No. 24-5438

IN THE

Supreme Court of the United States

MICHAEL BOWE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether 28 U.S.C. § 2244(b)(1) applies to a claim presented in a second or successive motion to vacate under 28 U.S.C. § 2255.

2. Whether 28 U.S.C. § 2244(b)(3)(E) deprives this Court of certiorari jurisdiction over the grant or denial of an authorization by a court of appeals to file a second or successive motion to vacate under 28 U.S.C. § 2255.

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BRIEF FOR PETITIONER

Petitioner Michael Bowe respectfully requests that the Court vacate the order below issued by the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit's order is reported at 2024 WL 4038107 and reproduced in the Joint Appendix (J.A.) at 72–79. The district court did not issue an opinion.

JURISDICTION

The Eleventh Circuit entered its order on June 27, 2024. Petitioner filed a petition for a writ of certiorari on August 29, 2024, which this Court granted on January 17, 2025. As explained below, this Court has certiorari jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Sections 2244, 2254, and 2255 of Title 28 of the United States Code are set out in full in the Appendix.

INTRODUCTION

One provision in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, requires the dismissal of a "claim presented in a second or successive *habeas corpus application under section 2254* that was presented in a prior application." 28 U.S.C. § 2244(b)(1) (emphasis added). Although state prisoners alone may file a "habeas corpus application under section 2254," the Eleventh Circuit below held that section 2244(b)(1) also applies to "motions to vacate" filed by federal prisoners under section 2255. The government concedes that this holding contravenes the plain statutory language.

Nonetheless, the government argues that this Court lacks jurisdiction to correct the Eleventh Circuit's refusal to adhere to AEDPA's text. But this Court construes limitations on its jurisdiction narrowly, and the government's argument flouts that settled principle. The government relies on section 2255(h), but that provision makes no mention of the Court's jurisdiction at all. Nor does section 2255(h)'s qualified reference to section 2244 incorporate a certiorari-stripping provision in section 2244(b)(3)(E). And, in any event, that highly circumscribed provision would still not strip this Court of jurisdiction over this particular case.

In short, this Court has certiorari jurisdiction over this case. And because the Eleventh Circuit relied solely on section 2244(b)(1), this case affords the Court an ideal opportunity to resolve an entrenched circuit conflict over that provision, which has evaded review. Therefore, the Court should effectuate AEDPA's plain text, hold that section 2244(b)(1) does not apply to federal prisoners, and vacate the contrary decision below.

STATEMENT

I. Statutory Background

Under AEDPA, state and federal prisoners are subject to different statutory provisions and requirements when it comes to seeking post-conviction relief.

A. Prisoners in custody pursuant to a state court judgment must generally seek post-conviction relief in federal court by way of an application for a writ of habeas corpus under 28 U.S.C. § 2254. To file a "second or successive" habeas corpus application under section 2254, state prisoners must satisfy strict gatekeeping requirements found in sections 2244(b)(1) and (b)(2).

The former provides that "[a] claim presented in a second or successive habeas corpus application under section 2254 that *was* presented in a prior application shall be dismissed." 28 U.S.C. § 2244(b)(1) (emphasis added). The latter requires dismissal of "[a] claim presented in a second or successive habeas corpus application under section 2254 that was *not* presented in a prior application," unless the claim satisfies one of two substantive criteria. § 2244(b)(2) (emphasis added). The first criterion relates to new rules of constitutional law that are made retroactive by this Court. § 2244(b)(2)(A). The second relates to newly discovered evidence of actual innocence. § 2244(b)(2)(B).

However, before a state prisoner may file a second or successive habeas corpus application in the district court, section 2244(b)(3)(A) requires the prisoner to "move" for authorization "in the appropriate court of appeals." Section 2244(b)(3)(B) requires that this motion "be determined by a three-judge panel of the court of appeals." Section 2244(b)(3)(C) provides that the

court of appeals may authorize the filing only if it determines that the applicant makes "a prima facie showing that the application satisfies requirements of this subsection"—*i.e.*, the gatekeeping requirements in sections 2244(b)(1) and (b)(2). And section 2244(b)(3)(D) requires the court of appeals to "grant or deny" authorization within 30 days of the filing.

Finally, section 2244(b)(3)(E) places limitations on subsequent review of the panel's authorization determination. Specifically, it provides that the "grant or denial of an authorization by a court of appeals . . . shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari."

B. Unlike state prisoners, federal prisoners may not file habeas corpus applications under section 2254 at all. Rather, they must generally seek post-conviction relief by way of a "motion to vacate" under 28 U.S.C. § 2255. To file a "second or successive" motion to vacate under section 2255, they must first satisfy strict gatekeeping requirements in section 2255(h).

Those gatekeeping requirements are different from the gatekeeping requirements applicable to state prisoners in sections 2244(b)(1) and (b)(2). Unlike section 2244(b)(1), section 2255(h) does not require the dismissal of a claim that was previously presented in a prior section 2255 motion to vacate. In fact, section 2255(h) does not distinguish between claims that were previously presented and those that were not. Instead, section 2255(h) "enumerate[s] two—and only two—conditions" for second or successive section 2255 motions. *Jones v. Hendrix*, 599 U.S. 465, 477 (2023).

Located in sections 2255(h)(1) and (h)(2), those conditions are similar—but "not identical"—to the state-

prisoner criteria in sections 2244(b)(2)(A) and (B). *Gonzalez v. Crosby*, 545 U.S. 524, 529 n.3 (2005). Section 2255(h)(2) relates to new rules of constitutional law made retroactive by this Court, and it sets out the same criterion as section 2244(b)(2)(A). However, section 2255(h)(1) relates to newly discovered evidence, and it is more lenient than the state-prisoner criterion in section 2244(b)(2)(B). Section 2255(h)(1) omits section 2244(b)(2)(B)'s requirements that the prisoner show both "due diligence" and a "constitutional error." *Compare* § 2255(h)(1) *with* § 2244(b)(2)(B)(i)–(ii).

While section 2255(h) sets forth its own substantive gatekeeping requirements, it borrows from section 2244 when it comes to the pre-filing authorization requirement. Specifically, section 2255(h) provides that a "second or successive motion [to vacate] must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain" one of the two substantive criteria in sections 2255(h)(1) and (h)(2).

Thus, federal prisoners are subject to the provisions in section 2244 governing how a second or successive motion is to be "certified" by a "panel of the appropriate court of appeals." That means federal prisoners must file a motion for authorization. § 2244(b)(3)(A). That motion must be determined by a three-judge panel. § 2244(b)(3)(B). The panel must determine whether the movant has made a prima facie showing satisfying the gatekeeping requirements in section 2255(h). § 2244(b)(3)(C). And the panel must grant or deny authorization within 30 days. § 2244(b)(3)(D).

II. Proceedings Below

In 2008, petitioner pleaded guilty in the Southern District of Florida to three federal crimes: conspiracy to commit Hobbs Act robbery (Count One); attempt to commit Hobbs Act robbery (Count Two); and discharging a firearm during and in relation to a "crime of violence"—*i.e.*, the offenses in Counts One and Two—in violation of 18 U.S.C. § 924(c) (Count Three). J.A. 1–3, 10–11. The district court sentenced him to 168 months in prison on Counts One and Two, and a mandatory consecutive sentence of 120 months in prison on Count Three. J.A. 18–20. Petitioner did not appeal.

Years later, however, intervening changes in the law invalidated the basis of his section 924(c) conviction. That conviction depended on Counts One or Two qualifying as a "crime of violence." At the time of his conviction, an offense could qualify under either the "elements clause" definition in section 924(c)(3)(A) or the "residual clause" definition in section 924(c)(3)(B). But after his conviction became final, two decisions from this Court established that Counts One and Two did not qualify as a predicate "crime of violence" under either clause. After these decisions, petitioner diligently sought relief by filing, or seeking authorization to file, a motion to vacate his conviction under section 2255.

In *Johnson v. United States*, 576 U.S. 591 (2015), this Court declared unconstitutionally vague the residual clause definition of "violent felony" in the Armed Career Criminal Act. Based on *Johnson*, petitioner filed his first section 2255 motion to vacate his section 924(c) conviction. The district court denied the motion because, even assuming that *Johnson* applied to the residual clause "crime of violence" definition in

section 924(c), petitioner's conviction remained valid under the elements clause. That was so, the court reasoned, because it was predicated in part on attempted Hobbs Act robbery. And, under circuit precedent at the time, that offense qualified as a "crime of violence" under the elements clause. *See* J.A. 42–43, 46–47.

