No. 24-5438

In the Supreme Court of the United States

MICHAEL BOWE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether this Court has certiorari jurisdiction to review the court of appeals' order declining to authorize an additional collateral attack on one of petitioner's convictions under 28 U.S.C. 2255, in light of a statute providing that "[t]he grant or denial of an authorization by a court of appeals to file a second or successive application * * * shall not be the subject of a petition * * * for a writ of certiorari," 28 U.S.C. 2244(b)(3)(E).

2. Whether 28 U.S.C. 2244(b)(1)—which 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," *ibid.*—applies to a request for authorization to file a second or successive collateral attack by a federal prisoner under Section 2255.

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INTRODUCTION

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, is designed "to advance the finality of criminal convictions." *Mayle* v. *Felix*, 545 U.S. 644, 662 (2005). To that end, 28 U.S.C. 2255(h) "strictly limit[s] 'second or successive'" collateral attacks on federal convictions to motions under Section 2255 that contain either newly discovered and convincing evidence of innocence, or a new retroactive rule of constitutional law. *Jones* v. *Hendrix*, 599 U.S. 465, 476 (2023) (quoting 28 U.S.C. 2255(h)). In addition, any such additional attack "must be certified as provided in section 2244 by a panel of the appropriate court of appeals" to satisfy those criteria. 28 U.S.C. 2255(h).

Section 2244, in turn, sets forth the procedures for second or successive federal habeas corpus applications by state prisoners. One of its paragraphs, 28 U.S.C.

2244(b)(3), specifies that: (A) a prisoner must seek court of appeals authorization before filing in district court; (B) the authorization request "shall be determined by a three-judge panel of the court of appeals," (C) authorization requires a "prima facie showing" of the relevant criteria; (D) the court of appeals shall "grant or deny the authorization" within 30 days of the request; and (E) 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."

Petitioner agrees (Br. 32) that the procedures in Subparagraphs (A)-(D) apply to collateral-attack authorization requests by federal prisoners. But he nonetheless insists (Br. 33-35) that such prisoners are free to seek rehearing and/or certiorari, irrespective of Subparagraph (E). He provides no sound basis for treating that subparagraph differently from the others. Not only would that approach be atextual, but it would undermine the streamlined procedures that the statute lays out. It would triple the number of filings that a litigious prisoner could make in every unsuccessful—or even patently meritless—additional collateral attack he conceives. And it would eviscerate Subparagraph (D)'s 30-day deadline by layering on the monthslong delay—and judicial burden—of rehearing proceedings in the court of appeals and certiorari proceedings in this Court.

Petitioner's own authorization request in this case should accordingly have started and ended with the "panel of the appropriate court of appeals" to which Section 2255(h) directed it. His fallback, case-specific, effort to avoid Section 2244(b)(3)(E)'s application, on the theory that "dismissing" his authorization request was different from "denying" it, is misplaced. Contrary

to his suggestion, Section 2244(b)(3) contemplates only two dispositions of a request for authorization to file an additional collateral attack: within 30 days, the court of appeals must "grant or deny the authorization." 28 U.S.C. 2244(b)(3)(D). And "a grant or denial" cannot be the subject of a writ of certiorari. 28 U.S.C. 2244(b)(3)(E). Some courts may opt—unlike other courts—to use the word "dismiss" in certain denials. See, *e.g.*, William C. Burton, *Legal Thesaurus* 149, 176 (2d ed. 1992). But Congress did not create a loophole for those courts to take as long as they like to decide such cases, much less permit federal—and state—prisoners in that happenstance set of cases to seek further review in this Court.

The decision below did make one procedural error: it processed petitioner's application by directly applying 28 U.S.C. 2244(b)(1), which bars a "claim presented in a second or successive *habeas corpus application under section 2254* that was presented in a prior application." *Ibid.* (emphasis added). Petitioner is requesting to file a motion challenging his federal sentence under 28 U.S.C. 2255, not seeking habeas corpus relief from a state-court judgment under 28 U.S.C. 2254. But this is a situation in which "Congress has chosen finality over error correction," *Jones*, 599 U.S. at 480—and with good reason. The procedural misstep here did not affect the ultimate correctness of the outcome—a denial of relief. And there are other ways, aside from a petition for a writ of certiorari, to rectify the court of appeals' misinterpretation of Section 2244(b)(1). The petition here should be dismissed for want of jurisdiction.

STATUTORY PROVISIONS INVOLVED

Section 2255(h) of Title 28 provides:

> A second or successive motion must be certified as provided in section 2244 by a panel of the appro-

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

Section 2244(b) of Title 28 provides:

(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 factfinder 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.

Other relevant statutory provisions are reproduced in the appendix to this brief.

STATEMENT

In 2009, following a guilty plea in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); one count of attempting Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); and one count of discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) (2006). J.A. 18; see J.A. 1-3. The district court sentenced petitioner to 288 months of imprisonment, to be followed by five years of supervised release. J.A. 20. Petitioner did not appeal.

In 2016, petitioner filed a motion under 28 U.S.C. 2255 to vacate his Section 924(c) conviction based on *Johnson* v. *United States*, 576 U.S. 591 (2015). The district court denied the motion. J.A. 46-47; see J.A. 27-45. The court of appeals denied a certificate of appealability, J.A. 48, and this Court denied certiorari, 138 S. Ct. 1583 (2018) (No. 17-8179).

In 2019, petitioner requested authorization from the court of appeals for leave to file a second Section 2255 motion based on *United States* v. *Davis*, 588 U.S. 445 (2019). 19-12989 C.A. Doc. 1, at 7, 17-21 (Aug. 7, 2019). The court of appeals denied authorization. J.A. 49-54.

In 2022, after this Court's decision in *United States* v. *Taylor*, 596 U.S. 845 (2022), petitioner again asked the court of appeals for authorization to file an additional Section 2255 motion based on *Davis*. 22-12278 C.A. Doc. 1, at 7-8 (July 13, 2022). The court denied petitioner's authorization request and his request for an initial en banc hearing. J.A. 61-65.

In 2023, petitioner applied to this Court for an original writ of habeas corpus, which the Court denied. 144 S. Ct. 1170 (2024) (No. 22-7871).

In 2024, petitioner returned to the court of appeals, once again seeking for leave to file an additional Section 2255 motion based on *Davis*, but acknowledging that his application was foreclosed by circuit precedent. 24-11704 C.A. Doc. 1, at 7-8 (May 28, 2024). Petitioner again petitioned for an initial en banc hearing of his request, 24-11704 C.A. Doc. 2 (May 29, 2024), and alternatively moved the panel to certify to this Court the question resolved by that circuit precedent, 24-11704 C.A. Doc. 3 (May 29, 2024). The court of appeals denied initial hearing en banc, J.A. 80, dismissed petitioner's authorization request for lack of jurisdiction, and denied the motion to certify, J.A. 72-79.

A. Legal Background

1. The first Congress authorized the federal courts to issue writs of habeas corpus to persons in federal custody. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 81-82; *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807). In 1867, Congress made the writ available to any prisoner —state or federal—"restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385.

In 1948, Congress enacted 28 U.S.C. 2255, which created a new postconviction "motion" remedy for federal prisoners as a substitute for habeas corpus. See *Jones* v. *Hendrix*, 599 U.S. 465, 473-474 (2023). The new remedy channeled postconviction proceedings to "the more convenient jurisdiction of the sentencing court," rather than the district of imprisonment. *United States* v. *Addonizio*, 442 U.S. 178, 185 (1979) (citing *United States* v. *Hayman*, 342 U.S. 205, 216-217 (1952)); see *Jones*, 599 U.S. at 473-474.

2. In 1996, in an effort to "advance the finality of criminal convictions" for state and federal prisoners, Congress enacted AEDPA. See *Mayle* v. *Felix*, 545 U.S. 644, 662 (2005); see, *e.g.*, *Woodford* v. *Garceau*, 538 U.S. 202, 206 (2003). Among AEDPA's changes were limitations on when and how a state or federal prisoner who had already received one full round of collateral review of a criminal conviction could bring a "second or successive" collateral attack. 28 U.S.C. 2244(b), 2255(h).

As modified by AEDPA, Section 2255(h) allows for an additional collateral attack under Section 2555 only in two "strictly limited" circumstances. *Jones*, 599 U.S. at 476; see 28 U.S.C. 2255(h). One is newly discovered convincing evidence of a prisoner's factual innocence. 28 U.S.C. 2255(h)(1). The other is a new rule of constitutional law "made retroactive to cases on collateral review by" this Court. 28 U.S.C. 2255(h)(2).

Section 2255(h) further provides that, as a procedural matter, a "second or successive motion" attacking a federal criminal judgment under Section 2255 "must be certified as provided in section 2244 by a panel of the appropriate court of appeals" as satisfying one of those criteria. 28 U.S.C. 2255(h). In conjunction with that change, AEDPA simultaneously amended 28 U.S.C. 2244, in part to add a new Section 2244(b)(3), which sets forth "'gatekeeping'" requirements for "second or successive" applications for postconviction relief. *Felker* v. *Turpin*, 518 U.S. 651, 656-657 (1996).

Section 2244(b)(3) has five subparagraphs. Subparagraph (A) specifies that before such an application may be filed, "the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. 2244(b)(3)(A). Subparagraph (B) specifies that the authorization re-

quest "shall be determined by a three-judge panel of the court of appeals." 28 U.S.C. 2244(b)(3)(B). Subparagraph (C) conditions a grant of authorization on "a prima facie showing that the application satisfies the requirements of this subsection." 28 U.S.C. 2244(b)(3)(C). Subparagraph (D) requires the court of appeals to "grant or deny" authorization within 30 days of a request. 28 U.S.C. 2244(b)(3)(D). And Subparagraph (E) specifies that 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." 28 U.S.C. 2244(b)(3)(E).

