No.

IN THE

Supreme Court of the United States

LAMONT DEJUAN HIGGS

Petitioner,

v.

WARDEN WILSON,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the saving clause of 28 U.S.C. § 2255(e) allows defendants to seek relief under 28 U.S.C. § 2241 on the grounds that a subsequent statutory interpretation decision, previously unavailable on direct appeal, renders their sentence unlawful.

RULE 14.1(b)(iii) STATEMENT

- *Lamont DeJuan Higgs* v. *United States*, Nos. 3:16-CV-1759-M, 3:13-CR-0461-M (1), United States District Court for the Northern District of Texas. Judgment entered November 30, 2017.
- *Lamont DeJuan Higgs* v. *Wilson*, No. 3:18-CV-2537-M, United States District Court for the Northern District of Texas. Judgment entered November 26, 2018.
- *Lamont DeJuan Higgs* v. *Wilson*, No. 18-11581, United States Court of Appeals for the Fifth Circuit. Judgment entered June 20, 2019.

There are no additional proceedings in any court that are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Lamont Dejuan Higgs respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Fifth Circuit (Pet. App. 1a-3a) is reported at 772 F. App'x 167 (5th Cir. 2019) (mem.). The district court's order denying petitioner's application for a writ of habeas corpus under 28 U.S.C. § 2241 is unreported, but available at 2018 WL 6171706 (Pet. App. 16a-18a). The magistrate judge's recommendation is unreported, but is available at 2018 WL 6174249 (Pet. App. 10a-15a).

JURISDICTION

The Fifth Circuit entered its judgment on June 20, 2019 (Pet. App. 1a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are 18 U.S.C. § 922(g), 21 U.S.C. § 841(a)(2), and 28 U.S.C. §§ 2241 and 2255. They are reproduced at Pet. App. 27a-34a.

INTRODUCTION

As the United States recently informed this Court, "[a]n entrenched conflict exists in the courts of appeals on whether the saving clause [of 28 U.S.C. § 2255(e)] allows a defendant who has been denied Section 2255 relief to challenge his conviction or sentence based on an intervening decision of statutory interpretation." U.S. Pet. for Cert. 23, *United States* v.

Wheeler, 139 S. Ct. 1318 (2019) (No. 18-420), 2018 WL 4846931 (Oct. 3, 2018) ("U.S. *Wheeler* Pet."). This "widespread circuit conflict about the availability of such relief under the saving clause . . . has produced, and will continue to produce, divergent outcomes for litigants in different jurisdictions on an issue of great significance." *Id.* at 12-13. Indeed, the Department of Justice itself has taken inconsistent positions on the scope of the saving clause, initially arguing that relief under the saving clause is unavailable for statutory claims, then embracing the view that inmates can seek relief for statutory-based errors under Section 2255(e), before finally returning to its prior, narrow interpretation. *Id.* at 13. As the United States put it, "[o]nly this Court's intervention can provide the necessary clarity." *Ibid.* The United States is correct that the deep circuit split calls out for this Court to resolve this issue of the proper interpretation of the saving clause, 28 U.S.C. § 2255(e).

Ordinarily, a prisoner has one chance to challenge his confinement: by filing a habeas petition under 28 U.S.C. § 2255(a) within one year of conviction, *id.* § 2255(f). But a prisoner also may file a "second or successive" motion under Section 2255 to urge a reviewing appellate court to consider "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." *Id.* § 2255(h). Additionally, the "saving clause" states that if it "appears" that a Section 2255 motion "is inadequate or ineffective to test the legality of his detention," a prisoner may file a habeas petition under 28 U.S.C. § 2241. *Id.* § 2255(e).

