No. 19-50914

IN THE

United States Court of Appeals

for the Fifth Circuit

MOHAMAD YOUSSEF HAMMOUD,
Petitioner–Appellant,

v.

WARDEN SERKOU MA'AT, FEDERAL CORRECTIONAL INSTITUTION BASTROP,
Respondent–Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

NO. 1:18-CV-00751

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER-APPELLANT

Cynthia Eva Hujar Orr
Regional Vice Chair,
5th Circuit Amicus Committee
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
Goldstein and Orr
310 S. St. Mary's Street
San Antonio, TX 78205
(210) 220-7463

Dan L. Bagatell
PERKINS COIE LLP
3 Weatherby Road
Hanover, NH 03755
(602) 351-8250

Thomas W. Hillier II
Mica D. Klein
Mallory Gitt Webster
PERKINS COIE LLP
1201 Third Avenue
Suite 4900
Seattle, WA 98101
(206) 359-8000

No. 19-50914

Counsel for Amicus Curiae National Association of Criminal Defense Lawyers

CERTIFICATE OF INTERESTED PERSONS

Hammoud v. Ma'at

The undersigned counsel of record certifies that the following listed persons and entities described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

***Amicus Curiae*:**

National Association of Criminal Defense Lawyers

Counsel for *Amicus Curiae*:

Thomas W. Hillier II
Dan L. Bagatell
Mica D. Klein
Mallory Gitt Webster
Perkins Coie LLP

/s/ *Thomas W. Hillier II*
Thomas W. Hillier II
Counsel of Record for Amicus National Association of Criminal Defense Lawyers

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 29(g), *amicus curiae* National Association of Criminal Defense Lawyers does not request leave to participate in oral argument.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS ii

STATEMENT REGARDING ORAL ARGUMENT iiii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION 2

BACKGROUND 4

A. This Circuit and Almost Every Other Circuit Have Recognized that the Savings Clause Allows Some Actual-Innocence Claims. 5

B. The Tenth and Eleventh Circuits Have Interpreted the Savings Clause as a Virtual Nullity that Can Be Invoked Only When the § 2255 Process Is Literally Unavailable. 7

ARGUMENT 9

A. The Court Should Reject Any Modification to Its Savings-Clause Jurisprudence that Focuses on the Mere Theoretical Availability of the § 2255 Process. 9

1. The Text of the Savings Clause Requires that Petitioners Have a Sufficient Opportunity to Challenge Their Detention. 10

2. The Process-Focused Tests in *Prost* and *McCarthan* Rely on Incorrect Textual Analyses. 13

3. The Supreme Court's Habeas Corpus Jurisprudence and Congress's Intent Reinforce the Proper Textual Analysis. 15

B. Narrowly Interpreting the Savings Clause Would Impose a Host of Unwarranted Burdens on the Courts, Petitioners, and Defense Counsel. 18

C. Interpreting § 2255 as Affording Only a Theoretically Available Process Risks Undermining Public Confidence in the Justice System. 23

CONCLUSION 24

CERTIFICATE OF COMPLIANCE 26

CERTIFICATE OF SERVICE 27

TABLE OF AUTHORITIES

Page(s)

CASES

Abdullah v. Hedrick,
392 F.3d 957 (8th Cir. 2004) 6

Beras v. Johnson,
978 F.3d 246 (5th Cir. 2020) 7, 8

Boumediene v. Bush,
553 U.S. 723 (2008).....15

Carlson v. Green,
446 U.S. 14 (1980).....12

Chambers v. NASCO, Inc.,
501 U.S. 32 (1991).....15

Christopher v. Miles,
342 F.3d 378 (5th Cir. 2003) 5

Davis v. United States,
417 U.S. 333 (1974).....17

Food Mktg. Inst. v. Argus Leader Media,
139 S. Ct. 2356 (2019).....10

Garland v. Roy,
615 F.3d 391 (5th Cir. 2010) 5

Hamdan v. Rumsfeld,
548 U.S. 557 (2006).....16

Harrison v. Ollison,
519 F.3d 952 (9th Cir. 2008) 6

In re Davenport,
147 F.3d 605 (7th Cir. 1998) 4, 6, 11

In re Dorsainvil,
119 F.3d 245 (3d Cir. 1997) 6

In re Jones,
226 F.3d 328 (4th Cir. 2000) 6

In re Smith,
285 F.3d 6 (D.C. Cir. 2002).....6

Jones v. Barnes,
463 U.S. 745 (1983).....19

Jones v. Cunningham,
371 U.S. 236 (1963).....16

Lorillard v. Pons,
434 U.S. 575 (1978).....15

McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.,
851 F.3d 1076 (11th Cir. 2017) .....*passim*