One other new paragraph, 28 U.S.C. 2244(b)(4), likewise refers to the authorization procedure. Section 2244(b)(4) instructs that even if a "court of appeals has authorized" a "second or successive application," a district court "shall dismiss any claim" within that application "unless the applicant shows that the claim satisfies the requirements of this section." 28 U.S.C. 2244(b)(4).

3. Section 2244(b) also contains two other paragraphs, 28 U.S.C. 2244(b)(1) and (2), that—unlike paragraphs (3) and (4) of Section 2244(b)—refer not to an "application" more generally, but instead to a "habeas corpus application under section 2254." 28 U.S.C. 2254(b)(1) and (2). Section 2254 addresses "application[s] for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court"—*i.e.*, collateral attacks by state, rather than federal, prisoners. 28 U.S.C. 2254(a); see 28 U.S.C. 2254(b)(2)-(3) and (c)-(g).

Specifically, Section 2244(b)(1) states 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). Section 2244(b)(2) then states that "[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 the claim satisfies one of two narrow exceptions. 28 U.S.C. 2244(b)(2).

The first of those exceptions, for a claim that "relies on" a new retroactive rule of constitutional law "made retroactive to cases on collateral review by" this Court, is worded nearly identically to one of the two grounds for permitting an additional collateral attack by a federal prisoner. 28 U.S.C. 2244(b)(2)(A); see 28 U.S.C. 2255(h)(2). The second, however, largely mirrors the other ground, where a federal prisoner provides newly discovered, clear and convincing evidence showing that no reasonable factfinder would have found the defendant guilty, while imposing an additional requirement of "constitutional error" only on state prisoners. 28 U.S.C. 2244(b)(2)(B); see 28 U.S.C. 2255(h)(1).

B. Factual And Procedural Background

1. In 2008, petitioner planned, and supplied equipment for, the armed robbery of an armored vehicle. Presentence Investigation Report (PSR) ¶ 38. Petitioner and three codefendants then attempted to rob a Loomis armored vehicle carrying $560,000 in cash at a Wachovia Bank in West Palm Beach, Florida, while one of the two armed guards stepped out to service an ATM. J.A. 1-3; PSR ¶¶ 9-10. Petitioner repeatedly fired a semiautomatic rifle, wounding both guards. PSR ¶¶ 10-12, 23, 31. One of the injured guards returned fire. PSR ¶¶ 10, 31. Petitioner and his codefendants then fled the scene before taking any money, with petitioner fleeing on foot and firing his rifle as he ran. PSR ¶ 11.

A federal grand jury indicted petitioner on one count of conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); one count of attempting Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); and one count of discharging a firearm during and in relation to a crime of violence, namely, the first two offenses, in violation of 18 U.S.C. 924(c) (2006). J.A. 1-3.

Petitioner pleaded guilty to all three counts pursuant to a plea agreement. J.A. 10-17. For the attempted Hobbs Act robbery count, petitioner acknowledged that he knowingly and willfully attempted to rob a Loomis employee "by means of actual or threatened violence or fear of injury." J.A. 10. Petitioner also acknowledged in the plea agreement that he had violated Section 924(c) by "discharg[ing] one or more firearms" during and in relation to "a crime of violence." J.A. 11; see J.A. 12 (acknowledging mandatory consecutive ten-year minimum).

The district court sentenced petitioner to 288 months of imprisonment—168 months on the Hobbs Act counts plus a mandatory consecutive sentence of 120 months on the Section 924(c) count—to be followed by five years of supervised release. J.A. 18, 20. Petitioner did not appeal.

2. In 2015, this Court held in *Johnson* v. *United States* that the residual clause of the definition of "violent felony" in the Armed Career Criminal Act of 1984 (ACCA) is unconstitutionally vague. 576 U.S. at 594-597. This Court subsequently held that *Johnson* announced a new substantive rule that applies retroactively to cases on collateral review. *Welch* v. *United States*, 578 U.S. 120, 122, 130, 135 (2016).

In 2016, petitioner filed a Section 2255 motion, seeking to vacate his Section 924(c) conviction in light of

Johnson. 16-cv-81002 D. Ct. Doc. 1, at 7, 17, 25-37 (June 16, 2016); 16-cv-81002 D. Ct. Doc. 7, at 2, 9-15, 34 (Aug. 15, 2016) (brief filed by counsel). One of Section 924(c)'s two alternative definitions of a predicate "crime of violence," 18 U.S.C. 924(c)(3)(B), uses language similar to the ACCA's residual clause, 18 U.S.C. 924(e)(2)(B)(ii). The district court, adopting a magistrate judge's report and recommendation, denied the motion. J.A. 27-47.

The adopted report observed that even if *Johnson* invalidated the "crime of violence" definition in Section 924(c)(3)(B), petitioner's conviction for attempted Hobbs Act robbery still qualified as a predicate "crime of violence" under the alternative definition in Section 924(c)(3)(A), which defines the term to include a felony offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," 18 U.S.C. 924(c)(3)(A). See J.A. 34-35, 42-43.

The government's response to the motion had not relied on Hobbs Act conspiracy as a crime of violence. See 16-cv-81002 D. Ct. Doc. 18, at 1 (Oct. 24, 2016). And the district court's order denying relief did not address it. Following the district court's order, the court of appeals denied a certificate of appealability, J.A. 48, and this Court denied certiorari, 138 S. Ct. 1583.

3. In 2019, this Court held in *United States* v. *Davis*, 588 U.S. at 470, that the "crime of violence" definition in Section 924(c)(3)(B) is unconstitutionally vague. Pursuant to Section 2255(h), petitioner asked the court of appeals for authorization to file a second Section 2255 motion based on *Davis*. 19-12989 C.A. Doc. 1. The court of appeals denied authorization. J.A. 49-54.

The court of appeals explained that even if *Davis* announced a new retroactive rule of constitutional law, pe-

titioner "cannot make a *prima facie* showing that his [Section] 924(c) conviction is unconstitutional in light of *Davis*," because the conviction was "fully supported by his attempted Hobbs Act robbery crime." J.A. 54. The court observed that circuit precedent still classified attempted Hobbs Act robbery as a crime of violence under "[Section] 924(c)(3)(A)'s elements clause." *Ibid.* (citing *United States* v. *St. Hubert*, 909 F.3d 335, 351-352 (11th Cir. 2018), cert. denied, 586 U.S. 1256 (2019), and 140 S. Ct. 1727 (2020)).

4. In 2022, this Court held in *United States* v. *Taylor*, 596 U.S. 845, that attempted Hobbs Act robbery does not qualify as a crime of violence under Section 924(c)(3)(A). *Id.* at 860. Petitioner filed a pro se request to file another Section 2255 motion, this time based on *Taylor*. 22-12211 C.A. Doc. 1-1, at 8 (July 1, 2022); 22-12211 C.A. Doc. 1-2, at 2, 7-9 (July 1, 2022).

The court of appeals denied the request on the ground that *Taylor* was a statutory-interpretation decision that did "not announce a new rule of constitutional law" and thus did not satisfy Section 2255(h)'s criteria for a valid second or successive motion. J.A. 59-60; see J.A. 55-60

5. Two days before the court of appeals issued that denial, petitioner filed a yet another request in the court of appeals for authorization to file a second Section 2255 motion, again based on *Davis*. 22-12278 C.A. Doc. 1, at 8 (July 13, 2022). Petitioner acknowledged that under the court of appeals' precedent, Section 2244(b)(1)—which provides that "[a] claim presented in a second or successive habeas corpus application under [28 U.S.C.] 2254 that was presented in a prior application shall be dismissed," 28 U.S.C. 2244(b)(1)—would require dismissal of his new request because he had already ap-

plied for authorization to file a second Section 2255 motion based on *Davis*. See 22-12278 C.A. Doc. 2, at 2, 6, 8-9, 11 (July 15, 2022). But he urged the court of appeals to grant initial en banc consideration and overrule that precedent. *Id.* at 11-16.

The court of appeals denied petitioner's request for initial en banc consideration and relied on Section 2244(b)(1)'s bar to dismiss the request for a new *Davis*-based collateral attack. J.A. 64-65.

6. Petitioner then filed an application for a writ of habeas corpus under 28 U.S.C. 2241 in the Southern District of Mississippi, the district of his confinement. 22-cv-515 D. Ct. Doc. 1 (Sept. 7, 2022). Petitioner later moved to voluntarily dismiss that petition following this Court's decision in *Jones* v. *Hendrix*, which made clear that federal prisoners cannot avoid Section 2255(h)'s limits on additional Section 2255 motions by a filing habeas application that raises an otherwise-barred statutory claim. 599 U.S. at 480; see 22-cv-515 D. Ct. Doc. 10 (June 28, 2023). The district court accordingly dismissed the application. J.A. 66-71.

7. In 2023, petitioner asked this Court for an original writ of habeas corpus. See Pet. Habeas Pet., *In re Bowe*, No. 22-7871 (June 23, 2023). He argued that the court of appeals had erred in applying Section 2244(b)(1)'s rule requiring dismissal of repetitive habeas claims to his request for authorization to file an additional Section 2255 motion. *Id.* at 5, 15-18. He maintained that this Court's habeas review was warranted on the theory that the Court would be unlikely to resolve a circuit conflict about whether Section 2244(b)(1)'s requirements apply in the Section 2255 context, in part because Section 2244(b)(3)(E)'s jurisdictional bar precluded him from obtaining certiorari review of the court

of appeals' rejection of his request for authorization to file another Section 2255 motion. *Id.* at 5-6, 11-12, 22-24.

