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Brief of Professor Brandon Hasbrouck as Amicus Curiae in Support of Appellant: *Bell v. Streeval*

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No. 22-6189

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JASON TYWANN BELL,

Petitioner-Appellant,

v.

J.C. STREEVAL, WARDEN OF USP LEE,

Respondent-Appellee.

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

BRIEF OF PROFESSOR BRANDON HASBROUCK AS AMICUS CURIAE IN SUPPORT OF APPELLANT

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INTEREST OF AMICUS CURIAE

This case raises the question of whether a federal inmate can be foreclosed from using habeas corpus to obtain post-conviction relief from an unconstitutional sentence by the gatekeeping provisions of 28 U.S.C. § 2255. *Amicus* is an Associate Professor of Law at Washington and Lee School of Law and a scholar of civil rights who has studied and written about the availability of remedies for unlawful sentences provided by the writ of habeas corpus and § 2255. *Amicus* has a professional interest in the sound development of the habeas corpus doctrine and ensuring this Court is fully and accurately informed about the issues raised by this proceeding, particularly as they relate to application of the Suspension Clause. U.S. Const. art. I, § 9, cl. 2. *Amicus* is expressing his own views, and not any views of his institution.

STATEMENTS REQUIRED BY FED. R. APP. P. 29

All parties have consented to the filing of this brief. *Amicus* certifies that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person other than *amicus curiae* and his counsel contributed money that was intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case goes to the heart of the integrity, fairness, and credibility of our criminal legal system. Jason Bell should be a free man today. Instead, he is serving

a 274-month sentence under the residual clause of the mandatory career offender guideline, even though an identically worded residual clause was declared unconstitutionally vague by the Supreme Court in *Johnson v. United States*, 576 U.S. 591 (2015), a decision given retroactive effect in cases on collateral review in *Welch v. United States*, 578 U.S. 120 (2016). Mr. Bell is seeking post-conviction relief through the writ of habeas corpus to correct what is undoubtedly an illegal sentence. *See Welch*, 578 U.S. at 134 ("[A] court lacks the power to exact a penalty that has not been authorized by any valid criminal statute.").

The Framers of the Constitution considered the writ of habeas corpus "a vital instrument for the protection of individual liberty." *Boumediene v. Bush*, 553 U.S. 723, 743 (2008). The privilege of habeas corpus "entitles [a] prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." *Id.* at 728–29 (quoting *INS v. St. Cyr*, 533 U.S. 289, 302 (2001)). The Framers protected the privilege of habeas corpus through the Suspension Clause of the Constitution: "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." U.S. Const. art. I, § 9, cl. 2

In 28 U.S.C. § 2255, Congress created a substitute procedure for federal prisoners seeking habeas review of their detention. However, § 2255's "gatekeeping" provisions can operate to deprive the courts of jurisdiction to hear

prisoners' petitions for relief. Congress therefore included in § 2255 a "savings clause" designed to ensure the statute's procedural requirements do not violate the Suspension Clause. The savings clause permits a federal prisoner to file a petition for habeas corpus pursuant to 28 U.S.C. § 2241 if it "appears that the [§ 2255] remedy by motion is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e).

This Court has appropriately interpreted § 2255's savings clause to allow federal prisoners to pursue habeas claims under § 2241 to challenge unlawful sentences when such challenges would otherwise be precluded by § 2255. *See, e.g.*, *Young v. Antonelli*, 982 F.3d 914 (4th Cir. 2020); *United States v. Wheeler*, 886 F.3d 415 (4th Cir. 2018). However, this Court has also said the savings clause encompasses only "limited circumstances," *In re Jones*, 226 F.3d 328, 333 (4th Cir. 2000), and "should provide only the tightest alleyway to relief," *Lester v. Flournoy*, 909 F.3d 708, 716 (4th Cir. 2018). The Court's precedents provide a clear avenue for granting relief in this case. Nevertheless, if Mr. Bell cannot proceed with a § 2241 petition under the savings clause, § 2255 would be precluding a prisoner from exercising "a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law," *Boumediene*, 553 U.S. at 728–29 (quoting *St. Cyr*, 533 U.S. at 302), in violation of the Suspension Clause.

