No. 18-7444

IN THE SUPREME COURT OF THE UNITED STATES

CHAD TALADA, PETITIONER

v.

DAVID V. COLE, SHERIFF, STEUBEN COUNTY JAIL

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that petitioner was barred from relitigating a previously rejected challenge to his 2009 conviction for violating the Sex Offender Registration and Notification Act (SORNA), 34 U.S.C. 20901 et seq., in a different circuit by filing a petition for habeas corpus under 28 U.S.C. 2241.

2. Whether the requirement under SORNA that a sex offender must register with local authorities, 34 U.S.C. 20913, was inapplicable to petitioner in 2007 on the theory that the interim regulation specifying that all sex offenders (including those convicted before SORNA's effective date) were required to register under SORNA, 28 C.F.R. 72.3, was not adopted in accordance with the Administrative Procedure Act, 5 U.S.C. 701 et seq.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A4-A5) is not published in the Federal Reporter but is reprinted at 739 Fed. Appx. 73. The order of the district court (Pet. App. A1-A3) is not published in the Federal Supplement but is available at 2017 WL 5194115.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 2018. The petition for a writ of certiorari was filed on January 10, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 2009, following a guilty plea in the United States District Court for the Southern District of West Virginia, petitioner was convicted of failing to update his registration as a convicted sex offender as required by the Sex Offender Registration and Notification Act (SORNA), 34 U.S.C. 20901 et seq., in violation of 18 U.S.C. 2250(a). C.A. App. A248. Petitioner was sentenced to 24 months of imprisonment, to be followed by 70 years of supervised release. Id. at A249-A250. The court of appeals affirmed, 380 Fed. Appx. 255, and this Court denied a petition for a writ of certiorari, 562 U.S. 1111.

In 2010, following petitioner's release from prison, he moved to the Western District of New York, to which jurisdiction over his ongoing supervised release was transferred. Pet. App. A1. In 2013, the district court revoked petitioner's supervised release and imposed an eight-month term of reimprisonment, to be followed by 50 years of supervised release. 15-cr-6117 Presentence Investigation Report (PSR) ¶ 68 (W.D.N.Y. Mar. 4, 2019). After petitioner completed the term of reimprisonment and had begun serving the supervised-release term, petitioner pleaded guilty pursuant to a plea agreement to one count of receiving child pornography, in violation of 18 U.S.C. 2252A(a)(2)(A) and (b)(1). Pet. App. A4-A5. After being reimprisoned, petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2241 in the Western District of New York, challenging his 2009 conviction

entered in the Southern District of West Virginia. Pet. App. A1. The district court denied the petition and dismissed the action. Id. at A1-A3. The court of appeals affirmed. Id. at A4-A5.

1. In 2006, Congress enacted SORNA, which "establishe[d] a comprehensive national system for the registration of [sex] offenders." 34 U.S.C. 20901. SORNA provides that every "sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." 34 U.S.C. 20913(a). SORNA defines a "sex offender" as "an individual who was convicted of a sex offense" that falls within the statute's defined categories. 34 U.S.C. 20911(1); see 34 U.S.C. 20911(5)-(7). The term "sex offense" includes, inter alia, "specified offense[s] against a minor." 34 U.S.C. 20911(5)(A)(ii). The term "specified offense against a minor," in turn, means "an offense against a minor that involves any" of several enumerated acts, including "[c]riminal sexual conduct involving a minor" and "[a]ny conduct that by its nature is a sex offense against a minor." 34 U.S.C. 20911(7)(H) and (I).

SORNA also establishes deadlines by which sex offenders subject to the registration requirement must register and update their registration. 34 U.S.C. 20913(b) and (c). As relevant here, the statute provides that a sex offender, after initially registering, "shall, not later than 3 business days after each change of name, residence, employment, or student status, appear

in person in at least 1 jurisdiction" where the offender resides, is an employee, or is a student, and shall "inform that jurisdiction of all changes in the information required for that offender in the sex offender registry." 34 U.S.C. 20913(c). To enforce SORNA's registration requirements, Congress created a federal criminal offense penalizing non-registration. Under 18 U.S.C. 2250(a), a convicted sex offender who "is required to register under [SORNA]," who "travels in interstate or foreign commerce," and who then "knowingly fails to register or update a registration as required by [SORNA]" may be punished by up to ten years of imprisonment. See Carr v. United States, 560 U.S. 438, 443-447 (2010).

