No. 20-911

IN THE

Supreme Court of the United States

MICHAEL JACKSON,

Petitioner,

v.

DON HUDSON, WARDEN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR JONATHAN F. MITCHELL AND ADAM K. MORTARA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

A convicted federal prisoner may seek collateral relief by motion under 28 U.S.C. § 2255. But he cannot file a second or successive motion unless it is based on either "newly discovered evidence" exculpating him or a "new rule of constitutional law" made retroactive by this Court. § 2255(h). At the same time, section 2255(e) prohibits convicted federal prisoners from petitioning for a writ of habeas corpus unless it "appears that the remedy by [section 2255] motion is inadequate or ineffective to test the legality of his detention." This caveat is known as the "savings clause" of section 2255(e).

The question presented is whether the section 2255 remedy is "inadequate or ineffective to test the legality" of a prisoner's "detention," and thus the prisoner is free to bring a habeas petition, if he is asserting a statutory claim that would have failed under circuit precedent as it stood at the time of his first motion but that has since been overruled by a statutory-interpretation decision from this Court.

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INTEREST OF *AMICI CURIAE*

Amici curiae write and teach about this Court's criminal law and habeas corpus jurisprudence. Jonathan F. Mitchell has taught federal habeas corpus as a professor and visiting professor at several law schools and is the former Solicitor General of the State of Texas. Mr. Mitchell recently served as a court-appointed amicus curiae in *In re Hall*, No. 19-10345 (5th Cir.). Adam K. Mortara is a Lecturer in Law at the University of Chicago Law School, where he has taught federal courts, federal habeas corpus, and criminal procedure since 2007. Mr. Mortara has also served as a court-appointed *amicus curiae* in criminal law and federal habeas cases, including by this Court in *Terry v. United States*, No. 20-5904, and *Beckles v. United States*, No. 15-8544, and by the Eleventh Circuit in *Wilson v. Warden*, No. 14-10681, and *Bryant v. Warden, FCC Coleman-Medium*, No. 12-11212.[1]

Amici file this brief in anticipation of a possible reversal in position by the government on the question presented. Prior to 1998, the United States supported *amici*'s view that prisoners cannot under section 2255(e) seek relief for statutory claims; after 1998, the government reversed course endorsing Petitioner's view that prisoners can seek such relief; but the government upon reconsideration reverted in 2017 to its original position. *See* U.S. Brief, *United States v. Wheeler*, No. 16-6073, Doc. 34 at 25–30 (4th Cir. Oct. 6, 2017). The current Administration has changed

[1] As required by Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

positions in this Court in cases ranging from the understandable differences in matters of national policy to an inexplicable, untimely, and baseless *volte face* in a criminal-sentencing case. *See* Letter of Respondent United States, *Terry*, No. 20-5904 (Mar. 15, 2021). Given the historical changes in the government's position on the meaning of section 2255(e) coupled with the current outbreak of inconstancy, *amici* here present views in defense of the judgment below. *Amici* also urge the Court to resolve the circuit split on the issue. When the government aligns with the convicted in the lower courts, the opportunities for this Court to resolve this circuit split dramatically narrow or disappear.

The arguments made herein are solely those of *amici* and are not necessarily the views of the law schools where *amici* have taught or their other faculty.[2]

[2] *Amici* have timely notified counsel of record of their intention to file this brief. Counsel of record for Petitioner consented; counsel of record for Respondent consented as well but takes no position as to whether the filing is timely. As a brief in support of Respondent, the filing is timely. Rule 37.2(a). *Amici* support the judgment in favor of Respondent, and Respondent has in the recent past sought certiorari on this issue (as *amici* do now). *See* Pet., *United States v. Wheeler*, No. 18-420 (Oct. 3, 2018). Particularly given that *amici* have no necessary reason to know (and do not know) what Respondent's position on certiorari will be, *amici*'s position on the judgment determines which party *amici* support.

SUMMARY OF ARGUMENT

Amici support the judgment below. As the Tenth Circuit held, section 2255's remedy is not made "inadequate or ineffective to test the legality of [a prisoner's] detention" simply because circuit precedent interpreting the statute of conviction was against him. 28 U.S.C. § 2255(e). Nor is the remedy "inadequate or ineffective" if it bars a prisoner's second or successive motion seeking to argue that the statute as newly interpreted no longer makes his conduct a crime. Only claims of new evidence or new *constitutional* rules can be raised in a second or successive motion; that a claim of a new statutory interpretation cannot be is a feature, not a defect, of the remedy.

