No. 24-5438

IN THE

Supreme Court of the United States

MICHAEL BOWE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The merits question presented here is whether the procedural bar in 28 U.S.C. § 2244(b)(1) applies only to claims brought in a second or successive "habeas corpus application" under 28 U.S.C. § 2254, as the plain text states, or whether it also applies to claims brought in a second or successive "motion to vacate" under 28 U.S.C. § 2255. Reaffirming its prior position, the government expressly "agrees with petitioner that Section 2244(b)(1) does not apply to Section 2255 motions, that the court of appeals erred in holding otherwise, and that the courts of appeals are divided on that issue." BIO 12. On top of that, three Justices have opined that this split should be resolved.

Nonetheless, the government opposes review on the sole ground that 28 U.S.C. § 2244(b)(3)(E) deprives this Court of jurisdiction over this petition. That position is incorrect. Like Section 2244(b)(1), Section 2244(b)(3)(E) applies only to habeas corpus applications, not motions to vacate. This Court strictly construes limitations on its jurisdiction, especially in the habeas context. And accepting the government's broad reading of Section 2244(b)(3)(E) would raise thorny questions under Article III.

Because this Court has jurisdiction over this petition, it may proceed to resolve the circuit conflict over Section 2244(b)(1) directly. But review is warranted regardless. Indeed, even an adverse resolution of the jurisdictional question would still facilitate this Court's ability to resolve the circuit conflict over Section 2244(b)(1). That is because both questions turn on the scope of a cross reference in Section 2255(h). The Court should seize this rare opportunity to resolve a circuit conflict that has evaded review for the past five years and is unlikely to ever otherwise be resolved.

I. This Court has jurisdiction over this certiorari petition.

1. Section 2244(b)(3)(E) provides 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." As explained, statutory text and context make clear that "application" here refers to a habeas corpus application, not a Section 2255 motion to vacate. *See* Pet. 18–19. The government does not dispute that key proposition. Thus, Section 2244(b)(3)(E)'s bar on certiorari would apply here only if it is incorporated through Section 2255(h), which governs successive Section 2255 motions by federal prisoners.

Section 2255(h), in turn, provides that "[a] second or successive motion [to vacate] must be *certified as provided in section 2244* by a panel of the appropriate court of appeals to contain" one of two substantive criteria. Petitioner's position here is straightforward: Section 2255(h)'s cross reference does not incorporate *all* of Section 2244; rather, it incorporates only those provisions governing the actual certification determination, which is made exclusively by the court of appeals. And Section 2244(b)(3)(E)'s certiorari bar does not govern the certification determination at all; rather, it prohibits certiorari review from that determination. *See* Pet. 15, 19.

In response, the government does not argue that Section 2255(h) incorporates the entirety of Section 2244. After all, the government expressly concedes that Section 2255(h) does not incorporate Section 2244(b)(1). And, as explained, not even the Eleventh Circuit (or any circuit for that matter) believes that Section 2255(h) incorporates the substantive criteria in Section 2244(b)(2). *See* Pet. 15–16. Thus, the

government recognizes that Section 2255(h) incorporates only *some* provisions in Section 2244. But which ones? The government's position is that, while Section 2255(h) does not incorporate Sections 2244(b)(1) or (b)(2), it does incorporate Section 2244(b)(3), including its bar on certiorari. That latter position is contrary to the text.

In providing that a second or successive Section 2255 motion must be "certified as provided" in Section 2244, Section 2255(h) incorporates only those provisions that govern the manner of certification. Indeed, the government itself previously took that position in this Court in a merits brief. Relying on the dictionary definition of the word "as," the government explained: "The natural reading of Section 2255's requirement that a second or successive motion be certified 'as provided' in Section 2244 is that such a motion is to be certified *in the manner* described in Section 2244." Br. for U.S. 14, *Castro v. United States*, 540 U.S. 375 (2003) (U.S. No. 02-6883) (June 2003) (emphasis in original). Under that "natural reading," Section 2255(h)'s cross reference does not incorporate Section 2244(b)(3)(E)'s certiorari bar because, again, it does not govern the manner in which a second or successive Section 2255 motion is to be certified at all; instead, it prohibits certiorari review of that determination.

