No. 24-5438

IN THE

Supreme Court of the United States

MICHAEL BOWE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

MOTION FOR LEAVE TO FILE AND BRIEF OF STEPHANIE N. O'BANION AS *AMICUS CURIAE* IN SUPPORT OF THE COURT'S CERTIORARI JURISDICTION AND IN SUPPORT OF VACATUR

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MOTION FOR LEAVE TO FILE

Movant Stephanie N. O'Banion seeks leave to file the accompanying brief as *amicus curiae* in support of the Court's certiorari jurisdiction and in support of vacatur. Movant has notified all parties and the court-appointed *amicus curiae* of her intent to file this motion and the accompanying brief. Both Mr. Bowe and the court-appointed *amicus* consent to the relief requested. The Government has not responded to Movant's request for its position. For the following reasons, there is good cause to grant Movant leave to file the accompanying brief.

Mr. Bowe petitioned for a writ of certiorari to the Eleventh Circuit on two questions. In response, the Government conceded error in the judgment below as to the first question presented. The Government nevertheless opposed Mr. Bowe's petition, arguing instead that, as to the second question presented, this Court lacks certiorari jurisdiction to correct the judgment below. This Court granted a writ of certiorari on both questions presented and appointed an *amicus curiae* to defend the judgment below as to the first question.

At the request of the parties and court-appointed *amicus*, the Court then modified the briefing schedule. As modified, the schedule extended the time for Mr. Bowe's merits brief to April 7, 2025; extended the time for the Government's brief to June 11, 2025; and set the time for court-appointed *amicus's* brief as August 22, 2025. As it pertained to other *amicus* briefs, the modified schedule provided that "[b]riefs of *amicus curiae* in support of the petitioner on either question presented" were to be filed by April 14, and that "[a]ny other briefs of *amicus curiae*" are due by August 29.

Regrettably, Movant submitted the accompanying *amicus* brief on July 2, under the mistaken impression that the brief was subject to the August 29 deadline for "any other briefs of *amicus curiae*." This was because Movant believed the brief was most fittingly characterized as supporting neither party on the second question presented and supporting both parties on the first question.[1] The Clerk has since notified Movant that the accompanying *amicus* brief was due by the April 14 deadline for briefs in support of petitioner on either question presented, as it supports Mr. Bowe on the first question, supports neither party on the second question,[2] and argues for vacatur of the judgment below. The Clerk has also instructed Movant to file this Motion for Leave to File.

Movant respectfully urges the Court to exercise its discretion and accept the accompanying *amicus* brief for filing.[3] *First*, Movant's diligence in preparing the brief is apparent from the record. Movant submitted the accompanying brief shortly after the Government filed its brief,[4] several weeks before the deadline for

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[1] *Cf. Memorandum to Those Intending to File an* Amicus Curiae *Brief in the Supreme Court of the United States*, available at www.supremecourt.gov/casehad/AmicusGuide2023.pdf, at 2 (advising that, at the merits stage, an *amicus* brief in support of multiple parties is generally due 7 days after the last timely-filed brief of a party supported).

[2] *See* Supreme Court Rule 37.3 (under the Court's standard briefing schedule, *amicus* briefs in support of neither party are due at the same time as *amicus* briefs in support of petitioner).

[3] Supreme Court Rule 21.2(b); *Bowles v. Russell*, 551 U.S. 205, 212 (2007).

[4] *See* Supreme Court Rule 37.1 (cautioning that *amicus* briefs that duplicate arguments made by the parties are disfavored).

court-appointed *amicus's* brief,[5] and nearly two months before Movant thought the brief was due.

Second, the delay in filing should not prejudice the parties, the court-appointed *amicus*, or the Court. Both Mr. Bowe and the court-appointed *amicus* have consented to the relief requested, and the government has been notified of Movant's intent to file this motion and accompanying brief. Oral argument is not scheduled until October 2025, and the proposed brief is intended only to aid the Court in its consideration of the questions presented.

Finally, the accompanying *amicus* brief would significantly assist the Court in resolving this case. Importantly, the brief draws into question whether the Eleventh Circuit had jurisdiction over Mr. Bowe's request for authorization – an issue that this Court has an independent obligation to consider, that the parties have not yet addressed, and that the court-appointed *amicus* is unlikely to contest in defending the judgment below on the first question presented.

CONCLUSION

Movant respectfully asks that the Court grant leave to file the accompanying brief of *amicus curiae* in support of the Court's certiorari jurisdiction and in support of vacatur. Movant apologizes for any inconvenience the delay in filing the brief has caused.

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[5] Despite the confusion as to when the proposed brief was due, Movant nevertheless recognized the importance of affording the court-appointed *amicus* an opportunity to consider Movant's views before the brief in support of the judgment below was filed. For that reason, Movant endeavored to complete and submit the proposed brief well in advance of the deadline for court-appointed *amicus's* brief.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae is a member of this Court's bar who has a particular expertise and keen interest in the subject matter of this litigation. *Amicus* has extensive experience working for the federal courts, having served as the chief deputy clerk of court and as a staff attorney for a federal court of appeals, and also as a law clerk for a federal administrative law judge, a district judge, and a circuit judge. Now in private practice with a primary focus on federal appellate litigation, *amicus* has a compelling professional interest in ensuring that prisoners retain full access to all the rights and remedies afforded them by the United States Constitution and other federal laws.

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, make a monetary contribution to the preparation or submission of this brief.

