No. 24-5438

IN THE

Supreme Court of the United States

MICHAEL BOWE,
Petitioner,

v.

UNITED STATES,
Respondent.

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

BRIEF OF THE UNIVERSITY OF VIRGINIA SCHOOL OF LAW'S CIVIL RIGHTS CLINIC AND FOUR OTHER CIVIL RIGHTS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF THE *AMICI CURIAE*

Amici write to highlight the real injustices caused by the atextual application of 28 U.S.C. § 2241(b)(1) to bar federal prisoners in much of the country from filing second-or-successive motions to vacate under 28 U.S.C. § 2255. *Amici* are civil rights and racial justice organizations, and a law school clinic, committed to protecting prisoners' rights. They therefore have a keen interest in this Court's application of procedural bars to federal prisoners wishing to file second-or-successive motions to vacate.[1]

The Civil Rights Clinic at the University of Virginia School of Law is a legal clinic in which law students, supervised by faculty attorneys, participate in impact advocacy and provide legal assistance to people who cannot afford private counsel. Many of the Clinic's clients face systemic injustices much like the ones exemplified by this case. The Clinic works primarily on post-conviction issues and, as a result, has an interest in the resolution of this case.

Rights Behind Bars ("RBB") is a nonprofit legal organization dedicated to bringing cases on behalf of incarcerated individuals. At the appellate level, RBB identifies uncounseled incarcerated litigants, or those

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[1] Pursuant to Supreme Court Rule 37, the University of Virginia School of Law's Civil Rights Clinic, the Legal Aid Justice Center, Rights Behind Bars, Fair and Just Prosecution and Due Process Institute respectfully submit this brief *amicus curiae* in support of Petitioner, Michael Bowe. No counsel for a party authored this brief in whole or in part and no person or entity other than amicus, its members, or counsel made a monetary contribution to its preparation or submission.

proceeding with small-firm counsel, and intervenes on the parties' behalf to assist in the preparation of the case presented on appeal. RBB thus has an interest in seeing that courts do not impose additional hurdles for prisoners to overcome beyond those created by Congress.

The Legal Aid Justice Center ("LAJC") is a non-profit organization located in Virginia committed to battling poverty and injustice through partnership with people and communities directly impacted by a range of issues—in the criminal legal system and beyond—using a variety of advocacy tools (including community organizing, public education, media work, administrative advocacy, and litigation). Due process and equal protection, especially when implicating the fundamental rights of physical liberty, are deeply ingrained in LAJC's ethos. Informed by over two decades of direct services, impact litigation, and other advocacy on behalf of low-income communities, LAJC's interest in the post-conviction rights at issue in this case flows from their efforts to challenge unfair court processes and the resulting impact on poor and other marginalized people in the criminal legal system.

Fair and Just Prosecution ("FJP"), a project of the Tides Center, brings together elected prosecutors from around the nation as part of a network of leaders committed to a justice system grounded in fairness, equity, compassion, and fiscal responsibility. The elected prosecutors with whom it works hail from urban and rural areas alike, and they collectively represent nearly 20 percent of our nation's population. FJP and the prosecutors with whom it works are committed to post-conviction justice and ensuring

that people who are wrongfully incarcerated have procedures available to them that allow their convictions and sentences to be revisited and corrected when they no longer serve the interest of justice. The failure to provide avenues for relief to unjust incarceration only serves to undermine public trust in the legal system, which in turn jeopardizes public safety.

Due Process Institute is a non-profit bipartisan public interest organization that seeks to ensure procedural fairness in the criminal justice system.

INTRODUCTION AND SUMMARY OF ARGUMENT

Michael Bowe is legally innocent of the charge of discharging a firearm during the commission of a "crime of violence." Nonetheless, the Eleventh Circuit is denying him the right to demonstrate this through the atextual application of 28 U.S.C. § 2244(b)(1) to his claims. Congress enacted section 2244(b)(1) to preclude only *state* prisoners from filing successive petitions for habeas corpus. Mr. Bowe is a *federal* prisoner to whom section 2244(b)(1), by its terms, does not apply. This Court should exercise its jurisdiction and reverse the Eleventh Circuit's decision.

Under this Court's precedents, Mr. Bowe's convictions—for attempt to commit, and conspiracy to commit Hobbs Act robbery—do not qualify as crimes of violence. Federal prisoners with claims similar to (or even weaker than) Mr. Bowe's are being granted the right to file successive motions to vacate in the Eleventh Circuit. Yet Mr. Bowe's motion, because he had previously sought to file a new motion to vacate

based on the new rule announced in *United States* v. *Davis*, 588 U.S. 445 (2019), is being summarily dismissed.