The courts have split in their interpretations of the scope of the saving clause. Some courts have held

that Section 2255 relief is "inadequate or ineffective" under the saving clause when a later statutory interpretation decision determines that the conduct for which the inmate was incarcerated was not actually a criminal offense at all—an "actual innocence" claim—*and* when a later statutory interpretation decision renders an inmate's sentence erroneous. *United States* v. *Wheeler*, 886 F.3d 415 (4th Cir. 2018); *Hill* v. *Masters*, 836 F.3d 591 (6th Cir. 2016); *Brown* v. *Caraway*, 719 F.3d 583 (7th Cir. 2013). Other courts, like the Fifth Circuit below, apply the saving clause to statutory interpretation "actual innocence" claims, but *not* sentencing errors. *See*, *e.g.*, *Gardner* v. *Warden Lewisburg USP*, 845 F.3d 99 (3d Cir. 2017); *Poindexter* v. *Nash*, 333 F.3d 372 (2d Cir. 2003); *Reyes-Requena* v. *United States*, 243 F.3d 893 (5th Cir. 2001). Finally, some courts do not apply the saving clause to any statutory interpretation decisions at all. *McCarthan* v. *Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076 (11th Cir. 2017) (en banc); *Prost* v. *Anderson*, 636 F.3d 578 (10th Cir. 2011).

This petition presents a perfect opportunity for the Court to resolve this split and decide that the saving clause applies to statutory sentencing errors.

STATEMENT OF THE CASE

In June 2014, petitioner Lamont Dejuan Higgs was sentenced in the Northern District of Texas to 151 months' imprisonment for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g) and for possession with intent to distribute a controlled substance in violation of 21 U.S.C. § 841(a)(2). Pet. App. 11a. Since petitioner had two prior Texas-state con-

victions, including a conviction for robbery and a conviction for possession with intent to deliver a controlled substance, a career-offender sentencing guideline was used to enhance his sentence. *See* U.S.S.G. § 4B1.1.

In June 2016, the U.S. Supreme Court decided *Mathis* v. *United States*, 136 S. Ct. 2243 (2016). *Mathis* focused on how a court should determine, in cases where a criminal statute "lists multiple, alternative means of satisfying one (or more) of its elements," the precise character of the crime of which a defendant was previously convicted. *Id.* at 2248. *Mathis* was particularly significant because it clarified the procedures by which sentencing courts determine whether sentencing enhancements, such as the career-offender guidelines, apply in a given case.

Mathis explained that the distinction between means and elements is essential: for sentencing-enhancement purposes, what matter are the *elements* of the crime (and how those elements map onto the corresponding "generic offense" under federal law), not the precise *means* by which the defendant committed the stated offense. *Id.* at 2251–53. To determine whether the listed items in an alternatively phrased statute—that is, a statute that describes multiple ways of committing the same crime—constitute elements or means, a court may look to controlling state authority. *Id.* at 2256.

In August 2016, the Fifth Circuit applied *Mathis* in considering whether a Texas conviction for possession of a controlled substance with intent to deliver could constitute a basis for an enhancement under the career-offender sentencing guideline. *United States* v.

Hinkle, 832 F.3d 569, 576–77 (5th Cir. 2016). At issue in *Hinkle* was the definition of "delivery": On one reading, "delivery" meant "offering to sell," while on another, "delivery" involved actual or constructive "transfer . . . to another [of] a controlled substance." *Id.* at 573.

The Fifth Circuit, citing *Lopez* v. *State*, 108 S.W.3d 293, 299–300 (Tex. Crim. App. 2003), held that the Texas statutory definition of "delivery" was broader than the generic federal offense. *Hinkle*, 832 F.3d at 576. That is, Texas's concept of the offense criminalized a broader range of conduct than the generic federal offense. As a result, prior Texas convictions for possession with intent to deliver a controlled substance could not serve as predicate offenses under the career-offender sentencing guidelines, U.S.S.G. § 4B1.1. *Id.* at 576–77.

Petitioner subsequently challenged his sentence under Section 2255, explaining that, since he had previously been convicted of the offense that now (under *Hinkle*) had been deemed broader than the generic federal offense—and sentenced as a career offender on that basis—he was indisputably serving too long a sentence. Pet. App. 23a. The District Court for the Northern District of Texas rejected his claim as barred by the statute of limitations. Pet. App. 11a. Petitioner then petitioned under Section 2241, relying on the saving clause in Section 2255(e). *Ibid.* The district court, however, held that the saving clause does not apply to sentencing issues. Petitioner pressed his argument on appeal to the Fifth Circuit, invoking the Fourth Circuit's decision in *United States* v. *Wheeler*, 886 F.3d 415 (4th Cir. 2018), explaining that his claim of fundamental sentencing error was cognizable under

Section 2241. The Fifth Circuit rejected his argument, stating that "*Wheeler* is not binding in this circuit." Pet. App. 3a.

