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10 to Question 1.

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1 P R O C E E D I N G S

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 24-5438,
5 Bowe versus United States.

6 Mr. Adler.

7 ORAL ARGUMENT OF ANDREW L. ADLER
8 ON BEHALF OF THE PETITIONER

9 MR. ADLER: Mr. Chief Justice, and may
10 it please the Court:

11 By its plain terms, 2244(b)(1) applies
12 to habeas corpus applications under Section
13 2254. It therefore does not apply to motions
14 to vacate under Section 2255. After all, those
15 motions have their own separate gatekeeping
16 requirements.

17 Resisting this straightforward
18 conclusion, the Court-appointed amicus proposes
19 an elaborate theory that no court in the
20 country has adopted. But the plain text,
21 context, and structure of the statute make
22 clear that (b)(1) does not apply to federal
23 prisoners. This Court has jurisdiction to so
24 hold.

25 We have offered several arguments for

1 why 2244(b)(3)(E) does not bar review here, but
2 the simplest one is this: The subject of our
3 cert petition is -- was not the denial of an
4 authorization. This argument is based on
5 Castro and the passage on page 380 that starts
6 with the sentence "Even if for argument's
7 sake." The Court assumed that there was a
8 denial of an authorization because the court of
9 appeals had stated that the prisoner could not
10 satisfy the gatekeeping requirements. But this
11 Court unanimously held that this denial was not
12 the subject of the cert petition because the
13 prisoner sought review only on the antecedent
14 question of whether he had to satisfy the
15 gatekeeping requirements at all.

16 There is no material distinction
17 between that question reviewed in Castro and
18 the question here, which is whether Petitioner
19 must satisfy the gatekeeping requirement in
20 (b)(1) at all. Because there is jurisdiction,
21 the Court should seize this opportunity to
22 resolve the 6-3 split that has evaded the
23 Court's review for the past several years and
24 that will otherwise go unresolved.

25 I welcome the Court's questions.

1 JUSTICE THOMAS: Why would Congress
2 want to treat federal and state prisoners
3 different?

4 MR. ADLER: Justice Thomas, the short
5 answer is federalism. We know throughout AEDPA
6 that Congress did, in fact, treat state and
7 federal prisoners differently. We cited
8 numerous examples in the statutory text that
9 reflects that differential treatment. And we
10 even see that with respect to second or
11 successive applications as well with respect to
12 the newly discovered evidence criteria, which
13 we know are different.

14 The fact is that state prisoners, when
15 they are in federal court and challenging a
16 state judgment, that the tension is high
17 with -- with the sovereignty of a state court.
18 And so that is why we see it with exhaustion.
19 We see it with the deferential standard in
20 2254(d). We see it with the limitations on
21 evidentiary hearings. And (b)(1) is just
22 another example of that differential treatment.

23 JUSTICE THOMAS: So what was the
24 point -- what was Congress trying to accomplish
25 with 2255, with the addition of (h) in 20 --

1 2255?

2 MR. ADLER: In (h), Congress was
3 enumerating the two conditions that federal
4 prisoners must -- one of two conditions that
5 they must satisfy before they can bring a
6 second or successive 2255 motion. The only
7 other thing it did in (h) was incorporate the
8 certification provisions in 2244(b)(3) that
9 govern how that determination is going to be
10 made.

11 JUSTICE THOMAS: As between federal
12 and state, beyond the federalism issue, why
13 would those be treated differently? The
14 prisoners, the federal prisoners and the state
15 prisoners, they had been treated differently,
16 but I think the effort by Congress was to bring
17 them closer together in treatment.

18 MR. ADLER: Your Honor, we don't agree
19 with that. We see numerous examples in AEDPA
20 where they are treated differently, so we know
21 that they're not treated the same.

22 And beyond federalism, we know
23 finality concerns are different. State
24 prisoners have had multiple rounds of review by
25 the time they get to a successive 2255 -- 4

1 petition, and -- and the number of state
2 prisoners far outnumber federal prison in
3 our -- in our system. And so Congress would
4 have been concerned about finality most of all
5 with state prisoners, including the fact that
6 the vast majority of capital inmates here in
7 this country are in state -- are state
8 prisoners.

9 JUSTICE SOTOMAYOR: Going back to that
10 point, when you say multiple rounds, a state
11 prisoner has had a state court, intermediate
12 state court, final supreme court, a district
13 court, and a court of appeals. But, in federal
14 court, a prisoner only has two rounds or three
15 rounds of review, correct?

16 MR. ADLER: That's correct. What
17 state prisoners have that federal prisoners do
18 not is they also have state post-conviction
19 review, which serves as an additional level of
20 review that federal prisoners do not have.
21 They also have, of course, the right to appeal
22 any federal claim to this Court, even on direct
23 appeal of their state conviction. And we
24 actually see a collateral estoppel bar in
25 2244(c) that applies only to state prisoners.

1 JUSTICE GORSUCH: Mr. --

2 JUSTICE SOTOMAYOR: Counsel -- I'm
3 sorry.

4 JUSTICE GORSUCH: No, no, please.

5 JUSTICE SOTOMAYOR: Counsel, I don't
6 want you to give up your first argument on
7 jurisdiction. I know that in -- in a previous
8 statement I made in this very case, I suggested
9 that it was wrong. But your brief gave me
10 great pause. Don't give up on it, all right?

11 You -- your position is that the
12 first -- that the cross-reference barring
13 jurisdiction does not unambiguously incorporate
14 the cert bar that exists for state prisoners,
15 correct?

16 MR. ADLER: That's correct.

17 JUSTICE SOTOMAYOR: And our case law
18 is replete that to deprive us of jurisdiction
19 it has to be clear.

20 MR. ADLER: That's correct.

21 JUSTICE SOTOMAYOR: All right. And
22 unambiguous?

23 MR. ADLER: Correct.

24 JUSTICE SOTOMAYOR: And this is not.
25 All it says is that successive habeas motions

1 filed by federal prisoners "must be certified,
2 as provided in Section 2244, by a panel of the
3 appropriate court of appeals," right?

4 MR. ADLER: Correct.

5 JUSTICE SOTOMAYOR: Now that's not
6 sufficiently clear because this Court is not a
7 panel of the court of appeals, right?

8 MR. ADLER: That is correct.

9 JUSTICE SOTOMAYOR: And so it's
10 speaking about whether a full panel could hear
11 it, not whether the Supreme Court could hear
12 it, correct?

13 MR. ADLER: That's correct. I -- to
14 be clear, we are not giving up that argument.

15 JUSTICE SOTOMAYOR: All right.

16 MR. ADLER: We are simply saying, as
17 we did on page 15 of our reply brief, that it's
18 not necessary.

19 JUSTICE SOTOMAYOR: Because of the
20 Castro argument?

21 MR. ADLER: And our other narrower
22 arguments.

23 JUSTICE SOTOMAYOR: All right.

24 MR. ADLER: But our argument --

25 JUSTICE SOTOMAYOR: But any review by

1 this Court of a panel's cert decision is not
2 part of how the panel certifies a successive
3 filing, correct?

4 MR. ADLER: That's correct. Our
5 argument is based on the text of 2255(h),
6 which -- which incorporates the parts of 2244
7 that "provide" for how a motion is to be
8 "certified" by a "panel" of the appropriate
9 court of appeals. And our position is that
10 incorporates (b)(3)(A) through (D) because
11 those provisions do just that, but it does not
12 incorporate (E), which comes into play only
13 after the certification determination has been
14 made, and it provides limitations on further
15 review in the form of rehearing and certiorari.

16 JUSTICE SOTOMAYOR: And then --

17 JUSTICE JACKSON: But why in the --

18 JUSTICE ALITO: Doesn't your --

19 JUSTICE GORSUCH: Sorry. Please go
20 ahead.

21 JUSTICE SOTOMAYOR: One last question.

22 The two standards of review, (h) and
23 what the state court looks for, you mentioned
24 earlier, are very different things, correct?
25 The substantive standard.

1 MR. ADLER: With respect to the newly
2 discovered evidence, they are different. With
3 respect to new rules of constitutional law,
4 they are identical.

5 JUSTICE SOTOMAYOR: But there's still
6 a difference?

7 MR. ADLER: With the newly discovered
8 evidence, yes.

9 JUSTICE SOTOMAYOR: And six circuits
10 are applying the state prisoner substantive
11 review provisions rather than the federal
12 substantive review provisions?

13 MR. ADLER: Our -- our position is
14 that they are applying (b)(1), which, on its
15 face, applies only to state prisoners. That's
16 correct.

17 JUSTICE SOTOMAYOR: All right. Thank
18 you, counsel.

19 CHIEF JUSTICE ROBERTS: Justice Alito?

20 JUSTICE GORSUCH: Go -- yeah, please.

21 JUSTICE ALITO: Doesn't your reading
22 of 2255(h) make a hash of the procedure that
23 Congress has prescribed? An authorization to
24 file a second or successive application must be
25 certified by a panel of a court of appeals,

1 and that court has to do that not later than
2 30 days after the filing of a motion.

3 But, on your reading, even though the
4 panel has to move very quickly, once the panel
5 has ruled, if it denies the application, then
6 the prisoner can move for rehearing en banc and
7 there are no special time limits on that or
8 rehearing before the panel, there are no
9 special time limits on that. Can file a
10 petition for a writ of certiorari, there are no
11 special time limits on that.

12 So doesn't your reading completely
13 vitiate what Congress was getting at?

14 MR. ADLER: Sure. We understand that
15 concern, Your Honor. Our position on -- this
16 is -- this only goes to our broadest
17 jurisdictional argument that Justice Sotomayor
18 referenced, not our narrow ones.

19 JUSTICE ALITO: Yeah, I understand.

20 MR. ADLER: But, to answer your
21 concern, we don't think that Congress has to
22 legislate in an all-or-nothing manner here.
23 So, with the 30-day limitation on the front
24 end, that significantly increases the
25 expediency of the process here. Where,

1 normally, an appeal would take a year, now it
2 takes 30 days.

3 But that doesn't mean that Congress
4 also wanted to eliminate all forms of further
5 review, and we see Congress doing this in 2266,
6 another provision of AEDPA, which places time
7 limits on the resolution of capital cases but
8 does not dispense with further review and
9 rehearing or certiorari.

10 Of course, our position is that the
11 Court does not need to address this argument
12 because we have three other narrower arguments.
13 And this, of course, was the same approach
14 that this Court took in Castro, where it --

15 JUSTICE ALITO: Every court of appeals
16 has decided the issue you've just been deciding
17 against you, right?

18 MR. ADLER: In the context of
19 rehearing. Of course, no court of appeals has
20 done so in the context of certiorari. But,
21 yes, I believe that is correct.

22 However, none of the --

23 JUSTICE GORSUCH: If that -- if that's
24 correct, right, so just to step back, you --
25 you agree that (b)(3)(A), (B), (C), and (D) are

1 all incorporated in 2255?

2 MR. ADLER: Correct.

3 JUSTICE GORSUCH: So we're left with
4 (E). And, as Justice Alito pointed out, every
5 single court that's addressed the issue says
6 that that does bar panel rehearings and en banc
7 rehearings. You would ask us to overturn all
8 those decisions, or do you think there's a way
9 to say those decisions are correct, but it's
10 only the bar -- it's pretty express -- no
11 certiorari right there in (E). Is it somehow
12 different?

13 MR. ADLER: From the rehearing bar?
14 No, that's not our position. We just think
15 that the six -- the circuit --

16 JUSTICE GORSUCH: So they're all
17 wrong? All those courts are wrong?

18 MR. ADLER: Correct. They have not
19 actually taken the text of 2255(h) seriously.

20 JUSTICE GORSUCH: Okay. Okay. I
21 appreciate that argument. I understand that
22 argument.

23 Is there something odd about the fact
24 that you would bar cert petitions and rehearing
25 petitions for not just state prisoners under

1 2254 but also any 2244 pre-conviction prisoners
2 but yet not federal prisoners?

3 Do you see what I'm saying?

4 I mean, 2244 isn't just
5 post-conviction relief. It's pre-conviction
6 relief too often. That's its -- that was its
7 central and original function.

8 And yet they couldn't bring cert
9 petitions. They couldn't bring rehearing
10 petitions. State prisoners can't bring
11 rehearing petitions post-conviction, but
12 federal prisoners can?

