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

BRIEF OF FEDERAL COURTS SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The *amici* signatories are enumerated in the Appendix. *Amici* are law professors who teach and write in the field of federal jurisdiction. Their academic work includes a focus on collateral review of convictions in federal court and the scope of Congress's power to limit this Court's jurisdiction to answer questions of federal law under Article III's Exceptions Clause. *Amici* are deeply familiar with the academic literature on the Exceptions Clause. They come together in shared belief that Congress's attempt to remove this Court's jurisdiction over this particular case exceeded its Exceptions Clause power—and that the Court should avoid that difficult constitutional question in this case. *Amici* are interested in sharing the scholarship on the Exceptions Clause to inform this Court's resolution of the jurisdictional question presented.

SUMMARY OF ARGUMENT

Under Article III of our Constitution, this Court has "appellate Jurisdiction" over cases "arising under this Constitution" and "the Laws of the United States," subject to "such Exceptions, and under such Regulations as the Congress shall make." U.S. Const. art. III, § 2. Scholars of federal jurisdiction

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

have persuasively argued that Congress's power under the Exceptions Clause to limit this Court's jurisdiction is broad, but not plenary. In particular, Congress cannot use its power to "destroy the essential role of the Supreme Court in the constitutional plan." Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1364–65 (1953). This "essential functions" thesis finds support in the text and structure of the Constitution and in accounts of the adoption of Article III at the Constitutional Convention.

One of this Court's "essential functions" is maintaining the uniformity of federal law. This Court recognized in some of its earliest decisions "the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347–48 (1816). Three features of the Constitution confirm this Court's role securing uniformity of federal law: Article III's requirement of "*one* supreme Court," U.S. Const. art. III, § 1 (emphasis added); Congress's power to create "Tribunals *inferior* to the supreme Court," U.S. Const. art. I, § 8, cl. 9 (emphasis added) & art. III, § 1; and the Supremacy Clause's requirement that federal law be the "supreme Law of the Land," U.S. Const. art. VI, cl. 2.

Under this view of the Court's essential functions, construing 28 U.S.C. § 2244(b)(3)(E) to apply to this case would raise grave constitutional

concerns. Interpreting § 2244(b)(3)(E) to remove this Court's appellate jurisdiction to review the Eleventh Circuit's dismissal under 28 U.S.C. § 2244(b)(1) of Petitioner Michael Bowe's application to file a second or successive motion to vacate his federal conviction would exceed Congress's Exceptions Clause power. The circuits are split over whether § 2244(b)(1)'s procedural bar applies to federal prisoners seeking to bring second or successive challenges to their convictions under 28 U.S.C. § 2255. *See In re Bowe*, 601 U.S. __, 144 S. Ct. 1170, 1170 (2024) (Sotomayor, J., respecting the denial of the petition for a writ of habeas corpus). Holding that § 2244(b)(3)(E) validly withdraws the Court's appellate jurisdiction in this case would leave no viable way for the Court to resolve the split. Unlike state prisoners, who may directly petition this Court for habeas corpus, *see Felker v. Turpin*, 518 U.S. 651, 661–62 (1996), there are serious questions whether federal prisoners may do the same after *Jones v. Hendrix*, 599 U.S. 465 (2023).

The Court should avoid these grave and difficult constitutional questions by construing § 2244(b)(3)(E) *not* to apply to this particular case.

ARGUMENT

I. Congress Cannot Use Its Power Under Article III's Exceptions Clause to Prevent this Court from Discharging Its Essential Constitutional Functions.

Article III vests the "judicial Power of the United States" in "one supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish." U.S. Const., art. III, § 1. Article III extends this federal judicial power to several categories of cases and controversies and provides that the one "supreme Court" created by Article III "shall have original Jurisdiction" over cases within a subset of these categories. *Id.* § 2. "In all other cases" to which the federal judicial power extends, Article III provides that "the supreme Court shall have appellate Jurisdiction"—but "with such Exceptions, and under such Regulations as the Congress shall make." *Id.*

