No. 24-5438

IN THE

Supreme Court of the United States

MICHAEL BOWE,

Petitioner,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Founded in 1958, the National Association of Criminal Defense Lawyers (NACDL) is a non-profit, voluntary professional bar association that works on behalf of criminal-defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL has a nationwide membership of many thousands of members, including private criminal-defense lawyers, public defenders, military-defense counsel, law professors, and judges. In total, NACDL has about 40,000 affiliates. It is the only nationwide professional bar association for both public defenders and private criminal-defense lawyers. NACDL is dedicated to advancing the proper, efficient, and fair administration of justice.

NACDL files numerous amicus briefs each year in this Court and other federal and state courts, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal-defense lawyers, and the criminal-justice system. Consistent with its mission, NACDL is deeply committed to ensuring that habeas law functions as intended—safeguarding the rights of those seeking relief and guaranteeing meaningful access to judicial review.

INTRODUCTION AND SUMMARY OF ARGUMENT

This brief focuses first on whether 28 U.S.C. § 2244(b)(1), which bars habeas applications by state prisoners brought under 28 U.S.C. § 2254 if the same

[1] No counsel for a party authored this brief in whole or in part, and no entity or person (other than amicus curiae, its members, and its counsel) made a monetary contribution intended to fund the preparation or submission of this brief.

claim was raised in a prior application, also applies to claims in second or successive motions to vacate by federal prisoners brought under 28 U.S.C. § 2255. Although six circuits have held that it does (in a mix of precedential and non-precedential decisions), that rule developed in large part due to rushed procedures and other "structural barriers," *In re Bowe*, 144 S.Ct. 1170, 1170 (2024) (Sotomayor, J., respecting denial of petition for writ of habeas corpus). As the history chronicled herein demonstrates, the first couple of circuits that interpreted section 2244(b)(1) as incorporated into section 2255 mentioned the rule only in passing, essentially without any substantive analysis. *See infra* Part I. Moreover, many of those early cases involved prisoners proceeding *pro se*, who understandably had difficulty parsing the interconnected habeas provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Tellingly, once courts began looking more closely at the first question presented, they began reaching the opposite conclusion: The plain text of section 2244(b)(1) applies only to habeas applications by state prisoners and is not incorporated by section 2255(h) for motions to vacate filed by federal prisoners. The government quickly agreed and has maintained that agreement through three presidential administrations.

As further explained in Part II, the development of the rule was especially skewed in the Eleventh Circuit. Unlike other courts of appeals, the Eleventh Circuit imposes procedural hurdles for second or successive motions beyond the ones Congress enacted, such as the required use of a standardized form, lack of briefing or oral argument, and strict deadlines for court decisions. Those hurdles have created a process in which mistakes are not just possible, but inevitable. The upshot is that the Eleventh Circuit's misreading of AEDPA and its

self-imposed constraints make it even harder for prisoners to have their claims meaningfully reviewed in that circuit. Rather than entrench the Eleventh Circuit's flawed process, this Court should hold that section 2244(b)(3)(E) does not deprive it of jurisdiction and that sections 2244(b)(1) and 2255(h) mean precisely what they say.

ARGUMENT

I. THE RULE FROM THE DECISION BELOW IS THE PRODUCT OF UNREASONED DECISIONS FROM MULTIPLE COURTS OF APPEALS

AEDPA sets a high bar for individuals in federal custody seeking to challenge their detention. When a prisoner wishes to collaterally challenge his federal detention, he must do so by filing a motion to vacate under 28 U.S.C. § 2255. If the motion fails, he is allowed another "bite at the post-conviction apple" in specific circumstances. *United States* v. *Barrett*, 178 F.3d 34, 57 (1st Cir. 1999). Specifically, the prisoner may petition "a panel of the appropriate court of appeals" for a certification "as provided in section 2244" to launch a subsequent collateral attack in district court if: (1) there is "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) this Court announces "a new rule of constitutional law" that is "made retroactive to cases on collateral review." 28 U.S.C. § 2255(h). These requirements are often referred to as the "gatekeeping" provisions. *See* Pet. Br.3.