SORNA authorized the Attorney General "to specify the applicability of the requirements of [SORNA] to sex offenders convicted before [SORNA's] enactment" in 2006 "or its implementation in a particular jurisdiction." 34 U.S.C. 20913(d). The statute further authorized the Attorney General to prescribe "rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with" the default statutory registration deadlines in Section 20913(b). Ibid. In Reynolds v. United States, 565 U.S. 432 (2012), this Court concluded that sex offenders who were convicted of sex offenses before SORNA's enactment were not "require[d] * * * to register" under SORNA "before the Attorney General validly specifie[d] that the Act's registration provisions appl[ied] to

them" pursuant to his authority under Section 20913(d). Id. at 439.

In February 2007, pursuant to that authority, the Attorney General issued an interim regulation, effective on that date, specifying that "[t]he requirements of [SORNA] apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act." 72 Fed. Reg. 8894, 8897 (Feb. 28, 2007) (28 C.F.R. 72.3) (Interim Rule). In 2010, the Attorney General promulgated a final rule that "finaliz[ed] [the] [I]nterim [R]ule" with minor modifications. See 75 Fed. Reg. 81,849, 81,850 (Dec. 29, 2010). In addition, in 2008, after notice and comment, the Attorney General -- in coordination with the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking -- promulgated guidelines for the States and other jurisdictions on matters of SORNA's implementation. See 73 Fed. Reg. 38,030 (July 2, 2008) (Final Guidelines). The Final Guidelines reaffirmed SORNA's application to all sex offenders. Id. at 38,035-38,036, 38,046, 38,063.

2. In 2002, before SORNA's enactment, petitioner was convicted in New York state court of attempted sexual abuse in the first degree for engaging in sexual contact with a three-year-old girl whom he was babysitting. PSR ¶ 66. In 2004, petitioner was convicted in New York state court of possessing multiple images of a sexual performance by a child less than 16 years of age. Ibid.

Both convictions required petitioner to register as a sex offender under New York law. PSR ¶ 68. Petitioner registered in accordance with that state law following his convictions. Ibid.

Sometime after April 2007 -- following the enactment of SORNA and the promulgation of the Attorney General's February 2007 Interim Rule -- petitioner moved from New York to West Virginia, but he did not register as a sex offender there or update his registration in New York. C.A. App. A221. In December 2008, a federal grand jury in the Southern District of West Virginia returned an indictment charging petitioner with one count of failing to update his registration as a sex offender, in violation of 18 U.S.C. 2250(a). C.A. App. A30. Petitioner moved to dismiss the indictment, raising several constitutional and statutory claims. Id. at A33-A70. A magistrate judge recommended denying petitioner's motion to dismiss the indictment. Id. at A150-A176. The district court adopted the recommendation and denied the motion. 631 F. Supp. 2d 797 (S.D. W. Va. 2009).

Petitioner thereafter entered a conditional guilty plea, pursuant to a plea agreement. 08-cr-269 D. Ct. Doc. 37, at 1-2 (S.D. W. Va. June 11, 2009); see C.A. App. A214-A220, A248. In the plea agreement, petitioner reserved his right to appeal the denial of his pending motion to dismiss the indictment, and, if that appeal were successful, to withdraw his guilty plea. C.A. App. A218 ("[Petitioner] reserves the right, in a timely appeal from the final judgment in this case, to have the United States

Court of Appeals for the Fourth Circuit review the District Court's order denying [petitioner's] Motion to Dismiss * * * . If [petitioner] prevails on appeal, he may withdraw his plea under this agreement, and this agreement shall be void."). Petitioner also reserved the right to appeal the district court's determination of the applicable Sentencing Guidelines range. Id. at A217. But petitioner otherwise "knowingly and voluntarily waive[d] the right to challenge his guilty plea and his conviction resulting from th[e] plea agreement, and any sentence imposed for the conviction, in any collateral attack, including but not limited to a motion brought under 28 U.S.C. § 2255." Ibid. The district court accepted petitioner's plea, finding that petitioner understood the terms of his plea agreement and the rights he would be giving up, and that his guilty plea was knowing, intelligent, and voluntary. 08-cr-269 D. Ct. Doc. 37, at 1-2.

