No. ____

IN THE

Supreme Court of the United States

MICHAEL BOWE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

HECTOR A. DOPICO
INTERIM FEDERAL PUBLIC DEFENDER
ANDREW L. ADLER
Counsel of Record
ASS'T FED. PUBLIC DEFENDER
1 E. Broward Blvd., Ste. 1100
Ft. Lauderdale, FL 33301
(954) 356-7436
Andrew_Adler@fd.org

Counsel for Petitioner

August 29th, 2024

QUESTIONS PRESENTED

Under 28 U.S.C. § 2244(b)(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." (emphasis added).

The first question presented is:

Whether 28 U.S.C. § 2244(b)(1) applies to a claim presented in 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 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 a writ of certiorari." (emphasis added).

The second question presented is:

Whether 28 U.S.C. § 2244(b)(3)(E) deprives this Court of certiorari jurisdiction over the grant or denial of an authorization by a court of appeals to file 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. 24-11704 (11th Cir. June 27, 2024) (third order denying authorization to file a second 28 U.S.C. § 2255 motion based on *United States v. Davis*, 588 U.S. 445 (2019));

- *In re Bowe*, No. 22-7871 (U.S. Feb. 20, 2024) (order denying petition for a writ of habeas corpus to review the Section 2244(b)(1) issue).

- *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 *Davis*);

- *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*, 596 U.S. 845) (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).

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

IN THE

Supreme Court of the United States

MICHAEL BOWE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Bowe respectfully seeks a writ of certiorari to review an order issued by the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit's order below is unreported but is reproduced as Appendix ("App.") A, 1a–9a. The district court did not issue a written opinion.

JURISDICTION

The Eleventh Circuit issued its decision on June 27, 2024. As explained further below, this Court has certiorari jurisdiction under 28 U.S.C. § 1254(1) notwithstanding the certiorari-stripping provision in 28 U.S.C. § 2244(b)(3)(E).

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.

INTRODUCTION

This case presents two important and recurring questions concerning second or successive "motions to vacate" brought by federal prisoners under 28 U.S.C. § 2255.

A provision in the Antiterrorism and Effective Death Penalty of 1996 (AEDPA) directs 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 circuits are divided 6–3 on whether the procedural bar in Section 2244(b)(1) extends to federal-prisoner motions to vacate under Section 2255. The government concedes that it does not. And three Justices of this Court have expressed their desire to resolve this circuit conflict. *See In re Bowe*, 144 S. Ct. 1170, 2024 WL 674656 (2024) (Sotomayor, J., joined by Jackson, J., statement respecting the denial of the petition for a writ of habeas corpus); *Avery v. United States*, 140 S. Ct. 1080 (2020) (Kavanaugh, J., statement respecting denial of certiorari).

But another provision in AEDPA has thus far stood in the way. A unique jurisdiction-stripping provision, Section 2244(b)(3)(E) prohibits certiorari petitions

from "[t]he grant or denial of an authorization by a court of appeals to file a second or successive *application*." Federal prisoners have long assumed that they cannot seek certiorari when a court of appeals denies them authorization to file a second or successive Section 2255 motion to vacate. But, in fact, that assumption is incorrect. The plain text of Section 2244(b)(3)(E) prohibits certiorari petitions from a court of appeals' grant or denial of authorization to file *only* a second or successive *habeas corpus application*, not a second or successive *motion to vacate* under Section 2255.

As a result, the Court has jurisdiction over this petition, and it may proceed to resolve the circuit conflict over Section 2244(b)(1). But even if there were any doubt about that conclusion, the jurisdictional question warrants review in its own right. Surprisingly, this Court has never addressed it. Yet it affects the scope of the Court's appellate jurisdiction over hundreds if not thousands of federal-prisoner, post-conviction cases every single year. And this case is an ideal vehicle to decide it for two reasons. First, the underlying merits question on Section 2244(b)(1) satisfies the traditional criteria for certiorari. And, second, even if the Court concluded that Section 2244(b)(3)(E) *did* strip it of jurisdiction, the Court's reasoning would still have the effect of resolving the Section 2244(b)(1) circuit conflict that has evaded review.

* * *

In sum, this petition affords the Court a rare opportunity to efficiently resolve not one but two related questions about second or successive federal-prisoner Section 2255 motions to vacate—each of which independently warrants review. And this may be the *only* way for this Court to resolve the 6–3 split that continues to evade review.

STATEMENT

1. In 2009, Petitioner 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"—namely, the offenses in Counts One and Two—in violation of 18 U.S.C. § 924(c) (Count Three). The district court sentenced Petitioner to 168 months on Counts One and Two, plus a mandatory, consecutive sentence of 120 months on the Section 924(c) offense in Count Three.