McCoy v. Ct. of App. of Wis., Dist. 1,
486 U.S. 429 (1988).....20

Merit Mgmt. Grp., LP v. FTI Consulting, Inc.,
138 S. Ct. 883 (2018).....9

N.C. State Bd. of Educ. v. Swann,
402 U.S. 43 (1971).....12

Prost v. Anderson,
636 F.3d 578 (10th Cir. 2011) .....*passim*

Reyes-Requena v. United States,
243 F.3d 895 (5th Cir. 2001) .....*passim*

Richmond Newspapers, Inc. v. Virginia,
448 U.S. 555 (1980).....23

Sherman v. United States,
356 U.S. 369 24

Stephens v. Herrera,
464 F.3d 895 (9th Cir. 2006) 6

Strickland v. Washington,
466 U.S. 668 (1984).....22

Swain v. Pressley,
430 U.S. 372 (1977).....16

Taylor v. Acxiom Corp.,
612 F.3d 325 (5th Cir. 2010) 9

Trenkler v. United States,
536 F.3d 85 (1st Cir. 2008).....6

Trevino v. Thaler,
569 U.S. 413 (2013).....16

Triestman v. United States,
124 F.3d 361 (2d Cir. 1997) 6

United States v. Baumgardner,
85 F.3d 1305 (8th Cir. 1996) 18

United States v. Hayes,
No. CRIM.A. 96-60031-008, 2006 WL 1581245
(W.D. La. June 6, 2006).....22

United States v. Hayman,
342 U.S. 205 (1952).....17

United States v. Phillips,
210 F.3d 345 (5th Cir. 2000) 22

United States v. Pineda-Arrellano,
492 F.3d 624 (5th Cir. 2007) 18, 19

Wesson v. U.S. Penitentiary Beaumont, Tex.,
305 F.3d 343 (5th Cir. 2002) 5

Wilson v. Roy,
643 F.3d 433 (5th Cir. 2011) 5

Wright v. Spaulding,
939 F.3d 695 (6th Cir. 2019) 6

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. art. 1, § 9, cl. 2 16

28 U.S.C. § 1927 21

28 U.S.C. § 2241 .....*passim*

28 U.S.C. § 2255 .....*passim*

Pub. L. No. 80-773, 62 Stat. 869 (1948).....4

RULES

Fed. R. App. P. 29(a) 2

Fed. R. App. P. 38 21

Fed. R. Civ. P. 11 21

La. R. of Prof'l Conduct 3.1 21

Miss. R. of Prof'l Conduct 3.1 21

Rules of Discipline, United States District Court Southern District of Texas Rule 1(A).....20

Tex. R. of Prof'l Conduct 3.01 21

OTHER AUTHORITIES

BLACK'S LAW DICTIONARY (3d ed. 1933) 12

BLACK'S LAW DICTIONARY (4th ed. 1951) 10

The Concise Oxford Dictionary of Current English (3d ed. 1944) 11, 12

Leah M. Litman, *Judge Gorsuch and* Johnson *Resentencing (This Is Not a Joke)*, 115 MICH. L. REV. ONLINE 67 (Jan. 2017).....11

Legislative History of the Codification of Title 28 of the United States Code Entitled Judicial Code and Judiciary: P.L. 80-773, Ch. 646, 2d Sess. (1948).....17

Merriam Webster's New International Dictionary (2d ed. 1934).....10, 11

Nicholas Matteson, *Feeling Inadequate?: The Struggle to Define the Savings Clause in 28 U.S.C. § 2255*, 54 B.C.L.R. 353 (Jan. 2013).....13

Charles Pengilly, *Never Cry* Anders*: The Ethical Dilemma of Counsel Appointed to Pursue a Frivolous Criminal Appeal*, 9 CRIM. JUSTICE J. 45 (1986).....20

Practitioners' Guide to the United States Court of Appeals for the Fifth Circuit (Dec. 2020).....19

Webster's New Collegiate Dictionary (2d ed. 1949).....11, 12

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit, voluntary bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of a crime or misconduct. NACDL has approximately 9,000 direct members in 28 countries and has 90 state, provincial, and local affiliate organizations with as many as 40,000 attorneys, including private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a fair, rational, and humane criminal justice system.

NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the U.S. Constitution and has a particular interest in ensuring that criminal proceedings are handled in a proper and fair manner. To promote these goals, NACDL has frequently appeared as *amicus curiae* before this Court in cases concerning substantive criminal law and criminal procedure.

This case presents a question concerning the proper interpretation of the savings clause of 28 U.S.C. § 2255(e). That issue is vitally important to defense lawyers and criminal defendants. NACDL submits this *amicus* brief because it is

concerned that an overly restrictive interpretation of the savings clause would be inconsistent with the statute's text, the Constitution, Congress's intent, the ethical obligations of defense counsel, and the judiciary's duty to maintain public confidence. Such an interpretation would also undermine the interests of NACDL, its members, and the clients they serve.

Pursuant to Federal Rule of Appellate Procedure 29(a)(2)–(3), NACDL has moved for leave to file this brief and certifies that all parties have consented to the filing of this brief. NACDL further certifies that (1) its counsel authored this brief in its entirety, (2) no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and (3) no person or entity other than NACDL, its members, and its counsel contributed money intended to fund preparing or submitting the brief.

