (citing *Gallagher v. United States*, 711 F.3d 315 (2d Cir. 2013); *United States v. Winkelman*, 746 F.3d 134, 135–36 (3d Cir. 2014); *In re Bourgeois*, 902 F.3d 446, 447 (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, 1340 (11th Cir. 2016)); *see Bourgeois*, 902 F.3d at 447 (citing additional opinions adopting this majority view).

2. By contrast, Justice Kavanaugh observed, the Sixth Circuit "recently rejected the other Circuits' interpretation of [§ 2244(b)(1)] and held that the statute covers only applications filed by state prisoners under § 2254." *Id*. (citing *Williams v. United States*, 927 F.3d 427 (6th Cir. 2019)). In *Williams*, the Sixth Circuit squarely addressed that issue and, based on its plain text, "conclude[d] that § 2244(b)(1) does not apply to a federal prisoner like Williams." *Id*. at 434; *see id*. at 436 ("We therefore hold that § 2244(b)(1) does not apply to federal prisoners"). In so concluding, it expressly rejected the six other circuits' "main argument against this reading of § 2244(b)(1)'s plain text" based on § 2255(h)'s reference to § 2244. *Id*. at 435. And *Williams* rejected the Eleventh Circuit's contrary precedents as based on "policy grounds" that were "an unjustifiable contravention of plain statutory text." *Id*. at 436.

In light of the decision in *Williams*, Justice Kavanaugh recognized that there was a "circuit split on this question of federal law." *Avery*, 140 S. Ct. at 1081. He also emphasized that the "United States now agrees with the Sixth Circuit that 'Section 2244(b)(1) does not apply to Section 2255 motions,' and that the contrary view is inconsistent with the text of Section 2244. In other words, the Government now disagrees with the rulings of the six Courts of Appeals that had previously decided the issue in the Government's favor." *Id*. at 1080–81 (quoting *Avery*, U.S. Br. in Opp., 2020 WL 504785, at *10, 13 (Jan. 29, 2020)). The government also agreed that *Williams* created a circuit split. *Avery*, U.S. Br. in Opp, 2020 WL 504785, at *15–16.

3. Since Justice Kavanaugh's 2020 opinion in *Avery*, two more circuits have embraced the minority position adopted by the Sixth Circuit and the government.

In *Jones v. United States*, 36 F.4th 974 (9th Cir. 2022), the Ninth Circuit summarized the landscape, observed that "our sister circuits are split" 6–1, and concluded that "the Sixth Circuit has the better of the debate" because "[t]he plain text of § 2244(b)(1) by its terms applies only to state prisoners' applications 'under section 2254'—not federal prisoners' motions under § 2255." *Id*. at 982. The Ninth Circuit added that "[s]tatutory structure further supports this reading. *Id*. at 983. And it expressly rejected the Eleventh Circuit's reasoning in *Baptiste* and *Bradford*. *Id*. at 983–84. Dissenting, Judge Wallace observed that "[t]he majority's approach creates a further split among the circuits on this issue by joining the Sixth Circuit, which alone holds that § 2244(b)(1) does not apply to § 2255 motions. Instead, [he] would join the Second, Third, Fifth, Seventh, Eighth, and Eleventh Circuits, and hold that § 2244(b)(1) governs second or successive § 2255 motions." *Id*. at 987.

Most recently, the Fourth Circuit deepened the circuit split in *In re Graham*, 61 F.4th 433 (4th Cir. 2023); *see In re Thomas*, 988 F.3d 783, 788 n.3 (4th Cir. 2021) (previously noting but declining to resolve the "split over whether [§ 2244(b)(1)'s] requirement for successive § 2254 applications also applies to federal inmates seeking to file successive § 2255 applications."). After summarizing the 6–2 split, the Fourth Circuit expressly "join[ed] the ranks of the Sixth and Ninth Circuits and conclude[d] that § 2244(b)(1) does not so apply" to federal prisoners. *Graham*, 61 F.4th at 438. The court's thorough opinion synthesized all of the textual arguments in favor of that

position and rejected all of the contrary arguments, including those advanced by the Eleventh Circuit in *Baptiste and Bradford*. *See Graham*, 61 F.3d at 438–41.

