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Prost v. Anderson and the Enigmatic Savings Clause of Sec. 2255: When is a Remedy by Motion Inadequate or Ineffective

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# *PROST V. ANDERSON* AND THE ENIGMATIC SAVINGS CLAUSE OF § 2255: WHEN IS A REMEDY BY MOTION "INADEQUATE OR INEFFECTIVE"?

## INTRODUCTION

The writ of habeas corpus is a principle mechanism by which prisoners may collaterally challenge their convictions or sentences.[1] The "Great Writ" has been a part of the American judicial system in one form or another since the birth of the nation.[2] It is a right guaranteed by the Constitution,[3] but one whose contours are ever-changing and ill-defined.[4] The writ was first explicitly granted in the Federal Judiciary Act of 1789, expanded by the Habeas Corpus Act of 1867, and statutorily revised multiple times in the twentieth century.[5] With every congressional revision of the writ, courts have modulated the scope of habeas corpus review to accommodate the perceived intent of Congress.[6] As a result, the breadth of the writ has changed over time, with periods of expansive application and others of more restricted application.[7]

In the centuries that the writ has evolved, a labyrinth of procedural complexities has evolved with it.[8] The latest of these complexities involves the savings clause[9] of 28 U.S.C. § 2255. The federal circuits are split in regard to the proper application of this enigmatic clause. In *Prost v. Anderson*,[10] the Tenth Circuit waded into the murky waters of savings clause jurisprudence, and in doing so, widened an already prominent split.

Part I of this Comment contrasts the relationship between two principle mechanisms by which federal prisoners may bring collateral challenges: 28 U.S.C. §§ 2255 and 2241. Part I also examines the savings clause of § 2255 and its interpretation across circuits. Part II summarizes

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1. *See* Harvey Bartle, Comment, *One Bite at the Apple: The Effect of Recharacterization on Post-Conviction Relief Under 28 U.S.C. § 2255*, 75 TEMP. L. REV. 613, 614 (2002).

2. Lyn S. Entzeroth, *Struggling for Federal Judicial Review of Successive Claims of Innocence: A Study of How Federal Courts Wrestled with the AEDPA to Provide Individuals Convicted of Non-Existent Crimes with Habeas Corpus Review*, 60 U. MIAMI L. REV. 75, 78 (2005).

3. *See* U.S. CONST. art. I, § 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.").

4. *See* Entzeroth, *supra* note 2, at 78.

5. *Id.* at 78–81.

6. *See id.* at 80–81; *see also* Felker v. Turpin, 518 U.S. 651, 663–64 (1996) (explaining that the original writ of habeas corpus was "quite different from that which exists today").

7. *See* Entzeroth, *supra* note 2, at 80–81.

8. *Id.* at 78.

9. This "savings clause," consisting of the final twenty words of 28 U.S.C. § 2255, is so termed because it may be used to validate certain petitions for relief otherwise prohibited by that subsection.

10. 636 F.3d 578 (10th Cir. 2011).

the Tenth Circuit's recent decision in *Prost*. Part III undertakes an analysis that begins with a critique of savings clause jurisprudence and concludes with a call for the Supreme Court to settle the ever-widening circuit split.

## I. BACKGROUND

Federal prisoners have recourse to collaterally challenge their convictions and sentences through the two principle mechanisms of 28 U.S.C. §§ 2241 and 2255, but each of these remedial mechanisms may be used only in particular circumstances. The following section details these habeas and habeas-equivalent statutes. It focuses on the courts' struggle to properly define the scope of § 2255's savings clause, which allows petitioners access to § 2241 when the § 2255 mechanism is deemed "inadequate or ineffective." As explained below, the circuits were split three ways regarding proper application of this clause even before *Prost* was decided.

### *A. Federal Collateral Challenges*

This section compares the relationship between the federal habeas corpus statute, § 2241, and the habeas-equivalent statute of § 2255. It begins by tracing the origins of these two statutes and concludes by describing the revisions brought about by the Anti-Terrorism and Effective Death Penalty Act.

