No. 24-5438

In the Supreme Court of the United States

MICHAEL BOWE, PETITIONER

v.

UNITED STATES OF AMERICA

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

REPLY BRIEF FOR THE UNITED STATES

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Before a federal prisoner may file a second or successive motion collaterally attacking his conviction or sentence under 28 U.S.C. 2255, Section 2255(h) requires that the motion "must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain" either (1) "newly discovered" and "clear and convincing evidence" of factual innocence, or (2) a new retroactive "rule of constitutional law." 28 U.S.C. 2255(h). Section 2255(h) thus addresses both the content that a second or successive collateral attack must "contain" and the procedures under which its content will be assessed. As to the content itself, Section 2255(h) specifies that the collateral attack must "contain" the requisite new evidence or constitutional rule. See U.S. Br. 8, 17, 45, 48. As to the procedure, Section 2255(h) specifies that the determination should follow the process set forth in 28 U.S.C. 2244, which principally addresses the procedures for processing requests by state prisoners

to file second or successive applications for federal writs of habeas corpus. See U.S. Br. 8-9, 16, 22-24, 45.

The government's opening brief explained that because the incorporated Section 2244 procedures ensure that an appellate panel's decision is the final word on certification, see 28 U.S.C. 2244(b)(3)(E), this Court lacks jurisdiction over petitioner's certiorari petition. U.S. Br. 2-3, 16-19, 21-42. But the brief also acknowledged that, although it was not ultimately consequential in this case, the court of appeals erroneously applied the requirements of 28 U.S.C. 2244(b)(1) to petitioner's request to file a second or successive Section 2255 motion. See U.S. Br. 3, 19-20, 43-50. Section 2244(b)(1)'s directive 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), is a limitation specific to habeas applications by state prisoners under 28 U.S.C. 2254. It does not apply to federal prisoners, who file their collateral attacks under Section 2255 (not Section 2254).

The court-appointed amicus curiae (amicus) is unable to show otherwise. Her principal submission is that Section 2255(h)'s cross-reference to Section 2244's *procedural* requirements winds up incorporating the new-claim *content* requirement as well. See *e.g.*, Amicus Br. 2, 11-12, 14-18. But although Section 2255(h) employs the procedures "provided in section 2244," 28 U.S.C. 2255(h), the content inquiry looks to whether the proposed Section 2255 motion "contain[s]" one of the things described in 28 U.S.C. 2255(h)(1) and (2). Even amicus acknowledges (*e.g.*, Br. 9) that the content criteria in Section 2244(b)(2) are not incorporated into Section 2255(h). There is no sound reason to treat Section 2244(b)(1)—which likewise applies only to "a second or successive

habeas corpus application under section 2254," 28 U.S.C. 2244(b)(1) and (2)—any differently. And the Court could make that clear even if it dismisses this case for lack of jurisdiction.

A. Section 2255(h) Does Not Incorporate Section 2244(b)(1)

Amicus's argument for applying Section 2244(b)(1) to federal prisoners primarily relies (Br. 2, 11-12, 14-18) on a three-step chain of inferences: (1) a federal prisoner's additional Section 2255 motion "must be certified as provided in section 2244," 28 U.S.C. 2255(h); (2) one of the provisions of Section 2244(b) states that a court of appeals may authorize the filing of a second or successive application only on a prima facie showing that "the application satisfies the requirements of this subsection," 28 U.S.C. 2244(b)(3)(C); and (3) that subsection —Subsection (b)—includes within its first paragraph the requirements at 28 U.S.C. 2244(b)(1). That inferential chain is flawed and cannot be squared with significant aspects of the statutory text.

1. Section 2255(h) requires that a second or successive collateral attack by a federal prisoner must "contain" (1) newly discovered and convincing evidence of innocence, or (2) a new and retractive rule of constitutional law. 28 U.S.C. 2255(h). Accordingly, under the plain text of Section 2255(h), the court of appeals looks to whether a proposed collateral attack "include[s]" one of those two things. See *Webster's Third New International Dictionary* 491 (1993) (*Webster's Third*) (defining "contain" to mean to "consist of wholly or in part," "comprise," or "include" (def. 2.b)) (capitalization omitted); see also *Webster's New International Dictionary* 574 (2d ed. 1943) (*Webster's Second*) (def. 1: similar).