II. The Majority View Is Clearly Wrong

By interpreting § 2244(b)(1) to bar successive claims presented by federal prisoners in a § 2255 motion, six circuits are contravening the plain text of AEDPA.

1. The statute is unambiguous. It provides: "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). A "habeas corpus under section 2254" can be filed only by "a person in custody pursuant to the judgment of a *State* court." 28 U.S.C. § 2254(a), (b)(1) (emphasis added). And this Court has recognized that "[t]he requirement of custody *pursuant to a state-court judgment* distinguishes § 2254 from other statutory provisions authorizing relief from constitutional violations—such as § 2255, which allows challenges to the judgments of federal courts." *Magwood v. Patterson*, 561 U.S. 320, 333 (2010); *see* 28 U.S.C. § 2255(a). Thus, "[t]he plain text of § 2244(b)(1) by its terms applies only to state prisoners' applications 'under section 2254'—not federal prisoners' motions under § 2255." *Jones*, 36 F.4th at 982. The analysis should begin—and end—with that text.

After all, Congress could have easily extended § 2244(b)(1)'s bar to federal prisoners had it sought to do so. The statute would simply read: "A claim presented in a second or successive habeas corpus application under section 2254 *or a motion to vacate under section 2255* . . . ." Six circuits have impermissibly re-written the statute by adding those italicized words. That judicial revision is particularly inappropriate

given that, in the preceding statutory provision, Congress expressly referenced § 2255, confirming that it knew how to do so when it chose. *See* 28 U.S.C. § 2244(a). And while Congress expressly limited §§ 2244(b)(1) and (b)(2) to "habeas corpus application[s] under section 2254," it did not include that state-prisoner limitation in the neighboring provisions in §§ 2244(b)(3) or (b)(4). That surrounding statutory structure confirms that Congress meant what it said: § 2244(b)(1)'s bar applies only to second or successive claims presented in a "habeas corpus application under section 2254," not second or successive claims presented in a motion to vacate under § 2255.

2. Discounting that plain text, six circuits have focused on the requirement in § 2255(h) that "[a] second or successive motion must be *certified as provided in section 2244* by a panel of the appropriate court of appeals." But that language does not incorporate the entirety of § 2244, including § 2244(b)(1). Rather, "§ 2255(h)'s reference to § 2244's certification requirement is much more sensibly read as referring to the portions of § 2244 that actually concern the certification procedures, *see* 28 U.S.C. § 2244(b)(3)—the provisions, in other words, that 'provide[ ]' for how such a 'motion [is to] be certified,' *see* 28 U.S.C. § 2255(h)." *Williams*, 927 F.3d at 935. Indeed, "it makes no linguistic sense to direct a court to 'certif[y] as provided in section 2244[(b)(1)]' that a motion contains the threshold conditions discussed in § 2255(h); what makes linguistic sense is to direct a court to certify that those preconditions are met in accordance with the procedures laid out in § 2244(b)(3)." *Id*.

Moreover, "interpreting § 2255(h) to incorporate only § 2244(b)(3) avoids creating surplusage." *Graham*, 61 F.4th at 439 (quotation omitted). That is so

because, as mentioned above, §§ 2244(b)(1) and (b)(2) expressly refer to "habeas corpus application[s] under § 2254," whereas §§ 2244(b)(3) and (b)(4) contain no such limitation. Thus, extending §§ 2244(b)(1) and (b)(2) to § 2255 motions "would render [their] express reference to § 2254 superfluous," whereas "restricting their scope to second or successive § 2254 applications affords their language proper effect." *Id*.

In that regard, even the Eleventh Circuit acknowledged that § 2255(h) "cannot incorporate § 2244(b)(2) because § 2255(h) and § 2244(b)(2) provide different requirements for the *prima facie* case that an applicant must make to file a successive habeas petition or motion." *Bradford*, 830 F.3d at 1276 & n.1. In other words, reading § 2255(h) to incorporate *all* of § 2244, including the substantive criteria in § 2244(b)(2), would conflict with the criteria in § 2255(h) itself—an "illogical, and perhaps even absurd, result." *Graham*, 61 F.4th at 440 (quotation omitted).