13 Is -- do you see the incongruity there
14 that I'm observing?

15 MR. ADLER: I -- I think it's a
16 difficult question whether 2244(b) applies to
17 2241 habeas petitions, which I think is what
18 your question is getting at. I certainly don't
19 think the Court has to decide any of that here.

20 JUSTICE GORSUCH: But that is -- that
21 is where your logic leads, and so I just wonder
22 how that could be.

23 MR. ADLER: Our --

24 JUSTICE GORSUCH: What would be the
25 rational account for it if that's how it works?

1 MR. ADLER: Our position is simply
2 that the text here treats federal prisoners
3 differently in (b)(3)(E) in the same way it
4 does in (b)(1). And that is, of course, due to
5 federalism. That is the -- that is a plausible
6 explanation.

7 Again, however, I don't think the
8 Court needs to go broad here when we have
9 narrower --

10 JUSTICE GORSUCH: But can -- but
11 can -- can you think of -- and maybe -- maybe
12 the answer is you can't on your feet, and I get
13 it -- any reason why pre-conviction prisoners
14 would be barred, but post-conviction prisoners
15 wouldn't be?

16 MR. ADLER: Well, Congress has drawn a
17 distinction throughout the statute between
18 people who are in custody pursuant to a
19 judgment and people who are not.

20 As for pretrial detainees, my
21 experience is that they are not having to file
22 second or successive motions to file their
23 2241 petitions.

24 To the extent that's a category of
25 cases, I'm just not aware of it. So I think,

1 in practice, it just hasn't been an issue.

2 But, again, I just don't think that the Court
3 has to decide any of this in this --

4 JUSTICE JACKSON: Right. So you keep
5 going back to your narrow jurisdictional
6 argument, and I'm quite interested in it. And
7 I guess I'm trying to understand whether your
8 response to Justice Gorsuch's bringing up all
9 of the prior court of appeals cases is that
10 perhaps they weren't focused on whether or not
11 the panel had actually granted or denied -- had
12 actually applied the substantive criteria and
13 that what (E) is really doing -- this is what
14 I take your argument to be -- is essentially
15 establishing a finality requirement when the
16 panel actually does apply the substantive
17 criteria and makes a determination about
18 whether this authorization should be granted
19 or denied.

20 But when, as here, the panel doesn't
21 do that because it makes some other
22 determination about, let's say, its lack of
23 jurisdiction to make that kind of a ruling,
24 that's still on the table as you read (E).
25 That's not being stripped by this statute.

1 Is that right?

2 MR. ADLER: In general -- generally,
3 yes. We have --

4 JUSTICE JACKSON: Okay.

5 MR. ADLER: -- three different narrow
6 arguments here and they're all slightly
7 different. If I can just briefly sketch those
8 out?

9 JUSTICE JACKSON: Sure.

10 MR. ADLER: The first one logically is
11 that the court of appeals here did not deny the
12 motion for authorization, the key word being
13 "denial," because the court of appeals
14 dismissed it for lack of jurisdiction. It did
15 not issue a ruling on the merits. And that
16 argument follows from this Court's decision in
17 Stuart.

18 The second argument --

19 JUSTICE JACKSON: But wait. That's --
20 that's sort of what I'm saying, right? It
21 didn't make the requisite determination --

22 MR. ADLER: Correct.

23 JUSTICE JACKSON: -- that triggers
24 (E).

25 MR. ADLER: Correct.

1 JUSTICE JACKSON: You have to grant or
2 deny, not dismiss.

3 MR. ADLER: That is correct. That is
4 correct.

5 JUSTICE JACKSON: All right.

6 MR. ADLER: That's our first argument.

7 Our second argument is, even if
8 there's a denial, they didn't -- they didn't --
9 the court of appeals did not issue a denial of
10 an authorization because it went beyond the
11 gatekeeping requirements.

12 Now this argument depends on whether
13 we're right about (b)(1), but if we are, it
14 means that the court of appeals did not issue a
15 proper authorization determination because it
16 relied on a requirement that is, in fact, not a
17 requirement for authorization at all. In fact,
18 it's irrelevant to the case.

19 And our third argument is based on
20 Castro, and it's the one I opened with, which
21 is that even if there is a denial of an
22 authorization, it's not the subject of our cert
23 petition.

24 The subject of our cert petition is a
25 antecedent question about whether we have to

1 even satisfy the gatekeeping requirement in
2 (b)(1) at all. That is the line that Castro
3 drew.

4 And on the other side of the spectrum,
5 if we had, say, challenged -- the court of
6 appeals said you cannot actually satisfy these
7 gatekeeping requirements, that's a denial,
8 that's barred. That is the sort of core focus
9 of (b)(3)(E).

10 JUSTICE JACKSON: So, under your --
11 under this narrow jurisdictional approach,
12 there's still work for (E) to do. It's not as
13 though your -- your broadest argument is (E)
14 doesn't even apply in federal cases.

15 MR. ADLER: Correct.

16 JUSTICE JACKSON: That's the one that
17 Justice Sotomayor explored with you.

18 MR. ADLER: Correct.

19 JUSTICE JACKSON: But now you're
20 saying, even if (E) applies, it doesn't apply
21 in our circumstance for these three reasons.

22 MR. ADLER: Correct. And this
23 situation is so far removed from the core of
24 (b)(3)(E). (b)(3)(E) is about preventing
25 this Court from reviewing individualized

1 applications and determinations, people seeking
2 error correction in this Court.

3 This case is far removed from that
4 because, first of all, we have a
5 non-merits-based dismissal based on a
6 gatekeeping requirement that we contend does
7 not even apply in this case.

8 JUSTICE JACKSON: Thank you.

9 JUSTICE KAVANAUGH: If I can --

10 JUSTICE ALITO: But you applied for --
11 you applied for authorization, right?

12 MR. ADLER: Correct.

13 JUSTICE ALITO: To file a second or
14 successive?

15 MR. ADLER: That's correct.

16 JUSTICE ALITO: And is that still on
17 the docket of the court of appeals?

18 MR. ADLER: No, it was -- it -- it is
19 not.

20 JUSTICE ALITO: So it was denied,
21 right?

22 MR. ADLER: No, Your Honor. There's a
23 distinction between a dismissal and a denial in
24 the statute.

25 JUSTICE ALITO: Well, it was

1 effectively -- it was effectively denied. What
2 you're saying is it was denied on an improper
3 ground.

4 MR. ADLER: Correct. The effect of
5 it --

6 JUSTICE ALITO: But --

7 MR. ADLER: -- was a denial. However,
8 we know from Stuart, this Court's decision in
9 Stuart, that the effect does not matter because
10 the effect of the ruling by the court of
11 appeals in Stuart was to grant authorization.

12 In fact, the court of appeals
13 transferred it to the district court. This
14 Court said it's not a grant of authorization,
15 and the reason why is it didn't rule on the
16 merits.

17 Now, here, the effect is to deny, but
18 the effect doesn't matter. What matters is the
19 court of appeals did not rule on the merits.
20 That's our first dismissal/denial argument
21 based on Stuart.

22 JUSTICE ALITO: All right. Okay.
23 Thank you.

24 JUSTICE KAVANAUGH: On -- on your
25 broader argument, picking up on Justice

1 Gorsuch's question, the distinction between en
2 banc or petition for rehearing in the court of
3 appeals and then this Court's review might
4 depend on the clear statement rule in part.
5 How should we think about the clear statement
6 rule and how to apply it here?

7 MR. ADLER: Your Honor, that is a
8 correct distinction that the clear statement
9 rule that this Court applied in *Castro* to
10 (b)(3)(E) would only apply to the certiorari
11 bar rather than the rehearing bar. So, if the
12 Court wanted to sort of decouple those, that
13 would be the basis to do it.

14 That's not our position. We just
15 think that (E) is not covered by the text of
16 the cross-reference in (b)(3)(E) because it
17 comes into play after the certification
18 determination has been made. And, as the
19 government acknowledges, (b)(3)(E), it's just a
20 limitation on further review. And -- and so
21 that's why we think the whole thing falls
22 outside the scope of (E). But you're correct
23 that to the extent the clear statement rule
24 would make a difference here, yes, the
25 certiorari bar is even further removed.

1 JUSTICE KAVANAUGH: What would a clear
2 statement -- what -- what more would Congress
3 have to do, do you think?

4 MR. ADLER: Well, we have a clear
5 statement in (E) itself with respect to state
6 prisoners with respect to habeas applications.
7 What we don't have is a clear statement in (h),
8 where we're talking about federal prisoners.

9 And we pointed this out in our initial
10 brief with the Hohn decision, and that case
11 drew a contrast between (b)(3)(E) as a clear
12 statement and a certificate of appealability
13 provision in 2253, which didn't have that.

14 And we think that same sort of
15 contrast exists here with (b)(3)(E) and
16 2255(h), which says nothing about jurisdiction.

17 JUSTICE BARRETT: 2255(h) does say --
18 and this is just -- as I'm trying to think
19 about this argument, this clear statement point
20 that you have, I think, is your best one on
21 your broader argument. 2255(h) does say,
22 though, that a second or successive motion must
23 be certified, as provided in Section 2254,
24 by -- 2244 by a panel of the appropriate court
25 of appeals.

1 So what are we to make of that? It
2 says certification has to come from a panel.
3 And then one could flip back to 2244 and say
4 that this whole section in (3) is talking about
5 how that certification happens by a panel, and
6 then (E) says and, yeah, it really happens by a
7 panel. The panel's word is final.

8 MR. ADLER: Your Honor, I understand
9 that point. That's not what (E) says, however.
10 All (E) does is prohibit a petition for
11 rehearing, so that's why every circuit to look
12 at this has said that sua sponte rehearing is
13 still on the table.

14 All we're saying is that (b)(3)(A)
15 through (D) say that the certification
16 determination has to be made by a three-judge
17 panel, but it doesn't prohibit rehearing
18 petitions by federal prisoners.

19 So it's a difficult -- it's a
20 difficult argument and a difficult issue,
21 again, that I don't think the Court would have
22 to address if it went with one of our narrower
23 arguments.

24 JUSTICE KAGAN: I mean, what (E) tells
25 you is when the certification process generally

1 stops. I suppose that's the same point that
2 Justice Barrett is making. And it seems to be
3 slicing the baloney pretty thin to say, well,
4 we'll do (A) through (D), but then we won't do
5 (E) even though (E) basically puts the period
6 on what (A) through (D) says. It says here's
7 when it ends, the certification process.

8 MR. ADLER: Sure, Your Honor. We take
9 that point. I think the key word that you just
10 used is "process," which is not a word that's
11 used in (h). That's a word that's added by the
12 government in its brief along with the words
13 "final" and "conclusive."

14 JUSTICE KAGAN: I take the point,
15 but -- but, you know, it's -- what (h) is about
16 is how something gets certified. So it doesn't
17 seem to be too much of a leap to say, when
18 you're talking about how something gets
19 certified, you're talking about the
20 certification process, and that includes sort
21 of the statement which (E) gives about when and
22 how that certification process ends.

23 MR. ADLER: Sure, Your Honor. So,
24 again, our argument is based on the full text
25 of (h), certified as provided by a panel of the

1 appropriate court of appeals. We think that
2 only covers the provisions that provide for
3 certification. (E) comes after that
4 determination has been made.

5 JUSTICE BARRETT: Could you win
6 without the clear statement rule?

7 MR. ADLER: I'm sorry?

8 JUSTICE BARRETT: Could you win this
9 argument without the clear statement rule?

10 MR. ADLER: I think so, Your Honor,
11 but, again, I think we're perhaps losing sight
12 of the bigger picture here, which is that the
13 top priority in this case, we think, is for
14 this Court to be able to resolve the circuit
15 conflict on (b)(1).

16 So we don't have a particular dog in
17 the fight on how the Court resolves its own
18 jurisdiction here. And that's why I keep
19 coming back to our narrower arguments because,
20 to the extent that anyone is concerned about
21 the implications for this, the narrower
22 arguments would avoid that.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 In your brief, you argue that

1 interpreting (b)(3)(E) as taking jurisdiction
2 away would raise serious questions under the
3 Exceptions Clause. You want to answer that
4 serious question?

5 MR. ADLER: I certainly don't want to
6 answer that question, Your Honor, but I think
7 this Court might have to if it concludes -- if
8 it rejects all of our jurisdictional arguments
9 such that there's really no way for this Court
10 to exercise its essential function under
11 Article III, which is to ensure the uniformity
12 of federal law, including a very important
13 federal statutory provision in AEDPA.