Failing to mention its earlier reading, the government now suggests that Section 2255(h) incorporates Section 2244(b)(3)(E)'s certiorari bar because it is "part of the certification procedure." BIO 15–16. But that conclusion does not follow from the premise; once again, Section 2244(b)(3)(E) does not govern the procedure for certification at all. But, more importantly, the premise is wrong. Section 2255(h) does not use the phrase "certification procedure." Rather, it requires that a Section 2255

motion be "certified as provided" in Section 2244. And that text incorporates only the provisions governing the manner of certification itself, not one prohibiting appeals.

The government's only other textual argument is that some provisions in Section 2244 expressly refer to habeas corpus applications by state prisoners whereas Section 2244(b)(3) does not. BIO 16. But it does not follow that Section 2244(b)(3) applies to federal prisoners. By its own terms, Section 2244(b)(3) applies only to "a second or successive application permitted by this section." 28 U.S.C. § 2244(b)(3)(A). And the only second or successive applications permitted by Section 2244 are state prisoner "habeas corpus application[s] under [S]ection 2254." 28 U.S.C. § 2244(b)(2). The government accordingly does not dispute that the term "application," as used in Section 2244(b)(3), refers to a habeas corpus application, not a Section 2255 motion to vacate. The upshot is that Section 2244(b)(3)—standing alone—applies only to state prisoners, even though there is no express state-prisoner limitation. As a result, the only way for Section 2244(b)(3)(E)'s certiorari bar to apply to federal prisoners is through Section 2255(h)'s cross reference. And that is contrary to the statutory text.

2. This Court's precedent further supports petitioner's reading of the text.

a. The Court has always required a clear statement, and exercised great caution, before concluding that Congress divested it of jurisdiction. As explained, the Court "read[s] limitations on [its] jurisdiction to review narrowly, *Castro v. United States*, 540 U.S. 375, 381 (2003) (quotation omitted), and "[r]epeals by implication are not favored" in the habeas context, *Felker v. Turpin*, 518 U.S. 651, 660 (1996). *See* Pet. 21. The government's position here flouts these established principles. By

extending Section 2244(b)(3)(E)'s certiorari bar to federal prisoners, the government "would close [this Court's] doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent." *Castro*, 540 U.S. at 381.

In addition to ignoring those principles, the government dismisses the Court's precedents applying them. As explained, the Court has repeatedly interpreted the phrase "second or successive" in a narrow manner, which effectively limits Section 2244(b)(3)(E)'s bar on certiorari even for state prisoners. *See* Pet. 20 (discussing cases).[*] The government's only response is that "second or successive" is a term of art, and "petitioner does not identify text relevant to his case that carries a term-of-art meaning or should otherwise be narrowly construed." BIO 17–18. But petitioner has done exactly that: the word "application" in Section 2244(b)(3)(E) is a term of art referring to a habeas corpus application, not a motion to vacate; and the phrase "certified as provided" in Section 2255(h) should be naturally (not broadly) construed.

b. The government relies on two of this Court's precedents, but it does not even argue that either announced a holding on the jurisdictional question here.

First, the government relies on *Hohn v. United States*, 524 U.S. 236 (1998), where the Court held that it *did* have certiorari jurisdiction over certificates of appealability. In doing so, *Hohn* described Section 2244(b)(3) as applying to "state prisoners filing second or successive habeas applications under § 2254." 524 U.S.

[*] The Court recently granted review in *Rivers v. Lumpkin* (No. 23-1345) (cert. granted Dec. 6, 2024) on whether a habeas petition that is amended while on appeal is "second or successive" under Section 2244(b)(2). *See* Pet. 20 n.2. Granting review in this case as well would promote efficiency, allowing the Court to concurrently consider multiple questions about "second or successive" petitions under the same statute (AEDPA).

at 249. That state-prisoner description is notable given that *Hohn* itself involved a federal prisoner. Although petitioner noted this description (Pet. 23), the government ignores it. Meanwhile, the passage on which the government relies is otherwise irrelevant to the question here. *See* BIO 18. It merely observed that AEDPA divested the Court of certiorari jurisdiction in the context of second or successive habeas corpus applications but not certificates of appelability. *See Hohn*, 524 U.S. at 349–50. Nothing in *Hohn* suggested that Section 2244(b)(3)(E) applies to federal prisoners.

