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

## REPLY BRIEF FOR PETITIONER


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## INTRODUCTION

By its plain terms, 28 U.S.C. § 2244(b)(1) applies to habeas corpus applications "under section 2254." Despite that express limitation, six circuits have held that (b)(1) *also* applies to motions to vacate under section 2255. Three circuits have since rejected that holding based on the plain statutory text. And the federal government has reached that same conclusion in each of the last three administrations. As a result, the government now concedes that the court below erred by applying (b)(1) to bar petitioner's section 2255 motion.

The Court-appointed amicus attempts to justify that error by concocting a theory that no court has adopted. Amicus' novel construction wrenches provisions out of context, creates structural anomalies, and takes so many twists and turns that a diagram is required just to explain it. Yet despite all this complexity, amicus still cannot reconcile her position with the plain text of (b)(1), which applies to habeas corpus applications "under section 2254," not motions under section 2255.

Despite acknowledging the error below, the government argues that this Court lacks jurisdiction to correct it. The government primarily argues that the certiorari-stripping provision in 28 U.S.C. § 2244(b)(3)(E) applies to section 2255 motions. But the Court need not resolve that issue here. Even if (b)(3)(E) applies to section 2255 motions in general, it does not apply to this particular case for three, independent reasons. The government meaningfully disputes only one of them, leaving the other two largely unchallenged.

Accordingly, this Court has certiorari jurisdiction to correct the error below and resolve the 6–3 circuit conflict that has stubbornly evaded the Court's review.

## I. Subsection 2244(b)(1) does not apply to section 2255 motions by federal prisoners.

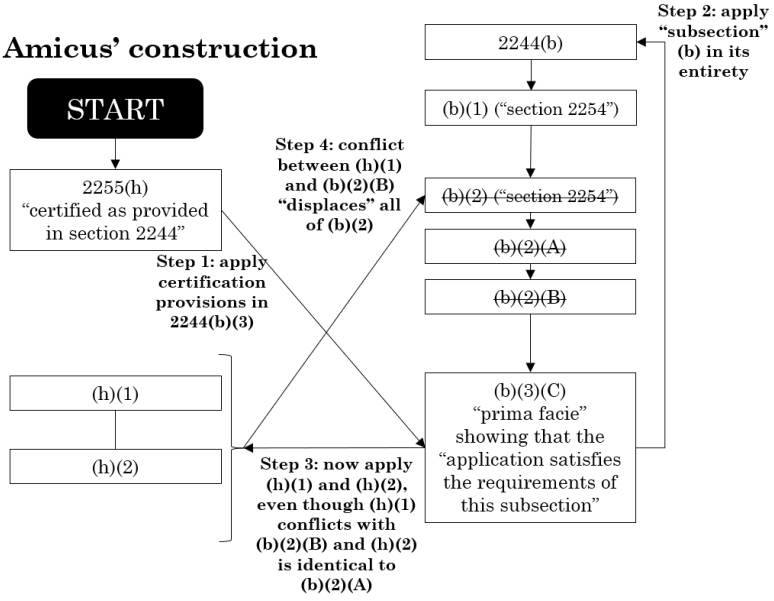
Subsection (b)(1) provides that "[a] claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." 28 U.S.C. § 2244(b)(1). The government concedes that (b)(1) "unambiguously" applies only to habeas corpus applications brought by state prisoners under section 2254—not motions to vacate brought by federal prisoners under section 2255. Br. 43–44. The Court-appointed amicus' argument to the contrary fails. And the government's efforts to minimize the dispositive error below backfire.

### A. Amicus' novel and convoluted theory defies statutory text, context, and structure.

Although six circuits have held that (b)(1) applies to section 2255 motions, they have offered minimal textual justification for that extension. *See* Pet'r Br. 19–27; NACDL Br. 2–9. Reflecting that weakness, amicus does not even cite a single one of those decisions. Instead, amicus charts a new course, advancing a construction that no court in the country has adopted.

Amicus' novel construction is tortuous. It involves multiple analytical steps, and it follows a circuitous route, repeatedly bouncing back and forth between subsections 2255(h) and 2244(b). The diagrams on the following page illustrate amicus' convoluted construction, as well as petitioner's straightforward construction for comparison. As explained below, amicus' implausible construction rewrites the plain text, ignores statutory context, and creates structural anomalies.