At present, following the Fifth Circuit's ruling, petitioner is serving a sentence that is unjust under current law. Were he incarcerated in Virginia, Michigan, or Illinois—within one of the circuits that *have* entertained claims like his under Section 2241—his appeal would likely have produced an altogether different outcome.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit's decision casts in high relief the deep circuit split regarding the saving clause's scope. Petitioner had informed the court below that the Fourth Circuit's decision in *United States* v. *Wheeler*, 886 F.3d 415 (4th Cir. 2018) had held "that fundamental sentencing errors satisfy the savings clause"; but the Fifth Circuit replied simply: "*Wheeler* is not binding in this circuit." Pet. App. 3a. The circuit split on this issue is pervasive and intractable. This petition gives the Court the opportunity to resolve the split and decide whether the saving clause applies to fundamental sentencing errors.

I. THE COURTS ARE INTRACTABLY SPLIT OVER THE SCOPE OF THE SAVING CLAUSE.

1. There exists an entrenched circuit split on the meaning of the saving clause. Three circuits—the Fourth, Sixth, and Seventh—have held that Section 2255(e)'s saving clause allows a prisoner to file a habeas petition under Section 2241 to challenge the lawfulness of his sentence based on an intervening decision of statutory interpretation. *United States* v. *Wheeler*, 886 F.3d 415 (4th Cir. 2018); *Hill* v. *Masters*,

836 F.3d 591, 595-596, 598-600 (6th Cir. 2016); *Brown* v. *Rios*, 696 F.3d 638, 640-641 (7th Cir. 2012). Other circuits have held that the saving clause does not apply to sentencing issues, but does apply to statutory decisions under which the conduct for which the inmate was incarcerated does not constitute a crime. *See*, *e.g.*, *Gardner* v. *Warden Lewisburg USP*, 845 F.3d 99 (3d Cir. 2017); *Poindexter* v. *Nash*, 333 F.3d 372 (2d Cir. 2003); *Reyes-Requena* v. *United States*, 243 F.3d 893 (5th Cir. 2001). Finally, two circuits—the Tenth and Eleventh—have held that Section 2255(e) does not allow any relief under 2241 based on an intervening decision of statutory interpretation. *McCarthan* v. *Director of Goodwill Indus.-Suncoast, Inc*., 851 F.3d 1076 (11th Cir. 2017) (en banc); *Prost* v. *Anderson*, 636 F.3d 578 (10th Cir. 2011). The Court now has the opportunity to resolve this tripartite divide.

The circuits recognizing the availability of relief for intervening statutory-interpretation decisions have explained in detail the statutory logic and prudential considerations underlying such a rule. In *Brown*, the Seventh Circuit held that a prisoner could challenge his sentence in a Section 2241 petition where an intervening statutory-interpretation decision altered the basis on which he was sentenced as a career offender under the Guidelines. 719 F.3d at 595–96. The Seventh Circuit reasoned that at the time of his conviction, "binding precedent foreclosed Brown's argument" and as a result "§ 2255 would provide an inadequate or ineffective remedy." *Ibid.* That is, the hypothetical possibility that Brown could have *initially* raised the same argument he later sought to press in a Section 2241 petition—at a time when that

argument was *foreclosed*—was not an adequate or effective option. Any such argument would have amounted to tilting at a windmill.

The Sixth Circuit echoed that general conclusion three years later in *Hill* v. *Masters*, 836 F.3d 591 (6th Cir. 2016). The *Hill* court carried the argument one step further, stressing the real-world importance of making Section 2241 relief available. "To require that Hill serve an enhanced sentence as a career offender, bearing the stigma of a 'repeat violent offender' and all its accompanying disadvantages, is a miscarriage of justice where he lacks the predicate felonies to justify such a characterization." *Id.* at 600. For a prisoner seeking relief from his now-unlawful Guidelines sentence, the proper route to a remedy was a Section 2241 petition; closing off such recourse would work an injustice.

