No. 20-1704

IN THE
SUPREME COURT of the UNITED STATES

RONRICO SIMMONS, JR.,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

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

BRIEF OF *AMICUS CURIAE* RIGHTS BEHIND BARS IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF THE AMICUS CURIAE[1]

Rights Behind Bars ("RBB") is a non-profit organization representing incarcerated or formerly incarcerated individuals in challenges to their conditions of confinement. Importantly for the present matter, RBB tracks *pro se* litigation filed by incarcerated individuals around the country and regularly serves as appellate counsel for formerly *pro se* litigants. *See e.g. Taylor v. Riojas*, 141 S. Ct. 52 (2020). Through the organization's tracking and representation of *pro se* litigants, RBB has developed particular knowledge, expertise, and interest in the barriers facing incarcerated individuals in accessing courts. RBB is concerned that the decision below misunderstands the realities facing *pro se* incarcerated litigants and will exacerbate already existing difficulties for incarcerated individuals seeking to file habeas petitions.

[1] Both Petitioner and Respondent have consented to the filing of this *amicus* brief in support of Petitioner. Parties were given notice of this notice of the filing of this brief pursuant to Rule 37.2.

DISCLOSURE STATEMENT

Rights Behind Bars is a 501(c)(3) non-profit organization with no publicly traded stock. This brief was not authored in whole or in part by counsel for any party. No person or entity other than amicus curiae made a monetary contribution towards preparation of this brief.

Both Petitioner and Respondent have consented to the filing of this amicus brief in support of Petitioner. Parties were given notice of this notice of the filing of this brief pursuant to Rule 37.2(a).

SUMMARY OF THE ARGUMENT

This case presents an ideal vehicle for the Court to clearly define the appropriate pleading standard for petitioners pursuing relief under 28 U.S.C. § 2255(f)(2). The Sixth Circuit committed a fatal error in its decision below: it artificially heightened the pleading standard for incarcerated individuals seeking post-conviction relief beyond anything contemplated by the text of 28 U.S.C. § 2255(f). According to the Sixth Circuit, a petitioner alleging he was prevented from accessing the federal law materials necessary to pursue his case must somehow plead not only that he could not access the materials and that the lack of access materially impeded his ability to pursue his habeas petition but, in order to show causality, must also plead how he discovered and sought to circumvent the impediment. This requirement is atextual and all but one circuit court to address the issue has held differently from the Sixth Circuit.

Further, there is good reason why the Sixth Circuit's approach to 28 U.S.C. § 2255(f)(2) should not be allowed to stand. Incarcerated individuals are simultaneously (1) the population most in need of robust access to the courts, as the rights they seek to vindicate are often fundamental liberty interests; and (2) the individuals with the least resources at their disposal for pursing their claims effectively. Incarcerated individuals rarely have access to counsel for post-conviction relief and, as a result, a staggering percentage of habeas petitions are filed *pro se* every year. These *pro se* petitioners face tremendous practical barriers to timely filing, and the entire scope of resources at their disposal are managed by the institutions

holding them in custody. The decision below, overlayed on the already existing barriers, will severely restrict *pro se* habeas petitioners by making their already difficult self-representation nearly impossible.

Because of the error committed by the Sixth Circuit and because of the import of this matter to incarcerated petitioners, *amicus curiae* respectfully urges review by this Court.

ARGUMENT

Amicus curiae urges this Court to grant Petitioner's petition for certiorari in order to (1) address the erroneous decision below, which has deepened an already existing circuit split; and (2) to prevent the drastic consequences of the Sixth Circuit's decision for incarcerated *pro se* petitioners.

I. The Sixth Circuit's decision artificially imposes a heightened pleading standard beyond the bounds of 28 U.S.C. § 2255(f)(2).

Until 1996, there was no restriction on timing for filing a federal habeas petition. *United States v. Smith*, 331 U.S. 469, 475 (1947) ("[H]abeas corpus provides a remedy ... without limit of time"). The only constraint was a flexible rule of prejudicial delay. *See Vasquez v. Hillery*, 474 U.S. 254, 265 (1986) ("The Habeas Corpus Rules permit a State to move for dismissal of a habeas petition when it has been prejudiced in its ability to respond to the petition by delay in its filing.") (internal quotations omitted).