In *United States v. Davis*, 588 U.S. 445 (2019), the Court declared unconstitutionally vague the residual clause in section 924(c). The Eleventh Circuit then held that *Davis* announced a new rule of constitutional law made retroactive by this Court, satisfying the criteria in section 2255(h)(2). *In re Hammoud*, 931 F.3d 1032, 1037–39 (11th Cir. 2019). As a result of that holding, federal prisoners could seek authorization to file second or successive section 2255 motions to vacate their section 924(c) convictions under *Davis*.

Shortly after *Davis*, petitioner sought authorization to do so. However, the Eleventh Circuit denied his request because, under then-existing circuit precedent, attempted Hobbs Act robbery remained a "crime of violence" under the elements clause. Thus, he could not make a "prima facie showing" that his section 924(c) conviction was invalid in light of *Davis*. J.A. 53–54.

That changed after *United States v. Taylor*, 596 U.S. 845 (2022). In that case, this Court squarely held that attempted Hobbs Act robbery was not a "crime of violence" under the elements clause, abrogating the Eleventh Circuit's contrary precedent. And there was no dispute that conspiracy to commit Hobbs Act robbery also did not qualify under the elements clause. *See Brown v. United States*, 942 F.3d 1069, 1075–76 (11th Cir. 2019); BIO 6. Thus, every possible basis of petitioner's section 924(c) conviction was invalidated.

Petitioner thereafter submitted another request for authorization to file a successive section 2255 motion based on *Davis*. For individuals with identical *Davis* claims predicated on attempted Hobbs Act robbery (or other federal attempt offenses)—but who had *not* previously sought to present such a claim—the Eleventh Circuit granted their requests for authorization. *See* Pet. 8 & n.1 (citing six cases). Ironically though, because petitioner had been *more* diligent by seeking to present his *Davis* claim right away, and before this Court's decision in *Taylor* abrogated erroneous circuit precedent, petitioner's request was foreclosed by *In re Baptiste*, 828 F.3d 1337, 1339–40 (11th Cir. 2016).

In *Baptiste*, the Eleventh Circuit interpreted 28 U.S.C. § 2244(b)(1). That provision requires the dismissal of a "claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application." *Baptiste* extended section 2244(b)(1) to claims presented in a second or successive motion to vacate under section 2255. Because the Eleventh Circuit had previously denied petitioner's *Davis*-based request for authorization, *Baptiste* meant that section 2244(b)(1) would bar his *Davis* claim. And that was so even though the Eleventh Circuit had denied his earlier *Davis*-based request for authorization based on circuit precedent that had since been abrogated by *Taylor*. As a result, and along with petitioner's request for authorization, he also sought initial hearing en banc, asking the Eleventh Circuit to reconsider and overrule *Baptiste*.

Relying solely on section 2244(b)(1) and *Baptiste*, the Eleventh Circuit dismissed petitioner's *Davis* claim and his request for authorization for lack of jurisdiction. J.A. 64–65. The court of appeals explained

that it remained bound by *Baptiste* until that case was overruled by this Court or the en banc Eleventh Circuit. *Id*. The court also summarized the arguments presented in his en banc petition and summarily denied that petition without explanation. J.A. 63–65.

Petitioner subsequently filed a petition for a writ of habeas corpus in this Court. Pet. for Writ of Habeas Corpus, *In re Bowe*, 144 S. Ct. 1170 (2024) (No. 22-7871). He emphasized that: the circuits were divided 6–3 on whether section 2244(b)(1) applied to claims by federal prisoners; the federal government had previously conceded that it did not; and Justice Kavanaugh had written separately to opine that the Court should resolve that question in a future case in light of the circuit conflict and the government's concession. *Avery v. United States*, 140 S. Ct. 1080 (2020) (statement respecting denial of certiorari). Petitioner explained, however, that section 2244(b)(3)(E)'s apparent bar on certiorari review, coupled with the government's concession, meant that there would be no way for a certiorari petition to present that question for review. As a result, he urged the Court to use his original habeas petition to resolve that circuit conflict.

In February 2024, this Court denied the original habeas petition. Justice Sotomayor, joined by Justice Jackson, issued a statement respecting the denial. *In re Bowe*, 144 S. Ct. at 1170. Although they "join[ed]" Justice Kavanaugh in his "desire for this Court to resolve this [circuit] split," and although they agreed with petitioner that there were "considerable structural barriers to this Court's ordinary review via certiorari petition," they questioned whether petitioner could meet the Court's "demanding" standard governing original habeas petitions. *Id*. at 1170–71.

The Justices concluded by identifying two alternative ways to resolve the dilemma. First, they noted the government's "suggest[ion] that a court of appeals seeking clarity could certify the question to this Court." *Id.* at 1171. Second, they "encourage[d] the courts of appeals to reconsider this question en banc" where they had binding circuit precedent extending section 2244(b)(1) to federal prisoners. *Id.* & n.*.

Petitioner therefore returned to the Eleventh Circuit and asked it to adopt one of those two solutions. He again sought authorization to file a second section 2255 motion based on *Davis*. But in light of *Baptiste*, he also petitioned for initial hearing en banc, again asking the full court to reconsider and overrule *Baptiste*. Alternatively, and in the event the Eleventh Circuit denied his en banc petition, he asked the Eleventh Circuit to certify the section 2244(b)(1) question to this Court. In his motion to certify, he emphasized that one of this Court's "essential functions" was to ensure the uniformity of federal law, but the section 2244(b)(1) circuit conflict was evading this Court's review. Motion to Certify at 9, C.A. ECF No. 3 (11th Cir. No. 24-11704) (June 27, 2024). He further observed that, absent certification, this Court would be unable to resolve the circuit conflict. *Id.* at 15. And that inability would present an Article III "Exceptions Clause" problem with section 2244(b)(3)(E)'s bar on certiorari, a problem that this Court had previously avoided in *Felker v. Turpin*, 518 U.S. 651 (1996). *Id.* at 16.

The Eleventh Circuit rejected all of petitioner's requests. As for his request for authorization, the court again applied its binding precedent in *Baptiste.* Because the court viewed section 2244(b)(1) as jurisdic-

tional, the court believed it could not "consider" petitioner's claim. J.A. 73; *see* J.A. 78 n.1 ("Lacking jurisdiction, we don't mean to imply anything about whether Bowe's *Davis* claim has any merit."). As a result, the court "dismissed" his claim and his request for authorization for lack of jurisdiction. J.A. 77–79.

As for petitioner's request to reconsider *Baptiste* en banc, the court of appeals declined to do so—with no active judge even calling for a vote. J.A. 79 n.2, 80. And the court of appeals denied his motion to certify the section 2244(b)(1) question. J.A. 78–79. It emphasized that this Court "has accepted only four certified questions since 1946, and none in the last forty-three years." J.A. 78. And the court of appeals did not want to "cause a newsworthy event and stir up the bloggers and podcasters by asking the [Supreme] Court to accept a certified question from a court of appeals for only the fifth time in 78 years." J.A. 79.

This Court subsequently granted certiorari. __ S. Ct. __, 2025 WL 226843 (Jan. 17, 2025) (Mem).

SUMMARY OF ARGUMENT

The government correctly concedes that the Eleventh Circuit legally erred by holding that 28 U.S.C. § 2244(b)(1) applies to second or successive motions under 28 U.S.C. § 2255. This Court has certiorari jurisdiction to correct that error, and it should do so.

I. Section 2244(b)(1) requires the dismissal of a claim "presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application." By its terms, section 2244(b)(1) does not apply to a claim presented in a second or successive motion to vacate under section 2255.

A. The text could not be plainer: (b)(1) applies only to claims presented in a "habeas corpus application under section 2254." And only state prisoners may file "habeas corpus application[s] under section 2254." Federal prisoners, by contrast, must generally file "motions to vacate" under section 2255. Congress has repeatedly drawn that basic distinction in the statutory text, and this Court has recognized it as well. Had Congress intended for (b)(1) to apply to claims presented in a second or successive "motion to vacate under section 2255," it would have said so. It did not. And federal courts may not re-write AEDPA's plain text.

B. Nonetheless, six circuits have done just that, substituting their own view for Congress'. But few of them have actually grappled with the statutory text. The Eleventh Circuit has done so, but its own reasoning confirms that (b)(1) does not apply to section 2255 motions. The Eleventh Circuit has relied on section 2255(h), which incorporates certain provisions in section 2244. But nobody believes that section 2255(h) in-

corporates *all* of section 2244. And the Eleventh Circuit itself has correctly acknowledged that section 2255(h) does not—indeed cannot—incorporate section 2244(b)(2), since those two provisions have conflicting criteria. That acknowledgment is fatal. Because section 2255(h) does not incorporate (b)(2), it does not incorporate (b)(1) either. That is so because (b)(1) and (b)(2) use identical language, referring only to claims presented in a "habeas corpus application under section 2254." The Eleventh Circuit failed to explain how section 2255(h) could incorporate (b)(1) but not (b)(2).