The court of appeals affirmed the district court's denial of petitioner's motion to dismiss the indictment. 380 Fed. Appx. 255, 256-258 (4th Cir. 2010) (per curiam). As relevant here, the court of appeals rejected petitioner's argument that SORNA did not apply to him on the theory that the Attorney General's 2007 Interim Rule specifying the applicability of SORNA's registration requirement to pre-SORNA offenders was not adopted in accordance with a provision of the Administrative Procedure Act (APA), 5 U.S.C. 553. 380 Fed. Appx. at 256-258. Petitioner contended that the Interim Rule had been promulgated without notice and

opportunity for public comment required by the APA. 380 Fed. Appx. at 256-257. Petitioner recognized, however, and the court of appeals agreed, that his argument was foreclosed by binding Fourth Circuit precedent holding that "the Attorney General had good cause to invoke the exception to providing the 30-day notice" otherwise required by the APA. Id. at 257 (quoting United States v. Gould, 568 F.3d 459, 470 (4th Cir. 2009), cert. denied, 559 U.S. 974 (2010)).

Petitioner filed a petition for a writ of certiorari (No. 10-6268), seeking review of his APA claim. This Court denied the petition. 562 U.S. 1111 (2010).

3. In March 2010, petitioner completed his term of imprisonment. Pet. App. A1. He relocated to the Western District of New York, and in June 2010 jurisdiction over his remaining term of supervised release was transferred to that district. Ibid.; see PSR ¶ 68; C.A. App. A265.

Petitioner repeatedly violated the conditions of supervised release. PSR ¶ 68. Between April 2011 and August 2013, the district court revoked supervised release three times. Ibid. After each revocation, the court imposed a term of imprisonment (of eight months, six months, and eight and a half months, respectively), to be followed each time by a 50-year term of supervised release. Ibid.

In July 2014, shortly after completing his third revocation term of imprisonment and beginning to serve his 50-year term of

supervised release, petitioner was charged with a fourth violation of the conditions of his release. PSR ¶ 68. The district court issued a warrant for petitioner's arrest, and petitioner was taken into custody. PSR ¶¶ 2-3.

In September 2015, while the fourth alleged violation of supervised release was pending in the district court petitioner was charged with one count of receiving child pornography, in violation of 18 U.S.C. 2252A(a)(2)(A). 15-cr-6117 D. Ct. Docs. 17, 18 (W.D.N.Y. Sept. 3, 2015); see PSR ¶ 1. Petitioner pleaded guilty to that offense pursuant to a written plea agreement. PSR ¶ 1. In the plea agreement, petitioner admitted (inter alia) that he "knowingly received at least 150 but less than 300 images of child pornography" between February 2012 and May 2012, that "[s]ome of the child pornography images depicted prepubescent minors or minors under twelve years old," and that "[s]ome of the child pornography images portrayed sadistic or masochistic conduct or other depictions of violence." 15-cr-6117 D. Ct. Doc. 19, at 4-5 (W.D.N.Y. Sept. 3, 2015). Petitioner has not yet been sentenced.

4. a. In March 2016, while proceedings in connection with his 2015 guilty plea were ongoing, petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. 2241 in the United States District Court for the Western District of New York. Pet. App. A1. Petitioner renewed his contention that his 2009 conviction in the Southern District of West Virginia for failing to register as required by SORNA in violation of 18 U.S.C. 2250

was invalid on the theory that the Attorney General's 2007 Interim Rule specifying SORNA's applicability to pre-SORNA offenders was not promulgated in accordance with the APA. C.A. App. A11-A18.