**Amicus' construction**

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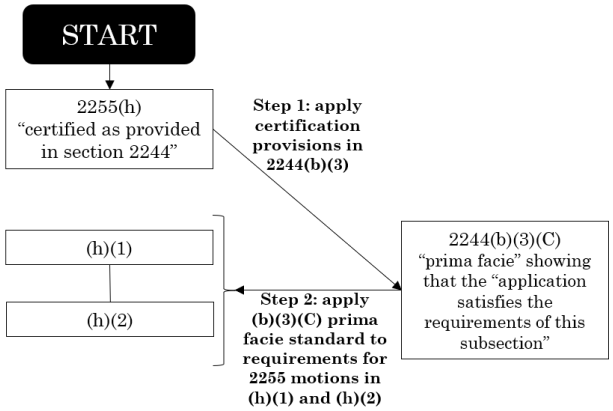
**Petitioner's construction**



**1. Amicus rewrites (b)(1)'s plain text.**

Despite its many maneuvers, amicus' construction never grapples with the problem at the heart of this case: the plain text of (b)(1) applies to habeas corpus applications "under section 2254." As a textual matter, then, how could (b)(1) possibly apply to motions under section 2255? Amicus has no answer to this fundamental question. *See* Br. 34. The only way (b)(1) could apply is by rewriting it to include "section 2255."

That flagrant revision is impermissible. Indeed, this Court has repeatedly recognized that, when Congress refers to a specific statutory section, courts may not add or substitute a different statutory section. *See, e.g.*, *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 583 U.S. 109, 124–25 (2018) (agency rule was not promulgated under a specific statutory section even though the rule had an effect on that section); *Ardestani v. INS*, 502 U.S. 129, 134–36 (1991) (deportation proceeding was not an adjudication under a specific statutory section even though it resembled adjudications that were).

Because amicus cannot deny that her construction rewrites (b)(1), amicus instead seeks to justify it. Amicus speculates that Congress used the "section 2254" language in (b)(1) and (b)(2) to cover all "postconviction prisoners" "in custody" pursuant to a "judgment." Br. 33–34. But that theory itself rewrites the statute. Worse, subsections 2244(a), (c), and (d)(1) all apply to "a person in custody pursuant to" a federal or state "judgment." Congress would have simply used that same language in (b)(1) and (b)(2) if amicus' theory were correct. Instead, Congress used the "section 2254" language in (b)(1) and (b)(2)—and nowhere else.

In that regard, the "section 2254" language in (b)(1) and (b)(2) is conspicuously absent from the neighboring provision in (b)(3). And everyone—including amicus—agrees that (b)(3)'s certification provisions *do* apply to section 2255 motions. This contrast confirms that Congress *deliberately* included "section 2254" in (b)(1) and (b)(2). So that language must be afforded its plain meaning, not rewritten to mean "section 2255."[1]

**2. Amicus disregards statutory context.**

Statutory context confirms that plain meaning. In (b)(1) and (b)(2), Congress set out the gatekeeping requirements for successive habeas corpus applications "under section 2254." In subsections 2255(h)(1) and (h)(2), Congress set out the gatekeeping requirements for successive motions to vacate under section 2255.

Despite those *separate* sets of requirements, amicus argues that the "section 2254" requirements in (b)(1) and (b)(2) *also* apply to section 2255 motions. Amicus' theory is that the phrase "requirements of this subsection" in (b)(3)(C) always refers to the requirements in "subsection" (b)—even in the section 2255 context.

Amicus' theory contravenes the "fundamental canon of statutory construction" that "the words of a statute must be read in their context and with a view to their

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[1] Because petitioner acknowledges that (b)(3)'s certification provisions apply to section 2255 motions yet argues that (b)(1) and (b)(2) do not, amicus accuses him of "cherry-picking." Br. 15–16. But, in addition to ignoring the "section 2254" distinction, amicus conflates two theories. All agree that (b)(3)'s certification provisions apply through the cross-reference in subsection 2255(h). Amicus does not argue that (b)(1) and (b)(2) apply on that theory. Instead, she argues that they apply through (b)(3)(C) as "requirements of this subsection." As explained below, that is incorrect.

place in the overall statutory scheme." *United States v. Miller*, 145 S. Ct. 839, 853 (2025) (citation omitted). Specifically, amicus fails to construe the phrase "requirements of this subsection" in (b)(3)(C) in the "particular statutory context" in which that phrase applies. *United States ex rel. Schutte v. SuperValu Inc.*, 598 U.S. 739, 754 (2023) (citation omitted); *see Mayle v. Felix*, 545 U.S. 644, 655 (2005) (meaning of a phrase in the Federal Rules of Civil Procedure adjusted to the habeas context in which the Rule was incorporated).