This Court denied the habeas application. 144 S. Ct. 1170. In a statement respecting the denial, Justice Sotomayor noted a circuit conflict about the Section 2244(b)(1) bar and observed that Section 2244(b)(3)(E) "bars petitions for certiorari stemming from '[t]he grant or denial of an authorization by a court of appeals to file a second or successive application.'" *Ibid.* (quoting 28 U.S.C. 2244(b)(3)(E)) (brackets in original). Justice Sotomayor nevertheless agreed that the Court's denial of petitioner's habeas application was appropriate, finding it "questionable" whether petitioner satisfied the "demanding standard" for this Court's habeas review "because it [wa]s not clear that, absent [Section] 2244(b)(1)'s bar," the court of appeals "would have certified his § 2255 motion." *Id.* at 1171.

8. In 2024, petitioner returned to the court of appeals, once again seeking leave to file an additional Section 2255 motion based on *Davis*. 24-11704 C.A. Doc 1 (May 28, 2024). Petitioner again "ack[n]owledge[d] that, because [the court of appeals had] previously denied him authorization based on *Davis*, [his] application [was] foreclosed by" circuit precedent applying the Section 2244(b)(1) relitigation bar to cases like his. *Id.* at 8 (emphasis added). Petitioner therefore again sought an initial en banc hearing, 24-11704 C.A. Doc. 2 (May 29, 2024), and "alternatively" moved the panel to certify the Section 2244(b)(1) issue to this Court, 24-11704 C.A. Doc. 3, at 5 (May 29, 2024).

The court of appeals declined to grant an initial hearing en banc. J.A. 80. A panel of the court also entered a separate order, J.A. 72-79, that again dismissed petitioner's application for lack of jurisdiction based on Sec-

tion 2244(b)(1), J.A. 77-78, and declined to certify the Section 2244(b)(1) issue to this Court. J.A. 79. The panel took the view that certification to this Court is "an extremely rare procedural device" and that the standard for certification is no less "demanding" than the standard recently applied by this Court in rejecting petitioner's original habeas application. J.A. 78-79.

SUMMARY OF ARGUMENT

Congress tasked three-judge panels of the courts of appeals—not this Court—with deciding whether to authorize a second or successive collateral attack on a federal criminal judgment under 28 U.S.C. 2255. It adopted the same authorization procedures for federal prisoners as for state prisoners, which expressly preclude petitions for writs of certiorari from authorization decisions. Although Congress was undoubtedly aware that appellate panels are not infallible, it evidently concluded that outcome-determinative errors would be vanishingly rare—and certainly not frequent enough to warrant creating an entirely new category of certiorari petition that would intrude on finality, tax judicial resources, further delay the imposition of federal death sentences, and congest this Court's docket.

This case illustrates the reasonableness of Congress's judgment. While the panel below in this case committed an error by applying a statutory relitigation bar that is limited to claims by state prisoners, the error was ultimately of no practical consequence. The opportunity to correct it provides no reason to expand this Court's jurisdiction beyond the boundaries that Congress put in place.

I. Congress did not allow petitions for writs of certiorari from federal prisoners who are seeking an additional round of collateral review of their final criminal

convictions. Under 28 U.S.C. 2255(h), a second or successive collateral attack by a federal prisoner "must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain" previously undiscoverable compelling evidence of factual innocence or a new rule of constitutional law made retroactive by this Court. *Ibid.* And 28 U.S.C. 2244(b)(3), in turn, has five subparagraphs of procedures, specifying that authorization (A) precedes filing of the collateral attack; (B) is assigned for decision to a three-appellate-judge panel; (C) requires prima facie verification that the substantive criteria are satisfied; (D) must be granted or denied within 30 days; and (E) may not, when granted or denied, be the subject of a rehearing or certiorari petition.

Petitioner does not dispute that Subparagraphs (A)-(D) of Section 2244(b)(3) are incorporated by reference into Section 2255. And he previously recognized, in seeking original habeas relief in this Court, that Subparagraph (E) is incorporated as well. His revised position, under which Subparagraph (E)'s "certiorari bar" is uniquely excised, is insupportable. When a Section 2244 procedure applies only to habeas corpus applications by state prisoners, the text makes that clear by specifically referring only to those applications. See, *e.g.*, 28 U.S.C. 2244(b)(1)-(2), (c), and (d). Section 2244(b)(3)(E), however, contains no such limitation. Instead, in conjunction with the undisputedly incorporated Subparagraphs (A)-(D), Subparagraph (E) ensures that authorization will in fact be decided by a "panel of the appropriate court of appeals" as Section 2255(h) specifies—not by this Court.

Petitioner's efforts to avoid the plain import of the statutory text through a clear-statement rule are un-

sound. The principal decision on which he relies for narrowly construing limitations on this Court's jurisdiction actually takes as a given that Subparagraph (E) *does* apply to federal prisoners. See *Castro* v. *United States*, 540 U.S. 375, 379-381 (2003). Petitioner also fails to explain how his narrow-construction rule could apply to Subparagraph (E)'s intertwined limitation on rehearing, or how the two limitations can textually or conceptually be decoupled. Finally, even if some type of clear-statement rule did apply, Section 2255(h)'s express directive for certification "as provided in section 2244 by *a panel of the appropriate court of appeals*" cannot reasonably be interpreted to allow federal prisoners to go to the full court of appeals or to this Court.

Petitioner also errs in contending, in the alternative, that his own case does not fall within the terms of Subparagraph (E)'s directive that "[t]he 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." Petitioner would draw a distinction between a "denial" and a "dismissal" that has no basis in text, context, practice, or practicality. A "dismissal" "'den[ies]'" relief "in a literal sense." *Gonzalez* v. *Automatic Emps. Credit Union*, 419 U.S. 90, 96 (1974). Subparagraph (D)'s 30-day time limit makes clear that the terms "grant" and "deny" cover the waterfront of a panel actions on an authorization request. Courts of appeals regularly describe the type of disposition in the order below as a "denial" rather than a "dismissal." And such happenstance choices of nomenclature do not make a practical difference that would invite jurisdiction over an arbitrary set of federal- and state-prisoner cases.

Nor is petitioner correct in suggesting that the Exceptions Clause supports his jurisdictional argument. Not only does he lack the textual grounding that a constitutional-avoidance argument requires, but this Court has already unanimously rejected an Exceptions Clause challenge to Section 2244(b)(3)(E). See *Felker* v. *Turpin*, 518 U.S. 651, 654, 661-662 (1996). Petitioner asserts that the Court's rationale for doing so, which noted the continued availability of an original writ of habeas corpus in this Court, may not apply to federal prisoners, even though he himself previously sought such a writ. But even if that remedy were in fact categorically foreclosed, other mechanisms for review, such as certification and the All Writs Act, 28 U.S.C. 1651, would remain. See *Felker*, 518 U.S. at 666 (Stevens, J., concurring),

Petitioner's own inability to utilize those mechanisms simply reflects the unsoundness of his underlying claim for relief, which seeks to undo the result he agreed to in his plea, based on a statutory argument that is not a valid basis for a second or successive collateral attack. His inability to file another collateral attack is the system functioning as it should—not a reason for opening the door to certiorari petitions from denials of authorization for prisoners to file additional challenges to their final criminal convictions.

II. Although it was not ultimately consequential, the court of appeals did err in this case by applying 28 U.S.C. 2244(b)(1) as the specific basis for rejecting petitioner's authorization request. Section 2244(b)(1) states 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). A federal prisoner's request for

authorization to file another Section 2255 motion is not a "claim," is not part of a filed "habeas corpus application," and does not depend in any way on 28 U.S.C. 2254 —which governs habeas applications challenging *state* judgments.

The portions of Section 2244(b) directly applicable to federal prisoners are the five subparagraphs of Section 2244(b)(3) and Section 2244(b)(4), under which district courts follow up on a court of appeals' prima facie look at the authorization stage by pruning any claims that do not in fact meet the authorization criteria. Section 2244(b)(1)'s statutory bar on repeated claims, however, does not directly apply to federal prisoners. Instead, their repeated claims may be dismissed based on preexisting claim-preclusion rules, or on other grounds—as petitioner's collateral attack should have been, and presumably would be even if this Court had jurisdiction to correct the court of appeals' misstep.

ARGUMENT

After pleading guilty to a violation of 18 U.S.C. 924(c), petitioner has sought to overturn the resulting conviction through a full round of collateral review under 28 U.S.C. 2255, including a petition for a writ of certiorari, a habeas-corpus application in the district where he is confined, an original application for habeas corpus in this Court, and four separate requests to the court of appeals for authorization to file another Section 2255 motion. He now presses a position that would proliferate his and many other prisoners' postconviction litigation even further by inviting two more rounds of briefing—one seeking rehearing and another seeking certiorari from this Court—each time authorization is denied.

That position runs directly counter to the text, context, and design of AEDPA, which recognize a point at which victims', the government's, and the courts' need for finality overcomes a prisoner's interest in additional filings. The court of appeals did make a procedural mistake in this particular case: the reason to deny relief was not 28 U.S.C. 2244(b)(1), which applies only to collateral attacks on state-court judgments, but instead Congress's preclusion of statutory-construction claims by federal prisoners who have already received a full round of collateral review. But that mistake was not outcome-determinative, and even if it had been, Congress has made the policy-laden, line-drawing judgment about how much postconviction litigation the system should bear. The petition for a writ of certiorari here crosses that line. The Court should dismiss it.

