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

BRIEF FOR *AMICUS CURIAE* THE CONSTITUTION PROJECT IN SUPPORT OF PETITIONER

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BRIEF FOR *AMICUS CURIAE* THE CONSTITUTION PROJECT IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

Founded in 1997, The Constitution Project is a bipartisan nonprofit organization that seeks solutions to contemporary constitutional issues through scholarship and public education.[1] The Project brings together legal and policy experts from across the political spectrum to promote consensus-based solutions to pressing constitutional issues. The Project undertakes original research; develops policy recommendations; issues reports, statements, and policy briefs; testifies before Congress; and holds regular briefings with legislative staff and policymakers. Its work includes strengthening access to justice, protecting civil liberties, and ensuring government transparency and accountability.

The Project also coordinates several bipartisan, blue-ribbon committees comprising former judges, prosecutors, defense lawyers, victim advocates, and others with extensive and varied experience in constitutional law, federal courts, and the criminal justice system. In 2014, the Project's Death Penalty Committee issued a report making recommendations seeking to guarantee that meaningful post-conviction review is available, particularly through the federal courts. *See* The Constitution Project, *Irreversible Error: Recommended Reforms for*

[1] No counsel for a party authored this brief in whole or in part, and no counsel or entity other than *amicus curiae* and its counsel made a monetary contribution to the preparation or submission of this brief. The parties were timely notified of *amicus*'s intent to file this brief more than ten days in advance of filing and have consented to this filing.

Preventing and Correcting Errors in the Administration of Capital Punishment at 23-34 (2014).[2]

Indeed, one of the Project's key areas of focus is the constitutional imperative of procedural fairness and due process in the criminal justice system. The Project is deeply concerned with the preservation of our fundamental constitutional guarantees and ensuring that those guarantees are respected and enforced by all three branches of government. Accordingly, the Project regularly files amicus briefs in this Court and other courts in cases, like this one, that implicate its bipartisan positions, in order to better apprise courts of the importance and broad consequences of those issues.

Amicus has filed this brief because the decision below threatens the procedural fairness of the criminal justice system by foreclosing any meaningful opportunity for certain federal prisoners to challenge the fundamental legality of their convictions or sentences.

SUMMARY OF ARGUMENT

The question presented in this case may at first appear narrow and technical, but it goes to the heart of the fairness and integrity of the criminal justice system: Can a federal prisoner detained without any statutory basis challenge the legality of his detention where the primary federal post-conviction review statute, 28 U.S.C. § 2255, has never provided him a meaningful opportunity to test it? In the decision below, the Eleventh Circuit joined the Tenth Circuit in holding that a federal prisoner *cannot* raise that claim through any post-conviction vehicle other than (perhaps) an original habeas petition filed in this Court. *See* Pet. App. 31a; *Prost v. Anderson*, 636 F.3d 578, 591-92 (10th Cir. 2011) (Gorsuch, J.). In so holding,

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[2] Available at http://constitutionproject.org/wp-content/uploads/2014/06/Irreversible-Error_FINAL.pdf.

these courts consciously created a direct conflict with the majority of other circuits, which hold that the "saving clause" in Section 2255(e) allows federal prisoners to raise collateral challenges to unauthorized convictions or sentences under 28 U.S.C. § 2241. *See* Pet. 14; Pet. App. 12a-14a; *Prost*, 636 F.3d at 592-94. The existence of such a stark, widespread, and entrenched conflict on an issue of fundamental fairness clearly merits this Court's review.