Finally, last year, the Fourth Circuit ruled that the saving clause "must provide an avenue for prisoners to test the legality of their sentences pursuant to § 2241." *United States* v. *Wheeler*, 886 F.3d 415, 428 (4th Cir. 2018). The *Wheeler* court correctly noted that since "the Supreme Court has long recognized a right to traditional habeas corpus relief based on an illegally extended sentence," it made little sense to restrict the saving clause to "'testing the legality of the underlying criminal conviction.'" *Id.* (quoting *Brown*, 719 F.3d at 588). Where fundamental Guidelines sentencing errors are present, prisoners have the right to bring that claim before a court.

In so deciding, the Fourth, Sixth, and Seventh Circuits recognized an elementary, commonsense axiom of law: Where prior, erroneous interpretations of law

entailed that prisoners were sentenced to terms that were too long, prisoners should be able to argue that their sentences should be adjusted.

The Tenth and Eleventh Circuits, on the other hand, have reached the opposite conclusion. In *Prost* v. *Anderson*, defendant Prost filed a habeas petition under Section 2241 in the wake of an intervening decision reinterpreting the statute under which he was convicted, arguing that his petition was proper since a petition under Section 2255 would be inadequate or ineffective to test the legality of his confinement. 636 F.3d 578, 580–82 (10th Cir. 2011). Specifically, prior to the intervening statutory-interpretation decision, the particular argument Prost brought in his petition would have been squarely foreclosed by prior circuit precedent. *Id.* at 590.

That was not good enough for the Tenth Circuit. In the court's telling, it simply did not matter that Prost's new statutory-interpretation argument based on the intervening decision—the one he sought to press in his Section 2241 petition—"likely would have been rejected on the merits at the district court and circuit panel levels because of adverse circuit precedent, leaving him with only *en banc* and certiorari petitions to try to undo that precedent." *Id.* at 590. In other words, in order to have his claim for relief considered, Prost was required to present an argument *totally barred by controlling circuit precedent*, on the off chance that the precedent might be reversed. For the Tenth Circuit, the bare *possibility* of relief being granted by some higher body on Prost's theory—notwithstanding the fact that his theory was expressly foreclosed by controlling authority at the time—meant that a Section 2255 motion would have been an

adequate vehicle for raising that claim previously. *Id.* at 589–90.

Six years later, a sharply divided *en banc* decision out of the Eleventh Circuit adopted *Prost*'s conclusion, opining that "[i]t is unclear why the chance to have precedent overruled en banc or by the Supreme Court would not qualify as a theoretically successful challenge or meaningful opportunity. . . . A test often failed can nevertheless be an adequate test." *McCarthan* v. *Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1087 (11th Cir. 2017) (en banc). With that, the Eleventh Circuit effectively slammed the door shut on claims for relief under Section 2241—and deepened the circuit split that already existed.

2. As the United States has repeatedly informed this Court, this entrenched circuit split requires the Court's swift intervention.

The United States on several occasions has emphasized that this Court should resolve this "widespread circuit split." U.S. *Wheeler* Pet. 12. "An entrenched conflict exists in the courts of appeals on whether the saving clause allows a defendant who has been denied Section 2255 relief to challenge his conviction or sentence based on an intervening decision of statutory interpretation." *Id.* at 23; *see ibid.* ("The courts of appeals are divided about whether Section 2241 relief is available under the saving clause based on a retroactive decision of statutory construction."). "The conflict on the scope of the saving clause has produced, and will continue to produce, divergent outcomes for litigants in different jurisdictions on an issue of great significance." *Id.* at 13. "[G]iven the

significance of the issue," the United States has repeatedly told this Court, "this Court's review would be warranted in an appropriate case." Br. in Opp. at 25, *McCarthan*, *supra* (No. 17-85).