I. AEDPA'S EXPEDITED PROCEDURES FOR AUTHORIZING ADDITIONAL COLLATERAL ATTACKS DO NOT ALLOW FEDERAL PRISONERS TO SEEK CERTIORARI

As petitioner previously recognized in his application for an original writ of habeas corpus, 28 U.S.C. 2244(b)(3)(E) "prevents prisoners" like petitioner "from seeking certiorari review" of a court of appeals' "den[ial of] authorization to file a second or successive [Section] 2255 motion." Pet. Habeas Pet. at 5, *In re Bowe*, No. 22-7871 (June 23, 2023); see *id.* at 11, 23; Pet. Br. 9. Petitioner now contends (Br. 27-48), however, that federal prisoners can in fact prolong postconviction litigation through petitions for writs of certiorari in this Court—and, presumably, requests for rehearing in the courts of appeals as well—when a "second or successive motion" under Section 2255 is not "certified * * * by a panel of the appropriate court of appeals," 28 U.S.C. 2255(h). That contention cannot be squared with the statute. Certification must be "as provided

in section 2244," *ibid.*, which streamlines authorization requests by specifying that a three-judge panel's determination "shall not be the subject of a petition for rehearing or for a writ of certiorari," 28 U.S.C. 2244(b)(3)(E).

A. AEDPA Channels Requests For Authorization Of Additional Collateral Attacks By Federal Prisoners To A Panel Of A Court Of Appeals

Since the enactment of AEDPA, "second or successive [Section] 2255 motions" have been "barred unless they rely on either 'newly discovered evidence,' * * * or 'a new rule of constitutional law.'" *Jones* v. *Hendrix*, 599 U.S. 465, 469 (2023) (quoting 28 U.S.C. 2255(h)(1) and (2)). Under Section 2255(h), a "second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals" as satisfying one of those two prerequisites. 28 U.S.C. 2255(h). Section 2244's procedures for certification "by a panel of the appropriate court of appeals" (*ibid.*), in turn, preclude petitions for writs of certiorari. 28 U.S.C. 2244(b)(3)(E).

1. Several of 28 U.S.C. 2244's provisions explicitly describe procedural rules for "habeas corpus" proceedings brought "by a person in custody pursuant to the judgment of a State court" (28 U.S.C. 2244(c) and (d)) or "habeas corpus application[s] under section 2254," (28 U.S.C. 2244(b)(1) and (2)), which are filed by such state prisoners, see 28 U.S.C. 2254(a). One set of provisions that does not refer exclusively to state prisoners, however, is Section 2244(b)(3), which "creates a 'gatekeeping' mechanism for the consideration of second or successive applications in district court." *Felker* v. *Turpin*, 518 U.S. 651, 657 (1996). Section 2244(b)(3) contains five subparagraphs that specify the procedure for

obtaining authorization—a procedure that precludes certiorari review in this Court. See *id.* at 657-659.

Under Subparagraph (A), "an order authorizing" a second or successive collateral attack must be sought from the court of appeals before such an attack may be filed in district court. 28 U.S.C. 2244(b)(3)(A). Under Subparagraph (B), the authorization request "shall be determined by a three-judge panel of the court of appeals." 28 U.S.C. 2244(b)(3)(B). Under Subparagraph (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." 28 U.S.C. 2244(b)(3)(C). Under Subparagraph (D), the court of appeals must "grant or deny the authorization" within 30 days of the prisoner's request. 28 U.S.C. 2244(b)(3)(D). And under Subparagraph (E), "[t]he 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." 28 U.S.C. 2244(b)(3)(E).

2. Section 2244(b)(3)'s gatekeeping requirements are a precise fit for Section 2255(h)'s cross-reference to "section 2244" as "provid[ing]" the procedure whereby a "second or successive motion" under Section 2255 is "certified * * * by a panel of the appropriate court of appeals," 28 U.S.C. 2255(h). Subparagraph (A) specifies when authorization must be sought (before filing in district court). Subparagraph (B) specifies the composition of the panel (three judges). Subparagraph (C) specifies that the panel is taking a quick look, not a deep dive, to see whether the requirements for an additional collateral attack are satisfied. Subparagraph (D) places

a time limit on the panel's deliberations (30 days). And Subparagraph (E) makes the three-judge panel's determination conclusive: no petition for "rehearing" (panel or en banc) or "writ of certiorari" is allowed. 28 U.S.C. 2244(b)(3)(E).

If Section 2255(h)'s cross-reference does not include Section 2244(b)(3), then it is difficult to see what the cross-reference *would* include. The only textual discrepancies between Section 2255 and Section 2244(b)(3) are minor. Section 2244(b)(3) refers to collateral attacks as "applications," while federal collateral attacks are typically described as "motions," but a "motion" applying for relief is quite naturally described as an "application." Every "motion," after all, *applies* to the court for some relief. See *Melendez* v. *United States*, 518 U.S. 120, 126 (1996) ("[T]he term 'motion' generally means 'an application made to a court or judge for purpose of obtaining a rule or order directing some act to be done in favor of the applicant.'" (quoting *Black's Law Dictionary* 1013 (6th ed. 1990))) (brackets omitted).

Moreover, if the term "application" were in itself specific to state prisoners, then Section 2255(h)'s cross-reference to Section 2244 would be wholly ineffectual. Cf. *Corley* v. *United States*, 556 U.S. 303, 314 (2009) ("[A] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.") (citation omitted). And Section 2244(b)(3)(C)'s reference to an application satisfying, as a prima facie matter, "the requirements of this subsection" must in context be understood to refer to "subsection" (h) of Section 2255, rather than Subsection (b) of Section 2244, or else there would be no description of the standard for an appellate panel's authorization decision in the federal context.

Accordingly, every court of appeals that has considered the issue has understood Section 2244(b)(3)—including Section 2244(b)(3)(E)'s bar on petitions for rehearing and certiorari—as applicable to federal prisoners. *In re Clark*, 837 F.3d 1080, 1082-1083 & n.3 (10th Cir. 2016) (per curiam) (citing cases); see, *e.g.*, *In re Baptiste*, 828 F.3d 1337, 1340 (11th Cir. 2016); *Págan-San Miguel* v. *United States*, 736 F.3d 44, 46 n.1 (1st Cir. 2013) (per curiam); *In re Sonshine*, 132 F.3d 1133, 1134 (6th Cir. 1997); *Triestman* v. *United States*, 124 F.3d 361, 367 (2d Cir. 1997), abrogated in part on other grounds by *Jones*, 599 U.S. at 477; *United States* v. *Lorentsen*, 106 F.3d 278, 279 (9th Cir. 1997). And as this Court has made clear, the limitations of Section 2244(b)(3) are jurisdictional. Both an unauthorized collateral attack and a petition for certiorari from a denial of authorization must be dismissed on jurisdictional grounds. See *Burton* v. *Stewart*, 549 U.S. 147, 149, 152-153 (2007) (per curiam) (unauthorized collateral attack); *Felker*, 518 U.S. at 658, 665 (certiorari petition).

B. Petitioner Identifies No Sound Basis For Uniquely Excluding 28 U.S.C. 2244(b)(3)(E) From 28 U.S.C. 2255(h)'s Incorporation Of Section 2244(b)(3)

Petitioner recognizes (Br. 32) that Section 2255(h)'s cross-reference to Section 2244 "incorporates" most of Section 2244(b)(3)'s certification procedures: namely, the procedures in the first four of the five subparagraphs. But he contends (Br. 33-35) that the incorporation uniquely excludes Subparagraph (E)'s assurance that the authorization decision from the three-judge panel be conclusive for the parties. That contention is unsound.

1. Nothing in the statutory text supports the singular exclusion of Subparagraph (E)

There is no textual basis for treating Subparagraph (E) differently from every other subparagraph of Section 2244(b)(3). Instead, the natural interpretation, taken into account in this Court's denial of petitioner's previous request for an original writ of habeas corpus, is that Subparagraph (E)'s restrictions apply to state and federal prisoners alike. See Pet. App. 11a (statement of Sotomayor, J., respecting the denial of the petition for a writ of habeas corpus).

a. Nothing in the language of Section 2244(b)(3)(E) suggests that it, alone, applies only to state prisoners. If, as the parties apparently agree, the term "application" in Section 2244(b)(3) encompasses a Section 2255 motion, then Subparagraph (E)'s directive that "[t]he 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" is textually just as applicable to Section 2255 as the rest of Section 2244(b)(3).

Throughout Section 2244, when Congress intended to refer only to a state prisoner's application for habeas relief, it said so expressly. See 28 U.S.C. 2244(b)(1) ("second or successive habeas corpus application under section 2254"), (b)(2) (same), (c) ("habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court"), and (d)(1) (similar). But Congress did not limit any of the subparagraphs of Section 2244(b)(3)—(A), (B), (C), (D), *or* (E)—to the state-prisoner context. And "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is gen-

erally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (citation omitted).

b. Nor is there anything in Section 2255(h)'s cross-reference that would suggest a Subparagraph-(E)-specific carve-out. Petitioner's assertion (Br. 33) that "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" is untenable. As the Tenth Circuit has observed, "the text" of "[Section] 2255(h) explicitly incorporates the certification process in [Section] 2244," and "[Section] 2244(b)(3)(E) is part of th[at] certification process." *Clark*, 837 F.3d at 1082-1083; see *Triestman*, 124 F.3d at 367 (explaining that "it is logical to assume that Congress intended to refer to all of the [relevant] subsections of [Section] 2244," "including * * * [Section] 2244(b)(3)(E)"). Even taking certiorari petitions in isolation, and ignoring Subparagraph (E)'s intertwined preclusion of rehearing petitions as well, limiting the authorization process to a request to the court of appeals is plainly an aspect of "how a successive section 2255 motion is to be 'certified' by 'the court of appeals,'" Pet. Br. 33.