INTRODUCTION

Under the "savings clause" of 28 U.S.C. § 2255(e), a prisoner may seek habeas corpus relief through 28 U.S.C. § 2241 under limited circumstances: when the § 2255 remedy is "inadequate or ineffective to test the legality of [the prisoner's] detention." 28 U.S.C. § 2255(e).

For 20 years, this Court has applied the savings-clause test it first articulated in *Reyes-Requena v. United States*, 243 F.3d 893 (5th Cir. 2001). Broadly speaking, the Court has recognized that the § 2255 remedy is inadequate or ineffective if a

petitioner cannot seek relief despite a retroactively applicable Supreme Court decision establishing that the petitioner may have been convicted of a nonexistent crime. Although the test leaves the door closed on some actual-innocence claims that should be recognized (including Mr. Hammoud's), it is generally consistent with the savings-clause tests in nearly every other regional court of appeals. And most importantly, the test confirms that the savings clause offers more than a hollow process providing no practical opportunity to end unlawful imprisonment.

On the other hand, two courts of appeals—the Tenth and the Eleventh—have held that the savings clause applies only if the procedure afforded by § 2255 was formally unavailable. According to those courts, so long as there was some theoretical chance to assert a claim under § 2255—even if the claim was futile or frivolous under existing precedent—the remedy was adequate and effective. That interpretation would limit the scope of the savings clause to extremely narrow, highly unusual circumstances.

The Court has indicated that as part of its *en banc* review, it is interested in whether *Reyes-Requena* should be modified or overruled. NACDL respectfully submits that the Court should not modify or overrule its savings-clause jurisprudence by adopting the formal-process test from the Tenth and Eleventh Circuits. That test contravenes the savings clause's text and congressional intent, poses constitutional concerns, and would force petitioners and their counsel to disregard binding prece-

dent, court rules, and ethical obligations that forbid arguments that would be frivolous under settled law. Moreover, the test would undermine the public's confidence in the justice system's treatment of prisoners who contend that retroactive changes in the law mean they are actually innocent.

BACKGROUND

Federal prisoners who seek to challenge the legality of their detention must generally do so through a motion to vacate under 28 U.S.C. § 2255. *See* Pub. L. No. 80-773, 62 Stat. 869, 967–68 (1948). Through the "savings clause" of § 2255(e), however, a prisoner may seek habeas relief through 28 U.S.C. § 2241 under limited circumstances: when "the remedy by motion" under § 2255 is "inadequate or ineffective to test the legality of [the prisoner's] detention." 28 U.S.C. § 2255(e).

Section 2255 does not define when "the remedy by motion is inadequate or ineffective," *id.*, there is limited legislative history specifying what Congress intended those words to mean, *see In re Davenport*, 147 F.3d 605, 609 (7th Cir. 1998), and the Supreme Court has "not provided much guidance" on their meaning, *see Reyes-Requena*, 243 F.3d at 902. The district and circuit courts have therefore had to interpret when the § 2255 remedy is inadequate or ineffective and when a prisoner may proceed with a § 2241 habeas petition.

A. This Circuit and Almost Every Other Circuit Have Recognized that the Savings Clause Allows Some Actual-Innocence Claims.

Although the savings clause may be interpreted more broadly, as Petitioner-Appellant Mohamad Youssef Hammoud rightfully advocates, NACDL submits that the Court correctly concluded in *Reyes-Requena* that the § 2255 remedy is "inadequate or ineffective" *at a minimum* when

> (1) the petition raises a claim that is based on a retroactively applicable Supreme Court decision; (2) the claim was previously foreclosed by circuit law at the time when it should have been raised in petitioner's trial, appeal or first § 2255 motion; and (3) that retroactively applicable decision establishes that the petitioner may have been convicted of a nonexistent offense.

Garland v. Roy, 615 F.3d 391, 394 (5th Cir. 2010) (quoting *Reyes-Requena*, 243 F.3d at 904) (internal quotation marks omitted). This Court has consistently applied that test in the 20 years since *Reyes-Requena* was decided. *See*, *e.g.*, *id.* at 393–94 (applying *Reyes-Requena* to a petitioner appealing the dismissal of his § 2241 habeas petition); *Wilson v. Roy*, 643 F.3d 433, 434–35 (5th Cir. 2011) (same); *Christopher v. Miles*, 342 F.3d 378, 382 (5th Cir. 2003) (same); *Wesson v. U.S. Penitentiary Beaumont, Tex.*, 305 F.3d 343, 346–47 (5th Cir. 2002) (same).

In *Reyes-Requena*, the Court concluded that this interpretation best comports with Congress's direction that "[t]he inadequacy or inefficacy of the remedy" under § 2255 "permit[s] a federal prisoner to file a writ of habeas corpus under provisions

such as § 2241." 243 F.3d at 901. The Court also recognized that the test gave due weight to "basic features" of "actual innocence and retroactivity": a petitioner must be able to seek relief from imprisonment "for conduct that was not prohibited by law," even when the legal flaw in the prosecution's theory was not revealed until after the petitioner first filed a § 2255 motion. *Id.* at 903.

