No. 22-____

IN THE

Supreme Court of the United States

JOHN JOSE WATFORD,
Petitioner,

v.

WARDEN, FCI MEMPHIS,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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**Appointed by the Sixth Circuit under the Criminal Justice Act, 18 U.S.C. § 3006A*

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QUESTION PRESENTED

Under 28 U.S.C. § 2255, a federal inmate can collaterally attack his sentence on any ground cognizable on collateral review, and in a "second or successive" petition on the basis of certain claims indicating factual innocence or relying on constitutional decisions made retroactive by this Court. 28 U.S.C. § 2255(h). Under 28 U.S.C. § 2255(e), an inmate can collaterally challenge his conviction through an "application for a writ of habeas corpus [under 28 U.S.C. § 2241]" whenever it appears "that the remedy by [§ 2255] motion is inadequate or ineffective to test the legality of his detention."

The question presented is whose law governs the scope of habeas relief under 28 U.S.C. § 2255(e) and § 2241. This question has two components. First, can a petitioner rely on an intervening circuit decision to trigger the savings clause? Second, does the substantive law of the petitioner's confining circuit or convicting circuit govern the scope of habeas relief?

PARTIES TO THE PROCEEDING

John Jose Watford, petitioner on review, was the appellant below.

Warden, FCI Memphis, respondent on review, was the appellee below.

RELATED PROCEEDINGS

United States Supreme Court:

Watford v. *United States*, No. 21-551 (Jan. 10, 2022)

United States Court of Appeals (6th Cir.):

Watford v. *Gonzales*, No. 06-6597 (July 25, 2007)

Watford v. *Ormond*, No. 18-5328 (July 15, 2019)

United States Court of Appeals (7th Cir.):

United States v. *Watford*, No. 98-1411 (Oct. 22, 1998)

Watford v. *United States*, No. 00-2793 (July 17, 2000)

United States v. *Watford*, Nos. 09-1209 & 09-1408 (Apr. 28, 2009)

Watford v. *United States*, No. 13-3806 (Jan. 9, 2013)

Watford v. *United States*, No. 14-1680 (Apr. 4, 2014)

Watford v. *United States*, No. 15-2918 (Oct. 2, 2015)

Watford v. *United States*, No. 15-3083 (Oct. 5, 2015)

Watford v. *United States*, No. 16-1404 (Mar. 15, 2016)

Watford v. *United States*, No. 16-1987 (May 23, 2016)

United States v. *Watford*, No. 21-1361 (Aug. 2, 2021)

United States District Court (E.D. Ky.):

Watford v. *Gonzales*, No. 06-cv-328-JMH (Nov. 22, 2006)

Watford v. *Ormond*, No. CV 17-322-DLB (Mar. 22, 2018)

United States District Court (N.D. Ind.):

United States v. *Watford*, No. 3:97-CR-26(2)RM (1997-2021)

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PETITION FOR A WRIT OF CERTIORARI

John Jose Watford respectfully petitions for a writ of certiorari to review the judgment of the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's opinion is not reported, but is available at 2022 WL 10833199 (6th Cir. Oct. 19, 2022). Pet. App. 1a-10a. That court's order denying rehearing and rehearing en banc is not reported. Pet. App. 51a-52a. The Eastern District of Kentucky's

opinion is not reported, but is available at 2020 WL 5118037 (E.D. Ky. Aug. 30, 2020). Pet. App. 11a-50a.

JURISDICTION

The Sixth Circuit entered judgment on October 19, 2022. The petition for rehearing en banc was denied on January 18, 2023. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2255(e) provides:

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

28 U.S.C. § 2241 provides in relevant part:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
>
> * * *
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless—

> (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
>
> (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States * * * .

The version of Florida Statute § 810.02(1) in effect at the time of Watford's 1990 conviction provided:

> "Burglary" means entering or remaining in a structure or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain.

At the time of Watford's 1990 conviction, Florida Statute § 810.011(1)-(2) contained the following definitions:

> (1) "Structure" means a building of any kind, either temporary or permanent, which has a roof over it, together with the curtilage thereof.
>
> (2) "Dwelling" means a building or conveyance of any kind, either temporary or permanent, mobile or immobile, which has a roof over it and is designed to be occupied by people lodging therein at night, together with the curtilage thereof.

GUIDELINES PROVISIONS INVOLVED

The version of U.S.S.G. § 4B1.2(a) in effect at the time of Watford's 1997 sentencing provided:

> The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that –
>
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

INTRODUCTION

This case implicates an acknowledged conflict over an important and recurring question about the interpretation of 28 U.S.C. § 2255(e). That provision, known as the savings clause, allows a federal prisoner to seek a writ of habeas corpus under 28 U.S.C. § 2241 when the remedy in § 2255 is "inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). The circuits have struggled for decades with the scope and limits of that safety valve, resulting in what numerous judges, commentators, and the Government itself have recognized as a "deep and important circuit conflict." Pet'r Reply Br. 1, *United States* v. *Wheeler*, No. 18-420 (U.S. Jan. 30, 2019). This case implicates one aspect of that entrenched split: Whose law governs the scope of the savings clause?

This question has outsized consequences for inmates like Petitioner John Jose Watford. Watford was sentenced in the Northern District of Illinois as a career offender under the then-mandatory Guidelines based in part on a prior Florida burglary conviction. That designation increased his total sentence by more than a decade. In the years since his conviction, however, decisions from this Court and the Seventh Circuit have made clear that Watford's Florida burglary conviction does not qualify as a crime of violence. But Watford is confined in the Sixth Circuit—not the Seventh—and § 2241 petitions must be filed in the *confining* circuit.