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

Congress did not alter Section 2255's basic aim when revising it as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). To be sure, AEDPA imposed new restrictions on federal prisoners' ability to file multiple Section 2255 motions challenging their convictions and sentences. *See* 28 U.S.C. § 2255(h). But those restrictions merely codified common law doctrines designed to prevent the "abuse of the writ" by sandbagging or repeated relitigation of the same claims. *Felker v. Turpin*, 518 U.S. 651, 664 (1996). Indeed, Congress expressly

allowed federal prisoners to file successive petitions challenging the fundamental legality of their convictions or sentences, whether through new evidence of factual innocence, 28 U.S.C. §2255(h)(1), or a new, retroactive rule of constitutional law, *id.* §2255(h)(2). And Congress recodified the saving clause as a new statutory subsection, leaving open a safety valve for federal prisoners "to test the legality of [their] detention" where Section 2255, as revised, proved "inadequate or ineffective"—including where they had been "denied . . . relief" on an earlier Section 2255 motion. 28 U.S.C. §2255(e). Section 2255 thus continues to reflect the core function of habeas review: ensuring that prisoners have a "meaningful opportunity" to challenge fundamentally unlawful convictions or sentences. *Trevino v. Thaler*, 133 S. Ct. 1911, 1921 (2013); *see Martinez v. Ryan*, 566 U.S. 1 (2012).

Petitioner's claim is precisely the type of claim that Congress intended to save with Section 2255(e). It is an attack on the fundamental legality of his detention that would raise substantial constitutional concerns if unaddressed. When this Court issues a decision narrowing the scope of a criminal statute, it is clarifying what the statute has meant since the time of enactment, eliminating the legal authority for the convictions or sentences of a subset of federal prisoners. Denying those prisoners an opportunity to contest the legality of their detention would raise substantial "constitutional questions," *Boumediene*, 553 U.S. at 776 (quotations omitted), including separation of powers problems raised by the detention of individuals without legal support, and due process concerns presented by the incarceration of the innocent.

Further, Section 2255's text and structure effectively foreclose review of such claims where, as here, they were previously precluded by precedent. Because of that adverse caselaw, Petitioner had no meaningful opportunity

to challenge the legality of his detention in his initial Section 2255 motion (or, for that matter, on direct appeal)—and he cannot now raise the claim in a Section 2255 motion because of the statute's general bar on second or successive motions. It is therefore unsurprising that the vast majority of federal circuits and the federal government agree that these claims fall within the heartland of the saving clause, *see* Pet. 14, 19: The remedy under Section 2255 is plainly "inadequate or ineffective to test the legality of . . . detention." 28 U.S.C. § 2255(e).

It is equally evident that the contrary approach of the Tenth and Eleventh Circuits would strip the saving clause of all meaning. Neither court has been able to explain the purpose that the saving clause continues to serve under their construction—notwithstanding the consistent Congressional history of retaining the clause as part of Section 2255. Needless to say, a construction of the saving clause that renders it irrelevant is not a valid construction at all.

This Court's intervention is warranted to ensure that Section 2255(e)—and Section 2255 more generally—operate as Congress intended throughout the country.

ARGUMENT

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

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

history—it was designed to "strengthen, rather than dilute," federal habeas review. *Boumediene*, 553 U.S. at 776.

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

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

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

One practical aspect of federal habeas did not change during this period: Federal prisoners typically filed habeas petitions in the districts where they were confined. *See Hayman*, 342 U.S. at 213 ("[A] habeas corpus action must be brought in the district of confinement."); *In re Davenport*, 147 F.3d 605, 608 (7th Cir. 2008) (before Section 2255, federal prisoners "had to file a petition for habeas corpus in the district . . . in which they were imprisoned").

2. When Congress enacted 28 U.S.C. § 2255 in 1948, it did not seek to limit the post-conviction remedies available to federal prisoners. It instead sought to solve a practical problem: Because "[f]ederal prisons were concentrated in a few districts, . . . the district judges in these districts were flooded with petitions." *Davenport*, 147 F.3d at 609; *see Hayman*, 342 U.S. at 213-14 (noting that a small number of federal courts had to "handle an inordinate number of habeas corpus actions"). Further, evaluating these applications proved to be a complicated task, because "the witnesses and the records of the sentencing court" were "not readily available to the habeas corpus court." *Hayman*,

342 U.S. at 213-14.

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

This history confirms that Congress's "purpose and effect" in enacting Section 2255 "was not to restrict access to the writ but to make postconviction proceedings more efficient." *Boumediene*, 553 U.S. at 775. This Court said as much shortly after Section 2255's enactment: "Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions. On the contrary, the sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum." *Hayman*, 342 U.S. at 219. The court has repeated the point many times since. *See Hill v. United States*, 368 U.S. 424, 427 (1962) (Section 2255 is "exactly commensurate" with preexisting federal habeas corpus remedy); *see also Boumediene*, 553 U.S. at 776.