ARGUMENT

I. The Suspension Clause Guarantees Federal Prisoners Such As Mr. Bell A Meaningful Opportunity To Challenge An Unconstitutional Sentence.

The core question raised by this case is whether a federal prisoner serving an unconstitutional sentence can be foreclosed from post-conviction habeas relief by the gatekeeping provisions of § 2255. The Constitution answers that question in the negative through the Suspension Clause. "[F]reedom from unlawful restraint [i]s a fundamental precept of liberty," and the writ of habeas corpus "a vital instrument to secure that freedom." *Boumediene*, 553 U.S. at 739. The importance of the common law writ was such that the Framers specified that it could be suspended only in the most exigent circumstances. U.S. Const. art. I, § 9, cl. 2; *see also Boumediene*, 553 U.S. at 739, 743; Martin H. Redish & Colleen McNamara, *Habeas Corpus, Due Process, and the Suspension Clause: A Study in the Foundations of American Constitutionalism*, 96 Va. L. Rev. 1361, 1370–72 (2010) (citing 2 The Records of The Federal Convention of 1787, at 438 (Max Farrand ed., rev. ed. 1966)). If § 2255's gatekeeping provisions preclude Mr. Bell's use of the statutory habeas substitute and § 2255's savings clause does not provide an avenue for habeas relief in this case, then the statute would violate the Suspension Clause.

As discussed below, Mr. Bell's pursuit of post-conviction habeas relief for his unconstitutional sentence is consistent with the historic use of habeas corpus in England and the United States. Further, the availability of habeas corpus to challenge

unconstitutional sentences such as Mr. Bell's protects critical principles of separation of powers and due process set forth in the Constitution. Any statute that precluded Mr. Bell and similarly situated prisoners from pursuing habeas relief would suspend the writ of habeas corpus in violation of the Suspension Clause.

A. Habeas Corpus Has Been Available For Post-Conviction Challenges To Unlawful Federal Sentences Since Our Nation's Founding.

Whether the nature of the writ of habeas corpus protected by the Suspension Clause should be defined by the common-law habeas protections available as of 1789 or by the writ as it has continued to evolve in the common-law tradition is a subject of ongoing debate. *See Boumediene*, 553 U.S. at 746 ("The Court has been careful not to foreclose the possibility that the protections of the Suspension Clause expanded along with post-1789 developments that define the present scope of the writ."). However, Mr. Bell's effort to challenge his unconstitutional sentence fits comfortably within the historic scope of the writ, which provided a means of seeking post-conviction review of constitutional claims alleging unlawful detention.

Prior to the creation of the American judicial system, common-law habeas corpus *ad subjiciendum*—the "Great Writ"—applied to detention challenges of all kinds. Blackstone described habeas as the "great and efficacious writ, in all manner of illegal confinement." 3 William Blackstone, *Commentaries on the Laws of England*, Ch. 8, at 131 (1765). Chief Justice Coke observed in his Institutes that "'if

a man be taken, or committed to prison *contra legem terrae*, against the Law of the land,' then '[h]e may have an *habeas corpus*.'" *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1984 (2020) (Thomas, J., concurring) (citing The Second Part of the Institutes of the Laws of England 55 (6th ed. 1681)).

In the American judicial system, the Supreme Court "started reviewing post-conviction constitutional claims under Congress's first grant of habeas authority, included in the Judiciary Act of 1789." *Brown v. Davenport*, 142 S. Ct. 1510, 1531 (2022) (Kagan, J., dissenting). The Act did not specifically provide for collateral review of constitutional claims, but "the Court in the mid-19th century invoked the habeas law to adjudicate [post-conviction constitutional] claims—including some from petitioners already convicted and sentenced." *Id.* at 1532. For example, in *Ex parte Wells*, 59 U.S. 307, 309–15 (1855), the Supreme Court scrutinized the merits of the petitioner's claim in detail before deciding that no constitutional violation occurred and the petitioner should remain in prison. In *Ex parte Lange*, 85 U.S. 163, 178 (1873), the Supreme Court, acting under the original habeas law, granted a federal prisoner habeas relief after finding a violation of the Double Jeopardy Clause, explaining it was carrying out a "sacred duty" in declaring that the prisoner was being held "without authority."