Circuits reaching a contrary view have erred. They allow such a claim raising a new statutory interpretation to proceed—in disregard of the express restrictions on second or successive motions. Several jurists, decrying the anti-textualist reasoning of these circuits and the increase in habeas litigation it has spawned, have urged this Court to resolve the split. *See, e.g.*, *Beras v. Johnson*, 978 F.3d 246, 253–64 (5th Cir. 2020) (Oldham, J., concurring); *Wright v. Spaulding*, 939 F.3d 695, 706–10 (6th Cir. 2019) (Thapar, J., concurring); *United States v. Wheeler*, 734 F. App'x 892, 893–94 (4th Cir. 2018) (Agee, J., statement respecting denial of rehearing en banc).

Absent intervention, the split will only worsen. The circuits outside the Tenth and Eleventh (which agrees with the Tenth) continue to splinter among themselves as to when a prisoner can access the savings clause: (1) Some circuits require binding precedent to have foreclosed a prisoner's claim; others

do not. (2) Some circuits allow the change in law to come from a court of appeals decision (and not just a decision of this Court); others do not. (3) Some circuits allow claims of sentencing error; others do not. (4) Some circuits appear to require proof of "actual innocence"; others do not. (5) One circuit allows the government to rebut a claim of "actual innocence" with extra-record evidence; another circuit does not. "[D]eep divide[s]" thus exist "[e]ven within the circuits that permit actual innocence claims based on changes in statutory interpretation." *Bruce v. Warden Lewisburg USP*, 868 F.3d 170, 180 (3d Cir. 2017). And this intra-mural divide confirms the error of these circuits' common rejection of the Tenth and Eleventh Circuits' position.

Adopting the Tenth and Eleventh Circuits' position would stop the fracturing. Congress struck a careful balance between finality and reopening criminal judgments based on changes in law. By design, section 2255 bars successive attacks on convictions based on changes in statutory interpretation. But circuits outside the Tenth and Eleventh have disrupted that balance, replacing the text with judge-made standards and producing intolerable uncertainty and protracted habeas litigation. This Court should grant certiorari.

ARGUMENT

I. THE TENTH CIRCUIT'S DECISION IS CORRECT.

The Tenth Circuit properly applied section 2255 in denying relief. It relied on an earlier decision holding that a petitioner may not resort to the savings clause if his argument challenging the legality of his detention could have been tested in an initial section 2255 motion. *See* Pet. App. 6a (citing *Prost v.*

Anderson, 636 F.3d 578, 589 (10th Cir. 2011) (Gorsuch, J.)). That holding is correct as a matter of statutory text, structure, and history. The Eleventh Circuit agrees. *See McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076 (11th Cir. 2017) (en banc); *see also Samak v. Warden, FCC Coleman-Medium*, 766 F.3d 1271, 1284–86 (11th Cir. 2014) (Pryor, J., concurring). And jurists in other circuits have, after carefully considering section 2255's unambiguous language, arrived at the same conclusion. *See, e.g.*, *Beras*, 978 F.3d at 253–64 (Oldham, J., concurring); *Wright*, 939 F.3d at 706–10 (Thapar, J., concurring); *Brown v. Caraway*, 719 F.3d 583, 597–600 (7th Cir. 2013) (Easterbrook, C.J., statement). Most recently, the Fifth Circuit granted *en banc* review to revisit its own savings clause precedent. *See Hammoud v. Ma'at*, Case No. 19-50914, Doc. 00515839086 (Apr. 27, 2021).

A. The text of the savings clause shows that section 2255's remedy is not made "inadequate or ineffective" just because the prisoner fails to obtain relief.

Section 2255(e) states that an application for a writ of habeas corpus "shall not be entertained" if 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." (Emphasis added.)