Congress's power to make "Exceptions" to this Court's appellate jurisdiction, however, is not plenary. This Court has already recognized at least one case in which Congress went too far. *See United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1872). And "most scholars agree" that Congress's Exceptions Clause power "is limited by constitutional sources other than Article III (known as 'external' limits)." Tara Leigh Grove, *The Exceptions Clause as a Structural Safeguard*, 113 Colum. L. Rev. 929, 934 (2013). For example, Congress could not strip

this Court of appellate jurisdiction "over suits brought by Black or female plaintiffs, as that would surely violate the external constraint posed by the equal protection component of the Fifth Amendment's Due Process Clause." Daniel Epps & Alan M. Trammell, *The False Promise of Jurisdiction Stripping*, 123 Colum. L. Rev. 2077, 2088–89 (2023).[2]

But in addition to external limits, Congress's Exceptions Clause power is also subject to *internal* constraints. There is a longstanding view, first articulated by Henry Hart, that Congress's power to make "exceptions" to this Court's appellate jurisdiction "must not be such as will destroy the essential role of the Supreme Court in the constitutional plan." Hart, *supra*, at 1364–65. Stated differently, the Exceptions Clause "does not give Congress power thus to negate the essential functions of the Supreme Court." Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. Pa. L. Rev. 157, 202 (1960).

This intuitive internal constraint on Congress's Exceptions Clause power, which "has become known as the 'essential functions' thesis," Epps &

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[2] *See also* Henry P. Monaghan, *Jurisdiction Stripping Circa 2020: What the Dialogue (Still) Has to Teach Us*, 69 Duke L.J. 1, 16–17 (2019) ("On the 'external' side, few (I suppose) would now dispute, for example, that many litigant-framed limits on an Article III court's jurisdiction (e.g., discriminating against black or Catholic litigants) are invalid and would be disregarded).").

Trammell, *supra*, at 2089, has gained significant support and development within the academic community. *See, e.g.*, Ratner, *supra*, at 160–201 (grounding the "essential functions" limitation in structural and historical sources); Lawrence Gene Sager, *Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17, 43–44 (1981) (addressing "General Objections to the Essential Function Claim" and analyzing "Review of State Conduct as an Essential Function of the Federal Judiciary"); Monaghan, *supra* note 1, at 13 ("I think Hart got it right."); Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 Harv. C.R.-C.L. L. Rev. 129, 135 (1981) (stating that "a strong argument may be made" for the essential functions limitation); *see also* William French Smith, *Constitutionality of Legislation Withdrawing Supreme Court Jurisdiction to Consider Cases Relating to Voluntary Prayer*, 6 Op. O.L.C. 13, 22 (1982) (hereinafter "Smith OLC Opinion") ("[I]t must be concluded that the Exceptions Clause does not authorize Congress to interfere with the Court's core functions in our constitutional system.").

Moreover, in *Felker v. Turpin*, 518 U.S. 651 (1996), three Justices specifically noted that this Court's essential constitutional functions may constrain Congress's Exceptions Clause power. Although 28 U.S.C. § 2244(b)(3)(E) removes this Court's authority "to entertain an appeal or a petition for a writ of certiorari to review a decision of a

court of appeals exercising its 'gatekeeping' function over" a state prisoner's "second [habeas] petition," *Felker* held that § 2244(b)(3)(E) did not exceed Congress's Exceptions Clause power because it did not repeal *other* avenues for review by this Court—including the Court's authority to entertain original habeas petitions. 518 U.S. at 661–62. But Justice Souter—joined by Justice Stevens and Justice Breyer—wrote separately to note that "if it should later turn out that statutory avenues other than certiorari for reviewing a gatekeeping determination were closed, the question whether the statute exceeded Congress's Exceptions Clause power would be open." *Id.* at 667 (Souter, J., concurring). And for that "open" question, Justice Souter cited both Hart and Ratner's "articulat[ions]" of the "'essential functions' limitation on the Exceptions Clause." *Id.* n.2.