It was under this framework that courts first declared the rule that the bar in section 2244(b)(1) on

second or successive habeas applications under section 2254 also extends to motions to vacate under section 2255. Back in 1999, a federal prisoner filed a second motion to vacate with the relevant district court, which transferred the case to the Sixth Circuit so that it could consider the filing "as a § 2244(b)(3) application for permission to file a successive § 2255 motion to vacate." *Charles* v. *Chander*, 180 F.3d 753, 755 (6th Cir. 1999) (per curiam). The petitioner's argument there focused on whether he could file a habeas application under section 2241 through the so-called saving clause in section 2255. *Id.* at 755-758. Both parties waived oral argument. *Id.* at 754-755. And none of the briefing addressed whether section 2244(b)(1) should be interpreted to bar a second or successive motion to vacate under section 2255.

In its per curiam opinion, the Sixth Circuit declared that the petitioner (Charles) was "not entitled to file a successive § 2255 motion to vacate because he [sought] permission to file the same claims that ha[d] already been denied on the merits." 180 F.3d at 755 (citing § 2244(b)(1)). That was the entirety of the court's reasoning. The Sixth Circuit had not been briefed on the question presented here, and neither party presented any argument on it. It appears that the Sixth Circuit based its interpretation of section 2244(b)(1) on a cursory review of the statute as a way to prematurely dispense with Charles's potential follow-on arguments. And so it was that the majority rule for section 2244(b)(1) was born.

Around the same time, the Seventh Circuit overread a prior decision, *Bennett* v. *United States*, 119 F.3d 468 (7th Cir. 1997), to reach the same conclusion in *Taylor* v. *Gilkey*, 314 F.3d 832 (7th Cir. 2002). *Bennett*, however,

had concluded only that "the phrase 'as provided in section 2244'" incorporated the "standard" and thus the "prima facie showing" requirement of section 2244(b)(3)(C). 119 F.3d at 469. The *Bennett* court was not aware of other cases distinguishing between motions to vacate from federal prisoners and habeas applications from state prisoners, and it could not "think of any reason why" the "prima facie showing" requirement would be any different in the two contexts. *Id.* *Bennett* did not hold that *all* of section 2244 "is equally applicable to § 2255 motions," as *Taylor* later assumed, 314 F.3d at 836. Like other decisions in this line of cases, moreover, *Taylor* did not analyze the scope of the bar in section 2244(b)(1). Rather, *Taylor* (like *Charles*) focused on the proper scope of the saving clause in section 2255. *Id.* at 834-836. The Seventh Circuit spent no more than a couple of sentences on the matter without any substantive analysis of the question presented here. *See id.* at 836. And on top of it all, *Taylor* was litigated by a *pro se* petitioner without the benefit of guidance from counsel to navigate AEDPA's labyrinthine provisions. *Id.* at 833. It was only through this chain of events that the overly muscular interpretation of section 2244(b)(1) became established in a second court of appeals.

In quick succession, other circuits adopted similar interpretations of section 2244(b)(1)—all with effectively no reasoning and often in cases litigated by *pro se* petitioners. In *Green* v. *United States*, 397 F.3d 101 (2d Cir. 2005) (per curiam), a federal prisoner asked the Second Circuit for authorization to file a second or successive motion to vacate under section 2255. *See id.* at 102. In denying the request, the court dropped a footnote stating that, to the extent the *pro se* prisoner raised a claim under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), that claim "must be dismissed as it was previously

adjudicated on the merits in his first section 2255 petition." *Green*, 397 F.3d at 102 n.1 (citing § 2244(b)(1)). That one footnoted sentence was the entirety of the Second Circuit's reasoning on the relevant issue.

The Tenth Circuit followed suit with the unpublished *United States* v. *Card*, 220 F.App'x 847 (10th Cir. 2007). *Card* was also litigated by a *pro se* prisoner, and it too adopted its interpretation of section 2244(b)(1) without significant reasoning. The court's discussion of the issue, in fact, was essentially one sentence that merely quoted the statute and assumed its applicability: "Under 28 U.S.C. §§ 2244(b)(1) and 2255, a 'claim presented in a second or successive habeas corpus application ... that was presented in a prior application shall be dismissed.'" *Id.* at 851 (omission in *Card*).