To start, the savings clause "juxtapos[es] the terms 'inadequate or ineffective' with the phrase 'to test the legality of [a prisoner's] detention.'" *Prost*, 636 F.3d at 584. It thus tells courts that if a petitioner's argument

could have been *tested* in a remedy by motion, that remedy cannot be inadequate or ineffective. *Id.* "To test" means "to try"; a prisoner need not "win." *McCarthan*, 851 F.3d at 1086 (citing 11 OXFORD ENGLISH DICTIONARY 220 (1st ed. 1933)); *see also Gray-Bey v. United States*, 201 F.3d 866, 876 (7th Cir. 2000) (Easterbrook, J., dissenting) ("Judicial emphasis must be on 'test': a § 2255 motion is not 'inadequate or ineffective' merely because the petitioner loses."). Thus "the clause is concerned with process—ensuring the petitioner an *opportunity* to bring his argument—not with substance—guaranteeing nothing about what the *opportunity* promised will ultimately yield in terms of relief." *Prost*, 636 F.3d at 584.

Reinforcing that reading, the text of the clause expressly distinguishes the "remedy" petitioner could invoke from the "relief" he might obtain. *See Beras*, 978 F.3d at 260 (Oldham, J., concurring) ("The textual key to understanding § 2255(e) is that it contrasts two different things: 'relief' and 'remedy.'"). "[R]elief is vacatur of [a prisoner's] conviction or sentence. By contrast, the 'remedy' is '[t]he *means* of enforcing a right or preventing or redressing a wrong.'" *Id.* (citing *Remedy*, BLACK'S LAW DICTIONARY (11th ed. 2019)). The clause further states that section 2241 is not available to a petitioner simply because a "court has denied him relief"; it must "*also* appea[r] that the *remedy* by motion is inadequate or ineffective." § 2255(e) (emphasis added); *Prost*, 636 F.3d at 584–85. Even an "erroneous decision on a § 2255 motion [does not] suffice to render the § 2255 remedy itself inadequate or ineffective." *Prost*, 636 F.3d at 585.

Other areas of the law support this conclusion. An "adequate" remedy at law precludes equitable relief

even if the legal claim cannot succeed on the merits. *McCarthan*, 851 F.3d at 1088. Nor is counsel "ineffective" simply because precedent "doom[s]" his arguments. *Id.* (citing *Brown*, 719 F.3d at 597 (Easterbrook, C.J., statement)). So too here: "The ultimate result may be right or wrong as a matter of substantive law," but a prisoner has no resort to the savings clause so long as he "had an opportunity to bring and test his claim." *Prost*, 636 F.3d at 585. Section 2255 is not "inadequate or ineffective to test the legality of [a prisoner's] detention" just because precedent (even if erroneous) was against him.

B. The limited exceptions allowing a successive motion, of which an intervening statutory decision is not one, are a feature, not a defect, of the remedy.

Context confirms what the text makes clear. The savings clause must be read in harmony with section 2255's requirements for bringing a second or successive motion. And those requirements, found in section 2255(h), allow claims based *only* on newly discovered evidence or new constitutional rules made retroactive to cases on collateral review by this Court. Claims based on new statutory interpretations are neither and thus excluded. The exclusion of those claims cannot render the remedy inadequate or ineffective when the exclusion was part of the remedy's design. We do not say that the remedy is "inadequate or ineffective to test the legality of [a prisoner's] detention" if he is barred by the statute of limitations from filing a motion (§ 2255(f)). Nor can we say, then, that the remedy is "inadequate or

ineffective" if a prisoner is barred by the statute's restrictions on second or successive filings (§ 2255(h)).

Indeed, "[s]ection 2255(h) 'speaks directly' to the question of '[h]ow often to rerun a search for error.'" *McCarthan*, 851 F.3d at 1090 (quoting *Taylor v. Gilkey*, 314 F.3d 832, 835 (7th Cir. 2002) (Easterbrook, J.)). And it permits reruns for two exceptions only: errors of fact and errors of constitutional law. Petitioner wants to add a third exception, for statutory-interpretation errors. But "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied." *McCarthan*, 851 F.3d at 1090 (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001)).

Congress did not exclude statutory-interpretation claims by mistake, as Petitioner suggests (*see* Pet. 27). Congress "was surely aware that prisoners might seek to pursue second or successive motions based on newly issued statutory interpretation decisions," since, long before the Antiterrorism and Effective Death Penalty Act, claims of innocence based on new statutory interpretations could be brought in a § 2255 motion. *Prost*, 636 F.3d at 585 (citing *Davis v. United States*, 417 U.S. 333, 347 (1974)). Congress's awareness is shown too by section 2255's statute of limitations, which runs from "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." § 2255(f)(3) (emphasis added). There, Congress speaks of newly recognized "right[s]," without distinguishing constitutional rights from statutory ones. But here, it narrowed the bases on which prisoners could seek second or successive

motions to new constitutional rules. Congress knew it could include statutory rules, but chose not to.