This case asks whether Watford is nevertheless barred from seeking relief under § 2241 from his wrongly enhanced sentence. As the law currently stands, whether Watford is required to serve over 10 additional years in prison depends not on the crime he committed, but on the circuit in which he happens to be incarcerated. The circuits are severely split on the question of whose law governs the scope of the savings clause. Specifically, there is a deep divide over whether a petitioner can rely on an intervening decision from his sentencing circuit to seek habeas relief under the savings clause, and whether the substantive law of the sentencing circuit or the confining circuit applies to § 2241 petitions.

"[T]he privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law." *Boumediene* v. *Bush*, 553 U.S. 723, 779 (2008) (internal quotation marks omitted). Watford was deprived of that oppor-

tunity here, simply because he happened to be confined in Kentucky when he filed his § 2241 petition, rather than Illinois, Virginia, or Arizona. "[T]he vagaries of the prison lottery" should not "dictate how much postconviction review a prisoner gets." *Wright* v. *Spaulding*, 939 F.3d 695, 710 (6th Cir. 2019) (Thapar, J., concurring). Only this Court's intervention can restore consistency and clarity to this important area of the law.

The petition should be granted. In the alternative, and to the extent the Court deems it appropriate, the petition should be held in abeyance pending resolution of *Jones* v. *Hendrix*, No. 21-857, and disposed of as appropriate in light of that decision.

STATEMENT

A. Legal Framework

A federal prisoner who wishes to collaterally attack his conviction or sentence must generally do so under 28 U.S.C. § 2255 by filing a motion to vacate in his convicting court. *See* 28 U.S.C. § 2255. "A second or successive motion" under § 2255 must either contain "(1) newly discovered evidence" establishing that "no reasonable factfinder would have found the movant guilty of the offense"; or "(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h).

Section 2255(e) contains an exception to that rule. A federal prisoner may pursue traditional habeas relief under 28 U.S.C. § 2241 where "the remedy [under § 2255] is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). This provision is colloquially known as the savings clause or safety

valve. Unlike § 2255 motions, which must be filed in the convicting court, § 2241 petitions must be filed in the district of incarceration. *See, e.g.*, *Chazen* v. *Marske*, 938 F.3d 851, 856 (7th Cir. 2019).

B. Factual Background

Watford was convicted of several federal crimes in 1997. *See* Pet. App. 2a. The sentencing court determined that Watford had two prior convictions for crimes of violence, including a 1990 Florida burglary conviction, meaning Watford qualified for a career-offender enhancement under the then-mandatory Guidelines. *See* U.S.S.G. § 4B1.1(a) (1997). That more than doubled his sentencing range, increasing it from 110-137 months to 262-327 months. *See* Pet. App. 2a, 12a. In sum, Watford was sentenced to 802 months—nearly 67 years. Pet. App. 2a, 13a. For the then 25-year-old, it was effectively a life sentence.

Watford filed his first § 2255 motion in 1999. *See Watford* v. *United States*, Dkt. 137, No. 3:97-cr-26-RLM-2 (N.D. Ind. Oct. 25, 1999). The district court denied his motion, and the Seventh Circuit affirmed. *Watford*, Dkt. 143, No. 3:97-cr-26-RLM-2 (N.D. Ind. Mar. 21, 2000); *see Watford* v. *United States*, Dkt. 1-2, No. 00-2793 (7th Cir. July 17, 2000).

In 2015, Watford asked the Seventh Circuit to authorize a successive § 2255 motion based on this Court's holding in *Johnson* v. *United States*, 576 U.S. 591 (2015), that the Armed Career Criminal Act's (ACCA) residual clause was unconstitutionally vague. Watford argued that the Sentencing Guidelines' residual clause, which was materially identical to ACCA's, was likewise unconstitutional.

The Government opposed Watford's motion on the ground that Watford's prior convictions did not "rely

on the residual clause." Resp. to Appl. at 6, *Watford* v. *United States*, ECF No. 3, No. 15-2918 (7th Cir. Sept. 9, 2015). According to the Government, the sentencing court found that Watford's Florida burglary conviction qualified as a crime of violence under the enumerated-offense clause. *Id.* at 5. The Seventh Circuit agreed, held that "Watford was not sentenced under the residual clause of the career-offender guideline," and denied his petition. Order, *Watford*, ECF No. 6, No. 15-2918 (7th Cir. Oct. 2, 2015).

Three years later, the Seventh Circuit invalidated the mandatory Guidelines' residual clause based on *Johnson*. *Cross* v. *United States*, 892 F.3d 288 (7th Cir. 2018).

C. Procedural History

Meanwhile, this Court decided *Mathis* v. *United States*, 579 U.S. 500 (2016), which changed how courts conduct the modified categorical approach.

In *Taylor* v. *United States*, this Court explained that, where a statute sweeps more broadly than the generic equivalent, "the Government should be allowed to use the conviction for enhancement" as long as record materials demonstrate the defendant's conviction was for conduct that matched the generic offense. 495 U.S. 575, 602 (1990). Using that logic, the circuits applied the modified categorical approach to hold that burglary statutes that were broader than the generic qualified as enumerated offenses. *E.g.*, *United States* v. *Howell*, 37 F.3d 1197, 1206-07 (7th Cir. 1994). *Mathis* changed that. This Court made clear that, if the statute merely "enumerates various factual means of committing a single" offense, some of

which fall outside the generic definition, it is "indivisible" and the modified categorical approach is unavailable. *Mathis*, 579 U.S. at 505-506.

In 2017, Watford filed a pro se § 2241 petition in the Eastern District of Kentucky challenging his career-offender designation under this Court's decisions in *Mathis*, 579 U.S. 500, and *Descamps v. United States*, 570 U.S. 254 (2013). *See* Pet. App. 3a. Watford explained that, under these cases, his 1990 Florida burglary conviction did not qualify as a crime of violence because the Florida statute swept more broadly than the generic federal offense.