INTRODUCTION

Michael Bowe is a federal prisoner who wants to file a motion under 28 U.S.C. § 2255 asserting one claim: that his conviction under 18 U.S.C. § 924(c) is invalid because neither of the offenses on which it is predicated—conspiracy to commit Hobbs Act robbery and attempted Hobbs Act robbery—qualifies as a "crime of violence." In support of this claim, he seeks to rely on *United States v. Davis*, 588 U.S. 445 (2019) and *United States v. Taylor*, 596 U.S. 845 (2022).

Because Mr. Bowe's § 2255 motion is "second or successive," however, he must first get authorization from the Eleventh Circuit Court of Appeals before he can file it in the district court. Mr. Bowe has—on four occasions—asked the Eleventh Circuit for permission to file a § 2255 motion challenging the validity of his § 924(c) conviction. The Eleventh Circuit denied his first request because, under then-binding Eleventh Circuit precedent, attempted Hobbs Act robbery still counted as a "crime of violence," even though, under this Court's then-recent decision in *Davis*, conspiracy to commit Hobbs Act robbery did not.

Then, this Court held, in *Taylor*, that attempted Hobbs Act robbery does not qualify as a "crime of violence" either. In fact, in *Taylor*, this Court concluded that a different federal prisoner was entitled to relief on his second or successive § 2255 motion challenging the validity of his § 924(c) conviction, which—just like Mr. Bowe's—was predicated on conspiracy to commit Hobbs Act robbery and attempted Hobbs Act robbery. 596 U.S. at 849-50; *id.* at 862-63 (Thomas, J., dissenting).

Mr. Bowe promptly filed two more requests for authorization to a second or successive § 2255 motion in the district court, but the Eleventh Circuit rejected both requests in short order. Specifically, the Eleventh Circuit dismissed the requests to the extent Mr. Bowe was trying to rely on *Davis* because he had already requested, and been denied, authorization to bring such a claim. In reaching this conclusion, the Eleventh Circuit relied on two of its own binding circuit precedents, *In re Baptiste* and *In re Bradford*. Between those two decisions, the Eleventh Circuit had concluded that, under 28 U.S.C. § 2244(b)(1), it lacks jurisdiction to even consider an authorization request that relies exclusively on a claim the prisoner has already proposed in a prior unsuccessful request. *See In re Baptiste* 828 F.3d 1337 (11th Cir. 2016) (per curiam); *In re Bradford*, 830 F.3d 1273 (11th Cir. 2016) (per curiam). The Eleventh Circuit denied Mr. Bowe authorization to the extent he sought to rely on *Taylor* because a claim based only on *Taylor* does not satisfy the requirements for authorization.

After unsuccessfully seeking a writ of habeas corpus from this Court, Mr. Bowe again asked the Eleventh Circuit for authorization to file a second or successive § 2255 motion challenging the validity of his § 924(c) conviction based on *Davis* and *Taylor*. That court responded by dismissing the request, in its entirety, for lack of jurisdiction based on § 2244(b)(1), *In re Baptiste*, and *In re Bradford*. This Court has granted a writ of certiorari on two questions.

SUMMARY OF THE ARGUMENT

This Court need not answer the second question presented. No matter how it might resolve that question, this Court has certiorari jurisdiction to review the Eleventh Circuit's dismissal of Mr. Bowe's authorization request for lack of jurisdiction. Any comment on the merits of the second question presented would be dictum, and the Court should thus leave that question for another day.

The Eleventh Circuit had jurisdiction, under 28 U.S.C. § 2244(b)(3), over Mr. Bowe's authorization request, and 28 U.S.C. § 2244(b)(1) did not divest it of that jurisdiction. That court thus had an obligation to exercise its jurisdiction and either grant or deny Mr. Bowe's request.

By its own terms and for myriad other reasons, § 2244(b)(1) applies only to claims presented by a state prisoner in a "habeas corpus application under section 2254." It does not apply to claims presented by a federal prisoner in a § 2255 motion to vacate, and it does not apply to claims a prisoner has only proposed in an earlier, unsuccessful authorization request.

Mr. Bowe's proposed second or successive § 2255 motion satisfies the requirements for authorization. This Court should find certiorari jurisdiction, vacate the judgment dismissing his authorization request for lack of jurisdiction, and remand this matter to the Eleventh Circuit with instructions to grant Mr. Bowe authorization to file his proposed § 2255 motion in the district court.

ARGUMENT

I. This Court should leave the second question presented for another day because, no matter how it might resolve that question, this Court has certiorari jurisdiction to review the Eleventh Circuit's dismissal of Mr. Bowe's request for authorization to file a second or successive motion to vacate under 28 U.S.C. § 2255.

Under 28 U.S.C. § 2244(b)(3)(E), "[t]he grant or denial of authorization by a court of appeals [of a prisoner's request for authorization] to file a second or successive application shall not be the subject of a petition . . . for writ of certiorari." By its express terms, § 2244(b)(3)(E) deprives this Court of certiorari jurisdiction over a circuit court's order granting or denying a state prisoner's request for authorization to file a second or successive application for a writ of habeas corpus under 28 U.S.C. § 2254. The second question presented in this case asks whether § 2244(b)(3)(E) also deprives this Court of certiorari jurisdiction over a circuit court's grant or denial of a federal prisoner's request for authorization to file a second or successive motion to vacate under § 2255. This Court need not answer that question because the Eleventh Circuit dismissed Mr. Bowe's authorization request for lack of jurisdiction and a "grant or denial" of authorization is therefore not "the subject of" his petition for writ of certiorari.