C. The history of the statute confirms that the savings clause does not allow a petitioner to circumvent the restrictions on second or successive motions.

The history of section 2255 supports the conclusion that new statutory interpretations cannot provide a basis to mount a second or successive challenge. Before section 2255's enactment, prisoners had to file a section 2241 petition challenging their detention in the district where they were incarcerated. *See Prost*, 636 F.3d at 587. In 1867, Congress expanded the availability of collateral relief, resulting in "a great increase in the number of applications" brought in the districts of confinement. *United States v. Hayman*, 342 U.S. 205, 212–13 (1952).

To reduce the burden on the few courts situated in those districts, Congress in 1948 enacted section 2255. Under that section, federal inmates were now required to bring their challenges in the districts where they were originally convicted and sentenced. *Prost*, 636 F.3d at 587. Not seeking to expand the grounds for collateral relief, Congress merely sought to address the "difficulties that had arisen in administering" habeas corpus, *Hayman*, 342 U.S. 205, 219 (1952), and "included the savings clause to ensure that those who couldn't comply with § 2255's new venue mandate were *still* provided with at least one opportunity to challenge their detentions," *Prost*, 636 F.3d at 588. Far from expanding habeas relief, "the sole purpose [of section 2255] was to minimize the difficulties encountered in habeas corpus hearings by affording

the same rights in another and more convenient forum." *Hayman*, 342 U.S. at 219.

The savings clause thus allows a prisoner to bring a section 2241 petition if the court that sentenced him no longer exists (such as court-martial proceedings that dissolve after sentencing). *See Prost*, 636 F.3d at 588. A prisoner can also bring a section 2241 challenge to the manner of execution of his sentence in the district in which the prisoner is confined. *See McCarthan*, 851 F.3d at 1089. Section 2255 addresses challenges to a prisoner's conviction and sentence and channels them into the district in which the prisoner was convicted and sentenced. Such a remedy does not address challenges to the manner of the sentence's execution.

Nearly 50 years later, Congress enacted limits on second and successive filings, further restricting the scope of the savings clause. *See id.* at 1090. If Congress had wanted to allow successive filings based on new statutory interpretations, it would have channeled those filings to the district in which the prisoner was convicted and sentenced (not to the district of his confinement), as the district of conviction and sentencing would be more familiar with the case and facts. Indeed, it would be very odd to have inmates file initial motions challenging their conviction and sentence in the districts where they were convicted and sentenced, but then to *require* second or successive motions challenging their conviction and sentence to be filed in districts *other than where they were convicted and sentenced* and that have no familiarity with the case and facts. But Petitioner would have courts read the savings clause to do just that. To now "channe[l] federal prisoners' postconviction challenges

back into the traditional habeas system," "[c]oncentrating an inordinate number of habeas corpus actions in districts with large prison populations," would "resurrec[t] the very problems § 2255 was supposed to put to rest." *Wright*, 939 F.3d at 707 (Thapar, J., concurring) (quotation marks omitted).

This much is clear. Nothing in the history shows that Congress deployed the savings clause, a modest but important administrative device, to throw open the gates to second or successive collateral attacks in the districts of confinement. Just the opposite: The savings clause does not allow an inmate to evade the clear restrictions on second or successive motions.

D. Petitioner's equity-based arguments fail.

Resistance to such a conclusion—compelled by text, structure, and history—stems ultimately from policy disagreement. "[N]o amount of policy-talk can overcome a plain statutory command." *Niz-Chavez v. Garland*, No. 19-863, slip. op. at 15 (U.S. Apr. 29, 2021). And even on its own terms, Petitioner's equity-based arguments fail.

Petitioner suggests that it is fundamentally unfair to preclude him from bringing a successive motion when circuit precedent that foreclosed his claim has been overruled by an intervening Supreme Court decision. *See* Pet. 13, 24, 28–29. Not so. Petitioner could have raised at trial, on appeal, or in his initial section 2255 motion the argument he presses now—nothing barred him from doing so. Even if circuit precedent were against him on the merits, Petitioner could have sought review *en banc* and then review from this Court (on direct appeal or collateral review).