The bar on certiorari petitions ensures that the court of appeals' decision is the final word on authorization. It specifies that the decision be made by the court of appeals, not on a remand from this Court. And it functions in tandem with Subparagraph (D)'s requirement that the court of appeals "shall grant or deny the authorization * * * not later than 30 days after" the prisoner's request. 28 U.S.C. 2244(b)(3)(D). Although courts of appeals have generally treated that time limit as nonbinding, see, *e.g.*, *In re Williams*, 330 F.3d 277,

280 (4th Cir. 2003) (citing cases), it provides a strong indicator of Congress's intent that the request be resolved quickly. If petitions for writs of certiorari were permissible, then the expeditious resolution that Subparagraph (D) requires would be quadrupled (or more) by the (extendable) 90-day period for seeking certiorari —and then prolonged even further by the time the respondent has to waive response, the (extendable) time to file a response if deemed helpful, and then the time to circulate or dispose of the petition. See Sup. Ct. R. 13.1, 15.1, 15.3, 15.5.

c. The procedural character of Subparagraph (E) becomes even more obvious when the implications of its preclusion on "petition[s] for rehearing" is considered. Though petitioner refers to Section 2244(b)(3)(E)'s "certiorari bar," he appears to define the term he has coined by reference to the bar on both certiorari and rehearing petitions. See Pet. Br. 35-36 (describing the entire operative text of Section 2244(b)(3)(E) as the "certiorari bar"). Yet exclusion of the bar on rehearing petitions from Section 2255(h)'s cross-reference would be completely incongruous—and would delay finality even more.

If that were the case, then federal prisoners could seek panel or en banc rehearing, see Fed. R. App. P. 40(d)(1), and then *also* seek certiorari thereafter, see Sup. Ct. R. 13.3 (time for seeking certiorari resets if rehearing is requested or granted). And as a textual matter, authorization by an en banc court of appeals cannot be considered certification by "a *panel* of the appropriate court of appeals," as Section 2255(h)—as well as the undisputedly incorporated Section 2244(b)(3)(B)—expressly require. 28 U.S.C. 2255(h) (emphasis added); see 28 U.S.C. 2244(b)(3)(B); see, *e.g.*, 28 U.S.C. 46(c)

(distinguishing a court of appeals "panel" from "the court in banc").

It is no answer to suggest, as petitioner does (Br. 34-35), that Section 2244(b)(3)(E) does not always ensure the finality of panel decisions because some courts of appeals have taken the view that Section 2244(b)(3)(E)'s prohibition on rehearing petitions does not preclude sua sponte rehearing en banc. As a threshold matter, that interpretation is difficult to square with the requirement for certification by a "panel," 28 U.S.C. 2255(h), of "three[]judge[s]," 28 U.S.C. 2244(b)(3)(B). Cf., *e.g.*, *Duncan* v. *Bonta*, 131 F.4th 1019, 1031 (9th Cir. 2025) (en banc) (Thomas, J., concurring) ("'[W]hen a case is heard or reheard *en banc*' * * * the en banc court is substituted for the three judge panel in considering the case.") (quoting *Summerlin* v. *Stewart*, 309 F.3d 1193 (9th Cir. 2002)); *United States* v. *Campbell*, 26 F.4th 860, 888 (11th Cir.) (W. Pryor, C.J., concurring) (similar), cert. denied, 142 S. Ct. 95 (2022); *Cooper* v. *Woodford*, 358 F.3d 1117, 1124 (9th Cir.) (en banc) ("[W]e authorize Cooper to file his second or successive application for habeas corpus in the district court."), cert. denied, 541 U.S. 1057 (2004). But even assuming such sua sponte en banc consideration were permissible, the possibility of such a rare judge-invoked procedure does not threaten finality, or invite ubiquitous delays, the way that allowing prisoner-filed petitions would.

As this Court has made clear, one of AEDPA's "purposes is to 'reduce delays in the execution of state and federal criminal sentences.'" *Rhines* v. *Weber*, 544 U.S. 269, 276 (2005) (citation omitted). But as this case well illustrates, prisoners (understandably) have a strong incentive to pursue every possible avenue of relief—however narrow or unlikely it might be. See, *e.g.*, *Black-*

ledge v. *Allison*, 431 U.S. 63, 71 (1977) ("More often than not a prisoner has everything to gain and nothing to lose from filing a collateral attack upon his guilty plea."). Of particular note, those convicted of capital crimes "might deliberately engage in dilatory tactics to * * * avoid execution of the sentence of death." *Rhines*, 544 U.S. at 277-278.

AEDPA's restrictions on second or successive collateral attacks further its delay-reducing purpose by limiting collateral attacks and ensuring that permissible ones are quickly identified. Even assuming AEDPA allows a court of appeals to consider exceptional authorization decisions en banc sua sponte, authorizing the en banc court of appeals to initiate further review stops far short of allowing every *prisoner* to do so.

2. Petitioner's reliance on a clear-statement rule is mistaken

Lacking a sound foothold in the statutory text itself, petitioner attempts to justify his excision of Subparagraph (E) by asserting (Br. 28-30) that precluding certiorari review would require a heightened level of clarity and that such clarity is lacking here. Both assertions are mistaken.

a. Petitioner's reliance on *Castro* v. *United States*, 540 U.S. 375 (2003), for the "'basic principle' that the Court 'read[s] limitations on [its] jurisdiction to review narrowly,'" Br. 28 (quoting *Castro*, 540 U.S. at 381) (brackets omitted), is misplaced. Although *Castro* applied a narrow interpretation principle to analyze the scope of Subparagraph (E)'s jurisdictional limitations *themselves*, see 540 U.S. at 381, that analysis took as a given that Subparagraph (E) applies to federal prisoners under Section 2255(h) in the first place. *Castro*

therefore cuts distinctly against petitioner on the question presented here.

In granting certiorari in *Castro*, the Court raised sua sponte the question whether Section 2244(b)(3)(E) barred the writ of certiorari filed by Castro, a federal prisoner. See *Castro* v. *United States*, 537 U.S. 1170 (2003) (granting certiorari). Although the Court ultimately found the provision inapplicable by its terms because Castro was not seeking authorization to file a second or successive collateral attack, *Castro*, 540 U.S. at 379-381, that entire analysis would have been unnecessary if Section 2255(h) did not incorporate Section 2244(b)(3)(E) to begin with. The government's brief had explained why it does. See U.S. Br. at 13-15, *Castro*, *supra* (No. 02-6683). Castro read the statute the same way, Pet. Br. at 12-13, *Castro*, *supra*; Reply Br. at 1-2, 4-5, *Castro*, *supra*—and so, apparently, did the Court, which did not even comment on the issue.

In any event, petitioner's asserted principle about certiorari jurisdiction cannot justify wholesale exclusion of Section 2244(b)(3)(E), which contains limitations on rehearing that would not be subject to that principle. It would make little sense to dispense with Subparagraph (E)'s rehearing limitations—which, as discussed above (pp. 28-30, *supra*), cohere with Section 2255(h)'s requirement that certification be decided by "a panel of the appropriate court of appeals"—based on a principle applicable to certiorari alone.

Nor does petitioner even identify a plausible textual basis in Section 2255(h) for excising only the certiorari-specific portion of Section 2244(b)(3)(E). See *Clark* v. *Martinez*, 543 U.S. 371, 380 (2005) (emphasizing that statutory language has consistent meaning across contexts). And incorporating only the rehearing limitations

would create a nonsensical scheme in which any asserted error by the panel could not be brought to the attention of the panel itself, or the full court of appeals, but would have to be asserted to this Court. Such a scheme would be antithetical to judicial economy and the normal course of judicial review. See *Winiewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

b. Petitioner's invocation of "the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction," Br. 28 (quoting *INS* v. *St. Cyr*, 533 U.S. 289, 298 (2001)), is similarly unsound. Assuming arguendo that Section 2255 should be treated as a form of habeas for purposes of that rule, it is common ground that Section 2255(h) *does* "repeal habeas jurisdiction." Petitioner recognizes (Br. 32) that "section 2255(h) incorporates" the first four subparagraphs of Section 2244(b)(3), including Subparagraph (A), which precludes district courts from entertaining additional collateral attacks unless they have been authorized. And the Court has made clear that failure to satisfy the authorization requirement requires dismissal "for lack of jurisdiction." *Burton*, 549 U.S. at 149; see *id.* at 152-153, 157.

It is thus the undisputed incorporation of Subparagraph (A), not the incorporation of Subparagraph (E), that would "repeal habeas jurisdiction." Unlike Subparagraph (A), which applies a jurisdictional prerequisite to the filing of a collateral attack itself, Subparagraph (E) simply limits further review of a decision whether to authorize a collateral attack by a prisoner who has already filed one in the past. That is simply a limitation on appellate review, not a repeal of habeas ju-

risdiction itself. And even if it did repeal habeas jurisdiction, petitioner provides no textual basis why his clear-statement rule would be satisfied by Subparagraph (A) but not Subparagraph (E). Subparagraph (E) does not contain any state-prisoner-specific language or reference that Subparagraph (A) does not also contain.

c. Moreover, even if a clear-statement rule applied, it would not exclude Subparagraph (E). As explained above (pp. 22-28, *supra*), Section 2255(h)'s incorporation of the certification procedures in "section 2244" is explicit, and Section 2244 itself expressly makes clear when a provision is applicable only to habeas corpus petitions that challenge state judgments. No such limitation appears in any of Section 2244(b)(3)'s five subparagraphs.