14 CHIEF JUSTICE ROBERTS: Well, it says
15 that not with respect to AEDPA but subject to
16 such exceptions and regulations as Congress may
17 make. Why isn't this just an exception that
18 Congress has made?

19 MR. ADLER: Sure. So, if you reject
20 all of our jurisdictional arguments, and given
21 the potential unavailability of original habeas
22 petitions by federal prisoners after *Jones v.*
23 *Hendrix*, there is really no viable way for this
24 Court to be able to ensure the uniformity of
25 federal law here.

1 Now the amicus beef -- brief by the
2 federal courts professors lays this out very
3 well and summarizes the scholarship, but this
4 case is a unique one in the sense that original
5 habeas has always functioned as a safety valve
6 here. That's what the Court has always pointed
7 to. And if that's not available, and if
8 certiorari is not available under any of our
9 arguments, then that is why I think we come
10 into serious problems here with the Exceptions
11 Clause. And I think the Court can simply avoid
12 all of that if it narrowly construes (b)(3)(E)
13 as it has always done in the only two cases
14 where it's interpreted that provision, in
15 Stuart and Castro, and exercises jurisdiction
16 on one of our narrower arguments and therefore
17 directly resolved the conflict over (b)(1).

18 CHIEF JUSTICE ROBERTS: But we've
19 never held that the Exceptions Clause does not
20 mean what it says, have we?

21 MR. ADLER: I'm not aware of any
22 decision by this Court resolving that question,
23 no. And I don't think that this is the case to
24 do it because of the avoidance -- the avenues
25 we've given this Court to exercise jurisdiction

1 on some other narrower ground.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Justice Thomas?

5 Justice Alito?

6 JUSTICE ALITO: On the relitigation
7 bar, what's your response to the argument that
8 Congress may not have been particularly
9 attentive to terminology but that the thrust of
10 what it was trying to do was to apply the same
11 rules to federal and state prisoners?

12 MR. ADLER: I think there's simply no
13 evidence to support that in the text. We have
14 2254 appearing in (b)(1) and (b)(2) but not in
15 (b)(3), by the way, which everyone agrees the
16 certifications there do apply. So that
17 distinction is important.

18 Everybody agrees, the Eleventh
19 Circuit, Court-appointed amicus agree that
20 (b)(2) doesn't apply to federal prisoners and
21 it uses the exact same 2254 language.

22 And then we have two separate and
23 independent gatekeeping requirements for
24 federal prisoners in (h)(1) and (h)(2), state
25 prisoners in (b)(1) and (b)(2). So it's a

1 symmetrical regime that they set up here. So I
2 think every textual indication here is to the
3 contrary.

4 JUSTICE ALITO: All right. Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Sotomayor?

7 JUSTICE SOTOMAYOR: Counsel, if
8 Congress wanted to include the cert bar, it
9 could have just said, "as provided in
10 Section 2244(b)(3)," correct?

11 MR. ADLER: Correct.

12 JUSTICE SOTOMAYOR: But it didn't. It
13 used a different phraseology.

14 MR. ADLER: Correct. It -- correct.

15 JUSTICE SOTOMAYOR: And the process
16 that was used that it references is a process
17 of court certification, not of cert, correct?

18 MR. ADLER: Correct.

19 JUSTICE SOTOMAYOR: And that's your
20 basic point?

21 MR. ADLER: That is supportive of our
22 basic point. Our basic point is really a
23 textual argument here. It's not a policy
24 argument. I think that's what the government
25 is trying to say here, is we don't want to see

1 a lot of cert petitions here because we're
2 overworked. I think that's the main concern.
3 But we're making a textual argument about the
4 scope of the reference in -- cross-reference in
5 (h).

6 JUSTICE SOTOMAYOR: All right. Can we
7 go back a moment to -- to the Chief Justice's
8 question, okay, with respect to review by the
9 court of appeals or -- or why isn't there a
10 constitutional question with AEDPA, but there
11 would be one if we deprive federal prisoners of
12 review of this issue?

13 MR. ADLER: I think this particular
14 circuit conflict on (b)(1) is unique in the
15 sense that it can be raised only by federal
16 prisoners. And if federal prisoners can no
17 longer file original habeas petitions in this
18 Court challenging their conviction and sentence
19 after Jones v. Hendrix, then this particular
20 split, I think, highlights the potential
21 constitutional problem in a way that no other
22 split would.

23 Now other splits could still raise the
24 question because this Court has rarely, if
25 ever, actually used its original habeas power,

1 but this particular split, I think, is -- is
2 the problem here because there's really no
3 other viable way for this Court to resolve this
4 circuit conflict on (b)(1).

5 JUSTICE SOTOMAYOR: And the circuit
6 conflict is on whether the successive petition
7 bars review at all?

8 MR. ADLER: No. The circuit conflict
9 is on whether (b)(1) applies to 2255 motions.

10 JUSTICE SOTOMAYOR: (b)(1). That's
11 what I meant.

12 MR. ADLER: Correct.

13 JUSTICE SOTOMAYOR: Okay. Thank you.

14 CHIEF JUSTICE ROBERTS: Justice Kagan?

15 JUSTICE KAGAN: Mr. Adler, the clear
16 statement rule that you invoke from Castro I
17 take it comes from the sentence where it -- it
18 speaks of the basic principle that we read
19 limitations on our jurisdiction to review
20 narrowly. Is that --

21 MR. ADLER: No, Your Honor. There's a
22 sentence, I believe, right before or right
23 after that, it says that we are not going to
24 read (b)(3)(E) in a manner that would deprive
25 the -- close this Court's door -- this Court's

1 courthouse doors to a class of habeas
2 petitioners without a clear indication that
3 Congress sought to do so.

4 JUSTICE KAGAN: Clear indications.

5 MR. ADLER: Correct.

6 JUSTICE KAGAN: Okay. Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Gorsuch?

9 JUSTICE GORSUCH: We haven't given you
10 much of a chance on the merits to speak, and I
11 do have one question for you about that that
12 I'm struggling with. So you agree that (b)(3)
13 and (b)(4) apply when we get to the merits,
14 right?

15 MR. ADLER: If you reject our broader
16 jurisdictional argument, then we would agree
17 with that.

18 JUSTICE GORSUCH: Okay. All right.

19 MR. ADLER: But not if you agree with
20 it.

21 JUSTICE GORSUCH: I understand that.

22 MR. ADLER: Okay.

23 JUSTICE GORSUCH: Okay. So we've got
24 (b)(3) and we've got (b)(4) in there but not
25 (b)(1) and (b)(2).

1 MR. ADLER: Correct.

2 JUSTICE GORSUCH: And one of the main
3 arguments as I understand it has been because
4 (b)(1) and (b)(2) speak about applications
5 under Section 2254, right?

6 MR. ADLER: Yes.

7 JUSTICE GORSUCH: Okay. I wonder why
8 that doesn't cut the other way because,
9 throughout 2244(b)(1), (2), (3), (4), it speaks
10 of applications, not motions, which you have in
11 the 2255 context. So you've got to -- you've
12 got to -- you've got to read motions as
13 applications, okay.

14 And 2254 is the state post-conviction
15 procedure that's most analogous to 2255, right?

16 MR. ADLER: I would agree with that,
17 yes.

18 JUSTICE GORSUCH: Okay. And that's
19 what's referenced in (b)(1) and (b)(2), is the
20 state post-conviction procedure.

21 MR. ADLER: Mm-hmm.

22 JUSTICE GORSUCH: And (b)(3) and
23 (b)(4) just talk about applications, which
24 includes pre-conviction, again, 2241 possibly,
25 possibly. So what do we do with that?

1 It seems to me like the fact that it
2 mentions 2254 in (b)(1) and (b)(2) makes it
3 more likely to be applicable rather than less.

4 MR. ADLER: No, Your Honor, we
5 strongly disagree with that.

6 JUSTICE GORSUCH: I know you do, and
7 I'm wondering why.

8 MR. ADLER: Here's why, because the
9 fact that 2254 is referenced in (b)(1) and
10 (b)(2) but not (b)(3) and (b)(4) suggests that
11 number one, the 2254 language in (b)(1) and
12 (b)(2) was deliberate, and number two, it
13 suggests that the omission of that language in
14 (b)(3) and (b)(4) allows those provisions to
15 apply to 2255 motions in a way that (b)(1) and
16 (b)(2) cannot.

17 JUSTICE GORSUCH: But why wouldn't --
18 I -- I -- I understand that. That's what you
19 said in your briefs. But I'm not sure it's
20 totally responsive to what I'm getting at,
21 which is it definitely signals that we're
22 talking about post-conviction when you mention
23 2254.

24 MR. ADLER: Mm-hmm.

25 JUSTICE GORSUCH: And the later

1 sections suggest it applies to all habeas,
2 whether it's 2241 or 2240 -- 2255, right?

3 MR. ADLER: No. So (b)(3) and (b)(4),
4 which don't have the 2254 language --

5 JUSTICE GORSUCH: Yeah.

6 MR. ADLER: -- we acknowledge what you
7 said earlier. I think everyone agrees the word
8 "application," which refers to a habeas corpus
9 application --

10 JUSTICE GORSUCH: Yeah.

11 MR. ADLER: -- has to mean motion in
12 order for the cross-reference in (h) to work.

13 JUSTICE GORSUCH: Right. I understand
14 that.

15 MR. ADLER: So then the question is,
16 once you -- once you adjust application to
17 motion, then what do you do there? All we're
18 doing is we're reading the rest of that (b)(3)
19 in that context.

20 What amicus wants you to do is,
21 instead of adjusting, you know, requirements of
22 this subsection, she -- she wants you to keep
23 that the same as it applies to applications and
24 then go up to (b)(1) and (b)(2) and rewrite
25 2254 to mean 2255 in a way that would

1 immediately create both conflict and
2 superfluity with (h)(1) and (h)(2).

3 JUSTICE GORSUCH: Okay. Thank you.

4 CHIEF JUSTICE ROBERTS: Justice --

5 JUSTICE BARRETT: Counsel, I want to
6 sketch something out for you and see if you
7 think it might work, okay?

8 So the government points out on pages
9 12 and 13 of its reply that if we agree with
10 you about your (b)(1) point, agree with you and
11 the government about the (b)(1) point, that it
12 would be pretty natural, even if we disagree
13 with you and agree with the government on the
14 jurisdictional point, pretty natural to express
15 agreement with the (b)(1) point in the course
16 of an analysis on the other.

17 Okay. Now let's say that I -- and
18 this is true. I do think there's something to
19 this argument that the courts of appeals have
20 made that (E) does not deprive them of
21 jurisdiction to sua sponte have a panel hearing
22 re -- rehearing en banc or -- sorry, panel
23 rehearing or rehearing en banc because it's
24 really talking about the prisoner's inability
25 to file such a petition or a petition for writ

1 of certiorari.

2 Okay. So this is what I'm sketching
3 out here. Wouldn't it be possible if this
4 Court said in the course of the analysis, as
5 the government proposes, that (b)(1) is not
6 incorporated, wouldn't it be possible for the
7 Eleventh Circuit on remand to sua sponte
8 correct its error? Wouldn't it be quite
9 surprising, in fact, if the Eleventh Circuit
10 didn't do that sua sponte if it has the
11 authority under (E) either by the panel or en
12 banc if we say that it is wrong in (b)(1)?

13 MR. ADLER: The problem with that,
14 Your Honor, is that there will be no remand if
15 the Court dismisses this case for lack of
16 jurisdiction. So we don't think the Court
17 should consider the government's proposal on
18 page 12 unless the Court totally rejects all of
19 our jurisdictional arguments. That's the
20 only --

21 JUSTICE BARRETT: That was the premise
22 of my question.

23 MR. ADLER: Oh, okay, I'm sorry. So,
24 yes, then there would be no remand for the
25 Eleventh Circuit to do that sua sponte

1 rehearing that you suggest.

2 And this is our concern here with the
3 suggestion, is that -- it's even beyond that,
4 which is that if the Court tries to resolve the
5 (b)(1) conflict in the course of dismissing
6 this case for lack of jurisdiction, we are
7 concerned that the courts of appeals may
8 perceive that to be dicta or -- or worse, an
9 advisory opinion.

10 So, if the Court does consider that
11 option, we would urge the Court to be as
12 explicit as possible on the (b)(1) question,
13 even to the point of saying that the reasoning
14 on the (b)(1) issue is a holding.