After the Civil War, Congress amended the Judicial Act to expressly provide for review of constitutional claims, and "[f]rom the mid-1800s on, federal courts

granted habeas writs to prisoners, federal and state alike, who on the way to conviction or sentence had suffered serious constitutional harms." *Davenport*, 142 S. Ct. at 1534 (Kagan, J., dissenting). For example, in *Ex parte Wilson*, 114 U.S. 417, 420–21 (1885), the Supreme Court explained that habeas review was appropriate when a prisoner's "sentence exceeds the jurisdiction of that court, or there is no authority to hold him under the sentence." And to remove any doubt, *Ex parte Nielsen* confirmed that habeas relief was available to remedy unconstitutional sentences. 131 U.S. 176, 185 (1889) ("In the present case the sentence was given beyond the jurisdiction of the court, because it was against an express provision of the constitution which bounds and limits all jurisdiction.").[1]

Mr. Bell's effort to challenge his unconstitutional sentence fits squarely within the traditional English and early American use of habeas to determine whether a prisoner was being held "without authority." *Ex parte Lange*, 85 U.S. at 178; *see*

[1] At this time, unconstitutional sentences were considered sentences issued in excess of a court's "jurisdiction." *See, e.g.*, *Ex parte Nielsen*, 131 U.S. at 185; *Ex parte Siebold*, 100 U.S. 371, 377 (1879) ("[I]f the laws are unconstitutional and void, the Circuit Court acquired no jurisdiction of the causes. Its authority to indict and try the petitioners arose solely upon these laws."); *see also Davenport*, 142 S. Ct. at 1533 (Kagan, J., dissenting) ("The concept of 'jurisdictional defects' could [during the 19th and 20th centuries] include—rather than contrast with—constitutional errors . . . ."); Jonathan R. Siegel, *Habeas, History, and Hermeneutics*, 64 Ariz. L. Rev. 505, 528 (2022) ("A nineteenth-century habeas court might also hold that a sentencing court lacked 'jurisdiction' and that habeas relief could be awarded because there was a constitutional defect in the procedure by which the sentencing court tried the petitioner."); Leah M. Litman, *The Myth of the Great Writ*, 100 Tex. L. Rev. 219, 260 (2021) (explaining that while early habeas cases "purported to focus on jurisdiction, that focus allowed courts to determine the rules about what made a detention lawful").

also Welch, 578 U.S. at 134 ("[A] court lacks the power to exact a penalty that has not been authorized by any valid criminal statute.").

In addition, arguments that the Framers intended the Suspension Clause to protect only the writ of habeas corpus as it was applied in 1789 wrongly suggest the Framers failed to recognize the writ itself had evolved, and would continue to evolve, over time in the common-law tradition. Through the seventeenth and eighteenth centuries, English and American courts understood habeas as an equitable remedy and embraced the flexibility of the writ, using habeas' broad reach to remedy a variety of legal failures. *See* Amanda L. Tyler, *A "Second Magna Carta": The English Habeas Corpus Act and the Statutory Origins of the Habeas Privilege*, 91 Notre Dame L. Rev. 1949, 1970–81 (2016); Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 Va. L. Rev. 575, 610–13 (2008). English courts "[took] the lead in developing habeas corpus jurisprudence right up to 1787," as they expanded application of the writ "to new questions as they continued to exercise the king's prerogative to protect the subject's liberty." Halliday & White, *supra*, at 612–13. When the Framers protected the writ of habeas corpus in the Suspension Clause, "they did so against the backdrop of an English history of habeas corpus, which included two centuries of judicial innovation in habeas corpus jurisprudence." *Id.* at 670; *see also Boumediene*, 553 U.S. at 779 ("Indeed, common-law habeas-corpus

was, above all, an adaptable remedy. Its precise application and scope change[] depending upon the circumstances."). Thus, in looking to the Founders' intent, the Suspension Clause still should be interpreted to protect the use of habeas corpus to challenge unlawful sentences as habeas evolved and the Supreme Court granted habeas relief, "on an assortment of constitutional grounds, to both federal and state prisoners challenging their convictions or sentences." *Davenport*, 142 S. Ct. at 1532 (Kagan, J., dissenting); *see also Preiser v. Rodriguez*, 411 U.S. 475, 485 (1973) ("[O]ver the years, the writ of habeas corpus evolved as a remedy available to effect discharge from any confinement contrary to the Constitution or fundamental law . . . .").