Petitioner errs in attempting (Br. 29-30) to derive meaning from differences in the wording of Sections 2255(h) and 2244(b)(3)(E). Section 2255(h) imposes procedural limitations by incorporating "section 2244." 28 U.S.C. 2255(h). Section 2244(b)(3)(E) is one of the procedural limitations that Section 2244 sets forth. See 28 U.S.C. 2244(b)(3)(E). Given their different roles, it is unremarkable that Sections 2255(h) and 2244(b)(3)(E) are worded differently—just as the incorporat*ing* language in Section 2255(h) differs from the incorporat*ed* limitations in Sections 2244(b)(3)(A), (B), (C), and (D). Unlike the two procedural limitations that the Court contrasted in *Hohn* v. *United States*, 524 U.S. 236, 249-250 (1998), each of which was a limitation on prolonged collateral litigation (namely, the requirement for a certificate of appealability to appeal the denial of collateral relief and the requirement for authorization for a second or successive collateral attack), Section 2255(h) and Section 2244(b)(3)(E) are not analogous.

To the extent that *Hohn* has any bearing here, it actually undercuts petitioner's position. In holding that this Court has jurisdiction to review denials of a certificate of appealability by a federal prisoner, the Court did not question the relevance of Section 2244(b)(3)(E) to federal cases. See *Hohn*, 524 U.S. at 249-250. That apparent understanding was then echoed not only in *Castro*, see 540 U.S. at 379-380, but also in in Justice Sotomayor's statement respecting the Court's denial of petitioner's original habeas petition last year, which viewed Section 2244(b)(3)(E) as a barring precisely the type of review that petitioner seeks now. See Pet. App. 11a.

C. The Court Of Appeals' Order In This Case Is Within The Scope Of Section 2244(b)(3)(E)

Petitioner alternatively claims (Br. 35-43) that even if Section 2244(b)(3)(E) applies to federal prisoners, it does not apply in this case. Specifically, he contends that because the court of appeals panel stated that his authorization request was "dismiss[ed] for lack of jurisdiction," J.A. 78-79, the panel's order was not a "denial of authorization" subject to Section 2244(b)(3)(E). That contention—which would open the door to substantial delay in an arbitrary set of federal- and state-prisoner cases—is unsound.

1. The court of appeals' order was a "denial of an authorization" within the meaning of Section 2244(b)(3)(E)

Section 2244(b)(3) does not provide any basis for deeming a "dismissal" to be distinct from a "denial." Section 2244(b)(3)(D) provides that a court of appeals "shall grant or deny" an authorization request within 30 days. Section 2244(b)(3)(E), in turn, specifies that "[t]he grant or denial * * * shall not be the subject of a

petition for rehearing or for a writ of certiorari." The statute does not contemplate a third category of "dismissals," which the court of appeals could take as long as it likes to issue, and which would be subject to review on petitions for rehearing or certiorari. Nor could the statute feasibly do so. The applicability of Subparagraph (D)'s time limits for adjudicating a request cannot depend on the ultimate disposition of the request, which is by definition unknown until that adjudication is complete.

Congress's use of the term "denial" in Section 2244(b)(3)(E) to cover the waterfront of authorization rejections is consistent with the plain meaning of that term. See *Black's Law Dictionary* 436 (defining "[d]eny" as "[t]o refuse to grant or accept"); *Ballentine's Law Dictionary* 333 (3d ed. 1969) ("denial" is a "refusal to grant"); William C. Burton, *Legal Thesaurus* 149 (2d ed. 1992) (listing "disallowance," "nonacceptance," "prohibition," and "rejection" as synonyms for "denial"); *id.* at 176 (listing "deny" as a synonym for "dismiss"). As this Court has recognized in the context of 28 U.S.C. 1253, which provides for an appeal to this Court of a three-judge district court's order "granting or denying" an injunction (*ibid.*), "dismissal of a complaint on grounds short of the merits does 'deny' the injunction in a literal sense." *Gonzalez* v. *Automatic Emps. Credit Union*, 419 U.S. 90, 96 (1974). Accordingly, this Court itself "denies" relief on non-merits grounds. See *Biden* v. *Nebraska*, 600 U.S. 477, 507 (2023) (application for relief "denied as moot"); see also, *e.g.*, *Ikome* v. *Bondi*, No. 24A1107, 2025 WL 1573183 (June 4, 2025) (same); *Bessent* v. *Dellinger*, 145 S. Ct. 1326 (2025) (same).

In addition, when Section 2244 does use the term "dismiss" or "dismissed," it does so exclusively in refer-

ence to the disposition of a "*claim* presented *in* an * * * application" for collateral review—not the disposition of a request for authorization to file an "application." 28 U.S.C. 2244(b)(1), (2), and (4) (emphases added); see *Russello*, 464 U.S. at 23. This Court has repeatedly "refused to adopt an interpretation of [Section] 2244(b) that would 'elide the difference between an "application" and a "claim."'" *Magwood* v. *Patterson*, 561 U.S. 320, 334 (2010) (quoting *Artuz* v. *Bennett*, 531 U.S. 4, 9 (2000)) (brackets omitted). But petitioner would do precisely that, by treating a dismissal—a disposition of a *claim*—as a distinct but unmentioned way to dispose of an *application*.

Furthermore, even in the Section 1253 context, where the Court has "frequently deviated from the path of literalism," *Gonzalez*, 419 U.S. at 96, the Court's more functional approach would counsel against a loophole for an order styled as a "dismissal." This Court has declined to rest its appellate jurisdiction under Section 1253 on the "happenstance" of a lower court's precise terminology, see *id.* at 101—an interpretive approach most recently at work in *Abbott* v. *Perez*, 585 U.S. 579 (2018). The Court held there that a three-judge district court's orders, which that court had expressly stated were not injunctions, had "the 'practical effect' of granting or denying an injunction" and "should be treated as such for purposes of appellate jurisdiction" under Section 1253. *Id.* at 594 (citation omitted). The Court explained that "if the availability of * * * review depended on the district court's use of the term 'injunction' or some other particular language, Congress's scheme could be frustrated." *Id.* at 595. Similar logic applies here.

Courts of appeals applying Section 2244(b)(1) to decline to authorize collateral attacks by state and federal prisoners, as the panel below did here, have frequently issued "denials" of authorization. See, *e.g.*, *In re Sharp*, 969 F.3d 527, 529 (5th Cir. 2020) (per curiam); *In re Bourgeois*, 902 F.3d 446, 448 (5th Cir. 2018); *United States* v. *Handy*, 646 Fed. Appx. 635, 637 (10th Cir. 2016); *In re Everett*, 797 F.3d 1282, 1293 (11th Cir. 2015); *In re Hill*, 715 F.3d 284, 301 (11th Cir. 2013); *Gallagher* v. *United States*, 711 F.3d 315, 316 (2d Cir. 2013) (per curiam); *White* v. *United States*, 371 F.3d 900, 903 (7th Cir. 2004); *In re Fowlkes*, 326 F.3d 542, 547 (4th Cir. 2003); *Bennett* v. *United States*, 119 F.3d 468, 470 (7th Cir. 1997); see also *Dawkins* v. *United States*, 829 F.3d 549, 550-551 (7th Cir. 2016) (per curiam) (order "deny[ing] authorization and dismiss[ing] * * * application") (capitalization omitted). Allowing certiorari petitions if and only if a court of appeals views Section 2244(b)(1) to require a "jurisdictional 'dismissal'" (Pet. Br. 37), rather than a "denial" (jurisdictional or otherwise), would be arbitrary. It would also be asymmetric because mirror-image errors that result in "grant[s]," 28 U.S.C. 2244(b)(3)(E), would remain unreviewable.

2. Petitioner's contrary argument lacks support

Contrary to petitioner's assertion (Br. 37-38), neither *Castro* nor *Stewart* v. *Martinez-Villareal*, 523 U.S. 637 (1998), supports review of orders styled as "dismissing" a request for authorization but not orders "denying" an identical request (potentially on identical grounds). Both cases instead involved circumstances in which no authorization decision had been made at all; in *Stewart*, the prisoner's filing had been deemed not to be a "second or successive" collateral attack that would require authorization, and in *Castro*, the prisoner had not

sought authorization because he contended his filing was not a "second or successive" collateral attack. See *Castro*, 540 U.S. at 379-381; *Stewart*, 523 U.S. at 641-642.

This Court's certiorari jurisdiction in those distinct scenarios sheds no meaningful light on the reviewability of authorization decisions themselves, based on how they happen to be styled. Indeed, any extent to which those decisions support a literal approach to the statute rather than a "practical" one, Br. 38-39, would not aid petitioner. A non-merits "dismissal" does "'deny'" the requested relief—*i.e.*, authorization—"in a literal sense," *Gonzalez*, 419 U.S. at 96. And the court of appeals plainly "refuse[d] to grant or accept"—that is, "[d]en[ied]," *Black's Law Dictionary* 436—petitioner's authorization request.

Nor does petitioner otherwise identify any viable way to "narrowly construe (b)(3)(E) and exercise jurisdiction over this case," Br. 15. Petitioner's contention (Br. 39-40) that the court of appeals did not make an "authorization" determination at all is untenable. Even if the word "authorization" could be segregated from its context, the court of appeals was clearly acting with respect to an "authorization" request. If application of an incorrect standard were enough to remove a decision from the realm of "authorization," then any number of "denial[s]"—or, for that matter, "grant[s]"—would be subject to further review. And petitioner makes (Br. 41) an analogous error when he contends that "the subject" of his certiorari petition concerns standards for authorization, not authorization itself. Again, his proposed carveout is ill-defined; could substantially swallow the preclusive rule of Section 2244(b)(3)(E); and

would allow rehearing and certiorari petitions by many state and federal prisoners.