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

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

as judicially evolved," *id.* at 10-11. After all, the Court warned, if Section 2255 created "substantial procedural hurdles" not previously present, "the gravest constitutional doubts would be engendered." *Id.* at 14.

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

The exceptions to the general bar on successive motions confirm that Congress was not trying to fundamentally alter the post-conviction remedies available to federal prisoners. Section 2255(h) ensured that federal prisoners would always have an avenue to pursue two types of commonly-raised claims affecting the fundamental legality of their sentences: claims based on new evidence of innocence, 28 U.S.C. § 2255(h)(1), and claims based on new and retroactive rules of constitutional law, *id.* § 2255(h)(2). Congress did not include a third exception for second or successive claims based on an intervening statutory interpretation decision—likely because the doctrine of so-called statutory retroactivity was then far less developed, and claims based on the doctrine were much less common.[3] Indeed, the

[3] The Tenth Circuit mistakenly ascribed great significance to the absence of a specific statutory exception, reasoning that Congress must

Court's leading decisions explaining the retroactive effects of a narrowed interpretation of a criminal statute were issued after AEDPA's enactment, *see Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004); *Bousley v. United States*, 523 U.S. 614, 620-21 (1998), and generally relied on civil decisions issued shortly before, *see Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312-13 (1994). But Congress did not lock the door to these claims either—it retained the saving clause, codifying it unchanged as new Section 2255(e). *See Davenport*, 147 F.3d at 608 ("Congress did not change th[e] language [of the saving clause] when in the Antiterrorism Act it imposed limitations on the filing of successive [Section] 2255 motions."). As explained above, that statutory provision serves as an outlet for other fundamental challenges (like Petitioner's, *see infra* at 14-17), that, if unaddressed, would raise substantial constitutional concerns regarding Section 2255. *See supra* at 9; *Davenport*, 147 F. 3d at 608. And critically, the text of the saving clause preserves this outlet even where "the court which sentenced [a prisoner] . . . has denied him relief" by "motion pursuant to this section"—in other words, where the challenge to

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have been aware of the possibility of such claims based on this Court's decision in *Davis v. United States*, 417 U.S. 333 (1974). But the claim in *Davis* was not materially similar to Petitioner's—there, a prisoner sought to challenge the legality of his conviction in an *initial* Section 2255 motion based on a Supreme Court decision that was *not clearly retroactive* and that interpreted a *regulation*. *Id.* at 337-40; *see id.* at 341 n.12 ("[T]his case is not an appropriate vehicle to consider whether the [prior] decision has retroactive application."). *Davis* thus did not put Congress on notice that it needed to include a specific exception for statutory claims, as opposed to the more general safety valve provided by the saving clause. To the extent *Davis* sent any message to the Congress that enacted AEDPA, it was that Section 2255 should not be construed to "impinge upon prisoners' rights of collateral attack upon their convictions." *Id.* at 344.

the "legality of his detention" is a *second or successive challenge*. 28 U.S.C. § 2255(e).

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

The very next Term, this Court made clear that the *Martinez* exception also applies where a state technically permits defendants to raise ineffective assistance of counsel claims on direct appeal, but through a process that is "difficult, and in the typical case all but impossible, to use successfully." *Trevino*, 133 S. Ct. at 1920. The Court began its analysis by underscoring the "historic importance of federal habeas corpus proceedings as a method for preventing individuals from being held in custody in violation of federal law." *Id.* at 1916-17 (citing *Martinez*, 566 U.S. at 9-10). It then explained why Texas's procedure for raising ineffective assistance of counsel claims on appeal failed to "afford[] meaningful review" of such claims. *Id.* at 1919. The details of the procedural deficiencies are not of particular salience

here; what matters is the Court's bottom line. Because the state appellate procedure did "not offer most defendants a *meaningful opportunity* to present a claim of ineffective assistance of trial counsel" before post-conviction review, there was "no significant difference [from] *Martinez*." *Id.* at 1921 (emphasis added).