Because § 2255(h) cannot be at war with itself, the Eleventh Circuit was forced to conclude that § 2255(h) incorporates *only* § 2244(b)(1) but *not* § 2244(b)(2). But the court failed to justify that selective incorporation. *See Bradford*, 830 F.3d at 1276 n.1. "After all, the text in § 2244(b)(2) that limits its applicability to § 2254 is identical to the text in § 2244(b)(1)." *Jones*, 36 F.4th at 983. And because "identical words used in different parts of the same act are intended to have the same meaning," there is "no reason to credit the cross-reference to § 2254 in § 2244(b)(2) but ignore it in § 2244(b)(1)." *Id*. (quotation omitted). In short: "because § 2255(h) cannot incorporate § 2244(b)(2), nor can it incorporate § 2244(b)(1)." *Graham*, 61 F.4th at 441.

Finally, some circuits have relied on policy considerations. The Eleventh Circuit believed that "it would be odd indeed if Congress had intended to allow federal prisoners to refile precisely the same non-meritorious motions over and over again while denying that right to state prisoners." *Baptiste*, 828 F.3d at 1339. But "such a purposive argument simply cannot overcome the force of the plain text." *Graham*, 61 F.4th at 441 (quotation omitted). And, in any event, AEDPA's "comity and federalism concerns arise when a federal court reviews a state-court conviction, but not when it reviews a federal conviction." *Jones*, 36 F.4th at 984. That distinction alone sensibly explains § 2244(b)(1)'s differential treatment among state and federal prisoners.

III. Exceptional Circumstances Warrant This Court's Intervention

1. The question presented is recurring and important. After all, nine circuits have issued at least one published opinion addressing it. And that question matters only where a federal prisoner would otherwise satisfy the stringent criteria to file a second or successive § 2255 motion. By definition, then, the stakes are high.

Indeed, the question presented typically arises after this Court issues a new rule of constitutional law and makes it retroactive, satisfying the criteria in § 2255(h)(2) for second or successive motions. Those sort of "substantive" rules necessarily "implicate a conviction or sentence that the Constitution deprives the State of power to impose." *Montgomery v. Louisiana*, 577 U.S. 190, 205 (2016); *see Edwards v. Vannoy*, 141 S. Ct. 1547, 1553 n.3, 1559–60, 1562 (2021). In the Eighth Amendment context, for example, those substantive rules call into doubt the legality of capital/LWOP sentences. The rule in *Johnson* called into doubt the legality of

sentences above the statutory maximum. And, here, the rule in *Davis* called into question the legality of § 924(c) convictions mandating long consecutive sentences.

Yet if a federal prisoner has already presented that otherwise-qualifying claim in a prior § 2255 motion, geography alone will determine whether § 2244(b)(1) bars him from presenting that claim in another § 2255 motion. As explained above, half the circuits with criminal jurisdiction hold that § 2244(b)(1)'s bar applies, even though that is contrary to the plain text of the statute. That means federal prisoners in New York, Philadelphia, Houston, Chicago, St. Louis, and Miami are *wrongly* being denied the opportunity to present inherently weighty constitutional claims, whereas identically-situated federal prisoners in Baltimore, Cincinnati, and Los Angeles are having those same claims heard and adjudicated. That state of affairs is untenable.

2. This case perfectly illustrates the need for this Court's intervention.

a. As a procedural matter, this case is an ideal vehicle for resolving the conflict. The Eleventh Circuit denied relief on the *sole* ground that § 2244(b)(1) barred Petitioner's *Davis* claim. Thus, had Petitioner been convicted in the Fourth, Sixth, or Ninth Circuits, he would have been allowed to present that now-meritorious claim. Moreover, Petitioner expressly asked the Eleventh Circuit to convene en banc and reconsider its § 2244(b)(1) precedents in *Baptiste* and *Bradford*. Pet. App. B. Although Petitioner emphasized that three circuits and the government itself had since rejected the Eleventh Circuit's approach, that court showed no interest in reconsidering its precedent. Thus, only this Court can require that court to conform to the statute.