To be sure, other scholars have opined that there are *no* internal constraints on Congress's Exceptions Clause power.[3] But under that plenary view, troubling possibilities abound. As just one example, if Congress "has plenary control over the appellate jurisdiction of the Supreme Court," then Congress

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[3] *See, e.g.*, Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 Stan. L. Rev. 895, 906 (1984); Martin H. Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 Vill. L. Rev. 900, 915 (1982); Herbert Wechsler, *The Courts and the Constitution*, 65 Colum. L. Rev. 1001, 1005 (1965).

could "[d]eprive the Supreme Court of *all* appellate jurisdiction and abolish the lower federal courts, thereby confining the judiciary of the United States to a single court exercising original jurisdiction over cases affecting ambassadors, public ministers, and consuls, or in which a state is a party." Ratner, *supra*, at 158 (emphasis added). Such legislative exercises of the Exceptions Clause power may very well "destroy the coordinate judicial branch and thus upset the delicately poised constitutional system of checks and balances"—let alone "profoundly alter the structure of American government." *Id.*

A plenary reading of the Exceptions Clause is also difficult to square with constitutional text, structure, and history.

Text. "[T]he concept of an 'exception' was understood by the Framers, as it is defined today, as meaning an exclusion from a general rule or law." Smith OLC Opinion at 16. It is therefore doubtful that the Exceptions Clause grants Congress plenary power over this Court's appellate jurisdiction, because "[a]n 'exception' cannot, as a matter of plain language, be read so broadly as to swallow the general rule in terms of which it is defined." *Id.*[4]

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[4] *See also* Hart, *supra*, at 1364–65 ("You would treat the Constitution, then, as authorizing exceptions which engulf the rule, even to the point of eliminating the appellate jurisdiction altogether? How preposterous!"); Epps & Trammell, *supra*, at 2089 ("As some have articulated the point, 'exceptions' to the Supreme Court's jurisdiction must remain just

To elaborate, "[d]ictionaries in existence at the time of the Constitutional Convention defined an 'exception' as an exclusion from the application of a general rule or description." Ratner, *supra*, at 168 (collecting authorities). And in the legal context of "a provision in a deed or lease withholding certain property from the operation of the conveyance," an exception "could not include all of the property otherwise conveyed," nor could it "extend to an essential part of the property conveyed." *Id.* at 169–70. Thus, "an exception"—as that term was understood during the Founding—could neither "nullify the rule or description that it limits" nor "destroy the essential characteristics of the subject to which it applies." *Id.* And so, "construed on the basis of gen-

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that—exceptions can't swallow the rule."); Monaghan, *supra* note 1, at 17–18 ("[T]he Exceptions Clause, which as a textual matter seems to connote something of relatively minor importance, is a strikingly oblique way to endow legislators with the expansive authority to eviscerate completely a central responsibility of another constitutionally ordained branch of government!"); Sager, *supra*, at 44 ("An 'exception' implies a minor deviation from a surviving norm; it is a nibble, not a bite. And there is reason to think that this sense of the term was, if anything, clearer at the time the Constitution was drafted than now."); Tribe, *supra*, at 135 ("[T]he text [of the Exceptions Clause] suggests that a total abolition of appellate jurisdiction would be impermissible; in particular, the reference to exceptions and regulations indicates that something substantial is to remain after Congress' subtractions have been performed."); William Baude, *Reflections of A Supreme Court Commissioner*, 106 Minn. L. Rev. 2631, 2644–45 (2022) ("[I]n appellate jurisdiction cases, the jurisdiction stripping has to be something we could comfortably describe as an 'exception.'").

eral usage" at the time of the Constitutional Convention, the Exceptions Clause "does not give Congress plenary control over the appellate jurisdiction of the Supreme Court." *Id.* at 171.[5]

Structure. The Exceptions Clause is just one of several provisions within Article III that address the structure of the federal judiciary. Another such provision is the Vesting Clause, which commands that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const., art. III, § 1.

By providing for only "*one* supreme Court," *id.* (emphasis added), the Vesting Clause "rul[es] out the possibility of multiple supreme courts"—a notable departure from "the British model of multiple courts of superior jurisdiction." James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 Tex. L. Rev. 1433, 1453 (2000). And the Vesting Clause imposes a hierarchy: any "inferior" court that Congress establishes or ordains must be subordinate to this "one supreme Court"—the *only* court created

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[5] Professor Ratner also noted, based on the same Founding-era dictionaries, that (1) "[a] 'regulation' in the latter part of the eighteenth century, as today, was a rule imposed to establish good order"; and (2) such an understanding of the term "regulation" "does not ordinarily include the power to prohibit the entire sphere of activity that is subject to regulation." *Id.* at 170–71.

by the Constitution. U.S. Const., art. III, § 1; *see also id.* art. I, § 8, cl. 9 ("Congress shall have Power . . . To constitute Tribunals inferior to the Supreme Court.").