In sum, Mr. Bell plainly could have used the writ of habeas corpus to challenge the legality of his sentence but for Congress's enactment of the gatekeeping provisions of § 2255.

B. Habeas Corpus Must Be Available For Post-Conviction Challenges To Unlawful Federal Sentences To Protect Separation Of Powers And Due Process Principles.

Supreme Court "case law does not contain extensive discussion of standards defining suspension of the writ of habeas corpus." *Boumediene*, 553 U.S. at 773. However, the Court has recognized that the writ's role in "the system conceived by the Framers . . . must inform proper interpretation of the Suspension Clause." *Id.* at 739. In other words, the Suspension Clause is designed to protect habeas corpus, so

it should be understood to demand, "at a minimum, the availability of habeas corpus relief to address federal detention when it violates the very doctrinal underpinnings of habeas review." *McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1122 (11th Cir. 2017) (en banc) (Rosenbaum, J., dissenting).[2] Habeas review finds its doctrinal underpinnings in separation of powers and due process principles. *See Boumediene*, 553 U.S. at 742–44; *Hamdi v. Rumsfeld*, 542 U.S. 507, 554–58 (Scalia, J., dissenting). A detention that violates either principle necessarily tramples on the foundations of habeas review and demands the availability of habeas to provide relief. Mr. Bell's detention pursuant to an unconstitutional sentence presents separation of powers and due process concerns that demand the availability of habeas.

1. Mr. Bell's challenge to his unconstitutional sentence implicates fundamental separation of powers principles.

As the Supreme Court has recognized, "the Framers deemed the writ to be an essential mechanism in the separation-of-powers scheme" designed to "preserve[] limited government." *Boumediene*, 553 U.S. at 743–44 (citing The Federalist No. 84 (Alexander Hamilton)). The courts' authority to consider petitions for habeas relief derives from "freedom's first principles," including "freedom from arbitrary and

[2] In *Wheeler*, the Fourth Circuit explicitly declined to follow the *McCarthan* majority, noting that decision was contrary to similar and long-standing Fourth Circuit law. 886 F.3d at 433–34.

unlawful restraint and the personal liberty that is secured by adherence to the separation of powers." *Id.* at 797. By guaranteeing the writ's availability, the Suspension Clause "protects the rights of the detained by a means consistent with the essential design of the Constitution . . . to maintain the delicate balance of governance that is itself the surest safeguard of liberty." *Id.* at 745 (internal quotation marks omitted). Properly understood, the Suspension Clause demands consideration of "claims raising challenges that a sentence was imposed in excess of a government branch's valid powers." *McCarthan*, 851 F.3d at 1134 (Rosenbaum, J., dissenting).

The writ of habeas corpus protects the Constitution's separation of powers and limited government principles by providing a detainee a judicial forum to challenge detention in several contexts. Habeas cases often involve prisoners seeking relief when they have been subjected to an unlawful sentence because a court misinterpreted a statute. In such cases, habeas protects the basic design of our constitutional system under which "defining crimes and fixing penalties are legislative, not judicial, functions." *United States v. Evans*, 333 U.S. 483, 486 (1948). Consistent with the principle of separation of powers, a person has a "constitutional right to be deprived of liberty as a punishment for criminal conduct only to the extent authorized by Congress." *Whalen v. United States*, 445 U.S. 684, 690 (1980); *see also Welch*, 578 U.S. at 134 ("[T]he separation of powers prohibits a court from imposing criminal punishment beyond what Congress meant to

enact."). The writ of habeas corpus must be available to allow prisoners to challenge detention when a sentencing court supplants the role of Congress.