By its terms, § 2244(b)(3)(E) operates to divest this Court of certiorari jurisdiction only when a circuit court has exercised its jurisdiction and either granted or denied authorization. *See Castro v. United States*, 540 U.S. 375, 379-81 (2003). In *Castro*, the district

court determined that a federal prisoner's § 2255 motion was "second or successive" and dismissed it because the prisoner had not obtained authorization from the circuit court. The circuit court affirmed, agreeing with the district court that the prisoner's motion was "second or successive" and thus subject to dismissal for lack of authorization. In its opinion, however, the circuit court also noted that the prisoner's § 2255 motion did not meet the requirements for authorization. *See id.* at 378-79.

This Court held that § 2244(b)(3)(E) did not divest it of certiorari jurisdiction because the prisoner had not requested the circuit court's authorization to file his § 2255 motion, nor had the circuit court granted or denied him authorization. Notably, the government argued to this Court that the circuit court's opinion had the "effect" of denying authorization, given its comment that the prisoner's § 2255 motion did not meet the requirements for authorization. In rejecting that argument, this Court explained that treating the circuit court's comment as a "statutorily relevant denial of a request that was not made" would have stretched the text of § 2244(b)(3)(E) "too far." This Court also held that § 2244(b)(3)(E) did not apply, and that it thus had certiorari jurisdiction, for a second reason. That is, "the subject" of the appeal was not a grant or denial of authorization. Rather, the subject of the appeal in this Court was the lower courts' determination that the prisoner's § 2255 motion was second or successive. *See id.* at 379-81.

Here, as in *Castro*, § 2244(b)(3)(E) does not apply to divest this Court of certiorari jurisdiction because a "grant or denial" of authorization is not the "subject of" Mr. Bowe's appeal. The Eleventh Circuit neither

granted nor denied Mr. Bowe's authorization request. Instead, the court dismissed his request for lack of jurisdiction, concluding that it lacked authority to even consider whether his proposed § 2255 motion meets the requirements for authorization. Moreover, as in *Castro*, the "subject of" this appeal is not a grant or denial of authorization. Rather, the subject of Mr. Bowe's petition for writ of certiorari is the Eleventh Circuit's reliance on § 2244(b)(1), which, by its own terms, applies only to "habeas corpus application[s] under section 2254," to conclude that it lacked jurisdiction over his request for authorization to file a second or successive § 2255 motion. *See id.* at 379-81.

Even if this Court were to answer the second question presented in the affirmative, it would nevertheless have certiorari jurisdiction over the Eleventh Circuit's judgment. Any comment on the applicability of § 2244(b)(3)(E) to § 2255 proceedings would be dictum, and this Court should thus leave that question for another day. *See Tyler v. Cain*, 533 U.S. 656, 667-68 (2001).

II. The Eleventh Circuit had jurisdiction over—and an obligation to either grant or deny—Mr. Bowe's authorization request; its judgment dismissing his request for lack of jurisdiction should be vacated.

A. Congress has unequivocally vested the circuit courts with jurisdiction to grant or deny a prisoner's request for authorization to file a second or successive § 2254 application or § 2255 motion.

In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress created a new "gatekeeping" procedure that requires state and

federal prisoners to obtain authorization from the circuit court before they can file a second or successive § 2254 application or § 2255 motion in the district court. *See* 28 U.S.C. § 2244(b)(3); *Felker v. Turpin*, 518 U.S. 651, 664 (1996); *Rivers v. Guerrero*, 145 S. Ct. 1634, 1642 (2025). A prisoner must first file a request for authorization in the appropriate court of appeals. *See* § 2244(b)(3)(A). A three-judge panel must then (1) determine whether the prisoner's proposed second or successive pleading makes a prima facie showing that it satisfies the authorization requirements, and (2) "grant or deny" authorization accordingly. *See* § 2244(b)(3)(B)-(D).

In AEDPA, Congress also adopted new "gatekeeping" standards (or "modified res judicata rules") that circuit courts must apply when deciding whether a prisoner's proposed second or successive pleading satisfies the authorization requirements. *See Stewart v. Martinez-Villareal*, 523 U.S. 637, 641-62 (1998); *Felker*, 518 U.S. at 661. Which standard applies depends on whether a state prisoner or a federal prisoner has requested authorization. *See* § 2244(b)(3)(A), (C); § 2255(h).

For federal prisoners, the "gatekeeping" standard is set out in § 2255(h). Under this standard, the circuit court is tasked with ascertaining whether the prisoner's proposed second or successive § 2255 motion contains either (1) newly discovered and convincing evidence of the prisoner's innocence, or (2) a new rule of constitutional law, made retroactive by this Court, that was previously unavailable. *Id.* If so, authorization may be granted; if not, it must be denied. *See* § 2244(b)(3)(C)-(D).

The "gatekeeping" standard for state prisoners is found in § 2244(b). This standard directs the circuit court to undertake a two-step, claim-by-claim review of the prisoner's proposed second or successive § 2254 application. First, § 2244(b)(1) mandates that any claim that has been "presented in a prior application shall be dismissed." In turn, § 2244(b)(2) instructs that any claim that has not been presented in a prior application must also be dismissed, unless the prisoner can make a prima facie showing that the claim meets one of two exceptions. Specifically, any newly presented claim must be dismissed unless it (1) relies on a new rule of constitutional law, made retroactive by this Court, that was previously unavailable, or (2) is based on newly discovered facts that, if proven, would convincingly establish that, but for constitutional error, no jury would have found the prisoner guilty of the offense. *Id.*

The standard for state prisoners in § 2244(b)(1) and (2) must also be read in context with § 2244(b)(4), which requires a district court to dismiss any claim presented to that court in an authorized second or successive § 2254 application, if the prisoner does not show that the claim satisfies § 2244(b)(1) and (2). *Rivers*, 145 S. Ct. at 1642. Read together, these three provisions direct the circuit court to determine whether the prisoner has made a prima facie showing that his or her proposed § 2254 application includes at least one claim that, if presented to the district court, would not be subject to dismissal under § 2244(b)(4) because it does not satisfy § 2244(b)(1) and (2). If so, authorization may be granted; otherwise, it must be denied. *See* § 2244(b)(3)(C)-(D).