The district court denied his petition on the ground that Watford's petition did not actually arise under *Mathis* or *Descamps*. *See id.* The court did not consider whether Watford's prior convictions qualified as crimes of violence. *See id.* Watford appealed, and the Sixth Circuit granted a limited remand for the district court to consider whether Watford's prior convictions were crimes of violence. *See id.* at 3a-4a.

On remand, the district court held that Watford's Florida burglary conviction qualified as a crime of violence under the Guidelines' residual clause and denied his § 2241 petition. *Id.* at 37a-44a.

The Sixth Circuit affirmed. The panel acknowledged "that the Seventh Circuit" held in *Cross*, 892 F.3d 288, that "§ 4B1.2(a)(2)'s residual clause [was] invalid for sentences imposed when the Guidelines were still mandatory." Pet. App. 8a. But the panel deemed that irrelevant, for two reasons. First, under Sixth Circuit precedent, "a § 2241 petitioner cannot state a cognizable claim based on a change in circuit court precedent; the petitioner 'must identify a new Supreme Court decision to show that § 2255's remedy

is inadequate or ineffective.'" *Id.* at 9a-10a (quoting *Hueso* v. *Barnhart*, 948 F.3d 324, 339 (6th Cir. 2020)). Second, the panel refused to apply precedent from Watford's convicting circuit to evaluate the merits of his § 2241 petition. The panel instead applied precedent from the Sixth Circuit, where Watford is currently confined. "[I]n the Sixth Circuit, § 4B1.2(a)(2)'s residual clause *is valid* for sentences imposed under the mandatory Guidelines." Pet. App. 9a.

Watford petitioned for panel rehearing or rehearing en banc, which the Sixth Circuit denied. *Id.* at 51a-52a. This petition follows.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE DIVIDED OVER WHOSE LAW GOVERNS THE SCOPE OF THE SAVINGS CLAUSE.

The circuits are openly and deeply divided about whose law governs the scope of the savings clause. This question has two components. First, there is an acknowledged split over whether an intervening change in law from a circuit court can trigger the savings clause. Second, the circuits are divided over whether a petitioner who demonstrates that his conduct would no longer be criminal in his convicting circuit can pass through the savings clause. As many judges and commentators have recognized, this Court's review is necessary to resolve these conflicts, which implicate fundamental questions of personal liberty and the separation of powers.

A. The circuits are split over whether a circuit court decision can trigger the savings clause.

The circuits are divided over whether and when a circuit court decision can trigger the savings clause.

Four circuits, including the circuit where Watford was convicted, would entertain a petition that relies on a decision from a court of appeals and meets the other savings clause criteria. Five circuits, including the circuit where Watford is currently confined, would not. The Court's intervention is warranted to correct this acknowledged split, which places federal prisoners' liberty at the mercy of geographic happenstance.

1. In the Third, Fourth, Seventh, and Ninth Circuits, petitioners can access the savings clause following a qualifying decision from a court of appeals.

The Fourth Circuit's decision in *United States* v. *Wheeler*, 886 F.3d 415 (4th Cir. 2018), is emblematic of this approach. In *Wheeler*, the petitioner filed a § 2241 petition arguing that the Fourth Circuit's en banc decision in *United States* v. *Simmons*, 649 F.3d 237 (4th Cir. 2011) (en banc), rendered his sentence illegal. The Fourth Circuit agreed. It held that § 2255 is inadequate or ineffective where the petitioner cannot satisfy § 2255(h)(2) and, as a result of "a change in this circuit's controlling law" or Supreme Court precedent made retroactive on collateral review, the petitioner's sentence suffers from a fundamental defect. *Wheeler*, 886 F.3d at 429. The court's holding was unequivocal: "We see no need to read the savings clause as dependent only on a change in Supreme Court law." *Id.* at 428.

The Seventh and Ninth Circuits similarly allow a petitioner to invoke the savings clause based on a qualifying change in circuit or Supreme Court law. *See, e.g.*, *Beason* v. *Marske*, 926 F.3d 932, 938-939 (7th Cir. 2019) (holding that *United States* v. *Spencer*, 739 F.3d 1027 (7th Cir. 2014), authorized relief under § 2241); *Alaimalo* v. *United States*, 645 F.3d 1042,

1048 (9th Cir. 2011) (holding that *United States* v. *Cabaccang*, 332 F.3d 622 (9th Cir. 2003), authorized relief under § 2241).

The Third Circuit applies a slightly modified version of this test. That court allows access to the savings clause when a petitioner argues "that 'he is being detained for conduct that has subsequently been rendered non-criminal by an intervening Supreme Court decision' and [Third Circuit] precedent construing an intervening Supreme Court decision." *United States* v. *Tyler*, 732 F.3d 241, 246 (3d Cir. 2013) (quoting *In re Dorsainvil*, 119 F.3d 245, 252 (3d Cir. 1997)). In *Tyler*, 732 F.3d at 248, the Third Circuit granted a § 2241 petition based on its decision in *United States* v. *Shavers*, which interpreted and "reconciled" this Court's "holdings in" *Arthur Anderson LLP* v. *United States*, 544 U.S. 696 (2005), and *Fowler* v. *United States*, 563 U.S. 668 (2011). *See United States* v. *Shavers*, 693 F.3d 363, 378 (3d Cir. 2012), *cert. granted, judgment vacated on other grounds*, 570 U.S. 913 (2013). The district court had denied Tyler's petition based on *Arthur Anderson* and *Fowler*, but the Third Circuit—relying on *Shavers*—reversed. *Tyler*, 732 F.3d at 249-250. The Third Circuit thus permits access to § 2241 "when there is a change in statutory caselaw that applies retroactively in cases on collateral review," and does not limit petitioners to qualifying decisions from this Court. *Bruce* v. *Warden Lewisburg USP*, 868 F.3d 170, 180 (3d Cir. 2017).