In the section 2254 context, the "requirements of this subsection" in (b)(3)(C) refers to the requirements in subsections (b)(1) and (b)(2). Again, those requirements expressly apply to "section 2254" habeas corpus applications. However, in the section 2255 context, the "requirements of this subsection" in (b)(3)(C) refers to the requirements in subsections 2255(h)(1) and (h)(2). After all, those separate requirements and subsections apply specifically to section 2255 motions.

This contextual adjustment occurs because (b)(3)(C) applies to section 2255 motions through the cross-reference in subsection 2255(h). The courts of appeals must therefore apply (b)(3)(C) through the lens of section 2255, mapping (b)(3)(C)'s prima facie standard on to section 2255 motions. And the "requirements" for those motions are in "subsections" (h)(1) and (h)(2).

Even amicus acknowledges that (b)(3)(C) depends on context. Despite arguing that "subsection" in (b)(3)(C) is fixed, amicus acknowledges that "application" in (b)(3)(C) is not. As amicus explains, (b)(3) applies to habeas corpus "applications." Yet all agree (b)(3) must also apply to section 2255 "motions." Otherwise, (h)'s cross-reference to section 2244 would be

ineffectual. Br. 32; *see* SG Br. 24. So all agree that "application" in (b)(3)(C) refers to a habeas corpus application in the state-prisoner context—but adjusts to a section 2255 motion in the federal-prisoner context.

The same contextual adjustment applies to the accompanying phrase "requirements of this subsection" in (b)(3)(C). In the state-prisoner context, where "application" refers to a section 2254 habeas corpus application, the requirements refer to subsections (b)(1) and (b)(2). In the federal-prisoner context, where "application" adjusts to refer to a section 2255 motion, the requirements likewise adjust to refer to subsections (h)(1) and (h)(2). That parallel, contextual adjustment in (b)(3)(C) ensures "a symmetrical and coherent regulatory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citation omitted).

**3. Amicus creates structural anomalies.**

By disregarding the statutory context, amicus' construction also gives rise to fatal structural problems.

**a.** Amicus does not even account for (h)(1) and (h)(2). If the "requirements of this subsection" in (b)(3)(C) always refers exclusively to "subsection" (b), as amicus contends, then the requirements in subsections (h)(1) and (h)(2) would not apply to section 2255 motions. After all, they are not part of "subsection" (b).

Even amicus recognizes that this implication cannot be correct. Indeed, amicus implicitly acknowledges that subsections (h)(1) and (h)(2) *must* apply to the section 2255 motions for which they were specifically and exclusively designed. However, amicus never explains how, as a textual matter, (h)(1) and (h)(2) could apply to section 2255 motions under her theory. There are only two possibilities, and neither one is viable.

Amicus cannot argue that (h)(1) and (h)(2) apply to section 2255 motions *through* (b)(3)(C) as additional "requirements of this subsection." That would conflict with her central assumption that "subsection" is fixed and refers *only* to (b), even in the section 2255 context.

The only alternative would be for (h)(1) and (h)(2) to apply *independent* of (b)(3)(C). But, in that scenario, (b)(3)(C)'s "prima facie" standard would *not* apply to (h)(1) or (h)(2)—something that no court has ever questioned. Meanwhile, the prima facie standard would still apply to (b)(2) for state prisoners. And that would create an anomaly: state prisoners would be subject to a more liberal authorization standard but stricter authorization criteria (for newly discovered evidence). *Compare* § 2255(h)(1) *with* § 2244(b)(2)(B).

**b.** Not only does amicus fail to explain how (h)(1) and (h)(2) could textually apply to section 2255 motions under her theory; actually applying them would create more anomalies. That is because amicus' theory would require applying the requirements in *both* (h)(1)–(h)(2) *and* "subsection" (b). And those requirements cannot apply simultaneously—for two reasons.

*First*, the criteria in (h)(2) and (b)(2)(A) for new rules of constitutional law are identical. So if both provisions applied, then one would be superfluous. *See Pulsifer v. United States*, 601 U.S. 124, 143 (2024) ("[T]he canon against surplusage applies with special force" when a construction "renders an entire subparagraph meaningless") (quotation and brackets omitted). Unable to account for this redundancy, amicus ignores it.

*Second*, as just mentioned, the newly-discovered evidence criteria in (h)(1) conflict with the criteria in (b)(2)(B). By simultaneously applying both, amicus'

construction would place the statute "at war with itself." *United States, ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 434 (2023) (citation omitted).

Amicus acknowledges this conflict but tries to use it to her advantage. Amicus claims that Congress used "explicit[ ]" and "specific language" in (h) to "displace" (b)(2)—and not (b)(1). Br. 9, 12, 19–22. But Congress did no such thing. Subsection (h) merely prescribes separate gatekeeping requirements for section 2255 motions. It does not mention (b)(2) at all, let alone use express language "displacing" it. That is because no displacement is necessary: like (b)(1), (b)(2) simply does not apply to section 2255 motions at any point.