When authorization is granted, the circuit court issues an order authorizing the prisoner to file his or her second or successive pleading in the district court. An authorization order from the circuit court is the prisoner's "jurisdictional ticket" to the district court. *Burton v. Stewart*, 549 U.S. 147, 152-53, 157 (2007) (per curiam); *Stewart*, 523 U.S. at 640-42. Once a state prisoner files an authorized second or successive § 2254 application in the district court, that court must then, under § 2244(b)(4), dismiss any claims that do not satisfy the "gatekeeping" standard in § 2244(b)(1) and (2).[2] Authorized second or successive § 2254 applications and § 2255 motions are litigated in the normal course otherwise.

B. The circuit courts' "gatekeeping" jurisdiction is limited to granting or denying authorization requests; it does not extend to adjudicating any proposed second or successive pleadings or claims that a prisoner has submitted with the request.

An authorization request merely seeks the circuit court's permission to file a second or successive § 2254 application or § 2255 motion in the district court. *See* § 2244(b)(3)(A). The relief being requested is an order authorizing the prisoner to file his or her proposed second or successive pleading in, and thus to present

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[2] There is no parallel post-authorization dismissal requirement for second or successive § 2255 motions, as the requirement in § 2244(b)(4) applies only to claims in § 2254 "applications." For federal prisoners, § 2255(h) requires action by the circuit court only, *i.e.,* certification of the proposed second or successive § 2255 motion. Unlike § 2244(b)(4), it says nothing about the district court or dismissing previously presented claims. All *new* claims are subject to the procedural-default rules, whether presented to the district court in an initial or authorized second or successive pleading. *See Magwood v. Patterson*, 561 U.S. 320, 340 (2010).

his or her proposed claims to, the district court. *See Stewart*, 523 U.S. at 641; *Rivers*, 145 S. Ct. at 1642-43. An authorization request does not seek the circuit court's consideration of the prisoner's proposed pleading or claims on the merits and thus is not itself a § 2254 application or § 2255 motion. *See Magwood v. Patterson*, 561 U.S. 320, 332 (2010) (a habeas applicant seeks invalidation of the judgment authorizing his confinement); *In re Jones*, 830 F.3d 1295, 1298-1301 (11th Cir. 2016) (per curiam) (Rosenbaum and Jill Pryor, J.J., concurring in the result) (distinguishing between authorization requests, § 2254 applications, and § 2255 motions).

Because an authorization request does not seek relief under § 2254 or § 2255, its filing is insufficient to trigger a court's jurisdiction over the prisoner's proposed second or successive § 2254 petition or § 2255 motion. *See Woodford v. Garceau*, 538 U.S. 202, 208 (2003) (citing § 2241(d) for the proposition that a court's power to grant a writ of habeas corpus is not triggered except by "application for a writ of habeas corpus"); *cf. Gonzalez v. Crosby*, 545 U.S. 524, 530-32 (2005) (some filings, while labeled as something else, seek vindication of a "claim" and are thus in substance a second or successive § 2254 application). Or, as Judge Martin of the Eleventh Circuit has put it:

> The language of [§ 2244(b)(3)] simply does not authorize courts of appeals to make merits decisions about the correctness of an inmate's sentence when he is merely seeking permission to file a habeas petition in District Court. A [circuit court] panel presented with a second or successive application

> is not empowered by the statute to decide in the first instance whether an inmate is entitled to relief.

See United States v. St. Hubert, 918 F.3d 1174, 1203 (11th Cir. 2019) (en banc) (Martin, J., dissenting).

Circuit courts do not have original jurisdiction over § 2254 applications or § 2255 motions in any event. The circuit courts used to have jurisdiction to consider the merits of applications for a writ of habeas corpus, but Congress withdrew that jurisdiction in AEDPA. *See* 28 U.S.C. § 2241(a); *Felker*, 518 U.S. at 660-64 & 661 n.3. (noting that, in § 103 of AEDPA, Congress amended Federal Rule of Appellate Procedure 22(a) "to bar consideration of original habeas [applications] in the courts of appeals"). Now, only the district courts and this Court have original jurisdiction over habeas corpus applications. *See Felker*, 518 U.S. at 660-61; *see also* Fed. R. App. 22(a) (requiring that any habeas corpus application submitted to a circuit court be transferred to the appropriate district court). The district courts have always had exclusive original jurisdiction over § 2255 motions. *See* § 2255(a)-(b); *United States v. Hayman*, 342 U.S. 205, 212-19 (1952).

In turn, without original jurisdiction over § 2254 applications or § 2255 motions themselves, circuit courts necessarily lack jurisdiction to adjudicate the merits of a proposed second or successive § 2254 application or § 2255 motion submitted in support of an authorization request. And, notwithstanding its directive that previously presented claims "shall be dismissed," § 2244(b)(1) does not independently vest circuit courts with jurisdiction over any previously presented claim that a prisoner has included in a proposed second or successive pleading. Rather, the

authority to dismiss previously presented claims, as required by § 2244(b)(1), lies with the district court once a state prisoner has filed an authorized second or successive § 2254 application in, and thus presented his or her claims to, that court. *See* § 2244(b)(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 . . ." (emphasis added)); Rule 4 of the Rules Governing Section 2254 Proceedings for the United States District Courts; *cf. Felker*, 518 U.S. at 662-63 (leaving open the question whether this Court is bound by § 2244(b)(1) and (2)).