D. The Constitutional-Avoidance Canon Does Not Apply

Petitioner further errs in invoking (Br. 43-48) the canon of constitutional avoidance. That canon cannot be applied solely "to this case" (Br. 45), but instead requires a sound construction of the statute that could apply uniformly across *all* cases. *Jennings* v. *Rodriguez*, 583 U.S. 281, 296 (2018); *Clark*, 543 U.S. at 380. And where, as here, "text, context, and structure decide" the statutory issue, the doctrine has no "role to play." *Bondi* v. *VanDerStok*, 145 S. Ct. 857, 876 (2025) (citation and internal quotation marks omitted). Constitutional avoidance also applies only when "'a *serious* doubt' is raised about the constitutionality of an Act of Congress," *Jennings*, 583 U.S. at 296 (emphasis added; citation omitted), and petitioner's Exceptions Clause argument creates no such doubt.

1. The Exceptions Clause provides that in cases where it lacks original jurisdiction, "the supreme Court shall have 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, Cl. 2. Even assuming that the Clause implicitly limits Congress's authority by denying Congress the ability to eliminate certain "'essential' and 'indispensible'" appellate jurisdiction, Pet. Br. 44—a source of some debate, see Fed. Cts. Scholars Amici Br. 7-8 & n.3—that limitation is not seriously threatened by applying AEDPA's plain text to preclude certiorari review of the denial of authorization for petitioner to file a second or successive collateral attack.

Petitioner frames this Court's "essential and indispensable" appellate jurisdiction at a high level of gener-

ality, to include apparently all cases in which this Court might "resolve conflicting interpretations of the federal law." Br. 44 (citation omitted). But even if that might in be appropriate in some respects or contexts, it fails to account for the particular history of collateral relief. "[A]t common law[,] an order denying habeas relief could not be reviewed" on appeal at all. *McCleskey* v. *Zant*, 499 U.S. 467, 479 (1991). Nor did the common law provide any right to postconviction relief to a federal prisoner who had been convicted by a court of competent jurisdiction, *Felker*, 518 U.S. at 663—let alone a right to file a second or successive collateral attack. Thus, under Founding-era principles, review of AEDPA's statutory procedure for authorizing second or successive collateral attacks to federal convictions is not a necessary subject of this Court's appellate jurisdiction.

Furthermore, this Court's decision in *Felker* v. *Turpin* unanimously rejected an Exceptions Clause challenge to Section 2244(b)(3)(E) brought by a state prisoner. See *Felker*, 518 U.S. at 654, 661-662. *Felker* observed, in particular, that the continued availability of an original "petition for habeas corpus" in this Court allowed "no plausible argument" that the Exceptions Clause had been violated. *Id.* at 661-662. Petitioner seizes on the particular rationale in *Felker* to argue for a different outcome here, positing that because Congress has largely replaced habeas applications with Section 2255 motions, see 28 U.S.C. 2255(e), federal prisoners "may" lack a similar avenue to seek relief in this Court. Pet. Br. 46. But the constitutional-avoidance canon provides no license to read the text of Subparagraph (E) any differently for federal prisoners than for state prisoners. See *Clark*, 543 U.S. at 380. And *Felker* in no way supports his argument in any event.

Even if an original petition for habeas corpus is categorically unavailable in this Court, the three concurring Justices in *Felker*, on whose opinions petitioner relies, identified other routes aside from an original habeas application—namely, the All Writs Act or an "interlocutory order" such as one that certifies a question for this Court, see 28 U.S.C. 1254(2)—that might equally suffice. *Felker*, 518 U.S. at 666 (Stevens, J., concurring). Some procedural issues arising in the authorization process, including the one on which petitioner seeks certiorari review here, might also be reviewable in circumstances where authorization is granted and case comes up through a district court's and court of appeals' adjudication of the authorized collateral attack. See, *e.g.*, *Avery* v. *United States*, 140 S. Ct. 1080, 1080 (2020) (Kavanaugh, J., respecting the denial of certiorari) (addressing certiorari petition on the second question presented here).

2. Contrary to petitioner's supposition (Br. 46-48), the potential hurdles of obtaining review through non-certiorari avenues do not give rise to a problem under the Exceptions Clause. Certiorari review itself is discretionary, infrequent, and can be difficult to secure. And petitioner's own difficulties availing himself of non-certiorari avenues of review is due not to their practical unavailability, but to the noncognizability of the additional collateral attack that he seeks to bring.

As the government explained in its response to petitioner's original habeas application, although petitioner styles his proposed additional motion as raising a constitutional claim, his claim is in fact a statutory one. Br. in Opp. at 14-16, *In re Bowe*, No. 22-7871 (Nov. 27, 2023). This Court's decision *United States* v. *Davis*, 588 U.S. 445 (2019), which held that Section 924(c)(3)(B)'s

definition of "crime of violence" is unconstitutionally vague, was not the source of error in his case.

Instead, petitioner's Section 924(c) conviction relied on the alternative elements-based "crime of violence" definition in Section 924(c)(3)(A). Both petitioner's indictment and his plea agreement tracked Section 924(c)(3)(A)'s language. See J.A. 2, 10. His claim, at bottom, therefore rests on *United States* v. *Taylor*, 596 U.S. 845 (2022), which held that attempted Hobbs Act robbery is not a crime of violence under Section 924(c)(3)(A). See J.A. 55-60 (court of appeals order denying authorization for petitioner to file a successive motion raising a statutory claim under *Taylor*). But *Taylor* was a statutory-interpretation decision, not a constitutional decision.

A statutory claim like petitioner's is not a valid basis for a second or successive collateral attack by a federal prisoner. 28 U.S.C. 2255(h)(2); *Jones*, 599 U.S. at 469-470. As Justice Sotomayor recognized when the Court denied petitioner's habeas petition, it is "not clear" that the court of appeals "would have certified his [Section] 2255 motion" as raising an arguable constitutional claim even "absent" the court's reliance on "[Section] 2244(b)(1)'s bar." Pet. App. 11a. Petitioner's inability to prolong his postconviction litigation with another collateral attack supplies neither a specific nor a general reason to dispense with Section 2244(b)(3)(E)'s prohibition against certiorari review of denials of authorization to file second or successive Section 2255 motions.

II. THE COURT OF APPEALS' APPLICATION OF 28 U.S.C. 2244(b)(1) TO PETITIONER'S REQUEST FOR AUTHORIZATION TO FILE AN ADDITIONAL SECTION 2255 MOTION WAS ERRONEOUS BUT INCONSEQUENTIAL

Although it did not affect the outcome in any practically significant way, the court of appeals erred in relying on 28 U.S.C. 2244(b)(1) in rejecting petitioner's request to file an additional motion under Section 2255. Section 2244(b)(1) provides that "*[a] claim* presented *in* a second or successive *habeas corpus application under section 2254* that was presented in a prior application shall be dismissed." 28 U.S.C. 2244(b)(1) (emphases added). It thus unambiguously applies only to "claim[s]" in second or successive "habeas corpus application[s]" by state prisoners under Section 2254—not to Section 2255 motions by federal prisoners, let alone requests for authorization to file them. And nothing in Section 2255(h) transmutes Section 2244(b)(1) into a bar that would apply in the federal context. Accordingly, if the Court were to take the view that it has certiorari jurisdiction, it should vacate the court of appeals' order, thereby allowing the court of appeals to consider other grounds for denying authorization.

A. Section 2244(b)(1) Applies To Claims By State Prisoners, Not To Requests By Federal Prisoners To Authorize Second Or Successive Collateral Attacks

Section 2244(b)(1) directs 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). A motion under Section 2255 seeking relief from a federal sentence is not a "habeas corpus application under section 2254." Much less is a federal prisoner's request for authorization *to file* a Section 2255 motion a "habeas corpus ap-

plication," or a "claim presented in" one. Thus, for multiple reasons, the plain text unambiguously gives Section 2244(b)(1) no role in federal prisoners' authorization requests.

First, Section 2244(b)(1) applies only to applications "under [S]ection 2254." And Section 2254 applications can be filed only by "a person in custody pursuant to the judgment of a State court," 28 U.S.C. 2254(a)—*i.e.*, a state prisoner. That "requirement of custody pursuant to a state-court judgment distinguishes [Section] 2254 from other statutory provisions authorizing relief from constitutional violations—such as [Section] 2255, which allows challenges to the judgments of federal courts." *Magwood*, 561 U.S. at 333 (emphasis omitted); see 28 U.S.C. 2255(a) (providing collateral review for a "prisoner in custody under sentence of a court established by Act of Congress").

Second, even with respect to state prisoners, Section 2244(b)(1) applies only where the prisoner has actually filed a "second or successive * * * application" for collateral review in district court, 28 U.S.C. 2244(b)(1), not where a prisoner asks a court of appeals to "authoriz[e] the district court to consider" such a "second or successive application" under Section 2244(b)(3), 28 U.S.C. 2244(b)(3)(A). A prisoner's request to a court of appeals *for authorization* to file an additional application in district court is procedurally distinct from the additional application that he would file if he received such authorization.

