No. 17-85

In the Supreme Court of the United States

DAN CARMICHAEL MCCARTHAN, PETITIONER

v.

JOSEPH C. COLLINS,
CHIEF UNITED STATES PROBATION OFFICER
FOR THE MIDDLE DISTRICT OF FLORIDA

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

REPLY BRIEF FOR THE PETITIONER

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In its response, the government concedes, as it must, that "a circuit conflict exists on the question presented." Br. in Opp. 11. The government further concedes, as it also must, that the question presented is "significan[t]" and that "this Court's review [is] warranted." *Id.* at 25.

What is more, the government announces that it is switching sides on the question presented—thereby abandoning a position it had taken for at least sixteen years across multiple administrations. Instead, the government now embraces the position it had repeatedly characterized as erroneous and that it even now recognizes produces "harsh results." Br. in Opp. 24 (citation omitted).

The government further represents that its change in position was "prompted in part" by the court of appeals' decision in this case. *Id.* at 15.

In light of all of that, one would surely expect the government to support certiorari in this case. But no! The government asserts that, while "this Court's review would be warranted in an appropriate case," Br. in Opp. 25, the petition in this case should be denied because of two purported vehicle problems, see *id.* at 25-32. But those supposed vehicle problems are not problems at all. The best evidence is that, while the government made the same arguments below, *none of the six opinions from the en banc court of appeals found those arguments posed an obstacle to resolution of the question presented.*

There is nothing inherently wrong with a new administration's changing position on a question before this Court—although it is rare on a question involving the administration of the criminal justice system. But when the government changes position on a concededly important question that has divided the circuits, it should at least have the courage of its convictions and be willing to defend its new position on the merits in this Court. The government's reluctance to do so here, in the very case that supposedly prompted its change in position, is telling. The petition for a writ of certiorari should be granted.

1. The government correctly concedes that "the circuits are divided regarding the availability of habeas relief under the saving clause" and that "the significance of the issue" means that "this Court's review would be warranted in an appropriate case." Br. in Opp. 25. But there is no good reason to delay review, and indeed there is good

reason not to: absent the Court's intervention, the entrenched circuit conflict will continue to produce divergent outcomes in the lower courts.[1]

a. Two recent decisions concerning a pair of brothers, Gary and Robert Bruce, vividly illustrate the costs of further delay. Both brothers were convicted in the same court of the same offense and received the same sentence. After this Court's decision in *Fowler* v. *United States*, 563 U.S. 668 (2011), which narrowed the scope of liability under their statute of conviction, both filed habeas applications under Section 2241.

Gary was incarcerated within the Third Circuit, whereas Robert was incarcerated within the Eleventh Circuit. Although Gary was afforded a meaningful opportunity to challenge his detention based on *Fowler* under Third Circuit precedent, Robert was not so lucky under Eleventh Circuit precedent. Compare *Bruce* v. *Warden*, 868 F.3d 170, 183 (3d Cir. 2017), with *Bruce* v. *Warden*, 658 Fed. Appx. 935, 939 (11th Cir. 2016) (per curiam), cert. denied, 137 S. Ct. 683 (2017). In adjudicating Gary's claim, the Third Circuit implored that this "disparate

[1] While agreeing with petitioner that there is a nine-to-two circuit conflict, the government notes that only two courts of appeals have expressly held that a prisoner may invoke the savings clause to pursue sentence-based claims. See Br. in Opp. 25-27 & n.2. The text of the savings clause, however, speaks of challenges to "detention"—a "different, broader word" that "supports the conclusion that Congress did not intend that 'detention' be equated with 'conviction,'" especially when "[o]ther provisions of Section 2255 expressly impose a conviction-only limitation." U.S. Supp. Br. at 14-15, *United States* v. *Surratt*, No. 14-6851 (4th Cir. Feb. 2, 2016). Moreover, there is no valid reason to treat challenges to unlawful convictions differently from challenges to unlawful sentences; as the government has recognized, "analogous considerations apply in [both] context[s] and justify the same result." U.S. Br. in Opp. at 13 & n.4, *Dority* v. *Roy*, No. 10-8286 (May 16, 2011).

treatment * * * not be overlooked," and it called on this Court or Congress to resolve the "entrenched split" in authority. *Bruce*, 868 F.3d at 177, 180.