Thus, when a prisoner requests authorization to file a second or successive § 2254 application or § 2255 motion that includes a previously presented claim, the circuit court does not have jurisdiction over the proposed pleading or the previously presented claim. It does, however, retain its "gatekeeping" jurisdiction over the authorization request.

In this situation, the circuit court should not, and cannot, rely on § 2244(b)(1) to dismiss or otherwise adjudicate the proposed second or successive pleading or the previously presented claim. Instead, the circuit court should exercise its "gatekeeping" jurisdiction and either grant or deny authorization based on the applicable "gatekeeping" standard. *See* § 2244(b)(3); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (federal courts generally have a strict duty to exercise the jurisdiction Congress has conferred upon them). If a federal prisoner has made the request, that means granting authorization if the proposed second or successive § 2255 motion meets the "gatekeeping" standard in § 2255(h) and denying authorization if it

does not. For state prisoners, if all the claims in the proposed second or successive § 2254 application have been presented previously, or do not otherwise meet the "gatekeeping" standard in § 2244(b)(1) and (2), the appropriate course of action for the circuit court is to *deny authorization*. If, however, at least one claim meets the standard, *authorization should be granted*. Once the state prisoner files the authorized second or successive § 2254 application in the district court, the district court will then have jurisdiction to dismiss any previously presented claims. *See* § 2244(b)(1), (4).

C. A circuit court has "gatekeeping" jurisdiction to consider an authorization request, notwithstanding § 2244(b)(1), even if the proposed second or successive pleading includes a claim the prisoner has already proposed in an earlier unsuccessful request.

First, § 2244(b)(1) does not apply to claims that a prisoner has only proposed as part of an authorization request. By its terms, § 2244(b)(1) applies only to "[a] claim presented in a second or successive habeas corpus application under [§] 2254 that was presented in a prior application." *See Magwood*, 561 U.S. at 332 (noting that a § 2254 application seeks invalidation of a state-court judgment). An authorization request is not an "application." *See In re Jones*, 830 F.3d at 1298 (Rosenbaum and Jill Pryor, J.J., concurring in the result) ("The term 'application' as used in § 2244(b)(1) clearly means the same thing it means in the rest of §2244—the actual substantive habeas petition filed in the district court."); *In re Williams*, 364 F.3d 235, 241-42 (4th Cir. 2004) ("Throughout § 2244(b), including within § 2244(b)(1) itself, the word 'application' refers to a collateral review application filed or sought to be filed in the district court.").

In addition, a claim that has only ever been proposed as part of an authorization request has never been "presented." This is because a claim can only be "presented" in a habeas corpus application or a § 2255 motion. *See* § 2241(d); § 2255(a); U.S. Sup. Ct. R. 20.4; Rule 9 of the Rules Governing Section 2254 Proceedings for the United States District Courts; Rule 9 of the Rules Governing Section 2255 Proceedings in the United States District Courts.

And a claim that a prisoner has only ever proposed in conjunction with an earlier authorization request cannot be considered "presented" simply because the circuit court purported to dismiss, "reject on the merits," or otherwise adjudicate the claim in its order denying that request. As discussed above, a circuit court exceeds its limited "gatekeeping" jurisdiction over an authorization request when it adjudicates a proposed pleading or claim the prisoner has submitted with the request.[3] *Felker*, 518 U.S. at 664 ("This Court has long recognized that the power to award the writ by any of the courts of the United States must be given by written law." (cleaned up)); § 2255(a)-(b); AEDPA § 103; *St. Hubert*, 918 F.3d at 1203-04 (Martin, J., dissenting) (circuit courts lack jurisdiction to decide the merits of a proposed second or successive pleading submitted with an authorization request); *cf. Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-02 (1998) ("For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it

[3] When a circuit court adjudicates the merits of a proposed second or successive pleading or claim in an order denying an authorization request, it effectively forecloses any meaningful opportunity for reconsideration or appellate review of its decision too. *See* § 2244(b)(3)(E). *But cf. Castro*, 540 U.S. 379-81.

has no jurisdiction to do so is, by very definition, for a court to act ultra vires.").

Critically, § 2244(b)(1) also does not divest circuit courts of their "gatekeeping" jurisdiction, even when a proposed second or successive pleading includes a claim the prisoner proposed in an earlier unsuccessful authorization request. Rather, § 2244(b)(1) is simply the first step of the two-step "gatekeeping" standard for second or successive § 2254 applications. As such, it applies to a circuit court acting in its "gatekeeping" capacity only to the extent it informs the court's decision whether to grant or deny a state prisoner's request for authorization. That is, § 2244(b)(1) is relevant to a circuit court only because it bears on the issue whether a state prisoner has made a prima facie showing that his or her proposed second or successive § 2254 application meets the "gatekeeping" standard, *i.e.*, whether it includes at least one claim that would not be subject to dismissal by the district court under § 2244(b)(4) because it does not satisfy § 2244(b)(1) and (2).[4]

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[4] Nor is § 2244(b)(4) is jurisdictional. *See Gonzalez v. Thaler,* 565 U.S. 134, 141-43 (2012) (discussing jurisdictional rules and claim-processing rules). Instead, it is a claim-processing rule that makes a second check for compliance with the "gatekeeping" standard part of the district court's preliminary review of an authorized second or successive § 2254 application. *See Rivers*, 145 S. Ct. at 1642; Rule 4 of the Rules Governing Section 2254 Proceedings for the United States District Courts. As such, § 2244(b)(4) narrows the claims to which the state must respond, and, in this way, functions much like the claim-processing rules Congress adopted for other forms of prisoner litigation, the day after it enacted AEDPA, in the Prison Litigation Reform Act of 1995, Pub. L. 104-134, §§ 803-805, 110 Stat. 1321 (codified, as relevant, at 28 U.S.C. §§ 1915(e)(2)(B), 1915A, and 1997e(c))).