* * *

Amicus' "displacement" theory highlights the implausibility of her interpretation. On amicus' view, Congress adopted *separate* requirements for habeas applications "under section 2254" and motions under section 2255. Congress then (somehow) applied *both* sets of requirements to section 2255 motions, even though they are redundant and conflicting. And Congress *then* made the section 2255 requirements *tacitly* displace the section 2254 requirements in (b)(2)—but not (b)(1). As the diagram above illustrates, amicus' elaborate, roundabout, and counterintuitive theory is too convoluted to credit. Congress would not have engaged in such acrobatics to subject section 2255 motions to (b)(1). "Here, as often is the case, the best interpretation is the straightforward one." *Jones v. Hendrix*, 599 U.S. 465, 480 (2023). And that is petitioner's.

**4. Amicus' remaining arguments fail.**

**a.** Amicus argues that applying (b)(1) to federal prisoners is necessary for courts of appeals to rule

within (b)(3)(D)'s 30-day "deadline." Br. 23–25. But what facilitates resolution within 30 days is not (b)(1); rather, it is (b)(3)(C)'s limited "prima facie" standard. *See Tyler v. Cain*, 533 U.S. 656, 661 n.3, 664 (2001). If anything, applying (b)(1) risks *prolonging* resolution by requiring an examination into the record to determine if the applicant seeks to present the same claim.

Amicus tries but fails to establish a connection between the applicability of (b)(1) and the enforceability of (b)(3)(D)'s deadline. Amicus emphasizes (at 24–25) that the three circuits deeming (b)(1) inapplicable to federal prisoners have held that the deadline is a nonbinding, time-related directive. But amicus omits that five more circuits have reached the same result, including three that *do* apply (b)(1) to federal prisoners. *See In re Williams*, 898 F.3d 1098, 1102 n.5 (11th Cir. 2018) (Wilson, J., specially concurring) (citing cases). This landscape shows that these issues are unrelated.

**b.** Amicus next contends that AEDPA revised the statutory regime to route all federal prisoners through subsection (b). Br. 27–30. But subsection 2244(a) alone refutes that narrative. Subsection (a) governs successive habeas corpus petitions by federal prisoners under section 2241. Contrary to amicus' assertion (at 28), (a) does not route those habeas petitions through (h) and, in turn, (b). That is because (h) governs only section 2255 motions, not habeas petitions. Instead, (a) routes those federal habeas petitions through the saving clause in subsection 2255(e). And that clause does not re-route those petitions back through section 2244 at all, let alone through (b)(1).

If anything, the statutory history supports petitioner. Before AEDPA, section 2255 contained just one

provision governing "second or successive" motions. It authorized courts to deny such motions if they sought "similar relief." 28 U.S.C. § 2255 (1948). AEDPA deleted that provision. In its place, Congress substituted (h) as the sole provision governing "second or successive" motions. That provision "enumerated two—and only two—conditions" for such motions. *Jones*, 599 U.S. at 477. Neither bars presenting a similar claim, indicating that Congress sought to *remove* such a bar.

**c.** Lastly, and resorting to policy, amicus appeals to finality, but federalism and comity alone explain why Congress subjected only state prisoners to (b)(1). Amicus has no answer. *See* Br. 35. In fact, amicus concedes that the federal-prisoner gatekeeping criteria (h)(1) are "gentler" and "more lenient" than the state-prisoner criteria in (b)(2)(B). Br. 9, 21–22. And amicus does not dispute that AEDPA otherwise subjects state prisoners to stricter requirements than federal prisoners because of federalism. *See* Pet'r Br. 23–27.

Regardless, even "[f]inality has special importance in the context of a federal attack on a *state* conviction." *McCleskey v. Zant*, 499 U.S. 467, 491 (1991) (emphasis added). As amicus acknowledges (at 31), "Congress knows that state prisoners are the vast majority of postconviction filers." And she overlooks (at 36) that, by the time of a second federal habeas petition, state prisoners will have often received *more* review than federal prisoners due to state post-conviction review.

### B. The error in this case was dispositive, and the circuit conflict should be resolved.

Despite conceding that the court of appeals erroneously applied (b)(1), the government argues that this

error is of "no practical consequence." Br. 16, 50. Reprising its argument from the cert. stage (BIO 20–21), the government speculates that the Eleventh Circuit would have denied authorization even apart from (b)(1). This argument fails for multiple reasons.