If Mr. Bowe had been sentenced within the Fourth, Sixth, or Ninth Circuits, he would have received authorization to file a successive motion to vacate under 28 U.S.C. § 2255. Similarly situated prisoners in those circuits have received authorization. And this Court's precedent confirms that Mr. Bowe can set out a prima facie case for relief as required by 28 U.S.C. § 2244(b)(3)(c). All that stands in his way is the Eleventh Circuit's erroneous application of section 2244(b)(1) to his claims.

Section 2244(b)(1) requires dismissal of any "claim presented in a second or successive *habeas corpus application under section 2254* that was presented in a prior application." (emphasis added). By its terms, section 2254 applies only to *state* prisoners. Congress has not applied it to federal prisoners, like Mr. Bowe. Three circuits follow the clear statutory text and apply section 2244(b)(1) only to habeas corpus applications brought by state prisoners under section 2254. Conversely, despite the clear text of section 2244(b)(1), six circuits, including the Eleventh Circuit, apply it to second or successive motions to vacate brought by federal prisoners under section 2255. See *In re Bowe*, 144 S. Ct. 1170, 1170 (2024) (Sotomayor, J., concurring in the denial of the petition for writ of habeas corpus) (collecting cases). The government agrees with the three circuits in the minority that section 2244(b)(1) does not apply to section 2255 motions to vacate. Nonetheless, the Eleventh Circuit used section 2244(b)(1) to bar Mr.

Bowe from challenging the ten-year sentence he is unlawfully serving.

The exercise of this Court's jurisdiction in this case is vital to ensure the equal and fair application of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") across the country. Congress passed AEDPA in large part to speed up the postconviction litigation process for state and federal prisoners. As part of that process, prisoners are directed to file their claims as soon as possible. *Duncan* v. *Walker*, 533 U.S. 167, 181 (2001). That is exactly what Mr. Bowe did, but he is being punished for it.

The Eleventh Circuit's rule encourages prisoners like Mr. Bowe to delay bringing their claims. Mr. Bowe's first attempt at filing a successive motion to vacate based on *Davis* failed because the Eleventh Circuit erroneously believed that his predicate crimes still qualified as crimes of violence under the elements clause. Had Mr. Bowe waited to bring his claims until this Court corrected that erroneous decision in *United States* v. *Taylor*, 596 U.S. 845 (2022), he would not be in the situation he is in today. Mr. Bowe's diligent attempts to vindicate his rights are being used against him.

As exemplified by Mr. Bowe's situation, the circuit split creates arbitrary results and the Eleventh Circuit's view perversely encourages federal prisoners to delay filing claims, promoting exactly what this Court has said AEPDA was meant to prevent. The exercise of this Court's jurisdiction is necessary to stop the unfair and arbitrary results created by the current circuit split and vindicate the plain text and purpose of AEDPA.

ARGUMENT

I. Mr. Bowe would have received authorization to file a second or successive motion to vacate absent the improper application of section 2244(b)(1) to his claim.

In 2009, Mr. Bowe pleaded guilty to conspiracy to commit, and attempt to commit, Hobbs Act robbery in violation of 18 U.S.C. § 1951(a). He also pleaded guilty to discharging a firearm during, and in relation to, a "crime of violence" in violation of 18 U.S.C. § 924(c), specifically the Hobbs Act counts. J.A. at 18. The district court sentenced him to 168 months (14 years) for the robbery charges, and a mandatory consecutive sentence of an additional 120 months (10 years) for the section 924(c) charge. J.A. at 20.

Since then, this Court struck down the residual clause of section 924(c) as unconstitutionally vague. *United States* v. *Davis*, 588 U.S. 445 (2019). Following that decision, the Eleventh Circuit held that conspiracy to commit Hobbs Act robbery is not a crime of violence under the elements clause. *Brown* v. *United States*, 942 F.3d 1069, 1075–76 (11th Cir. 2019). And finally, this Court held that attempted Hobbs Act robbery also fails to qualify as a crime of violence under the elements clause. *United States* v. *Taylor*, 596 U.S. 845 (2022). Thus, Mr. Bowe's section 924(c) conviction is no longer based on any lawful predicate crime of violence.