Second, the government relies on *Castro*, but *Castro* reaffirmed that limits on this Court's jurisdiction must be strictly construed in the habeas context. Moreover, as petitioner pre-emptively explained, *Castro* did not hold that Section 2244(b)(3)(E) applies to federal prisoners. Indeed, *Castro* had no need to address that issue at all, since it found that Section 2244(b)(3)(E) did not cover the particular facts of that case. *See* Pet. 20, 23–24. The government does not argue otherwise. The most it can say is that it had advised the *Castro* Court that the lower courts had applied Section 2244(b)(3)(E)'s bar on rehearing to federal prisoners, and this Court left that view "undisturbed." BIO 18–19. But this fact only underscores that *Castro* said *nothing* about the jurisdictional question here, even though the government briefed it (and petitioner's sole amicus noted it too, *see Castro*, NACDL Br. 12 n.2, 2003 WL 1240383). If anything, then, the Court in *Castro* reserved (not resolved) the question.

Unable to identify any supporting precedent from this Court, the government resorts to the lower courts. As in *Castro*, it observes that the courts of appeals have concluded that Section 2255(h) incorporates Section 2244(b)(3)(E)'s bar on petitions

for rehearing. BIO 16–17. But the textual analysis in those lower court decisions is superficial. And even assuming they reached the correct result, a bar on rehearing petitions is materially different from a bar on certiorari petitions. The former arguably relates to the manner of certification by the court of appeals, but the latter does not; again, it relates only to the ability to appeal the certification determination.

3. Finally, as explained, applying Section 2244(b)(3)(E)'s bar on certiorari to this case would raise a serious constitutional question under Article III § 2's Exceptions Clause. If the Court lacks certiorari jurisdiction, then it could not directly resolve the circuit split over Section 2244(b)(1) and thereby ensure the uniformity of federal law—one of the Court's "essential functions." Since this implicates a difficult and longstanding debate about the Exceptions Clause, the canon of constitutional avoidance also militates against applying Section 2244(b)(3)(E)'s bar. *See* Pet. 21–23.

The government responds that there are other procedural avenues available to resolve the circuit conflict over Section 2244(b)(1). BIO 19–20. But petitioner has already explained why those avenues are illusory. The government points to the certiorari petition in *Avery v. United States*, 140 S. Ct. 1080 (2020), but petitioner has explained in detail why the prospect of a similar certiorari petition is exceedingly remote under the current landscape. *See* Pet. Original Habeas Reply 6–9 (No. 22-7871) (Dec. 6, 2023). After all, not a single certiorari petition presenting the Section 2244(b)(1) question has even been filed since Justice Kavanaugh highlighted the split back in *Avery*—nearly five years ago. A certified question is even more fanciful, as the decision below reflects. *See* Pet. App. 7a–9a (emphasizing the "last four decades

of non-use of that procedure"). And the same is true of an original habeas petition, which this Court has never used to resolve a question of law. *See* Pet. 22 & n.3.

The government ignores all of petitioner's arguments on this front. Nor does it acknowledge that petitioner himself has done everything possible to bring the Section 2244(b)(1) issue to this Court. After seeking initial hearing en banc (twice), he filed an original habeas petition in this Court and then a motion to certify the question to this Court—all to no avail. And he specifically argued below that certifying the Section 2244(b)(1) question was necessary for this Court to fulfill its "essential function" to ensure the uniformity of federal law and thus avoid an Exceptions Clause problem. *See* Pet. 9–10. So contrary to the government's unexplained assertion, if any case "implicates" the Exceptions Clause question, it is this one. *See* BIO 19.

II. This Court's review is warranted even if there is no jurisdiction.

Because the Court has certiorari jurisdiction over this petition, it may proceed to resolve the Section 2244(b)(1) circuit conflict directly. But this Court's review is warranted here even were the Court to ultimately conclude that it lacks jurisdiction over this petition. *See United States v. Ruiz*, 536 U.S. 622, 628 (2002) ("it is familiar law that a federal court always has jurisdiction to determine its own jurisdiction").

1. Adversely resolving the jurisdictional question would, at the very least, still facilitate resolution of the Section 2244(b)(1) conflict that has long evaded review. That is because the jurisdictional and merits questions both turn on the same question of statutory interpretation: what is the scope of Section 2255(h)'s cross reference, and which provisions in Section 2244(b) does Section 2255(h) incorporate?

As explained, the government does not dispute that Section 2244(b)(3)(E) itself applies only to second or successive "application[s]" (*i.e.*, habeas corpus applications), not Section 2255 motions to vacate. Thus, Section 2244(b)(3)(E)'s certiorari bar would apply to federal prisoners only if incorporated by Section 2255(h)'s cross reference.