**1.** As an initial matter, the merits of petitioner's authorization request are not before the Court. As explained in his cert. reply (at 13), the Eleventh Circuit below relied exclusively on (b)(1)—without addressing whether he would otherwise obtain authorization. And this Court is a "court of review, not first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Accordingly, the government itself acknowledges that, if this Court has jurisdiction, it should vacate the order below and remand for further proceedings. Br. 43.

**2.** In any event, the government is wrong on the merits. The best evidence that the Eleventh Circuit would grant authorization here is that it *has* granted authorization to prisoners seeking to present identical (and even inferior) claims. Perversely, the only reason those prisoners received authorization is that they were not as diligent as petitioner and were not subject to (b)(1). *See* Pet'r Br. 8; Civil Rights Orgs. Br. 8–10.

**3.** Ignoring that authority, and citing none of its own, the government argues that petitioner does not satisfy the authorization criteria in (h)(2). The government does not dispute that *United States v. Davis*, 588 U.S. 445 (2019) satisfies (h)(2)'s criteria. Instead, the government argues that petitioner does not really seek to present a claim under *Davis* but rather a claim under *United States v. Taylor*, 596 U.S. 845 (2022), which does not satisfy (h)(2)'s criteria. *See* Br. 41–42. This mischaracterizes the record in three respects.

*First*, the authorization-request form prompted petitioner to identify any "new rule of constitutional law" upon which he relied. He identified *Davis*—not *Taylor*. App. for Leave to File Successive Section 2255 Motion, C.A. ECF No. 1 at 8 (11th Cir. No. 24-11704) (May 28, 2024). And, under "longstanding policies" of civil procedure, he was the "master of [his] complaint." *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831 (2002) (citation omitted).

*Second*, and presumably for that reason, the Eleventh Circuit below expressly recognized that petitioner sought to "present[ ] a *Davis* claim." J.A. 77. The Eleventh Circuit then proceeded to apply (b)(1) because petitioner previously sought to present a *Davis* claim. So the government's argument here that petitioner actually sought to present a *Taylor* claim is contrary to the central premise of the decision below.

*Third*, the government asserts that petitioner's section 924(c) conviction was predicated on the elements clause (construed in *Taylor*), not the residual clause (construed in *Davis*). The only support for this assertion is that the indictment/plea agreement tracked the elements clause. *See* Br. 42; SG Original Habeas BIO 14–15 (U.S. No. 22-7871). But that is simply incorrect: the language on which the government relies ("actual or threatened force, or violence, or fear of injury") tracks the Hobbs Act, 18 U.S.C. § 1951(b)(1)—*not* the elements clause, 18 U.S.C. § 924(c)(3)(A).[2]

[2] This identical, standard Hobbs Act language also appeared in other Hobbs Act-section 924(c) indictments where the Eleventh Circuit granted authorization to present a *Davis* claim post-*Taylor*. *See, e.g.*, Civil Rights Orgs. Br. 8; Indictment, ECF No. 1-1 at

**4.** Separate and apart from the criteria in (h)(2), the government also speculates that authorization may have been denied based on the pre-AEDPA res judicata and the law-of-the-case doctrines. Br. 50. But even if those doctrines applied in this context, the government overlooks that they both have an exception for an "intervening change in the law." *Sanders v. United States*, 373 U.S. 1, 17 (1963); *Davis v. United States*, 417 U.S. 333, 342 (1974). And that exception would squarely apply here, because *Taylor* abrogated the circuit precedent that the Eleventh Circuit used to reject petitioner's first *Davis* authorization request.

**5.** Moving beyond this case, the government suggests that (b)(1) is generally "inconsequential" because the lower courts have others tools for addressing repeat claims. Br. 43, 48–50. To be sure, the lower courts have relied on the gatekeeping criteria in (h)(1)–(h)(2) to swiftly dispatch any meritless repeat claims when nothing has changed. *See* NAFD Br. 2–13. But that does not mean (b)(1) is insignificant. To the contrary, as this case illustrates, for claims that *do* satisfy subsection 2255(h)'s criteria after a vindicating change in the law, (b)(1) would *still* require dismissal because it has "no exceptions." SG Br. 48. It is therefore important that the Court resolve whether (b)(1)'s categorical bar applies to section 2255 motions.

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In sum, this case refutes the government's assertion that (b)(1) is inconsequential. Rather, (b)(1) is a prominent provision in AEPDA. It has divided the circuits

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2–3, *United States v. Corn*, No. 13-cr-100 (M.D. Fla. May 16, 2013); Superseding Indictment, ECF No. 98 at 9–10, *United States v. Ragland*, No. 09-cr-14016 (S.D. Fla. Apr. 30, 2009).