The government does not suggest that the circuit conflict will somehow resolve itself. In fact, when the government informed the Fourth Circuit of its change in position in a case currently pending there, it did not seek reconsideration of circuit precedent interpreting the savings clause—even though the government now disagrees with it. See U.S. Br. at 24, 31, *United States* v. *Wheeler*, No. 16-6073 (4th Cir. Oct 6, 2017); cf. U.S. Supp. Br. at 7-52, *United States* v. *Surratt*, No. 14-6851 (4th Cir. Feb. 2, 2016) (taking the contrary position in a brief signed by Deputy Solicitor General Dreeben). Not only does the government thus accept the circuit conflict; it has shown itself unwilling to ameliorate the status quo. But such a division, on a question so fundamental to the administration of the criminal justice system, is intolerable. See *Camacho* v. *English*, 872 F.3d 811, 815 (7th Cir. 2017) (Easterbrook, J., concurring) (stating that "the Supreme Court needs to decide whether § 2255(e) permits litigation of this kind").

b. The government acknowledges that it argued for the majority position on the question presented for at least sixteen years. See Br. in Opp. 14. It claims, however, to have "reconsidered the issue" and "come to a different conclusion," "prompted in part" by the decision below. *Id.* at 14-15. That change in position merely reinforces the case for certiorari.

i. Sixteen years ago, during the administration of President George W. Bush, the government assured this Court that, "[b]ecause of the availability of the 'savings clause,' there is no concern that federal prisoners who have a claim based on a new decision of this Court cutting back on the sweep of a criminal statute * * * will lack

a remedy." U.S. Br. at 20 n.9, *Tyler* v. *Cain*, No. 00-5961 (Mar. 2, 2001). And in the years that followed, the government filed at least eleven briefs in this Court arguing that the savings clause provides relief "where Section 2255 prevents a federal prisoner from presenting a claim that, under an intervening, retroactively applicable statutory-construction decision of this Court, his sentence is above the statutory maximum, and circuit law foreclosed his legal claim at the time of his sentencing, direct appeal, and first Section 2255 motion." U.S. Br. in Opp. at 9, 11-13, *Dority* v. *Roy*, No. 10-8286 (May 16, 2011); see Pet. 19-20 (citing other briefs). In so doing, the government emphatically rejected the position it now embraces. See Pet. 20-21.

What is more, the government leveraged its acceptance of the majority rule to urge this Court to adopt the government's positions in other cases. For example, the government pointed to the availability of the savings clause for prisoners seeking relief under decisions that narrowed criminal statutes in arguing that there was "no basis for distorting" the gatekeeping provision of 28 U.S.C. 2244(b)(2)(A) to "create such a remedy." U.S. Br. at 20-21 n.9, *Tyler*, *supra*. Similarly, the government urged denial of petitions for certiorari in other cases involving the savings clause because those cases fell outside the majority rule. See Pet. 23 nn.10-11.

ii. The government represents that its change in position was "prompted in part" by the court of appeals' decision below. Br. in Opp. 15. That explanation does not hold water.

The majority opinion of the en banc court of appeals (written by Judge William Pryor) essentially restates the view that Judge Pryor articulated in his concurring opinion in *Samak* v. *Warden*, 766 F.3d 1271 (11th Cir. 2014). See Pet. 18-19. And Judge Pryor's opinion, in turn, was

based on then-Judge Gorsuch's opinion in *Prost* v. *Anderson*, 636 F.3d 578 (10th Cir. 2011), cert. denied, 565 U.S. 1111 (2012). Yet those opinions did not "prompt" a government rethink. To the contrary, in its brief below, the government "disagree[d]" with the *Samak* concurrence and *Prost*, asserting that their analysis was "refuted by section 2255(e)'s drafting history and text, when read as a whole." Gov't C.A. En Banc Br. 20 (Sept. 9, 2016). And in *Prost* itself, the government urged rehearing and criticized the panel for employing "a faulty mode of interpretation" that led to an "extreme result." U.S. Resp. to Pet. for Reh'g En Banc at 8, 13, *Prost*, *supra* (Apr. 25, 2011).