In fact, of all the six circuits, the Eleventh Circuit has been the most forceful defender of extending § 2244(b)(1) to federal prisoners. After *Baptiste* held that § 2244(b)(1) applied to federal prisoners, several judges in that circuit criticized the holding as "demonstrably incorrect," *In re Jones*, 830 F.3d 1295, 1297–1300 (11th Cir. 2016) (Rosenbaum & Jill Pryor, JJ., concurring in result), and "not consistent with the text of the habeas statute," *In re Anderson*, 829 F.3d 1290, 1295 (11th Cir. 2016) (Martin, J., dissenting); *see also In re Clayton,* 829 F.3d 1254, 1266 (11th Cir. 2016) (Martin, J., joined by Jill Pryor, concurring in result). Despite those sound textual critiques, the Eleventh Circuit quickly re-affirmed *Baptiste* in *Bradford*. And, as the proceedings below indicate, there is no sign that the Eleventh Circuit will reconsider.

b. This case also demonstrates why this Court cannot afford to remain idle.

Petitioner's § 924(c) conviction is now plainly invalid. That conviction was predicated on conspiracy and attempt to commit Hobbs Act robbery. While both of those offenses qualified as a "crime of violence" under the residual clause in § 924(c)(3)(B), *Davis* invalidated that definition. The Eleventh Circuit subsequently confirmed in *Brown* that Hobbs Act conspiracy is not a "crime of violence" under the elements clause in § 924(c)(3)(A). And this Court has held in *Taylor* that attempted Hobbs Act robbery is not a "crime of violence" under the elements clause either. Without any predicate "crime of violence," Petitioner's § 924(c) conviction is invalid. And that invalid conviction carried a mandatory consecutive ten-year sentence. Notably, Petitioner's current release date is 2029. So he should no longer be in prison.

Moreover, Petitioner did everything possible to vindicate his *Davis* claim. After *Johnson*, he presciently filed a § 2255 motion challenging his § 924(c) conviction, arguing that it was not predicated on a "crime of violence" without the residual clause. But the court denied that motion because, even assuming that *Johnson* invalidated the residual clause in § 924(c)(3)(B), and even assuming that Hobbs Act conspiracy was not a "crime of violence" under the elements clause in § 924(c)(3)(A), Eleventh Circuit precedent had held that attempts Hobbs Act robbery *was* a "crime of violence" under the elements clause. As we now know from *Taylor*, that precedent was wrong.

Then, after *Davis* confirmed Petitioner's earlier argument that the residual clause in § 924(c)(3)(B) was invalid, he sought authorization to file a second § 2255 motion based on *Davis*. Although the Eleventh Circuit recognized that *Davis* satisfied the criteria in § 2255(h)(2), it denied his request because its precedent continued to treat attempted Hobbs Act robbery as a "crime of violence" under the elements clause. Again, we now know that precedent was wrong. Yet Petitioner was shut out of court.

Finally, after *Taylor* abrogated the Eleventh Circuit's precedent—confirming that Petitioner had been correct from the very beginning—he again sought authorization to file a second § 2255 motion based on *Davis*. After all, there could no longer be any doubt that his § 924(c) conviction was invalid. Yet the Eleventh Circuit denied the request again. Why? Because Petitioner was *too* diligent; he had already tried to bring a *Davis* claim, and the Eleventh Circuit had rejected it on the merits (under precedent that this Court has since abrogated). So, under *Baptiste* and *Bradford*, § 2244(b)(1) barred Petitioner from presenting that now-meritorious claim.

In short, Petitioner did everything right. And the Eleventh Circuit's a-textual application of § 2244(b)(1) is the only thing that stands between him and his freedom. *See, e.g.*, *In re Corn*, No. 23-11623 (11th Cir. June 2, 2023) (unpublished order at 6–7 & n.3) (authorizing a successive § 2255 motion under *Davis* to challenge a § 924(c) conviction predicated on attempted Hobbs Act robbery because, unlike in this case, that "was the first time he ha[d] raised a *Davis*-based claim in either a § 2255 motion or an application to file a second or successive § 2255 motion") (citing § 2244(b)(1)).

3. Finally, while this case comes to the Court by way of an extraordinary writ, this posture may well be the only way for this Court to resolve the circuit split.

