No. 21-763

In the Supreme Court of the United States

JOHN FORREST HAM, JR., PETITIONER,

v.

WARDEN M. BRECKON.

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

BRIEF FOR *AMICUS CURIAE* HOWARD UNIVERSITY SCHOOL OF LAW CIVIL RIGHTS CLINIC IN SUPPORT OF PETITIONER

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BRIEF FOR *AMICUS CURIAE* HOWARD UNIVERSITY SCHOOL OF LAW CIVIL RIGHTS CLINIC IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE[1]

Howard University School of Law is the nation's first historically Black law school. For more than 150 years since its founding during Reconstruction, the law school has worked to train "social engineers" devoted to the pursuit of human rights and racial justice. As part of this mission, the Howard University School of Law's Civil Rights Clinic advocates on behalf of clients and communities fighting for the realization of civil rights guaranteed by the U.S. Constitution. The Clinic has a particular interest in eradicating racial disparities in the criminal justice system and dismantling unjust laws and policies that contribute to mass incarceration and the prison industrial complex.

SUMMARY OF ARGUMENT

The question presented in this case may at first appear narrow and technical, but it goes to the heart of the fairness and integrity of the criminal justice system: Can a federal prisoner detained without any statutory basis challenge the legality of his detention where the primary federal post-conviction review statute, 28 U.S.C. § 2255, has never provided him a meaningful opportunity to test it? The Fifth, Tenth, and Eleventh Circuits have held that

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or entity other than amicus curiae and its counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to this filing.

a federal prisoner cannot raise that claim other than by invoking this Court's original habeas jurisdiction. The majority of other circuits, by contrast, allow federal prisoners to challenge unauthorized convictions or sentences through the so-called "saving clause" in Section 2255(e). In the decision below, the Fourth Circuit adopted a halfway approach based on an atextual gloss on the saving clause: The panel would allow a prisoner to invoke the clause to challenge an unlawful sentence, but only where the prisoner's claim is based on intervening precedent that changes, rather than merely clarifies, the law.

Amicus submits this filing not to retrace the obvious circuit conflict, but to illustrate the degree to which the decisions precluding the use of Section 2255(e) in cases like this one contravene the text, history, and purpose of Section 2255. Since the 1800s, Congress has taken care to ensure that federal habeas review provides defendants a meaningful opportunity to challenge unlawful convictions or sentences. The enactment of Section 2255 in 1948 furthered this goal by addressing the practical complications that arose when federal prisoners challenged their convictions and sentences in their districts of confinement. In addressing these problems, Congress sought to "strengthen, rather than dilute," federal collateral review, and thus included the saving clause in Section 2255 to ensure that no meritorious claims would slip through any newly created cracks and raise constitutional concerns with the new regime. *Boumediene v. Bush*, 553 U.S. 723, 776 (2008).

Congress did not alter Section 2255's basic aim when revising it as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). AEDPA imposed some new restrictions on federal prisoners' ability to file multiple Section 2255 motions challenging their convictions and sentences. *See* 28 U.S.C. § 2255(h). But those

restrictions merely codified common law doctrines designed to prevent the "abuse of the writ" by sandbagging or repeated relitigation of the same claims. *Felker v. Turpin*, 518 U.S. 651, 664 (1996). Indeed, Congress expressly allowed federal prisoners to file successive petitions challenging the fundamental legality of their convictions or sentences, whether through new evidence of factual innocence, 28 U.S.C. § 2255(h)(1), or a new, retroactive rule of constitutional law, *id.* § 2255(h)(2). And Congress recodified the saving clause as a new statutory subsection, leaving open a safety valve for federal prisoners "to test the legality of [their] detention" where Section 2255, as revised, proved "inadequate or ineffective"—including where they had been "denied . . . relief" on an earlier Section 2255 motion. 28 U.S.C. § 2255(e). Section 2255 thus continues to reflect the core function of habeas review: ensuring that prisoners have a "meaningful opportunity" to challenge fundamentally unlawful convictions or sentences. *Trevino v. Thaler*, 569 U.S. 413, 428 (2013); *see Martinez v. Ryan*, 566 U.S. 1 (2012).