These features of the Vesting Clause constrain Congress's Exceptions Clause power. The requirement that there be only "one supreme Court" must mean that Congress cannot use its Exceptions Clause power to render some *other* court (or courts) "supreme."[6] Similarly, the "requirement of lower court inferiority"—and this Court's superiority—"den[ies] Congress the power" to diminish this Court's jurisdiction in a way that would "place subordinate tribunals beyond the reach of th[is] Court in the exercise of its supervisory function." Pfander, *supra*, at 1453; *see also id.* at 1501 (arguing that "the constitutional requirement that the Court remain supreme in relation to lower courts . . . operate[s] as a constitutional check on" Congress's Exceptions Clause powers). Through these requirements, the Vesting Clause makes clear that Congress's Exceptions Clause power cannot be plenary.[7]

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[6] *See* Laurence Claus, *The One Court that Congress Cannot Take Away: Singularity, Supremacy, and Article III*, 96 Geo. L.J. 59, 61 (2007) ("If the judicial Power is to be vested in only *one* supreme Court and is to extend to the matters listed in Article III, then the 'one supreme Court' must have ultimate power to decide the issues arising in all Article III matters.").

[7] *See also* Sager, *supra*, at 42 (asserting that "article III itself and the Constitution broadly considered contemplate a

History. The events at the Constitutional Convention surrounding the adoption of Article III and the Exceptions Clause are also worth noting. "The language 'with such exceptions and under such Regulations as Congress may make' first appeared in the draft which the Committee on Detail reported to the Convention." Ratner, *supra*, at 172 (citing 2 M. Farrand, Records of the Constitutional Convention 186 (1911)). Thereafter, the Convention rejected, by a 6 to 2 vote, a resolution that would have amended that language to: "the judicial power shall be exercised in such manner as the Legislature shall direct." *Id.* (citing 2 Farrand, *supra*, at 425, 431). "The Convention thus *rejected* a clear statement of plenary congressional power over the Court's appellate jurisdiction." Smith OLC Opinion at 18 (emphasis added). "The defeat of the amendment thus may reasonably be construed as a rejection by the Convention of plenary congressional control over the appellate jurisdiction of the Court." Ratner, *supra*, at 173.

The stark difference in how the Framers treated inferior federal courts, relative to how they viewed this Court, is also instructive. "While the necessity of a Supreme Court was accepted without signifi-

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basic framework of judicial authority" and "Congress cannot exclude federal jurisdiction to the point of dismantling that framework"); Monaghan, *supra* note 2, at 17 ("[T]he textual argument [for plenary power] is quite weak if one reads the [Exceptions] clause in the context of the overall structure and relationships created by the Constitution.").

cant dissent among the Framers, there was vigorous disagreement over whether inferior federal courts could be provided." Smith OLC Opinion at 18. Though the Convention initially approved a constitutional provision establishing inferior federal courts, it later struck that provision. *See* Ratner, *supra*, at 161 (citing 1 Farrand, *supra*, at 95, 104–05, 119, 124–25). Eventually, the Convention reached a compromise that left the creation of inferior federal courts to the discretion of Congress. *See id.* (citing 1 Farrand, *supra*, at 125; 2 Farrand 38–39, 45–46, 424). Thus, unlike this Court—which "was viewed as a necessary part of the constitutional structure and was established by the Constitution itself"—inferior federal courts "were viewed as an optional part of the government and were authorized but not established by the Constitution." Smith OLC Opinion at 19.