When a prisoner requests authorization to file a proposed second or successive pleading that contains a claim the prisoner has only ever proposed in a prior unsuccessful authorization request, § 2244(b)(1) has no impact on the circuit court's "gatekeeping" jurisdiction. In this situation, the circuit court is generally obligated to exercise its jurisdiction, decide whether the prisoner's proposed second or successive pleading meets the authorization requirements, and then grant or deny authorization accordingly.[5] *See* § 2244(b)(3); *Quackenbush*, 517 U.S. at 716.

D. The Eleventh Circuit has concluded otherwise, however. In *In re Baptiste*, the Eleventh Circuit held that § 2244(b)(1) applies not only to claims that a state prisoner presents in a second or successive § 2254 application, but that it also applies to claims a federal prisoner presents in a second or successive § 2255 motion. It also concluded that § 2244(b)(1) "applies with equal force" to claims that the court "rejected on the merits" in denying a prisoner's prior authorization request.[6] 828 F.3d at 1339-40. Furthermore, in *In re Bradford*, the Eleventh Circuit held that § 2244(b)(1)

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[5] Circuit courts have other tools available—like the law-of-the-case doctrine and their inherent authority to impose reasonable filing restrictions—to mitigate the burden of repetitive authorization requests. *See In re Jones*, 830 F.3d at 1302-03 (Rosenbaum and Jill Pryor, J.J., concurring in the result) (noting the importance of the law-of-the-case doctrine in this context).

[6] To reiterate, circuit courts do not have jurisdiction to "reject on the merits" or to otherwise adjudicate claims that a prisoner has proposed as part of a request for authorization. Rather, the circuit courts' "gatekeeping" authority is limited to determining whether a prisoner's proposed second or successive pleading meets the "gatekeeping" requirements and granting or denying authorization accordingly. *See* § 2244(b)(3)(C)-(D); *Woodford*, 538 U.S. at 208; *Felker*, 518 U.S. at 660-64 & 661 n.3.

divests it of jurisdiction to even consider an authorization request that relies exclusively on a claim for which the prisoner has already requested, and been denied, authorization. 830 F.3d at 1277-78.

The Eleventh Circuit relied on *In re Baptiste* and *In re Bradford* to conclude that it lacked jurisdiction over Mr. Bowe's request for authorization. Those decisions are erroneous and should be overturned. The Eleventh Circuit had jurisdiction over Mr. Bowe's request under § 2244(b)(3), and § 2244(b)(1) did not divest it of that jurisdiction. The Eleventh Circuit thus had an obligation to exercise its jurisdiction and either grant or deny Mr. Bowe's authorization request. *See Quackenbush*, 517 U.S. at 716. Its judgment of dismissal should be vacated.

III. By its own terms and for myriad other reasons, § 2244(b)(1) does not apply to claims presented in a second or successive § 2255 motion.

A. First, by its terms, § 2244(b)(1) does not apply to claims presented in a second or successive § 2255 motion. Specifically, the text of § 2244(b)(1) refers only to claims presented in a "habeas corpus application under [§] 2254." *Magwood*, 561 U.S. at 332 ("The limitations imposed by § 2244(b) apply only to a habeas corpus application under § 2254, that is, an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court." (cleaned up)). In holding that § 2244(b)(1) does not extend to federal prisoners seeking relief under § 2255, the Sixth Circuit described § 2244(b)(1)'s express reference to § 2254 applications as a "glaring textual red flag." That court has also criticized *In re*

Baptiste, referring to its application of § 2244(b)(1) to § 2255 movants as "an unjustifiable contravention of [the] plain statutory text." *Williams v. United States*, 927 F.3d 427, 434-436 & 435 n.5 (6th Cir. 2019). Moreover, as the Fourth Circuit has aptly explained:

> Sections 2244(b)(1) and (b)(2) . . . appear to work in tandem to establish the requirements for authorizing a second or successive § 2254 application; which provision applies turns on whether the petitioner seeks to bring a claim "presented in a prior application."
>
> By contrast, the gatekeeping test for authorizing a second or successive § 2255 motion applies, by its terms, to any "second or successive motion," regardless of whether the claim in the second or successive motion was previously presented. That is, whereas § 2244(b)(2) limits the application of its gatekeeping test for second or successive § 2254 applications to claims that were "not presented in a prior application," § 2255(h) provides no such limiting language.

In re Graham, 61 F.4th 433, 439 (4th Cir. 2023).

B. Besides, if Congress had wanted § 2244(b)(1) to apply to claims presented in § 2255 motions too, it knew how to make that happen.

One obvious option would have been to modify the text of § 2244(b)(1) so that it applies to both § 2254 applications and § 2255 motions. Congress did just

that, elsewhere in AEDPA, when it amended the standard for appellate review for both habeas applicants and § 2255 movants. *See* AEDPA § 102 (codified at 28 U.S.C. § 2253(a)) ("In a habeas corpus proceeding or a proceeding under section 2255 . . ."); *Williams*, 927 F.3d at 435 (noting that, in AEDPA, "Congress clearly knew how to refer to federal prisoners (or all applicants) when it wanted to do so").