Unable to square their position with the statutory text, several circuits have openly relied on legislative history and policy. But the legislative history shows that Congress was primarily concerned about abusive filings by *state* prisoners. And AEDPA's text reflects that overriding concern, repeatedly subjecting state prisoners to stricter requirements than federal prisoners. That differential treatment effectuates one of AEDPA's core objectives—namely, to promote federalism and comity. And that objective sensibly explains why Congress subjected state prisoners alone to (b)(1).

II. This Court has certiorari jurisdiction to correct the error below and to effectuate (b)(1)'s plain text.

A. Like (b)(1), the certiorari-stripping provision in section 2244(b)(3)(E) does not apply to second or successive section 2255 motions by federal prisoners.

It is well settled that the Court narrowly construes limitations on its jurisdiction, requiring a clear statement from Congress. No such statement exists here.

The government relies on section 2255(h), but that provision makes no mention of the Court's jurisdiction at all. In stark contrast, section 2244(b)(3)(E) clearly

limits the Court's jurisdiction with respect to second or successive habeas corpus applications. This contrast reflects a deliberate choice. Congress enacted sections 2255(h) and (b)(3)(E) at the same time in AEDPA. And a Congress that so clearly limited jurisdiction over habeas applications would have done the same for section 2255 motions had it wished to do so.

Unable to identify any jurisdiction-stripping language in section 2255(h) itself, the government argues that section 2255(h) incorporates the certiorari bar in (b)(3)(E). But this roundabout theory of incorporation by implication is not a clear statement from Congress. In fact, section 2255(h) does not incorporate (b)(3)(E)'s certiorari bar at all. Section 2255(h)'s text incorporates only the parts of section 2244 that "provide" for how a second or successive section 2255 motion is to be "certified" by a "panel of the appropriate court of appeals." The certiorari bar in (b)(3)(E) does no such thing. Indeed, it comes into play only after the court of appeals has made the certification determination.

B. In any event, even if the certiorari bar applied to section 2255 motions, it would not cover *this* case.

The scope of (b)(3)(E) is limited. It bars certiorari review where the court of appeals denies on the merits an authorization request for failure to make a prima facie showing satisfying the applicable gatekeeping requirements. Here, by contrast, the court of appeals never even considered the merits of petitioner's authorization request under the applicable gatekeeping requirements in section 2255(h). Instead, the court dismissed his request for lack of jurisdiction based on a gatekeeping requirement that did not apply—*i.e.*, (b)(1). The certiorari bar does not cover this scenario.

The text of (b)(3)(E) dictates that conclusion for three independent but mutually reinforcing reasons. First, (b)(3)(E) covers only the "grant or denial" of authorization. But here, the court of appeals "dismissed" the authorization request for lack of jurisdiction. Second, (b)(3)(E) covers only the denial of "an authorization." But here, the court of appeals exceeded the proper scope of the authorization determination by relying on an inapplicable gatekeeping requirement. Third, under (b)(3)(E), "the subject" of the certiorari petition here is the court of appeals' determination that (b)(1) applied. But this Court's precedent establishes that (b)(3)(E) does not bar certiorari review of threshold legal questions about whether the gatekeeping requirements are applicable in the first place.

At the very least, the constitutional-avoidance canon requires the Court to exercise jurisdiction here. Applying (b)(3)(E)'s certiorari bar to this case would raise a serious constitutional question under Article III about whether Congress has exceeded its power to make "exceptions" to this Court's appellate jurisdiction. That is so because one of the Court's essential functions is to ensure the uniformity of federal law. And applying (b)(3)(E) would prevent the Court from resolving the circuit conflict over (b)(1). Stretching (b)(3)(E) to deprive the Court of jurisdiction over this particular case would trigger (not avoid) this constitutional question. Thus, the Court should narrowly construe (b)(3)(E) and exercise jurisdiction over this case.

* * *

In sum, the Court has certiorari jurisdiction to resolve the circuit conflict. The Court should do so and hold that (b)(1) does not apply to federal prisoners.

ARGUMENT

As the government correctly concedes, the gatekeeping requirement in section 2244(b)(1) unambiguously applies only to state prisoners, not federal prisoners like petitioner. However, six circuits, including the Eleventh Circuit below, have improperly substituted their own policy judgment for the plain statutory text. Thus, the parties agree that the court of appeals legally erred by applying section 2244(b)(1) in this case.

The government, however, contends that this Court is powerless to correct this contravention of AEDPA's text. To the contrary, the Court has jurisdiction for multiple reasons, and it may therefore resolve the circuit conflict over section 2244(b)(1). Accordingly, the Court should hold that section 2244(b)(1) does not apply to federal prisoners and vacate the decision below.

I. Section 2244(b)(1) applies only to state—not federal—prisoners.

In the decision below, the Eleventh Circuit dismissed petitioner's request for authorization based exclusively on 28 U.S.C. § 2244(b)(1). Section 2244(b)(1) provides, in full: "A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." As explained below, the Eleventh Circuit legally erred by applying (b)(1) in this case because that provision applies only to state, not federal, prisoners.

A. The text of (b)(1) is plain.

"As with any question of statutory interpretation, our analysis begins with the plain language of the statute." *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009). This Court has "stated time and again that

courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992). "It is well established that when the statute's language is plain, the sole function of the courts . . . is to enforce it according to its terms." *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) (cleaned up). "When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Germain*, 503 U.S. at 254 (cleaned up). This cardinal canon of construction disposes of this case.

Section 2244(b)(1) is unambiguous: it applies only to state prisoners. It provides that "[a] claim presented in a second or successive *habeas corpus application under section 2254* that was presented in a prior application shall be dismissed." 28 U.S.C. § 2244(b)(1) (emphasis added). The italicized language makes plain that this provision applies only to second or successive habeas corpus applications filed under 28 U.S.C. § 2254. And, critically, such applications may be filed only by "a person in custody pursuant to the judgment of a State court." 28 U.S.C. § 2254(a).

Federal prisoners, by contrast, cannot file habeas corpus applications under section 2254 at all. Rather, they must seek post-conviction relief by way of a "motion to vacate" under 28 U.S.C. § 2255. In enacting section 2255, Congress "rerout[ed] federal prisoners' collateral attacks" from "habeas proceedings" to a "separate remedial vehicle." *Jones*, 599 U.S. at 473–74. Accordingly, this Court has recognized the distinction between habeas corpus applications filed by state prisoners under section 2254 and motions to vacate filed by federal prisoners under section 2255. *See Magwood v. Patterson*, 561 U.S. 320, 333 (2010) ("The

requirement of custody pursuant to a state-court judgment distinguishes § 2254 from other statutory provisions authorizing relief from constitutional violations—such as § 2255, which allows challenges to the judgments of federal courts.") (emphasis omitted).

Congress itself repeatedly drew this basic distinction between "habeas corpus applications" and "motions to vacate" under section 2255. For example, in the statutory subsection immediately preceding section 2244(b)(1), Congress limited successive "application[s] for a writ of habeas corpus" by federal prisoners, "except as provided in section 2255." 28 U.S.C. § 2244(a). Section 2255, in turn, forbids "[a]n application for a writ of habeas corpus" by "a prisoner who is authorized to apply for relief by motion pursuant to this section," unless the narrow criteria of the saving clause are met. § 2255(e); *see also Jones*, 599 U.S. at 469 ("Since 1948, Congress has provided that a federal prisoner who collaterally attacks his sentence ordinarily must proceed by a motion in the sentencing court under § 2255, rather than by a petition for a writ of habeas corpus."). Thus, in both sections 2244 and 2255, Congress carefully distinguished between habeas corpus applications and motions to vacate. Yet the plain language of (b)(1) applies only to the former.

Moreover, Congress *was* explicit when it wanted one of AEDPA's provisions to apply to both habeas corpus applications and motions to vacate under section 2255. Congress did so, for example, when requiring certificates of appealability (COA). *See* 28 U.S.C. § 2253(c)(1) (requiring a COA from: "(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a

State court; or (B) the final order in a proceeding under section 2255"). And, as another example, Congress did so again when requiring that courts prioritize capital cases. *See* 28 U.S.C. § 2266(a) ("The adjudication of any application under section 2254 that is subject to this chapter, and the adjudication of any motion under section 2255 by a person under sentence of death, shall be given priority by the district court and by the court of appeals over all noncapital matters.").