15 Otherwise, what's going to happen is
16 that if even one of the six circuits says, you
17 know what, this is dicta, it doesn't abrogate
18 our prior panel rules and the Eleventh Circuit
19 in particular has a very strict one, then we're
20 in a situation where there's no way to get back
21 up to this Court on cert and the circuit
22 conflict will never be resolved and then we
23 have -- we'll have wasted all of our time and
24 this will all be for nothing.

25 So I think the better way to deal with

1 this, rather than that sort of very unorthodox
2 approach, is to narrowly construe (b)(3)(E) as
3 it has always done, as this Court has always
4 done, and directly resolve the circuit conflict
5 over (b)(1).

6 JUSTICE BARRETT: Okay. Well, I don't
7 know that that would be unorthodox because we
8 say things, we have alternate holdings and we
9 say things in opinions all the time that aren't
10 directly relevant, but I take your point.

11 Just one other question. The Chief
12 Justice asked you about the constitutional
13 avoidance on the essential functions piece, and
14 you say that, yes, it would raise a
15 constitutional question because construing this
16 jurisdictional bar to be total would threaten
17 the Court's essential function of maintaining
18 the uniformity of federal law.

19 Why wouldn't that completely
20 eviscerate the Exceptions Clause? Because it's
21 possible to have a split on any question of
22 federal law, right?

23 So why could Congress ever withdraw
24 our jurisdiction to weigh in on any question
25 because, even if a -- a split doesn't exist

1 then, it could always exist, right?

2 MR. ADLER: We're not saying that it
3 wouldn't, a problem wouldn't arise in that
4 situation. I think it's important to point out
5 that this statute, (b)(3)(E), is unique. There
6 is no other statute like this. There are
7 plenty of statutes that bar judicial review
8 across the board, but there is no statute like
9 this that targets this Court's certiorari
10 jurisdiction.

11 And the -- and the problem that arises
12 is the lower courts, the federal courts of
13 appeals, are interpreting and applying AEDPA.
14 And if this Court cannot superintend that and
15 step in when there's a conflict --

16 JUSTICE BARRETT: So Congress can't --
17 I mean, I -- I -- I take then the -- the
18 straightforward answer to my question is that,
19 yes, Congress can really never deprive this
20 Court of certiorari to resolve questions of
21 federal law because that would deprive us of
22 our ability to ensure the uniformity of federal
23 law?

24 MR. ADLER: I think there's at least a
25 serious question about that, and that's

1 because, whenever lower courts are deciding
2 issues of federal law and this Court cannot
3 step in, then this Court ceases to be the
4 Supreme Court. The courts of appeals then
5 become their own mini supreme courts.

6 Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Jackson?

9 Thank you, counsel.

10 Mr. Yang.

11 ORAL ARGUMENT OF ANTHONY A. YANG
12 ON BEHALF OF THE RESPONDENT

13 MR. YANG: Mr. Chief Justice, and may
14 it please the Court:

15 Section 2255(h) incorporates the
16 certification process for second or successive
17 applications in 2244(b)(3) and (b)(4). And
18 because (b)(3)(E) prohibits review by petition
19 for writ of certiorari, this Court lacks
20 jurisdiction.

21 2255(h) specifies three key aspects
22 for certifying a successive application: Who
23 must certify it, what is certified, and how
24 that process proceeds and stops.

25 First, certification must be by a

1 panel of the appropriate court of appeals.
2 Second, the application must be certified to
3 contain either of (h)(1) or (h)(2)'s content
4 requirements for new evidence or a new rule of
5 constitutional law. And, third, the
6 application must be certified as provided in
7 Section 2244, which means the certification
8 process proceeds in the same manner as in 2244.

9 (B)(3) and (b)(4) are the only
10 provisions in Section 2244 that address the
11 certification process for authorizing the
12 filing of a successive application. Every
13 provision in (b)(3) and (b)(4) and only those
14 provisions in Section 2244 use authorization
15 language and use the term "second or successive
16 application," a term that naturally captures a
17 federal prisoner's 2255 application and a state
18 prisoner's 2254 application.

19 Petitioner agrees that (b)(3)(A)
20 through (D) apply to federal prisoners. He
21 previously argued in his habeas petition to
22 this Court that (E) also applies. And there's
23 no sound basis for excluding (E), as every
24 court of appeals to have addressed (E) has
25 concluded. Petitioner did not even attempt in

1 his reply brief to rebut any of our arguments
2 on this broader point. He instead notes that
3 (E) prohibits cert only when authorization is
4 granted or denied, and he primarily focuses on
5 that point, saying his request was not denied;
6 it was merely dismissed.

7 But a dismissal is quite literally a
8 denial of his request. That denial is the
9 subject of his certiorari petition. This
10 Court, therefore, lacks jurisdiction.

11 I welcome the Court's questions.

12 JUSTICE THOMAS: Mr. Yang, would you
13 turn to the clear statement rule and how it
14 applies here?

15 MR. YANG: Yes. We think the language
16 is clear, both the text as well as an important
17 contextual point, and I'd like to build on what
18 Justice Alito said there, and then I'd also
19 like to address the clear statement rule, which
20 I don't think is as clear as Castro, the one
21 passage in Castro might suggest.

22 First, the contextual point, and we
23 can talk about text, but one significant
24 contextual point is not only would allowing a
25 90- to a 150-day period simply to petition this

1 Court for a writ of certiorari, not only would
2 that blow the 30-day limit apart, but you have
3 to ask why would Congress impose a 30-day limit
4 on the most important part of this process.
5 That's the court of appeals' screening decision
6 itself. Why would that be limited to 30 days
7 if Congress contemplated that a petitioner
8 could take 90 to 50 -- 150 days just to
9 consider whether to file a petition for a writ
10 of certiorari --

11 JUSTICE KAGAN: Mr. Yang, that might
12 be a good argument, but it's not the kind of
13 argument that you can make if there's a clear
14 statement rule.

15 MR. YANG: And -- and I think, though,
16 actually, context is considered. If you're
17 looking at statutory construction for clear
18 statement, you include both the text and the
19 context. And we think that --

20 JUSTICE KAGAN: You might put it in
21 as, like, "and also."

22 MR. YANG: Well --

23 JUSTICE KAGAN: But you need -- you
24 need something in the text that is a clear
25 indication, that is a clear statement that

1 basically says what you want to say.

2 MR. YANG: And we think (h) does that.

3 (h) incorporates the "shall be certified as
4 provided in 2244." And part of that process is
5 to decide who is certifying it and how is it
6 being certified. It's being certified on a
7 request for leave to file filed by a
8 petitioner -- a prisoner. It's not on a
9 petition for rehearing or on a petition for
10 cert. The process ends. It does not continue.

11 JUSTICE KAGAN: When I tried a version
12 of that argument to Mr. Adler, Mr. Adler told
13 me that I was adding the word "process," which
14 no place appears in the statute.

15 MR. YANG: Well --

16 JUSTICE KAGAN: And, of course, he's
17 right about that.

18 MR. YANG: -- "process" doesn't
19 appear, but it says "certified as provided in
20 Section 2244."

21 JUSTICE KAGAN: As provided by the
22 court of appeals. So that would suggest that
23 even though it looks a little bit weird to go
24 from (A) to (D) and skip (E), what -- what
25 2255(h) describes is the stuff that's described

1 in (A) through (D) but not in (E).

2 MR. YANG: And -- but that's just part
3 of the analysis. You also have to look at the
4 language in (E). (E) uses "second or
5 successive application," and it talks about the
6 authorization.

7 "Second or successive application," if
8 Congress had intended to include -- to cut out
9 state prisoners, it would have done exactly
10 what it did in (b)(1) and (b)(2). It would
11 have said second or successive habeas corpus
12 application under Section 2254.

13 Instead, (b)(3) and (b)(4), which are
14 all procedural provisions regarding the
15 process, which we think is incorporated, all
16 use distinct language. And the -- no one
17 has -- has come up with any explanation that --
18 that will respond to the Russello presumption.
19 It's a strong presumption. All of these
20 provisions were enacted at the same time.

21 JUSTICE KAGAN: Could you comment on
22 Mr. Adler points to this language from Castro,
23 which is about this very provision, of course,
24 and it says that, you know, read one way, it
25 would close our doors to a class of habeas

1 petitioners seeking review without any clear
2 indication that such was Congress's intent,
3 indicating that a clear indication is what's
4 needed given the basic principle that we read
5 limitations on our jurisdiction to -- narrowly.

6 MR. YANG: I think that should be read
7 somewhat narrower. It has to be read in light
8 of what immediately preceded it in that
9 paragraph. In that paragraph, the Court says,
10 first, we've already construed (E) to allow the
11 government -- when -- when the lower court
12 disfavors the government, the government can
13 seek review on the question of whether it was a
14 second or successive. And then it goes on to
15 say: And we're not going to deny the flip-side
16 rule when a prisoner comes up.

17 But that is all in the context of
18 asking the core question of, was this a second
19 or successive application? Was it in the box
20 that the jurisdictional bar --

21 JUSTICE KAVANAUGH: Do you --

22 MR. YANG: -- comes from? And that's
23 all that --

24 JUSTICE KAVANAUGH: Do you think
25 there's a clear statement rule or not?

1 MR. YANG: I think no.

2 JUSTICE KAVANAUGH: No?

3 MR. YANG: At least not broad -- as
4 broadly defined. If you look at what --

5 JUSTICE KAVANAUGH: Well, what does
6 that mean? I'm not --

7 MR. YANG: Well, if you look at what
8 Castro cites, it cites to, for the clear
9 statement, Utah versus Evans.

10 JUSTICE KAVANAUGH: You think there
11 should be a clear statement rule, add that in
12 too?

13 MR. YANG: No. First of all, this
14 Court has narrowly construed grants of
15 appellate jurisdiction to it. Appellate --
16 mandatory appellate jurisdiction under 1253 and
17 what was formerly 1254(2), and if you look at,
18 like, Abbott versus Perez or Maine versus
19 Taylor, the Court narrowly construes those
20 grants of -- grants of jurisdiction, and it
21 does not sit comfortably to narrowly construe
22 exceptions to jurisdiction in light of those
23 precedents.

24 And if you look at what the Court was
25 doing --

1 JUSTICE SOTOMAYOR: Why? Meaning
2 Congress has given us a very broad
3 jurisdictional grant over decisions by court of
4 appeals through our cert jurisdiction, and when
5 Congress wants to take it back, it's when we
6 require clarity.

7 MR. YANG: But that reasoning would
8 equally apply to 1253, which is the three-judge
9 district court appeal, or what used to be
10 1254(2), which is state appeals with regards to
11 the unconstitutionality of state provisions.
12 Both of those are -- are phrased broadly, but
13 the Court narrowly -- has narrowly construed
14 them in a long line of decisions.

15 Now the -- the -- the question about
16 what was going on in Castro, I think, has to be
17 read in light of that and in light of what --

18 JUSTICE SOTOMAYOR: Are you going back
19 to Justice Kavanaugh's question?

20 MR. YANG: Yeah. I'm -- I'm trying to
21 pivot back to -- to what Utah versus Evans --

22 JUSTICE KAVANAUGH: The reason for a
23 clear statement rule or -- or a clear
24 indication is that the underlying
25 constitutional question is one that we haven't

1 had to squarely answer for 236 years.

2 MR. YANG: Yeah. And the Exceptions
3 Clause, if you were going to address the
4 Exceptions Clause and the scope of Congress's
5 power there, it would not be in the context of
6 a habeas appeal because, at the founding,
7 it's -- it's well established that there was no
8 right to appeal at all the denial of habeas.
9 It was not in this Court's or any court's
10 appellate jurisdiction. And so the idea that
11 there would be an Exceptions Clause problem is
12 just a completely ahistorical principle.

13 JUSTICE KAVANAUGH: So we get out of
14 that in your view because this is just
15 different because it's habeas?

16 MR. YANG: It's -- it's habeas, I
17 mean, and -- and there's just no founding
18 era --

19 JUSTICE KAVANAUGH: Collateral.

20 MR. YANG: -- principle that would
21 have applied here.

22 JUSTICE JACKSON: So -- so --

23 MR. YANG: Moreover, there are some
24 bases for review. I don't -- I don't think
25 that --

1 JUSTICE KAVANAUGH: Yeah. What are
2 those?

3 MR. YANG: Yeah. So, first of all, I
4 think, as -- as Justice Barrett indicated, this
5 Court could -- if the Court took the
6 interpretive approach that we did here, I think
7 its decision on jurisdiction would effectively
8 announce the proper interpretation that we
9 want.