Petitioner's claim is precisely the type of claim that Congress intended to save with Section 2255(e). It is an attack on the fundamental legality of his detention that would raise substantial constitutional concerns if unaddressed. When this Court issues a decision narrowing the scope of a criminal statute, it is clarifying what the statute has meant since the time of enactment, eliminating the legal authority for the convictions or sentences of a subset of federal prisoners. Denying those prisoners an opportunity to contest the legality of their detention at all—or, as the Fourth Circuit ruled, because of a semantic distinction between a changed rule and an outcome-determinative clarification of an existing rule—would raise substantial "constitutional questions," *Boumediene*, 553 U.S. at 776 (quotations omitted), including separation of powers problems raised by the detention of individuals

without legal support, and due process concerns presented by the incarceration of the innocent.

Further, Section 2255's text and structure effectively foreclose review of such claims where, as here, they were previously precluded by precedent. Because of that adverse case law, Petitioner had no meaningful opportunity to challenge the legality of his detention in his initial Section 2255 motion (or, for that matter, on direct appeal)—and he cannot now raise the claim in a Section 2255 motion because of the statute's general bar on successive motions. It is therefore unsurprising that the federal government agrees that these claims fall within the heartland of the saving clause, *see* Pet. 25, 9a: The remedy under Section 2255 is plainly "inadequate or ineffective to test the legality of . . . detention." 28 U.S.C. § 2255(e).

It is equally evident that the Fourth Circuit's "change" versus "clarification" approach has no basis in the statutory text or history. The Court should grant review to ensure that Section 2255(e)—and Section 2255 more generally—operate as Congress intended throughout the country.

ARGUMENT

I. The History Of Section 2255 Confirms That Congress Intended To Provide Individuals In Federal Custody A Meaningful Opportunity To Challenge Their Convictions Or Sentences.

Throughout the Nation's history, Congress has taken "care . . . to preserve the writ [of habeas corpus] and its function." *Boumediene*, 553 U.S. at 773. Over the years, the federal habeas statutes have evolved to "ensure that proper consideration [i]s given to a substantial claim," *Martinez*, 566 U.S. at 14. Section 2255 fits seamlessly into that history—it was designed to "strengthen, rather than dilute," federal habeas review. *Boumediene*, 553 U.S. at 776.

1. The history of federal habeas law prior to Section 2255's enactment reveals a consistent expansion of the writ to permit challenges to unlawful restraint and confinement. At the founding, federal habeas review had a narrow reach. The Judiciary Act of 1789 permitted federal courts to grant habeas relief only to federal prisoners. *See McCleskey v. Zant*, 499 U.S. 467, 477-78 (1991). And the scope of review was defined by reference to the common law, at which "a judgment of conviction . . . was conclusive proof that confinement was legal." *United States v. Hayman*, 342 U.S. 205, 211 (1952). Federal courts therefore did not review all claimed errors, but considered only whether the court that issued the judgment "'ha[d] general jurisdiction of the subject.'" *Wainwright v. Sykes*, 433 U.S. 72, 78 (1977) (quoting *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830) (Marshall, C.J.)).

Over the years, both the Court and Congress broadened the writ's reach. In 1867, Congress made federal habeas "available to one held in state as well as federal custody," *Wainwright*, 433 U.S. at 78, empowering district courts to grant relief "'in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States.'" *Felker*, 518 U.S. at 659 (quoting Act of Feb. 5, 1867, ch. 28, 14 Stat. 385). For its part, the Court steadily "expand[ed] the availability of habeas relief beyond attacks focused narrowly on the jurisdiction of the sentencing court." *Wainwright*, 433 U.S. at 79. One particularly notable expansion was permitting prisoners to claim that there was no legal authority supporting their convictions. *See Ex parte Siebold*, 100 U.S. 371, 376-77 (1879) (claim that statute of conviction is unconstitutional is "proper for consideration on *habeas corpus*" because "[a]n offence created by [an unconstitutional law] is not a crime").

This trend toward broadening habeas relief had the effect of "'substitut[ing] for the bare legal review that seems

to have been the limit of judicial authority under the common-law practice . . . a more searching investigation . . . into the very truth and substance of the causes of [a prisoner's] detention.'" *Hayman*, 342 U.S. at 211 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 466 (1938)). In 1942, the Court finally "discarded the concept of jurisdiction," allowing review of all claims of "'disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights.'" *Wainwright*, 433 U.S. at 79 (quoting *Waley v. Johnston*, 316 U.S. 101, 104-05 (1942)). The purpose of such review, this Court later explained, was "to afford a swift and imperative remedy in *all cases* of illegal restraint upon personal liberty." *Price v. Johnston*, 334 U.S. 266, 283 (1948) (emphasis added).