That is how many new statutory-interpretation cases have arisen (including the one at issue here); in the face of adverse circuit precedent, petitioners in those cases persisted and prevailed. *See, e.g.*, *United States v. Rehaif*, 888 F.3d 1138 (11th Cir. 2018), *rev'd*, 139 S. Ct. 2191 (2019); *United States v. Sekhar*, 683 F.3d 436 (2d Cir. 2012), *rev'd*, 570 U.S. 729 (2013); *United States v. Chambers*, 473 F.3d 724 (7th Cir. 2007), *rev'd*, 555 U.S. 122 (2009); *United States v. Begay*, 470 F.3d 964 (10th Cir. 2006), *rev'd*, 553 U.S. 137 (2008); *United States v. Bailey*, 36 F.3d 106 (D.C. Cir. 1994), *rev'd*, 516 U.S. 137 (1995). Indeed, the fact that statutory corrections can and do occur through the section 2255 remedy shows the remedy's adequacy and effectiveness.

Nor does a change in statutory interpretation necessarily mean that Petitioner is innocent of the newly defined offense, as the government has not had the opportunity to carry its burden of proof under that offense (*i.e.*, that Petitioner *knew* he was a felon at the time of the charged firearm possession). *Cf. Bousley v. United States*, 523 U.S. 614, 623–24 (1998) ("Actual innocence means factual innocence, not mere legal insufficiency."). This is not the case where newly discovered evidence (such as DNA evidence) or a new constitutional rule leaving lawmakers with no power to punish may exculpate a criminal defendant entirely. Surely it is not irrational for Congress, aiming to stem the tide of habeas litigation, to have treated those rare changes that may more clearly demonstrate a petitioner's actual innocence differently from the more "regula[r]" occurrence of subsequent developments in statutory interpretation. *See* Pet. 16.

Petitioner's position produces an unfairness—by giving prisoners who have a new statutory-interpretation claim "a *superior* remedy" than that available to prisoners who have a claim based on newly discovered evidence or a new constitutional rule. *McCarthan*, 851 F.3d at 1091. Under Petitioner's view, prisoners raising new statutory claims through the savings clause are *excused* from complying with the one-year statute of limitations (§ 2255(f)), the restrictions on second or successive motions (§§ 2244, 2255(h)), and the requirements on appellate authorization (§ 2253(c))—as such claims would be governed by section 2241 and not section 2255. *See McCarthan*, 851 F.3d at 1091. But prisoners raising claims based on newly discovered evidence or new constitutional rules remain subject to those limitations. *See id.* Petitioner offers no explanation for that absurdity.

Nor would any attempt by Petitioner to disguise his policy views as a Suspension Clause argument succeed. "In a discussion about habeas corpus, nothing is more disqualifying than the belief that the Suspension Clause has anything to do with prisoners who have already been convicted by a Court of competent jurisdiction." Br. for Jonathan F. Mitchell and Adam K. Mortara as *Amici Curiae* at 4, *Edwards v. Vannoy*, No. 19-5807 (July 21, 2020) (citing *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1983, 1985 n.2 (2020) (Thomas, J., concurring)).

In the end, a policy judgment has to be made about when final convictions are no longer subject to reopening. For "[t]here comes a point where a procedural system which leaves matters perpetually open no longer reflects humane concern but merely

anxiety and a desire for immobility." *McCleskey v. Zant*, 499 U.S. 467, 492 (1991) (quoting Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 452–53 (1963)). As Judge Friendly said, "[t]here is an inevitable attraction in the position that a person convicted of a serious crime should receive a new trial whenever a later decision of the highest court indicates that, with the benefit of hindsight, a different course should have been followed at his trial in any consequential respect." *United States v. Sobell*, 314 F.2d 314, 324 (2d Cir. 1963). But yielding "to that attraction" would cause litigation to be "interminable" and "would drastically impair the ability of the Government to discharge the duty of protection which it owes to all its citizens." *Id.*

Petitioner's conviction is nearly 20 years old. He was tried, convicted, and sentenced. He pursued an appeal. He brought multiple collateral challenges to his conviction or sentence. Successive revisits of decades-old convictions inflict "social costs" on "victims, their families, future potential victims, the government, and the courts." *Prost*, 636 F.3d at 583 (alterations omitted). Understanding the need for finality, Congress permitted successive attacks only for claims raising new facts or new constitutional rules made retroactive by this Court. Because Petitioner brought no such claim, relief was properly denied.