10 JUSTICE KAVANAUGH: Would the lower
11 courts have to follow that? I think not.

12 MR. YANG: You know, I -- I think it
13 would be a pretty willful lower court that --

14 JUSTICE KAVANAUGH: Well, what would
15 we do if they didn't?

16 MR. YANG: Well, if you didn't --

17 JUSTICE KAVANAUGH: If they didn't --

18 MR. YANG: -- there is the question of
19 sua sponte en banc, which we can discuss, but
20 if you wanted to address it specifically, I
21 think there's a question of certified -- a
22 certified question to this Court.

23 JUSTICE KAVANAUGH: And if it's not
24 certified?

25 MR. YANG: Well, first of all, I think

1 the court of appeals misunderstood the
2 certification standard. The certification
3 standard here is whether in -- it's appropriate
4 in a rare instance when advisable in the proper
5 administration and expedition --

6 JUSTICE KAVANAUGH: The only point I
7 was making is that it seems pretty cute to kind
8 of have a collateral dicta and expect everyone
9 to follow that when we're openly saying, under
10 your view, no jurisdiction.

11 MR. YANG: It depends on how the Court
12 writes the opinion. I -- I think it's not a --
13 the Court will not go out of its way to escape
14 the -- you know, rule on the merits when
15 addressing jurisdiction. But, if you agree
16 with us, the natural way to do that is to
17 analyze the statute in a way that will carve
18 out (b)(1).

19 JUSTICE KAGAN: Mr. Adler says --

20 JUSTICE BARRETT: So what about
21 relief --

22 JUSTICE KAGAN: -- at the very
23 least --

24 JUSTICE BARRETT: Oh, I was just going
25 to ask, what about relief for Mr. Bowe on

1 remand?

2 MR. YANG: Well, Mr. Bowe might not --
3 there wouldn't be a remand, but Mr. Bowe --

4 JUSTICE BARRETT: Right.

5 MR. YANG: -- has already filed
6 multiple applications in the Eleventh Circuit
7 on his --

8 JUSTICE BARRETT: But your solution --

9 MR. YANG: He could just file another
10 one.

11 JUSTICE BARRETT: But your solution
12 for the page 12 and 13 of your reply proposal
13 that you make would apply for other petitioners
14 in other circuits but would not help this
15 Petitioner?

16 MR. YANG: On this application.

17 JUSTICE BARRETT: On this application.

18 MR. YANG: But he could simply file
19 another successive application.

20 JUSTICE JACKSON: So, Mr. --

21 JUSTICE SOTOMAYOR: And why wouldn't
22 it suffer the same fate?

23 MR. YANG: Because --

24 JUSTICE SOTOMAYOR: They've already
25 said they're not certifying to us.

1 MR. YANG: Because the court of
2 appeals --

3 JUSTICE SOTOMAYOR: They've already
4 said they're not --

5 MR. YANG: No, no, no, because the
6 court of appeals would say the reason we -- we
7 bumped it before is we thought (b)(1) applied.
8 The Supreme Court has construed 2244 --

9 JUSTICE SOTOMAYOR: So a third or
10 fourth successive petition for him would be a
11 second --

12 MR. YANG: Well, he's not --

13 JUSTICE SOTOMAYOR: -- or third or
14 fourth.

15 MR. YANG: -- he's not even filed a
16 second application yet.

17 JUSTICE SOTOMAYOR: All right. Thank
18 you.

19 JUSTICE JACKSON: So, Mr. Yang, can I
20 just -- let's say I agree with you that (E) is
21 a part of the certification process that is
22 being referenced in (h).

23 Can I have you address the more narrow
24 jurisdictional argument which does focus on the
25 text of (E)? Your argument seems to suggest

1 that we should not pay attention to the
2 difference between granting and denying
3 something or denying an authorization and
4 dismissing the entire matter for lack of
5 jurisdiction.

6 And I guess I don't understand that.
7 We have very clear procedural requirements and
8 understandings when a court is doing certain
9 things. And, here, the court of appeals panel
10 did not grant or deny an authorization.

11 MR. YANG: We disagree with that.

12 JUSTICE JACKSON: Okay.

13 MR. YANG: The statute says -- and
14 this is (D) -- the Court shall grant or deny
15 authorization, shall.

16 JUSTICE JACKSON: Right.

17 MR. YANG: Those are the two -- only
18 two statutory options.

19 JUSTICE JACKSON: What if the Court
20 doesn't do that? Let's say the --

21 MR. YANG: Well --

22 JUSTICE JACKSON: Let's -- let me give
23 you a hypothetical, all right? Suppose we have
24 a three-judge panel that doesn't do what
25 Congress has said you're supposed to do with

1 respect.

2 MR. YANG: Well, what -- what does it
3 do?

4 JUSTICE JACKSON: No, I -- I'm -- let
5 me finish.

6 MR. YANG: Yeah, yeah.

7 JUSTICE JACKSON: All right? So, in
8 my hypothetical, the three-judge panel doesn't
9 apply any of the relevant statutory criteria
10 when it reviews an author -- authorization
11 request.

12 So you agree here that the (h)(1) and
13 (h)(2) substantive requirements apply, and in
14 my hypothetical, the panel says we don't care
15 about that. We're just going to rubber stamp
16 all of these applications as denied.

17 All right? So we have a rogue panel
18 not following what the statute says. Now
19 they've technically denied in that sense, but
20 they certainly haven't followed what the
21 statute says. They haven't granted or denied
22 on the merits.

23 And I guess I'm trying to understand
24 why (E) would preclude someone from appealing
25 that. It seems to me that (E) was really just

1 about Congress not wanting the actual
2 substantive determination that a panel properly
3 makes to be appealed.

4 What it was not doing was policing all
5 of the -- or -- or precluding an appeal about
6 whether or not the panel had acted procedurally
7 properly under the statute.

8 MR. YANG: Well, there's two
9 responses. One is a textual response, and then
10 I think you're actually getting into a policy
11 response.

12 JUSTICE JACKSON: No, I'm not
13 actually.

14 MR. YANG: Well, I think -- well, the
15 textual response is this. It says grant or
16 deny. Literally, a dismissal is a denial of
17 the application, as this Court has recognized
18 in Gonzalez. It's denied on the ground that
19 the claim would be dismissed.

20 Now, whether a court is wrong in a
21 denial or wrong in a grant, it can happen both
22 ways.

23 JUSTICE JACKSON: No, no, no. But
24 we're talking -- we're --

25 MR. YANG: A grant or denial is not

1 subject to review by this Court.

2 JUSTICE JACKSON: We're -- we're --
3 I -- I guess I understand your point. It just
4 seems to me to elide a very key and critical
5 thing that Congress was trying to do here,
6 which is Congress gave this panel particular
7 requirements that it has to apply when making
8 this decision.

9 One could conceive of the finality
10 requirement as being, once the panel has gone
11 through and applied (h)(1) and applied (h)(2)
12 and determined that authorization should be
13 denied, that's the end of it. That's final.
14 That's the work of (E).

15 To me, and I think, textually, you
16 know, this -- it supports the view that if a
17 panel has not done that, if a panel has not
18 actually made a determination about whether or
19 not this should be granted or denied and say
20 they have dismissed it for some other reason,
21 it doesn't trigger what (E) is trying to do.

22 There isn't a finality requirement in
23 the same way. Congress -- why would Congress
24 have even put in the substantive criteria if
25 the panel could do whatever it wanted?

1 MR. YANG: Well --

2 JUSTICE JACKSON: There still has to
3 be judicial review as to whether or not the
4 panel has acted properly procedurally pursuant
5 to the statute.

6 MR. YANG: -- the premise -- that
7 premise does not lead to the conclusion. Of
8 course, Congress wanted the panel to follow the
9 law. But the question is whether Congress
10 determined that there should be certiorari
11 review of claims that the panel erred.

12 The -- the statute doesn't say --

13 JUSTICE JACKSON: Erred with respect
14 to what?

15 MR. YANG: But the statute does not
16 say grant or deny on the merits. It says grant
17 or deny, period.

18 JUSTICE JACKSON: All right. Thank
19 you.

20 MR. YANG: And a dismissal is a
21 denial. Moreover, the structure, the structure
22 you have -- with a 30-day time limit, that time
23 limit cannot depend on the disposition of a
24 court, which is unknown in advance. If the
25 court doesn't know if it's going to dismiss or

1 deny, it can't operate under a 30-day time
2 limit unless it knows what the time limit is in
3 advance.

4 That theory of dismissal being
5 distinguishable from denial would apply not
6 only to (E), it would apply to (D), which is
7 where the 30 time -- 30-day time limit is. It
8 makes absolutely no sense.

9 It's arbitrary, and it would also be
10 asymmetric. It would allow, where denials for
11 grant -- for -- for -- on a non-merits ground,
12 that could go up on cert, but if granted, like
13 if the Court rejects the non-merits ground and
14 allows it to go forward, that couldn't be.
15 That -- again, that doesn't make great sense
16 and it's not compelled by the text.

17 The -- I think we were talking about
18 certified questions briefly. I -- I just want
19 to address this because I think this is
20 important. The court of appeals said that
21 certified questions are very rare. And that's
22 right normally, but that's because certiorari
23 jurisdiction is available.

24 The standard is when it's available --
25 advisable and the proper administration and

1 expedition of judicial business. When there's
2 cert, which can be granted before or after
3 judgment, extraordinarily rare, but if cert's
4 not available, if cert's not available and
5 there's a square and significant conflict
6 that's recurring, it's entirely appropriate for
7 a court of appeals panel and you only need two
8 judges on a panel to certify the question to
9 this Court and then this Court could decide
10 what to do.

11 Moreover, there's merits review. As
12 you may remember, Justice Kavanaugh, you wrote
13 separately in a case called Avery. Avery came
14 out of the Sixth Circuit raising this exact
15 (b)(1) issue, but it came in a different
16 posture. It came where the panel -- a -- a --
17 a panel cert -- certified a second or
18 successive. It went down to district court,
19 was litigated and came back.

20 The issue can come back on the merits
21 in that way too. And, of course, there's All
22 Writs Act jurisdiction. All Writs jurisdiction
23 is not precluded. Now it would only address
24 clearest errors, but it still exists.

25 JUSTICE KAVANAUGH: Right. The

1 standard there would be indisputably clear.

2 MR. YANG: It's a very high standard,
3 but it -- but it would take care of the
4 clearest errors. Now there's a question --
5 and -- and so, even if -- which I don't think
6 is -- is clear, but even if there weren't
7 original habeas in this Court, which is what I
8 think the hook that Petitioner relies on,
9 there's other avenues for this Court to address
10 these issues.

11 JUSTICE KAGAN: Mr. Yang, when you and
12 Justice Kavanaugh were talking about the clear
13 statement rule, your answer to him seemed to
14 reduce to habeas is different. But, of course,
15 Castro is a habeas case, and Castro dealt with
16 the very habeas provision that we're talking
17 about here.

18 And I guess I'm -- you -- you referred
19 me to earlier sentences from Castro, and I've
20 read those sentences again now.

21 MR. YANG: Mm-hmm.

22 JUSTICE KAGAN: And I -- I really
23 don't see how it gets around what Castro says,
24 which is that you need a clear indication to
25 when -- when -- when the -- the interpretation

1 would limit our jurisdiction.

2 MR. YANG: I -- I think it has to --
3 this is a two-step process. First, the Court
4 recognized that we already allowed this for the
5 government. Now we're talking about the flip
6 side. Same question, though, about whether
7 it's second or successive, whether that's
8 barred.

9 Then you look at Utah, Utah versus
10 Evans, which is ultimately the cite for the
11 narrow reading.

12 JUSTICE KAGAN: Yeah, but Utah, I
13 mean -- I mean, that's the kind of cite that
14 people throw in because it has good language.
15 So I don't think you can read Utah v. Evans
16 back into this.