Nine other circuits have held that § 2255 is inadequate or ineffective under similar circumstances. *See Trenkler v. United States*, 536 F.3d 85, 99 (1st Cir. 2008) (quoting *In re Davenport*, 147 F.3d at 608); *Triestman v. United States*, 124 F.3d 361, 375, 377 (2d Cir. 1997), *abrogated on other grounds by Rosario v. United States*, 164 F.3d 729 (2d Cir. 1998); *In re Dorsainvil*, 119 F.3d 245, 251 (3d Cir. 1997); *In re Jones*, 226 F.3d 328, 333–34 (4th Cir. 2000); *Wright v. Spaulding*, 939 F.3d 695, 705 (6th Cir. 2019); *In re Davenport*, 147 F.3d at 611; *Abdullah v. Hedrick*, 392 F.3d 957, 960 (8th Cir. 2004); *Harrison v. Ollison*, 519 F.3d 952, 959 (9th Cir. 2008) (quoting *Stephens v. Herrera*, 464 F.3d 895, 898 (9th Cir. 2006)); *In re Smith*, 285 F.3d 6, 8 (D.C. Cir. 2002). Indeed, several circuits have adopted a more expansive test than this Court. *See, e.g.*, *Triestman*, 124 F.3d at 377; *In re Dorsainvil*, 119 F.3d at 251.

Although those courts articulate their respective tests somewhat differently, they all agree that the savings clause applies when § 2255 would prevent a challenge to continued imprisonment *for certain conduct now recognized not to have been*

illegal in the first place. Thus, under every such test, the savings clause provides more than an empty process affording no genuine opportunity to test the legality of detention.

B. The Tenth and Eleventh Circuits Have Interpreted the Savings Clause as a Virtual Nullity that Can Be Invoked Only When the § 2255 Process Is Literally Unavailable.

Only two Circuits—the Tenth and Eleventh—have reached the opposite conclusion. *See Prost v. Anderson*, 636 F.3d 578 (10th Cir. 2011); *McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076 (11th Cir. 2017); *see also Beras v. Johnson*, 978 F.3d 246, 253–64 (5th Cir. 2020) (Oldham, J., concurring) (agreeing with *Prost* and *McCarthan*). Those courts have adopted an extremely narrow interpretation of the savings clause focused solely on whether the *procedure* afforded by § 2255 was *formally* available. Under that interpretation, prisoners can invoke the savings clause only if they had no ability at all to file a claim challenging their detention.

In *Prost*, the Tenth Circuit held that the savings 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 in terms of relief." 636 F.3d at 584. For the savings clause to apply under *Prost*'s reasoning, "there must be something about the initial § 2255 procedure that *itself* is inadequate or ineffective for *testing* a challenge to detention." *Id.* at 589.

Six years later, the Eleventh Circuit followed suit in *McCarthan*. The majority there held that a motion under § 2255 "is inadequate or ineffective to test the legality of a prisoner's detention only when it cannot remedy a particular kind of claim"—that is, when the process of bringing a § 2255 motion is unavailable. 851 F.3d at 1099. The *McCarthan* majority contended that even if binding circuit precedent bars a petitioner's claim, "a motion to vacate remains an adequate and effective remedy for a prisoner to raise the claim and attempt to persuade the court to change its precedent, and failing that, to seek certiorari in the Supreme Court." *Id.* That theoretical possibility, it concluded, is all that § 2255 affords. *See id.* (reasoning that "the chance to have precedent overruled en banc or by the Supreme Court" is a "*theoretically* successful challenge or meaningful opportunity" (emphasis added)).

This test is so difficult to satisfy that the courts have identified only two instances in which the § 2255 procedure might be inadequate or ineffective: (1) if the sentencing court literally no longer exists, such as when a military tribunal has been disbanded, or (2) if a petitioner wants to challenge a facet of detention other than its legality, such as "good time" credits. *See McCarthan*, 851 F.3d at 1088 (acknowledging that a motion to vacate under § 2255 could be inadequate or ineffective to test a "claim about the *execution*" of a prisoner's "sentence" or "if the sentencing court no longer exists"); *see also Beras*, 978 F.3d at 261 (Oldham, J.,

concurring) ("Beyond these limited lacunas, the § 2255 remedy is generally both adequate and effective.").

ARGUMENT

NACDL submits that this Court should not overrule *Reyes-Requena* in favor of the formal-process approach adopted by the Tenth and Eleventh Circuits. The latter approach contravenes the text of § 2255(e), Congress's intent in including the savings clause in the statute, and the Supreme Court's broader habeas jurisprudence. It also generates ethical conundrums for defense counsel and risks undermining public confidence in the judiciary.

A. The Court Should Reject Any Modification to Its Savings-Clause Jurisprudence that Focuses on the Mere Theoretical Availability of the § 2255 Process.