Congress separately specified the manner and effect of determining that a proposed motion in fact includes

such content. Specifically, a federal prisoner's second or successive collateral attack "must be certified as provided in section 2244 * * * to contain" either new convincing evidence of innocence or a new rule of constitutional law. 28 U.S.C. 2255(h). The phrase "as provided in section 2244" instructs that a court's determination as to whether a proposed Section 2255 motion "contains" the requisite content, *ibid.*, must be accomplished "in the same way or manner" that is provided in Section 2244. *Webster's Third* 125 (defining the conjunction "as" (def. 2)); see *Webster's Second* 159 (same definition). But it does not incorporate the content requirements applicable to state prisoners' second or successive habeas applications. Section 2255 itself—which expressly defines what a federal prisoner's second or successive application must "contain" and embodies prior doctrine governing federal collateral attacks, U.S. Br. 49-50—defines the required content.

Amicus appears to acknowledge (Br. 22-23) in passing that Section 2255(h) specifies *what* a federal prisoner's second or successive application "*must* * * * contain," *i.e.*, the requisite new evidence or new rule of constitutional law listed in Section 2255(h)(1) and (2). But amicus would nevertheless read Section 2255(h)'s description of *how* that certification should be made—"as provided in section 2244 by a panel of the appropriate court of appeals," 28 U.S.C. 2255(h)—to incorporate an additional substantive criterion from Section 2244(b)(1). That reading is untenable. Section 2244(b)(1) and Section 2244(b)(2) explicitly apply only to "second or successive habeas corpus application[s] under section 2254." 28 U.S.C. 2244(b)(1) and (2). They do not address what a second or successive motion under Section 2255 must "contain" in order to be authorized. 28 U.S.C. 2255(h).

2. Section 2244(b)(1) and Section 2244(b)(2) contrast with the provisions that Section 2255(h) does, in fact, incorporate by reference: Section 2244(b)(3) and Section 2244(b)(4). Those latter two provisions use language broad enough to translate to the Section 2255 context: "second or successive application." 28 U.S.C. 2244(b)(3)(A)-(E) and (4); see U.S. Br. 24 (explaining that a Section 2255 "motion" is an "application" for collateral relief). Congress thus eschewed more targeted language for those provisions that would have explicitly limited their scope to state-prisoner filings alone—such as Section 2244(b)(1)'s and Section 2244(b)(2)'s explicit references to a "habeas corpus application under section 2254." See U.S. Br. 22-24, 43-44, 46. Furthermore, Section 2244(b)(3) and Section 2244(b)(4)—and *only* those provisions within Section 2244—refer to an appellate panel's "authorization" to file a second or successive application, *i.e.*, the certification process that Section 2255(h) provides must be accomplished "as provided in section 2244." See U.S. Br. 45-47.

The five subparagraphs of Section 2244(b)(3) require that a prisoner move the court of appeals for an "order authorizing the district court to consider" his "second or successive application" "[b]efore" filing the application, 28 U.S.C. 2244(b)(3)(A); provide that a three-judge panel of the court of appeals must determine whether to issue an "order authorizing" the consideration of the "second or successive application," 28 U.S.C. 2244(b)(3)(B); explain that the panel may "authorize the filing of a second or successive application" only if it determines that the prisoner has made a prima facie showing that it satisfies the relevant requirements, 28 U.S.C. 2244(b)(3)(C); establish a 30-day period within which the court "shall grant or deny the authorization to file a second or suc-

cessive application," 28 U.S.C. 2244(b)(3)(D); and direct that the "grant or denial of an authorization * * * to file a second or successive application" is not subject to review by "a petition for rehearing or for a writ of certiorari," 28 U.S.C. 2244(b)(3)(E).

Section 2244(b)(4) similarly elaborates on the limited effect of an appellate panel's "authoriz[ation]" to file a "second or successive application," 28 U.S.C. 2244(b)(4), which reflects only a determination that the prisoner has made an initial "prima facie showing" that his application satisfies the relevant requirements, 28 U.S.C. 2244(b)(3)(C). The very concept of a preliminary "prima facie" inquiry necessarily contemplates a subsequent, more searching, dispositive determination. See U.S. Br. 47. And Section 2244(b)(4), as incorporated by Section 2255(h), spells out that post-certification process expressly, providing that a district court must dismiss "any claim presented in a second or successive application that the court of appeals has authorized to be filed," unless "the claim satisfies the [relevant] requirements." 28 U.S.C. 2244(b)(4).

Congress's "disparate inclusion or exclusion" of such broad and narrow terminology in contemporaneously enacted provisions within Section 2244 is strong evidence that "Congress act[ed] intentionally." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (citation omitted). And here, the differing language draws a clear line between the provisions in Section 2244 that apply to the authorization of "application[s]" of both state and federal prisoners and the provisions—like Section 2244(b)(1)—that apply only to the "habeas corpus application[s] under section 2254" of state prisoners. Indeed, even amicus acknowledges (*e.g.*, Br. 12) that Congress excluded Section 2244(b)(2), which sets forth content criteria for

state prisoners' second or successive collateral attacks, from the procedures incorporated by Section 2255(h).