2. By contrast, in the Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits, a retroactively applicable circuit decision will not suffice to access the savings clause.

In *Hueso*, the Sixth Circuit expressly "decline[d]" to adopt the Fourth Circuit's circuit-or-Supreme-Court approach. 948 F.3d at 326. Hueso argued that he should be allowed to access the savings clause based on an intervening decision from the Ninth Circuit, where he was sentenced. *Id.* at 331. The Sixth Circuit rejected that argument and held that § 2241 "requires a Supreme Court decision that adopts a new interpretation of a statute after the completion of the initial § 2255 proceedings." *Id.* at 333. "[L]ater circuit decisions do not suffice." *Id.* at 335.

The Fifth Circuit has also held that the savings clause is available only where "the petition raises a claim 'that is based on a retroactively applicable Supreme Court decision.' " *Garland* v. *Roy*, 615 F.3d 391, 394 (5th Cir. 2010) (quoting *Reyes-Requena* v. *United States*, 243 F.3d 893, 904 (5th Cir. 2001)).

The Eighth, Tenth, and Eleventh Circuits take an even more restrictive approach. In those courts, a retroactively applicable legal change will *never* suffice to trigger § 2241, even if that change means the person is in prison for conduct that is not criminal. These circuits hold that as long as a prisoner could have argued on appeal or in her initial § 2255 motion that controlling precedent was incorrect, a subsequent change in case law establishing that precedent was incorrect does not render § 2255 "inadequate or ineffective." *See Jones* v. *Hendrix*, 8 F.4th 683, 687 (8th Cir. 2021) ("the saving clause is interested in opportunity, not outcome"), *cert. granted*, No. 21-857 (argued Nov. 1, 2022); *McCarthan* v. *Director of Goodwill Industries-Suncoast, Inc.*, 851 F.3d 1076, 1080 (11th Cir. 2017) (en banc) ("a change in caselaw does not make a motion to vacate a prisoner's sentence 'inadequate or

ineffective to test the legality of his detention' " (quoting § 2255(e))); *Prost* v. *Anderson*, 636 F.3d 578, 584 (10th Cir. 2011) (Gorsuch, J.) ("The relevant metric or measure, we hold, is whether a petitioner's argument challenging the legality of his detention could have been tested in an initial § 2255 motion. If the answer is yes, then the petitioner may not resort to the savings clause and § 2241.").

3. The Court should grant certiorari to resolve this clear split. In the decision below, the Sixth Circuit applied *Hueso* to prevent Watford from relying on an intervening circuit decision to obtain relief under § 2241. Pet. App. 9a-10a. But in the Third, Fourth, Seventh, or Ninth Circuits, a petition relying on a qualifying circuit decision would have been allowed to proceed. As even the Sixth Circuit has admitted, "[a] federal prisoner's ability to seek habeas relief under § 2241 should not depend on where the executive branch opts to confine him." *Hueso*, 948 F.3d at 340. Yet that is precisely the situation this circuit split has created. The Court should grant certiorari to resolve this acknowledged conflict.

B. The circuits are split over whether a petitioner can rely on substantive law from his convicting circuit to demonstrate that his conduct is non-criminal.

Lower courts are divided about whether a petitioner can obtain relief under § 2241 where his convicting circuit has made clear that the conduct underlying his imprisonment is no longer criminal. The Fourth Circuit and district courts in the Seventh and Ninth Circuits will grant a § 2241 petition that relies on substantive law from the petitioner's convicting circuit to show he is in prison for conduct that is no longer a

crime. By contrast, the Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits will reject such a petition. The Court's review is needed to bring clarity to this confusing and important issue.

1. Several courts, including the Fourth Circuit and district courts in the Seventh and Ninth Circuits, will grant a § 2241 petition where the substantive law of the convicting circuit demonstrates the petitioner is in prison for conduct that is non-criminal.

The Fourth Circuit "look[s] to the substantive law of the circuit where a defendant was convicted" to determine whether he can satisfy the savings clause. *Hahn* v. *Moseley*, 931 F.3d 295, 300-301 (4th Cir. 2019). In *Hahn* the petitioner invoked a recent decision from the Tenth Circuit, where he was sentenced, that "render[ed] non-criminal the conduct on which his * * * conviction was based." *Id.* at 301. The Fourth Circuit agreed. As it explained, the Tenth Circuit decision "constitutes a substantive change in the law that" shows Hahn's conviction "cannot stand." *Id.* at 302, 304 (citing *United States* v. *Rentz*, 777 F.3d 1105 (10th Cir. 2015) (en banc)); *accord, e.g.*, *Marlowe* v. *Warden, FCI Hazelton*, 6 F.4th 562, 572 (4th Cir. 2021). The Fourth Circuit accordingly granted Hahn's petition and instructed the district court to vacate his 300-month sentence. *Hahn*, 931 F.3d at 304.

The Seventh Circuit has signaled its agreement with this approach. In *In re Davenport*, Judge Posner explained that, when courts are confronted with different law in the convicting circuit versus the confining circuit, "there is no presumption that the law in the circuit that favors the prisoner is correct, and hence there is no basis for supposing him unjustly con-

victed merely because he happens to have been convicted in the other circuit." 147 F.3d 605, 612 (7th Cir. 1998). Although the Seventh Circuit has not yet definitively decided this issue, *see Chazen*, 938 F.3d at 859-860, district courts in the Seventh Circuit have cited this language from *Davenport* in applying the substantive law of the convicting circuit, *see, e.g.*, *Cox* v. *Kallis*, No. 17-CV-1243, 2018 WL 2994378, at *2 (C.D. Ill. June 14, 2018) (collecting cases); *Salazar* v. *Sherrod*, No. 09-CV-619-DRH-DGW, 2012 WL 3779075, at *4 (S.D. Ill. Aug. 31, 2012); *Hernandez* v. *Gilkey*, 242 F. Supp. 2d 549, 554 (S.D. Ill. 2001).