The Fifth Circuit adopted the same rule with no reasoning in the unpublished *Montalvo* v. *Casterline*, 48 F.App'x 480 (5th Cir. 2002) (per curiam). In assessing whether the petitioner there could proceed under the saving clause, the court noted in a single sentence that he was "precluded" from filing a second or successive motion under section 2255 to "re-rais[e] his … claim" under *Richardson* v. *United States*, 526 U.S. 813 (1999), "because a claim presented in a prior § 2255 motion shall be dismissed." 48 F.App'x at 480 (citing §§ 2244(b)(1), 2255). The Fifth Circuit doubled down on *Montalvo* in deciding *In re Hartzog*, 444 F.App'x 63 (5th Cir. 2011) (per curiam). As in prior cases, the court there merely stated in passing that "[c]laims presented in prior § 2255 motions must be dismissed," with a "*see also*" citation to section 2244(b)(1). *Id.* at 64. The remainder of the court's decision centered on whether the district court had properly treated a motion to vacate as successive in transferring it to the court of appeals. *Id.* at 64-67.

The Third Circuit eventually waded into the fray. In *United States* v. *Winkelman*, 746 F.3d 134 (3d Cir. 2014), two brothers with "a long and protracted litigation history" moved *pro se* to recall the court's mandate and to reinstate their direct appeals, *id.* at 135. In explaining its gatekeeping role under AEDPA, the court of appeals stated that it must "dismiss any claim presented in a second or successive petition that the petitioner presented in a previous application." *Id.* (citing § 2244(b)(1)). Without further analysis of that issue, the Third Circuit went on to consider whether this Court announced a new, retroactive rule of constitutional law in *Alleyne* v. *United States*, 570 U.S. 99 (2013). *Winkelman*, 746 F.3d at 135-136.

After all the decisions just discussed, the sheer number of circuits that had expanded the reach of section 2244(b)(1) soon became a reason, in and of itself, for other courts of appeals to do so. The prime example is *In re Baptiste*, 828 F.3d 1337 (11th Cir. 2016), which provides the foundation for the decision below. In *Baptiste*, the Eleventh Circuit made much of the fact that "several … sister circuits ha[d] applied § 2244(b)(1) to federal prisoners seeking to file a second or successive application under § 2255." *Id.* at 1339. Remarkably, the court took the lack of reasoning in several of the prior decisions by other courts as a *positive* sign that the rule was "so obvious" that it did not require "any analysis." *Id.* (citing *Green*, 397 F.3d at 102 n.1, and *Charles*, 180 F.3d at 758). The Eighth Circuit then relied on *Baptiste* and the cases cited in it to adopt the rule without any additional analysis. *Winarske* v. *United States*, 913 F.3d 765, 768-769 (8th Cir. 2019).

When the Fifth Circuit revisited the issue in its first published opinion on the matter, it likewise noted the growing number of circuits embracing the rule. *In re*

Bourgeois, 902 F.3d 446, 447 (5th Cir. 2018) (collecting cases). In response to the prisoner's argument why section 2244(b)(1) should not be extended to reach motions under section 2255, the Fifth Circuit cited its prior, unpublished decisions in *Montalvo* and *Hartzog*. *See supra* p.6. Then, the court relied heavily on the agreement of "[e]very other circuit to take up the question." *Bourgeois*, 902 F.3d at 447. The Fifth Circuit also relied on "the larger statutory context" and lack of distinctions in the "'legislative history'" to read section 2244(b)(1) as reaching beyond its plain text through section 2244(h). *Id.* at 448.

The Sixth Circuit broke the trend in *Williams* v. *United States*, 927 F.3d 427 (6th Cir. 2019). There, the court stated that "[w]ith regard to § 2244(b)(1), we start and end with the text." *Id.* at 434. The court then conducted a rigorous textual analysis that spilled over three pages. *See id.* at 434-436. It dismissed some of its earlier opinions as having suggested the opposite in dicta, "without any explanation." *Id.* at 435. It thus declared that other circuits' interpretation of section 2244 was "an unjustifiable contravention of plain statutory text." *Id.* at 436.

Williams's analysis was so compelling that it stopped the previously snowballing rule in its tracks, starting with the Ninth Circuit's decision in *Jones* v. *United States*, 36 F.4th 974 (9th Cir. 2022). As the *Jones* court explained, "the Sixth Circuit has the better of the debate," *id.* at 982, as "policy considerations, to the extent they cut against the text at all, are insufficient to overcome the language and structure of § 2244(b)(1)," *id.* at 984.