One practical aspect of federal habeas did not change during this period: Federal prisoners typically filed habeas petitions in the districts where they were confined. *See Hayman*, 342 U.S. at 213 ("[A] habeas corpus action must be brought in the district of confinement."); *In re Davenport*, 147 F.3d 605, 608 (7th Cir. 1998) (before Section 2255, federal prisoners "had to file a petition for habeas corpus in the district . . . in which they were imprisoned").

2. When Congress enacted 28 U.S.C. § 2255 in 1948, it did not seek to limit the post-conviction remedies available to federal prisoners. It instead sought to solve a practical problem: Because "[f]ederal prisons were concentrated in a few districts, . . . the district judges in these districts were flooded with petitions." *Davenport*, 147 F.3d at 608-09; *see Hayman*, 342 U.S. at 213-14 (noting that a small number of federal courts had to "handle an inordinate number of habeas corpus actions"). Further, evaluating these applications proved to be a complicated task, because "the witnesses and the records of the sentencing court" were "not readily available to the habeas corpus court." *Hayman*, 342 U.S. at 213-14.

Congress ultimately adopted a "practical" solution for these "practical difficulties." *Hayman*, 342 U.S. at 219. Initially, the Judicial Conference of the United States proposed two methods of addressing the frequency and concentration of habeas petitions: a "procedural bill" designed to prevent abuses of the writ, and a "jurisdictional bill" allowing federal prisoners to collaterally attack their convictions in the sentencing court. *Id.* at 215. The Conference transferred these bills to Congress in 1944, along with a statement explaining that the jurisdictional bill was "intended to be as broad as habeas corpus." *Id.* at 217. The House of Representatives subsequently adopted one section of the jurisdictional bill as part of its ongoing revision of the entire Judicial Code. That section, 28 U.S.C. § 2255, was designed to "provide[] an expeditious remedy for correcting erroneous sentences without resort to habeas corpus." *Hayman*, 342 U.S. at 218 (citing H.R. Rep. No. 2646, 79th Cong., 2d Sess. (1946) A172; H.R. Rep. No. 308, 80th Cong., 1st Sess. (1947) A180).

This history confirms that Congress's "purpose and effect" in enacting Section 2255 "was not to restrict access to the writ but to make postconviction proceedings more efficient." *Boumediene*, 553 U.S. at 775. This Court said as much shortly after Section 2255's enactment: "Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions. On the contrary, the sole purpose 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 court has repeated the point many times since. *See Hill v. United States*, 368 U.S. 424, 427 (1962) (Section 2255 is "exactly commensurate" with preexisting federal habeas corpus remedy); *see also Boumediene*, 553 U.S. at 776.

Congress's decision to include the saving clause in Section 2255 was part and parcel of its goal of "strengthen[ing],

rather than dilut[ing], the writ's protections." *Boumediene*, 553 U.S. at 776. The clause ensured "that a writ of habeas corpus would be available if the alternative process proved inadequate or ineffective." *Id.*; *see Hayman*, 342 U.S. at 223 (same); *Davenport*, 147 F.3d at 609 (saving clause is "a safety hatch" for situations where Section 2255 is "not . . . an adequate substitute for habeas corpus."). This "safety hatch" had the further benefit of forestalling the constitutional infirmities that could arise if Section 2255 precluded a prisoner from raising a fundamental defect in "the legality of his detention." 28 U.S.C. § 2255 (1964 ed.); *see Boumediene*, 553 U.S. at 776 ("The Court placed explicit reliance upon [the saving clause] in upholding [Section 2255] against constitutional challenges."); *Hayman*, 342 U.S. at 223 (declining to "reach constitutional questions" regarding Section 2255 based on presence of saving clause).