Under 28 U.S.C. 2255(e), a federal prisoner generally may not file a petition for a writ of habeas corpus under Section 2241 "if it appears that [he] has failed to apply for relief, by motion [under 28 U.S.C. 2255], to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion [under Section 2255] is inadequate or ineffective to test the legality of his detention." Ibid. Petitioner acknowledged that he had failed to seek postconviction relief under Section 2255 within one year of his conviction in the Southern District of West Virginia, and that any motion under Section 2255 would therefore be time barred pursuant to 28 U.S.C. 2255(f). Pet. App. A2. He argued, however, that he was entitled to seek habeas relief under Section 2241's "unless" clause -- referred to as the "saving clause" -- on the ground that any attempt to bring a Section 2255 "challenge in the Fourth Circuit would have been futile due to binding contrary precedent." Ibid.; C.A. App. A19-A26.

The district court denied the petition. Pet. App. A1-A3. The court explained that, "[i]n the Second Circuit, governing precedent allows the saving[] clause of § 2255 to be invoked to allow § 2241 relief in 'cases involving prisoners who (1) can prove actual innocence on the existing record, and (2) could not have

effectively raised their claims of innocence at an earlier time.'" Id. at A2 (quoting Cephas v. Nash, 328 F.3d 98, 104 (2d Cir. 2003)) (brackets omitted). The district court determined that "[i]t would be unwarranted to say that a § 2255 [motion] could not have been effectively raised in the Fourth Circuit simply because Petitioner disagreed with the precedents in the Fourth Circuit." Id. at A3. The district court observed that this Court "has previously held that, 'futility cannot constitute cause for procedural relief if it means simply that a claim was unacceptable to that particular court at that particular time.'" Id. at A2 (quoting Bousley v. United States, 523 U.S. 614, 623 (1998)) (brackets omitted). The court accordingly did not address the merits of petitioner's contention that the 2007 Interim Rule was issued in violation of the APA.

b. The court of appeals affirmed in an unpublished summary order. Pet. App. A4-A6. The court rejected petitioner's argument that Section 2255 was rendered "inadequate or ineffective" by the fact that binding precedent had foreclosed the argument that he would have made in a collateral attack in the Fourth Circuit. Id. at A5. The court reasoned that "[petitioner] was certainly able to test the legality of his detention under section 2255." Ibid. It explained that petitioner's challenge would have been unsuccessful because "his detention was in fact legal under the applicable law of the Fourth Circuit" and that "'[t]he remedy afforded by section 2255 is not rendered inadequate or ineffective

merely because an individual has been unable to obtain relief under that provision.'" Ibid. (quoting Triestman v. United States, 124 F.3d 361, 376 (2d Cir. 1997)) (brackets omitted). The court of appeals additionally determined that "denying [petitioner] a writ of habeas corpus pursuant to section 2241 under these circumstances" would pose "no serious constitutional question." Ibid. Like the district court, the court of appeals did not reach the merits of petitioner's underlying APA challenge to his 2009 conviction.

ARGUMENT

Petitioner contends (Pet. 26-38) that the courts below should have granted the habeas petition that he filed under 28 U.S.C. 2241, which challenged his 2009 conviction for failing to register as a sex offender under SORNA on the theory that the Attorney General's 2007 Interim Rule specifying SORNA's applicability to pre-SORNA offenders such as petitioner did not comport with the APA. The courts below, however, did not address that question because they both determined that petitioner is not entitled to seek relief under Section 2241, reasoning that petitioner had failed to show that the remedy afforded by 28 U.S.C. 2255 was "inadequate or ineffective to test the legality of his detention." 28 U.S.C. 2255(e). That determination is correct and does not conflict with any decision of this Court or another court of appeals. Although disagreement exists among the courts of appeals regarding when a Section 2255 motion is "inadequate or

ineffective," this case does not implicate that disagreement, and in any event it would be an unsuitable vehicle to address that issue. This case also would be an unsuitable vehicle to address petitioner's underlying challenge to the procedural validity of the 2007 Interim Rule, a question that neither court below addressed.