District Courts in the Ninth Circuit take the same approach. *See, e.g.*, *Kipp* v. *Rardin*, No. CV-20-00167-TUC-RM(JR), 2022 WL 14963883, at *5-6 (D. Ariz. Sept. 28, 2022), *report and recommendation adopted*, No. CV-20-00167-TUC-RM, 2022 WL 14813732 (D. Ariz. Oct. 26, 2022).

2. On the opposite side of the spectrum, the Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits will deny a § 2241 petition even where precedent from the petitioner's convicting circuit conclusively demonstrates that the conduct underlying his sentence is no longer criminal.

The Sixth Circuit applies its own substantive law in evaluating whether a petitioner is serving time for conduct that is no longer criminal. In the decision below, the Sixth Circuit acknowledged that the Seventh Circuit—where Watford was convicted and sentenced—had invalidated the mandatory Guidelines' residual clause. Pet. App. 8a (citing *Cross*, 892 F.3d at 299-306). The court also admitted that "Watford's conviction cannot qualify as a crime of violence under an invalid residual clause." Pet. App. 8a. Yet the

court declined to apply this Seventh Circuit precedent. Instead, the panel applied its *own* substantive law, holding that "in the Sixth Circuit, § 4B1.2(a)(2)'s residual clause *is valid* for sentences imposed under the mandatory Guidelines." Pet. App. 9a. Because Watford's Florida conviction would still qualify as a crime of violence in the Sixth Circuit, the panel denied his § 2241 petition. Pet. App. 9a-10a.

The Fifth Circuit likewise applies its own substantive law to savings clause petitions. In *Searcy* v. *Young*, the petitioner argued that his sentence was invalid because it exceeded the statutory maximum based on precedent from the Eleventh Circuit, where he was sentenced. 489 F. App'x 808, 809 (5th Cir. 2012). The Fifth Circuit "reject[ed] Searcy's argument based upon 11th Circuit precedent," noting that the petitioner "cite[d] no authority for the proposition that we must apply the law of the circuit in which the conviction occurred to the § 2241 question." *Id.* at 810 n.2. District courts in the Fifth Circuit have reached the same result. *See, e.g.*, *Rudisill* v. *Martin*, No. 5:08-CV-272(DCB)(MTP), 2013 WL 1871701, at *3 (S.D. Miss. May 3, 2013).

The Eighth, Tenth, and Eleventh Circuits' approach is more restrictive, but leads to the same result. In those circuits, a petitioner can never rely on a later change in the law to trigger § 2241. *See supra* pp. 13-14. Even if the substantive law of the petitioner's convicting circuit proves that he is in prison for conduct that is no longer criminal, the petitioner will not be entitled to relief under the savings clause. Yet even those circuits have recognized "the practical problems district courts face in trying to provide § 2255 relief

under § 2241 when the habeas court is not the sentencing court." *United States* v. *Rhodes*, 834 F. App'x 457, 461 (10th Cir. 2020).

3. This Court should step in to resolve this division in authority. As then-Judge Barrett explained, the question of "which circuit's law applies to a [§ 2241] petition" often dictates whether a § 2241 petition will succeed or "fail." *Chazen*, 938 F.3d at 864 (Barrett, J., concurring). In many instances, only the convicting circuit will have controlling law on which a petitioner could base a claim for relief. Courts in the Fourth, Seventh, and Ninth Circuits would allow a petitioner to rely on that precedent to show that they are serving time for conduct that no longer qualifies as criminal. But a petitioner housed in the Fifth, Sixth, Eighth, Tenth, or Eleventh Circuits would be required to serve the duration of that unlawful sentence. Fundamental questions of individual liberty should not be left to such geographic happenstance. This Court's review is warranted to resolve this conflict.

II. THE DECISION BELOW IS WRONG.

The decision below is incorrect. The Sixth Circuit denied Watford's § 2241 petition based on the belief that a habeas petitioner cannot rely on a qualifying circuit court decision to demonstrate a fundamental sentencing error. The court also rejected Watford's argument that a petitioner can obtain relief under § 2241 where his convicting circuit has made clear that the conduct underlying his imprisonment is no longer criminal. The panel was wrong on both counts. Under a correct interpretation of the law, Watford should have been allowed to pass through the savings clause.

1. The panel below reached the wrong result on both aspects of the "whose law" question. It erroneously held that an intervening circuit decision cannot trigger the savings clause. And it incorrectly looked to the substantive law of the confining circuit, rather than the convicting circuit, to determine whether the sentence in question was fundamentally defective. Neither conclusion withstands scrutiny.

First, a retroactive court of appeals decision can trigger the savings clause. A petitioner can access § 2241 when it "appears that the remedy by [§ 2255] motion is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). Nothing in the text of that provision limits petitioners to retroactive decisions from only this Court. In fact, Congress did include such a limit elsewhere in the same section: Section 2255(h) permits a "second or successive motion" based only on "a new rule of constitutional law, made retroactive to cases on collateral review *by the Supreme Court*." 28 U.S.C. § 2255(h)(2) (emphasis added). "Congress could have made savings clause relief dependent *only* on changes in Supreme Court constitutional law by using the identical language in § 2255(e), but it did not." *Wheeler*, 886 F.3d at 428-429; *see Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation and alteration omitted).