17 MR. YANG: Well, there -- well,
18 there's two things actually going on in Utah
19 versus Evans. First, it -- which I don't think
20 applies, but it says that with respect to this
21 narrow reading, it rejects the argument that
22 because Congress allowed a pre-sentence
23 challenge, it precludes a post-sentence
24 challenge. But that's about any review. It's
25 not this Court's review. Then it --

1 JUSTICE KAGAN: This was -- this is
2 not an opinion, is what I'm trying to say,
3 where it says, you know, really, we should look
4 to Utah v. Evans for the rule, you know, and
5 describes why or describes how this case is the
6 same as Utah v. Evans. It's just plucking some
7 language from Utah v. Evans. But the -- the
8 purport of this paragraph is quite clear, is
9 that because there's a construction that limits
10 our jurisdiction, you need a clear indication.

11 MR. YANG: But the part that -- of
12 Utah versus Evans which is actually analogous
13 to what's going on here is, there, the Court
14 said that it was not going to read into a
15 statute an unexpressed intent to bar
16 jurisdiction that we have previously exercised.

17 And, there, the Court had previously
18 exercised post-census review. And, here, what
19 the Court is saying is we previously exercised
20 jurisdiction when the government comes up
21 saying this is second or successive when it was
22 deemed not to be.

23 And, here, it's the flip side. Here,
24 it's the prisoner. Now maybe, on that --

25 JUSTICE KAGAN: I don't -- I don't

1 read any of that in this paragraph.

2 MR. YANG: Well, this is how we read
3 the paragraph because there's three sentences
4 in the paragraph.

5 JUSTICE KAGAN: I mean, the paragraph
6 doesn't say any of that.

7 MR. YANG: Well, it's true that
8 this -- that the paragraph doesn't say that
9 explicitly, but I think you have to read
10 between the lines. Anyway, the principle that
11 this Court's cert jurisdiction is always to
12 be --

13 JUSTICE KAGAN: That would be reading
14 between the lines so that we could do your
15 policy arguments.

16 MR. YANG: Well, I don't think it's a
17 policy argument. We have textual arguments.
18 But I don't think -- this is also actually a
19 relatively significant question that intersects
20 with Congress's authority to exercise its
21 Exceptions Clause. And I think, there, the --
22 the question is, you know, why do you need a
23 clear statement?

24 This has not been followed by this
25 Court. This -- this is kind of an isolated

1 thing. And if you look at the authority for
2 it, it just doesn't bear fruit, particularly
3 when you look at how the Court has construed
4 its mandatory jurisdiction.

5 JUSTICE ALITO: Well, Mr. -- Mr. Yang,
6 there's been a lot of talk about a clear
7 statement rule, which seemed to suggest that
8 some sort of verbal formulation is required.
9 But what Castro says is that there has to be a
10 clear indication of Congress's intent. So what
11 Castro says is that we look to the intent and
12 some clear indication of intent.

13 Can't that indication of intent come
14 from something other than specific words? Can
15 it come from the structure?

16 MR. YANG: Certainly. I mean, that's
17 normal statutory construction. You -- you --
18 you determine the meaning of Congress through
19 interpretation of the words and the context and
20 surrounding provisions. And, again, all of
21 these are coming together, in our view, to
22 point in our direction. No one --

23 JUSTICE ALITO: And do you think those
24 structural arguments are policy arguments?

25 MR. YANG: No, not at all. These

1 are -- these are textual arguments. And, you
2 know, no one has come up with an answer. No
3 one has come up with an answer to why Congress
4 used the particular text, "second or successive
5 application," in (E). (A), (B), (C), (D), and
6 (E) all use that broad language that naturally
7 captures 2255 and 2254. Why did it do that and
8 then in (b)(1) and (b)(2) uses very specific
9 targeted language, "habeas corpus petition
10 under Section 2254."

11 That is, I think, almost fatal to any
12 argument that either the amicus or Petitioner
13 has that would -- that would sweep out, you
14 know, either jurisdiction or sweep in (b)(1).
15 Now I would say the amicus, if you take the
16 amicus's reading, the amicus's reading would
17 sweep in (E) anyway. We'd win on jurisdiction
18 under the amicus's reading.

19 But the text, there's just not been a
20 textual explanation for Congress's deliberate
21 use of this distinct language. That language,
22 though, maps directly -- the language is --
23 both the authorization language in (b)(3)(A)
24 through (E), as well as (4), the authorization
25 language and the broader use of "successive" --

1 "second or successive application," all of that
2 directly maps onto 2255, which is asking about
3 the certification process in 2244.

4 So, when you add all of that together,
5 we think there's a pretty strong and compelling
6 textual reason to conclude that there's no
7 jurisdiction here. And the idea that this is a
8 dismissal, not a denial, just, I think, is
9 counter-textual, and not only that, I think we
10 really haven't gone into what Castro says, but
11 Castro's holding is ultimately that the
12 subject is -- it says the subject is not the
13 denial of authorization, which would be a
14 denial of authorization to file a second or
15 successive. It is the lower court's refusal to
16 recognize that the 2255 motion is his first,
17 not his second.

18 That, again, maps directly onto the
19 question of whether it's a second or -- a
20 second or successive under the jurisdictional
21 provision that bars review of denials of second
22 or successive.

23 All that Castro, just like
24 Villamonte-Marquez or Stuart if you call it
25 that, all those two cases were deciding was

1 that these cases aren't in the box of second or
2 successive. The whole grant-or-denial thing is
3 not relevant here. Therefore, there's no
4 jurisdictional bar.

5 If you were to start construing the
6 juris- -- the -- the cert bar to include, well,
7 we're going to look to the reason, maybe this
8 applies, maybe that doesn't apply, you're --
9 you're -- you're creating a huge hole when
10 Congress used broad language to say any -- it's
11 any -- it's going to be any grant or denial of
12 authorization is now subject to review.

13 JUSTICE JACKSON: Does it matter,
14 Mr. Yang, that in Castro, there was a dismissal
15 of the motion for failure to comply with the
16 second or successive?

17 MR. YANG: It does because what
18 happened is --

19 JUSTICE JACKSON: Just like there's a
20 dismissal here for failure to --

21 MR. YANG: It's different.

22 JUSTICE JACKSON: -- or for lack of
23 jurisdiction?

24 MR. YANG: It's different. The
25 procedural posture is very different. If I may

1 finish?

2 CHIEF JUSTICE ROBERTS: Please. Yeah.

3 MR. YANG: The procedural posture in
4 Castro was that the prisoner filed a 22-5
5 application, actual application, the habeas
6 corpus, if you want to call it habeas, 2255 in
7 district court. The district court dismissed
8 it because it concluded it was second or
9 successive without certification from the court
10 of appeals.

11 That went up on direct appeal to the
12 court of appeals on a COA. The sort of CO --
13 the court of appeals said, yeah, we agree this
14 was second or successive. Therefore, it was
15 not properly filed in district court to begin
16 with.

17 Then it comes to this Court on cert.
18 There's no limit -- this is kind of like an
19 Avery issue. It came up on the merits because
20 it had been resolved by the court of appeals.
21 And the court of appeals said, yeah -- you
22 know, this Court said, no, no, no, this is not
23 the grant or denial of a second or successive.
24 It's just a normal case.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Mr. Yang, would your arguments be
3 different, and why, if Congress decided this is
4 still getting too messy or whatever, and the
5 decision of the district court judge will be
6 final?

7 MR. YANG: I'm sorry, I didn't --

8 CHIEF JUSTICE ROBERTS: The decision
9 of the district court judge in these matters
10 will be final and not subject to further
11 review. Same language with respect to the
12 court of appeals' decision, except applying it
13 to the district court.

14 MR. YANG: I think it would probably
15 be the same. I mean, if -- if --

16 CHIEF JUSTICE ROBERTS: So the
17 Department's position is that you could cut off
18 review after a district court decision?

19 MR. YANG: Well, if -- so is -- I'm a
20 little confused. Is the district court
21 decision like a screening decision? Is that
22 what your problem --

23 CHIEF JUSTICE ROBERTS: Well, just,
24 no, in the final regular application of
25 whatever, you know, the habeas application --

1 MR. YANG: There might be distinctions
2 between a final disposition. I think, with
3 respect to the Exceptions Clause, I think we'd
4 have to revisit the question about what was
5 expected at the founding when Congress enacted
6 Article III, and Congress went on to --

7 CHIEF JUSTICE ROBERTS: Not -- not --
8 not the Exceptions Clause. Just whatever kind
9 of provision that the -- no further review.

10 MR. YANG: If Congress --

11 CHIEF JUSTICE ROBERTS: You may say
12 cutting off the review at the court of appeals
13 stage. And I just wonder why don't your
14 arguments support the idea of cutting review
15 off at the district court phase?

16 MR. YANG: If Congress enacted a
17 statute that said the district court's
18 determination in some set of cases shall be
19 final and not subject to review of any form,
20 that would be a little harder. I mean, you
21 might not therefore get -- you wouldn't get
22 certification. There wouldn't be other
23 avenues. I think it would be a little more
24 difficult for purposes of the question about an
25 exception to this Court's appellate

1 jurisdiction.

2 But, again, if this was limited to the
3 habeas context, again, it's not clear to me
4 that as -- as an original matter, when you go
5 back to the founding, Article III would have
6 thought that that's an issue since there was no
7 appellate jurisdictional at all over habeas
8 determinations.

9 CHIEF JUSTICE ROBERTS: Thank you.

10 Justice Thomas?

11 Justice Alito?

12 JUSTICE ALITO: On the issue of
13 constitutional avoidance, haven't we said that
14 there has to be a real constitutional -- a real
15 potential constitutional problem that hasn't
16 been considered and that the -- the canon, the
17 constitutional avoidance canon, doesn't mean,
18 well, if there -- you know, if somebody
19 suggests that there might be a constitutional
20 problem, that's -- then the canon comes into
21 play? Haven't we limited that canon in that
22 way? And has this Exceptions Clause issue been
23 briefed adequately in this case for us to base
24 a decision on avoiding a potential Exceptions
25 Clause issue?

1 MR. YANG: Well, there's two questions
2 there. I think you're right that you need a
3 very significant constitutional question in
4 order to avoid it.

5 And then, two, whether the briefing is
6 sufficient, I mean, I would leave that to the
7 Court. We addressed the Exceptions Clause in
8 two ways, both as an original matter discussing
9 the habeas jurisdiction, as well as the fact
10 that there are other avenues for this Court's
11 review outside of cert from a denial of a -- or
12 grant of leave to file a second or successive.
13 Whether that's sufficient, I would leave that
14 to the Court.

15 JUSTICE ALITO: Is the limitation that
16 you think is placed on our jurisdiction here at
17 all comparable to a rule that would prevent us
18 from reviewing the merits of cases decided by a
19 district court or a court of appeals?

20 MR. YANG: No. That -- this -- this
21 is much more narrow. Remember, the posture
22 that this comes up in is there's already been
23 direct review through the federal system.
24 There's already been one full round of
25 collateral review through the federal system,

1 including a cert petition to this Court.

2 Now we're talking about seconds or
3 successives. The aperture of the case has
4 really narrowed down.

5 And Congress had very significant
6 finality concerns in this context, both with
7 respect to federal prisoners, as well as state
8 prisoners, and, therefore, appropriately
9 provided for certification that's just done by
10 a panel of the court of appeals in 30 days and
11 not subject to cert with the 90- to 50 --
12 150-day deadline to file after.

13 The process ends in the court of
14 appeals.

15 JUSTICE ALITO: And this is a
16 screening process that's supposed to weed
17 out -- the panel of the court of appeals has
18 to -- is supposed to weed out the frivolous
19 applications essentially --

20 MR. YANG: That's correct.

21 JUSTICE ALITO: -- and only let those
22 that might conceivably have some merit go
23 forward. So --

24 MR. YANG: That's correct. And I
25 would -- I would note that the options for

1 either review in the court of appeals, which
2 would be a sua sponte rehearing or en banc or a
3 certification by a court of appeals to this
4 Court, are things that are done when judges
5 decide that this is sufficiently important --

6 JUSTICE ALITO: Right. Thank you.

7 MR. YANG: -- not when a prisoner
8 decides to petition.

9 JUSTICE ALITO: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Sotomayor?

12 JUSTICE SOTOMAYOR: Counselor, we
13 haven't gotten back to the main question that
14 amicus has addressed. You agree with
15 Petitioner that 2244(b)(1) applies only to
16 state prisoners, the successive -- the same
17 claim litigation bar, correct?