1. On direct appeal from his 2009 conviction for failing to register under SORNA, petitioner contended that his conviction was invalid because the Attorney General's 2007 Interim Rule specifying SORNA's applicability to pre-SORNA offenders violated the APA. The Fourth Circuit rejected that contention, 380 Fed. Appx. 255 (2010), and this Court denied review of that question, 562 U.S. 1111 (2010). Several years later, petitioner filed a petition under 28 U.S.C. 2241 in a different forum challenging his 2009 conviction on the same ground. Pet. App. A1-A2. He did not assert any intervening change in the law. The Second Circuit determined that petitioner was not entitled to seek habeas relief under Section 2241 on that ground. Id. at A4-A5. That determination is correct and does not warrant further review by this Court.

a. The general mechanism for a federal prisoner to collaterally attack his conviction is a motion under 28 U.S.C. 2255. Triestman v. United States, 124 F.3d 361 (2d Cir. 1997). Section 2255(e) permits a federal prisoner to file a petition for a writ of habeas corpus under 28 U.S.C. 2241 only if "the remedy

by motion [pursuant to Section 2255] is inadequate or ineffective to test the legality of his detention." 28 U.S.C. 2255(e). That portion of Section 2255(e) is known as the saving clause.

This Court has not addressed the circumstances under which a Section 2255 motion is "inadequate or ineffective to test the legality of [a prisoner's] detention," making resort to Section 2241 appropriate. 28 U.S.C. 2255(e). The courts of appeals, however, have generally agreed upon a number of governing principles. They recognize that Section 2255 is not "inadequate or ineffective" simply because relief has been denied under that provision, see, e.g., Pack v. Yusuff, 218 F.3d 448, 452 (5th Cir. 2000); because a prisoner is barred from pursuing Section 2255 relief once the statute of limitations has expired, see, e.g., Hill v. Morrison, 349 F.3d 1089, 1091 (8th Cir. 2003); or because a prisoner has been denied authorization to file a second or successive Section 2255 motion, see, e.g., United States v. Barrett, 178 F.3d 34, 50 (1st Cir. 1999), cert. denied, 528 U.S. 1176 (2000); see generally Charles v. Chandler, 180 F.3d 753, 756 (6th Cir. 1999) (per curiam) (collecting cases). As the courts have explained, a contrary approach would nullify the limitations that Congress placed on federal collateral review. See In re Jones, 226 F.3d 328, 333 (4th Cir. 2000); Barrett, 178 F.3d at 50; In re Davenport, 147 F.3d 605, 608 (7th Cir. 1998); Triestman, 124 F.3d at 376; In re Dorsainvil, 119 F.3d 245, 251 (3d Cir. 1997).

The court of appeals here correctly determined that petitioner's case does not present the narrow circumstances in which a Section 2255 motion would be "inadequate or ineffective to test the legality of his detention." 28 U.S.C. 2255(e). As the court explained, petitioner "certainly was able to test the legality of his detention under section 2255." Pet. App. A5. He elected, however, not to do so; petitioner acknowledges (Pet. 11) that "[he] did not bring a collateral attack to his judgment of conviction pursuant to 28 U.S.C. § 2255." Indeed, in his 2009 plea agreement, he "knowingly and voluntarily waive[d] the right to challenge his guilty plea and his conviction resulting from th[e] plea agreement, and any sentence imposed for the conviction, in any collateral attack, including but not limited to a motion brought under 28 U.S.C. § 2255." C.A. App. A217. Section 2255 relief was not unavailable to petitioner; instead, he chose to waive and forgo that avenue.