In 2016, Petitioner filed a Section 2255 motion to vacate his Section 924(c) conviction in light of *Johnson v. United States*, 576 U.S. 591 (2015). (Case No. 16-cv-81002). *Johnson* declared unconstitutionally vague the residual clause "violent felony" definition in the Armed Career Criminal Act. The district court denied his motion because, even assuming that *Johnson* invalidated the similar residual clause "crime of violence" definition in Section 924(c), his conviction remained valid. It was predicated in part on attempted Hobbs Act robbery, which, under circuit precedent at the time, was a "crime of violence" under the elements clause. (*See* Cv. DE 20, 22). The lower courts denied him a COA, and this Court denied certiorari in 2018.

2. In *United States v. Davis*, 588 U.S. 445 (2019), this Court declared the residual clause in Section 924(c) unconstitutionally vague. Shortly thereafter, the Eleventh Circuit Court held that *Davis* announced a new rule of constitutional law made retroactive by this Court for purposes of 28 U.S.C. § 2255(h)(2). *In re Hammoud*,

931 F.3d 1032, 1037–39 (11th Cir. 2019). As a result, some federal prisoners could file second or successive Section 2255 motions to vacate their Section 924(c) convictions.

Shortly after *Davis*, Petitioner sought authorization to do just that. (11th Cir. No. 19-12989). But the Eleventh Circuit denied his request because his Section 924(c) conviction was predicated in part on attempted Hobbs Act robbery. And, under then existing circuit precedent, attempted Hobbs Act robbery still remained a "crime of violence" under the elements clause. Thus, Petitioner could not make a prima facie showing that his Section 924(c) conviction was invalid post-*Davis*. (App. D, 20a).

Then came two key legal developments. In *Brown v. United States*, 942 F.3d 1069, 1075–76 (11th Cir. 2019), the Eleventh Circuit made clear that Hobbs Act conspiracy was not a "crime of violence" under the elements clause. And, in *United States v. Taylor*, 596 U.S. 845 (2022), this Court held that attempted Hobbs Act robbery was also not a "crime of violence" under the elements clause, abrogating the Eleventh Circuit's precedent. Thus, Petitioner Section 924(c) conviction is invalid.

Petitioner, through counsel, thereafter submitted another request for authorization to file a second Section 2255 motion based on *Davis*. (11th Cir. No. 22-12278). However, he recognized that the Eleventh Circuit's precedent in *In re Baptiste*, 828 F.3d 1337, 1339–40 (11th Cir. 2016)—extending the procedural bar in 28 U.S.C. § 2244(b)(1) to federal prisoners—would bar his request. That was so because the Eleventh Circuit had previously denied Petitioner's earlier *Davis*-based application. Under *Baptiste*, Section 2244(b)(1) would preclude authorization, even though the Eleventh Circuit had denied his earlier *Davis*-based application based on

circuit precedent that had since been abrogated by *Taylor*. As a result, along with his request for authorization, Petitioner also filed a petition for initial hearing en banc, asking the Eleventh Circuit to reconsider and overrule its precedent in *Baptiste*.

Relying solely on Section 2244(b)(1) and *Baptiste*, the Eleventh Circuit denied authorization. App. C, 15a ("Bowe is barred from bringing any claim based on *Davis* . . . because he previously raised the same claim in his 2019 successive application, and we rejected it. 28 U.S.C. § 2244(b)(1); *In re Baptiste*, 828 F.3d at 1340."). The panel reasoned that, under the prior panel precedent rule, it remained bound by *Baptiste* unless and until it was overruled by the Supreme Court or the en banc Eleventh Circuit. *Id*. The panel also summarized the arguments contained in his en banc petition and summarily denied it without explanation. *See* App. 14a–15a.

3. Petitioner assumed that Section 2244(b)(3)(E) prohibited him from filing a certiorari petition in this Court. So instead he filed a petition for a writ of habeas corpus in this Court. (U.S. No. 22-7871). In the petition, he emphasized that the circuits were divided 6–3 on whether Section 2244(b)(1) applies to federal prisoners; that the federal government had previously conceded that it did not; and that Justice Kavanaugh had previously written separately opining that the Court should resolve that question in a future case in light of the circuit conflict and the government's concession. *Avery v. United States*, 140 S. Ct. 1080 (2020) (statement respecting denial of certiorari). Petitioner explained, however, that due to Section 2244(b)(3)(E)'s apparent bar on certiorari petitions and the government's concession, there would be

no way for a certiorari petition to present that question for the Court's review. As a result, he urged this Court to resolve the conflict via his original habeas petition.