Under a plenary reading of the Exceptions Clause, however, "the power of Congress over the Supreme Court would be virtually indistinguishable from its power over inferior federal courts." *Id.* "Just as Congress could decline to create inferior federal courts, it could, in the guise of creating 'exceptions' to the Supreme Court's appellate jurisdiction, deny the Supreme Court the vast majority of the judicial powers which the Framers insisted 'shall be vested' in the federal judiciary." *Id.* Such a reading of the Exceptions Clause is difficult to reconcile "with the stark difference in treatment which the Framers accorded to the Supreme Court and the inferior federal courts." *Id.* Given the in-

tense debate at the Convention over inferior federal courts—and the absence of any similar disagreement regarding the Supreme Court—"it seems highly unlikely that the Convention would have adopted without comment a provision which, for most practical purposes, would place the Supreme Court and the inferior federal courts in the same position vis-à-vis Congress." *Id.*[8]

These are just some of the considerations that militate against a plenary understanding of the Exceptions Clause and in favor of an "essential functions" limitation on Congress's power over this Court's appellate jurisdiction. Of course, the Exceptions Clause does not specifically identify what this Court's essential functions are, nor does it "directly establish a precise boundary around a core of irreducible Supreme Court appellate jurisdiction." Sager, *supra*, at 45. "[B]ut this lack of an obvious answer merely invites an application of the tools of constitutional interpretation," wherein we "must draw on other constitutional resources." *Id.* at 44–45. And as explained below, when we apply these interpretive tools and resources, at least one of this Court's essential constitutional functions is readily apparent: ensuring the uniform application of federal law.

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[8] *See also id.* at 19–21 (positing that a plenary view of Congress's Exceptions Clause power "cannot easily be reconciled with" the Framers' documented views regarding the separation of powers).

II. Congress Cannot Use Its Exceptions Clause Power to Prevent this Court from Ensuring the Uniformity of Federal Law.

This Court and scholars alike have long recognized that "maintaining the uniformity and supremacy of federal law" is one of the Court's "essential functions." Ratner, *supra*, at 184. As Justice Story explained over two hundred years ago in *Martin v. Hunter's Lessee*, the Constitution vests this Court with appellate jurisdiction due to "the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution." 14 U.S. at 347–48. Inferior courts might otherwise reach "jarring and discordant judgments" about federal law with no court to "harmonize them into uniformity." *Id.* at 348.

Congress thus cannot use its Exceptions Clause power "to deprive the judiciary of the Court's basic leadership." Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 Stan. L. Rev. 817, 837 (1994) (footnote omitted). "To be truly 'supreme' . . . , the Court must . . . have subject matter jurisdiction sufficiently broad to provide general leadership in defining federal law." *Id.* Three structural features of the Constitution make clear this limitation on Congress's Exceptions Clause power: Article III's Vesting Clause, Congress's Article I power to create only "inferior" tribunals and Article III power to create only "inferior" courts, and the Supremacy Clause.

First, the Vesting Clause imbues the federal judicial power "in *one* supreme Court," as discussed above. U.S. Const. art. III, § 1 (emphasis added). The requirement of "one supreme Court" serves to ensure uniformity. As Alexander Hamilton explained in Federalist No. 22, "[t]o produce uniformity in these determinations" of federal law, cases "ought to be submitted, in the last resort, to one SUPREME TRIBUNAL." Alexander Hamilton, Federalist No. 22. A single supreme tribunal "avoid[s] the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories." *Id.*

Evidence from the Constitutional Convention shows that the choice to establish one Supreme Court was deliberate. The Framers arrived at the language of the Vesting Clause after rejecting a proposal "for the creation of a national judiciary, to consist of one or more supreme tribunals." Pfander, *supra*, at 1452 (quotation omitted). Thus, in providing for one, and only one, "supreme" court, "the Framers appear to have contemplated that the Supreme Court was to play a distinctive role as the hierarchical leader of the judicial department." *Id.*

That "distinctive" leadership role must include the ability to ensure the uniformity of federal law. The reason is straightforward: if Congress could divest this Court of its ability to resolve conflicting interpretations of federal law among the inferior courts, there would no longer be only "one supreme Court" as mandated by the Vesting Clause. Instead, multiple inferior courts would have the last

word on federal law; in effect, there would be multiple supreme courts, each reigning over its own geographic territory, with no means (or reason) to reconcile conflicts between them.

Second, both Article I and Article III limit Congress to establishing courts "inferior" to this Court. Article I authorizes Congress to "constitute Tribunals *inferior* to the supreme Court," U.S. Const. art. I, § 8 (emphasis added), and Article III authorizes Congress to vest some part of "the judicial power of the United States" in "*inferior* Courts." U.S. Const. art. III, § 1 (emphasis added).