The Fourth Circuit followed suit with *In re Graham*, 61 F.4th 433 (4th Cir. 2023). The *Graham* court "join[ed]

the ranks of the Sixth and Ninth Circuits" because "the plain text of § 2244(b)(1) clearly circumscribes the provision's applicability." *Id.* at 438. Thus, the courts of appeals that have most recently—and most carefully—examined the issue all uniformly agree that section 2244(b)(1) does not apply to second or successive motions to vacate by federal prisoners.

Even the government was persuaded. The Solicitor General conceded the issue in the brief in opposition in *Avery* v. *United States*, 140 S.Ct. 1080 (2020). Both *Jones* and *Graham* noted the government's position, with *Jones* stating that the "government … takes the position that … § 2244(b)(1) does not cover § 2255 motions," 36 F.4th at 982, and *Graham* observing that "[i]n their briefing, Graham and the Government agree that § 2244(b)(1) does not bar Graham's … claim," 61 F.4th at 437. Indeed, the government has now conceded the issue consistently across three administrations: President Trump's first term, in *Avery*; President Biden's term, with *In re Bowe*, 144 S.Ct. 1170 (2024); and here, during President Trump's second term.[2]

The government and the Fourth, Sixth, and Ninth Circuits correctly concluded that section 2255(h) does not incorporate the preclusion provision in section 2244(b)(1). Ultimately, although petitioner's position is the minority rule, it is better aligned with the plain text of sections 2244(b)(1) and 2255(h), and it is better supported by more rigorous legal analysis.

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[2] The *In re Bowe* decision just cited was this Court's ruling on petitioner's earlier petition for a writ of habeas corpus based on this Court's jurisdiction to entertain original habeas petitions. 144 S.Ct. at 1171.

II. THE ELEVENTH CIRCUIT'S ENDORSEMENT OF THE OVERLY HARSH RULE IS DUE TO A RUSHED PROCESS AND OTHER SELF-IMPOSED CONSTRAINTS

As mentioned, a prisoner can clear AEDPA's gatekeeping requirements either by offering new evidence establishing actual innocence or by relying on a new, retroactive rule of constitutional law. 28 U.S.C. § 2255(h). Both paths are difficult to satisfy, but the second presents a distinct challenge: It is rare for this Court both to announce a new rule of constitutional law and to make it retroactive before the expiration of the one-year time limit in section 2255(f). *See Dodd* v. *United States*, 545 U.S. 353, 358-359 (2005) (discussing the one-year limit). When such an announcement happens, it can trigger meritorious claims because a retroactive rule, by its nature, often means that a certain category of individuals was convicted or sentenced unconstitutionally. Take, for instance, *Johnson* v. *United States*, 576 U.S. 591 (2015). There, this Court struck down the Armed Career Criminal Act's residual clause as unconstitutionally vague. *Id.* at 606. Within a year, in *Welch* v. *United States*, 578 U.S. 120, 130 (2016), the Court made *Johnson* retroactive, creating a path for prisoners whose sentences had been enhanced under the residual clause to challenge their now-unlawful sentences through second or successive motions to vacate under section 2255.

Congress put strict limits on how courts of appeals handle these cases. Under section 2255(h), a court of appeals must "certify" that the second or successive motion meets the requirements of 28 U.S.C. § 2244, the provision governing state prisoners' habeas applications under 28 U.S.C. § 2254. The statute further mandates that a court of appeals resolve an application within 30 days.

28 U.S.C. § 2244(b)(3)(D). Faced with such a demanding deadline, courts must move fast.

Congress struck a careful balance, allowing only a narrowly defined set of important claims to disrupt finality while pressuring courts to resolve them fairly yet quickly. The Eleventh Circuit, however, has disregarded that balance, throwing extra roadblocks into the process so as to make it even harder for habeas applicants to get a fair hearing. *See St. Hubert* v. *United States*, 140 S.Ct. 1727, 1727-1728 (2020) (Sotomayor, J., respecting denial of certiorari).