These other provisions in AEDPA confirm that, "[h]ad Congress wished" for section 2244(b)(1) to apply to *both* habeas corpus applications under section 2254 and motions to vacate under section 2255, "it easily could have done so." *Jones*, 599 U.S. at 478. But federal courts are not permitted to "re-write the statute" by adding such language to the text. *Dodd v. United States*, 545 U.S. 353, 359 (2005). Rather, their "sole function is to apply the law as [they] find it." *Niz-Chavez v. Garland*, 593 U.S. 155, 160 (2021) (cleaned up). Put simply, then, the bottom line here is that, "[b]ecause the plain language" of section 2244(b)(1) "is unambiguous, [the] inquiry begins with the statutory text, and ends there as well." *Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 583 U.S. 109, 127 (2018) (cleaned up).

B. The contrary reasoning of six circuits is atextual and unpersuasive.

Despite the foregoing, six circuits have held that section 2244(b)(1) applies to federal prisoners. However, that holding originated almost by accident, with little to no reasoning at all. *See, e.g.*, *Taylor v. Gilkey*, 314 F.3d 832, 836 (7th Cir. 2002); *Green v. United States*, 397 F.3d 101, 102 n.1 (2d Cir. 2005); *see also Williams v. United States*, 927 F.3d, 427, 435–36 (6th Cir. 2019)

(declining to follow earlier cases that had "suggested (though without any explanation) that § 2244(b)(1) *does* apply in § 2255 cases"). And the few circuits that have offered reasoning have failed to meaningfully engage with the statutory text, relying instead on a mistaken view of both legislative history and policy.

1. As for the text, these circuits have relied on section 2255(h), which provides that "[a] second or successive motion [to vacate] must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain" one of two substantive criteria. The Eleventh Circuit, for example, relied on this provision in *Baptiste*. 828 F.3d at 1339. But the Eleventh Circuit's own reasoning confirms that section 2255(h) does not—indeed cannot—incorporate (b)(1).

Most importantly, the Eleventh Circuit has correctly acknowledged that "§ 2255(h) cannot and does not incorporate § 2244(b)(2)." *In re Bradford*, 830 F.3d 1273, 1277 n.2 (11th Cir. 2016). That is because the substantive criteria for federal prisoners in section 2255(h)(1) differ from the corresponding criteria for state prisoners in (b)(2). In particular, the newly discovered evidence criteria in section 2255(h)(1) for federal prisoners are different from (and more lenient than) the corresponding criteria for state prisoners in (b)(2)(B).

To file a second or successive section 2255 motion, federal prisoners must show "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense." 28 U.S.C. § 2255(h)(1). But state prisoners

must show more. On top of section 2255(h)(1)'s already strict standard of actual innocence, state prisoners must *also* show: that "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence," 28 U.S.C. § 2244(b)(2)(B)(i); and that, "but for [some] constitutional error," no reasonable factfinder would have found the applicant guilty, § 2244(b)(2)(B)(ii).

Given that section 2255(h) has its own substantive criteria for federal prisoners that differ from the substantive criteria for state prisoners in section 2244(b)(2), section 2255(h) cannot incorporate (b)(2). Otherwise, section 2255(h) would be "at war with itself." *United States, ex rel. Polanksy v. Exec. Health Res., Inc.*, 599 U.S. 419, 434 (2023) (citation omitted). And this Court has repeatedly refused to "attribut[e] to Congress an intention to render a statute so internally inconsistent." *Jones*, 599 U.S. at 479 (citation omitted); *see Groff v. DeJoy*, 600 U.S. 447, 472 (2023); *Santos-Zacaria v. Garland*, 598 U.S. 411, 429 (2023).

Critically, because section 2255(h) does not incorporate (b)(2), it cannot incorporate section 2244(b)(1) either. Sections 2244(b)(1) and (b)(2) "work in tandem to establish the requirements for authorizing a second or successive § 2254 application." *In re Graham*, 61 F.4th 433, 439 (4th Cir. 2023). They are mirror images of each other, and they use identical language—both dealing with the situation where a "claim [is] presented in a second or successive habeas corpus application under section 2254." 28 U.S.C. §§ 2244(b)(1), (b)(2). They differ only in that the former provision applies where the claim "*was* presented in prior applica-

tion," § 2244(b)(1) (emphasis added), whereas the latter applies where the claim "was *not* presented in a prior application," § 2244(b)(2) (emphasis added).

Given that (b)(1) and (b)(2) use the same language dealing with "habeas corpus application[s] under section 2254," there is simply "no reason to credit the cross-reference to § 2254 in § 2244(b)(2) but ignore it in § 2244(b)(1)." *Jones v. United States*, 36 F.4th 974, 983 (9th Cir. 2022). Indeed, "the normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning." *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 570 (1995) (cleaned up). And that rule applies with particular force here given that (b)(1) and (b)(2) stand side-by-side and use the identical phrase.

Ignoring that rule, the Eleventh Circuit concluded that "[t]he fact that § 2255(h) does not incorporate § 2244(b)(2) does not prevent it from incorporating every other part of § 2244(b)." *Bradford*, 830 F.3d at 1276 n.1. But the court failed to acknowledge that (b)(1) and (b)(2) use identical language. And the court ultimately made no effort to explain how section 2255(h) could incorporate (b)(1) but not (b)(2). There is simply no textual justification for that incongruity.

2. Lacking textual support for their position, some circuits have reasoned that "the legislative history does not distinguish between second or successive motions by federal and by state prisoners." *In re Bourgeois*, 902 F.3d 446, 448 (5th Cir. 2018) (citation omitted). But, in fact, members of Congress were heavily focused on the need to "stop the endless, pointless, and abusive delays currently available to those in our *State* court system to avoid the carrying out of a death

sentence." 142 Cong. Rec. 4595 (Mar. 13, 1996) (statement of Rep. Barr) (emphasis added); *see, e.g.*, 142 Cong. Rec. 7564 (April 16, 1996) (statement of Sen. Thurmond, co-sponsor of AEDPA) ("[T]he current habeas system has robbed the State criminal justice system of any sense of finality."); 142 Cong. Rec. 7553 (April 16, 1996) (statement of Sen. Biden) ("If it is in Federal court, there is no evidence of delay on habeas corpus to begin with."). This concern reflected the fact that, at the time, "[m]ost capital cases [we]re State cases." 142 Cong. Rec. 7559 (April 16, 1996) (statement of Sen. Hatch); *see* Capital Punishment 1995 at 1, U.S. Department of Justice, Bureau of Justice Statistics (noting 3,046 state prisoners on death row, as compared to 8 federal prisoners on death row).

This overriding concern about state prisoners is reflected in the statutory text itself, which is the "authoritative statement" of Congress' intent. *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 599 (2011) (citation omitted). Indeed, section 2244(b)(1) is just one example where the text subjects state prisoners to more stringent requirements than federal prisoners.

Take, for example, the substantive gatekeeping criteria governing second or successive petitions. As explained above, the newly discovered evidence criteria is stricter for state prisoners than for federal prisoners. It would have been most simple for Congress to subject state and federal prisoners to the same substantive criteria for successive petitions. Instead, AEDPA imposed both a due-diligence requirement and a constitutional-error requirement for state prisoners but not federal prisoners. Given that state prisoners alone are subject to the strict gatekeeping requirements in section 2244(b)(2), it would be perfectly

congruous for state prisoners alone to be subject to the strict gatekeeping requirement in section 2244(b)(1).

Consider also section 2244(c), which applies only "[i]n a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court." 28 U.S.C. § 2244(c). That provision "embodies a recognition that if this Court has 'actually adjudicated' a claim on direct appeal or certiorari, a state prisoner has had the federal redetermination to which he is entitled. A subsequent application for habeas corpus raising the same claims would serve no valid purpose and would add unnecessarily to an already overburdened system of criminal justice." *Neil v. Biggers*, 409 U.S. 188, 191 (1972). Congress adopted this particular form of collateral estoppel only for state prisoners, even though federal prisoners also seek direct review in this Court. That choice fully accords with petitioner's interpretation of section 2244(b)(1). Similar to section 2244(c), (b)(1) bars state prisoners alone from presenting a federal claim in a second or successive federal habeas proceeding that has already been rejected in a prior federal habeas proceeding.

Finally, AEDPA otherwise imposes numerous requirements on state prisoners that do not apply to federal prisoners. State prisoners must exhaust their remedies in state court. 28 U.S.C. § 2254(b)–(c). For any claim adjudicated on the merits in state court, state prisoners cannot obtain relief in federal court unless the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined" by this Court, or "was based on an unreasonable determination of the facts in light of the evidence presented in" state court. § 2254(d). And where state prisoners fail to develop

the factual basis of their claim in state court, they cannot even obtain a hearing in federal court unless they meet one of two criteria similar to those governing successive applications. § 2254(e)(2). None of these strict textual requirements apply to federal prisoners.