Mr. Bell's case presents a different but equally important issue implicating the Constitution's separation of powers and limited government principles: Congress, acting through the mandatory Sentencing Guidelines, forced the judiciary to impose a sentence based on a statutory provision that is unconstitutionally vague. Allowing a prisoner detained under an unconstitutional sentence to seek habeas relief preserves the basic role of the judiciary to say where the legislature has overstepped the boundaries set forth in the Constitution. Congress's role is to define crimes and fix penalties, but the "courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution." *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997); *accord id.* at 524 ("The power to interpret the Constitution in a case or controversy remains in the Judiciary."). The duty to say what the law is, including what the Constitution means, represents one of the core functions of the Judicial Branch, reserved to it by the Constitution. U.S. Const. art. III, § 2.

A statute that prevented courts from using habeas to correct unconstitutional sentences would substantially undermine the separation of powers and limited government principles enshrined in the Constitution. Habeas "accomplishes [its] crucial function by requiring consideration of claims where a prisoner tests the

legality of his imprisonment on the basis that, in jailing him, at least one of the branches of government violated the separation of powers . . . by exceeding its constitutional powers." *McCarthan*, 851 F.3d at 1134 (Rosenbaum, J., dissenting); *see also* Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 Harv. L. Rev. 901, 972 (2012) (explaining that habeas was understood by the Framers as one of the "'bulwarks of civil and political liberties' to be guarded with 'an unceasing jealousy'" (quoting 3 Joseph Story, *Commentaries on the Constitution of the United States § 1773*, at 652) (citing 1 William Blackstone, *Commentaries*, at 133) (alterations omitted)). A statute that prevented the writ from serving its basic function would shift power to the legislature at the expense of the judiciary, contrary to the Constitution's design. *See Morrison v. Olson*, 487 U.S. 654, 693 (1988) ("[T]he system of separated powers and checks and balances established in the Constitution was regarded by the Framers as 'a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'" (citation omitted)). The writ of habeas corpus must remain available to allow courts to consider claims revealing that Congress exceeded its constitutional powers.

2. Mr. Bell's challenge to his unconstitutional sentence implicates fundamental due process principles.

The writ of habeas corpus also plays a critical role in securing the Constitution's guarantee of due process. The Framers were determined to constitutionalize protections against arbitrary detentions to protect fundamental

precepts of liberty. They did so by constitutionalizing due process of law in the Fifth Amendment and habeas corpus through the Suspension Clause. *See* Amanda L. Tyler, *Is Suspension A Political Question?*, 59 Stan. L. Rev. 333, 383–84 (2006) ("[A]t its most fundamental and as it relates to the Great Writ, the guarantee of due process promises that the Executive must answer to an impartial body with a valid cause for depriving one of his or her liberty."). The Due Process Clause and the Suspension Clause work together to secure the fundamental idea, derived from the Magna Carta, that no man should be imprisoned contrary to the law of the land: the Due Process Clause provides the right against unlawful detention, and habeas corpus is "the instrument by which due process could be insisted upon by a citizen illegally imprisoned." *Hamdi*, 542 U.S. at 555–56 (Scalia, J., dissenting).

This Court has recognized that habeas should be available when "an arbitrary disregard of the petitioner's right to liberty is a denial of due process of law." *Wheeler*, 886 F.3d at 431–32 (quoting *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980)); *see also Lester*, 909 F.3d at 713 (discussing *Wheeler* and *Hicks*). In *Hicks*, the Supreme Court found a due process violation where a defendant was deprived of his "substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by [a] jury in the exercise of its statutory discretion." 447 U.S. at 346. In *Wheeler*, this Court identified due process concerns where a habeas petitioner was sentenced under an erroneous statutory enhancement that prevented

the district judge from exercising the proper range of his sentencing discretion. *See Wheeler*, 886 F.3d at 430–32.

Mr. Bell's situation presents an even sharper case of an unlawful sentence that undermines the fundamental liberty interests protected by the Due Process Clause. Mr. Bell surely had a substantial and legitimate expectation that he would not be subjected to an unconstitutionally enhanced sentence. Yet he is now continuing to serve a 274-month sentence, well beyond the 176 to 199-month guideline range that would have applied absent the constitutional error. *See* App. Op. Br. 18–19. Such sentencing errors that alter the ceiling or floor of the range prescribed by Congress are fundamental defects that the savings clause is designed to prevent. *See* Brandon Hasbrouck, *Saving Justice: Why Sentencing Errors Fall Within the Savings Clause, 28 U.S.C. § 2255(e)*, 108 Geo. L.J. 287, 313–23 (2019); *see also United States v. Tucker*, 404 U.S. 443, 447–49 (1972) (upholding decision vacating sentence based on prior convictions that were later ruled constitutionally invalid).