Contrary to amicus's assertion (Br. 12, 19-21) Congress did not do so merely *implicitly* by "including specific language in §2255(h) departing from §2244(b)(2)," Br. 12. Congress did so *explicitly* by limiting Section 2244(b)(2)'s application to "claim[s] presented in a second or successive habeas corpus application under section 2254." 28 U.S.C. 2244(b)(2). And that same limitation appears in Section 2244(b)(1). 28 U.S.C. 2244(b)(1) ("A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.").

3. Amicus's main response to that set of linguistic obstacles is to assert (Br. 4, 13, 32) that "*all* of subsection (b)" of Section 2244 "uses language that facially excludes § 2255 *motions*," Br. 4, because "[e]very provision" in Subsection (b) "speaks of an 'application'—which a § 2255 motion is not." Br. 13. But not every provision of Section 2244(b) is explicitly limited to "claim[s] presented in a second or successive habeas corpus application under section 2254"; only Section 2244(b)(1) and Section 2244(b)(2) are. 28 U.S.C. 2244(b)(1) and (2). And as the government has previously explained (U.S. Br. 22-24, 43-44, 46), the broader language of Section 2244(b)(3) and Section 2244(b)(4) readily translates to the Section 2255 context.

In particular, a Section 2255 motion is itself an "application" for collateral relief. This Court has recognized that "the term 'motion' generally means 'an *application* made to a court or judge for purpose of obtaining a rule or order directing some act to be done in favor of the applicant.'" *Melendez* v. *United States*, 518 U.S. 120, 126 (1996) (quoting *Black's Law Dictionary* 1013

(6th ed. 1990)) (emphasis added; brackets omitted). Under that prevailing understanding of the legal term, a Section 2255 "motion" is literally an "application" for collateral relief. See U.S. Br. 24.

Amicus provides no sound explanation for Congress's use in Section 2244(b)(1) and Section 2244(b)(2) of language specific to a state prisoner's "habeas corpus application under section 2254," and Congress's distinct use—right afterward in the same subsection (in Section 2244(b)(3) and Section 2244(b)(4))—of broader "application" language that textually encompasses both federal and state filings. Amicus cannot deny that Congress's use of differing language is presumed to be intentional—particularly where, as here, the provisions were enacted at the same time in the same statutory section. *Russello*, 464 U.S. at 23; U.S. Br. 46; see Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 106(b), 110 Stat. 1220-1221.

The best understanding of the distinct formulations here, particularly when read in the context of Section 2255(h)—the text of which was likewise adopted as part of the same statute, see AEDPA § 105, 110 Stat. 1220—is that only the provisions in Section 2244(b) that define the procedural elements of certification and that use the broader term "application" apply to federal-prisoner motions under Section 2255. Those are Section 2244(b)(3) and Section 2244(b)(4)—not Section 2244(b)(1) and Section 2244(b)(2), which expressly apply only to a state prisoner's "second or successive habeas corpus application under section 2254," 28 U.S.C. 2244(b)(1) and (2).

4. Amicus additionally suggests (Br. 23-26) that Section 2244(b)(1)'s instruction to dismiss "[a] claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior appli-

cation," 28 U.S.C. 2244(b)(1), is an essential part of the procedural requirement that a court of appeals panel grant or deny a request to file a second or successive collateral attack within a 30-day period, 28 U.S.C. 2244(b)(3)(D). But amicus provides no basis in the text for linking the two provisions in that way. In any event, as a practical matter, timely disposition of federal prisoners' requests for further collateral attacks does not require the additional step of ensuring that each claim is new.

Amicus posits (Br. 23) that Section 2244(b)(1) will expedite the processing of such requests because it "allows prompt disposal" of previously presented claims "based on a quick review of prior litigation." But the absence of that *additional* step—which may require reviewing voluminous amounts of prior post conviction litigation—should not unduly delay the courts of appeals. A prima facie check, see 28 U.S.C. 2244(b)(3)(C), into whether a proposed collateral attack "contain[s]" convincing "newly discovered evidence" of innocence or a "new [retroactive] rule of constitutional law * * * that was previously unavailable," 28 U.S.C. 2255(h), need not be any more onerous or time-consuming than comparing the proposed collateral attack to previous collateral attacks. Indeed, it may well be much less onerous.

The court of appeals can be prompt in part because its review is just a prima-facie determination, not the last word. See 28 U.S.C. 2244(b)(3)(C). If the panel certifies a second or successive Section 2255 motion for filing, the district court can then adjudge more definitively whether each claim is properly presented in a second or successive application. 28 U.S.C. 2244(b)(3)(A) and (4). And as the government has previously observed (U.S. Br. 48-50), courts may dismiss claims on the ground

that they were presented in a prior Section 2255 application, without relying on Section 2244(b)(1).