The Anti-Terrorism and Effective Death Penalty Act ("AEDPA") introduced a one-year statute of limitations for filing § 2254 petitions challenging a state criminal judgment and § 2255 motions challenging a federal criminal judgment. § 2255(f) establishes the one-year statute of limitations at issue here as well as tolling for impediments created by government action:

> (f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the petitioner could not file on time due to the government-created impediment.

28 U.S.C. § 2255. § 2255(f)(2) thus establishes that the statute of limitations for filing a petition is tolled if a petitioner proves that they were (1) impeded from making a motion; (2) that the impediment was a product of government action; (3) that the impediment violated the Constitution; and (4) that it was the impediment itself that was responsible for the failure to file within the time requirements set forth in § 2255(f).

In the decision below the Sixth Circuit recognized that Mr. Simmons had specified that he had:

> "no access to [a] federal law library; legal materials; assistance by prison authorities in the preparation and filing of meaningful legal papers; and no access to the Rules Governing 2255 Proceedings and AEPDA [sic] statute of limitations[.]" According to him, these inadequacies served as an impediment in violation of the Constitution that "prevented him from having the ability to timely pursue and know the timeliness for filing a 2255 Motion[.]"

Pet. App. 4a.

As such, Mr. Simmons had alleged that he was (1) impeded by the lack of federal legal materials available to him, including resources relevant to AEPDA; (2) that the impediment was of the government's creation (the state

prison controls access to all legal research materials); and (3) that the impediment was the cause of his non-compliance with the normal one-year statute of limitations. The additional element, that the impediment was a violation of the Constitution, is not at issue here as the Sixth Circuit assumed that the deprivation of federal legal materials and assistance constituted a Constitutional violation in accordance with this Court's decision in *Bounds v. Smith*, 430 U.S. 817 (1977), and in agreement with other circuits that have addressed the issue. Pet. App. 7a-9a.

Despite meeting all of the above-listed statutory requirements, the Sixth Circuit then developed an additional requirement for Mr. Simmons: holding that Mr. Simmons nonetheless failed to show causality between the impediment and his "out of time" motion because he had not pleaded precisely what steps he undertook to discover the impediment and to circumvent it. Pet. App. 11a-12a.

The text of the statute speaks for itself, and this additional requirement is nowhere to be found within it. § 2255(f)(2) does not ask Courts to determine what, if anything, a petitioner did to remedy a government-created impediment. It instead asks whether the government created an impediment and whether that impediment was the cause of the out of time filing.

A. A heightened pleading standard runs counter to the necessary lenience afforded *pro se* petitioners.

By creating a heightened pleading standard for incarcerated petitioners, the Sixth Circuit decision imposes an unduly stringent barrier on *habeas* filings when the exact opposite is demanded by this Court's precedent and

practical considerations for incarcerated petitioners who are most often proceeding *pro se*.

Subsequent to AEDPA's enactment, this Court reaffirmed that "[t]he writ of habeas corpus plays a vital role in protecting constitutional rights." *Slack v. McDaniel*, 529 U.S. 473, 483 (2000); *Holland v. Florida*, 560 U.S. 631, 649 (2010) (quoting *Slack* and noting that habeas corpus is "the only writ explicitly protected by the Constitution"). Because of this importance, this Court has long recognized that "[m]eticulous insistence upon" compliance with procedural intricacies "is foreign to the purpose of habeas corpus," *Gibbs v. Burke*, 337 U.S. 773, 779 (1949), and that, "[a] petition for habeas corpus ought not to be scrutinized with technical nicety," *Holiday v. Johnston*, 313 U.S. 342, 350 (1941). This Court has further emphasized that it would be inappropriate to interpret AEDPA to "close [the courts'] doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent." *Panetti v. Quarterman*, 551 U.S. 930, 946 (2007) (quoting *Castro v. United States*, 540 U.S. 375, 381 (2003)).