#### 1. The Relationship Between § 2241 and § 2255

As the Great Writ evolved, the rate at which prisoners filed habeas corpus petitions increased enormously.[11] Many of these petitions were "repetitious and patently frivolous," flooding the courts with an unending quagmire of work.[12] A series of administrative difficulties compounded the volume problem, hindering even the meritorious petitions.[13] Chief among these difficulties was the requirement that habeas petitions be filed in the district of confinement rather than the sentencing district.[14] This left the districts containing federal prisons with an "inordinate number of habeas corpus actions."[15] Furthermore, many times the districts of confinement did not have easy access to witnesses and case records, resulting in further delays and backlogs.[16]

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11. *See* United States v. Hayman, 342 U.S. 205, 212 (1952).
12. *Id.*
13. *Id.*
14. Benjamin R. Orye III, *The Failure of Words: Habeas Corpus Reform, The Antiterrorism and Effective Death Penalty Act, and When a Judgment of Conviction Becomes Final for the Purposes of 28 U.S.C. § 2255(1)*, 44 WM. & MARY L. REV. 441, 447 (2002).
15. *Hayman*, 342 U.S. at 213–14.
16. Orye, *supra* note 14, at 447–48.

Seeking to alleviate these difficulties, Congress in 1948 enacted a statutory alternative to habeas corpus, codified at 28 U.S.C. § 2255.[17] The statute was enacted to provide "a remedy exactly commensurate" with prior habeas corpus relief, but available in the sentencing district rather than the district of confinement.[18] It was intended to "minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum."[19] The statute provides, in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.[20]

Upon enactment, the statute became the "exclusive remedy for testing the validity of a judgment and sentence."[21]

In contrast to the habeas-equivalent remedy afforded by § 2255, federal court jurisdiction over actual habeas corpus petitions is codified at 28 U.S.C. § 2241, the descendant of the 1789 provision.[22] Motions pursuant to § 2241 must be brought in the district of confinement and not the district that imposed the sentence.[23] Like § 2255, this revision of habeas was also enacted in 1948, but was made available only in narrow circumstances.[24] The statute provides:

> The writ of habeas corpus shall not extend to a prisoner unless—
>
> (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
>
> (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment, or decree of a court or judge of the United States; or
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

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17. Stephen I. Vladeck, *The New Habeas Revisionism*, 124 HARV. L. REV. 941, 990 (2011) (book review).

18. Hill v. United States, 368 U.S. 424, 427 (1962).

19. *Hayman*, 342 U.S. at 219.

20. 28 U.S.C. § 2255(a) (2006).

21. Bradshaw v. Story, 86 F.3d 164, 166 (10th Cir. 1996) (quoting Johnson v. Taylor, 347 F.2d 365, 366 (10th Cir. 1965)).

22. Lee Kovarsky, *Original Habeas Redux*, 97 VA. L. REV. 61, 79 (2011).

23. Story, 86 F.3d at 166.

24. *See* Entzeroth, *supra* note 2, at 81.

> (4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right . . . claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or
>
> (5) It is necessary to bring him into court to testify or for trial.[25]

While § 2255 is the principle collateral mechanism through which prisoners may challenge their convictions, § 2241 remains the mechanism through which prisoners may challenge the execution of a sentence rather than its validity.[26] These complaints may involve prison conditions, the administration of parole, or prison disciplinary actions, among others.[27] However, it may be used only in these narrow circumstances; prisoners cannot utilize § 2241 to challenge unlawful detentions that may be remedied by § 2255.[28]

2. The AEDPA Amendments

In 1996, Congress substantially revised the federal collateral challenge statutes when it enacted the Anti-Terrorism and Effective Death Penalty Act (AEDPA).[29] One of the main goals of the revisions was to "curb the abuse of the statutory writ of habeas corpus."[30] To achieve this goal, Congress placed severe limitations on second and successive collateral challenges.[31] Post-AEDPA, subsection (h) of § 2255 provides:

> A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—
>
> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.[32]

Before this amendment, courts were free to hear successive petitions even on grounds similar to previous § 2255 motions.[33] The prior version only provided that courts were not required to hear second and

25. 28 U.S.C. § 2241(c) (2006).
26. Entzeroth, *supra* note 2, at 83.
27. Jiminian v. Nash, 245 F.3d 144, 146 (2d Cir. 2001).
28. Entzeroth, *supra* note 2, at 85.
29. *Id.* at 87.
30. H.R. REP. NO. 104-518, at 111 (1996) (Conf. Rep.).
31. Entzeroth, *supra* note 2, at 87–88.
32. 28 U.S.C. § 2255(h) (2006).
33. Entzeroth, *supra* note 2, at 88.