Section 2255 did allow sentencing courts to decline "to entertain a second or successive motion for similar relief on behalf of the same prisoner," 28 U.S.C. § 2255 (1964 ed.), but that restriction was not designed to foreclose review of challenges to the fundamental legality of a prisoner's conviction or sentence. "At common law, res judicata did not attach to a court's denial of habeas relief," meaning that prisoners could continue to raise the same claims time and again. *McCleskey*, 499 U.S. at 479. The courts therefore developed the "abuse of the writ" doctrine to limit the burdens created by limitless relitigation of the same claims, *see, e.g.*, *Sanders v. United States*, 373 U.S. 1, 18 (1963), or situations where a petitioner "deliberately withholds" a ground of relief "in the hope of being granted two hearings rather than one," *id.* The limitation on successive petitions in Section 2255 codified the existing state of the abuse of the writ doctrine and was "not intended to change the law as judicially evolved," *id.* at 10-11. After all, the Court warned, if Section 2255 created "substantial procedural

hurdles" not previously present, "the gravest constitutional doubts would be engendered." *Id.* at 14.

3. Congress's decision to revise Section 2255 as part of AEDPA likewise did not change the focus of post-conviction proceedings for federal prisoners. The revised statute imposed "certain gatekeeping provisions that restrict a prisoner's ability to bring new and repetitive claims," *Boumediene*, 553 U.S. at 774—most relevant, a general bar on "second or successive" motions under Section 2255. 28 U.S.C. § 2255(h). But these provisions simply represented further evolution of the "abuse of the writ" doctrine. *Felker*, 518 U.S. at 664; *see McCleskey*, 499 U.S. at 503 (applying "cause and prejudice" standard to claims first presented in a second or successive habeas petition). So here too, the restrictions on successive petitions "did not constitute a substantial departure from common-law habeas procedures." *Boumediene*, 553 U.S. at 774.

The express exceptions to the general bar on successive motions confirm that Congress was not trying to fundamentally alter the post-conviction remedies available to federal prisoners. Section 2255(h) ensured that federal prisoners would always have an avenue to pursue two types of commonly raised claims affecting the fundamental legality of their sentences: claims based on new evidence of innocence, 28 U.S.C. § 2255(h)(1), and claims based on new and retroactive rules of constitutional law, *id.* § 2255(h)(2). In these two circumstances, prisoners could raise those claims regardless whether they had previously filed a motion under Section 2255.

One reason Congress may have included only those two express exceptions to the general second or successive bar is that it "appears to have modeled § 2255(h)(2) on § 2244(b), which governs second and successive collateral attacks by state prisoners." *Chazen v. Marske*, 938 F.3d 851, 863 (7th Cir. 2019) (Barrett, J., concurring). *See id.*

"Congress seems to have lost sight of the fact that federal convicts more often can raise federal *statutory* claims in their collateral attacks—notably in cases in which the federal criminal statute under which a prisoner was convicted has since been authoritatively interpreted more narrowly." *Chazen*, 938 F. 3d at 863 (quoting Hart & Wechsler's The Federal Courts and the Federal System 1362 (Richard H. Fallon, Jr. et al. eds., 7th ed. 2015)). After all, in the context of federal habeas petitions brought by state prisoners, it would be exceedingly uncommon for federal *statutory* questions to present a basis for relief.

Another possible reason for the absence of a third express exception for claims based on the narrowing of a criminal statute is that the doctrine of so-called statutory retroactivity was then far less developed, and claims based on the doctrine much less common. Indeed, the Court's leading decisions explaining the retroactive effects of a narrowed interpretation of a criminal statute were issued after AEDPA's enactment, *see Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004); *Bousley v. United States*, 523 U.S. 614, 620-21 (1998), and generally relied on civil decisions issued shortly before, *see Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312-13 (1994).

But while Congress may not have expressly opened the door to such claims, it did not lock the door either. Congress retained the saving clause, codifying it unchanged as a new Section 2255(e). *See Davenport*, 147 F.3d at 608 ("Congress did not change th[e] language [of the saving clause] when in the Antiterrorism Act it imposed limitations on the filing of successive [Section] 2255 motions."). As explained above, that statutory provision serves as an outlet for other fundamental challenges (like Petitioner's, *see infra* at 14-17), that, if unaddressed, would raise substantial constitutional concerns regarding Section 2255. *See supra* at 8-9; *Davenport*, 147 F. 3d at 608. And critically, the text of the saving clause preserves this outlet even

where "the court which sentenced [a prisoner] . . . has denied him relief" by "motion pursuant to this section"—in other words, where the challenge to the "legality of his detention" is a second or successive challenge. 28 U.S.C. § 2255(e).