3. Lastly, and remarkably, some courts of appeals have expressly relied on policy considerations. In particular, these courts have reasoned that, "[a]lthough § 2244(b)(1) explicitly applies to petitions filed under § 2254, which applies to state prisoners, it would be odd indeed if Congress had intended" it to apply only to state prisoners but not federal prisoners. *Baptiste*, 828 F.3d at 1339; *accord Bourgeois*, 902 F.3d at 448. But courts may not discard the statutory text and substitute their own policy judgment for that of Congress. And this Court has taken pains to enforce that prohibition with AEDPA. *See, e.g.*, *Dodd*, 545 U.S. at 359–60 (adhering to AEDPA's plain text notwithstanding its "potential for harsh result in some cases").

In any event, there is nothing "odd" about treating state and federal prisoners differently. To the contrary, the reason why the statutory text repeatedly subjects state prisoners to stricter requirements than federal prisoners is because state prisoners squarely implicate AEDPA's objectives "to advance the principles of comity, finality, and federalism." *Shoop v. Twyford*, 596 U.S. 811, 818 (2022) (cleaned up). Most importantly here, AEDPA's concern with federalism and comity applies exclusively to state prisoners.

"AEDPA recognizes a foundational principle of our federal system: State courts are adequate forums for the vindication of federal rights." *Burt v. Titlow*, 571 U.S. 12, 19 (2013). "Recognizing the duty and ability

of our state-court colleagues to adjudicate claims of constitutional wrong, AEDPA erects a formidable barrier to federal habeas relief" for state prisoners. *Id*. After all, "[f]ederal habeas review of state convictions frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (citation omitted). Indeed, it "intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Id*. (citation omitted).

Many of AEDPA's requirements for state prisoners reflect this respect for state sovereignty. "The exhaustion requirement of § 2254(b) ensures that state courts have the opportunity fully to consider federal-law challenges to a state custodial judgment before the lower federal courts may entertain a collateral attack upon that judgment." *Duncan v. Walker*, 533 U.S. 167, 178–79 (2001). The strict standards in section 2254(d) for obtaining federal habeas relief "reflect a presumption that state courts know and follow the law." *Woods v. Donald*, 575 U.S. 312, 316 (2015) (cleaned up). And the strict limitations in section 2254(e)(2) on developing and considering new evidence in a federal habeas proceeding likewise promote federalism and comity by "ensur[ing] that the state trial on the merits is the main event, so to speak, rather than a tryout on the road for what will later be the determinative federal habeas hearing." *Shoop*, 596 U.S. at 819 (cleaned up); *see Shinn v. Ramirez*, 596 U.S. 366, 381–82 (2022).

Similar federalism and comity concerns explain why section 2244(b)(1) applies only to state (not federal) prisoners. Allowing a federal habeas court to review a state judgment even once creates tension with state

sovereignty. But, in enacting (b)(1), Congress determined that allowing a federal habeas court to review the same federal claim a *second* time would go too far. That second layer of federal review would presume that state courts could not properly adjudicate federal claims. AEDPA squarely rejected such a presumption.

In stark contrast, no federalism or comity concerns arise at all when federal prisoners collaterally attack a federal judgment in federal court. Allowing federal prisoners to present a federal claim in federal court that they had previously presented in federal court would not implicate or conflict with any state interests. The interests are purely "federal." Thus, "no . . . federalism concern" exists. *Taylor*, 596 U.S. at 859.

In that regard, "[i]t would be passing strange to interpret a statute seeking to promote federalism and comity as requiring" that statute's identical application to state and federal prisoners. *McQuiggin v. Perkins*, 569 U.S. 383, 394 (2013). To account for federalism and comity, Congress subjected state prisoners to limitations that federal prisoners are not. The plain text of (b)(1) reflects that sensible policy choice by Congress, and federal courts are required to honor it.

II. This Court has certiorari jurisdiction.

Because the Eleventh Circuit below erroneously applied section 2244(b)(1) to petitioner's case, the only remaining question is whether this Court has jurisdiction to correct that legal error. As explained below, it does—notwithstanding the certiorari-stripping provision in section 2244(b)(3)(E). Like (b)(1), (b)(3)(E)'s certiorari bar does not apply to second or successive section 2255 motions. And even if the certiorari bar

did generally apply to such motions, it would not strip the Court of jurisdiction over this particular case.

A. Section 2244(b)(3)(E)'s certiorari bar does not apply to section 2255 motions.

The analysis is governed by the "basic principle" that the Court "read[s] limitations on [its] jurisdiction to review narrowly." *Castro v. United States*, 540 U.S. 375, 381 (2003) (quoting *Utah v. Evans*, 536 U.S. 452, 463 (2002)). That principle has great force in this case given "the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction." *INS v. St. Cyr*, 533 U.S. 289, 298 (2001). "Implications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous statutory directives to effect a repeal." *Id*. at 299.

In *Castro*, the Court applied these established principles to section 2244(b)(3)(E). There, the government advanced a broad interpretation that would have stripped this Court of certiorari jurisdiction over any court of appeals decision that "had the *effect* of denying 'authorization . . . to file'" a second or successive petition. *Castro*, 540 U.S. at 380. The Court rejected that interpretation because it would have impermissibly "close[d] our doors to a class of habeas petitioners seeking review without any *clear indication* that such was Congress' intent." *Id.* at 381 (emphasis added).

The same logic applies here. In arguing that the Court lacks jurisdiction, the government relies on section 2255(h). But nothing in the text of section 2255(h) even mentions this Court's jurisdiction. That omission stands in stark contrast to section 2244(b)(3)(E),

which clearly limits jurisdiction over successive habeas corpus applications. And the text of section 2255(h) incorporates only the parts of section 2244 that "provide" for how a second or successive section 2255 motion is to be "certified" by a "panel of the appropriate court of appeals. Section 2244(b)(3)(E)'s certiorari bar does no such thing. As a result, section 2255(h) does not extend section 2244(b)(3)(E)'s certiorari bar to second or successive section 2255 motions.

1. Section 2255(h) reflects no intent to strip the Court of jurisdiction.

Far from reflecting a clear intent to limit jurisdiction, section 2255(h) "makes no mention" of this Court's jurisdiction at all. *Felker*, 518 U.S. at 661. Indeed, section 2255(h) does not even use the words "jurisdiction," "Supreme Court," "review," or "certiorari." As a textual matter, then, section 2255(h) does not impose any limit, much less a clear limit, on this Court's jurisdiction as to successive section 2255 motions.

In stark contrast, section 2244(b)(3)(E) *does* clearly limit the Court's certiorari jurisdiction. That provision uses language that section 2255(h) does not, expressly prohibiting a "petition . . . for a writ of certiorari." Accordingly, this Court has previously recognized that (b)(3)(E) strips the Court of certiorari jurisdiction as to "state prisoners filing second or successive habeas applications under § 2254." *Hohn v. United States*, 524 U.S. 236, 249 (1998); *see Felker*, 518 U.S. at 661.

The upshot is that Congress clearly limited the Court's jurisdiction over habeas corpus applications in section (b)(3)(E) but *not* motions to vacate in section 2255(h). This contrast reflects a deliberate choice. Indeed, Congress enacted sections (b)(3)(E) and 2255(h)

at the same time in AEDPA. *See Jones*, 599 U.S. at 513 (Jackson, J., dissenting) ("Section 2255(h) was enacted in the same Public Law as § 2244(b), a provision that contains analogous second-or-successive petition limitations for *state* prisoners."). And it is an established "principle of statutory construction that when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted).

The Court employed this precise reasoning in *Hohn*. There, the Court held that it possessed certiorari jurisdiction to review denials of certificates of appealability (COA). After observing that section (b)(3)(E) and the provision governing COAs were "enacted in the same statute," the Court "contrast[ed]" the "clear limit" on jurisdiction in the former "with the absence of an analogous limitation to certiorari review" in the latter. *Hohn*, 524 U.S. at 250. The Court concluded that "a Congress concerned enough to bar our jurisdiction in one instance would have been just as explicit in denying it in the other, were that its intention." *Id*.

So too here. Had Congress intended to limit this Court's jurisdiction over successive motions to vacate under section 2255 as well as successive habeas corpus applications, it would have been "just as explicit" in section 2255(h) as it was in (b)(3)(E). *Id*. But Congress included no jurisdiction-stripping language at all in section 2255(h), reflecting that Congress lacked any such intent with respect to motions to vacate.