Yet Mr. Bowe's attempts to correct his plainly unlawful sentence have been rejected without any consideration of their merits. When he filed

applications for authorization to file a second or successive motions to vacate under section 2255, he was denied. The sole reason for those denials was the Eleventh Circuit's atextual application of section 2244(b)(1) to his claims. J.A. at 60, 64, 77.

Mr. Bowe has made a "prima facie showing" that his motion satisfies the requirements of 28 U.S.C. § 2244(b)(3)(c). Under Eleventh Circuit precedent, he must show "that the decision he is relying on announced a new rule of constitutional law, that the rule has been made retroactive by the Supreme Court, and that it was previously unavailable [,and] that there is a reasonable likelihood that he will benefit from the rule." *In re Pollard*, 931 F.3d 1318, 1319–20 (11th Cir. 2019) (internal quotation marks omitted).

This Court's ruling in *Davis* has been made retroactive for purposes of section 2255(h)(2). *In re Hammond*, 931 F.3d 1032, 1039 (11th Cir. 2019). And the *Davis* rule was unavailable to Mr. Bowe when he filed his first section 2255 motion in 2017. J.A. at 27. Further, *Davis* invalidated the residual clause, and neither of the crimes Mr. Bowe pleaded guilty to qualify as crimes of violence under the elements clause anymore. Mr. Bowe has thus demonstrated a reasonable likelihood that he will benefit from the rule in *Davis*. Absent the application of the atextual procedural bar adopted by the Eleventh Circuit, Mr. Bowe would have been granted authorization to file a successive section 2255 motion to vacate.

A. The Eleventh Circuit has granted authorization to file second or successive motions to vacate to prisoners with similar claims to Mr. Bowe who had not previously sought relief based on *Davis*.

The Eleventh Circuit has granted numerous people authorization to file successive section 2255 motions to vacate to challenge their section 924(c) convictions in the aftermath of *Davis* and *Taylor*. Michael Ragland has one section 924(c) conviction with Hobbs Act robbery as the predicate crime of violence. His petition for authorization to file a successive motion to vacate was granted in light of *Davis* and *Taylor*. *In re Ragland*, No. 22-13236, 2022 U.S. App. LEXIS 28400, *8 (11th Cir. Oct. 12, 2022). The same is true for John Corn, Jr. and his section 924(c) conviction predicated on an attempted Hobbs Act robbery charge. *In re Corn*, No. 23-11623, 2023 U.S. App. LEXIS 13736, *9 (11th Cir. June 2, 2023). And for Michael Chance and his section 924(c) conviction, which is also predicated on an attempted Hobbs Act robbery charge. *In re Chance*, No. 23-13875 (11th Cir. Dec. 18, 2023), ECF No. 2, at 2, 5–6. Leonard Brown has two section 924(c) convictions in relation to two attempted armed bank robberies. In 2023, he was granted the right to file a successive motion to vacate based on the new constitutional rule announced in *Davis* and the fact that attempted armed robbery does not qualify as a crime of violence in light of *Taylor*. *In re Brown*, No. 22-12838, 2022 U.S. App. LEXIS 26541, *14 (11th Cir. Sept. 22, 2022).

Comparing Mr. Bowe's claim to those brought by other federal prisoners in the Eleventh Circuit further demonstrates that he can make out a prima

facie case for relief. The Eleventh Circuit has granted petitions to file successive section 2255 motions to vacate even where the predicate crimes qualify as violent under Eleventh Circuit precedent, but that qualification had been called into question by *Taylor*. Jose Thomas Barriera-Vera, for example, was convicted of attempted bank robbery and violation of section 924(c) in connection with that robbery. Despite the open question in the Eleventh Circuit of whether attempted bank robbery qualifies as a crime of violence under the elements clause, Mr. Barriera-Vera was granted permission to file a successive section 2255 motion based on *Davis* and the logic from *Taylor*. *In re Berriera-Vera*, No. 23-11517 (11th Cir. May 22, 2023), ECF No. 2–3, 9. Similarly, Corey Berry pleaded guilty to attempted carjacking, carjacking, and a section 924(c) charge for brandishing a firearm during the attempted carjacking. He was also allowed to file a second or successive motion to vacate based on the new rule in *Davis* because the Eleventh Circuit had not yet, post-*Taylor*, revisited its ruling that attempted carjacking is a crime of violence. *In re Berry*, No. 23-13310, 2023 U.S. App. LEXIS 28910, *16 (11th Cir. Oct. 31, 2023). Neither Mr. Barriera-Vera nor Mr. Berry had previously attempted to file a motion to vacate based on *Davis*.