4. Several of this Court's recent decisions further confirm that AEDPA was not designed to foreclose "proper consideration [of] a substantial claim." *Martinez*, 566 U.S. at 14. Ordinarily, negligence by counsel in state post-conviction proceedings does not constitute "cause" sufficient to allow a defendant to present a procedurally defaulted claim on federal habeas review. *Id.* at 10. In *Martinez*, however, the Court carved out a narrow exception to that rule in situations where state law precludes defendants from raising claims of ineffective assistance of trial counsel before post-conviction proceedings. *Id.* "When an attorney errs in initial-review collateral proceedings," the Court held, "it is likely that no state court at any level will hear the prisoner's claim." *Id.* The Court therefore concluded that ineffective (or nonexistent) assistance from counsel in those "initial-review" proceedings could serve as "cause" excusing the procedural default of a "substantial" trial-ineffectiveness claim. *Id.* at 14. In so holding, the Court expressly rejected an argument that a statutory provision added by AEDPA foreclosed consideration of such claims. *Id.* at 17.

The very next Term, this Court made clear that the *Martinez* exception also applies where a state technically permits defendants to raise ineffective assistance of counsel claims on direct appeal, but through a process that is "difficult, and in the typical case all but impossible, to use successfully." *Trevino*, 569 U.S. at 427. The Court began its analysis by underscoring the "historic importance of federal habeas corpus proceedings as a method for preventing individuals from being held in custody in violation of federal law." *Id.* at 421 (citing *Martinez*, 566 U.S. at 9-10). It then

explained why Texas's procedure for raising ineffective assistance of counsel claims on appeal failed to "afford[] meaningful review" of such claims. *Id.* at 425. The details of the procedural deficiencies are not of particular relevance here; what matters is the Court's bottom line. Because the state appellate procedure did "not offer most defendants a *meaningful opportunity* to present a claim of ineffective assistance of trial counsel" before post-conviction review, there was "no significant difference [from] *Martinez*." *Id.* at 428 (emphasis added).

Martinez and *Trevino* of course arose in a different procedural context, but that only strengthens their persuasive force. Both decisions involved federal habeas review of *state* court convictions—a dynamic that this Court has suggested implicates federalism concerns counseling in favor of more limited review by federal courts. *Martinez*, 566 U.S. at 9-10. But even in that context, the Court held that federal habeas review must afford prisoners a "meaningful opportunity" to challenge the legality of their convictions or sentences. *Trevino*, 569 U.S. at 428.

II. The Decision Below Contravenes The Text, History, And Purpose Of The Saving Clause.

As the foregoing history makes clear, the saving clause is a critical part of Section 2255. It preserves review for challenges to the "legality of . . . detention" that are not adequately or effectively addressed by Section 2255, and so obviates any constitutional infirmity in the statute. Petitioner's claim falls squarely within the saving clause: He asserts (and the federal government agrees) that his sentence exceeds the maximum authorized by law—a claim that would raise substantial constitutional concerns if unaddressed—and Section 2255 has never provided him a meaningful opportunity to challenge it. To hold otherwise is to deprive the saving clause of all meaning.

1. Petitioner's Claim Falls Within The Saving Clause.

1. The claim that Petitioner seeks to raise—and that the Fourth Circuit foreclosed from review—is that his unlawful sentence must be remedied in light of a statutory interpretation decision from this Court. *See Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). In *Mathis*, this Court interpreted the scope of predicate offenses, such as a violent felony, under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). *Id.* As the parties appear to agree, *Mathis* makes clear that Petitioner's sentence is unlawful.

In the district court, Petitioner pleaded guilty to a felon in possession charge under 18 U.S.C. § 922(g)(1). Pet. App. 4a. This charge carries a maximum penalty of 120 months. 18 U.S.C. § 924(a)(2). The court nevertheless sentenced Petitioner to 235 months on this charge, and ultimately to a total term of 319 months. Pet. App. 31a. The court based that sentence on its finding that Petitioner had three state court convictions that qualify as predicate offenses under ACCA. Pet. App. 5a-6a.