2. Section 2255(h) does not incorporate by implication the certiorari bar in (b)(3)(E).

Unable to identify any express jurisdiction-stripping language in section 2255(h), the government is forced to rely entirely on its cross reference to section 2244. Again, section 2255(h) provides that "[a] second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain" one of the substantive criteria. Contrary to the government's argument here, section 2255(h) does not incorporate (b)(3)(E)'s certiorari bar.

a. As an initial matter, the government's argument is one of incorporation by "implication," which does not constitute a clear statement of congressional intent required to strip the Court of jurisdiction. *St. Cyr*, 553 U.S. at 299. Not only does section 2255(h) fail to mention this Court or its jurisdiction; it also fails to reference section 2244(b)(3)(E) in particular. Instead, section 2255(h) references "section 2244." And section 2255(h) clearly does not incorporate the entirety of section 2244. As explained above, section 2255(h) does not incorporate sections 2244(b)(1) and (b)(2). As another example, section 2255(h) does not incorporate section 2244(d) either. On its face, section 2244(d) prescribes a statute of limitations only for state prisoners, and section 2255 motions are governed by a separate statute of limitations set out in section 2255(f).

Because section 2255(h) does not incorporate all of section 2244, and because section 2255(h) does not expressly incorporate (b)(3)(E), the government is unable to point to the "specific and unambiguous statutory directive[ ]" required to strip this Court of juris-

diction. *St. Cyr*, 553 U.S. at 299. Thus, the government's effort to find jurisdiction-stripping by way of an implied incorporation fails at the very outset.

b. In any event, the government's interpretation ignores critical textual limitations in section 2255(h). That provision requires that a second or successive section 2255 motion "be certified as provided in section 2244 by a panel of the appropriate court of appeals." 28 U.S.C. § 2255(h). Section 2255(h) thus incorporates only the parts of section 2244 that "provide" for how a second or successive section 2255 motion is to be "certified." And section 2255(h) further hones in on the specific act of certification by expressly identifying the actor who must make that determination: "a panel of the appropriate court of appeals."

Given these textual limits, section 2255(h) incorporates the following provisions in section 2244(b)(3):

- (b)(3)(A), which provides that the applicant must file a motion for authorization in the court of appeals before he may file a second or successive application in the district court.
- (b)(3)(B), which provides that the motion for authorization must be determined by a three-judge panel of the court of appeals.
- (b)(3)(C), which provides that the applicant must make a prima facie showing that the application satisfies the gatekeeping criteria.
- (b)(3)(D), which provides that the court of appeals must grant or deny the motion for authorization within 30 days after filing.

Sections 2244(b)(3)(A) through (D) share one thing in common: they "provide" for how a motion is to be "certified" by a "panel of the appropriate court of appeals."

In stark contrast, the certiorari bar in (b)(3)(E) does not "provide" for how a successive section 2255 motion is to be "certified" by "the court of appeals" in any respect. Rather, it addresses an entirely separate and subsequent issue—the ability to seek review of the panel's certification determination in this Court. As such, it comes in to play only *after* the certification determination has been made. To illustrate the point: if Congress repealed the certiorari bar tomorrow but left (b)(3)(A) through (D) as is, then the process governing the certification determination would not change one wit. The only change would be that parties (in state-prisoner cases) would be able to seek certiorari from the authorization determination. It cannot be that the certiorari bar "provides" for how a motion is to be "certified" when it has no bearing on the certification determination. Rather, the certiorari bar addresses an entirely different act (filing a certiorari petition, not certifying a successive motion) by an entirely different actor (the prisoner, not the panel) in an entirely different court (this Court, not the court of appeals).

The government itself previously adopted a similar understanding of section 2255(h)'s scope. In a merits brief in this Court, the government argued that "[t]he natural reading of Section 2255's requirement that a second or successive motion be certified 'as provided' in Section 2244 is that such a motion is to be certified *in the manner* described in Section 2244. See *Webster's Third New International Dictionary* 125 (1993) (one meaning of 'as' is 'in the same way or manner')." Br. for U.S. 14, *Castro v. United States*, 540 U.S. 375

(2003) (No. 02-6883) (June 2003). But if section 2255(h) incorporates only the provisions in section 2244 governing the "manner" of certification, then it would not incorporate the certiorari bar in (b)(3)(E). As explained above, the certiorari bar has no bearing on the certification determination at all, let alone the manner in which that determination must be made.

c. Perhaps sensing the problem, the government's brief in opposition here made additional arguments.

First, the government observed that petitioner previously assumed that he could not seek certiorari when he filed an original habeas petition in this Court. BIO 12, 15. But, as he has acknowledged, this assumption was mistaken. *See* Cert. Reply 12. And it has no bearing on this Court's review here because arguments going to a federal "court's power to hear a case . . . can never be forfeited or waived" by the parties. *United States v. Cotton*, 535 U.S. 625, 630 (2002).

Second, the government argued that (b)(3)(E) is a "key part of the certification procedure" because Congress intended the panel's "certification decisions generally to be final." BIO 15–16. But that argument is unmoored from the text of section 2255(h), which does not mention "procedure" or "finality" at all. It serves a far more limited function: to incorporate the parts of section 2244 that "provide" for how a section 2255 motion is to by "certified" by the court of appeals. Thus, this atextual argument does not support extending (b)(3)(E)'s certiorari bar to section 2255 motions.

In any event, there is no support for the government's suggestion that (b)(3)(E) itself requires the authorization determination to be "final." To the contrary, every circuit to address the question has held

that, while (b)(3)(E) prohibits parties from petitioning for rehearing, it does not prohibit the court of appeals from *sua sponte* rehearing an authorization determination. *See, e.g.*, *Baptiste*, 828 F.3d at 1340; *Thompson v. Calderon*, 151 F.3d 918, 922 (9th Cir. 1998); *Triestman v. United States*, 124 F.3d 361, 367 (2d Cir. 1997).

Third, the government observed that, unlike other provisions in section 2244, section 2244(b)(3) uses the term "application" without specifying whether it was filed under section 2254 or by a state prisoner. From this, the government leapt to the conclusion that section 2255(h) incorporates all of (b)(3), including the certiorari bar in (b)(3)(E). BIO 16. But that inference misunderstands the reason why section 2255(h) incorporates (b)(3)(A) through (D). Those provisions are instead incorporated because they "provide" for how a second or successive motion is to be "certified" by a "panel of the appropriate court of appeals." The certiorari bar in (b)(3)(E), by contrast, does no such thing.

B. The certiorari bar in section 2244(b)(3)(E) does not apply to this particular case.

Alternatively, even if section 2255(h) somehow incorporated section 2244(b)(3)(E)'s certiorari bar, the bar would not apply to the particular circumstances of this unusual case. Accordingly, the Court could simply exercise certiorari jurisdiction over this one case and resolve the circuit conflict over section 2244(b)(1)—without addressing whether (b)(3)(E)'s certiorari bar generally applies to section 2255 motions to vacate.

The certiorari bar is circumscribed. It provides only that "[t]he grant or *denial* of *an authorization* by a court of appeals to file a second or successive applica-

tion shall not be appealable and shall not be *the subject* of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E) (emphases added).

As explained below, the italicized text establishes that the certiorari bar applies where the court of appeals denies authorization on the merits for failure to make a prima facie showing satisfying the applicable gatekeeping requirements. But the bar does not apply where, as here, the court of appeals dismisses a request for authorization for lack of jurisdiction based on a requirement that was legally inapplicable. This conclusion follows not only from the statutory text but from this Court's precedent strictly construing the certiorari bar in (b)(3)(E), the "basic principle" that the Court "read[s] limitations on [its] jurisdiction to review narrowly," *Castro*, 540 U.S. at 381 (citation omitted), and the canon of constitutional avoidance.

1. The "denial" of "an authorization" is not "the subject" of this certiorari petition.

The text of the certiorari bar does not apply here for three independent but mutually reinforcing reasons.

a. The decision below is not a "grant or denial."

Section 2244(b) repeatedly differentiates between a "dismissal" and a "denial." Sections 2244(b)(1) and (b)(2) require a court to "dismiss" a claim that does not satisfy their requirements. By contrast, (b)(3) contemplates the "grant or denial" of authorization to file a second or successive petition in the district court. 28 U.S.C. §§ 2244(b)(3)(D), (E). This textual distinction between the "dismissal" of a claim and the "denial" of authorization to file reflects that Congress understood these actions to be different. Yet Congress wrote (b)(3)(E)'s certiorari bar to encompass only the latter.