Notably, although petitioner did not pursue (and expressly waived) Section 2255 relief, petitioner could and did seek review of his 2009 conviction on direct appeal, and in doing so raised the same APA challenge to the 2007 Interim Rule that he asserted years later in his Section 2241 petition. 380 Fed. Appx. at 256-257. The Fourth Circuit considered and rejected petitioner's contention, applying its existing precedent. Ibid. Petitioner then sought this Court's review, pressing the same contention, but this Court denied certiorari. 562 U.S. 1111. Especially because

it is clear that petitioner had an opportunity to raise his present claim on direct review, his "fail[ure] to file a motion within the specified one-year time limit" of Section 2255, Pet. App. A5, does not justify the extraordinary resort to the habeas saving clause. Cf. Davenport, 147 F.3d at 609 (denying habeas relief where prisoner "had an unobstructed procedural shot at getting his sentence vacated" in his initial Section 2255 motion); see also Ivy v. Pontesso, 328 F.3d 1057, 1060 (9th Cir.) ("[I]t is not enough that the petitioner is presently barred from raising his claim of innocence by motion under § 2255. He must never have had the opportunity to raise it by motion."), cert. denied, 540 U.S. 1051 (2003).

Petitioner contended below, and maintains in this Court (Pet. 18-26), that Section 2255 was rendered "inadequate or ineffective" by the fact that "his detention was in fact legal under the applicable law of the Fourth Circuit." Pet. App. A5. The court of appeals correctly rejected that contention. Ibid. As that court explained, "[t]he remedy afforded by [Section] 2255 is not rendered inadequate or ineffective merely because an individual has been unable to obtain relief under that provision." Ibid. (quoting Triestman, 124 F.3d at 376) (second set of brackets in original). Petitioner is not entitled to use a petition for habeas corpus relief in order to relitigate -- in a different forum -- the same claim that he raised and lost on direct appeal. Such relitigation, at least absent an intervening change of law, is "a

paradigm abuse" of the writ of habeas corpus. Roundtree v. Krueger, 910 F.3d 312, 314 (7th Cir. 2018). Neither the fact that a timely Section 2255 motion would have failed in the Fourth Circuit nor the happenstance that petitioner is no longer located in that jurisdiction justifies allowing him to evade the procedural limits on habeas relief or the substantive law of the circuit in which he pleaded guilty, was convicted, and both waived and forwent collateral review.

b. Petitioner contends (Pet. 18-26) that this Court should grant review to provide "clarity" on the scope of relief available under the saving clause of 28 U.S.C. 2255(e). Although the courts of appeals are divided on the scope of the saving clause, that divide does not warrant review in this case because petitioner would not be entitled to relief in any circuit.

The courts of appeals are divided over whether the saving clause authorizes federal prisoners to seek habeas relief under Section 2241 based on certain statutory claims that were previously foreclosed by controlling precedent and that Section 2255 would otherwise preclude. The disagreement, however, concerns the effect of an intervening judicial decision interpreting a statutory provision that changes the legal landscape. Two courts of appeals have determined that Section 2255(e) categorically does not permit habeas relief based on an intervening decision of statutory interpretation. See McCarthan v. Director of Goodwill Indus.-Suncoast, Inc., 851 F.3d 1076, 1079-1080 (11th Cir.)

(en banc), cert. denied, 138 S. Ct. 502 (2017); Prost v. Anderson, 636 F.3d 578, 584-585, 590 (10th Cir. 2011), cert. denied, 565 U.S. 1111 (2012). Petitioner necessarily could not have obtained Section 2241 relief in those circuits.

Other courts of appeals, in contrast, have concluded that relief under Section 2241 is available under the saving clause in at least some circumstances. The circuits that permit such challenges require, at a minimum, that the prisoner's claim (1) is based on an intervening decision of statutory interpretation that applies retroactively on collateral review, (2) was foreclosed by binding precedent at the time of the prisoner's direct appeal and his first motion under Section 2255, and (3) would not be cognizable on a second-or-successive motion under Section 2255. See, e.g., Reyes-Requena v. United States, 243 F.3d 893, 903-904 (5th Cir. 2001); Jones, 226 F.3d at 333-334; Davenport, 147 F.3d at 609-612; Triestman, 124 F.3d at 378-380; Dorsainvil, 119 F.3d at 251-252. Petitioner would not prevail under that standard because he identifies no intervening change in law since the court of appeals denied his claim on direct appeal. Cf. Roundtree, 910 F.3d at 313 ("[N]one of this circuit's decisions -- and none in the circuits that agree * * * -- permits relitigation under § 2241 of a contention that was actually resolved in a proceeding under § 2255, unless the law changed after the initial collateral review.").