Of those three, Petitioner's third-degree burglary conviction from South Carolina is the only offense of salience here. Burglary falls within the "violent felony" ACCA predicate. 18 U.S.C. § 924(e)(2)(B)(ii). But Congress did not intend for *all* burglaries to count as violent felonies—only burglaries that fall within the "*generic* version[]" of that offense. *Mathis*, 136 S. Ct. at 2248 (emphasis added). South Carolina's burglary statute broadly defines the single crime of burglary as unlawfully entering a building, further defining a building as "any structure, vehicle, watercraft, or aircraft" where people live or "assemble." S.C. Code Ann. §§ 16-11-310(1), 16-11-313(A). The district court found Petitioner's conviction under this statute to be a violent felony under ACCA.

But in 2016—after Petitioner's Section 2255 motion was dismissed—this Court drew a different line. *Mathis*, 136 S. Ct. at 2247-48. The defendant in *Mathis* received an enhanced sentence for a prior burglary conviction under Iowa law, and this Court determined that the sentence enhancement was unlawful. *Id.* at 2250-54. Iowa's burglary statute broadly defined burglary, by permitting a conviction for unlawfully entering not just a "building or other structure" (the generic offense), but rather "any building, structure, [or] land, water, or air vehicle." *Id.* at 2259. This Court reaffirmed the principle "that a state crime cannot qualify as an ACCA predicate if its elements are broader than those of a listed generic offense." *Id.* at 2251. It further held that where a statute contains multiple "means of fulfilling" an element of the offense, such as the definition of a building, it is inappropriate to try to parse the evidentiary record to determine whether the defendant used a means that falls within ACCA. *Id.* at 2250, 2253. It is undisputed that under the logic of *Mathis*, Petitioner's conviction under South Carolina law is not a violent felony. Pet. 8.

2. For that reason, Petitioner's claim falls within the heartland of the saving clause. Ultimately, *Mathis* clarifies that the "violent felony" enhancement does not include offenses like Petitioner's South Carolina conviction. When courts clarify a criminal statute's meaning in this fashion, they make clear what the statute has always meant. *See Rivers*, 511 U.S. at 312-13 ("A judicial construction of a statute is an authoritative statement of what the statute *meant before as well as after the decision* of the case giving rise to that construction." (emphasis added)). The consequence of this principle is that this Court's statutory interpretation decisions are, in effect, retroactive. *See AT&T Corp. v. Hulteen*, 556 U.S. 701, 712 n.5 (2009) (decision clarifying "meaning and scope of sex discrimination under Title VII" explains what the statute

meant since enactment); *Schriro*, 542 U.S. at 351 ("[D]ecisions that narrow the scope of a criminal statute by interpreting its terms" "generally apply retroactively.").

It is equally clear that *Mathis* affects the "legality" of "detention" within the scope of Section 2255. Black's Law Dictionary defines detention as "[t]he act or an instance of holding a person in custody," and legality as "[t]he quality, state, or condition of being allowed by law." Detention, Black's Law Dictionary (11th ed. 2019); Legality, Black's Law Dictionary (11th ed. 2019). The text of the saving clause thus makes clear that it is meant to address the legal justification or the condition of one's custody, including its length. This Court has underscored these principles, noting that Section 2255 is the correct vehicle to "prevent[] individuals from being held in custody in violation of federal law." *Trevino*, 569 U.S. at 421.

3. Denying Petitioner an opportunity to raise this claim would raise substantial constitutional concerns. "[U]nder our federal system it is only Congress, and not the courts, which can make conduct criminal." *Bousley*, 523 U.S. at 620-21. As this Court has explained, "the separation of powers prohibits a court from imposing criminal punishment beyond what Congress meant to enact." *Welch v. United States*, 578 U.S. 120, 134 (2016); *see id.* ("[A] court lacks the power to exact a penalty that has not been authorized by any valid criminal statute."). That is precisely what Petitioner claims has happened to him.