Any analysis of a statute must begin with its text. *See Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883, 893 (2018); *Taylor v. Acxiom Corp.*, 612 F.3d 325, 335 (5th Cir. 2010). A textual analysis of the savings clause does not inexorably lead to the conclusion the Tenth and Eleventh Circuits reached in *Prost* and *McCarthan*—that the § 2255 remedy is adequate or effective as long as there was a theoretical ability to invoke § 2255. Rather, a faithful textual analysis shows that the savings clause's reach is more expansive, though still limited. Moreover, that textual analysis is consistent with other considerations that this Court should

consider, including the Supreme Court's habeas jurisprudence, the constitutional right to habeas relief, and Congress's intent in enacting the savings clause.

1. The Text of the Savings Clause Requires that Petitioners Have a Sufficient Opportunity to Challenge Their Detention.

The savings clause allows a federal prisoner who has been "denied relief" under § 2255 to bring a habeas petition if "*the remedy by motion is inadequate or ineffective to test the legality of his detention*." 28 U.S.C. § 2255(e) (emphasis added). The text explains that the savings clause makes habeas petitions under § 2241 available to petitioners whenever the § 2255 motion would afford them an inadequate or ineffective remedy to challenge their continued detention. *See Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) (holding that "a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself"). The text does not support the Tenth and Eleventh Circuits' conclusion that the savings clause may be invoked only in the exceedingly rare instances in which the § 2255 procedure is literally unavailable.

The ordinary meanings of "inadequate" and "ineffective" make clear that the words address "the ultimate effect" or "the result," not merely the *process* leading to an effect or result. *See McCarthan*, 851 F.3d at 1105 (Jordan, J., concurring in part). "Inadequate" means, for example, "lacking in effectiveness," *Inadequate*, BLACK'S LAW DICTIONARY (4th ed. 1951), and "insufficient," *Merriam Webster's*

New International Dictionary 1254 (2d ed. 1934). "Ineffective" means not producing an intended effect. *The Concise Oxford Dictionary of Current English 583* (3d ed. 1944); *Webster's New Collegiate Dictionary* 428 (2d ed. 1949)); *see also Merriam Webster's New International Dictionary* 1271 (2d ed. 1934) (similar).

The phrase "inadequate or ineffective" thus means a situation in which a petitioner has no way to attempt to obtain the desired "substantive result" under § 2255. *McCarthan*, 851 F.3d at 1106 (Jordan, J., concurring in part). The savings clause accordingly provides a "sufficient" opportunity to challenge the legality of a petitioner's detention—one that realistically could produce the intended effect. *See id.* at 1131 (Rosenbaum, J., dissenting) ("§ 2255 is inadequate if practical considerations effectively or actually render the procedures § 2255 establishes unavailable for testing the legality of a prisoner's detention."); *see also In re Davenport*, 147F.3d at 611 ("A procedure for postconviction relief can fairly be termed *inadequate* when it is so configured as to deny a convicted defendant any opportunity for judicial rectification of so fundamental a defect in his conviction as having been imprisoned for a nonexistent offense." (emphasis added)).

Likewise, the term "remedy" refers to a result, not just the process of achieving a result. The Supreme Court, for example, has referred to "remedy" as "the result a plaintiff obtained." Leah M. Litman, *Judge Gorsuch and* Johnson *Resentencing (This Is Not a Joke)*, 115 MICH. L. REV. ONLINE 67, 74 (2017) (citing

Carlson v. Green, 446 U.S. 14, 20–21 (1980); *N.C. State Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971)). That makes sense because a remedy is "[t]he means by which a right is enforced or the violation of a right is prevented, redressed, or compensated"—that is, the attempt to obtain a particular result. *Remedy*, BLACK'S LAW DICTIONARY (3d ed. 1933); *see also* Litman, *supra* (explaining that "as a verb, 'remedy' means to set something right"). "Remedy" is also often defined as a complement to "relief," another term emphasizing the result sought. *See Relief*, BLACK'S LAW DICTIONARY (3d ed. 1933) (defining "relief" as "the assistance, redress, or benefit which a complainant seeks at the hands of the court"). "Remedy" therefore refers to more than the nominal availability of a formal process; it refers to a real opportunity to achieve a substantive outcome.

The verb "test" is also informative. When read along with the other terms of the savings clause, it indicates that a petitioner has the right to "try" the legality of an imprisonment when § 2255 is insufficient. *The Concise Oxford Dictionary of Current English* 1266 (3d ed. 1944) ("Put to the test, make trial of"); *Webster's New Collegiate Dictionary* 878 (2d ed. 1949) ("To put to the test or proof; to try"). Of course, as this Court and others have repeatedly held, there is no guarantee of success. But the savings clause text's reveals that the ability to adequately and effectively test the legality of a detention requires an opportunity to obtain a result, not merely the formal ability to invoke a procedure.

The savings-clause interpretation this Court articulated in *Reyes-Requena* is consistent with this textual analysis. "[I]n the *language* of the savings clause," the remedy of a § 2255 motion can be "inadequate or ineffective to test" a detention when a petitioner raises a claim of actual innocence, 243 F.3d at 904 (emphasis added), allowing "a writ of habeas corpus under provisions such as § 2241," *id.* at 901.