Although petitioner asserts (Pet. 19-20) that the courts of appeals "are split as to whether § 2255's 'inadequate or ineffective' requirement may be based on issue foreclosure by prior Circuit precedent," petitioner does not identify any decision of any court of appeals that would permit him to pursue a claim under Section 2241 merely because that claim would have been "foreclosed" in a different venue, in the absence of any intervening decision. This Court has denied petitions for writs of certiorari in other cases in which the petitioners would not have been eligible for relief even in circuits that have allowed some statutory challenges to a conviction or sentence under the saving clause. See, e.g., Young v. Ocasio, 138 S. Ct. 2673 (2018) (No. 17-7141); Venta v. Jarvis, 138 S. Ct. 648 (2018) (No. 17-6099); McCarthan v. Collins, 138 S. Ct. 502 (2017) (No. 17-85). The Court should follow the same course here.

For similar reasons, petitioner's alternative suggestion (Pet. 26) that the Court hold his petition pending the disposition of the petitions for writs of certiorari in United States v. Wheeler, No. 18-420 (filed Oct. 3, 2018), and Lewis v. English, No. 18-292 (filed Sept. 4, 2018), that concerned the lower-court disagreement about whether and in what circumstances an intervening statutory decision may provide grounds for invoking the saving clause, is accordingly misplaced. In any event, since the filing of the petition in this case, however, the Court denied

both of those petitions. See Wheeler, supra (Mar. 18, 2019) (No. 18-420); Lewis, supra (Mar. 18, 2019) (No. 18-292).

c. Even if the question petitioner raises regarding the availability of Section 2241 relief otherwise warranted review, this case would be a poor vehicle to address it because petitioner would be barred from such relief for at least two additional, independent reasons.

First, petitioner is barred from relitigating in a habeas proceeding his APA challenge to the 2007 Interim Rule under ordinary law-of-the-case principles. In Sanders v. United States, 373 U.S. 1 (1963), this Court held that a previous federal determination of a claim made on collateral review is controlling in subsequent postconviction proceedings if "(1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application." Id. at 15. In Davis v. United States, 417 U.S. 333 (1974), the Court additionally recognized that Sanders's bar to relitigation on collateral review extends to claims that were determined on direct review. Id. at 342. Davis establishes that, in federal criminal prosecutions, law-of-the-case principles apply to claims resolved on direct appeal and then reasserted in a motion under Section 2255. See ibid.; see also Reed v. Farley, 512 U.S. 339, 358 (1994) (Scalia, J., concurring in part and concurring in

the judgment) ("[C]laims will ordinarily not be entertained under § 2255 that have already been rejected on direct review."); Kaufman v. United States, 394 U.S. 217, 227 n.8 (1969).

Davis's reasoning applies with full force in the context of a petition seeking the extraordinary remedy of habeas corpus relief and thus bars petitioner's request for relief under Section 2241. Petitioner, on direct appeal, obtained review of his claim on the merits. Petitioner filed a petition for a writ of certiorari from the court of appeals' determination in that case, which was denied. Petitioner does not seek relief from his conviction and sentence under any intervening judicial decision, see Davis, 417 U.S. at 342-346, and no reason exists to permit petitioner to relitigate the claim on collateral review.

Second, in his 2009 plea agreement, petitioner expressly waived his right to bring any collateral attack against his 2009 conviction, which would foreclose a Section 2241 petition even if such relief were otherwise available. A defendant may validly waive rights as part of the plea-bargaining process, including "many of the most fundamental protections afforded by the Constitution." United States v. Mezzanatto, 513 U.S. 196, 201 (1995) (collecting cases). The right to pursue collateral review is among the rights that a defendant may waive in return for the benefits of a plea deal. See Hurlow v. United States, 726 F.3d 958, 964 (7th Cir. 2013) (referring to the "well-settled" rule "that waivers of * * * collateral review in plea agreements are

generally enforceable"); Ackerland v. United States, 633 F.3d 698, 701 (8th Cir. 2011) (same).