Martinez and *Trevino* of course arose in a different procedural context, but that only strengthens their persuasive force. Both decisions involved federal habeas review of *state* court convictions—a dynamic that this Court has suggested implicates federalism concerns counseling in favor of more limited review by federal courts. *Martinez*, 566 U.S. at 9-10. But even in that context, the Court held that federal habeas review must afford prisoners a "meaningful opportunity" to challenge the legality of their convictions or sentences. *Trevino*, 133 U.S. at 1921.

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

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

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

1. The claim that Petitioner seeks to raise—and that the Eleventh Circuit precluded from review in the

federal courts—is that his sentence is and has always been unlawful. Petitioner's maximum sentence, based on his offense of conviction, was ten years' (or 120 months') imprisonment. Pet. 5. The district court sentenced him to 211 months, however, concluding that he was eligible for an enhanced sentence under the Armed Career Criminal Act (ACCA). *Id.* That conclusion was based in part on the court's determination that Petitioner's 1992 conviction for walk-away escape was a "crime of violence" under ACCA, and thus one of the three predicate convictions justifying the enhancement. *Id.* at 5-6; *see* 18 U.S.C. §§ 924(e), 3583(b)(1). But in 2009—after Petitioner's Section 2255 motion was finally adjudicated—this Court held that walk-away escape is *not* a crime of violence. *Chambers v. United States*, 555 U.S. 122, 130 (2009). *Chambers* confirmed that there has never been a lawful basis for the sentence the district court imposed.

That understanding of the scope of *Chambers* follows naturally from this Court's precedents. "A judicial construction of a statute is an authoritative statement of what the statute *meant before as well as after the decision* of the case giving rise to that construction." *Rivers*, 511 U.S. at 312-13 (1994) (emphasis added). The necessary consequence of this foundational principle is that this Court's statutory interpretation decisions are, in effect, retroactive. *See AT & T Corp. v. Hulteen*, 556 U.S. 701, 712 n.5 (2009) (decision clarifying "meaning and scope of sex discrimination under Title VII" explains what the statute meant since enactment); *Schriro*, 542 U.S. at 351 ("[D]ecisions that narrow the scope of a criminal statute by interpreting its terms" "generally apply retroactively."); *Bousley*, 523 U.S. at 625-26 (Stevens, J., concurring in part) (decision narrowing a criminal statute "merely explained what [the statute] had meant ever since [it] was enacted," meaning the advice petitioner received at the time of his plea was "critically incorrect");

id. at 633 (Scalia, J., dissenting) (statutory interpretation decisions clarify "'what the statute has meant continuously since the date when it became law'" (quoting *Rivers*, 511 U.S. at 313 n.12)). That principle has special force for criminal statutes, because a "decision[] of this Court holding that a substantive federal criminal statute does not reach certain conduct . . . necessarily carr[ies] a significant risk that a defendant stands convicted of 'an act that the law does not make criminal.'" *Id.* at 620 (quoting *Davis v. United States*, 417 U.S. 333, 346 (1974)).

2. Denying Petitioner an opportunity to raise this claim would raise substantial constitutional concerns. "[U]nder our federal system it is only Congress, and not the courts, which can make conduct criminal." *Id.* at 620-21. If Congress did not intend to impose "punishment on a particular class of persons," *Schriro*, 542 U.S. at 353, their detention raises serious separation-of-powers concerns. As this Court recently explained, "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); *see id.* ("[A] court lacks the power to exact a penalty that has not been authorized by any valid criminal statute."); *Bousley*, 524 U.S. at 620-21. That is precisely what Petitioner claims has happened to him.[4]

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[4] The Court's recent decision in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), is to the same effect. There, the Court held that states are required to give retroactive effect to new substantive rules of constitutional law, even in their own courts, because those rules "place certain criminal laws and punishments altogether beyond the State's power to impose," and thus make convictions or sentences under those laws "by definition, unlawful." *Id.* at 729-30. *Montgomery* confirms that convictions or sentences that are not authorized by law pose serious constitutional problems.