On February 20, 2024, this Court denied the petition. However, Justice Sotomayor—joined by Justice Jackson—authored an opinion respecting the denial. App. B, 10a–11a; 144 S. Ct. 1170, 2024 WL 674656. They observed that "[t]he Government agrees with Bowe that § 2244(b)(1)'s plain language covers only challenges by state prisoners under § 2254." *Id*. at *1. And "[t]hree Circuits now agree with that interpretation," "[b]ut six Circuits disagree." *Id*. (citing cases). Thus, they "join[ed]" Justice Kavanaugh in his "desire for this Court to resolve this split." *Id*.

Importantly, they further observed that Petitioner's case was the "first case to reach the Court presenting this question since [Justice Kavanuagh] welcomed petitions on the split in *Avery*." *Id*. They explained that, in light of Section 2244(b)(3)(E)'s apparent bar on certiorari and the government's concession, there were "considerable structural barriers to this Court's ordinary review via certiorari petition." *Id*. Although they "welcome[d] the invocation of the Court's original habeas jurisdiction" to resolve this "important issue" in a future case, a petitioner had to show "exceptional circumstances," and it was "questionable" whether the Eleventh Circuit would have granted Petitioner authorization even absent Section 2244(b)(1)'s bar. *Id*. at *2. (In fact, this was not in question: there have been numerous identical—and inferior—post-*Taylor* cases where the Eleventh Circuit granted authorization.).[1]

[1] *See, e.g.*, *In re Chance*, No. 23-13875, ECF No. 2, at 5–6 (11th Cir. Dec. 18, 2023) (granting authorization where the Section 924(c) conviction was predicated on attempted Hobbs Act robbery); *In re Corn*, No. 23-11623, ECF No. 2 at 6 (11th Cir.

The Justices concluded by identifying two alternative ways to resolve the dilemma. First, they endorsed the government's "suggest[ion] that a court of appeals seeking clarity could certify the question to this Court." *Id*. Second, they "encourage[d] the courts of appeals to reconsider this question en banc" where they had precedent extending Section 2244(b)(1) to Section 2255 motions. *Id*. at *2 & n.*.

4. Petitioner therefore returned to the Eleventh Circuit and asked it to adopt one of those two solutions. He again sought authorization to file a second Section 2255 motion based on *Davis*. But recognizing that *Baptiste* continued to foreclose that request, he also petitioned for initial hearing en banc, again asking the full court to reconsider and overrule *Baptiste*. (11th Cir. No. 24-11704, ECF No. 2). Alternatively, in the event that the Eleventh Circuit denied his en banc petition, Petitioner asked the Eleventh Circuit to certify the Section 2244(b)(1) question to this Court. (11th Cir. No. 24-11704, ECF No. 3). In that motion, he emphasized that one of this Court's "essential functions" was to ensure the uniformity of federal law, and that the Section 2244(b)(1) circuit conflict was evading certiorari review. (*See id*. at 1–5, 7–8, 12–13). He further observed that, absent certification, this Court would be unable to resolve the circuit conflict, and that inability would present an Article III

June 2, 2023) (same); *In re Ragland*, No. 22-1326, ECF No. 2 at 6 (11th Cir. Oct. 12, 2022) (same); *see also In re Berry,* No. 23-13310, ECF No. 2 at 11–12 (11th Cir. Oct. 31, 2023) (granting authorization where the Section 924(c) conviction was predicated on attempted carjacking, and it was unclear whether that remained a "crime of violence" post-*Taylor*); *In re Barriera-Vera*, No. 23-11517, ECF No. 2 at 8–9 (11th Cir. May 22, 2023) (same, as to attempted bank robbery); *In re Brown*, No. 22-12838, ECF No. 2 at 9 (11th Cir. Sept. 22, 2022) (same, as to attempted armed bank robbery).

"Exceptions Clause" problem with Section 2244(b)(3)(E)'s bar on certiorari—a problem that this Court avoided in *Felker v. Turpin*, 518 U.S. 651 (1996). (*Id*. at 9).

The Eleventh Circuit denied Petitioner's request for authorization. App. A. Once again, the court of appeals applied its precedent in *Baptiste* and held that Section 2244(b)(1) precluded Petitioner's request. App. 6a–7a. As for Petitioner's request to reconsider *Baptiste* en banc, the court denied that request, with no active Judges calling for a vote. App. 9a n.2; 11th Cir. No. 24-11704, ECF No. 6. As for Petitioner's motion to certify the Section 2244(b)(1) question to this Court, the panel denied that request. App. 6a–9a. The court did not want to "cause a newsworthy event and stir up bloggers and podcasters by asking the [Supreme] Court to accept a certified question from a court of appeals for only the fifth time in 78 years." App. 8a.