6–3. And its erroneous application below is all that stands between petitioner and his ability to challenge a conviction that is invalid under the Court's precedent and that mandated a ten-year prison sentence.

## II. Subsection 2244(b)(3)(E)'s certiorari bar does not apply to this particular case.

Fortunately, the Court has certiorari jurisdiction to correct the error below, notwithstanding the certiorari-stripping provision in 28 U.S.C. § 2244(b)(3)(E). In his initial brief, petitioner identified two independent bases of jurisdiction—one broad, one narrow. The broad basis is that (b)(3)(E)'s certiorari bar does not extend to section 2255 motions at all. *See* Pet'r Br. 28–35. The narrow basis is that, regardless of whether (b)(3)(E) extends to section 2255 motions, its terms do not cover this particular case. *See* Pet'r Br. 35–48.

As explained below, the government's incomplete response to the narrower argument makes it unnecessary for this Court to address the broader one. Thus, the simplest resolution to the jurisdictional dispute is to hold that (b)(3)(E) does not apply to this particular case. That is the same approach this Court took in *Castro v. United States*, 540 U.S. 375, 379–81 (2003).[3] And exercising jurisdiction on that narrow basis would fully enable the Court to correct the error below and resolve the circuit conflict over (b)(1). Accordingly, the arguments below focus on the narrower argument.

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[3] The government asserts that *Castro* silently "took as a given" that (b)(3)(E) generally applied to section 2255 motions. Br. 30–31. But, in fact, *Castro* had no need to address that broader issue at all. Indeed, as the government recognizes, the Court "did not even comment" on it because the Court concluded that (b)(3)(E) did not apply to the particular circumstances of that case. Br. 31.

Phrased in the statutory language, (b)(3)(E) does not apply here for three, independent reasons. The court of appeals did not issue: (1) a "grant or denial"; (2) of "an authorization"; (3) that is the "subject" of this certiorari petition. *See* Pet'r Br. 36–41. If even one of those three textual requirements is absent, then (b)(3)(E)'s certiorari bar does not apply. Inexplicably, however, the government largely ignores both the "authorization" and "subject" requirements. So the government's response is incomplete. The government instead devotes almost its entire response to the "denial" requirement, but much of the government's reasoning actually supports jurisdiction over this case.

### A. The "dismissal" of petitioner's proposed claim for lack of jurisdiction was not a "grant or denial" of authorization.

The certiorari bar in (b)(3)(E) applies only to the "grant or denial" of authorization. Here, however, the court of appeals "dismissed" petitioner's proposed *Davis* claim and, in turn, his authorization request for "lack of jurisdiction." J.A. 73, 77–79. That jurisdictional "dismissal" was not a "denial" under (b)(3)(E).

The government's response confirms that straightforward conclusion. The government correctly explains that (b)(3) does not permit the court of appeals to "dismiss" any "claims" at the authorization stage. *See* Br. 35–36, 44–45. Rather, (b)(3) provides that the "court of appeals shall grant or deny the authorization" request. 28 U.S.C. § 2244(b)(3)(D). By contrast, the surrounding provisions in subsection 2244(b) instruct district courts to "dismiss" certain "claim[s]" after they are presented in a filed second-or-successive application. 28 U.S.C. §§ 2244(b)(1), (b)(2), (b)(4).

Although the government emphasizes this textual distinction between granting or denying authorization on the one hand and dismissing claims on the other, the government overlooks that the court of appeals misapplied that distinction here. The court of appeals did not "grant or deny" petitioner's authorization request. Instead, the court of appeals (improperly) "dismissed" his proposed claim. As a result, the court did not issue a "statutorily relevant 'denial'" for purposes of (b)(3)(E). *Castro*, 540 U.S. at 380; *see* Pet'r Br. 37.

The jurisdictional nature of the court's dismissal confirms this conclusion. Again, the court of appeals determined that it lacked jurisdiction over petitioner's proposed claim and, in turn, his authorization request. Because the court of appeals determined that it lacked jurisdiction over the authorization request, the court could not have adjudicated the merits of that request at all, let alone "denied" it. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("Without jurisdiction the court cannot proceed at all," and so "the only function remaining to the court is that of announcing the fact and dismissing the cause.") (quoting *Ex parte McCardle*, 74 U.S. 506, 514 (1868)).