Petitioner's continued incarceration also raises substantial due process concerns. Petitioner has a "constitutional right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress." *Whalen v. United States*, 445 U.S. 684, 690 (1980). As just explained, Congress did not "authorize[]" the sentence that Petitioner is currently serving. At the least, in several other contexts, the Court has made clear that ordinarily-applicable procedural limitations should yield where a habeas petitioner makes a substantial showing of actual innocence. *See, e.g.*, *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1928 (2013) (actual innocence is "a gateway through which a petitioner may pass" where the applicable statute of limitations has expired); *House v. Bell*, 547 U.S. 518, 536-37 (2006) (same for state procedural default rule). Here, petitioner has made a similar showing, establishing that he is innocent of being an armed career criminal. And here, there is no need to resort to equitable principles to allow his claim to proceed—the saving clause exists to ensure that Section 2255 does not unconstitutionally deprive him of that opportunity. *See Triestman v. United States*, 124 F.3d 361, 380 (2d Cir. 1997) ("[P]reclud[ing] all collateral review in a situation like this would raise serious questions as to the constitutional validity of the AEDPA's amendments to § 2255.").

3. Finally, it is clear that Petitioner has never had a meaningful opportunity to pursue his claim under Section 2255. Today, Petitioner cannot challenge his sentence under that statute, because he has already filed one Section 2255 motion and his claim based on *Chambers* does not fit within the enumerated exceptions to the general bar on second or successive motions. 28 U.S.C. § 2255(h). But Section 2255 also effectively barred Petitioner's claim at the time of his initial motion. Then, Eleventh Circuit precedent (incorrectly) held that walkaway escape was a crime of violence. *See United States v. Lee*, 586 F.3d 859,

874 (11th Cir. 2009). If Petitioner had challenged the use of his escape conviction as an ACCA predicate, the district court would have been powerless to grant him relief (much like the Eleventh Circuit panel in his direct appeal). And he could not have appealed the denial of a Section 2255 motion challenging the statutory basis for his sentence, because the statute governing appeals in Section 2255 proceedings permits only appeals of "the denial of a *constitutional* right." 28 U.S.C. § 2253(c)(2) (emphasis added).

As this Court recently emphasized, a "theoretically available procedural alternative" that is "all but impossible[] to use successfully . . . does not offer most defendants a meaningful opportunity to present a claim," *Trevino*, 133 S. Ct. at 1920-21. So too here with Section 2255. But the saving clause solves this problem: "[T]he court which sentenced [Petitioner] . . . has denied him relief," and "the remedy by [Section 2255] motion is inadequate or ineffective to test the legality of his detention," meaning that he can file "[a]n application for a writ of habeas corpus" under Section 2241. 28 U.S.C. § 2255(e).

2. The Decision Below Strips The Saving Clause Of All Meaning.

The consequences of the Eleventh Circuit's contrary construction of the saving clause should eliminate any remaining doubts about whether Petitioner's claim should proceed. The Tenth and Eleventh Circuits were unable to provide any plausible account of the saving clause's purpose under their construction—meaning their interpretation must be rejected. *See Triestman*, 124 F.3d at 376 ("'[I]nadequate and ineffective' must mean *something*, or Congress would not have enacted it in 1948 and reaffirmed it in the AEDPA.").

The Eleventh Circuit's first suggestion about the saving clause's function ignores the text and purpose of