REASONS FOR GRANTING THE PETITION

The merits question presented here is whether the procedural bar in Section 2244(b)(1) extends to motions to vacate under Section 2255. As three Justices of this Court have recognized over the past four years, this question satisfies the traditional criteria for review. But this Court has been unable to resolve the circuit conflict due to the assumption that Section 2244(b)(3)(E) deprives this Court of certiorari jurisdiction. In fact, that assumption is mistaken. And that threshold jurisdictional question itself warrants review, as it affects the scope of this Court's jurisdiction over a large swath of federal cases. This case is an ideal vehicle to decide that surprisingly unresolved question because, even if the Court ultimately found no jurisdiction, its reasoning would effectively resolve the underlying Section 2244(b)(1) circuit conflict.

I. The merits question warrants review.

As three Justices of this Court have now recognized, the Section 2244(b)(1) question presented here warrants review. The parties agree that the circuits are divided 6–3 on whether the bar in Section 2244(b)(1) applies *only* to state-prisoner habeas corpus applications filed under Section 2254, or whether it *also* applies to federal-prisoner motions to vacate filed under Section 2255. The parties also agree that the plain text of the statute bars only state-prisoner habeas corpus applications. And the Eleventh Circuit denied relief below based exclusively on Section 2244(b)(1).

A. The circuits are divided 6–3 over Section 2244(b)(1).

Between 2002 and 2019, six circuits—the Second, Third, Fifth, Seventh, Eighth, and Eleventh Circuits—all uniformly held that Section 2244(b)(1)'s procedural bar extends to federal-prisoner Section 2255 motions. *See Winarske v. United States*, 913 F.3d 765, 768–769 (8th Cir. 2019); *In re Bourgeois*, 902 F.3d 446, 447 (5th Cir. 2018); *In re Baptiste*, 828 F.3d 1337, 1339–1340 (11th Cir. 2016); *United States v. Winkelman*, 746 F.3d 134, 135–136 (3rd Cir. 2014); *Gallagher v. United States*, 711 F.3d 315 (2d Cir. 2013); *Taylor v. Gilkey*, 314 F.3d 832, 836 (7th Cir. 2002).

In 2019, however, the Sixth Circuit expressly broke from those six circuits. Based on the plain text, that court squarely "h[e]ld that § 2244(b)(1) does not apply to federal prisoners." *Williams v. United States*, 927 F.3d 427, 434–36 (6th Cir. 2019).

Shortly after *Williams*, Justice Kavanaugh recognized there was now a "circuit split on this federal question of law" that should be resolved. *Avery v. United States*, 140 S. Ct. 1080, 1081 (2020) (Kavanaugh, J., statement respecting the denial of

certiorari) (citing cases). He further emphasized that "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.'" *Id*. at 1080 (quoting *Avery*, U.S. Br. in Opp., 2020 WL 504785, at *10, 13 (Jan. 29, 2020)).

Since Justice Kavanaugh's opinion in *Avery*, the Fourth and Ninth Circuits have expressly rejected the majority review and joined the Sixth Circuit (and the United States), holding that Section 2244(b)(1)'s procedural bar plainly does not apply to federal-prisoner Section 2255 motions. *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) (2–1).

Most recently, and in Petitioner's own case, the United States (now under a different Administration) reaffirmed its "agree[ment] that Section 2244(b)(1) does not apply to Section 2255 motions, that the court of appeals erred in holding otherwise, and that the courts of appeals are divided on that issue." *Bowe*, U.S. Br. in Opp. 9 (Nov. 27, 2023). In that original habeas proceeding, two more Justices recognized that the circuits were divided 6–3 on this "important issue." *In re Bowe*, 2024 WL 674656, at *1–2 (Feb. 20, 2024) (Sotomayor, J., joined by Jackson, J., statement respecting the denial of the petition for a writ of habeas corpus). And they expressly "join[ed]" Justice Kavanaugh in "expressing his desire for this Court to resolve this split." *Id*.

In the meantime, they suggested that circuits taking the majority review reconsider their precedents en banc. *Id*. at 2 & n.*. The Eleventh Circuit has already refused to do so. After the denial of his original habeas petition, Petitioner returned to the Eleventh Circuit and again asked that court to convene en banc and overrule

its precedent in *Baptiste*. Pet. C.A. Pet. for Initial Hearing En Banc, 11th Cir. No. 24-11704, ECF No. 2. The Eleventh Circuit denied that petition—with no active Judges on that court calling for a vote. App. 9a n.2; 11th Cir. No. 24-11704, ECF No. 6. Thus, the circuit split has only grown *more* entrenched since Justice Sotomayor's opinion.

B. Six circuits are flouting Section 2244(b)(1)'s plain text.

1. Section 2244(b)(1) provides that "[a] claim presented in a second or successive *habeas corpus application under section 2254* that was presented in a prior application shall be dismissed." 28 U.S.C. § 2244(b)(1) (emphasis added). This statute is unambiguous: it does not apply to motions to vacate brought under Section 2255.