18 MR. YANG: That is correct, although
19 we may have slightly different reasons for
20 concluding that. I think some of it overlap,
21 but they don't --

22 JUSTICE SOTOMAYOR: Either --

23 MR. YANG: -- rely on all of our --

24 JUSTICE SOTOMAYOR: But you disagree
25 with amici's position?

1 MR. YANG: That's correct.

2 JUSTICE SOTOMAYOR: Why don't you just
3 summarize why you disagree with amici.

4 MR. YANG: Well, I think there's
5 the -- the -- the -- I'll give you a preface
6 and then I'll -- I'll jump to, I think, a more
7 dispositive point.

8 First, when you look at the language
9 that's used in (b)(3) and (b)(4), the language
10 is distinctive from (b)(1) and (b)(2). It uses
11 second or successive application and it uses
12 authorization language.

13 Both of those map directly onto what
14 (h) is doing, that is, bringing a federal
15 prisoner --

16 JUSTICE SOTOMAYOR: Just go back to
17 it.

18 MR. YANG: And then the second -- and
19 then the second point is, even if you -- most
20 of the amicus's argument turns on the fact that
21 (b)(3)(C) says look to the prima facie
22 requirement with respect to the requirements of
23 this subsection. Subsection (b) includes
24 (b)(1) and (b)(2).

25 Even if you accept that you look to

1 the subsection, when you look at (b)(1), by its
2 own terms, it only applies to a habeas corpus
3 petition under Section 2240 -- 54.

4 JUSTICE SOTOMAYOR: So what you're --

5 MR. YANG: It just wouldn't --

6 JUSTICE SOTOMAYOR: The bottom line --

7 MR. YANG: -- even apply on its own
8 terms even if this --

9 JUSTICE SOTOMAYOR: So the bottom line
10 is you agree substantively that the court of
11 appeals, the district court, and the court of
12 appeals, or the -- the court of appeals did not
13 subject this to the proper review. It should
14 have reviewed it under 20 -- on this --

15 MR. YANG: Yes, and this has been the
16 Department's position before any court of
17 appeals took that.

18 JUSTICE SOTOMAYOR: All right. Yes,
19 that was -- you've been saying that from the
20 beginning.

21 But you're claiming that this
22 is unlike Castro and that we don't have
23 jurisdiction even under the narrow reading,
24 which is the Castro reading by your --

25 MR. YANG: That is correct.

1 JUSTICE SOTOMAYOR: -- by your
2 adversary.

3 MR. YANG: That is correct.

4 JUSTICE SOTOMAYOR: Does that make any
5 sense?

6 MR. YANG: Yes.

7 JUSTICE SOTOMAYOR: There has been no
8 review of the merits of this case --

9 MR. YANG: Well, Justice Sotomayor --

10 JUSTICE SOTOMAYOR: -- at all by the
11 court of appeals?

12 MR. YANG: -- Justice Sotomayor, the
13 jurisdictional inquiry does not look to whether
14 there's an error and then decide whether they
15 have jurisdiction.

16 JUSTICE SOTOMAYOR: Well, they used it
17 that way. They -- they refused to apply
18 2255(h) by dismissing the case. They didn't
19 deny the application as not newly discovered
20 evidence or not a new rule of constitutional
21 law. They dismissed the case instead of
22 denying it because they said they lacked
23 jurisdiction.

24 MR. YANG: That seems to support my
25 point. Their point was not that it doesn't --

1 we're not going to address whether he's right
2 or wrong, Petitioner, the prisoner, is right or
3 wrong. We just lack jurisdiction. The same
4 thing is true here.

5 JUSTICE SOTOMAYOR: Well, if they
6 didn't --

7 MR. YANG: The jurisdictional inquiry
8 does not turn --

9 JUSTICE SOTOMAYOR: -- lack
10 jurisdiction, they got the ground wrong.
11 That's what basically Marshall is saying.

12 MR. YANG: I've not seen any decision
13 by this Court that clearly set the -- the --

14 JUSTICE SOTOMAYOR: By the way -- by
15 the way, there's no question that if he goes
16 back down and they look at it substantively,
17 they'll probably boot him out anyway, but it
18 wouldn't take care of the circuit split.

19 MR. YANG: It wouldn't, but as -- as
20 we discussed, there are other ways to take care
21 of that. This -- just because this vehicle
22 comes to you doesn't mean you need to pull the
23 trigger immediately, particularly when there's
24 a jurisdictional bar that would -- if you rule
25 against us on the broad ground at least, would

1 triple the number of filings by prisoners.

2 JUSTICE SOTOMAYOR: No, it wouldn't,
3 because all that would have to happen is that
4 circuit courts would just say we're granting or
5 denying under (h), and that's clearly barred.
6 That's what they should be doing anyway but
7 they're not doing. Some of them are using
8 the state habeas substantive provisions instead
9 of the federal habeas substantive provisions.

10 MR. YANG: Well, we agree that there's
11 an error there, but I don't think that error --

12 JUSTICE SOTOMAYOR: That's all --
13 that -- there wouldn't be an increase in
14 filings. We'd simply -- Castro hasn't
15 increased our filings. We -- they would just
16 do what they're supposed to do, say under (h)
17 denied.

18 MR. YANG: Well, that's because Castro
19 is only the question of whether it's second or
20 successive. And in this case, there's no
21 question it's his second application. It's --
22 it would be his second.

23 JUSTICE SOTOMAYOR: But it would only
24 be with respect to (b)(1), a ruling by us.

25 CHIEF JUSTICE ROBERTS: Justice Kagan?

1 Justice Gorsuch?

2 JUSTICE GORSUCH: Just real briefly,
3 Mr. Yang, on the merits.

4 You -- you make -- you ask us to read
5 all of (b)(3)(A), (B), (C), (D), and (E) on
6 jurisdiction as a piece, but on the merits, you
7 ask us to split up (B).

8 So you say don't split up (3) on
9 the -- on jurisdiction, but split up, on the
10 merits, (B). And you say (b) -- (b)(3) and (4)
11 apply, but (b)(1) and (2) don't.

12 And -- and one of the arguments, main
13 argument, as I understand it from you, is
14 because the first two mention Section 2254.

15 But the same question I had to
16 Mr. Adler, why doesn't that cut against your
17 view on the merits given that this provision,
18 (B), is all about all habeas, pre- and
19 post-conviction, federal and state?

20 You -- you agree that that's -- that's
21 the case and --

22 MR. YANG: Are you -- I'm sorry, do
23 you mean all of (B) or just (b)(3) and (b)(4)?

24 JUSTICE GORSUCH: Well, (b)(3) and (4)
25 are all about all applications. Everybody.

1 Everybody.

2 MR. YANG: Yeah.

3 JUSTICE GORSUCH: Everybody's in,
4 pre and post. And what the inclusion of 2254
5 tells us is that that's addressed to
6 post-conviction applications.

7 Why -- why isn't that a natural
8 understanding that it's actually more
9 applicable in the 2255 context?

10 We have to read motions as
11 applications anyway under your reading. Why
12 aren't these the most relevant applications for
13 federal prisoners?

14 MR. YANG: 2255 is post-conviction
15 too.

16 JUSTICE GORSUCH: I understand that.
17 That's my point.

18 MR. YANG: Well, I guess I'm confused
19 because Congress has chosen --

20 JUSTICE GORSUCH: All right. I'll --
21 I'll ask your -- I'll ask --

22 MR. YANG: But Congress chose distinct
23 language.

24 JUSTICE GORSUCH: Yes, I understand
25 that, and I'm asking you why. But that's all

1 right. I'll ask amicus.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 Justice Gorsuch.

4 Justice Barrett?

5 Justice Jackson?

6 Thank you, counsel.

7 MR. YANG: Thank you, Your Honor.

8 CHIEF JUSTICE ROBERTS: Ms. Mitchell.

9 ORAL ARGUMENT OF KASDIN M. MITCHELL

10 COURT-APPOINTED AMICUS CURIAE IN SUPPORT OF
11 THE JUDGMENT BELOW AS TO QUESTION 1

12 MS. MITCHELL: Mr. Chief Justice, and
13 may it please the Court:

14 On the one-year anniversary of Timothy
15 McVeigh's bombing of a federal building,
16 Congress passed AEDPA to advance the finality
17 of criminal convictions. Congress largely did
18 away with post-conviction applications by
19 federal prisoners, requiring them to file
20 motions under Section 2255.

21 And Congress amended Section 2244
22 to provide finality requirements for
23 state prisoners who largely seek
24 post-conviction relief via an application
25 under Section 2254.

1 Everyone agrees that Section 2244 is
2 principally about state prisoners and that
3 there is a cross-reference that makes it
4 applicable to federal prisoners.

5 That structure means that there is
6 going to be language in 2244 that is specific
7 to state prisoners, and you have to read that
8 in light of a cross-reference that makes
9 language about state prisoners apply to federal
10 prisoners.

11 Everyone agrees that the
12 cross-reference incorporates 2244(b)(3)(C),
13 which says to apply the requirements of this
14 subsection, subsection (b).

15 And the very first requirement of
16 subsection (b) is the do-over bar. That
17 interpretation follows from simple statutory
18 cross-references.

19 It also makes perfect sense in light
20 of Congress's clear goals. There is no reason
21 to think that in the landmark legislation
22 passed in the wake of the Oklahoma City bombing
23 in which Congress was trying to focus on
24 finality, it entirely eliminated any do-over
25 bar on post-conviction motions by federal

1 prisoners like McVeigh.

2 I welcome the Court's questions.

3 JUSTICE THOMAS: Ms. Mitchell, the --
4 both the government and Petitioner, they'll put
5 more weight on the difference in language in
6 2255 and -- and 44, the language, application
7 versus motion, that there's more emphasis on
8 habeas for state prisoners.

9 How do you reconcile the -- the
10 difference in language?

11 MS. MITCHELL: Justice Thomas, the way
12 you reconcile this is because you're viewing
13 this statute via the lens of a cross-reference.
14 I think this is really important to understand
15 what both the government and Petitioner are
16 arguing. They're saying that when you see the
17 word "application," on its face, it includes
18 federal motions. That carries significant
19 consequences for AEDPA.

20 In the statute of limitations
21 provision, for example, 2244(d)(1)(B), Congress
22 distinguished in the state context filing an
23 application.

24 In the statute of limitation provision
25 governing federal prisoners, 2255(f)(2), it

1 used different language. It said an impediment
2 to making a motion.

3 That application and motion
4 distinction was critical to AEDPA. Both the
5 Petitioner and the government say, well, we're
6 just going to read "application" to mean
7 "motion." And I don't think you can do that.
8 "Application" means application.

9 You apply it to motions via
10 cross-reference. And that's why, to Justice
11 Gorsuch's question, the under 2254 language
12 makes it a closer fit to 2255 motions than the
13 general provisions in subsection (b)(3).
14 (b)(3) speaks only of applications which on its
15 face excludes 2255 motions.

16 In addition to rewriting "motion" to
17 mean "application," both the governor --
18 government and the Petitioner want to rewrite
19 the language "this subsection," and, again,
20 that has sweeping consequences not just for
21 AEDPA but for the U.S. Code.

22 One of the principal decisions that my
23 brief relies on is the Cyan decision, where
24 this Court said clearly that when Congress
25 means "subsection" -- says "subsection," it

1 means "subsection."

2 JUSTICE JACKSON: But why wouldn't we
3 take that to be right in the category of the
4 very first thing that you said, which is we all
5 agree that this -- this 2244 primarily applies
6 to state prisoners and that there will be
7 language as a result that might not be a
8 perfect fit because it's directed to state
9 prisoners? And I would think "this subsection"
10 is that kind of thing.

11 MS. MITCHELL: I don't think so, Your
12 Honor, because "this subsection" is direct
13 command of the cross-reference, and it says to
14 apply all of (b), and that's part of the very
15 provision that everyone agrees is incorporated.

16 JUSTICE JACKSON: I understand. But
17 your -- your -- your view of this makes us
18 think that Congress was trying to get to (b)(1)
19 in the federal context through two
20 cross-references.

21 That seems like such a -- an odd way.
22 I mean, if Congress wanted the (b)(1) bar to
23 apply in federal habeas scenarios, they easily
24 could have just written that, or in (h), they
25 could have directly referenced (b)(1). But you

1 get us there through the cross-reference in (h)
2 and then the cross-reference in (b)(3), and
3 that just seems so strange.

4 MS. MITCHELL: I think that's the
5 easiest way to do it in light of all of the
6 parties' agreement that (b)(3)(C) applies. But
7 there is another path, which is just to say, on
8 its face, it's a requirement that applies via
9 the cross-reference because the cross-reference
10 says "as provided in 2244," and you're going to
11 bring in subsection (b)(1), which isn't
12 displaced by (h)(1) and (2), which applies.