The only difference between those men and Mr. Bowe is that they had not previously attempted to file a successive section 2255 motion based on the new constitutional rule announced in *Davis*. Thus, the only thing keeping Mr. Bowe from a determination on the merits of his section 2255 motion to vacate is what the government admits is an incorrect application of section 2244(b)(1) to his claims. Had Mr. Bowe not done exactly what this Court has demanded when he

diligently sought to vindicate his rights after the decision in *Davis*, but instead waited for more clarity on the elements clause from this Court in *Taylor*, he would have received the opportunity to argue the merits of his motion by now. Just like Messrs. Brown, Ragland, Corn, Jr., Chance, Barriera-Vera, and Berry did. In short, Mr. Bowe is being punished for his diligence.

B. Had Mr. Bowe been convicted in Baltimore, Cincinnati, or Phoenix, he would have been granted the ability to file a successive section 2255 motion based on *Davis*.

In *Teague* v. *Lane*, when this Court established its modern retroactivity doctrine, it forcefully stated that "the harm caused by the failure to treat similarly situated defendants alike cannot be exaggerated." 489 U.S. 288, 315 (1989). Mr. Bowe is experiencing that harm—he is being treated differently than similarly situated federal prisoners merely because he was convicted in a district court within the Eleventh Circuit, as opposed to the Fourth, Sixth, or Ninth Circuits.

Federal prisoners across the country obtain different results when they seek to file second or successive motions to vacate based on the same new constitutional rule made retroactive by this Court. Prisoners in three circuits obtain a ruling on the merits of their motions to vacate. Prisoners in the rest of the country are out of luck. This "inequitable treatment" of individuals based merely on which federal circuit they were sentenced in "hardly comports with the ideal of 'administration of justice

with an even hand.'" *Hankerson* v. *North Carolina*, 432 U.S. 233, 247 (1977) (Powell, J., concurring in judgment) (quoting *Desist* v. *United States*, 394 U.S. 244, 255 (1969) (Douglas, J., dissenting)).

In the Sixth Circuit, which has properly limited the application of section 2244(b)(1) to petitions under section 2254, people similarly situated to Mr. Bowe have been granted the ability to file successive motions to vacate based on *Davis* so that they may take advantage of this Court's ruling in *Taylor*. Dion Kinnear has a section 924(c) conviction associated with his conviction for attempted armed bank robbery. In 2020, he "sought authorization to file a second or successive section 2255 motion, claiming that his section 924(c) conviction was invalid after *United States* v. *Davis*, 588 U.S. 445 (2019)." *In re Kinnear*, No. 23-5573, 2024 U.S. App. LEXIS 4247, *1–2 (6th Cir. Feb. 23, 2024). The Sixth Circuit denied that request because attempted armed bank robbery still qualified as a crime of violence under the elements clause at the time. *Id.* at *2. Two years later, after *Taylor*, Mr. Kinnear again sought authorization to file a second or successive section 2255 motion based on *Davis*. *Id.* at *2–3. The Sixth Circuit granted this request, and Mr. Kinnear was able to proceed to the merits of his claim. *Id.* at *6. Similarly, David Patterson, whose first attempt to file a successive section 2255 motion based on *Davis* was denied, received authorization to file a successive section 2255 motion based on *Davis* after this Court decided *Taylor*. *In re Patterson*, No. 22-5683, 2022 U.S. App. LEXIS 34759, *2–4 (6th Cir. Dec. 15, 2022). This is the exact same circumstance in which Mr. Bowe finds himself. But because he was convicted in Florida and not Illinois, Virginia, or any other state within a

circuit that follows the text of section 2244(b)(1), his claim was summarily dismissed.

Lastly, this Court's precedents demonstrate that Mr. Bowe can make out a prima facie case that he is entitled to relief. In *Taylor*, the prisoner seeking relief had a section 924(c) conviction for using a firearm while conspiring to commit, and attempting to commit, Hobbs Act robbery. *United States* v. *Taylor*, 979 F.3d 203, 205 (4th Cir. 2020) (affirmed 596 U.S. 845 (2022)). Those are the same predicate crimes that formed the basis of Mr. Bowe's section 924(c) conviction. J.A. at 18. After *Johnson*, Mr. Taylor received authorization from the Fourth Circuit to file a successive section 2255 motion to vacate his section 924(c) conviction because neither attempted Hobbs Act robbery nor conspiracy to commit Hobbs Act robbery qualified as crimes of violence. *Taylor*, 979 F.3d at 206. While his motion to vacate was pending, this Court invalidated section 924(c)'s residual clause. *United States* v. *Davis*, 588 U.S. 445 (2019). Moreover, also while Mr. Taylor's motion was pending in the district court, the Fourth Circuit held that conspiracy to commit Hobbs Act robbery does not qualify as a predicate crime of violence under section 924(c). *United States* v. *Simms*, 914 F.3d 229, 233-34, 236 (4th Cir. 2019) (en banc). Just like the Eleventh Circuit did at the same time. *Brown* v. *United States*, 942 F.3d 1069, 1075–76 (11th Cir. 2019).