A "habeas corpus application 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 already 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, as three circuits have since recognized, "[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 v. United States*, 36 F.4th 974, 982 (9th Cir. 2022); *accord In re Graham*, 61 F.4th 433, 438–41 (4th Cir. 2023); *Williams v. United States*, 927 F.3d 427, 434–36 (6th Cir. 2019). The analysis should begin—and end—with that plain statutory text.

After all, Congress could have easily extended Section 2244(b)(1)'s bar to Section 2255 motions 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* . . . ." There is no basis for federal courts to re-write the statute by adding those italicized words. That sort of judicial revision is particularly inappropriate here given that, in the preceding statutory provision, Congress expressly referenced Section 2255, confirming that it knew the difference. *See* 28 U.S.C. § 2244(a). This adjacent reference to Section 2255 makes clear that Congress meant what it said: Section 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 Section 2255."

2. Despite reaching the contrary conclusion, the Eleventh Circuit in *Baptiste* acknowledged that "§ 2244(b)(1) explicitly applies to petitions filed under § 2254, which applies to state prisoners." 828 F.3d at 1339. But, citing decisions from other circuits, *Baptiste* discarded that explicit textual limitation because, in its view, "it made little sense to deny the ability to file repetitious petitions only to state prisoners." *Id*. In other words, the Eleventh Circuit, along with five other circuits, have substituted their policy judgment for Congress' judgment in the plain text.

Three Judges of the Eleventh Circuit quickly criticized *Baptiste* as "not consistent with the text of the habeas statute." *In re Anderson*, 829 F.3d 1290, 1295 (11th Cir. 2016) (Martin, J., dissenting). They emphasized that Section 2255 motions are "certainly not brought 'under section 2254,' which governs petitions filed by state

prisoners." *In re Clayton*, 829 F.3d 1254, 1266 (11th Cir. 2016) (Martin, J., joined by Jill Pryor, J., concurring in result). And Congress could have easily written "under sections 2254 or 2255" but did not. *See In re Jones*, 830 F.3d 1295, 1297–1300 (11th Cir. 2016) (Rosenbaum & Jill Pryor, JJ., concurring in result) (opining that *Baptiste*'s "analysis of the . . . plain language is demonstrably incorrect").

In response to these critiques, the Eleventh Circuit sought to textually justify *Baptiste* in *In re Bradford*, 830 F.3d 1273 (11th Cir. 2016). It emphasized that a successive Section 2255 motion "must be certified as provided in section 2244." 28 U.S.C. § 2255(h). And, according to *Bradford*, that language "incorporate[d] the whole range of procedures and limitations set out in" Section 2244, including Section 2244(b)(1). *Id.* at 1276–77. But, as other circuits have explained, "§ 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. After all, "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.*

Even the Eleventh Circuit in *Bradford* acknowledged that Section 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." 830 F.3d at 1276 & n.1. So reading Section 2255(h) to incorporate *all* of Section 2244, including the criteria in Section 2244(b)(2), would conflict with the criteria in Section 2255(h) itself—an "illogical, and perhaps even absurd, result." *Graham*, 61 F.4th at 440 (quotation omitted)

Because Section 2255(h) could not be at war with itself, the Eleventh Circuit in *Bradford* was forced to conclude that Section 2255(h) incorporates *only* Section 2244(b)(1) but *not* Section 2244(b)(2). But the court failed to justify this 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, and as the Fourth Circuit has explained, "because § 2255(h) cannot incorporate § 2244(b)(2), nor can it incorporate § 2244(b)(1)." *Graham*, 61 F.4th at 441.

In the end, the holding of *Baptiste* and five other circuits is grounded not in the statutory text but rather in the policy view 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, "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 Section 2244(b)(1)'s differential treatment among state and federal prisoners. That choice by Congress is entitled to respect.

C. This case is an ideal vehicle.

The Eleventh Circuit denied relief below based exclusively on Section 2244(b)(1), applying its precedent in *Baptiste*/*Bradford*. App. 6a–7a. Because the Eleventh Circuit had previously denied Petitioner authorization to file a second Section 2255 motion based on *Davis*, Section 2244(b)(1) barred his request. App. 7a. And because neither the en banc court nor this Court had overruled *Baptiste*, the panel was bound to apply it under the prior panel precedent rule. *Id*. The court further noted that, because Section 2244(b)(1) barred his request, it did not "mean to imply anything about whether Bowe's *Davis* claim has any merit." App. 7a n.1.

Moreover, after *Davis* and *Taylor* made clear that Petitioner's Section 924(c) conviction is now invalid, the Eleventh Circuit has never suggested that it would deny authorization even if Section 2244(b)(1) did not apply. When the Eleventh Circuit denied Petitioner authorization after *Taylor* in 2022, it again did so based exclusively on Section 2244(b)(1). And, as explained above, the Eleventh Circuit has repeatedly granted authorization after *Taylor* to individuals whose *Davis* claims are identical (and even inferior) to Petitioner's—*i.e.*, where the Section 924(c) conviction is based on an offense that is no longer a qualifying "crime of violence." *See supra* pp. 8–9 n.1 (citing cases). But for Section 2244(b)(1), then, Petitioner would have obtained authorization. This case therefore squarely presents the Section 2244(b)(1) question.