II. THIS COURT'S REVIEW IS NECESSARY TO RESOLVE A SPLIT ON AN IMPORTANT ISSUE.

A split exists that demands resolution. It is ripe for this Court's review, and this case offers an opportune vehicle. The varying tests on offer in the circuits

(outside the Tenth and Eleventh) and the uncertainties they produce only highlight their error and the need for this Court to intervene.

A. The circuit split is entrenched, and this case is an appropriate vehicle to resolve it.

The courts of appeals are sharply divided over whether the savings clause permits a petitioner who was denied section 2255 relief to challenge his detention on the basis of an intervening decision of statutory interpretation.

The Tenth and Eleventh Circuits have answered no, adopting the correct position grounded in the text and structure of the savings clause and respecting the balance that Congress struck between finality and post-conviction error correction. *See supra* Section I.

Nine other circuits hold a contrary position. *See United States v. Barrett*, 178 F.3d 34, 51–52 (1st Cir. 2008); *Poindexter v. Nash*, 333 F.3d 372, 378 (2d Cir. 2003); *In re Dorsainvil*, 119 F.3d 245, 247–48 (3d Cir. 1997); *In re Jones*, 226 F.3d 328, 333–34 (4th Cir. 2000); *Reyes-Requena v. United States*, 243 F.3d 893, 903–04 (5th Cir. 2001); *Wooten v. Cauley*, 677 F.3d 303, 307–08 (6th Cir. 2012); *In re Davenport*, 147 F.3d 605, 611 (7th Cir. 1998); *Marrero v. Ives*, 682 F.3d 1190, 1192 (9th Cir. 2012); *In re Smith*, 285 F.3d 6, 8 (D.C. Cir. 2002). The Eighth Circuit has addressed without expressly adopting the majority view. *See Abdullah v. Hedrick*, 392 F.3d 957, 963 (8th Cir. 2004).

The split is well teed up for this Court to resolve. As jurists have acknowledged, "[t]here is a deep and mature circuit split on the reach of the savings clause."

Bryant v. Warden, FCC Coleman-Medium, 738 F.3d 1253, 1279 (11th Cir. 2013), overruled by *McCarthan*, 851 F.3d 1076. Several circuits "agree . . . that the saving clause permits a prisoner to challenge his detention when a change in statutory interpretation raises the potential that he was convicted of conduct that the law does not make criminal." *Bruce*, 868 F.3d at 179–80. But "[t]wo circuits see things differently, holding that an intervening change in statutory interpretation cannot render § 2255 inadequate or ineffective." *Id.* "The circuits are already split. The rift is unlikely to close on its own." *Wright*, 939 F.3d at 710 (Thapar, J., concurring). "What's more, so long as it lasts, the vagaries of the prison lottery will dictate how much postconviction review a prisoner gets. A federal inmate in Tennessee can bring claims that would be thrown out were he assigned to neighboring Alabama. Like cases are not treated alike." *Id.*; *see also Wheeler*, 734 F. App'x at 893 (Agee, J.); *Camacho v. English*, 872 F.3d 811, 815 (7th Cir. 2017) (Easterbrook, J., concurring) ("[T]he Supreme Court needs to decide whether § 2255(e) permits litigation of this kind.").

This case presents an appropriate vehicle to resolve the split. There is no doubt that, in this case, the Supreme Court has overruled circuit precedent that had foreclosed Petitioner's argument on the merits at the time of his initial section 2255 motion. *See Rehaif v. United States*, 139 S. Ct. 2191, 2196 (2019), overruling *United States v. Games-Perez*, 667 F.3d 1136 (10th Cir. 2012), and *United States v. Thomas*, 615 F.3d 895 (8th Cir. 2010). The only question is: Can Petitioner now resort to the savings clause and bring the claim in a § 2241 application? Two circuits say no; most say yes. All that's left is for this Court to decide.