2. The Process-Focused Tests in *Prost* and *McCarthan* Rely on Incorrect Textual Analyses.

Prost and *McCarthan* purport to rely on the textual meaning of the savings clause but in fact stray far from it. In *Prost*, for example, the court distinguished between "remedy" and "relief," reasoning that "remedy" refers only to "an opportunity or chance to test" a petitioner's "argument." 636 F.3d at 585. But as explained above, that reading of "remedy" ignores that the remedy is the opportunity or chance to obtain relief—a substantive outcome—and the fact that "remedy" and "relief" are often used synonymously. The *Prost* court did not engage in any further textual analysis. *See id.* at 584–85. Instead, the court turned to "focus[ ] more on the restrictions on second and successive motions," *see* Nicholas Matteson, *Feeling Inadequate?: The Struggle to Define the Savings Clause in 28 U.S.C. § 2255*, 54 B.C.L. Rev. 353, 376 (2013); other provisions of 28 U.S.C. § 2255, *see* 636 F.3d at 584–88; and the history of the savings clause, *id.* The court did not grapple with the meaning of the other key terms of the clause.

The *McCarthan* majority also distinguished "remedy" and "relief," concluding that a remedy "does not promise 'relief.'" 851 F.3d at 1086. But again, the fact that a remedy does not *guarantee* a particular outcome does not mean the term is divorced from a *realistic opportunity to obtain* a particular outcome, as the full definition of "remedy" makes clear. The *McCarthan* majority also asserted that "to test" means only to have an "opportunity to test or try a claim," not "'to win release." *Id.* at 1086. That articulation again ignores that the opportunity must be one that could lead to a release, even though that outcome is not guaranteed. Petitioners cannot truly "test" their convictions when they have only a nominal opportunity to raise a claim that is foreclosed by binding precedent.

The *McCarthan* majority also interpreted the terms "inadequate" and "ineffective." But instead of recognizing that those terms refer to a result, the court focused on "the nature of the motion to vacate"—the formal *process* available under § 2255. 851 F.3d at 1087. That focus ignores the ordinary meaning of those terms, which address practical efficacy. The court also strained in reading the disjunctive "or" in the phrase "inadequate or ineffective" as meaning the terms "share the same ordinary meaning." *Id.* at 1088. By doing that, the court elided the meaning of the terms that connects them to a substantive result. *See id.* at 1087–88 ("We are hard pressed to imagine a remedy that is 'lacking in effectiveness' but not 'ineffective,' or 'of such a nature as not to produce the intended effect' but not 'inadequate.'").

Contrary to the holdings in *Prost* and *McCarthan*, the savings clause does not limit a federal prisoner to filing a § 2241 habeas petition only when the § 2255 remedy is completely non-existent. Such an interpretation ignores the full meaning of the words in the clause, both when read independently and when read together. To avoid reaching a similarly incorrect outcome, this Court should reject the crabbed reading of the Tenth and Eleventh Circuits.

3. The Supreme Court's Habeas Corpus Jurisprudence and Congress's Intent Reinforce the Proper Textual Analysis.

The text of the savings clause must also be read in light of the Supreme Court's broader habeas corpus jurisprudence. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 48 (1991) (holding that "we do not lightly assume that Congress has intended to depart from established principles"); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of . . . [a] judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." (citations omitted)). And the Court has been clear: "the 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) (emphasis added; quotations omitted); *see also id.* at 779–82 (cataloguing centuries of habeas jurisprudence as "an adaptable remedy" that "entitles the prisoner to a meaningful opportunity" to challenge

detention); *Jones v. Cunningham*, 371 U.S. 236, 243 (1963) (Habeas is not "a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose."); *Hamdan v. Rumsfeld*, 548 U.S. 557, 575 (2006) (warning that courts should not "presume[ ]" that Congress "effected [a] denial [of habeas relief] absent an unmistakably clear statement to the contrary"). A merely "theoretically available procedural alternative" does not suffice. *Trevino v. Thaler*, 569 U.S. 413, 427 (2013).

This Court correctly recognized in *Reyes-Requena* that it must interpret the savings clause within that broader constitutional framework, observing that "if Congress had not included the savings clause in § 2255, it is arguable that a problem would exist under the Suspension Clause." 243 F.3d at 901 n.19 (citing U.S. Const. art. 1, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."); *Swain v. Pressley*, 430 U.S. 372, 381 (1977) (stating that the "substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus" in violation of the Constitution)).

This broader jurisprudence—including the constitutional guarantee of the availability of habeas corpus—therefore confirms that the savings clause provides

an opportunity to challenge the legality of a petitioner's detention and produce the intended effect.