Thus, even if the text of § 2255(f)(2) were ambiguous, the importance of the *habeas* right compels courts to draw constraints on the right narrowly and not prevent access to courts where there is not clear congressional direction. In other words, while the presumption cuts in favor of the petitioner, the Sixth Circuit introduced an element cutting against him.

These concerns apply even more forcefully in light of the fact that many habeas petitions—including that of petitioner Mr. Simmons in this case—are prepared by *pro se* petitioners. This Court has long established that a "pro se document is to be liberally construed." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). Where, as is true of the vast

majority of *habeas* petitioners, the petitioner prepares his filings without the assistance of counsel, this Court's decisions require that filings be evaluated under "less stringent standards than formal pleadings drafted by lawyers." *See Haines v. Kerner*, 404 U.S. 519, 520 (1972).

The Sixth Circuit's decision then cuts against two background principles of leniency – leniency toward habeas petitions because of the important rights they seek to vindicate and leniency toward *pro se* petitioners who have neither the legal resources nor knowledge of trained attorneys.

II. The Sixth Circuit's current rule will seriously impact access to the courts for hundreds of incarcerated *pro se* petitioners annually.

The background principles described above—leniency in the *habeas* context and leniency for incarcerated *pro se* litigants—have their genesis in the practical realities and difficulties that face incarcerated *pro se* plaintiffs. The Sixth Circuit rule fails to recognize these realities, and, if left unaddressed, that rule will effectively close the courthouse door to hundreds of petitioners with potentially viable claims every year.[2]

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[2] In 2017, prisoners filed more than 27,000 civil rights and prison conditions cases in federal district courts, accounting for nearly 10 percent of the district courts' civil docket. Richard H. Frankel & Alistair E. Newbern, *Prisoners and Pleading*, 94 Wash. U. L. Rev. 899, 901 (2017). 92 percent of these filings were *pro se*, with the most common filings being federal post-conviction actions brought under 28 U.S.C. §§ 2254 and 2255 and civil rights complaints under 42 U.S.C. § 1983. *Id.* The sheer quantity of unpublished district court orders disposing of these claims have led scholars to estimate that *thousands* of *pro se* habeas petitions are dismissed as untimely every year. *See*

Pro se litigants face numerous hurdles to raising potentially meritorious claims for *habeas* review.

> Today, someone who has been wrongly convicted and sentenced and is in prison must overcome an extremely complex set of time-sensitive procedural requirements to get a state or federal court to review claims or evidence of innocence. The typical prisoner must face these constantly changing and extraordinarily demanding litigation rules with limited education, without counsel or legal aid, and with virtually no resources.

Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 Harv. C.R.-C.L. L. Rev. 339, 349 (2006).

A *pro se* litigant must "teach himself complex criminal procedure, legal reasoning, legal doctrines, how to research claims, and how to write legal briefs and motions…." Thomas C. O'Bryant, *The Great Unobtainable Writ: Indigent Pro Se Litigation After the Antiterrorism and Effective Death Penalty Act of 1996*, 41 Harv. C.R.-C.L. L. Rev. 299, 306 (2006) (where the author, then incarcerated in the Florida Department of Correction System, describes the barriers that AEDPA's time-bar presents to *pro se* litigants inside prisons and jails).

Further barriers facing *pro se* litigants include statistically significant rates of mental or physical

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John H. Blume, *AEDPA: The "Hype" and the "Bite,"* 91 Cornell L. Rev. 259, 289 n. 143 (2006) ("Due to the large number of unpublished district court orders dismissing habeas petitions as untimely, many of which are not appealed, it is impossible to say with precision how many petitions have been deemed untimely. However, the number is definitely in the thousands."); Stevenson, *supra*, at 358 (stating AEDPA's statute of limitations "has barred thousands of prisoners from review of their constitutional claims because, without counsel, they could not timely file their pleadings....").