The same is true for Section 2244(b)(1). The government emphasizes that, unlike Section 2244(b)(3)(E), Section 2244(b)(1) is expressly limited to "second or successive habeas corpus application[s] under [S]ection 2254." *See* BIO 16, 21. But six circuits have nonetheless held that Section 2244(b)(1) applies to federal prisoners by virtue of Section 2255(h)'s cross reference. Thus, like the jurisdictional question, the merits question here also turns on the scope of Section 2255(h)'s cross reference.

Given the substantial overlap between the jurisdictional and merits questions, resolving the former would, at the very least, enable the Court to resolve the latter. To resolve its own jurisdiction, the Court would need to clarify the scope of 2255(h) and its relationship to Section 2244(b). In doing so, the Court could opine on which provisions in Section 2244(b) are incorporated beyond Section 2244(b)(3)(E). The Court could thus rather easily resolve the closely related Section 2244(b)(1) question.

In fact, if the government is correct that the Court lacks jurisdiction, then the jurisdictional ruling would necessarily resolve the merits question. That is because, if the Court agrees with the government that Section 2255(h) incorporates only the "certification procedures" in Section 2244(b)(3), including (b)(3)(E), then that would mean that Section 2255(h) does not incorporate Section 2244(b)(1). Likewise, if the Court agrees with the government that Section 2255(h) incorporates Section

2244(b)(3) because, unlike other provisions, it lacks an express state-prisoner limitation, then that too would mean that Section 2255(h) does not incorporate Section 2244(b)(1). The government fails to recognize that any opinion adopting its jurisdictional argument would effectively resolve the merits question too. *See* BIO 21.

The Court should seize this opportunity because, as explained, there is no other realistic way for the Court to resolve the circuit conflict over Section 2244(b)(1). That conflict has existed since 2019, Justice Kavanaugh highlighted it in March 2020, and three Justices are on record favoring its resolution. Yet no suitable vehicle has ever reached the Court. This petition finally affords the Court an opportunity to resolve the conflict, without using an extraordinary writ to do so. And the Court should not wait for a certiorari petition or a certified question that will never come. In short, even if the Court concludes that it lacks jurisdiction over this petition, it can still use this case as the vehicle to resolve a deep and entrenched circuit conflict that has evaded review for the past five years and will otherwise continue to do so indefinitely.

2. Granting review would not only allow the Court to finally resolve that circuit conflict; it would also allow the Court to resolve the dispute about its own jurisdiction—a question that warrants review in its own right. Two birds, one stone.

This question is surprisingly unresolved. *See* Pet. 23–24. As explained above, the government's response only reinforces that this Court has no binding precedent resolving whether Section 2244(b)(3)(E)'s certiorari bar applies to federal prisoners.

Moreover, the government does not dispute that this question is important and recurring. As explained, it is the only statute today that strips this Court of certiorari

jurisdiction. And the question affects the scope of this Court's appellate jurisdiction over hundreds if not thousands of federal post-conviction cases each year. *See* Pet. 24.

Given the number of federal post-conviction cases affected, the importance of safeguarding this Court's certiorari jurisdiction from congressional encroachment, and the inability of the courts of appeals to resolve (or even divide on) a question about this Court's jurisdiction, resolution of the jurisdictional question is overdue.

The government notes that the Court has declined to review it in the past, citing five petitions spanning 2000 through 2016. BIO 12–13. But this only reinforces that the jurisdictional question has recurred for several decades. It arose shortly after AEDPA's inception, it was left unresolved in *Castro*, and it remains unresolved today.

Moreover, unlike this case, none of those prior petitions presented the only opportunity for the Court to resolve an underlying question that warranted review. The closest case was *Hammons v. United States* (U.S. No. 15-6110) (cert. denied Jan. 11, 2016). But the Court was ultimately able to resolve the underlying question there by granting certiorari from the denial of a certificate of appealability in *Welch v. United States*, 578 U.S. 120, 126–28 (2016). So the Court did not need to take up the jurisdictional question to resolve the cert-worthy issue there. Here, by contrast, there is no alternative avenue available to resolve the circuit conflict on Section 2244(b)(1).

III. This case is an ideal and rare vehicle.

The government does not argue that this case is a poor vehicle for reviewing either question presented. That is because there are no vehicle issues. Nonetheless, the government makes assertions about this particular case that warrant a response.