Third, Section 2244(b)(1) applies only to certain "claim[s] presented in" a state prisoner's actual "habeas corpus application." 28 U.S.C. 2244(b)(1). It thus presupposes that the prisoner filed a collateral attack before and is filing another one that might include one or

more identical claims. Its instruction is thus directed solely at individual claims—not the "application" as a whole. That is a deliberate distinction, see *Magwood*, 561 U.S. at 334 (emphasizing distinction between applications and claims), that narrows the compass of Section 2244(b)(1) in a manner that distances it even further from a federal prisoner's request for authorization to file an additional Section 2255 motion.

B. Section 2255(h) Does Not Extend Section 2244(b)(1) To The Federal-Prisoner Context

The court of appeals nonetheless applied Section 2244(b)(1) here, relying on precedents taking the view that Section 2255(h) "incorporates the * * * limitations set out in [Section] 2244(b)(1)." *In re Bradford*, 830 F.3d 1273, 1276-1278 (11th Cir. 2016) (following *Baptiste*, 828 F.3d at 1339-1340); see J.A. 77-78 (applying *Bradford* and *Baptiste*). But no sound reading of Section 2255(h) can overcome Section 2244(b)(1)'s explicit textual limitation to individual claims, by state prisoners, in filed habeas corpus applications.

1. Section 2255(h) provides that a federal prisoner's additional Section 2255 motion "must be certified as provided in section 2244 by a panel of the appropriate court of appeals" to contain either (1) newly discovered convincing evidence of factual innocence or (2) a new retroactive rule of constitutional law. 28 U.S.C. 2255(h). Section 2255(h) therefore incorporates the relevant provisions of "section 2244" that concern the process and effect of appellate "certifi[cation]," *i.e.*, a court of appeals' authorization to file an application for collateral review in district court. Those provisions are contained in Sections 2244(b)(3) and (4)—not in Section 2244(b)(1).

Unlike Section 2244(b)(1), Sections 2244(b)(3) and (4) expressly refer to "authorization" to file an additional

application for collateral review. Each subparagraph of Section 2244(b)(3) uses the term "authorize," "authorizing," or "authorization"—always in reference to a court of appeals' order addressing a request to file a second or successive collateral attack. 28 U.S.C. 2244(b)(3)(A)-(E). And Section 2244(b)(4) directs that "[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." 28 U.S.C. 2244(b)(4) (emphasis added).

Sections 2244(b)(3) and (4), however, are the only provisions of Section 2244 that refer to "authorization." Neither Section 2244(b)(1) nor any other provision does. See 28 U.S.C. 2244(a), (b)(1)-(2), (c) and (d). Sections 2244(b)(3) and (4) are also textually distinct from the others in their use of the unadorned word "application." See 28 U.S.C. 2244(b)(3) and (4). Sections 2244(b)(1) and (2), in contrast, use the much more specific "habeas corpus application under section 2254," 28 U.S.C. 2244(b)(1) and (2), thereby confirming their exclusion from the certification proceedings for additional collateral attacks by federal prisoners under Section 2255.

2. Given that the relevant language of both Sections 2244 and 2255(h) was enacted at the same time in AEDPA, the textual distinctions provide a dividing line between the incorporated and unincorporated provisions. See AEDPA §§ 105(2), 106(b), 110 Stat. 1220-1221; *Russello*, 464 U.S. at 23. The plain import of the text is also reinforced by the context, as Sections 2244(b)(3) and (4) are the only ones that are necessary to make Section 2255(h)'s certification process work.

Section 2244(b)(3)'s five subparagraphs all address critical aspects of the authorization process: (A) when

authorization must be sought; (B) who makes the authorization decision; (C) how the decision is made; (D) the timing for the decision; and (E) the conclusiveness of that decision. Section 2244(b)(4), in turn, narrows the scope of an authorized application to only those claims that meet the authorization criteria, see 28 U.S.C. 2244(b)(4), and doublechecks that no ineligible claim has erroneously survived the quick initial "prima facie" screen, 28 U.S.C 2244(b)(3)(E), of the authorization process. Section 2255(h) naturally presupposes a procedure like Section 2244(b)(4)'s; without such a backstop, a federal prisoner might obtain relief on substantive grounds that are not permissible bases for an additional collateral attack. See 28 U.S.C. 2255(h)(1) and (2). But incorporating Section 2244(b)(4) supplies the details of the procedure's operation.

Section 2244(b)'s remaining paragraphs, in contrast, do not concern certification-related matters that Section 2255(h) would naturally be understood to incorporate. Section 2244(b)(2), for example, specifies the substantive criteria for authorizing in an additional "application under section 2254" by a state prisoner—which differ from the substantive criteria under Section 2255(h). Compare 28 U.S.C. 2244(b)(2)(B)(ii) (requiring convincing new evidence that shows "constitutional error" in the conviction), with 28 U.S.C. 2255(h)(1) (requiring convincing new evidence of factual innocence). Thus, even the court below does not read Section 2255(h) to incorporate Section 2244(b)(2). *Bradford*, 830 F.3d at 1276 n.1.

For its part, Section 2244(b)(1) not only includes the same state-specific language as Section 2244(b)(2) ("claim presented in a second or successive habeas corpus application under section 2254"), but has a function even

further afield of determining whether a proposed filing "contain[s]," 28 U.S.C. 2255(h), a valid substantive basis for an additional collateral attack. Section 2244(b)(1) does not address substantive criteria at all. Instead, it simply provides that the current claim "shall be dismissed"—with no exceptions—if it was "presented in a prior application." 28 U.S.C. 2244(b)(1). It therefore reflects res judicata principles, not whether a claim meets the criteria for an additional collateral attack.

Those two issues have historically been analytically distinct. Under pre-AEDPA law, courts applied a "qualified application of the doctrine of res judicata," *McCleskey*, 499 U.S. at 486 (citation omitted), to attempts by state and federal prisoners to raise claims that they had raised in previous collateral attacks. See *Sanders* v. *United States*, 373 U.S. 1, 15 (1963). But a separate "abuse of the writ" doctrine applied when a prisoner asserted a claim that had not been adjudicated before. See *id.* at 17-18. Section 2255(h), which requires certification that an additional collateral attack meets certain substantive criteria, is an outgrowth of abuse of the writ, not modified res judicata principles. And it only incorporates those parts of Section 2244—namely, Sections 2244(b)(3) and (4)—that similarly address that subject.

C. Even Without Section 2244(b)(1)'s Direct Application, Lower Courts Have Tools For Addressing Repetitious Collateral Attacks By Federal Prisoners

The inapplicability of Section 2244(b)(1), in itself, to federal prisoners does not mean that federal prisoners are free to serially refile the same claim or claims in add-on Section 2255 motions. Section 2255(h) permits the filing of a second or successive Section 2255 motion only where a court of appeals has certified that the pro-

posed motion contains a "prima facie showing" (28 U.S.C. 2244(b)(3)(C)) of either newly discovered convincing evidence of factual innocence or a new retroactive rule of constitutional law. See *Jones*, 599 U.S. at 476. Even then, the motion has a one-year statute of limitations that runs from the date on which the new facts could have been discovered with due diligence or the date on which this Court initially recognized the relevant constitutional right. 28 U.S.C. 2255(f)(3) and (4). And a district court must dismiss any claim in a Section 2255 motion that fails, on the merits, to satisfy the relevant new-evidence or new-constitutional-rule requirements. 28 U.S.C. 2244(b)(4).

In addition, Congress is presumed to be aware of the various judge-made doctrines limiting potential abuses of collateral review that formed part of the backdrop for AEDPA. See *Abuelhawa* v. *United States*, 556 U.S. 816, 821 (2009). Congress can displace those doctrines by legislating on the same subject—for instance, by imposing "more stringent requirements," *Williams* v. *Taylor*, 529 U.S. 420, 433-434 (2000)—but in the absence of such legislation, AEDPA is properly understood to retain them. See *Banister* v. *Davis*, 590 U.S. 504, 515 (2020) (applying abuse-of-writ principles from pre-AEDPA habeas practice because "Congress passed AEDPA against this legal backdrop, and did nothing to change it").

That includes this Court's pre-AEDPA recognition that when a federal prisoner's subsequent Section 2255 motion presents a claim "identical" to a prior claim that the district court denied, the court may, as a matter of "'sound judicial discretion,'" "den[y the claim] without [a] hearing." *Sanders*, 373 U.S. at 8-9 (1963) (quoting *Salinger* v. *Loisel*, 265 U.S. 224, 231 (1924)). That prin-

ciple supplements a court's independent authority to dismiss previously resolved claims under "the law-of-the-case doctrine." See *Baptiste*, 828 F.3d at 1340.

The court of appeals might well have employed that preexisting principle here. If not, the lower courts would have denied relief because petitioner's claim is statutory, not "constitutional," as Section 2255(h)(2) requires. See 28 U.S.C. 2255(h)(2); pp. 41-42, *supra*. Thus, while the court of appeals' error in applying Section 2244(b)(1) would warrant correction if this Court had certiorari jurisdiction, it was ultimately of no practical consequence.

CONCLUSION

The petition for a writ of certiorari should be dismissed for want of jurisdiction.

Respectfully submitted.

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APPENDIX

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APPENDIX

1. 28 U.S.C. 2241 provides:

Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state,

or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been

properly detained as an enemy combatant or is awaiting such determination.

2. 28 U.S.C. 2244 provides:

Finality of determination

(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 factfinder 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.

3. 28 U.S.C. 2253 provides:

Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals 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.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

4. 28 U.S.C. 2254 provides in pertinent part:

State custody; remedies in Federal courts

(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.

* * * * *

5. 28 U.S.C. 2255 provides:

Federal custody; remedies on motion attacking sentence

(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.