disabilities, lower levels of literacy and educational attainment, and a lack of financial resources. For example, most prisoners have at least one disability—including 7% with vision disabilities, 6% with hearing disabilities, and 10% with ambulatory disabilities—which can prevent prisoners who are not provided assistive aids or other requisite accommodations access to law libraries. Margo Schlanger, *Prisoners with Disabilities*, 4 REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE (Erik Luna ed., 2017); *see, e.g.*, *Palladeno v. Mohr*, No. 3:18-CV-1352, 2020 WL 2199748, at *4 (N.D. Ohio May 6, 2020) (concerning a plaintiff who was too disabled to climb stairs but was put on the second floor with the law library on the first floor). More than half of prison and jail inmates suffered from some form of mental illness. Schlanger, *supra; see* Doris J. James & Lauren E. Glaze, *Mental Health Problems of Prison and Jail Inmates,* Bureau of Justice Statistics Special Report, U.S. Dep't of Justice, (2006), http://www.bjs.gov/content/pub/pdf/mhppji.pdf. Moreover, the average reading level of many state prisoners has been calculated as equal to that of a sixth grader, with language skills equal to those who have completed fourth grade. O'Bryant, *supra*, at 310 & n.75; *see also* Jessica Feierman, "The Power of the Pen": Jailhouse Lawyers, Literacy, and Civic Engagement, 41 Harv. C.R.-C.L. L. Rev. 369, 372 (2006) (noting that fourteen percent of prisoners did not complete the eighth grade, and often perform reading and writing functions at two to three grade levels below the level actually completed in school.). AEDPA's statute of limitations has an especially adverse impact on prisoners with low literacy levels who may not understand the time limit or "may have difficulty concluding their research and

filing their petitions before it expires." Feierman, *supra*, at 379.

Financial costs also establish disproportionate barriers for *pro se* habeas petitioners. According to a study conducted by the Brookings Institute, only 49 percent of incarcerated men were employed in the three years prior to incarceration, with a median annual income of only $6,250. The Brookings Institute, *Work and Opportunity Before and After Incarceration*, 1-2 (March 2018), https://www.brookings.edu/wp-content/uploads/2018/03/es_20180314_looneyincarceration_final.pdf. Impoverished *pro se* prisoners who lack the sufficient funds to purchase copies of the trial court record must often attempt to recall pertinent dates and research potential claims based on their memory of the proceedings alone. O'Bryant, *supra*, at 315–16. Though this Court has held that an indigent defendant is to be given a copy of the trial record, or a reasonable alternative, without charge, *see Griffin v. Illinois*, 351 U.S. 12 (1956), the copy of the trial court record is provided only to appellate counsel if an appeal is taken, rather than directly to the defendant. O'Bryant, *supra*, at 315–16. Some courts have held that the right to free trial court records does not apply for the purpose of preparing collateral post-conviction remedies. *See, e.g., Hansen v. United States*, 956 F.2d 245, 248 (11th Cir. 1992) ("We do not agree, however, that this right [to free trial court records] extends to access to the record for the purpose of preparing a collateral attack on a conviction."). A *pro se* prisoner wishing to file a *habeas* petition will therefore only receive a copy of the trial court records after completion of the direct appeal and, consequently, after AEDPA's time limitation has already begun. Considering the delays that often plague the prison mail system, much of the one-year time limitation might

elapse before the prisoner actually receives the record. *See Day v. Crosby*, 391 F.3d 1192, 1193 (11th Cir. 2004) ("Day's third argument was that the state public defenders withheld his trial transcripts for 352 days, and the delay cost him time in which he could have worked towards filing his appeals.").

These limitations illustrate two broader issues: (1) *pro se* litigants in carceral facilities face many difficulties and (2) even a minor government impediment, like lack of access to federal legal materials can create a formidable barrier.

Because prisoners' right to the appointment of counsel at state expense for post-conviction proceedings is not established, *Coleman v. Thompson*, 501 U.S. 722 (1991), *pro se* litigants need law libraries with appropriate resources and trained legal assistance in order to obtain access to the courts. Only through the use of prison law libraries and, in appropriate instances, the assistance of persons trained in the law, can they adequately pursue habeas corpus actions and thereby assert their rights to post-conviction relief.