Scholarship on the text and history of these clauses reveals that they mean this Court must have the final word on issues of federal law. Professor Pfander has shown that this "requirement of lower court inferiority appears to cement the Court's distinctive role by denying Congress the power to place subordinate tribunals beyond the reach of the Court in the exercise of its supervisory function." Pfander, *supra*, at 1453. And Professor Claus has shown that "[i]f supremacy in Article III means power to give ultimate judgment, then no inferior court should be vested with power to have the last word on a matter that falls within the judicial Power of the United States." Claus, *supra*, at 69. By requiring this Court to have the final say on issues of federal law, these constitutional provisions also bestow on this Court the supervisory function of resolving conflicting interpretations of federal law among its inferiors.

Third, the Supremacy Clause provides that "[t]his Constitution, and the Laws of the United States which shall be made in pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." U.S. Const. art. VI cl. 2. However, "[t]he supremacy clause standing alone . . . is no more than an exhortation. A tribunal with nationwide authority is needed to interpret and apply the supreme law." Ratner, *supra*, at 160. Article III makes the Supreme Court the "constitutional instrument for implementing the supremacy clause" by giving it "appellate jurisdiction over cases involving the supreme law of the land whether those cases are initiated in state or federal courts." *Id*. at 160–61.

Importantly, this Court's early cases acknowledged its role in enforcing the Supremacy Clause *by securing uniform interpretation of supreme federal law*. In *Cohens v. Virginia*, for example, Justice Marshall upheld the Court's power to review on writ of error a state court criminal judgment, writing: "the necessity of uniformity, as well as correctness in expounding the constitution and laws of the United States, would itself suggest the propriety of vesting in some single tribunal the power of deciding, in the last resort, all cases in which they are involved." 19 U.S. (6 Wheat.) 264, 416 (1821). And in *Ableman v. Booth*, this Court asserted its power to review state court judgments granting habeas corpus to persons in federal custody based on the Supremacy Clause. 62 U.S. (21 How.) 506, 517–18 (1858). Explaining the need for a single tri-

bunal to "finally and conclusively decide[ ]" federal law issues, the Court explained: "Without such a tribunal, it is obvious that there would be no uniformity of judicial decision; and that the supremacy, (which is but another name for independence,) so carefully provided in the clause of the Constitution above referred to, could not possibly be maintained peacefully, unless it was associated with this paramount judicial authority." *Id.* at 518.

To be sure, the constitutional requirement that this Court have the final word on federal law does not mean it must have appellate jurisdiction over every case that presents a federal issue. Congress undoubtedly has broad power to limit the Court's appellate jurisdiction. Congress could, for instance, impose issue-neutral criteria such as an amount-in-controversy requirement. As one historical example, the Judiciary Act of 1789 imposed a then-substantial $2,000 amount-in-controversy requirement on the Court's appellate jurisdiction. Pfander, *supra*, at 1467–68.

Nor does the Constitution specify a particular mode of review. The Judiciary Act of 1789 "required" the Court "to review every case that came before it on appeal." Grove, *supra*, at 949. In 1891, Congress "dramatically expanded the Supreme Court's appellate jurisdiction but also created discretionary certiorari review . . . to ensure that the Court could establish uniform federal rules in broader classes of cases." *Id.* And of course, in *Felker*, this Court concluded that it retained appellate jurisdiction under Article III because it could

grant a state prisoner's petition for habeas corpus, even if 28 U.S.C. § 2244(b)(3)(E) did remove the Court's "authority to entertain an appeal or a petition for a writ of certiorari to review a decision of a court of appeals exercising its 'gatekeeping' function over a second petition." 518 U.S. at 661.

But at bottom, the Constitution denies Congress the power to remove issues of federal law from this Court's jurisdiction entirely. Such jurisdiction-stripping legislation would create more than one Supreme Court, elevate inferior tribunals above this Court, and turn the Supremacy Clause into mere "exhortation." Ratner, *supra*, at 160. The structure of the Constitution confirms the heart of the essential functions thesis: that this Court must have some way to supervise lower federal courts and secure a uniform interpretation of federal law. There cannot be questions of federal law that some court can resolve, but this Court cannot.