B. The divergence among circuits outside the Tenth and Eleventh underscores the need for this Court's review.

This case also presents this Court the opportunity to clean up a split that has left the state of the law in circuits outside the Tenth and Eleventh a mess. No circuit court holding that a petitioner can bring a successive challenge to his conviction based on a new statutory interpretation has addressed the "textual and structural clues" in section 2255 that the Tenth and Eleventh Circuits have analyzed in depth. *Prost*, 636 F.3d at 593. And several jurists have written forcefully about the erroneous position taken by their circuits. *See, e.g.*, *Wright*, 939 F.3d at 707 (Thapar, J., concurring) ("We started by assuming that the out-of-circuit cases *might* be right [about the savings clause]. . . . But at no point did we stop to study the text of the statute itself."); *Beras*, 978 F.3d at 253–64 (5th Cir. 2020) (Oldham, J., concurring).

As a result, untethered from text, the tests created by circuits outside the Tenth and Eleventh have "widely diverge[d]." *Bruce*, 868 F.3d at 179. To illustrate: In the Ninth Circuit, resort to the savings clause is allowed whenever a petitioner "has not had an unobstructed procedural shot at presenting [an actual innocence] claim." *Harrison v. Ollison*, 519 F.3d 952, 959 (9th Cir. 2008) (quoting *Stephens v. Herrera*, 464 F.3d 895, 898 (9th Cir. 2006)). This broad approach has been described as permitting resort to the savings clause "not only where a petitioner was foreclosed by adverse precedent but also where the petitioner lacked an affirmative basis for his claim of actual innocence." *Prost*, 636 F.3d at 605 n.5

(Seymour, J., concurring in part and dissenting in part).

Other circuits have not gone so far. In the Second Circuit, for example, the savings clause applies when "the petitioner cannot, for whatever reason, utilize § 2255" and "the failure to allow for collateral review would raise serious constitutional questions." *Triestman v. United States*, 124 F.3d 361, 377 (2d Cir. 1997). And "serious constitutional questions would arise if a person who can prove his actual innocence on the existing record—and who could not have effectively raised his claim of innocence at an earlier time—had no access to judicial review." *Id.* at 363. The Third Circuit adopted a similar standard, *see Dorsainvil*, 119 F.2d at 248, but later explained that it (like the Ninth Circuit) did *not* require circuit foreclosure as a prerequisite to invoking the savings clause, *see Bruce*, 868 F.3d at 180.

The Seventh Circuit thought that a standard such as the Second Circuit articulated was "too indefinite" and would fail to "meet the needs of practical judicial enforcement." *Davenport*, 147 F.3d at 611. Instead, a "federal prisoner should be permitted to seek habeas corpus only if he had no reasonable opportunity to obtain earlier judicial correction of a fundamental defect in his conviction or sentence because the law changed after his first 2255 motion." *Id.* Later decisions construed *Davenport* to require circuit foreclosure and developed a "three-part test" to determine whether the savings clause applied—but that test complicated rather than clarified. *See Beason v. Marske*, 926 F.3d 932, 935 (7th Cir. 2019). As then-Judge Barrett observed, "the complexity of our cases in this area is 'staggering.' We have stated the 'saving

clause' test in so many different ways that it is hard to identify exactly what it requires." *Chazen v. Marske*, 938 F.3d 851, 863 (7th Cir. 2019) (Barrett, J., concurring).

Davenport served as the template for many other circuits, but variations existed still. The Fourth Circuit uses a similar three-part test as the Seventh but applies a different *four*-part test with respect to sentencing challenges. *See United States v. Wheeler*, 886 F.3d 415, 427, 429 (4th Cir. 2018). The Fifth Circuit has offered a two-part test requiring circuit foreclosure (as opposed to the Ninth and Third Circuits, which do not). *See Reyes-Requena*, 243 F.3d at 904. And the Sixth Circuit applies a four-part test and appears to require that petitioner "prove his actual innocence" before resorting to the savings clause (as opposed to the Second Circuit, which does not). *See Wooten*, 677 F.3d at 307–08, 311.