Again, there is nothing inherently wrong with a new administration's changing position on a question before this Court. But where that happens, the government should be more forthright about its reasons, as it has in other cases. Cf. U.S. Br. at 13, *Epic Systems Corp.* v. *Lewis*, No. 16-285 (June 16, 2017) (explicitly citing "the change in administration" as the basis for a change in position).

2. This case is a suitable vehicle for review of the question presented because it lacks the complications of earlier cases presenting the same question. See Pet. 22-23. The government contends that the Court should deny review because of two purported vehicle problems. See Br. in Opp. 25-32. But neither issue presents a threshold obstacle to the Court's review; at most, they are issues for the lower courts to consider on remand. And in any event, each of the government's arguments is insubstantial.

a. The government first notes that petitioner could potentially obtain relief on his discrete claim under *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), which is the subject of a pending (but stayed) Section 2255 motion. See Br. in Opp. 28-29. The government raised that argument below, but none of the six opinions saw fit even to

mention it. See Pet. 25. Should the Court agree with petitioner on the question presented, it can readily leave any question concerning the second Section 2255 motion for the lower courts to address in the first instance. See *ibid.*

In any event, as the government itself has argued, because a constitutional claim under *Johnson* is discrete from the statutory claim at issue here under *Chambers* v. *United States*, 555 U.S. 122 (2009), a prisoner is entitled to pursue a *Chambers* claim under Section 2241 regardless of his ability to bring a second or successive Section 2255 motion raising a *Johnson* claim. See Return and Answer, *Butler* v. *McClintock*, Civ. No. 15-321, Dkt. No. 16, at 2-3 (D. Ariz. Nov. 20, 2015). In *Butler*, the government supported relief under the savings clause on a *Chambers* claim *after* the prisoner had filed a habeas petition in this Court raising a *Johnson* claim, and the district court ultimately granted that relief. See Steve Vladeck, *Is the Solicitor General Playing a Shell Game With the Supreme Court Over 'Johnson' Retroactivity?* PrawfsBlawg (Dec. 16, 2015) <tinyurl.com/vladeckpost>. *Butler* is materially indistinguishable from this case.

b. The government next contends that petitioner's claim would fail on the merits because his presentence report identified three prior convictions independent of the challenged escape conviction. See Br. in Opp. 29-32. Whether petitioner is entitled to relief *on the merits*, however, is plainly discrete from whether the savings clause permits petitioner *to file an application* under Section 2241; the merits can and should be left for the lower courts in the event of a ruling in petitioner's favor on the threshold question.

In any event, the government's argument is once again insubstantial. In the initial proceedings, neither the presentence report, nor the government, nor the district court even identified the convictions the government now

invokes as *potential* predicates under the Armed Career Criminal Act, see Br. in Opp. 30, and Eleventh Circuit precedent makes clear that the government cannot do so for the first time on appeal, see Pet. 24 n.12. One member of the original panel recognized as much in the en banc proceedings, see *ibid.*, and a separate panel of the Eleventh Circuit, adjudicating petitioner's application for leave to file a successive Section 2255 motion, concluded that "it is not clear" that petitioner "has three prior convictions that categorically qualify as ACCA predicates," C.A. Order at 4-5, *In re McCarthan*, No. 16-13334 (July 7, 2016). That issue likewise poses no obstacle to the Court's consideration of the question presented.[2]

3. Perhaps recognizing that this case is an obvious candidate for further review, the government devotes much of its brief to a preview of its newfangled position on the merits. See Br. in Opp. 15-25. Those arguments warrant only a brief response at this stage.

a. The government first asserts that the text of the savings clause shows the clause "is concerned with process—ensuring the petitioner an opportunity to bring his argument—not with substance—guaranteeing nothing about what the opportunity promised will ultimately yield

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[2] The government states in passing that petitioner "cannot show that he is actually innocent of an ACCA-enhanced sentence." Br. in Opp. 32. That is a puzzling statement. As the government has explained, it is an "err[or] at the outset [to] import[] the 'actual innocence' framework" to the context of the savings clause. U.S. Supp. Reply Br. at 11, *Surratt*, *supra* (Mar. 9, 2016). Actual innocence "operates as a judge-made background principle that permits a prisoner seeking habeas relief to overcome procedural default or other procedural limitations that would otherwise bar relief." *Ibid.* (citing *McQuiggin* v. *Perkins*, 133 S. Ct. 1924 (2013)). The savings clause, by contrast, is an express grant of statutory authority; as a result, "application of the savings clause does not turn on actual innocence." *Id.* at 12.

in terms of relief." Br. in Opp. 16 (quoting *Prost*, 636 F.3d at 584). But the correct inquiry is whether the process afforded by Section 2255 can fairly be described as providing "a *meaningful* opportunity" for relief, not merely a nominal one. *Boumediene* v. *Bush*, 553 U.S. 723, 779 (2008) (emphasis added).