III. The Court Should Avoid the Grave Questions About Congress's Exceptions Clause Power Presented by this Case.

This case raises grave questions about whether Congress can strip this Court of jurisdiction to resolve conflicts among the inferior federal courts of appeals about the meaning of a federal statute, 28 U.S.C. § 2244(b). The Court may avoid these questions by construing § 2244(b)(3)(E) *not* to apply to this particular case. *See* Br. of Pet. at 44–48. And as explained below, the *other* circuit splits that

have arisen regarding the interpretation of § 2244(b) illustrate that the case for avoidance is especially strong here.

Section 2244(b), part of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), requires prisoners filing a "second or successive habeas corpus application under section 2254" to "move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. § 2244(b)(3). The federal courts of appeals play a gatekeeping role to determine whether prisoners "make[ ] a prima facie showing" that the second or successive application either "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court" or relies on facts that "could not have been discovered previously through the exercise of due diligence." 28 U.S.C. § 2244(b)(2), (3).

Section 2244(b) further provides that the court of appeals' gatekeeping determinations "shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E). This provision purports to "remove [this Court's] authority to entertain an appeal or a petition for a writ of certiorari to review a decision of a court of appeals exercising its 'gatekeeping' function over a second petition." *Felker*, 518 U.S. at 661.

This restriction on the Court's ability to superintend the inferior courts of appeals has led to circuit

splits over the interpretation of § 2244. Some circuits say the prima facie standard "does not direct the appellate court to engage in a preliminary merits assessment." *See Ochoa v. Sirmons*, 485 F.3d 538, 541 (10th Cir. 2007) (per curiam). Others "reach[ ] beyond" the question whether a prisoner's application met the prima facie standard to "mak[e] a decision about whether the prisoner would win if [the court] let him file his § 2255 motion in district court." *United States v. St. Hubert*, 918 F.3d 1174, 1206–07 (11th Cir. 2019) (en banc) (Martin, J., dissenting from the denial of rehearing en banc).

And that is not the only split that has emerged. Section 2244 states that "[t]he courts 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." 28 U.S.C. § 2244(b)(3)(D). Most circuits have held that "they are not strictly bound by the thirty-day rule." *In re Williams*, 898 F.3d 1098, 1102 n.5 (11th Cir. 2018) (Wilson, J., specially concurring) (collecting authority). But the Eleventh Circuit has mandated that it obey the 30-day deadline, giving it a very short timetable to resolve these important requests. *See id.* at 1103. The Eleventh Circuit also publishes far more precedential decisions on applications for leave to file a second or successive petition than any other circuit. *St. Hubert*, 918 F.3d at 1191 (Jordan, J., concurring in the denial of rehearing en banc). The Eleventh Circuit's uniquely compressed timeline heightens the risk of error not just

for the prisoner requesting permission to proceed, but also for all other prisoners bound by the error in future cases.

The Eleventh Circuit is thus "significantly out of step with other courts in how it approaches applications seeking authorization to file second or successive habeas petitions." *St. Hubert v. United States*, 140 S. Ct. 1727, 1729 (2020) (Sotomayor, J., respecting the denial of certiorari). This Court would ordinarily resolve a division like this, but § 2244(b)(3)(E) limits its ability to do so.

Petitioner Michael Bowe's case raises another circuit split: whether the procedural bar in 28 U.S.C. § 2244(b)(1) applies to federal prisoners at all. That question has divided the courts of appeals six to three. *See In re Bowe*, 144 S. Ct. at 1170 (Sotomayor, J., respecting the denial of the petition for a writ of habeas corpus); *Avery v. United States*, 140 S. Ct. 1080, 180 (2020) (Kavanaugh, J., respecting denial of certiorari). Federal prisoners bringing second or successive claims in § 2255 motions in the Second, Third, Fifth, Seventh, Eighth, and Eleventh Circuits are subject to dismissal under § 2244(b)(1); federal prisoners in the Fourth, Sixth, and Ninth Circuits are not. *See In re Bowe*, 144 S. Ct. at 1170.