II. The jurisdictional question warrants review.

The only real question here, then, is whether this Court has jurisdiction over this certiorari petition in light of another provision in AEDPA: Section 2244(b)(3)(E). All agree that Section 2244(b)(3)(E) deprives the Court of certiorari jurisdiction over a court of appeals' denial of authorization to file a second or successive *habeas corpus application*. But this Court has never resolved whether Section 2244(b)(3)(E) *also* deprives the Court of certiorari jurisdiction over a court of appeals' denial of authorization to file a second or successive *motion to vacate* under Section 2255. This statutory question is important and recurring. And even an adverse resolution of that question will effectively resolve the underlying Section 2244(b)(1) circuit conflict. As this case demonstrates, it is unclear how that conflict will otherwise be resolved.

A. Section 2244(b)(3)(E)'s prohibition on certiorari applies only to habeas corpus applications, not motions to vacate.

1. Section 2244(b)(3)(E) prohibits certiorari petitions only from "[t]he grant or denial of an authorization by a court of appeals to file a second or successive *application*." Section 2244's text and structure make clear that the term "application" refers to a habeas corpus application, not a motion to vacate under Section 2255.

Section 2244(a) prohibits federal courts from entertaining a successive "*application* for a writ of habeas corpus" by federal prisoners under 28 U.S.C. § 2241, except as provided in Section 2255. Section 2244(b)(1)'s procedural bar and Section 2244(b)(2)'s substantive gatekeeping criteria both refer to a "claim presented in a second or successive habeas corpus *application* under section 2254." Section 2244(b)(3) then contains a number of procedural provisions, including Section

2244(b)(3)(E), all of which refer back to the successive habeas corpus "applications" referenced in Sections 2244(a) and (b). *See, e.g.*, 28 U.S.C. § 2244(b)(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*.") (emphasis added). Finally, Section 2244(d) prescribes a statute of limitations (and related rules) governing "an *application* for a writ of habeas corpus" by those in state custody. Thus, when Section 2244(b)(3)(E) prohibits certiorari petitions from the grant or denial of authorization to file a second or successive "application," it is referring only to the grant or denial of authorization to file a successive *habeas corpus application*, not to the grant or denial of authorization to file a successive *motion to vacate* under Section 2255.

As with Section 2244(b)(1), the only way that Section 2244(b)(3)(E) would apply to motions to vacate is through the cross-reference in Section 2255(h). Again, Section 2255(h) provides that a second or successive Section 2255 motion "must be *certified as provided in section 2244* by a panel of the appropriate court of appeals." But, as explained above, Section 2255(h) does not incorporate the entirety of Section 2244. Rather, it incorporates only the provisions in Section 2244 governing the certification determination by the court of appeals. And that does not include Section 2244(b)(3)(E)'s prohibition on certiorari. That prohibition has nothing to do with the certification determination itself, only the availability of appellate review therefrom.

2. Although this conclusion required by the statutory text alone, this Court's precedent further bolsters this interpretation of Section 2244(b)(3)(E).

In *Castro v. United States*, 540 U.S. 375 (2003), the Court narrowly interpreted Section 2244(b)(3)(E). There, a federal prisoner did not seek authorization to file a successive Section 2255 motion; rather, he filed the motion in the district court because he believed that it was his first. On appeal, the court of appeals (erroneously) held that the Section 2255 motion was successive. In that posture, this Court held that Section 2244(b)(3)(E) did not deprive the Court of jurisdiction to review that determination. *Id*. at 379–81. Likewise, in *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), the Court held that Section 2244(b)(3)(E) did not deprive this Court of jurisdiction where the court of appeals correctly held that a claim was not successive, such that the provisions in Section 2244(b) did not apply at all. *Id*. at 641–42.

The Court has also construed the term "successive" in a narrow manner, even for state prisoners. *See, e.g.*, *Panetti v. Quarterman*, 551 U.S. 930, 942–47 (2007) (second habeas petition raising newly-ripe claim was not successive); *Gonzalez v. Crosby*, 545 U.S. 524, 532–36 (2005) (true Rule 60(b) motion to reopen was not a successive petition); *Martinez-Villareal*, 523 U.S. at 642–45 (claim brought in a first habeas petition and dismissed as premature was not successive when re-asserted upon ripening); *Slack v. McDaniel*, 529 U.S. 473, 485–89 (2000) ("a habeas petition which is filed after an initial petition was dismissed without adjudication on the merits for failure to exhaust state remedies is not a 'second or successive' petition"). These precedents have the effect of limiting the applicability of Section 2244(b)(3)(E).[2]

[2] A pending certiorari petition presents a related question: how do Section 2244(b)(2)'s requirements for "successive" petitions apply where a petition is amended while it is on appeal? *Rivers v. Lumpkin* (U.S. No. 23-1345) (response requested Aug. 12, 2024).