A statute that prevented courts from using habeas to correct unconstitutional sentences would substantially undermine the due process principles enshrined in the Constitution. The fundamental right to freedom from unlawful restraint protected by the Due Process Clause depends on the protection provided by the writ. *See Wheeler*, 886 F.3d at 430 (explaining that an unlawful sentence implicates "due process rights fundamental to our justice system"). Mr. Bell is imprisoned contrary to the law of

the land, contrary to the promise of the Constitution. The writ of habeas corpus must remain available to allow courts to consider claims that a prisoner is serving a sentence exceeding what would be legitimately expected absent a violation of the Constitution or other applicable law. Otherwise, a prisoner could be "held pursuant to 'the erroneous application or interpretation' of relevant law." *Boumediene*, 553 U.S. at 743 (quoting *St. Cyr*, 533 U.S. at 302).

II. Mr. Bell Will Be Denied The Meaningful Opportunity To Challenge His Unconstitutional Sentence Guaranteed By The Suspension Clause Unless The Court Allows Him To Proceed With A § 2241 Petition Under § 2255's Savings Clause.

The Suspension Clause "secure[s] the writ [of habeas corpus] and ensures its place in our legal system." *Boumediene*, 553 U.S. at 740. In enacting § 2255, Congress created a statue that "replaced traditional habeas corpus for federal prisoners (at least in the first instance) with a process that allowed the prisoner to file a motion with the sentencing court on the ground that his sentence was, *inter alia*, 'imposed in violation of the Constitution or the laws of the United States.'" *Id.* at 774–75 (quoting *United States v. Hayman*, 342 U.S. 205, 207 n.1 (1952)). This Court should conclude that § 2255's savings clause allows Mr. Bell to pursue habeas relief for his claim under § 2241. Reliance on § 2255's savings clause would be consistent with Congress's intent in enacting § 2255 and this Court's precedent interpreting the savings clause. However, if this Court were to conclude that § 2255's gatekeeping provisions preclude Mr. Bell's use of the statutory habeas

substitute and § 2255's savings clause does not provide an avenue for Mr. Bell to pursue habeas relief, then it would also have to conclude that § 2255 violates the Suspension Clause.

A. Congress Did Not Intend § 2255 To Restrict Access To The Writ Of Habeas Corpus.

Congress did not intend § 2255 to restrict access to habeas corpus. Originally, prisoners' first habeas petitions were filed under § 2241 in the district of confinement, which yielded administrative problems and led to the enactment of § 2255 "to make postconviction proceedings more efficient." *Boumediene*, 553 U.S. at 775. Section 2255 "channels collateral attacks by federal prisoners to the sentencing court (rather than to the court in the district of confinement) so that they can be addressed more efficiently." *In re Jones*, 226 F.3d at 332 (citation omitted). Therefore, § 2255 "afford[s] federal prisoners a remedy identical in scope to federal habeas corpus." *Davis* v. *United States*, 417 U.S. 333, 343 (1974).

Congress's intent to make habeas more efficient, while preserving the writ's remedial scope, is confirmed by § 2255's inclusion of "a saving clause, providing that a writ of habeas corpus would be available if the alternative process proved inadequate or ineffective." *Boumediene*, 553 U.S. at 776; *see* 28 U.S.C. § 2255(e) (permitting an application for writ of habeas corpus under § 2241 if "the remedy by motion is inadequate or ineffective to test the legality of [a prisoner's] detention"). Congress's enactment of the Antiterrorism and Effective Death Penalty Act of 1996