Congress's intent in enacting § 2255 and the savings clause leads to the same conclusion. The legislative history of § 2255 indicates that the statute was designed to "provide[ ] an expeditious remedy for correcting erroneous sentences without resort to habeas corpus," suggesting the same focus on substance that the text of the savings clause does. *Legislative History of the Codification of Title 28 of the United States Code Entitled Judicial Code and Judiciary:* P.L. 80-773, Ch. 646, 2d Sess. (1948). As the Supreme Court explained in *United States v. Hayman*, 342 U.S. 205, 219 (1952), Congress adopted § 2255 "to meet practical difficulties that had arisen in administering the habeas corpus jurisdiction of the federal courts"—*not* to "impinge upon prisoners' rights of collateral attack." *Id.*; *see also Davis v. United States*, 417 U.S. 333, 343 (1974) ("Th[e] [legislative] history makes clear that § 2255 was intended to afford federal prisoners a remedy identical in scope to federal habeas corpus."). Adopting a test that applies the savings clause only in extremely unusual circumstances would ignore that Congress explicitly provided prisoners an avenue to pursue relief when the remedy under § 2255 is inadequate or ineffective.

B. Narrowly Interpreting the Savings Clause Would Impose a Host of Unwarranted Burdens on the Courts, Petitioners, and Defense Counsel.

In addition to deviating from the textual meaning of the savings clause, the *Prost*/*McCarthan* test would effectively force petitioners and their counsel to present a laundry list of arguments, many of which would be both futile and frivolous in the face of binding precedent. That kitchen-sink approach would not only be inefficient for the courts and counsel, but would also raise ethical landmines for counsel.

If this Court adopted that test, petitioners and their counsel would be required to advance every argument that could even theoretically help their cases, including arguments foreclosed by precedent. That would be inefficient and waste both public and private resources. *See, e.g.*, *United States v. Baumgardner*, 85 F.3d 1305, 1309 (8th Cir. 1996) (holding that "to require a defendant to raise all possible objections at trial despite settled law to the contrary would encourage frivolous arguments, impeding the proceeding and wasting judicial resources").

This Circuit has frowned on that very approach. In *United States v. Pineda-Arrellano*, for example, the petitioner raised "as his sole appellate issue" an argument foreclosed by precedent only "to preserve it for Supreme Court review." 492 F.3d 624, 625 (5th Cir. 2007). The Court made clear its frustration, noting that "[w]e have repeatedly rejected such arguments on the basis that *Almendarez-Torres* remains binding precedent until and unless it is officially overruled by the Supreme

Court." *Id.* Recognizing that "lower courts are not empowered to deconstruct such clear statements of governing authority by the Supreme Court," the Court admonished that "few issues have less merit for a defendant than the potential overruling of" [well-established, existing precedent], a fact of which "defense counsel are well aware." *Id.*; *see also* Practitioners' Guide to the United States Court of Appeals for the Fifth Circuit (December 2020) ("Make an effort to present only a few questions or issues for review. The questions you select should be stated clearly and simply. A brief that assigns a dozen errors and treats each as being of equal importance when some are clear losers may suggest that none are very good. As Justice Frankfurter once said, 'a bad argument is like the clock striking thirteen, it puts in doubt the others.'"). Adopting the *Prost/McCarthan* test would put petitioners and defense counsel in direct tension with the Court's admonitions in *Pineda-Arrellano*, whereas a more practical interpretation of the savings clause would avoid that result.

Moreover, courts discourage counsel from raising issues that distract from their client's strongest arguments. *See, e.g., Jones v. Barnes*, 463 U.S. 745, 746 (1983) ("Experienced advocates have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues. Selecting the most promising issues for review has assumed a greater importance in an era when the time for oral argument is strictly limited in most courts and when page limits on briefs are widely imposed."). Interpreting the

savings clause in a way that requires petitioners to raise even the arguments that appear weak (because they are foreclosed by binding precedent) directly conflicts with courts' reasonable attempts to dissuade litigants from preserving dead-on-arrival arguments.

The test from *Prost* and *McCarthan* would also put defense counsel in the untenable position of choosing between their ethical obligation to avoid presenting frivolous arguments and their ethical obligation to vigorously advocate their client's interests. *See McCoy v. Ct. of App. of Wis., Dist. 1*, 486 U.S. 429, 435 (1988) ("Ethical considerations and rules of court prevent counsel from . . . advancing frivolous or improper arguments"); *cf.* Charles Pengilly, *Never Cry* Anders*: The Ethical Dilemma of Counsel Appointed to Pursue a Frivolous Criminal Appeal*, 9 CRIM. JUSTICE J. 45, 64 (1986) (addressing frivolous criminal appeals and explaining that "an attorney confronted with the *Anders* situation has to do something that the Code of Professional Responsibility describes as unethical; the only choice is as to which canon he or she prefers to violate.").

Indeed, the ethical rules in this Court's subsidiary districts all prohibit counsel from presenting arguments foreclosed by precedent. For example, Texas Disciplinary Rule of Professional Conduct Rule 3.01, which federal courts in Texas follow, *see* Rules of Discipline, U.S. Dist. Ct. for the S. Dist. of Tex. R. 1(A), provides that a lawyer must not assert or oppose an argument "unless the lawyer

reasonably believes that there is a basis for doing so that is not frivolous." Under that rule, "[a] filing or assertion is frivolous if . . . the lawyer is unable either to make a good faith argument that the action taken is consistent with existing law or that it may be supported by a good faith argument for an extension, modification or reversal of existing law." Tex. R. of Prof'l Conduct 3.01 cmt. 2. Mississippi and Louisiana impose similar obligations. Miss. R. of Prof'l Conduct 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and in fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."); *id.* cmt. ("The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed."); La. R. of Prof'l Conduct 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.").

The Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure likewise prohibit frivolous arguments. *See* Fed. R. Civ. P. 11 (imposing sanctions for presenting frivolous arguments); Fed. R. App. P. 38 (allowing an award of damages and costs on the filing of frivolous appeals); *see also* 28 U.S.C. § 1927

(authorizing sanctions for an attorney or litigant who "multiplies the proceedings in any case unreasonably and vexatiously").

Although these rules allow defense counsel to present arguments for "good faith" extensions of the law, the *Prost* and *McCarthan* test would incentivize defense counsel to go farther. In the interest of protecting their clients' rights, counsel would be compelled to stretch their interpretation of "good faith," and raise any argument that could theoretically be raised, regardless of how remote success may be.

Finally, if defense counsel decided *not* to make an argument that later proved meritorious, the defendant would likely be foreclosed from raising an ineffective-assistance-of-counsel claim. That is because there would be no clear parameters for a court to evaluate what arguments counsel should (or should not) have asserted and no way to judge the reasonableness of counsel's decision-making. *See Strickland v. Washington*, 466 U.S. 668, 688 (1984) ("In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances."); *see also United States v. Phillips*, 210 F.3d 345, 350 (5th Cir. 2000) (holding that a failure or refusal to make a frivolous argument does not constitute "deficient performance" because counsel need not raise "every non-frivolous issue" to be effective); *United States v. Hayes*, No. CRIM.A. 96-60031-008, 2006 WL 1581245, at *3 (W.D. La. June 6, 2006) (holding that "this Court is bound to evaluate Mr. Hayes' arguments in light of the precedent that

existed at the time of Mr. Hayes' appeal" and accordingly, "it was not deficient for Mr. Hayes' appeal counsel to fail to challenge" a "firearm-based enhancement").

Not only does the text of the savings clause point *away* from adopting the *Prost* and *McCarthan* test, but the significant unintended consequences further caution against reaching the same outcome in this circuit. Whether this Court modifies or in some way overrules *Reyes-Requena*, it should take care to avoid a savings-clause interpretation that creates follow-on burdens for petitioners and counsel. Criminal defendants should be able to invoke the savings clause where its text allows—consistent with congressional intent and the Constitution—and tailor their § 2255 arguments to give due weight to existing law. And their counsel should be able to mount an effective challenge to their clients' convictions and imprisonment without violating their ethical obligations.

C. Interpreting § 2255 as Affording Only a Theoretically Available Process Risks Undermining Public Confidence in the Justice System.

Finally, this Court should bear in mind the effects of its decision on public confidence in the judicial decision.

The Supreme Court has recognized that "in the administration of criminal justice," courts must act to ensure "public acceptance of *both the process and its results*." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980) (emphasis added). To that end, "the federal courts have an obligation" to reject legal inter-

pretations that "violate rationally vindicated standards of justice." *See Sherman v. United States*, 356 U.S. 369, 380 (Frankfurter, J., concurring); *see also id.* ("Public confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law, is the transcending value at stake.").

Interpreting the savings clause as affording only an empty, formalistic process risks undermining public confidence in the judicial system. That is especially so because reaching that interpretation requires a strained, non-straightforward reading of the statute's text. To inspire confidence in the § 2255 process and the results of that process—whether a petitioner is successful or not—this Court should maintain a savings-clause test that promotes a meaningful opportunity to challenge continued imprisonment for claims of actual innocence.

CONCLUSION

The Court should decline to adopt a restrictive, formal-process approach to the savings clause.

* * *

DATED: August 2, 2021

Dan L. Bagatell
PERKINS COIE LLP
3 Weatherby Road
Hanover, NH 03755
Telephone: (602) 351-8250

Cynthia Eva Hujar Orr
Regional Vice Chair,
5th Circuit Amicus Committee
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
Goldstein and Orr
310 S. St. Mary's Street
San Antonio, TX 78205
Telephone: (210) 220-7463

/s/ *Thomas W. Hillier II*
Thomas W. Hillier II
Mica Klein
Mallory Gitt Webster
PERKINS COIE LLP
1201 Third Avenue
Suite 4900
Seattle, WA 98101
Telephone: (206) 359-8000

Counsel of Record for Amicus Curiae National Association of Criminal Defense Lawyers

CERTIFICATE OF COMPLIANCE

This brief contains 5,720 words in compliance with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and 5th Circuit Rule 32.3, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/ *Thomas W. Hillier II*
Thomas W. Hillier II

Counsel of Record for Amicus Curiae National Association of Criminal Defense Lawyers

CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2021, I electronically filed the foregoing Brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ *Mica D. Klein*
Mica D. Klein

Counsel of Record for Amicus Curiae National Association of Criminal Defense Lawyers