The government suggests that, because (b)(3) contemplates only the "grant or denial" of authorization, *any* action taken by the court in response to an authorization request constitutes a "grant or denial." Br. 18, 34–35. But that suggestion is foreclosed by *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998). In that case, the Court found no (b)(3)(E) "grant or denial" where the court of appeals "dismissed" the authorization request as unnecessary and transferred the petition to the district court. *Id*. at 641–42. Just as that response to the prisoner's authorization request

was something other than a "grant or denial" of authorization, so too was the jurisdictional dismissal here. Indeed, in both cases, the court of appeals did not adjudicate the merits of the authorization request.

The government also argues that a court of appeals cannot evade (b)(3)(E) by virtue of "nomenclature." Br. 18. But petitioner's argument is not based on how the court "styled" its order. *Id*. at 36–37. Rather, his argument is based on "what the Court of Appeals *did*." *Martinez-Villareal*, 523 U.S. at 641 (emphasis added). And, here, what the court did was dismiss his claim and his authorization request for lack of jurisdiction.

Finally, the government argues that the dismissal here constituted a "denial" in a literal and functional sense because it had the "practical effect" of declining to grant authorization. Br. 18, 35–36, 38 (citation omitted). But that argument is also foreclosed by precedent. In *Castro*, the Court rejected the government's argument that the court of appeals' ruling was a (b)(3)(E) "denial" because it "had the *effect* of denying" authorization. 540 U.S. at 380 (emphasis in original). And, on the flip side, the Court in *Martinez-Villareal* found no (b)(3)(E) "grant" even though the ruling below had the effect of allowing the habeas petition to proceed to the district court. 523 U.S. at 641–42. *See* Pet'r Br. 38–39. A "grant or denial" thus depends not on the effect of the court of appeals' ruling but rather on whether the court of appeals adjudicates the merits of the authorization request. That did not occur here.[4]

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[4] The government cites two cases about 28 U.S.C. § 1253, which confers appellate jurisdiction on this Court over three-judge district court orders "granting or denying" injunctions. But § 1253

### B. The court of appeals did not make "an authorization" determination.

Even if the court of appeals had issued a "denial," that would not defeat jurisdiction. That is because the certiorari bar in (b)(3)(E) applies only to the grant or denial of "an authorization." And the court of appeals did not make "an authorization" determination here.

Importantly, the scope of "an authorization" determination for purposes of (b)(3)(E) is circumscribed by (b)(3)(C). Again, that provision requires the court of appeals to "determine[ ] that the application makes a prima facie showing that the application satisfies the requirements of this subsection." As the government concedes (at 24), and as explained at length above, the "requirements of this subsection" for section 2255 motions are found in subsections 2255(h)(1) and (h)(2).

In this case, however, the court of appeals did not address those requirements at all. Rather, it relied solely on (b)(1), which was not an applicable "requirement." In doing so, the court exceeded the scope of the

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is not analogous to (b)(3)(E) because it affirmatively grants rather than strips jurisdiction. In any event, both cases backfire.

*First*, the government (at 18, 35–36, 38) cites *Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90 (1974). But that case held that a jurisdictional dismissal (for lack of standing) was *not* an order "granting or denying" an injunction. *Id*. at 99–101.

*Second*, the government (at 36) cites *Abbott v. Perez*, 585 U.S. 579 (2018). While the Court adopted a "practical effect" approach there, it did so to *preserve* § 1253's grant of jurisdiction. *Id*. at 595. Adopting a "practical effect" approach for (b)(3)(E)'s certiorari bar would instead operate to *restrict* the Court's jurisdiction.

authorization determination under (b)(3)(C). As a result, the court did not issue the denial of "an authorization" for purposes of (b)(3)(E). *See* Pet'r Br. 39–40.

That plain-text conclusion is bolstered by precedent. In *SAS Institute Inc. v. Iancu*, 584 U.S. 357 (2018), this Court interpreted a statute barring judicial review of the Patent Director's decision to institute inter partes review. *See id.* at 370–71. The Court explained that the statute *did* bar review of the Director's application of the legal standard governing his initial determination to institute inter partes review. But the statute did *not* bar review of any and all "legal question[s] bearing on the institution of inter partes review," *id.* at 370, including whether the Director "exceeded his statutory authority by limiting review to fewer than all of the claims," *id.* at 371. So too here: (b)(3)(E) bars review of a court of appeals' application of the governing standard in (b)(3)(C); but it does not bar review of the argument that the court of appeals "exceed[ed] [its] statutory authority." *Id.* at 371; *see also* Pet'r Br. 42 n.1 (citing additional precedents).