Indeed, the United States itself has taken different positions on the issue. In 1998, the Department of Justice asserted that relief under the saving clause is not available for statutory claims. *See* U.S. *Wheeler* Pet. 13. The United States then changed its position, taking the view that inmates *do* have the ability to seek successive relief under Section 2255(e) for statutory errors. *See ibid.* And the United States recently switched positions *again*, asserting that statutory interpretation decisions as a whole are ineligible for saving clause relief. *See ibid.*

Moreover, as the United States has explained, the existence of the circuit split leads to irrational and unjustly varied outcomes. "The disparate treatment of identical claims is particularly problematic because habeas petitions are filed in a prisoner's district of confinement," which "mean[s] that the cognizability of the same prisoner's claim may depend on where he is housed by the Bureau of Prisons and may change if the prisoner is transferred." U.S. *Wheeler* Pet. 25. "Only this Court's intervention can ensure nationwide uniformity as to the saving clause's scope." *Id*. at 25-26.

Given this widespread circuit split, this Court should grant review to resolve the disagreement among the circuits.

II. THIS CASE PRESENTS AN EXCELLENT OPPORTUNITY FOR ADDRESSING WHETHER THE SAVING CLAUSE APPLIES TO STATUTORY SENTENCING ERRORS.

This petition cleanly presents the question whether the saving clause applies to sentencing issues, in particular errors involving the sentencing Guidelines. This petition thus presents the perfect companion case to another petition that is currently pending before the Court, which deals with sentencing enhancements under the Armed Career Criminal Act ("ACCA"). Petition for Certiorari 25, *Walker* v. *English* (No. 19-52) (July 8, 2019). That petition presents an ideal vehicle for considering the application of the saving clause to ACCA errors. *Wheeler*, however, involved a guidelines error, not an ACCA error. As a result, a grant of certiorari in *Walker*, and a subsequent decision that Section 2241 relief is available to prisoners whose sentences were enhanced under the ACCA, will not decisively resolve the current split. Granting this case alongside *Walker*, on the other hand, will ensure that the entire split is resolved.

This Court often grants alongside one another cases that are valuable companions to each other. For example, the Court granted certiorari in both *United States* v. *Fanfan*, 542 U.S. 956 (2004), and *United States* v. *Booker*, 543 U.S. 220 (2005). *Booker* presented a constitutional challenge to the federal sentencing guidelines, and *Fanfan* presented the question whether the offending portions of the guidelines were severable. *See id*. at 267. Hearing the two cases together allowed the Court to resolve all the relevant questions at the same time, rather than piecemeal. *See id*. at 229. Similarly, the Court granted certiorari

in *Gratz* v. *Bollinger*, 539 U.S. 244 (2003), to hear the case together with *Grutter* v. *Bollinger*, 539 U.S. 306 (2003). While *Grutter* involved an equal-protection challenge to the admissions policy at University of Michigan's law school, *Gratz* involved a similar challenge to the University's policy for admitting undergraduates. *Gratz* thus allowed this Court to "address the constitutionality of the consideration of race in university admissions in a wider range of circumstances." 539 U.S. at 359-60. The Court should do the same here.

It is no barrier to review that in this case, petitioner was sentenced after the federal sentencing guidelines were rendered advisory rather than mandatory. The question here is whether relief is available under the saving clause for defendants who seek to challenge an application of the Sentencing Guidelines on the grounds that a subsequent statutory-interpretation decision previously unavailable on direct appeal renders their sentence unlawful. *Cf. United States* v. *Williamson*, 183 F.3d 458, 462 (5th Cir. 1999) (emphasis added) ("Section 2255 motions may raise only constitutional errors and other injuries that *could not have been raised on direct appeal that will result in a miscarriage of justice if left unaddressed*."). That is precisely what is at issue in this case—the proper way for petitioner to apprise a reviewing court of a decision interpreting Texas law that he could not have raised on direct appeal. Section 2241 is the

proper avenue for presenting this issue, and this case gives the Court the opportunity to say so.[1]

And even if this petition were not cert-worthy on its own, granting this petition alongside *Walker* would allow this Court to address the full scope of the saving clause. *See* U.S. *Wheeler* Pet. 28 (urging this Court to grant a second question that "would not independently warrant this Court's review" alongside the first to allow full consideration of the issue). By granting certiorari in this case alongside *Walker*, the Court may directly address the circuit split in the context of intervening statutory-interpretation decisions that impact sentencing guidelines calculations. This case is the best vehicle to confront this ongoing issue—particularly when paired with *Walker*, which addresses the same issue in the context of the ACCA.