The split at issue in this case is unique. The splits over the prima facie standard and the 30-day deadline affect second-or-successive applications by both state and federal prisoners. *See, e.g.*, *Ochoa*, 485 F.3d at 546 (applying prima facie standard to

grant state prisoner leave to file a second or successive habeas petition). By contrast, the split in this case—whether § 2244(b)(1)'s procedural bar applies to federal prisoners—affects *only* federal prisoners. No state prisoner's application to a court of appeals could present a justiciable question whether § 2244(b)(1) applies to federal prisoners.

The uniqueness of this split strengthens the case for constitutional avoidance. Under AEDPA, this Court retains its power to grant an original petition for habeas corpus to a state prisoner. *See Felker*, 518 U.S. at 661–62. For this reason, the Court may still, at least in theory, exercise appellate jurisdiction where state prisoners are concerned. But the same may not be true for federal prisoners after this Court held in *Jones v. Hendrix* that 28 U.S.C. § 2255(e) sharply limits federal prisoners' ability to petition for habeas corpus under 28 U.S.C. § 2241. 599 U.S. at 469–70. With an uncertain path to this Court's original habeas jurisdiction, the circuit split regarding § 2244(b)(1)'s applicability to federal prisoners appears unresolvable unless this Court retains and exercises the appellate jurisdiction conferred by Article III.[9]

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[9] Certification by the courts of appeals under this Court's Rule 19 does not seem like a realistically available alternative. The decision below shows why. The courts of appeals view certification as an "extremely rare procedural device." *In re Bowe*, No. 24-11704, 2024 WL 4038107, at *3 (11th Cir. June 27, 2024). And they see even requesting certification as a "newsworthy event." *Id.* This Court has not accepted a certified question in more than four decades. *See id.*

None of this is to say that § 2244(b)(3)(E) is without constitutional concern as applied to circuit splits that implicate state prisoners. But that is not an issue for the Court to resolve in this federal-prisoner case. The point here is simply that this case presents special constitutional problems because state prisoners cannot raise the question whether § 2244(b)(1) applies to federal prisoners, and federal prisoners may not be able to do so via a habeas petition to this Court.

For this reason, the canon of constitutional avoidance weighs especially strongly in favor of construing § 2244(b)(3)(E) not to apply to this case. A contrary construction would require the Court to confront whether a statute that gives rise to seemingly unresolvable circuit splits is compatible with the constitutional structure of one Supreme Court and one supreme law of the land. There is serious reason to think it is not. If applied to this case, § 2244(b)(3)(E) would create a host of inferior courts with the last, unreviewable word on federal prisoners' ability to collaterally attack their conviction or sentence. It would also permanently entrench divergent outcomes for federal prisoners

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And on top of the rarity of the device, this Court's Rule 19 gives a court of appeals discretion whether to certify a question. The court of appeals, not this Court, thus decides in the first instance whether this Court may fulfill its constitutionally mandated role of securing uniformity. The inferior courts cannot control this Court's role in the constitutional plan in this way.

based solely on where they were sentenced. The Exceptions Clause power, while broad, does not allow Congress to create such a state of affairs.

As discussed above, three Justices of this Court foresaw in *Felker* that the day might come when "statutory avenues other than certiorari for reviewing a gatekeeping determination were closed." 518 U.S. at 667 (Souter, J., concurring). In such a case, those Justices acknowledged that "the question whether th[is] statute exceeded Congress's Exceptions Clause power would be open." *Id.*

"What, indeed, might then have been only prophecy, has now become fact; and the appellate jurisdiction must continue to be the only adequate remedy for such evils." *Martin*, 14 U.S. at 348. Federal courts of appeals have now "adopted divergent interpretations of the gatekeeper standard" in § 2244(b)(1). *Felker*, 518 U.S. at 667 (Souter, J., concurring). This Court should hold that § 2244(b)(3)(E) does not apply to this particular case to avoid the constitutional questions that would arise were the Court to reach the contrary result.

CONCLUSION

The Court should interpret 28 U.S.C. § 2244(b)(3)(E) not to apply to this case to avoid the constitutional question that would arise if Congress attempted to use its Exceptions Clause power to strip the Court of jurisdiction over this particular case.

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APPENDIX

APPENDIX—
SIGNATORIES OF
FEDERAL COURTS SCHOLARS

Signatories

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