That is true due to a highly unusual confluence of circumstances. The question presented arises only where a federal prisoner seeks to a file a second or successive § 2255 motion, and such motions must first be certified by the court of appeals under § 2244(b)(3). In the Fourth, Sixth, and Ninth Circuits, the court of appeals will authorize a second or successive § 2255 motion, even if it seeks to present a claim that had been presented in a previous § 2255 motion. That claim will therefore proceed to the district court—free from the procedural bar in § 2244(b)(1). Critically, because the government agrees that § 2244(b)(1) should not apply, it would not raise that issue in the district court or appeal the court's failure to apply the bar. Thus, the § 2244(b)(1) issue will not reach this Court from a circuit taking the minority view.

Nor will it come to this Court from any circuit taking the majority review. As this case illustrates, the courts of appeals in those circuits will apply § 2244(b)(1) and deny authorization where a second or successive § 2255 motion seeks to present a

claim that had been presented in a previous § 2255 motion. The problem is that, under § 2244(b)(3)(E), federal prisoners cannot seek certiorari from those rulings. Thus, the § 2244(b)(1) issue cannot reach this Court via a certiorari petition from those circuits.

The upshot is that it is unclear how this Court could resolve the conflict other than via an extraordinary writ like this one. At the very least, it will be highly unlikely for a suitable vehicle to reach this Court any other way. That explains why there have been zero cert. petitions presenting the issue since the Sixth Circuit first created the circuit split in *Williams* in June 2019. After all, that conflict is well publicized: one Justice of this Court has expressed a desire to resolve it; the issue recurs regularly; and the government agrees with defendants. The absence of even a single petition presenting that issue in the four years since *Williams* confirms that it is highly unlikely for this conflict to be resolved by a traditional certiorari petition.

Notably, this Court anticipated this very scenario in *Felker v. Turpin*, 518 U.S. 651 (1996). *Felker* held that § 2244(b)(3)(E)'s bar on certiorari review did not violate the Constitution because this Court retained the ability to entertain original habeas petitions. *See id*. at 660–62. And three Justices wrote separately to observe that § 2244(b)(3)(E) did not restrict the Court's jurisdiction to issue other extraordinary writs under the All Writs Act. *Id*. at 666 (Stevens, J., concurring); *id*. at 667 (Souter, J., concurring). But, they warned, "if it should later turn out that [such] statutory avenues . . . for reviewing a gatekeeping determination were closed, the question whether [§ 2244(b)(3)(E)] exceeded Congress's Exceptions Clause power would be

open," and that "question could arise if the courts of appeals adopted divergent interpretations of the gatekeeper standard." *Id.* at 667 (Souter, J., concurring).[2]

That divergence has now come to pass with respect to § 2244(b)(1). Waiting for a certiorari petition that will never arrive would revive the serious constitutional concerns that were identified in *Felker*. And it would effectively deprive this Court of its supreme authority to definitively interpret AEDPA—a statute that this Court has taken pains to safeguard, summarily reversing lower courts where they "clearly violate[ ] this Court's AEDPA jurisprudence" in order to *grant* habeas relief. *Shinn v. Kayer*, 141 S. Ct. 517, 520 (2020). The Court should adopt a similar approach where lower courts are flouting the plain text of AEDPA in order to *deny* habeas relief.

* * *

In sum, this is a rare situation presenting exceptional circumstances that warrant the issuance of an extraordinary writ. Doing so is necessary for this Court to resolve a deep and entrenched circuit conflict on a recurring question of federal habeas law will otherwise evade review. And doing so is necessary to stop lower federal courts from continuing to re-write the plain text of an important provision in AEPDA, erroneously foreclosing weighty and meritorious claims by federal prisoners.

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[2] In that regard, the Court may alternatively construe this original habeas petition as a petition for a writ of mandamus and direct the Eleventh Circuit to authorize Petitioner's successive § 2255 motion. Mandamus would aid this Court's appellate jurisdiction; Petitioner has "no other adequate means to attain the relief he desires"; the Eleventh Circuit's disregard of § 2244(b)(1)'s plain text makes his right to relief "clear and indisputable"; and the writ is otherwise "appropriate under the circumstances" that he has described above. *Cheney v. U.S. Dist. Ct. for Dist. of Columbia*, 542 U.S. 367, 380–81 (2004) (quotations omitted); *see* Sup. Ct. R. 20.1.

CONCLUSION

The Court should set this case for briefing and argument.

Respectfully submitted,

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