The government does not meaningfully respond to this argument. Indeed, it does not dispute that the court of appeals here exceeded its statutory authority under (b)(3)(C) by relying on the inapplicable requirement in (b)(1). The government observes only that the court was "acting with respect to an 'authorization' request." Br. 38. Again, that is not dispositive under this Court's precedent. *See Martinez-Villareal*, 523 U.S. at 641–42 (holding that (b)(3)(E) did not bar review even though the prisoner requested authorization). Rather, the court of appeals' response is what matters.

The government also asserts that the "application of an incorrect standard" cannot avoid (b)(3)(E). Br. 38. But the court of appeals here did not apply an "incorrect standard." Instead, the court relied on the inapplicable statutory "requirement" in (b)(1) and thus exceeded the scope of its authority under (b)(3)(C). That is different than a court of appeals acting within the scope of its authority and applying an incorrect standard during the course of its prima facie determination.

### C. Any denial of authorization is not the "subject" of this certiorari petition.

Finally, even if the court of appeals had somehow issued the "denial of an authorization," that still would not defeat jurisdiction here because that denial would not be the "subject" of this certiorari petition under (b)(3)(E). Rather, the "subject" of this certiorari petition is the threshold question of whether (b)(1) applies to section 2255 motions. *See* Pet'r Br. 40–41.

In a single sentence, the government responds that the "subject" of this certiorari petition "concerns . . . authorization itself." Br. 38. But that expansive understanding is foreclosed by *Castro*, where the Court clarified that the "subject" of the petition for purposes of (b)(3)(E) is not the decision under review but rather the "question" presented for review. *See Castro*, 540 U.S. at 380 ("The 'subject' of Castro's petition is not the Court of Appeals' 'denial of an authorization.' It is the lower courts' refusal to recognize that this § 2255 motion is his first, not his second. That is a very different *question*.") (emphasis added). The government wholly ignores this controlling passage from *Castro*.

Moreover, the "question" in *Castro* was analogous to the one here, since it was about the threshold applicability of the gatekeeping requirements. Specifically, the question presented there was whether a court's recharacterization of a *pro se* post-conviction filing as a section 2255 motion rendered a subsequent motion "second or successive" and thereby subject to the gatekeeping requirements. Pet'r Br. i, *Castro*, 540 U.S. 375 (No. 02-6683), 2003 WL 1232998; *see also* Pet'r Br. i, *Martinez-Villareal*, 523 U.S. 637 (No. 97-300), 1997 WL 739275 (asking whether "AEDPA's limitations on second or successive habeas corpus petitions apply to all claims and in every court, including competency for execution claims"). Here, the question presented even more directly implicates the applicability of those requirements: does (b)(1) apply to section 2255 motions?

Ignoring that striking similarity, the government observes (at 37–38) that, unlike petitioner, the prisoner in *Castro* did not request authorization. But that fact had no bearing on the "subject" of his certiorari petition. In fact, even though he did not request authorization, the court of appeals still went out of its way to opine that he "could not meet the requirements" for authorization. 540 U.S. at 380. And this Court held that, even if that ruling constituted the denial of authorization, that denial was *still* not the "subject" of his petition. Rather, the "subject" was the threshold legal "question" implicating the applicability of the gatekeeping requirements. *Id*. So too here.

At bottom, petitioner's position is that (b)(3)(E) broadly bars review of garden-variety authorization determinations that a prisoner has failed to make the prima facie showing satisfying the applicable gatekeeping requirements. But it does not bar review of

threshold questions about whether a gatekeeping requirement is applicable in the first place. *See* Pet'r Br. 14, 36, 41–43. Contrary to the government's assertion (at 38–39), this straightforward distinction is not "ill-defined"; and it would in no way "swallow" (b)(3)(E) given that disputes like this one over the applicability of gatekeeping requirements are exceedingly rare.

* * *

To the extent there is any doubt about any of the three independent requirements above, that doubt should be resolved in favor of jurisdiction. As the government expressly concedes, this Court in "*Castro* applied a narrow interpretation principle to analyze the scope" of (b)(3)(E). Br. 30; *see Castro*, 540 U.S. at 381.

The government nonetheless flouts that principle, advancing a sweeping interpretation that would bar review of *any* ruling made in response to an authorization request. Indeed, its position would bar review were a court of appeals to reject authorization on the basis of requirements found nowhere in the statute, including those that were entirely arbitrary. That implication further conflicts with *Castro*, which refused to interpret (b)(3)(E) in a manner that would "produce troublesome results" and "procedural anomalies." 540 U.S. at 380. The Court should refuse to do so again here. Instead, it should narrowly construe (b)(3)(E) and resolve the elusive 6–3 circuit conflict over (b)(1).

## CONCLUSION

The order of the Eleventh Circuit should be vacated and the case remanded for further proceedings.

Respectfully submitted,

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