In his 2009 plea agreement, petitioner "knowingly and voluntarily waive[d] the right to challenge his guilty plea and his conviction resulting from th[e] plea agreement, and any sentence imposed for the conviction, in any collateral attack, including but not limited to a motion brought under 28 U.S.C. § 2255." C.A. App. A217. Petitioner's Section 2241 petition falls within the scope of that broadly worded waiver. The waiver covers "any collateral attack" to his 2009 conviction or to "any sentence" imposed for that conviction. See Ali v. Federal Bureau of Prisons, 552 U.S. 214, 218-219 (2008) ("We have previously noted that, read naturally, the word 'any' has an expansive meaning, that is, one or some indiscriminately of whatever kind." (citation and other internal quotation marks omitted)).

Although the government did not address petitioner's waiver below, focusing instead on other reasons why his Section 2241 petition is barred, that fact does not preclude this Court from considering the waiver issue and affirming on that alternantive ground. See United States v. New York Tel. Co., 434 U.S. 159, 166 n.8 (1977) ("[A] prevailing party may defend a judgment on any ground which the law and the record permit that would not expand the relief it has been granted."); see also, e.g., Dahda v. United States, 138 S. Ct. 1491, 1498-1500 (2018) (affirming on alternative ground not asserted below but raised in response to petition for

a writ of certiorari). Unlike a case in which the government effects a "deliberate waiver" of a litigation defense, Wood v. Milyard, 566 U.S. 463, 466 (2012), the government here merely did not invoke a threshold bar to appellate relief, without any indication that the government affirmatively intended to relinquish it. Under those circumstances, the bar remains an alternative basis for affirming a judgment in the government's favor. Id. at 472; see Day v. McDonough, 547 U.S. 198, 211 (2006) (explaining that court may consider a threshold procedural bar not pressed by the government where "nothing in the record suggests that the [government] 'strategically' withheld the defense or chose to relinquish it"). The availability of that alternative basis for affirming the court of appeals' judgment further demonstrates that this case is an inappropriate vehicle for addressing the question presented.

2. Petitioner urges the Court (Pet. 26-38) to grant review to address the underlying merits of his APA challenge to the 2007 Interim Rule. This case does not provide a viable vehicle for addressing that issue. In light of their determination that petitioner cannot seek Section 2241 relief at all, neither court below addressed the underlying merits of petitioner's APA argument. And unless this Court were to grant review and hold in favor of petitioner on the threshold question whether Section 2241 relief is available in these circumstances, it likewise would have no occasion to address that merits argument. This Court has

previously denied review of that question, including in connection with petitioner's direct appeal from his 2009 conviction. 562 U.S. 1111 (No. 10-6268); see also Stevenson v. United States, 568 U.S. 930 (2012) (No. 11-10520); Johnson v. United States, 565 U.S. 834 (2011) (No. 10-10330); Dean v. United States, 562 U.S. 1066 (2010) (No. 10-5632); Foster v. United States, 562 U.S. 842 (2010) (No. 09-9247); Gould v. United States, 559 U.S. 974 (2010) (No. 09-6742). Further review is likewise not warranted here.*

* Petitioner observes (Pet. 28 n.2) that the Court granted certiorari (and heard argument earlier this Term) in Gundy v. United States, No. 17-6086 (argued Oct. 2, 2018), on the question whether SORNA's delegation of authority to the Attorney General to issue regulations under 34 U.S.C. 20913(d) violates the nondelegation doctrine. Petitioner correctly does not suggest that this petition should be held pending the Court's decision in that case. Even if the Court were to answer that question in the affirmative, the saving clause would not authorize petitioner to challenge his SORNA conviction in a habeas petition under Section 2241, because constitutional claims of that sort must be raised, if at all, in a second-or-successive motion for postconviction relief under Section 2255. See 28 U.S.C. 2255(h)(2) (authorizing second-or-successive motions based on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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