13 I mean, we think the -- the better
14 place is to start where all the parties agree.
15 But I'm not going to resist a reading that
16 would bring it in on the "as provided in 2244"
17 cross-reference alone.

18 JUSTICE JACKSON: Thank you.

19 MS. MITCHELL: In addition, just to
20 hone in on the problems with reading
21 "subsection" to mean something else, not only
22 did this Court confront that in the Cyan
23 decision, which neither the government nor the
24 Petitioner even cite in their reply brief, but
25 it's been an issue in numerous other cases that

1 this Court has confronted, including with
2 respect to the Federal Vacancies Act in NLRB
3 versus Southwest General and throughout.

4 We also know that in AEDPA, Congress
5 knew how to specify and pick and choose
6 provisions when it wanted. So, for example, in
7 2264(b), Congress said: Following review,
8 subject to subsections (A), (D), and (E) of
9 Section 2254, the Court shall rule on the
10 claims properly before it.

11 So there are other examples in AEDPA
12 where it picked and -- decided to pick and
13 choose among subsections and it was specific.
14 Here, Congress enacted in a wholesale
15 cross-reference with respect to, at a minimum,
16 the certification provisions that all agree
17 include (b)(3)(C).

18 JUSTICE KAVANAUGH: What do you make
19 of the fact that Congress -- to your
20 alternative point to Justice Jackson, that
21 Congress didn't just end at 2255(h) after "as
22 provided in Section 2244"? They could have
23 just ended it there and then the
24 cross-reference would have been complete, I
25 think. And what are we to make of that other

1 language, if anything?

2 MS. MITCHELL: They could -- they
3 could have done that. There are two reasons
4 why I think they didn't.

5 The first is because they were
6 bringing over the certification procedures.
7 And the second is they wanted to provide
8 constraints on the abuse of the writ, which is
9 what (h)(1) and (2) principally address.

10 So, in the pre-HEDPA -- pre-AEDPA
11 context, there were two problems that the Court
12 faced with habeas corpus applications. One was
13 the successive problem. So you have someone
14 who's bringing a claim that they brought again.
15 A separate and distinct problem was abuse of
16 the writ, which is where you held on to a
17 claim, you brought one, waited, you brought
18 your other one and another one in a second
19 application, you bring a third one. That was a
20 distinct problem, abuse of the writ.

21 And in 1948, when Congress amended
22 AEDPA, they added in 2255, a successive bar.
23 So what Congress said was the sentencing court
24 shall not be required to entertain a second or
25 successive motion for similar relief on behalf

1 of the same prisoner. This was in the 1948
2 Act.

3 This Court interpreted that language
4 in Sanders to say Section 2244 -- and this
5 language is addressed only to the problem of
6 successive applications. And what the Court
7 did is say, well, we're not going to read that
8 to read out the abuse of the writ doctrine, so
9 we're going to -- this is addressing successive
10 applications, and we're also going to apply
11 abuse of the writ doctrine.

12 The provisions in (1) and (2), which
13 are now after the 2008 technical amendments
14 (h)(1) and (2), only address abuse of the writ.
15 So there's no reason to think that when
16 Congress omitted that language and instead put
17 a cross-reference to 2244 that it meant not to
18 include the number one finality-promoting
19 provision, which is (b)(1).

20 Additionally, there's some argument
21 that the government and the Petitioner make
22 that this is really not a problem, kind of what
23 are we doing here. But Judge Rosenbaum in the
24 Eleventh Circuit observed that in the three
25 months after this Court's decision in Welch,

1 the Eleventh Circuit saw 1800 applications for
2 Johnson-based review. So I do think it is a
3 real problem that courts are grappling with.

4 And the tools that Congress gave the
5 courts of appeals to deal with this problem
6 allowed it to make the expeditious
7 determination under the 30-day clock. And what
8 Petitioner and the government would say is,
9 well, we're going to take one of those key
10 tools out of their tool belt. We're not going
11 to allow them to look and see was this argument
12 already presented and, if so, can we dismiss it
13 on that basis alone. And that makes it more
14 difficult to accomplish its task in 30 days.

15 I think one thing is significant about
16 that also is Congress provided the same 30-day
17 clock for state prisoners and federal
18 prisoners. It didn't say we're going to give
19 30 days for state prisoners and 45 for federal
20 or some other indication that they intended to
21 treat them differently.

22 And, Justice Thomas, to your question
23 to Petitioner, all indications by use of
24 legislating by cross-reference is that Congress
25 wanted to treat, at least for successive

1 applications, state prisoners and federal
2 prisoners alike. That's why they choose --
3 chose this kind of clunky mechanism to do so
4 via cross-reference.

5 One additional point, Petitioner, in
6 response to one of the questions about
7 jurisdiction, said that there is a clear
8 statement rule as it relates to state prisoners
9 with the jurisdictional point because of the
10 word "application" in (3)(E). That's
11 significant because that is saying that is a
12 clear statement that this applies to state
13 prisoners, which is exactly our point.

14 Every time Congress said
15 "application," it was excluding on its face
16 federal motions. So, in order to read any of
17 these provisions as applying to federal motions
18 under 2255, you have to view them in light of
19 the cross-reference. And that's exactly what
20 you do when you look at (3)(C)'s
21 cross-reference to (b)(1). You read that
22 language, "a successive habeas corpus
23 application," under 2254 in light of that
24 cross-reference to apply to similarly situated
25 federal prisoners.

1 And, again, Justice Gorsuch, to your
2 question, it's not like it says applications by
3 Guantanamo detainees. I think my argument
4 would be harder if the additional language was
5 something that didn't map on so tightly to the
6 2255 mechanism, but, instead, that's a closer
7 fit than the application language that the
8 government and Petitioner rely on to bring in
9 the certification provisions in the first
10 place.

11 JUSTICE GORSUCH: Which can include
12 pre-conviction detainees?

13 MS. MITCHELL: Yes, Your Honor.

14 JUSTICE GORSUCH: Yeah.

15 MS. MITCHELL: And so it's just a
16 natural fit to see what Congress was doing
17 there. Again, in the wake of Oklahoma City,
18 it -- there's no reason to think that the
19 number one finality provision in 2244, which
20 was titled "Finality of Determinations," that
21 they intended that not to apply to federal
22 prisoners like McVeigh, which was the exact
23 target of the one-year anniversary when
24 President Clinton signed this bill into law.

25 JUSTICE GORSUCH: It was the implicit

1 repeal of a power federal courts had previously
2 to prevent do-over petitions by federal habeas
3 petitioners.

4 MS. MITCHELL: Exactly. And, instead,
5 they routed them through the provisions for
6 22 -- the provisions that otherwise applied to
7 state prisoners. And one important point. The
8 standalone language that prevented successive
9 application by federal prisoners had long been
10 marginalized by this Court. In Sanders, the
11 Court said this can't be taken seriously. And
12 so it's perfectly natural for Congress to say
13 you didn't -- you didn't do what we said in
14 2255, and so this time around we're going to
15 put you in the same bucket as state prisoners,
16 where you will enforce the successive bar.

17 And the combination of (b)(1),
18 together with subsection (1) and (2) in 2255,
19 address both the successive and the abuse of
20 the writ problems that Congress was targeting
21 in AEDPA.

22 CHIEF JUSTICE ROBERTS: Thank you.
23 Justice Thomas, anything further?
24 Justice Alito?
25 Justice Sotomayor?

1 JUSTICE SOTOMAYOR: Counsel,
2 collateral estoppel would apply to successive
3 positions in federal court, so you get to the
4 same place, just a different issue.

5 MS. MITCHELL: That --

6 JUSTICE SOTOMAYOR: And as quick.

7 MS. MITCHELL: That's not true, Your
8 Honor. There are decisions by this Court
9 saying that res judicata does not apply into
10 the habeas -- in the habeas context, and,
11 instead, what 2244 and 2255 did was -- and this
12 is in the legislative history -- was to codify
13 a modified res judicata principle. So res
14 judicata traditionally --

15 JUSTICE SOTOMAYOR: All right.

16 MS. MITCHELL: -- has not applied in
17 habeas.

18 JUSTICE SOTOMAYOR: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice Kagan?

20 Justice Gorsuch?

21 Justice Kavanaugh?

22 Justice Barrett?

23 JUSTICE BARRETT: No.

24 CHIEF JUSTICE ROBERTS: Justice
25 Jackson?

1 Thank you, counsel.

2 MS. MITCHELL: Thank you.

3 CHIEF JUSTICE ROBERTS: Mr. Adler,
4 rebuttal?

5 REBUTTAL ARGUMENT OF ANDREW L. ADLER
6 ON BEHALF OF THE PETITIONER

7 MR. ADLER: Thank you, Mr. Chief
8 Justice.

9 We acknowledge that this is a
10 technical case, but I'd like to try to simplify
11 how the Court should resolve it if it agrees
12 with us on (b)(1), which we do believe is
13 resolved on the face of the provision. This
14 is -- this is the rare AEDPA case where the
15 plain text of the statute resolves the
16 question.

17 So, if you agree with us on (b)(1),
18 then, on the jurisdictional question, there's
19 two options, I think. One is the government's
20 late-breaking suggestion on page 12 of its
21 reply brief that to dismiss this case for lack
22 of jurisdiction and indirectly resolve the
23 (b)(1) question -- this goes to Justice
24 Barrett's suggestion earlier -- our concerns
25 with that remain that there is a significant

1 risk that doing that would not resolve the
2 circuit conflict unless the Court is
3 crystal-clear that it is purporting to resolve
4 the (b)(1) question in a holding. We also have
5 significant concerns about whether Mr. Bowe of
6 all people could benefit from that.

7 We appreciate the government's
8 suggestion that he could refile. However, we
9 are not sure about that in light of some
10 language in the Bradford decision, Eleventh
11 Circuit, that says that (b)(1) dismissals are
12 with prejudice. And if anybody should benefit
13 from a statement by this Court on (b)(1), it's
14 Mr. Bowe, who has been waging a three-year
15 campaign designed to eliminate this atextual
16 obstacle that has been placed in front of him.

17 So that's one option. We think it is
18 highly unorthodox and can be avoided simply by
19 accepting one of our narrower jurisdictional
20 arguments, and we have given the Court three of
21 them. We think the clear statement rule
22 applies to all of them. I don't understand how
23 the government can say there's no clear
24 statement rule when Castro says it on this
25 particular statutory provision.

1 We don't have to do two steps. It's
2 right there on the face of the opinion. And,
3 by the way, the case it cites for that is not
4 Utah versus Walker. It is Felker versus
5 Turpin, which is a habeas case that says no
6 implied repeals of habeas jurisdiction, the
7 Court applies it here to (b)(3)(E).

8 Justice Jackson, I think you have
9 identified the simplest way to -- to find
10 jurisdiction over this case, and it is the fact
11 that the court of appeals dismissed this
12 without ruling on the merits. It did not grant
13 or deny. The text of (b)(3) is very clear that
14 we have grants or denials and we have
15 dismissals.

16 The court here dismissed this case
17 improperly. That's not the error that we're
18 complaining about. That would be harmless
19 because the effect would be a denial. But it
20 is the reason why there's jurisdiction.
21 There's no denial here.

22 That follows directly from this
23 Court's (b)(3) precedent in Stuart, which also
24 involved a dismissal, no merits ruling, and the
25 Court said the effect, even though it was to

1 grant it, didn't matter, it wasn't a grant.

2 And the final thing about that, if the
3 Court simply clarifies that in this opinion
4 that courts of appeals should not be dismissing
5 claims in this posture but should instead be
6 granting or denying them, then the Court will
7 not see a single cert petition under that
8 theory come to this Court because the courts of
9 appeals will simply grant or deny moving
10 forward.

11 And so, if the Court is concerned
12 about receiving additional cert petitions under
13 this statute, that's the easy way to go. And
14 so, at the end of the day, we think the text of
15 (b)(1) is plain. This Court has jurisdiction
16 to effectuate that text and resolve the circuit
17 conflict directly once and for all.

18 Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Ms. Mitchell, the Court appointed you
22 to brief and argue this case as an amicus
23 curiae in support of the judgment below as to
24 Question 1. You have ably discharged your
25 responsibility for which we are grateful.

1 Thank you.

2 The case is submitted.

3 (Whereupon, at 11:36 a.m., the case
4 was submitted.)

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