The Court's precedent in this area reflects two broader, related principles of statutory construction, both of which this Court invoked in *Castro*. First, this Court "read[s] limitations on [its] jurisdiction to review narrowly." *Castro*, 540 U.S. at 381 (quoting *Utah v. Evans*, 536 U.S. 452, 463 (2002)). Second, there is a "longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction." *INS v. St. Cyr*, 533 U.S. 289, 298–99 (2001) (requiring "clear, unambiguous, and express" statement). For example, the Court in *Felker* held that Section 2244(b)(3)(E) did not impliedly repeal this Court's jurisdiction over original habeas petitions. *See* 518 U.S. at 660–61 ("Repeals by implication are not favored"). Similar restraint should be exercised here before reading Section 2244(b)(3)(E) to "close [this Court's] doors to a class of [federal prisoners] seeking review without any clear indication that such was Congress' intent." *Castro*, 540 U.S. at 381 (citing *Felker*).

3. The canon of constitutional avoidance also militates heavily against applying Section 2244(b)(3)(E) here. *See Clark v. Martinez*, 543 U.S. 371, 381–82 (2005) (explaining that the canon is a "tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable assumption that Congress did not intend the alternative which raises serious constitutional doubts").

In *Felker*, the Court held that Section 2244(b)(3)(E) did not exceed Congress' authority under Article III § 2 to make "Exceptions" to this Court's appellate jurisdiction because original habeas petitions remained available. *Id*. at 661–62. Writing separately, however, three Justices explained that this constitutional question "would be open" if there was no avenue available for the Court to exercise

appellate jurisdiction and resolve "divergent interpretations of the gatekeeper standard" adopted by the courts of appeals. *Id*. at 667 & n.2 (Souter, J., concurring).

Applying Section 2244(b)(3)(E) here would revive that serious Article III question because that application would effectively prevent the Court from directly resolving the Section 2244(b)(1) circuit conflict. As two Justices recently recognized in Petitioner's case, the combination of Section 2244(b)(3)(E)'s certiorari-stripping provision and the government's concession are effectively preventing this Court from resolving the Section 2244(b)(1) conflict via certiorari. *Bowe*, 2024 WL 674656, at *1 (Sotomayor, J., statement respecting the denial of the petition for a writ of habeas corpus). Petitioner's case also demonstrates that, despite *Felker*'s assurance, the availability of original habeas petitions to resolve circuit conflicts is purely theoretical. And Petitioner's case likewise demonstrates that it is exceedingly unlikely for a court of appeals to certify the Section 2244(b)(1) question to this Court. *See supra* pp. 8–10 & n.1 (summarizing the recent procedural history of this case).[3]

The upshot is that applying Section 2244(b)(3)(E) here would prevent this Court from exercising one of its "essential functions" in our constitutional system: to ensure the uniformity of federal law. *See Felker*, 518 U.S. at 667 n.2 (Souter, J., concurring) (citing, *inter alia*, Henry M. Hart, Jr., The Power of Congress to Limit the

[3] History confirms the practical unavailability of these latter two avenues. Despite several opportunities post-*Felker*, this Court has never used an original habeas petition to resolve a question of law—not even when the *government* urged the Court to do so. *See In re Smith*, U.S. Br. as Amicus Curiae (No. 98-5804) (May 1999). And, as the court of appeals below emphasized, this Court has not answered a certified question since 1981, App. 8a–9a—and this Court summarily dismissed the certificate the last time a court of appeals issued one, *United States v. Seale*, 558 U.S. 985 (2009).

Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1365 (1953)). And that would raise the serious constitutional question, avoided by this Court in *Felker*, about whether Section 2244(b)(3)(E) exceeds Congress' authority under Article III § 2 to make "Exceptions" to the Court's appellate jurisdiction. That question implicates a longstanding debate about whether Congress has plenary authority to strip this Court of appellate jurisdiction, or whether there is an "essential functions" limitation. Avoiding that thorny question is yet another reason to limit Section 2244(b)(3)(E) to its plain text, not extend it to Section 2255 motions to vacate.

B. The question presented is unresolved, important, and recurring.

1. Surprisingly, though, this Court has never before resolved whether Section 2244(b)(3)(E)'s prohibition on certiorari petitions applies to federal prisoners.