For starters, most circuits treat the 30-day deadline for a decision as aspirational, recognizing that meaningful review sometimes takes longer due to a variety of circumstances beyond the courts' control. *See Orona* v. *United States*, 826 F.3d 1196, 1198-1199 (9th Cir. 2016) (per curiam); *In re Siggers*, 132 F.3d 333, 336 (6th Cir. 1997). But the Eleventh Circuit enforces it as an inflexible deadline, no matter the complexity of the case or other circumstances. *E.g.*, *In re Henry*, 757 F.3d 1151, 1157 n.9 (11th Cir. 2014); *see also In re Williams*, 898 F.3d 1098, 1102-1103 (11th Cir. 2018) (Wilson, J., specially concurring) (explaining the history behind the Eleventh Circuit's treatment of the 30-day deadline). And while other circuits allow briefing, which gives applicants a chance to explain their claims and provide the court with a fuller picture, the Eleventh Circuit reduces the process to a standardized form, with no response from the government, no oral argument, and no real opportunity for the applicant to be heard. *See Williams*, 898 F.3d at 1101-1102 (Wilson, J., specially concurring); *United States* v. *Seabrooks*, 839 F.3d 1326, 1349-1350 (11th Cir. 2016) (Martin, J., concurring in the judgment).

Moreover, instead of conducting the statute's limited "prima facie" review, the Eleventh Circuit digs deeply into the merits of claims—often in *pro se* cases with no briefing—combing through records, and issuing published decisions despite the rushed process. *St. Hubert*, 140 S.Ct. at 1729 (Sotomayor, J., respecting denial of certiorari); *see also Williams*, 898 F.3d at 1105-1110 (Martin, J., specially concurring); *In re Hoffner*, 870 F.3d 301, 310 n.13 (3d Cir. 2017). Those decisions don't just affect the applicant; they become binding precedent, even in cases on direct appeal. *United States* v. *St. Hubert*, 909 F.3d 335, 346 (11th Cir. 2018), *abrogated on other grounds by United States* v. *Taylor*, 596 U.S. 845 (2022); *see also St. Hubert*, 140 S.Ct. at 1727-1728 (Sotomayor, J., respecting denial of certiorari). That is *not* the system Congress created.

The impact of the Eleventh Circuit's approach has become especially clear over the last decade. In the three months after *Welch*, which (as noted) confirmed the retroactivity of the rule announced in *Johnson*, the Eleventh Circuit received a number of applications—mostly from *pro se* prisoners who were required to use a standardized form that barred attachments (except in death-penalty cases). *In re Jones*, 830 F.3d 1295, 1301-1302 (11th Cir. 2016) (Rosenbaum & Jill Pryor, JJ., concurring). During that short period, the Eleventh Circuit issued 33 published decisions—many of them fractured—without full briefing or adversarial testing. Kahn & Song, *A Touchy Subject: The Eleventh Circuit's Tug-of-War Over What Constitutes Violent "Physical Force,"* 72 U. Miami L. Rev. 1130, 1143 & nn.62-63 (2018). Hence, in a rush to comply with the 30-day deadline (which, again, other circuits treat as aspirational), the court created binding precedent based solely on forms submitted by unrepresented prisoners. This example

demonstrates how the Eleventh Circuit's process has led to rushed and poorly reasoned decisions.

Congress imposed high hurdles for second or successive motions to vacate under section 2255 and paired them with an expedited appellate authorization process. That reality demands careful and deliberate review. The Eleventh Circuit has done the opposite, resolving cases hastily without meaningful input from the parties, and often exceeding the statute's limited "prima facie" inquiry.

But there is more. At the heart of this case is the Eleventh Circuit's expansive interpretation of section 2244, which has imposed yet another layer of procedural obstacles and further restricted meaningful review. That approach treats nearly all of section 2244 as part of the process for motions to vacate under section 2255. *See In re Bradford*, 830 F.3d 1273, 1275-1277 & n.1 (11th Cir. 2016). The only exception is the standard for the prima facie showing a habeas applicant must make under section 2244(b)(2), which applies only to habeas applications by state prisoners under section 2254. *Id.* Otherwise, in the Eleventh Circuit's view, the incorporation in section 2255(h) includes both section 2244(b)(1), which prohibits applicants from raising claims they previously presented, and section 2244(b)(3)(E), which forecloses rehearing and even review by this Court. *Id.*

The result is that, on top of the already stringent limitations Congress imposed, the Eleventh Circuit's anomalous procedures and flimsy reasoning have effectively foreclosed even meritorious claims from being meaningfully considered, no matter how clear they may be.

If the Court affirms here, the ruling will only exacerbate the Eleventh Circuit's flawed practices. That

cannot be what Congress intended, especially given its acknowledgment that some claims demand meaningful review. To be sure, finality matters in the context of section 2255. But finality cannot trump the bedrock principle that individuals with legitimate claims deserve fair consideration.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APRIL 2025