This Court's decision in *Davis* v. *United States*, 417 U.S. 333 (1974), offers further support for the view

that qualifying circuit precedent can trigger the savings clause. "The sole issue" in that case was whether "a change in the law of [the Ninth] Circuit after the petitioner's conviction" that establishes "he could not be lawfully convicted" "may * * * be successfully asserted by him in a § 2255 proceeding." *Id.* at 341, 346. This Court held that "[t]here can be no room for doubt that such a circumstance 'inherently results in a complete miscarriage of justice' and 'present(s) exceptional circumstances' that justify collateral relief under § 2255." *Id.* at 346-347 (quoting 28 U.S.C. § 2255 (1974)). That conclusion applies equally to § 2241.

Allowing § 2241 petitioners to rely on intervening circuit decisions will not open the floodgates to a deluge of new claims. Several other important guardrails constrain relief under § 2241. The Fourth Circuit, for example, restricts relief to situations in which "binding precedent at the time of [the petitioner's] conviction foreclosed" the argument he seeks to advance in his § 2241 petition, a retroactive change in statutory interpretation that occurs after the direct appeal and first § 2255 motion demonstrates a sentencing error, and the sentencing error presents a fundamental defect. *See, e.g.*, *Marlowe*, 6 F.4th at 569, 572. Other courts contain similar limits.

On the flip side, allowing a petitioner to access the savings clause based on an intervening circuit decision avoids potential constitutional concerns. Only Congress can define crimes and punishments. "A conviction or sentence imposed in violation of a substantive rule is * * * contrary to law and, as a result, void." *Montgomery* v. *Louisiana*, 577 U.S. 190, 203 (2016). Requiring a defendant to serve a sentence longer than that authorized by Congress violates this maxim, and

the defendant's fundamental right to liberty. And requiring a federal court to continue an unauthorized detention would violate the separation of powers. *Whalen* v. *United States*, 445 U.S. 684, 689 (1980) ("If a federal court exceeds its own authority by imposing multiple punishments not authorized by Congress, it violates * * * the constitutional principle of separation of powers in a manner that trenches particularly harshly on individual liberty."). Allowing courts to recognize intervening circuit decisions establishing a defendant is serving an illegal sentence prevents these problems.

Second, a petitioner can pass through the savings clause where his convicting circuit has since declared the conduct underlying his sentence is non-criminal. As then-Judge Barrett acknowledged, "[t]his position has force." *Chazen*, 938 F.3d at 865 (Barrett, J., concurring). Section 2255 requires prisoners to file for post-conviction relief in their convicting circuit. Thus, to determine whether § 2255 is "inadequate or ineffective," the confining circuit should likewise look to the substantive law of the convicting circuit—not the confining circuit.

Applying the convicting circuit's substantive law also makes sense in the broader context of the savings clause. Those courts that allow petitioners to access the savings clause based on a later decision generally ask whether precedent in the convicting circuit or Supreme Court would have prevented the petitioner from successfully raising their claim at the time of the conviction or initial § 2255 motion. *See, e.g.*, *Fulks* v. *Watson*, 4 F.4th 586, 593 (7th Cir. 2021); *Marlowe*, 6 F.4th at 569-572; *Wright*, 939 F.3d at 703. It makes

no sense to look to the substantive law of the *convicting* circuit to determine whether the petitioner was previously *prevented* from raising a given argument, but to the substantive law of the *confining* circuit to determine whether that same claim would succeed *today*.

Using the convicting circuit's substantive law has significant practical advantages. It "eliminates the arbitrary nature of tying the law that governs a § 2241 petition to the location in which the prisoner happens to be detained." *Hueso*, 948 F.3d at 337. Under the Sixth Circuit's contrary rule, for example, co-defendants convicted of the same crimes could be treated differently depending on where they are confined. Applying the convicting circuit's substantive law also removes any difficulties or disparities that might arise if a prisoner is transferred to another circuit while his § 2241 petition is pending. In addition, this rule limits forum shopping. If the confining circuit's law instead governs, a prisoner could possibly manipulate the choice-of-law analysis. "For example, a prisoner desiring to have Seventh Circuit law apply to him could misbehave in order to be sent to USP–Marion, a maximum security facility in Marion, Illinois." *Hernandez*, 242 F. Supp. 2d at 554.

Finally, looking to the convicting circuit's substantive law comports with how courts approach the question of whose law to apply in other contexts. Applying the *procedural rules* of the confining circuit comports with the general rule that courts apply their own procedural law; applying the *substantive law* of the convicting circuit comports with the principle that courts generally apply the substantive law of the jurisdiction that provides the cause of action. *See, e.g.*, *Erie R.R.*

Co. v. *Tompkins*, 304 U.S. 64, 78 (1938); *Flex–Foot, Inc.* v. *CRP, Inc.*, 238 F.3d 1362, 1365 (Fed. Cir. 2001) (applying "the law of the regional circuit to which the district court appeal normally lies unless the issue pertains to or is unique to patent law") (internal quotation marks omitted).

2. The Sixth Circuit's decision below is at odds with these basic principles. Today, precedent from this Court and Watford's convicting circuit makes clear that Watford's Florida conviction cannot qualify as a crime of violence. But at the time of his first § 2255 petition, precedent reasonably foreclosed any such claim. As a result, Watford was sentenced to *ten-to-twelve years* longer than the law allows. He should have been able to invoke § 2241 to obtain relief from that fundamentally defective sentence.

Watford was convicted under a Florida statute that defined burglary as "entering or remaining in a structure or a conveyance with the intent to commit an offense therein." Fla. Stat. § 810.02(1) (1987). The burglary qualified as a second-degree felony if "the offender does not make an assault or battery or is not armed * * * and the structure or conveyance entered is a dwelling." § 810.02(3). Florida defined "structure" and "dwelling" broadly to include the building, "together with the curtilage thereof." § 810.011(1)-(2).