Prisoners' need for access to the courts through the provision of legal materials and trained legal assistance is especially critical in light of the fact that *habeas corpus* proceedings have become extraordinarily complex and prisoners face a minefield of procedural requirements when seeking post-conviction relief. *Pro se* habeas petitioners "must decipher a complex maze of jurisprudence in order to determine which of his constitutional rights, if any, may have been violated." *Brown v. Vasquez*, 952 F.2d 1164, 1167 (9th Cir. 1991), *cert. denied*, 503 U.S. 1011 (1992). Such a task is "difficult even for a trained lawyer to master," and is often beyond the abilities of most prisoners. *Murray v. Giarratano*, 492 U.S.

1, 28 (1989) (Stevens, J. dissenting). This Court in *Bounds v. Smith* noted that "[i]t would verge on incompetence" for a lawyer to file an initial pleading without researching such issues as jurisdiction, venue, standing, exhaustion of remedies, and the types of relief available. 430 U.S. 817, 825 (1977). "Most importantly, of course, a lawyer must know what the law is in order to determine whether a colorable claim exists, and if so, what facts are necessary to state a cause of action." *Id.* If a lawyer must perform such preliminary research, it is no less vital for a *pro se* prisoner. Not only do prisoners require the relevant legal materials and assistance in order to set forth legitimate claims for relief, such materials and assistance are critical to ensuring that prisoner's claims make it past the pleading stage. For example, a prisoner attempting to avoid summary dismissal of his petition for habeas corpus must be able to research and challenge the government's "seemingly authoritative citations" and to "rebut the State's argument." *Id.* at 826. It is grossly unfair if the government's attorneys have access to a law library, and the prisoner does not. This asymmetry of information is exacerbated by the fact that government attorneys are repeat players with deep subject matter expertise on issues related to habeas petitions and prison conditions litigation.

Barriers to *pro se* litigants should be of deep concern to the Court. Habeas petitions make up a substantive percentage of the federal court docket with approximately 18,000 habeas petitions are filed every year. Administrative Office of the Courts, Judicial Business of the U.S. Courts 2006, Tables B1-A, C-2. [3] Of the non-capital

[3] Indeed, the vast quantity of *pro se* prisoner filings might serve as an additional barrier itself. As Justice Jackson wrote about prisoners' habeas petitions in *Brown v. Allen*, "[i]t must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He

habeas petitions filed, over 92% are filed by *pro se* petitioners. Emily Garcia Uhrig, *The Sacrifice of Unarmed Prisoners to Gladiators: The Post-AEDPA Access-to-the-Courts Demand for a Constitutional Right to Counsel in Federal Habeas Corpus*, 14 U. Pa. J. Const. L. 1219, 1254 (2012). Despite the number of claims, more than one in five litigants are already unable to file within AEDPA's designated one-year time period. Nancy J. King et al., *Final Technical Report: Habeas Litigation in U.S. District Courts: An Empirical Study of Habeas Corpus Cases Filed by State Prisoners Under the Antiterrorism and Effective Death Penalty Act of 1996*, at 46, 57 (2007), http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf. Adding an additional pleading requirement and foreclosing the scope of relief to time requirements offered by § 2255(f)(2), as the Sixth Circuit's decision does, will only serve to time-bar more claims and deprive potential petitioners and the courts the opportunity to hear meritorious claims.

The reality is plain: nearly all habeas petitions that come before district courts are uncounseled. This requires special solicitude particularly when such important rights are at stake. The Sixth Circuit's rule removes an important safety valve built into AEDPA and effectively makes impossible the already difficult task of filing a timely habeas petition as an incarcerated *pro se* litigant.

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who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search." *Brown v. Allen*, 344 U.S. 443, 537 (1953) (Jackson, J., concurring).

CONCLUSION

Amicus curiae respectfully urges the Court to grant Petitioner's petition for certiorari. The matter is ripe for review because (1) the decision below deepens an existing circuit split; (2) the decision of the Sixth Circuit imposes an atextual heightened pleading standard for those seeking relief under § 2255(f)(2); and (3) the significant deleterious impact the ruling will have on access to courts for incarcerated petitioners who almost exclusively proceed *pro se.*

Respectfully submitted,

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