added to § 2255 the gatekeeping provisions that are now preventing Mr. Bell from seeking relief, but also preserved and recodified the savings clause as § 2255(e). As this Court has observed, § 2255's savings clause "arguably saves § 2255 from unconstitutionally suspending habeas corpus" by preserving the traditional habeas remedy if the statutory process proves inadequate or ineffective to test the legality of a prisoners' detention. *Lester*, 909 F.3d at 711; *see also Boumediene*, 553 U.S. at 776 ("The Court placed explicit reliance upon [the savings clause] in upholding [§ 2255] against constitutional challenges."); *United States v. Surratt*, 797 F.3d 240, 271 (4th Cir. 2015) (Gregory, J., dissenting) ("History therefore confirms that Congress meant for the writ of habeas corpus to remain unabridged even in the face of some limits on collateral review found in § 2255, and that the savings clause plays a distinct and crucial role within the statute. And of course we cannot forget that, ultimately, the writ of habeas corpus is an equitable remedy.").

In short, interpreting § 2255 together with its savings clause as preserving pre-existing rights of prisoners to challenge detentions through traditional habeas is consistent with Congress's intent. *See Hayman*, 342 U.S. at 219 ("Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions.").

B. This Court's Precedents Allow Mr. Bell To Pursue Relief Under § 2241.

This Court's precedents establish a clear avenue for Mr. Bell and others in a similar position to invoke § 2255's savings clause and pursue a habeas claim under § 2241. This Court has interpreted the savings clause to allow federal prisoners to pursue habeas claims under § 2241 to challenge unlawful sentences when such challenges would otherwise be precluded by § 2255. *See, e.g.*, *Young*, 982 F.3d at 917–19 (4th Cir. 2020); *Wheeler*, 886 F.3d at 429.

Appellant's Brief fully explains why Mr. Bell is entitled to relief under this Court's precedent in *Wheeler* and *Young*. In light of the Supreme Court's decisions in *Johnson* and *Welch*, Mr. Bell's current sentence is plainly unconstitutional and requires correction. In *Wheeler*, the Fourth Circuit established a four-part test to determine when a habeas petitioner may invoke § 2255's savings clause to "test the legality of his detention" via a § 2241 petition because § 2255 "is inadequate or ineffective." *Wheeler*, 886 F.3d at 429. At issue in Mr. Bell's appeal is *Wheeler*'s second prong, which asks whether, after the petitioner's direct appeal and first § 2255 motion, "settled substantive law" of the Fourth Circuit or Supreme Court changed. *Id. Young* establishes that the Fourth Circuit can evaluate the legal landscape and recognize a change in law that dictates a change in its precedent during its application of the *Wheeler* test. 982 F.3d at 919. Similarly here, although the district court was not permitted to recognize the clear change in settled

substantive law that necessarily follows from the Supreme Court's decision in *Johnson*, the Fourth Circuit faces no such constraint and now can (and should) reach the straightforward conclusion that Mr. Bell's sentence was imposed in violation of the Constitution.

If the Court were for some reason to cabin its application of *Wheeler* and *Young* such that they would not permit Mr. Bell to invoke § 2255's savings clause to obtain a remedy though § 2241, then the Court would have to contend with the Suspension Clause.

C. If § 2255's Savings Clause Does Not Provide An Avenue For Mr. Bell To Pursue Habeas Relief, § 2255 Would Violate The Suspension Clause.

As discussed above, the Supreme Court's *Boumediene* decision indicates that, to the extent the other portions of § 2255 do not allow for review, no gap should exist between claims subject to § 2255's savings clause and claims protected by the Suspension Clause. In other words, habeas claims cognizable before Congress's enactment of § 2255 must be cognizable under either § 2255 or § 2241 (by way of § 2255's savings clause), or else § 2255 violates the Suspension Clause. As the Court has recognized, failure to interpret § 2255's savings clause that way would raise "serious question[s] about the constitutionality of [§ 2255]." *Boumediene*, 553 U.S. at 776 (quoting *Swain v. Pressley*, 430 U.S. 372, 381 (1977) (internal quotation marks omitted)).