At the time of Watford's sentencing, a prior conviction could qualify as a crime of violence (1) if it had "as an element the use, attempted use, or threatened use of physical force"; (2) if it matched the generic definition of "burglary of a dwelling"; or (3) if it otherwise involved "conduct that presents a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2(a) (1997). Watford's Florida second-degree

burglary conviction cannot qualify as a crime of violence under any of these three options.[1]

First, Watford's Florida conviction cannot qualify under the elements clause because it does not have as an element the use of force. *See James* v. *United States*, 550 U.S. 192, 197 (2007), *overruled on other grounds by Johnson*, 576 U.S. 591.

Second, Watford's Florida conviction cannot qualify under the enumerated-offense clause. Generic burglary requires unlawful entry into a "building or other structure." *Taylor*, 495 U.S. at 598. At the time of Watford's conviction and original § 2255 petition, the Seventh Circuit held that a burglary conviction could constitute a crime of violence under the enumerated-offense clause even where the statute was "broader than the generic definition," as long as the relevant record materials demonstrated that the defendant "committed the offense of *residential burglary*." *E.g.*, *Howell*, 37 F.3d at 1206-07.

Mathis makes that approach untenable. *See United States* v. *Haney*, 840 F.3d 472, 475-476 (7th Cir. 2016) (per curiam). Like the Iowa burglary statute at issue in *Mathis*, Florida's burglary statute lists alternative factual means of satisfying a single locational element: It prohibits "entering or remaining in a structure or a conveyance," and lays out alternate means of satisfying that element—either by entering "a building" or "the curtilage thereof." Fla. Stat. §§ 810.02(1),

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[1] The Sixth Circuit, like several others, allows prisoners sentenced under the mandatory Guidelines to challenge a sentencing enhancement in a § 2241 petition. *Hill* v. *Masters*, 836 F.3d 591, 593-599 (6th Cir. 2016); *accord, e.g.*, *Lester* v. *Flournoy*, 909 F.3d 708 (4th Cir. 2018); *Brown* v. *Caraway*, 719 F.3d 583, 588 (7th Cir. 2013).

810.011(1)-(2) (1987); *see Mathis*, 579 U.S. at 506-507. Like Iowa burglary, Florida burglary is therefore indivisible, and the modified categorical approach is unavailable. *Mathis*, 579 U.S. at 517-518. Thus, like Iowa burglary, Florida burglary cannot qualify as an enumerated offense. *Id.* at 520.

Third, at the time of Watford's first § 2255 petition, the mandatory Guidelines' residual clause was still valid in the Seventh Circuit. The Seventh Circuit has since invalidated that clause. *Cross*, 892 F.3d at 299-306. Watford's Florida second-degree burglary conviction accordingly cannot qualify as a crime of violence under the mandatory Guidelines' residual clause.

Punishing someone for "an act that the law does not make criminal * * * inherently results in a complete miscarriage of justice and present(s) exceptional circumstances' that justify collateral relief." *Davis*, 417 U.S. at 346-347 (internal quotation marks omitted). By reaching the wrong conclusion on these two aspects of the "whose law" decision, the Sixth Circuit erroneously denied Watford that relief. This Court's correction is essential.

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT AND WARRANTS REVIEW HERE.

This case presents a good opportunity to resolve an issue that "goes to the heart of the integrity, fairness, and credibility of our criminal justice system." Brandon Hasbrouck, *Saving Justice: Why Sentencing Errors Fall Within the Savings Clause*, 28 U.S.C. § 2255(e), 108 Geo. L.J. 287, 290 (2019).

1. The question presented is fundamental to our justice system. Congress in § 2255 specifically crafted a

tradeoff that restricted federal prisoners from challenging convictions and sentences that all agree are unlawful, except in certain narrow circumstances. But the savings clause preserves the right to pursue habeas relief when the remedy in § 2255 is "inadequate or ineffective." 28 U.S.C. § 2255(e). The availability of this safety valve is thus "an important lynchpin in our constitutional structure: it ensures that there must be an adequate substitute procedure for habeas corpus" so that prisoners "have a meaningful opportunity to demonstrate that they are being held pursuant to an erroneous application or interpretation of relevant law." Hasbrouck, 108 Geo. L.J. at 290.

That safety valve is broken. As it currently stands, "geography, circuit precedent, and the nature and timing of intervening changes to a court's understanding of a criminal statute * * * determine whether and when prisoners who are serving sentences for acts that the law did not criminalize" can successfully invoke the savings clause. Jennifer L. Case, *Kaleidoscopic Chaos: Understanding the Circuit Courts' Various Interpretations of § 2255's Savings Clause*, 45 U. Mem. L. Rev. 1, 4 (2014). Worse, because a § 2241 petition must be filed in the district of confinement, a federal inmate's ability to obtain relief from a fundamentally defective sentence currently depends on "the fortuitous placement of a prisoner by the Bureau of Prisons." *Chazen*, 938 F.3d at 865 (Barrett, J., concurring) (internal quotation marks omitted); *accord, e.g.*, *Wright*, 939 F.3d at 710 (Thapar, J., concurring) (lamenting that "the vagaries of the prison lottery will dictate how much postconviction review a prisoner gets"). This concern is particularly pressing here: Watford was previously confined in Illinois, Arizona, and Virginia. Courts in those districts would not bar

an inmate relying on a qualifying, retroactive circuit decision from passing through the savings clause, and would allow a petitioner to rely on the substantive law from his convicting circuit to show that his conduct is no longer criminal. Instead, Watford's § 2241 petition landed in the Sixth Circuit, which does not recognize such claims.