Here, the Eleventh Circuit's decision below is not a "denial" of authorization. The court of appeals did not even consider the merits of petitioner's authorization request—namely, whether he had made a prima facie showing satisfying the applicable requirements for authorization in section 2255(h). Instead, the court of appeals believed that his claim was subject to "dismissal" under (b)(1), and so the court "dismissed" his authorization request for lack of jurisdiction. J.A 73, 77–79. That jurisdictional "dismissal" is not a "denial."

The Eleventh Circuit itself has repeatedly recognized and scrupulously applied this basic distinction throughout the life of petitioner's case. In 2019, it "denied" his authorization request on the merits for failure to make a prima facie showing satisfying the gatekeeping requirements in section 2255(h). J.A. 54. By contrast, in 2024 (and in 2022), the Eleventh Circuit "dismissed" petitioner's claim and his authorization request based on (b)(1). J.A. 64–65, 73, 77–79. Again, in doing so, the court did not consider the merits of his request for authorization and whether he made a prima facie showing under section 2255(h). That "dismissal" is therefore not a "denial" under (b)(3)(E). And that is true even though the effect of the dismissal was to prevent petitioner from filing a successive motion.

This conclusion is confirmed by *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), where the Court strictly construed the phrase "grant or denial" in (b)(3)(E). There, a state prisoner sought authorization. But the court of appeals did not consider the merits of his request at all, since it determined that the claim was not "second or successive." Authorization was therefore unnecessary, and the court of appeals "dismissed" the request and transferred the habeas

application to the district court. *Stewart*, 523 U.S. at 641; *Martinez-Villareal v. Stewart*, 118 F.3d 628, 634–35 (9th Cir. 1997). This Court held that (b)(3)(E) did not bar its review. *Stewart*, 523 U.S. at 641–42. Although the court of appeals "dismissed" the express authorization request (as unnecessary), this Court did not even consider the possibility that such a dismissal constituted a "denial" under (b)(3)(E). And although the court of appeals effectively permitted the applicant to proceed to the district court, this Court held that the court of appeals did not "grant" him authorization (again, since it was unnecessary). *Id*. at 641.

In *Castro*, the Court again declined to rely on the practical effect of the court of appeals' ruling. On an appeal from the dismissal of a section 2255 motion, the court of appeals concluded that the movant's claim was "second or successive." The court of appeals then proceeded to opine that the motion "could not meet the requirements for second or successive motions" under section 2255(h). 540 U.S. at 380. Based on that statement, the government came to this Court and "argue[d] that the Eleventh Circuit's opinion had the *effect* of denying authorization" for purposes of (b)(3)(E). *Id*. (emphasis in original). This Court rejected that argument because it "stretch[ed] the words of the statute too far." *Id*. Although the court of appeals had denied the prisoner authorization to file as a practical matter, the Court held that this was not a "statutorily relevant 'denial'" for purposes of (b)(3)(E). *Id*. (The Court relied on the technical fact that the prisoner had not formally made a request for authorization.).

In short, there was no statutorily relevant "denial" of authorization here. This Court has strictly parsed the phrase "grant or denial" in (b)(3)(E). That phrase

cannot be rewritten to encompass the "dismissal" here given that section 2244(b) repeatedly uses that term elsewhere. And it is insufficient that the practical effect of the Eleventh Circuit's dismissal prevented petitioner from filing a successive section 2255 motion.

b. The decision below was also not "an authorization" determination subject to the bar in (b)(3)(E).

The certiorari bar in (b)(3)(E) applies only to the grant or denial of "an authorization." Importantly, the scope of the authorization determination is circumscribed by (b)(3)(C). So where a court of appeals exceeds the scope of the authorization determination in (b)(3)(C), the certiorari bar in (b)(3)(E) does not apply.

Recall that (b)(3)(C) requires the applicant to make a "prima facie showing that the application satisfies the *requirements of this subsection*." 28 U.S.C. § 2244(b)(3)(C) (emphasis added). For state prisoners, the "requirements of this subsection" are found in (b)(1) and (b)(2). So where a court of appeals denies authorization for failure to make a prima facie showing that the application satisfies those applicable requirements, that constitutes the denial of "an authorization" subject to the certiorari bar in (b)(3)(E).

For federal prisoners, the applicable gatekeeping requirements are found in sections 2255(h)(1) and (h)(2). So where a court of appeals denies certification for failure to make a prima facie showing satisfying those requirements, that constitutes the denial of "an authorization" subject to the certiorari bar in (b)(3)(E) (assuming that it applies to section 2255 motions).

Here again, however, the court of appeals did not even consider whether petitioner satisfied the applicable gatekeeping requirements in section 2255(h).

Rather, the court of appeals dismissed his authorization request based on (b)(1). But, as explained above, (b)(1) does not apply to federal prisoners at all. So the court of appeals dismissed petitioner's request based on a requirement that was legally inapplicable to the authorization determination prescribed by (b)(3)(C). That ruling is therefore not "an authorization" determination subject to the certiorari bar in (b)(3)(E).

c. Finally, that threshold legal ruling on (b)(1) is "the subject" of this certiorari petition, and the certiorari bar does not cover that type of determination.

The certiorari bar in (b)(3)(E) does not strip the Court of jurisdiction over *every* ruling made at the authorization stage. Rather, the certiorari bar strips the Court of jurisdiction only where "the subject" of the certiorari petition is the grant or denial of an authorization. This Court's decision in *Castro* establishes that "the subject" of a certiorari petition for purposes of (b)(3)(E) is the particular legal question on which review is sought. And *Castro* and *Stewart* establish that threshold legal questions about whether the gatekeeping requirements are applicable in the first place do not fall within the scope of the certiorari bar.

As explained above, the court of appeals in *Castro* held that, as a threshold matter, the section 2255 motion was "second or successive." The court of appeals then added that the motion "could not meet the requirements for second or successive motions." *Castro*, 540 U.S. at 380. The prisoner sought certiorari review only on the former threshold legal determination. Although the court of appeals had actually purported to apply the gatekeeping requirements in section

2255(h), this Court nonetheless held that "[t]he 'subject' of Castro's petition is not the Court of Appeals' 'denial of an authorization'"; rather, the "subject" was "the lower courts' refusal to recognize that this § 2255 motion is his first, not his second. That is a very different *question*." *Id.* (emphasis added); *see also Stewart*, 523 U.S. at 641–42, 645 (holding that (b)(3)(E) did not deprive this Court of certiorari jurisdiction over the court of appeals' threshold determination that the application was not "second or successive").

Applying that reasoning here, "the subject" of this certiorari petition is whether (b)(1) applies to federal prisoners. Indeed, that is literally the "question" presented for review. Pet. i. And that is the same type of threshold legal question that this Court reviewed in *Castro* and *Stewart*. Moreover, *Castro*'s logic applies with even greater force because, unlike in *Castro*, the court of appeals here never even considered whether petitioner could satisfy the applicable gatekeeping requirements in section 2255(h). Thus, "the subject" of this petition could not possibly be the denial of a request for authorization. Rather, "the subject" of this petition is the Eleventh Circuit's threshold legal determination that (b)(1) applies to federal prisoners.

* * *

In short, the text of (b)(3)(E)'s certiorari bar does not cover this unusual case. Petitioner does not seek review of any application of the governing gatekeeping requirements. Again, there was no such application at all. Instead, he seeks review of the Eleventh Circuit's

threshold determination that the gatekeeping requirement in (b)(1) applied to him in the first place.[1]

This distinction makes perfect sense in this context. To streamline the process, Congress did not want this Court to review individualized applications of the gatekeeping requirements. But Congress did not intend to bar certiorari review where, as here, the courts of appeals venture beyond the gatekeeping requirements altogether and deny relief based on legal requirements that do not apply. Were it otherwise, the courts of appeals could deny authorization based on grounds that are legally irrelevant or even entirely arbitrary, and there would be no legal recourse. This Court has previously interpreted (b)(3)(E)'s certiorari bar to avoid "troublesome results" and "procedural

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[1] Notably, Congress enacted (b)(3)(E) against the backdrop of decisions by this Court drawing similar distinctions when construing statutes limiting judicial review. *See, e.g.*, *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 491–95 (1991) (interpreting a statutory bar on "judicial review of a determination respecting an application for adjustment of status" to be limited to "review on the merits of a denial of a particular application," and not legal challenges to the "practices and policies used by the agency in processing applications"); *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Brock*, 477 U.S. 274, 285 (1986) (holding that a statutory bar on judicial "review of individual eligibility determinations" made under federal labor guidelines did not preclude legal "challenges to the federal guidelines themselves" or "claims that [the] program is being operated in contravention of" federal law); *Bowen v. Mich. Academy of Family Physicians*, 476 U.S. 667, 674–78 (1986) (holding that a statutory bar on judicial review of "any determination" about the "amount" of Medicare benefits or payments did not bar "challenges mounted against the *method* by which such amounts are to be determined rather than the *determinations* themselves").

anomalies." *Castro*, 540 U.S. at 381. That approach is sound, and the Court should follow it once again here.