Beyond the variations, issues remain about how those tests should be applied—issues that could themselves produce (and have produced) additional splits. For example, when is a claim deemed "foreclosed" by precedent such that a petitioner can invoke the savings clause? While petitioner's claim here was surely foreclosed on the merits, that question will not always be clear. *See, e.g.*, *Prost*, 636 F.3d at 595. Further, does the change in law have to come from the Supreme Court, or is a court of appeals case sufficient? *Contrast Chazen*, 938 F.3d at 864 (Barrett, J., concurring) (noting that the Seventh Circuit permits the change to come from a court of appeals case), *with Reyes-Requena*, 243 F.3d at 904 (requiring "a retroactively applicable Supreme Court decision"). What would qualify as a "new" statutory

interpretation to trigger application of the savings clause, *see Chazen*, 938 F.3d at 866 (Barrett, J., concurring), or is "newness" not even the right way to formulate the test, *see Wright*, 939 F.3d at 705 n.7 ("our circuit has avoided this mistake" of using the "new rule" language based on *Teague v. Lane*)?

The ambiguities do not end there: How direct must the overruling of circuit precedent be, and would it be enough if a subsequent decision undermined or invalidated the rationale of earlier circuit precedent without expressly overruling it? Also, which circuit's law applies to a petition invoking the savings clause—the law of the circuit in which the petitioner is confined or the circuit in which he was convicted and sentenced? *Chazen*, 938 F.3d at 864 (Barrett, J., concurring). Does the petitioner need to prove "actual innocence" before he can invoke the savings clause, or is it enough to show a possibility, or is it something in between? *Contrast Wooten*, 677 F.3d at 311 ("Because Petitioner has not proven his 'actual innocence,' he does not fall within the savings clause of § 2255."), *with Triestman*, 124 F.3d at 365 n.2 ("[A]t this stage we are concerned only with the question of whether Triestman can present his actual innocence claim, not the question of whether he is actually innocent."). Does the savings clause encompass sentencing claims or only claims relating to the legality of conduct? *Contrast Brown*, 719 F.3d at 588 (allowing sentencing claims), *with In re Bradford*, 660 F.3d 226, 230 (5th Cir. 2011) (disallowing them); *see also Hill v. Masters*, 836 F.3d 591, 597–99 (6th Cir. 2016) (circuits "have split on the issue"). And what evidence can the government present to respond to a claim of "actual innocence"? (Petitioner recognizes a separate split on

this issue as well. *See* Pet. 21 n.10.) *Contrast Santillana v. Upton*, 846 F.3d 779, 784 (5th Cir. 2017) (looking "to what the factfinder actually decided"), *with Martin v. Perez*, 319 F.3d 799, 804 (6th Cir. 2003) (looking beyond it).

These divergences in the circuits outside the Tenth and Eleventh reinforce the need for this Court to grant review and return the law to its text. Otherwise, the circuits will continue to fracture, creating splits within splits within a split. Only by resolving the principal split here—whether a prisoner with a previously foreclosed statutory claim can resort to the savings clause at all—can the splintering stop.

What's worse, not only do the judicial tests unmoored from text yield uncertainty and conflict, but they also have grown into yet more expansions of the savings clause. *See, e.g.*, *Wheeler*, 886 F.3d at 428–29 ("We see no need to read the savings clause as dependent only on a change in Supreme Court law."); *Chazen*, 938 F.3d at 864 (Barrett, J., concurring) (tracing the circuit's most "recen[t]" evolution of savings clause jurisprudence as permitting relief "based on a court of appeals case" and not just a Supreme Court case); *id.* ("Under our circuit's law, therefore, a prisoner with a second or successive *statutory* claim can secure relief based on a court of appeals case, while a prisoner with a second or successive *constitutional* claim can secure relief only when the Supreme Court acts. That is an odd state of affairs."); *Wright*, 939 F.3d at 708 (Thapar, J., concurring) (discussing precedent that "expanded the saving clause to cover not just *invalid* sentences but *miscalculated* ones too"). These unwarranted expansions have further burdened the courts already

facing an overcrowded habeas docket. Absent this Court's intervention, the metastasis, curable only by adhering to the statute's text, will continue.

There is no chance this circuit split will resolve itself. Indeed, many circuits have doubled down on their error, eroding (not enforcing) the habeas system enacted by Congress and producing (not mending) more circuit divisions in the process. With a split lopsided in favor of an erroneous position that imposes real and increasing social costs on victims and the judiciary, now is the time for this Court to act.

CONCLUSION

For the foregoing reasons, this Court should grant the requested writ and affirm.

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Respectfully submitted,

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