Mr. Taylor's conviction under section 924(c) therefore could only be valid if attempted Hobbs Act robbery is a predicate crime of violence—the exact same situation Mr. Bowe was in. The Fourth Circuit in Mr. Taylor's case held that attempted Hobbs Act robbery does not qualify as a crime of violence,

vacated that conviction, and remanded the matter to the district court for resentencing. *United States* v. *Taylor*, 596 U.S. 845, 849-50 (2022). On appeal, this Court affirmed that ruling, holding that Mr. Taylor "may not be lawfully convicted and sentenced under section 924(c) to still another decade in federal prison." *Id*. at 860. Mr. Taylor's section 924(c) conviction was unlawful, and accordingly he was resentenced. But Mr. Bowe, solely because he promptly sought to file a successive section 2255 motion after *Davis*, cannot even file a motion correct his sentence, which is the exact same sentence this Court has called unlawful.

II. The Eleventh Circuit's atextual application of section 2244(b)(1) serves to punish Mr. Bowe for acting diligently.

A. The statutory text of AEDPA and this Court's decisions interpreting the same evince a clear interest in prisoners filing their habeas petitions and motions to vacate as soon as possible.

The passage of AEDPA constituted a sea change in the law governing habeas corpus applications and motions to vacate. Congress enacted AEDPA to "further the principles of comity, finality, and federalism." *Williams* v. *Taylor*, 529 U.S. 420, 436 (2000). Mr. Bowe's case originated in federal court, so the issues of comity and federalism do not apply.[2]

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[2] While the text of section 2241(b)(1) is clear, the lack of concern for federalism and comity in the section 2255 motion to vacate context makes it reasonable for Congress to have not applied the successive claim bar to those claims. Moreover, state prisoners

Congress' aim in encouraging finality was to "reduce delays in the execution of state and federal criminal sentences." *Woodford* v. *Garceau*, 538 U.S. 202, 206 (2003). To effectuate that purpose, Congress enacted numerous statutory changes aimed at speeding up postconviction proceedings for both state and federal prisoners. Perhaps the biggest change was the implementation of a new one-year statute of limitations (subject to certain caveats) for both habeas corpus actions under section 2254[3] and motions to vacate under section 2255. See 28 U.S.C. § 2244(d), § 2255(f). Prior to the passage of AEDPA, either action could be brought at any time. See 28 U.S.C. § 2255 (1994) (amended 1996); see also John H. Blume, *AEDPA: The "Hype" and the "Bite,"* 91 Cornell L. Rev. 259, 270 (2007) ("Prior to AEDPA, there was no set time limit on a habeas petitioner's ability to seek federal review of his state conviction or sentence.").

This short statute of limitations reflects "'Congress' decision to expedite collateral attacks by placing stringent time restrictions on [them].'" *Mayle* v. *Felix*, 545 U.S. 644, 657 (2005) (alteration in original) (quoting *United States* v. *Hicks*, 283 F.3d 380, 388 (D.C. Cir. 2002)); see also *Carey* v. *Saffold*, 536 U.S. 214, 226 (2002) ("The Ninth Circuit's rule consequently threatens to undermine the statutory purpose of encouraging prompt filings in federal court in order to protect the federal system from being forced to hear stale claims.") (citing *Duncan* v. *Walker*,

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seeking a writ of habeas corpus will have already had one opportunity to seek relief through the state courts. Conversely, a federal prisoner will only be able to seek relief in federal court.

[3] A shorter timeline applies to capital cases for states that "opt-in" under Chapter 154 of AEDPA. See 28 U.S.C. § 2263(a); *Calderon* v. *Ashmus*, 523 U.S. 740, 742–43 (1998).

533 U.S. 167, 179 (2001)); Anne R. Traum, *Last Best Chance for the Great Writ: Equitable Tolling and Federal Habeas Corpus*, 68 Md. L. Rev. 545, 597 (2009) (explaining that AEDPA's purpose, as stated by this Court, is "to speed up habeas review, curb habeas abuse, and promote finality of state court judgments").