As this Court has noted, "a theoretically available procedural alternative * * * does not offer most defendants a meaningful opportunity." *Trevino* v. *Thaler*, 133 S. Ct. 1911, 1920-1921 (2013). And as the government has previously explained, "a theoretical opportunity to 'test' the legality of [one's] conviction or sentence * * * by overruling precedent, insulated by the doctrine of *stare decisis*, does not provide the adequate and effective opportunity for review that the savings clause contemplates." U.S. Supp. Br. at 30-31, *Surratt*, *supra*.

b. The government also contends "[t]he logical inference" from Section 2255(h) is that Congress intended to define "the *only available grounds* on which a federal inmate who has previously filed a Section 2255 motion can obtain further collateral review of his conviction or sentence." Br. in Opp. 18.

Again, that contention is unavailing. It "requires drawing a negative inference about the meaning of the savings clause from Congress's inclusion of new constitutional decisions as a basis for a successive motion under Section 2255(h)(2), despite the absence of evidence that Congress ever contemplated statutory decisions." U.S. Supp. Reply Br. at 10, *Surratt*, *supra* (Mar. 9, 2016). But this Court "do[es] not read the enumeration of one case to exclude another unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it." *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 168 (2003). The more logical inference is that Congress did

not consider the retroactive potential of statutory decisions when it enacted Section 2255(h). See Pet. App. 128a-129a n.24 (Rosenbaum, J., dissenting); Constitution Project Br. 10-11.

c. The government next asserts that "[p]rinciples of constitutional avoidance do not support the availability of habeas relief for prisoners like petitioner." Br. in Opp. 22. But numerous courts have indicated otherwise, see, *e.g.*, *In re Davenport*, 147 F.3d 605, 611 (7th Cir. 1998); *Triestman* v. *United States*, 124 F.3d 361, 376-380 (2d Cir. 1997); *In re Dorsainvil*, 119 F.3d 245, 248 (3d Cir. 1997), and for good reason.

"In the federal system, defining crimes and fixing penalties are legislative, not judicial, functions." U.S. Supp. Br. at 15, *Surratt*, *supra* (internal quotation marks and citation omitted). Put simply, "the separation of powers prohibits a court from imposing criminal punishment beyond what Congress meant to enact," *Welch* v. *United States*, 136 S. Ct. 1257, 1268 (2016), and "the Constitution requires substantive rules to have retroactive effect regardless of when a conviction became final," *Montgomery* v. *Louisiana*, 136 S. Ct. 718, 729 (2016). Absent the ability of federal prisoners to vindicate that principle, Section 2255's constitutionality is doubtful. But as the name suggests, the savings clause avoids that problem. See *Boumediene*, 553 U.S. at 776.

d. Finally, conceding that its new position leads to "harsh results," Br. in Opp. 24 (citation omitted), the government asks the Court to take comfort in the possibilities that petitioner could seek executive clemency and that the Department of Justice might propose legislation that would assist "some prisoners," *id.* at 25. To the best of our knowledge, however, this Court has never denied review based on the theoretical possibility of executive clemency. Nor has it done so based on the theoretical possibility that

legislation (which may not even benefit petitioner) may be enacted at some unspecified point in the future. Cf. *Garcia* v. *Texas*, 564 U.S. 940, 941-943 (2011) (per curiam) (denying government's request for a stay pending "hypothetical legislation" because "[o]ur task is to rule on what the law is, not what it might eventually be").

Where, as here, a petition presents an exceptionally important question on which the courts of appeals are deeply divided, and where there is no threshold obstacle to the Court's considering and resolving that question, further review is plainly warranted. The government offers no colorable reason for a different outcome.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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