While some of this Court's cases suggest that § 2255's savings clause should be applied narrowly, none suggest the Court would fail to apply the savings clause in the circumstances presented here. In *Lester*, this Court noted that the savings clause "should provide only the tightest alleyway to relief," 909 F.3d at 716, and in *In re Jones*, the Court suggested § 2255 could be considered inadequate under "limited circumstances," 226 F.3d at 333. This Court is correct to the extent it means § 2255's savings clause should not be invoked without carefully considering whether the relief at issue could be pursued under § 2255. But in both cases, this Court nevertheless found the savings clause's requirements met and allowed petitioners to test the legality of their detention under § 2241. This Court has also stated that "[its] savings clause tests, including *Wheeler*, do not permit 'constitutional claims.'" *Slusser v. Vereen*, No. 19-7482, 2022 WL 2089023, at *4 (4th Cir. June 10, 2022) (quoting *Farkas v. Butner*, 972 F.3d 548, 559 (4th Cir. 2020)). But as Appellant observes, those statements related to constitutional claims that would otherwise pass (and in *Slusser*, had previously passed) through the gatekeeping provisions of § 2255, so § 2255 *was* adequate to test the legality of the challenged detentions. *See* App. Op. Br. 50. And in dicta in *Ham v. Breckon*, this Court described its action in *Young* as "drastic" and said the approach should be used "sparingly." *Ham*, 994 F.3d 682, 695 n.9 (4th Cir. 2021). But *Ham* still recognized that it is appropriate to establish a change in substantive law where "a change in

Supreme Court precedent necessarily dictates a change in [the Circuit's] law," as was the case in *Young*. *Id.* Those are the circumstances presented by Mr. Bell's petition.

If Mr. Bell is precluded from seeking habeas relief for his fundamentally defective sentence under the savings clause, the purpose of traditional habeas to remedy such defects "would remain unfulfilled," *Wheeler*, 886 F.3d at 428, and this Court would be interpreting § 2255 to violate the Suspension Clause. As Appellant explains, Mr. Bell is precluded from presenting his claim in a § 2255 motion through no fault of his own. (Ironically, § 2255 treats his claim as premature, even though he will never be in a position to pursue it under § 2255. *See* App. Op. Br. 41–42.) Mr. Bell's challenge to his detention falls squarely within the protections provided by habeas corpus before Congress enacted § 2255. He seeks what *Boumediene* reminds us is the basic privilege of habeas corpus protected by the Suspension Clause: "a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." *Boumediene*, 553 U.S. at 779 (quoting *St. Cyr*, 533 U.S. at 302). "[T]he Supreme Court has long recognized a right to traditional habeas corpus relief based on an illegally extended sentence." *Wheeler*, 886 F.3d at 428. Indeed, "the 'core' of habeas corpus" includes challenges to "the duration of [a prisoner's] sentence." *Nelson v. Campbell*, 541 U.S. 637, 643 (2004). Accordingly, if this Court were to interpret § 2255 to preclude Mr. Bell and

similarly situated prisoners from seeking habeas relief to challenge their detention, § 2255 would violate the Suspension Clause.

The Suspension Clause violation can also be seen in how § 2255's preclusion of Mr. Bell and others from seeking habeas relief would undermine the doctrinal underpinnings of habeas review. In requiring an unconstitutional sentence to go unchallenged, § 2255 would be undermining the judiciary's basic role in preserving separation of powers and limited government principles enshrined in the Constitution, *see Morrison*, 487 U.S. at 693, and disabling "the instrument by which due process could be insisted upon by a citizen illegally imprisoned," *Hamdi*, 542 U.S. at 555–56 (Scalia, J., dissenting).

Mr. Bell's circumstances cry out for relief. Interpreting § 2255 to preclude him from seeking habeas review would condemn him to continue serving an unjust sentence imposed under an unconstitutional statute. Such a result would severely undermine the integrity, fairness, and credibility of our criminal justice system. Habeas corpus should be available to prevent such outcomes, and precluding access to the writ of habeas corpus in this case would violate the Suspension Clause.

CONCLUSION

Section 2255's habeas substitute procedures are inadequate and ineffective to test the legality of Mr. Bell's detention. Accordingly, the savings clause Congress

provided in § 2255(e) and the Suspension Clause ensure that a petition under § 2241 is available for Mr. Bell to challenge his unconstitutional sentence.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) because it contains 5,813 words, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2016 in Times New Roman and 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing brief was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on June 21, 2022.

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