2. Applying the certiorari bar to this case would raise a constitutional question under Article III.

If any doubt remains, the constitutional-avoidance canon would require the Court to exercise jurisdiction here in order to ensure the uniformity of federal law.

a. That familiar cannon of construction provides that, "if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is fairly possible, we are obligated to construe the statute to avoid such problems." *St. Cyr*, 533 U.S. at 299–30 (cleaned up). This "cardinal" and "elementary rule" of construction "has for so long been applied by this Court that it is beyond debate." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (citation omitted); *see Davis*, 588 U.S. at 494–95 (Kavanaugh, J., dissenting) (collecting cases going back "more than 200 years").

The Court's obligation to avoid constructions raising serious constitutional problems when fairly possible "is a categorical one." *Rust v. Sullivan*, 500 U.S. 173, 190 (1991). That is because the canon "rest[s] on the reasonable presumption that Congress did not intend the alternative [construction] which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). Respect for Congress thus requires the Court to "assume" that it "legislates in the light of constitutional limitations." *Rust*, 500 U.S. at 191. So where a "statute invokes the outer limits of Congress'

power, we expect a clear indication that Congress intended that result." *St. Cyr*, 533 U.S. at 299.

b. Interpreting (b)(3)(E) to strip this Court of certiorari jurisdiction over this petition would raise a serious constitutional question under Article III § 2.

After prescribing the class of cases over which this Court has original jurisdiction, that constitutional provision otherwise vests this Court with "appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." U.S. Const., art. III § 2. Congress' power to make "exceptions" to this Court's appellate jurisdiction, however, "must not be such as will destroy the essential role of the Supreme Court in the constitutional plan." Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1365 (1953). Indeed, the Constitution should not be interpreted as "authorizing its own destruction." *Id*.[2]

One of this Court's "essential" and "indispensable" functions in the constitutional plan is to "resolve conflicting interpretations of the federal law." Leonard G.

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[2] Many scholars have endorsed this sensible limitation. *See* Daniel Epps & Alan M. Trammel, The False Promise of Jurisdiction Stripping, 123 Colum. L. Rev. 2077, 2089 & n.51 (2023) (citing scholarship). So too has the Executive Branch itself under Attorney General William French Smith. *See* Constitutionality of Legislation Withdrawing Supreme Court Jurisdiction to Consider Cases Relating to Voluntary Prayer, 6 Op. OLC 13, 21–22 (1982) ("[T]he Exceptions Clause does not authorize Congress to interfere with the Court's core functions in our constitutional system," for otherwise Congress "could reduce the Supreme Court to a position of impotence in the tripartite constitutional scheme.").

Ratner, Congressional Power Over the Appellate Jurisdiction of the Supreme Court, 109 U. Pa. L. Rev. 157, 161, 166 (1960). After all, the Constitution vests the judicial Power "in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const., art. III § 1; *see id*. art. I § 8 cl. 9 ("Congress shall have Power . . . To constitute Tribunals inferior to the Supreme Court."). That hierarchal relationship between this "Supreme" Court and "inferior" federal courts "makes little practical sense" unless this Court retains appellate "jurisdiction sufficiently broad to provide general leadership in defining federal law." Evan H. Caminker, Why Must Inferior Courts Obey Superior Court Precedents?, 46 Stan. L. Rev. 817, 835–37 (1994).

c. Applying (b)(3)(E)'s certiorari bar to this case would create (not avoid) a serious constitutional question under Article III's Exceptions Clause, because it would prevent the Court from resolving an entrenched circuit conflict over a federal statute—namely, (b)(1).

In *Felker*, a case involving a state prisoner, the Court held that (b)(3)(E) did not violate the Exceptions Clause because it did not repeal the Court's jurisdiction over original habeas petitions, which would permit the Court to exercise its appellate jurisdiction over gatekeeping determinations. 518 U.S. at 661–62. Writing separately, however, three Justices presciently cautioned that, "if it should later turn out that statutory avenues other than certiorari for reviewing a gatekeeping determination were closed, the question whether the statute exceeded Congress's Exceptions Clause power would be open." *Id*. at 667 (Souter, J., concurring). And, they added, that "question could

arise if the courts of appeals adopted divergent interpretations of the gatekeeper standard." *Id*.

That describes this case. It is undisputed that the courts of appeals are divided over whether the gatekeeping requirement in (b)(1) applies to federal prisoners. Three Justices have expressly recognized the need for the Court to resolve that conflict. And this case squarely presents that question, since it is the sole basis of the decision below. Given its role in the constitutional plan, this Court must retain authority to ensure the uniform application of this federal law.

However, none of the alternative avenues identified in *Felker* are meaningfully available to the Court here. Most importantly, and unlike state prisoners, it is not clear that federal prisoners can even file original habeas petitions in this Court. In *Jones v. Hendrix*, this Court held that the saving clause in section 2255(e) largely prevents federal prisoners from challenging their convictions or sentences in a habeas corpus application under section 2241. *See* 599 U.S. at 474–76 (identifying very narrow exceptions). And the text of the saving clause in section 2255(e) appears to apply to *all* such applications by federal prisoners—whether filed in the district court or this Court. Thus, while the availability of original habeas petitions saved (b)(3)(E) from violating the Exceptions Clause in *Felker*, it may not do so here. And while state prisoners can still file original habeas petitions, they cannot tee up the circuit split over (b)(1)'s application to federal prisoners.

This Court's certified-question jurisdiction is not viable either. *See* 28 U.S.C. § 1254(2); Sup. Ct. R. 19. That pathway is available only if a court of appeals

acts first by certifying a question. Relying on this avenue would thus flip the judicial hierarchy, allowing the courts of appeals to control this Court's supervisory function. That result would be especially perverse given that the courts of appeals no longer certify questions at all. This Court has emphasized that doing so is warranted only "in rare instances." *Wisniewski v. United States*, 353 U.S. 901, 902 (1957). And the courts of appeals have taken that to heart. Indeed, this Court summarily dismissed the last certificate that a court of appeals issued, *United States v. Seale*, 558 U.S. 985 (2009), and no circuit has dared to issue one since then. As the Eleventh Circuit below recognized, this Court has "accepted only four certified questions since 1946, and none in the last forty-three years." J.A. 78. And even though three Justices had opined that the (b)(1) conflict warranted resolution, the Eleventh Circuit declined to certify it just because it did not want to "cause a newsworthy event." J.A. 79.

Finally, a writ of mandamus is not available in this context either. *See* 28 U.S.C. § 1651(a). "Mandamus, of course, may never be employed as a substitute for appeal." *Will v. United States*, 389 U.S. 90, 97 (1967). And since it has the "unfortunate consequence of making the judge a litigant," *Ex parte Fahey*, 332 U.S. 259, 260 (1947), mandamus may be used in "only exceptional circumstances amounting to a judicial usurpation of power," *Will*, 389 U.S. at 95, or a "clear abuse of discretion," *Cheney v. U.S. Dist. Ct. for the Dist. of Columbia*, 542 U.S. 367, 380 (2004). Most importantly here, the right to relief must be "clear and indisputable." *Cheney*, 542 U.S. at 381 (citation omitted). Thus, mandamus would be ill-suited to resolve legal issues that have divided the circuits, as those issues are

hardly "clear and indisputable." Yet that is the scenario where the Court's review is needed most of all.

This case again illustrates the point. Despite filing an original habeas petition in this Court, multiple requests for initial hearing en banc, and a motion for a certified question, petitioner has been unable to obtain further review of the (b)(1) question. If (b)(3)(E) now stripped the Court of jurisdiction over this certiorari petition, then the Court would have no way to directly resolve the circuit conflict over the application of the gatekeeping requirement in (b)(1). And the Court's inability to do so would call into question whether (b)(3)(E) has exceeded Congress' power under the Exceptions Clause. Rather than stretch the text of (b)(3)(E) to trigger this serious constitutional question, the canon of constitutional avoidance instead requires this Court to adopt petitioner's interpretation of (b)(3)(E) above. That narrow resolution would permit the Court to exercise certiorari jurisdiction over this case and to resolve the circuit conflict over (b)(1).

CONCLUSION

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

Respectfully submitted,

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APPENDIX: STATUTORY PROVISIONS

A. 28 U.S.C. § 2244

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)

(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)

(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for

constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

(3)

(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that

the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United

States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

B. 28 U.S.C. § 2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)

(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)

(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the

State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)

(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by

the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this

section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

C. 28 U.S.C. § 2255

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under

this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.