III. THIS COURT SHOULD INTERPRET 28 U.S.C. § 2241 TO PERMIT CHALLENGES TO THE LAWFULNESS OF SENTENCES.

Allowing prisoners access to relief under Section 2241 in the event of an intervening statutory interpretation decision is a matter of common sense and is most consistent with the text of the statute.

A. The Minority Rule Ignores Obvious Realities Of The Appeal Process.

The minority rule of *Prost* and *McCarthan* holds that even where a prisoner's "argument likely would

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[1] Nor is there anything unusual about the posture of this petition. This court has granted numerous cases from identical orders. *See*, *e.g.*, *Coppedge* v. *United States*, 369 U.S. 438 (1962); *Farley* v. *United States*, 354 U.S. 521 (1957); *Johnson* v. *United States*, 352 U.S. 565 (1957).

have been rejected on the merits at the district court and circuit panel levels because of adverse circuit precedent, leaving him with only *en banc* and certiorari petitions to try to undo that precedent," *Prost*, 636 F.3d at 590, a motion under Section 2255 is still not "inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e).

That argument requires willful blindness to the realities of the appellate process. The Federal Rules of Appellate Procedure explain that "en banc hearing or rehearing is *not favored* and *ordinarily will not be ordered*," except where "uniformity of the court's decisions" or "a question of exceptional importance" is at stake. Fed. R. App. P. 35 (emphases added). An appeal urging the court to overturn existing circuit precedent—an argument for *disrupting* the uniformity of the court's decisions—is rarely likely to fit this description. Moreover, for the court term spanning 2017–18, the Fifth Circuit granted less than five percent of the petitions for rehearing *en banc* it entertained. U.S. Court of Appeals, Fifth Circuit, *Clerk's Annual Report July 2017-June 2018* at 31 (2018), http://www.ca5.uscourts.gov/docs/default-source/default-document-library/2018-annual-report-public.pdf?sfvrsn=2.

This Court's Rules, too, specify that "compelling reasons" are required to trigger the Court's review, and make clear that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. An appeal stemming from facts like those in petitioner's case—a sentencing court's erroneous determination

that the career-offender designation applied—is exactly the type of case this Court typically *declines* to take up. Moreover, this Court typically grants less than three percent of the petitions for certiorari it receives—reducing petitioner's chances of success even further. Supreme Court Press, *Success Rate of a Petition for Writ of Certiorari to the Supreme Court* (2018), https://supremecourtpress.com/chance_of_success.html.

The government knows this full well—or, at least, knew it at one point. In a Fourth Circuit brief filed in 2016, the government rejected the notion of "[r]eading Section 2255(e) to bar habeas review when a prisoner had a mere theoretical opportunity to raise a claim, even though foreclosed by circuit precedent." U.S. Reh'g Supp. Br. 39, *United States* v. *Surratt*, No. 14-6851 (4th Cir. Feb. 2, 2016). The reason was simple: "A defendant whose claim is foreclosed by controlling circuit law cannot readily 'test' his claim" because "only rare and discretionary action by the en banc court or the Supreme Court can alter the law." *Id.* at 30.

B. The Minority Rule Violates Fundamental Principles Of Statutory Interpretation.

What's more, despite much talk of Congress's purpose and concerns, the minority rule of *Prost* and *McCarthan* violates the fundamental principle that Congress does not write surplusage into its statutes. *See* Antonin Scalia & Bryan A. Garner, *Reading Law* 174 (2012) (emphasis added) ("If possible, every word and every provision is to be given effect. . . . None should needlessly be given an interpretation that

causes it to duplicate another provision *or to have no consequence*."). *Prost* and *McCarthan* would read the saving clause so narrowly as to render it essentially a nullity, in contravention of this core tenet of statutory interpretation.

It is not enough to simply declare, as the *Prost* and *McCarthan* courts did, that the saving clause does not apply where a prisoner *could* have raised an argument obviously foreclosed by controlling precedent. Taking Congress's directives seriously requires providing an account of what the saving clause is *for*—that is, under what circumstances it would be appropriate for a defendant to obtain relief via that clause. But the inner logic of *Prost* and *McCarthan* absolutely defeats any account of what Section 2241 actually does.