Petitioner's continued incarceration also raises substantial due process concerns. Petitioner has a "constitutional right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress." *Whalen v. United States*, 445 U.S. 684, 690 (1980). As previously explained, Congress did not "authorize[]" the sentence that Petitioner is currently serving. *Id.*

4. Finally, it is clear that Petitioner has never had a meaningful opportunity to pursue his claim under Section 2255. At the time of Petitioner's initial 2255 motion, erroneous Fourth Circuit precedent confined Mr. Ham to an enhanced sentence, leaving him with no avenue for redress. As this Court has emphasized, a "theoretically available procedural alternative" that is "all but impossible[] to use *successfully* . . . does not offer most defendants a meaningful opportunity to present a claim." *Trevino*, 569 U.S. at 427-28 (emphasis added). So too here with the usual Section 2255 remedy. But the saving clause solves this problem: "[T]he court which sentenced [Petitioner] . . . has denied him relief," and "the remedy by [Section 2255] motion is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). Ham must be permitted to file "[a]n application for a writ of habeas corpus" under Section 2241. *Id.*

2. The Decisions Denying Relief Cannot Be Squared With The Text And History Of The Saving Clause.

A textually tethered reading makes plain why the parsimonious approaches of the Fourth, Fifth, Tenth, and Eleventh Circuits do not dutifully interpret the saving clause.

The courts that prohibit any challenge to an unlawful sentence based on an intervening statutory decision purport to rely on "textual and structural clues." *See McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1085 (11th Cir. 2017) (en banc) (quoting *Prost v. Anderson*, 636 F.3d 578, 593 (10th Cir. 2011)). But, tellingly, none convincingly explain their crabbed view of the phrase "legality of detention." And none answer the key structural question created by the saving clause's existence—why would Congress take the trouble to include such a provision if not to address claims like Petitioner's?

Rather than hew to the text and structure of Section 2255, these courts "essentially read[] the savings clause of section 2255(e) out of the statute." *Webster v. Daniels*, 784 F.3d 1123, 1136 (7th Cir. 2015) (en banc); *see* Brandon Hasbrouck, *Saving Justice: Why Sentencing Errors Fall Within the Savings Clause, 28 U.S.C. § 2255(e)*, 108 Geo. L.J. 287, 303 (2019) (noting that these minority circuits are "[a]nimated by finality" rather than statutory text).

The Fourth Circuit's approach fares no better. In prior decisions, the Fourth Circuit (correctly) concluded that the saving clause permits prisoners to raise materially similar claims. *See In re Jones*, 226 F.3d 328, 334 (4th Cir. 2000) (noting that prisoners may challenge convictions via the saving clause after demonstrating that "the substantive law changed"); *United States v. Wheeler*, 886 F.3d 415, 429 (4th Cir. 2018) (requiring petitioners to establish that "settled substantive law changed"); *accord Wheeler*, 886 F.3d at 430 (allowing an unauthorized sentence to stand implicates "separation of powers principles and due process rights fundamental to our justice system"). But in the decision below, the Fourth Circuit held that an equally consequential error *cannot* be remedied by the federal courts, based on a distinction between decisions that "change" versus "clarify" a statute. Where that distinction comes from is anyone's guess—the court did not explain it, let alone identify anything in the text or structure of Section 2255(e) justifying it.

The consequence of the Fourth Circuit's interpretation is grave. In sum, the Fourth Circuit's ruling permits courts to raise the sentencing ceiling for a defendant, without any subsequent judicial scrutiny, so long as a later decision identifying error can be labeled a clarification rather than a change. Here, Petitioner's sentence was nearly doubled based on a misunderstanding of one predicate conviction. Pet. App. 5a. The Government conceded below that this enhancement is unlawful, yet Petitioner

remains confined to an extended sentence, procedurally bound from obtaining a remedy. If he were elsewhere in the country—or if the Fourth Circuit had simply attached a different label to *Mathis*—he could obtain relief. Nothing in the text or history of the habeas statute suggests Congress intended to restrict prisoners' access to the courts in such an arbitrary manner.

* * *

The question presented in this case reduces to a simple inquiry: When Congress included and then recodified the saving clause as part of Section 2255, was it inserting a provision that requires a change in settled substantive law—above and beyond an outcome-determinative "clarification" of the law—for a court to obtain jurisdiction over these claims? Or was Congress attempting to ensure that federal prisoners have a meaningful opportunity to raise challenges to the fundamental legality of their convictions or sentences that cannot be raised under Section 2255? The answer is clear: The text and history of Section 2255 confirm that Congress wanted to allow claims like Petitioner's to be reviewed by a federal court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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