On the flip side, a failure to act diligently is often held against a prisoner applying for a writ of habeas corpus or filing a motion to vacate. The statutory framework for petitions for writs of habeas corpus and motions to vacate penalizes prisoners for a failure to act diligently. See, *e.g.*, 28 U.S.C. § 2254(e)(2)(A)(ii) (authorizing a district court to hold an evidentiary hearing to develop the factual basis of a claim if the factual predicate of the claim "could not have been previously discovered through the exercise of due diligence"); 28 U.S.C. § 2255(f)(4) (directing that the statute of limitations for a motion to vacate shall run from the latest of, among other dates, "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence"); 28 U.S.C. § 2244(d)(1)(D) (directing that the statute of limitations for an application for a writ of habeas corpus shall run from the latest of, among other dates, "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence"); 28 U.S.C. § 2244(b)(2)(B)(i) (allowing second or successive habeas corpus applications if, as one of two options, "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence").

In addition, this Court has often applied the principles of equitable tolling to motions to vacate and applications for writs of habeas corpus. Such principles include requiring a litigant to prove they have been pursuing their rights diligently. See*, e.g.*, *Holland* v. *Florida*, 560 U.S. 631, 649 (2010) ("[A] 'petitioner' is 'entitled to equitable tolling' only if he shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing.") (quoting *Pace* v. *DiGuglielmo*, 544 U.S. 408, 418 (2005)); *Williams* v. *Taylor*, 529 U.S. 420 (2000) (holding that under section 2254(e)(2), as amended by AEDPA, a "fail[ure] to develop" a claim's factual basis in state-court proceedings is not established unless there is lack of diligence).

In sum, diligence is one of "AEDPA's core purposes." *Johnson* v. *United States*, 544 U.S. 295, 309 (2005). Mr. Bowe followed Congress's wishes and this Court's dictates and sought relief to file "as soon as possible." *Duncan* v. *Walker*, 533 U.S. 167, 181 (2001). He is now being punished for his diligence. The incorrect, atextual application of section 2244(b)(1)'s procedural bar on successive habeas corpus claims to Mr. Bowe's attempt to file a second or successive motion to vacate contradicts the purpose of AEDPA and this Court's jurisprudence. This Court should exercise its jurisdiction and enforce the plain text of AEDPA.

B. The rule followed by the Eleventh Circuit encourages federal prisoners to sit on their claims, contrary to the intentions of Congress in passing AEDPA.

This Court has said that when interpreting AEDPA, its "purposes, and the practical effects of our holdings, should be considered." *Panetti* v. *Quarterman*, 551 U.S. 930, 945 (2007). The practical effect of the Eleventh Circuit's atextual application of section 2244(b)(1) is that federal prisoners like Mr. Bowe are encouraged to sit on their claims while Supreme Court and circuit court precedent continues to evolve. The only reason Mr. Bowe has not been able to get a decision on the merits of his section 2255 motion based on *Davis*, while Messrs. Brown, Ragland, Corn, Jr., Chance, Barriera-Vera, and Berry have, is that Mr. Bowe previously sought to file such a motion.

Had Mr. Bowe waited a few more years for the Supreme Court to fully clarify the scope of the elements clause and hold that Mr. Bowe was correct about that scope all along, he would not be in this unpredictable and unjust situation. AEDPA was supposed to prevent delays. If this atextual application of section 2244(b)(1) to motions to vacate is allowed to persist, delay will be the prudent course of action for many federal prisoners. That is contrary to both congressional intent and this Court's holdings.

CONCLUSION

Mr. Bowe is serving a ten-year sentence for a charge of which no person could lawfully be convicted

today. If this Court does not intervene, he will have no recourse. Mr. Bowe's situation highlights the arbitrary and unfair application of section 2244(b)(1) in the Eleventh Circuit in comparison to other circuits. Despite no holding from this Court and no statutory text dictating such a result, the Eleventh Circuit has barred Mr. Bowe from obtaining relief that would be available in other circuits. Mr. Bowe can easily make out a prima facie case that he is entitled to relief. The mere fact that he previously sought to file a second or successive motion to vacate based on this Court's holding in *Davis* should not bar him from filing a successive motion to vacate pursuant to section 2255. This Court should exercise its jurisdiction, apply the text of section 2244(b)(1), and reverse the holding of the Eleventh Circuit.

Respectfully submitted,

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