In particular, the *Prost* court left undisturbed prior precedents (1) approving the use of a Section 2241 petition to test a sentence where multiple district courts had disclaimed jurisdiction over a Section 2255 petition stemming from a defendant's conviction in a territorial court, *Spaulding* v. *Taylor*, 336 F.2d 192, 193 (10th Cir. 1964); and (2) approving the use of a Section 2241 petition to challenge a military conviction, *Ackerman* v. *Novak*, 483 F.3d 647, 649 (10th Cir. 2007).

But under *Prost* and *McCarthan*'s logic, it is unclear how those prior precedents could persist. Why not, for instance, require *Spaulding*'s defendant to press his jurisdictional argument in a Supreme Court appeal? Why not require *Ackerman*'s defendant to challenge his military conviction in a direct petition to

the Supreme Court? After all, as *Prost* and *McCarthan* asserted, it is always *hypothetically* possible that a higher body would reverse itself. If that is indeed the rule, and the reasoning of *Prost* and *McCarthan* is taken to its logical conclusion, consistent application would effectively make the saving clause of Section 2255 into a dead letter. No Section 2255 petition would ever be "inadequate or ineffective" to raise a particular claim.

That cannot be the law. Congress did not write the saving clause so that no one could ever avail themselves of its safeguards. In taking such a restrictive line, with no obvious limiting principle, *Prost* and *McCarthan* effectively read the saving clause out of the U.S. Code.

Taking the statutory text seriously requires providing an account of when relief *is* available under the saving clause. And the circumstances of this case—which involve intervening statutory interpretation decisions that render a sentence unlawful—present a logical basis for that relief.

C. The Minority Rule Demands The Proliferation of Ostensibly "Frivolous" Legal Arguments.

The minority rule of *Prost* and *McCarthan*, in addition to being unworkable as both a practical and theoretical matter, is also not feasible as a matter of judicial and professional responsibility. In essence, *Prost* and *McCarthan* demand that litigants, to receive a fair hearing on their claims under Section 2255, must in the first instance raise arguments they know to be foreclosed by controlling circuit precedent. This rule would necessitate a burdensome kitchen-

sink approach to Section 2255 litigation. Litigants under the minority rule—both those represented by counsel and those proceeding pro se—would have a powerful incentive to press as many unrelated and precedentially barred arguments as possible into their habeas filings, wholly irrespective of whether those arguments have real merit. Sifting through this morass of new arguments would impose needless administrative burdens on the judicial process.

Second, the minority rule tests the boundaries of professional responsibility. It is hornbook law that "[e]thical considerations and rules of court prevent counsel from . . . advancing frivolous or improper arguments . . . . An attorney, whether appointed or paid, is therefore under an ethical obligation to refuse to prosecute a frivolous appeal." *McCoy* v. *Court of Appeals of Wisconsin, Dist. 1*, 486 U.S. 429, 435–36 (1988); *see also Polk County* v. *Dodson*, 454 U.S. 312, 323 (1981) ("It is the obligation of any lawyer—whether privately retained or publicly appointed—not to clog the courts with frivolous motions or appeals.").

But the *Prost/McCarthan* rule dictates that litigation tactics that were once considered "frivolous" are now the *sole* and *appropriate* means of securing collateral relief where an intervening change in law subsequently transpires. This puts lawyers to a Hobson's choice: If they zealously advocate for their incarcerated clients under the terms of *Prost* and *McCarthan*, they risk violating their professional duty to present nonfrivolous claims. That is an unacceptable result.

And it is not a necessary result. *Prost* and *McCarthan* departed from the commonsense principle laid down in *Brown*, *Hill*, and *Wheeler* that statutory text

means what it says, and that prisoners really do have a right to challenge their sentences under Section 2241 where a motion under Section 2255 would prove inadequate or ineffective in the real world. The Court need only affirm that principle to resolve the longstanding split.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari alongside the petition for certiorari in *Walker*.

Respectfully submitted.

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