On the one hand, the Court has described Section 2244(b)(3)(E) as applying to "state prisoners filing second or successive habeas petitions under § 2254." *Hohn v. United States*, 524 U.S. 236, 249 (1998). And *Felker* similarly described Section 2244(b)(3)(E) as applying to "second habeas petition[s]," making no mention of motions to vacate. 518 U.S. at 660. But the question was not presented in either case.

On the other hand, *Castro* appeared to assume that Section 2244(b)(3)(E) *did* apply to motions to vacate. But the Court did not expressly address let alone decide that issue. Indeed, the petitioner there did not advance the contrary argument, successfully arguing instead that Section 2244(b)(3)(E) did not apply to the posture of his case. *See Castro*, Pet'r Br., 2003 WL 1232998, at *9, *11–13 (Mar. 13, 2003); *Castro*, Pet'r Reply Br., 2003 WL 21692829, at *1–5 (July 16, 2003). And this Court

has never considered itself bound by jurisdictional rulings that are made *sub silentio*. *See, e.g.*, *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 97 (1994) (citing cases).

2. This unresolved question of statutory interpretation is important. Although bills are occasionally introduced,[4] Section 2244(b)(3)(E) is the only statute today that strips this Court of certiorari jurisdiction. There should not be any doubt about its scope. And even in the absence of such a jurisdiction-stripping statute, this Court has previously granted review in the habeas context to clarify the scope of its own appellate jurisdiction. *See Hohn*, 524 U.S. at 238–39 (granting certiorari for the sole purpose of "determin[ing] whether the Court has jurisdiction to review decisions of the courts of appeals denying applications for certificates of appealability").

3. This important jurisdictional question recurs frequently. Indeed, it is implicated any time that a court of appeals rules on a federal prisoner's request for authorization to file a successive Section 2255 motion. There are (at least) hundreds of such requests every year. And there are *thousands* of such requests in the aftermath of a retroactive constitutional decision by this Court. *See, e.g.*, *United States v. St. Hubert*, 918 F.3d 1174, 1178–79 tbl. 1 & n.5 (11th Cir. 2019) (Tjoflat, J., concurring in the denial of rehearing en banc) (reporting numbers in the Eleventh Circuit alone between 2013–2018, including over 2,220 requests/rulings just in 2016).

Despite the compelling textual arguments above, federal prisoners have always assumed that Section 2244(b)(3)(E) *does* prohibit them from seeking certiorari

[4] For the most recent example, see No Kings Act, S. 4973 §§ 2(a)(8), 2(b)(3), 4(a)(2), 4(b)(7) 118th Cong. (2024) (purporting to strip this Court of appellate jurisdiction over various issues relating to presidential immunity from criminal prosecution).

review from the denial of authorization to file a successive Section 2255 motion. That is why this Court does not receive such petitions. The statutory question thus remains unresolved: has Congress in fact stripped this Court of jurisdiction over this large swath of federal-prisoner, post-conviction cases? Only this Court can answer that.

C. This case is an ideal vehicle.

This case provides a rare and perfect vehicle to resolve this statutory question.

1. As explained, the merits question about Section 2244(b)(1) is plainly cert-worthy and squarely presented here. And the Court should decide the threshold jurisdictional question in a case where the underlying merits question also warrants review. After all, it would an inefficient use of the Court's resources to grant review on a jurisdictional question and find jurisdiction—only to then decline to review the merits. Seldom will the criteria for certiorari be met in a case arising from the denial of authorization to file a successive Section 2255 motion. But this is such a rare case.

2. More importantly, even if the Court ultimately found no jurisdiction here, its reasoning would *still* resolve the underlying Section 2244(b)(1) conflict. As explained, Section 2244(b)(3)(E)'s prohibition on certiorari petitions would apply here only if it were incorporated by Section 2255(h)'s cross-reference to Section 2244. If the Court concluded that this cross-reference incorporated the entirety of Section 2244(b), then it would incorporate Section 2244(b)(1) as well. And if the Court more narrowly concluded that the cross-reference incorporated only the provisions relating to certification, and that Section 2244(b)(3)(E) qualified as such a provision, then that reasoning would apply to Section 2244(b)(1) as well. Were a prohibition on certiorari

review—a prohibition that has nothing to do with the certification determination itself—sufficiently related to certification, then so too would be Section 2244(b)(1)'s procedural bar on successive claims. After all, the courts of appeals themselves routinely apply that bar at the certification stage. The upshot is that even an adverse resolution of the jurisdictional question would have the effect of resolving the Section 2244(b)(1) circuit conflict that will otherwise continue to evade review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

HECTOR A. DOPICO
INTERIM FEDERAL PUBLIC DEFENDER

/s/ Andrew L. Adler
ANDREW L. ADLER
ASS'T FED. PUBLIC DEFENDER
1 E. Broward Blvd., Ste. 1100
Ft. Lauderdale, FL 33301
(954) 356-7436
Andrew_Adler@fd.org