Alternatively, Congress could have imported the text of § 2244(b)(1) into § 2255(h), making minimal revisions so that it would refer to federal prisoners instead of state prisoners. Congress took that very approach, elsewhere in AEDPA, when it enacted nearly identical statutes of limitations for both § 2254 applications and § 2255 motions. *Compare* AEDPA § 101 *and* 28 U.S.C. § 2244(d)(1), *with* AEDPA § 105 *and* 28 U.S.C. § 2255(f).

C. Notably, in AEDPA, Congress struck an existing "gatekeeping" provision from § 2255 that had, for nearly half a century, already limited federal prisoners' ability to re-litigate claims they had presented in a prior § 2255 motion. *See* 28 U.S.C. § 2255, ¶ 5 (1948) ("The sentencing court shall not be required to entertain a second or successive [§ 2255] motion for similar relief on behalf of the same prisoner."); *see also* AEDPA § 105 (striking the fifth undesignated paragraph from § 2255). That provision, together with this Court's pre-AEDPA jurisprudence, generally prevented district courts from reaching the merits of claims that had been heard and decided on the merits in a prior § 2255 motion (*i.e.*, successive claims), or claims that were previously available, but not raised, in an earlier motion (*i.e.*, abuse of the writ). *See Sanders v. United States*, 373 U.S. 1, 12-15 (1963).

It would have made scant sense for Congress to strike the existing "gatekeeping" provision from §2255, in favor of enacting a new standard for second or successive § 2255 motions by: (1) adopting only half of the new standard in § 2255, where the standard had been codified since the remedy was first created, *see Sanders*, 373 U.S. at 4, 12-13; (2) borrowing half of its new standard for second or successive § 2254 applications to serve as the other half of its new standard for § 2255 motions, even though that provision, by its own express terms, applies only to § 2254 applications, *see* § 2244(b)(1); and (3) doing so via an overly broad cross-reference to all of § 2244, where it had only ever codified standards for second or successive habeas corpus applications, *see Kuhlmann v. Wilson*, 477 U.S. 436, 448-51 (1986).

The more plausible inference is that, in AEDPA, Congress chose one new "gatekeeping" standard for second or successive § 2254 applications and codified it in § 2244, like it always had; and that it adopted a different new standard for second or successive § 2255 motions and codified that standard *in its entirety* in § 2255, as it always had. *Compare* AEDPA § 106(a) ("Limits on Second or Successive Applications"), *with* AEDPA § 105 ("Section 2255 Amendments").

D. Moreover, in AEDPA, Congress simultaneously replaced the "gatekeeping" provision that it struck from § 2255 with a new standard for second or successive § 2255 motions that, like its predecessor, applies to both new and previously raised claims.

Conspicuously, the new "gatekeeping" standard for second or successive § 2255 motions incorporates stricter versions of the same standards courts had been applying to both new and previously presented

claims under the since-stricken provision and this Court's pre-AEDPA jurisprudence. *See Felker*, 518 U.S. at 664. Before AEDPA was enacted, district courts generally could not reach the merits of claims that a prisoner had, or could have, raised in a prior § 2255 motion. *See Sanders*, 373 U.S. at 12-15. A prisoner's failure to present a claim in an earlier § 2255 motion could be excused, however, upon a showing of either "cause and prejudice" or "actual innocence." *See McCleskey v. Zant*, 499 U.S. 467, 477-95 (1991). So too could a prisoner be excused for not having made a particular legal argument or adduced evidence that would have supported a previously presented claim. *See Kuhlmann*, 477 U.S. at 451-54.

The new "gatekeeping" standard for federal prisoners seeking to bring new claims or to re-litigate previously denied claims based on newly discovered evidence incorporates a more limited version of both the "actual innocence" and "cause and prejudice" standards. *Compare* § 2255(h)(1), *with Schlup v. Delo*, 513 U.S. 298, 313-27 (1995), *Sawyer v. Whitley*, 505 U.S. 333, 338-47 (1992), *Kuhlmann*, 477 U.S. at 451-54, *and McCleskey*, 499 U.S. at 493-95. And the new standard for federal prisoners seeking another round of § 2255 review based on an intervening change in law is a narrower version of the "cause and prejudice" standard. *Compare* § 2255(h)(2), *with Bousley v. United States,* 523 U.S. 614, 622-24 (1998); *cf. Jones v. Hendrix*, 599 U.S. 465, 469, 476-80 (2023).

By adopting modified versions of the pre-AEDPA "gatekeeping" standards, Congress appears to have intended its new standard for second or successive § 2255 motions to apply to both new and previously raised claims too.

E. Likewise, the text of AEDPA itself supports the conclusion that § 2244(b)(1) does not apply to claims presented in a § 2255 motion to vacate.

In AEDPA, Congress made substantial changes to Chapter 153 of Title 28 of the United States Code, which authorizes federal courts to grant the writ of habeas corpus. *See Felker*, 518 U.S. at 654. In § 104 of the Act, titled "Section 2254 Amendments," Congress amended "Section 2254." *See* AEDPA § 104 ("Section 2254 . . . is amended . . ."). In §105 of the Act, titled "Section 2255 Amendments," Congress amended "Section 2255." *See* AEDPA § 105 ("Section 2255 . . . is amended . . .").