Judges on both sides of the split agree that this Court should intervene. Absent clear guidance from this Court, some circuits will continue to "withhold[ ] relief from" defendants "whose legal arguments have * * * been undisputedly accepted by" their sentencing circuits. *Hueso*, 948 F.3d at 353 (Moore, J., dissenting). Not only is that unfair to those specific defendants, it also creates a world in which relief inures to only some "prisoners sentenced in the same circuit, purely by chance." *Id.* at 354. Such "disparate treatment," sometimes of two co-defendants tried for identical crimes but ultimately imprisoned in separate states, "should not be overlooked." *Bruce*, 868 F.3d at 180. These issues "are of significant national importance and" require "clear guidance" from this Court to ensure "consistent results in this important area of law." *United States* v. *Wheeler*, 734 F. App'x 892, 893-894 (4th Cir. 2018) (Agee, J., statement respecting denial of rehearing en banc).

The Government has previously emphasized the "significance of the issue" in calling for this Court's review. Pet'r Reply Br. at 3, *Wheeler*, No. 18-420 (citation omitted). "The disparate treatment of identical claims is particularly problematic because habeas petitions are filed in a prisoner's district of confinement, meaning 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." Pet. for Writ of Certiorari 25, *Wheeler*, No. 18-420 (Oct. 3, 2018). As the Solicitor General rightly observed, "[o]nly this Court's intervention can ensure nationwide uniformity as to the saving clause's scope." *Id.* at 25-26.

Commentators have likewise recognized that the circuits' approaches to determining whose law governs the savings clause inquiry are a "kaleidoscopic chaos." Case, 45 U. Mem. L. Rev. at 1; *see id.* at 43-44, 46-47 (noting disparate circuit outcomes based on a subsequent circuit court decision or subsequent prison transfer). As they have explained, the circuits are "intractably divided" on this issue. Ashley Alexander, *One Strike, You're Out: The Post-*Hueso *State of Habeas Corpus Petitions Under the Savings Clause*, 57 Am. Crim. L. Rev. Online 84, 94-97 (2020).

This problem is not going away. This confusion will recur each and every time this Court or a court of appeals issues an intervening decision that narrows the scope of a criminal statute. That happens frequently. *See, e.g.*, *Ruan* v. *United States*, 142 S. Ct. 2370 (2022); *United States* v. *Taylor*, 142 S. Ct. 2015 (2022); *Borden* v. *United States*, 141 S. Ct. 1817 (2021); *Mathis*, 579 U.S. 500; *Rosemond* v. *United States*, 572 U.S. 65 (2014); *Descamps*, 570 U.S. 254; *Skilling* v. *United States*, 561 U.S. 358 (2010); *Carr* v. *United States*, 560 U.S. 438 (2010); *Chambers* v. *United States*, 555 U.S. 122 (2009); *United States* v. *Santos*, 553 U.S. 507 (2008); *Begay* v. *United States*, 553 U.S. 137 (2008). It will also recur each and every time a

circuit court issues a decision that could affect the validity of a federal prisoner's sentence, which happens even more often.

It is "high time" for this Court to step in on this important issue of "individual liberty." Alexander, 57 Am. Crim. L. Rev. Online at 94. Virtually every circuit has weighed in to some degree on the question of whose law governs the scope of habeas relief under § 2241. The only circuits that have not addressed this question are the First, Second, and D.C. Circuits. Those courts have always lagged behind on habeas jurisprudence due to their comparatively small prison populations. *See* Fed. Bureau of Prisons, Statistics, https://www.bop.gov/about/statistics/population_statistics.jsp (last visited Apr. 17, 2023) (only 5% of federal prisoners are housed in these circuits). There is no need to wait for these courts to weigh in on a question that has divided the nine other circuits where 95% of prisoners are located.

2. This case is a good vehicle to resolve these purely legal issues. Watford remains incarcerated and his sentence is not set to expire within the next several years, obviating any risk of mootness. The sentencing court did not identify any other conviction that could substitute for Watford's Florida burglary offense as a predicate crime of violence. Watford's argument that his Florida burglary conviction cannot qualify as a predicate crime of violence would have been foreclosed in his original § 2255 petition. And there is no dispute that, under precedent from this Court and Watford's sentencing circuit, he is serving a substantially enhanced sentence for conduct that no longer qualifies as a crime of violence. Granting Watford's petition would therefore shorten his sentence.

Moreover, although the Court is currently considering certain issues related to the scope of the savings clause in *Jones* v. *Hendrix*, No. 21-857, this case raises an additional question not squarely presented there. *Jones* asks whether a petitioner can seek habeas relief under the savings clause when a statutory claim he could have raised in his first § 2255 motion would have failed at that time, but would now prevail under an intervening decision from this Court. The briefing and argument did touch on the question of whether an intervening circuit decision can also suffice to trigger the savings clause. *See* Br. for Respondent 19-22; Br. for Court-Appointed *Amicus Curiae* in Support of Judgment Below 30-31, 33-36, 38-39; Reply Br. for Petitioner 12-13, 18-20; Reply Br. for Respondent 8-9; Tr. of Oral Arg. 9-11, 13-14. But because that issue was not central to *Jones*, it was not fully developed there. This case, by contrast, turns on whether Watford can invoke an intervening decision from his convicting circuit in a § 2241 petition presented to his confining circuit, whether to trigger the savings clause or to demonstrate that he is entitled to relief on the merits.

To the extent this Court determines that *Jones* implicates the question presented here, however, the petition should be held pending the resolution of *Jones* and disposed of as appropriate in light of that decision.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision below reversed. Alternatively and to the extent the Court deems it appropriate here, the

Court should hold this case in abeyance pending resolution of *Jones* and then disposed of as appropriate in light of that decision.

Respectfully submitted,

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