Section 2255. The court surmised that "[t]he saving clause has meaning" because it allows a federal prisoner to "file a petition for a writ of habeas corpus to challenge the *execution* of his sentence, such as the deprivation of good-time credits or parole determinations," Pet. App. 28a (emphasis added). But the saving clause applies only to prisoners "authorized to apply for relief by motion pursuant to" Section 2255, and the statute "authorize[s]" only claims challenging the *legality* (not the execution) of a sentence. 28 U.S.C. §§ 2255(a), (e). As both the Tenth and Eleventh Circuits have held, sentence-execution claims should be brought directly under Section 2241 in the district of confinement. *See Saleh v. Davis*, 398 F. App'x 331, 332 (10th Cir. 2010) ("A petition under 28 U.S.C. § 2241 attacks the execution of a sentence rather than its validity . . . whereas a 28 U.S.C. § 2255 petition attacks the legality of detention." (quotations omitted)); *Antonelli v. Warden, U.S.P. Atlanta*, 542 F.3d 1348, 1351 (11th Cir. 2008) ("[F]ederal prisoners challenging the execution of their sentence . . . raise claims which, if they are to succeed, must [proceed] under § 2241, not § 2255."). The saving clause thus has no bearing on such claims.

The Eleventh Circuit's other suggested purpose for the saving clause ignores Section 2255's history. The court suggested that the saving clause might also exist to preserve an opportunity for review "when the sentencing court is unavailable," citing the example of a military court-martial. Pet. App. 29a. But there is no indication that Congress had courts-martial on its mind when it was enacting Section 2255. As explained above, Congress was trying to solve a different, widespread problem—the severe burdens that habeas review was placing on the handful of federal districts that housed federal prisons. *See supra* at 8-9. It would be beyond strange for Congress to have embedded a sentence addressing military courts in

a statutory provision designed to address a more far-reaching problem affecting federal district courts.

Several structural features regarding military courts make the Eleventh Circuit's hypothetical even more far-fetched. First, like challenges to the execution of a sentence, collateral review of military convictions does not happen under Section 2255. Courts-martial are convened by the military, not "a court established by Act of Congress," 28 U.S.C. § 2255(a), and so review of military convictions has been governed by Section 2241. *See United States v. Denedo*, 556 U.S. 904, 920 n.1 (2009); *Clinton v. Goldsmith*, 526 U.S. 529, 537 n.11 (1999); *McClaughry v. Deming*, 186 U.S. 49, 68 (1902). Further, when Section 2255 was enacted, individuals challenging military convictions could challenge only the "jurisdiction" of the trial court. *See, e.g.*, *United States v. Grimley*, 137 U.S. 147, 150 (1890) ("The single inquiry, the test, is jurisdiction.").[5] Congress would not have used the expansive phrase, "inadequate or ineffective to test the legality of his detention," if it had intended for the saving clause to apply solely to the narrow set of claims that could have been raised in collateral review of court-martial decisions.[6]

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[5] It was not until 1953—several years after Section 2255's enactment—that the Court extended the scope of collateral review of military convictions to allow a broader set of claims to proceed. And even then, it allowed review only of whether the trial court gave full and fair consideration to a defendant's claims. *Burns v. Wilson*, 346 U.S. 137, 142 (1953) (plurality op.).

[6] The dissents below briefly mused about the possibility that the saving clause preserves an avenue of review for decisions by territorial courts that have dissolved—but then correctly rejected that possibility. *See* Pet. App. 64a-65a (Jordan, J., dissenting); *id.* at 110a n.17 (Rosenbaum, J., dissenting). Again, in enacting Section 2255, Congress was focused on streamlining *federal* review of *federal* convictions, and there is no reason to think that it made the bizarre decision to embed a statutory provision relating to territorial courts within

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The question presented in this case ultimately reduces to the following simple inquiry: When Congress included and then recodified the saving clause as part of Section 2255, was it inserting a provision that did nothing (or at least nothing related to the end Congress was trying to accomplish)? Or was Congress attempting to ensure that federal prisoners have a meaningful opportunity to raise challenges to the fundamental legality of their convictions or sentences that cannot be raised under Section 2255? The answer is clear: The text and history of Section 2255 confirm that Congress wanted to allow claims like Petitioner's to be reviewed by a federal court.

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that scheme. Moreover, it is far from clear that Congress would even have thought of territorial courts as being subject to Section 2255, because at least some of those courts are "created by the legislature of the territory," and thus "are not 'courts established by an act of Congress' within the meaning of Section 2255(a)." Pet. App. 64a-65a (Jordan, J., dissenting).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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