1. The government does not dispute that the jurisdictional question is squarely presented for review. After all, petitioner has filed a certiorari petition expressly presenting that question for review and extensively arguing that the Court has jurisdiction notwithstanding Section 2244(b)(3)(E). *See* Pet. i, 1, 4, 10, 18–23.

Moreover, this case is an exceptionally good and rare candidate for reviewing the jurisdictional question. The government concedes that the underlying merits question warrants review. And, as explained, resolving the jurisdictional question would also allow the Court to resolve a deep circuit conflict evading review. Rarely (if ever) will those features be present in a case presenting this jurisdictional question.

The government observes that, in his original habeas petition, petitioner assumed that Section 2244(b)(3)(E)'s bar on certiorari applied to federal prisoners. BIO 12, 15. As explained, federal prisoners have long assumed that to be the case. *See* Pet. 4, 7, 10, 24–25. But the government does not contend that petitioner's earlier assumption would somehow prevent or obstruct this Court from reviewing the jurisdictional question here and now. And any such contention would fail because it is well established that a federal "court's power to hear a case . . . can never be forfeited or waived" by the parties. *United States v. Cotton*, 535 U.S. 625, 630 (2002); *see Castro*, 540 U.S. at 379–81 (characterizing Section 2244(b)(3)(E) as jurisdictional).

2. The government also does not dispute that the merits question is squarely presented for review. As explained, the Eleventh Circuit below denied relief based exclusively on Section 2244(b)(1). Pet. App. 6a–7a. And the Eleventh Circuit did the same when denying his identical certification request in 2022. Pet. App. 15a.

Nonetheless, the government argues that the Eleventh Circuit would deny petitioner certification even apart from Section 2244(b)(1). BIO 20. But the Eleventh Circuit has never addressed the merits of petitioner's certification request; rather, it has denied relief (twice) based exclusively on Section 2244(b)(1). Because this Court is a "court of review, not of first view," *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005), the merits of petitioner's certification request is not properly before this Court. So that issue would not obstruct the Court's review of the Section 2244(b)(1) question.

In any event, at no point has the Eleventh Circuit suggested that it would deny certification based on something *other* than Section 2244(b)(1). Meanwhile, as petitioner has explained, the Eleventh Circuit has repeatedly granted requests for certification that are identical (and even inferior) to his. *See* Pet. 8–9 & n.1 (citing six cases). These previous grants are the best evidence about what the Eleventh Circuit would do here. Moreover, petitioner has previously explained in detail why the government's certification argument is contrary not only to the Eleventh Circuit's own practice but also this Court's precedent, the record in this case, and the government's concessions in other cases. *See* Pet. Original Habeas Reply 11–14.

3. Finally, and going well beyond the liberal "prima facie" showing needed for certification, 28 U.S.C. § 2244(b)(3)(C), the government asserts that petitioner's "ultimate claim" is "weak[ ]." BIO 20. But the Eleventh Circuit expressly declined to address the merits of his claim. Pet. App. 7a n.1. In any event, the government does not dispute that petitioner's Section 924(c) conviction is *invalid* under this Court's precedent. *See* Pet. 5–6. In one conclusory sentence, the government asserts that his

offense conduct would support the same sentence even without the Section 924(c) conviction. But that conviction carried a mandatory consecutive sentence of *ten years*, and he has already served more than half of it. Whether the government could somehow support such a massive upward variance would be addressed at a future re-sentencing only after petitioner was able to present and then prevail on his claim.

If anything, the fact that petitioner is more than half way into a ten-year sentence for a conviction that is indisputably invalid under this Court's precedent strengthens rather than weakens the case for review. But petitioner is not asking this Court to grant review so that it can address the merits of his claim. Nor is he asking this Court to address his preliminary request for certification, which would merely permit him to present his claim in a second or successive Section 2255 motion. Rather, he is modestly asking this Court to grant review so that it can resolve two important, recurring threshold questions of law about second or successive Section 2255 motions.

Those questions, of course, include the Section 2244(b)(1) question. And once again, on that question: the government agrees that the circuits are divided 6–3; the government concedes that the Eleventh Circuit erroneously resolved that question in petitioner's case; and three Justices of this Court have previously opined that this circuit conflict should be resolved. As petitioner has explained, and as the procedural history of this case illustrates, it is unclear how this circuit conflict will otherwise ever be resolved. Accordingly, the Court should seize this unique and rare opportunity to resolve a cert-worthy circuit conflict that has stubbornly evaded the Court's review for the past five years and will otherwise continue to do so on an indefinite basis.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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