B. Amicus Provides No Defense Of the Court Of Appeals' Application Of Section 2244(b)(1) To Bar A Claim That Was Never Filed In Any Previous Collateral Attack

For the reasons explained above and the similar reasons explained in the government's opening brief (*e.g.*, Br. 45-48), Section 2255(h) does not incorporate Section 2244(b)(1). Nor, as previously explained (U.S. Br. 43-45), would Section 2244(b)(1) apply of its own force, absent incorporation.

Amicus suggests (Br. 37-39) that the government's opening brief misread two aspects of Section 2244(b)(1): namely, Section 2244(b)(1)'s focus on collateral attacks that are actually filed in district court (see U.S. Br. 44) and its focus on individual claims within those filed attacks (see U.S. Br. 44-45). Amicus is correct that those aspects of Section 2244(b)(1) are not so broad as to mean that Section 2244(b)(1) "*never* applies" even in the context of a *state* prisoner's request for authorization to file a collateral attack under Section 2254 (Br. 37), as to which Section 2244(b)(1) would in fact be one of the "requirements of this subsection" that must be satisfied for certification, 28 U.S.C. 2244(b)(3)(C). Amicus is also correct (Br. 39) that those aspects of Section 2244(b)(1) are not so broad as to mean that a request to file a second or successive collateral attack is never subject to claim-by-claim review (Br. 39). But amicus overlooks that those aspects of Section 2244(b)(1) further undermine its applicability in the specific circumstances of this case.

In this case, the court of appeals denied petitioner's request to file an additional Section 2255 application not because he had presented the same claim based on

United States v. *Davis*, 590 U.S. 504 (2020), in a previously filed Section 2255 application, but because he had previously requested—but was was denied—*leave to file* an additional Section 2255 application to make that *Davis* claim. J.A. 77; see J.A. 74-76. The aspects of Section 2244(b)(1) noted in the government's opening brief —which reflect that Section 2244(b)(1) "presupposes that the prisoner filed a collateral attack before" and is attempting to reassert "one or more identical claims," U.S. Br. 44-45—therefore present further impediments to amicus's defense of the judgment below.

Because the court of appeals denied petitioner's earlier request, the second or successive motion that he sought to file at that time was never filed. As a result, petitioner never filed a prior collateral attack in district court presenting a *Davis* claim that would bar his current *Davis* claim under Section 2244(b)(1)'s prohibition against reasserting a "claim * * * that was presented in a prior application," 28 U.S.C. 2244(b)(1). Accordingly, even if Section 2255(h) did in fact incorporate Section 2244(b)(1), it still would not have applied here.

Although amicus defends the court of appeals' incorporation of Section 2244(b)(1) into Section 2255(h) as a general matter, amicus provides no defense of the court of appeals' case-specific application of Section 2244(b)(1) to circumstances where it does not apply. And that additional case-specific deficiency would be a further barrier, beyond the threshold barrier of Section 2244(b)(1)'s nonincorporation, to affirming the judgment below, if the Court had jurisdiction to do so.

C. This Court's Resolution Of The Jurisdictional Issue Could Effectively Resolve The Section 2244(b)(1) Issue As Well

While the Court's lack of certiorari jurisdiction would preclude it from directly answering the Section 2244(b)(1) question, the two questions presented are closely related. As a result, a decision in which the Court explains that it does not have certiorari jurisdiction could effectively suggest the answer to the Section 2244(b)(1) question as well.

The parties' dispute about whether Section 2255(h)'s cross-reference to Section 2244 incorporates Section 2244(b)(3)(E)'s bar on certiorari jurisdiction involves identifying the subset of provisions within Section 2244 that Section 2255(h) incorporates. See, *e.g.*, U.S. Br. 16-19, 21-42. The Court's resolution of the jurisdictional issue is therefore likely to consider the extent of that incorporation.

If the Court were to state in its analysis that Section 2255(h) incorporates only the procedural provisions of Section 2244 governing the manner and effect of certification—*i.e.*, the provisions in Section 2244(b)(3) and (4)—that analysis would not only directly support the absence of certiorari jurisdiction, but would also incidentally indicate that Section 2255(h) does not incorporate Section 2244(b)(1). And if that were the reasoning underlying the Court's holding on the first question presented, the courts of appeals in future cases would presumably embrace the Section 2244(b)(1)-related consequences of that analysis, even without a formal holding on the second question presented.

* * * * *

For the reasons stated in the government's opening brief, the Court should dismiss the petition for a writ of certiorari for want of jurisdiction. If the Court determines that such jurisdiction exists, the Court should reverse and remand for the reasons above and those stated in the government's opening brief.

Respectfully submitted.

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