Congress's amendments to § 2244 are found in § 106 of the Act. As discussed above, § 2244(b), as amended by AEDPA, contains the new "gatekeeping" procedure for both state and federal prisoners, *see* § 2244(b)(3), and the new "gatekeeping" standard for second or successive § 2254 applications, *see* § 2244(b)(1)-(2), (4). Notably, Congress did not title § 106 of the Act "Section 2244 Amendments," nor does the text of § 106 make any reference to "Section 2244."

Instead, § 106 of AEDPA is titled "Limits on Second or Successive Applications" and is subdivided into two parts. In § 106(a), Congress amended "Section 2244(a)." *See* AEDPA § 106(a) ("Section 2244(a) . . . is amended . . ."). In turn, in § 106(b), Congress amended "Section 2244(b)." *See* AEDPA § 106(b) ("Section 2244(b) . . . is amended . . .").[7]

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[7] It is unclear whether this was intentional or inadvertent, but either way, it does not accord with Congress's ordinary practice for referencing subdivided statutory provisions. *See Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60-61 (2004) (discussing

It thus appears that, as used in § 106(b) of AEDPA and the amended text of § 2244(b), Congress used the phrases "Section 2244(b)" and "this section" to refer only to § 2244(b), not to the entirety of § 2244. By extension, it appears that, in § 106(b) of AEDPA and the text of § 2244(b)(3), the phrase "this subsection" refers only to § 2244(b)(3), not to all of "Section 2244(b)." When read this way, § 2244(b) makes eminently more sense. *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997) ("The upshot is that our analysis accords more coherence to [two provisions of AEDPA] than any rival we have examined.").

Under this reading of "Section 2244(b)," a circuit court may grant authorization when a prisoner makes a prima facie showing that his or her proposed second or successive pleading "satisfies the requirements of [§ 2244(b)(3)]." *See* § 2244(b)(3)(C). A state prisoner's proposed second or successive § 2254 application "satisfies the requirements of [§ 2244(b)(3)]" if it is "permitted by ['Section 2244(b)']."[8] S*ee* § 2244(b)(3)(A). "Section 2244(b)" has only three other provisions, § 2244(b)(1), (2), and (4); and as discussed above, they provide the new "gatekeeping" standard for second or successive § 2254 applications. For federal prisoners,

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Congress's ordinary practice); *Lindh v. Murphy*, 521 U.S. 320, 337 (1997) ("All we can say is that in a world of silk purses and pigs' ears, [AEDPA] is not a silk purse of the art of statutory drafting."). Congress did not similarly deviate from its ordinary practice in § 101 of AEDPA, and its use of the phrase "this subsection" in § 2244(d)(2) thus appears to refer to the entirety of § 2244(d), as one would expect from reading the statutory text.

[8] Other requirements in § 2244(b)(3) include filing the authorization request in the appropriate circuit court and doing so before filing the proposed § 2254 application or § 2255 motion in the district court. *See* § 2244(b)(3)(A).

a proposed second or successive § 2255 motion "satisfies the requirements of [§ 2244(b)(3)]" if it is "permitted by [§ 2255(h)]." *See* § 2244(b)(3)(A).

Put another way, under this reading of "Section 2244(b)," the "gatekeeping" *procedure* that Congress enacted in § 2244(b)(3) directs a circuit court to the relevant "gatekeeping" *standard* depending on whether a state prisoner or a federal prisoner has requested authorization. When a state prisoner has made the request, § 2244(b)(3) directs the court to the standard for state prisoners found in § 2244(b)(1), (2), and (4). For requests by federal prisoners, § 2244(b)(3) directs the court to the standard for federal prisoners in § 2255(h).[9] *See Lindh*, 521 U.S. at 336.

For these reasons, § 2244(b)(1) applies only to claims presented by a state prisoner in a "habeas corpus application under [§] 2254." It does not apply to claims presented by a federal prisoner in a § 2255 motion, and it does not apply to claims a prisoner has only proposed in an earlier, unsuccessful request for authorization. And to be sure, it does not divest a circuit court of its "gatekeeping" jurisdiction over a prisoner's authorization request under § 2244(b)(3).

IV. Mr. Bowe's proposed second or successive § 2255 motion satisfies the requirements for authorization.

Mr. Bowe wants to file a § 2255 motion asserting one claim: that his conviction under § 924(c) is invalid

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[9] Under this reading, it also follows that a proposed second or successive pleading need not be timely to meet the "gatekeeping" requirement, as the statutes of limitations are not among the "gatekeeping" requirements in "Section 2244(b)." *See* § 2244(d); § 2255(f); *Day v. McDonough,* 547 U.S. 198, 202, 205-09 (2006).

because neither of the offenses on which it is predicated—conspiracy to commit Hobbs Act robbery and attempted Hobbs Act robbery—qualifies a "crime of violence." *See* § 2255(a). In support of this claim, he seeks to rely on *Davis* and *Taylor*. In *Davis*, this Court announced a new retroactive rule of constitutional law that was previously unavailable to Mr. Bowe. *See In re Hammoud*, 931 F.3d 1032, 1036-39 (11th Cir. 2019). Mr. Bowe's proposed § 2255 motion is "permitted by" § 2255(h) because it "contain[s] . . . a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." *See* § 2244(b)(3)(A). He has satisfied the requirements for authorization to file his proposed second or successive § 2255 motion in the district court. *See* § 2244(b)(3)(A), (C).

CONCLUSION

This Court should find certiorari jurisdiction, vacate the judgment dismissing Mr. Bowe's authorization request for lack of jurisdiction, and remand this matter to the Eleventh Circuit with instructions to grant Mr. Bowe authorization to file his proposed second or successive § 2255 motion in the district court.

Respectfully submitted,

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