successive motions.[34] Under the revised statute, all claims presented in prior motions must be dismissed, and new claims must fall into one of the two "narrow exceptions."[35] Thus, the AEDPA amendments "greatly restrict[ed] the power of federal courts" to hear second and successive collateral challenges and ushered in a new, much more restrictive era of federal habeas corpus.[36]

*B. The Savings Clause*

The following sections describe the savings clause of § 2255 and the courts' inconsistent efforts to properly define it. As described below, a majority of circuits have taken their respective turns interpreting the clause, resulting in at least three different tests and a sharp split among the circuits.

1. Text and Meaning

Notwithstanding the restrictions contained in subsection (h) of § 2255, several courts have interpreted subsection (e) as an alternative means through which certain prisoners may bring a second or successive collateral challenge. Subsection (e) provides:

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, *unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.*[37]

The legislative history contains few meaningful clues regarding the true meaning of the "inadequate or ineffective" language of this savings clause.[38] However, in the "extremely limited circumstances" in which a prisoner is able to prove that the § 2255 remedy is "inadequate or ineffective," courts have authorized a habeas corpus petition pursuant to § 2241 via the savings clause, even if a prior § 2255 motion has been denied.[39]

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34. *Id.*

35. Tyler v. Cain, 533 U.S. 656, 661 (2001).

36. *Id.*

37. 28 U.S.C. § 2255(e) (2006) (emphasis added).

38. *See, e.g.*, Wofford v. Scott, 177 F.3d 1236, 1241 (11th Cir. 1999) (explaining that there is nothing "in the legislative history explaining why the relevant language was changed or what the new language means").

39. Prost v. Anderson, 636 F.3d 578, 584 (10th Cir. 2011) (quoting Caravalho v. Pugh, 177 F.3d 1177, 1178 (10th Cir. 1999)).

2. Inter-Circuit Jurisprudence

Despite the scant legislative history behind the savings clause, several circuits have attempted to formulate a rule regarding its proper application. These efforts have produced inconsistent results.[40] Although the circuits are in general agreement that access to § 2241 via the savings clause should turn on whether the petitioner has had an opportunity to present his claim, the circuits are split as to what satisfies the requisite "opportunity."[41]

a. The Second and Third Circuits' Constitutional Test

The Second and Third Circuits were among the first to interpret the AEDPA-revised version of § 2255. Both circuits determined that the savings clause may be available when constitutional issues would otherwise arise.[42] In each case, the courts allowed a second collateral challenge via the savings clause and § 2241 because the prisoner would have had no other recourse to bring a claim of actual innocence.[43] However, neither circuit elaborated on which issues are of sufficient constitutional dimension to trigger the savings clause.

b. The "Unobstructed Procedural Shot" Test

A number of circuits soon expanded upon the analyses of the Second and Third Circuits and adopted slightly more formulaic rules regarding proper application of the savings clause.[44] Although the tests have been articulated in slightly different ways, each involves common ingredients of (1) actual innocence and (2) retroactivity.[45] As the Seventh

40. *See, e.g., id.* at 594 (recognizing that the circuits have split "three different ways on how best to read the savings clause").

41. *See id.* at 589–94 (discussing the different tests used across circuits).

42. *See In re* Dorsainvil, 119 F.3d 245, 248 (3d Cir. 1997) (holding that the unavailability of collateral review to a party claiming innocence would raise a "thorny constitutional issue"); Triestman v. United States, 124 F.3d 361, 377 (2d Cir. 1997) (holding that the savings clause is available when failure to provide collateral review would raise "serious constitutional questions").

43. *In re Dorsainvil*, 119 F.3d at 251 (holding that the savings clause applies because Dorsainvil "does not have and . . . never had an opportunity to challenge his conviction"); *Triestman*, 124 F.3d at 380 (allowing resort to § 2241 because an attempt by Congress to preclude all collateral review "would raise serious questions as to the constitutional validity of the AEDPA's amendments to § 2255").

44. *See* Reyes-Requena v. United States, 243 F.3d 893, 902–04 (5th Cir. 2001) (relying on the analyses of its sister circuits to formulate a rule based on actual innocence and retroactivity); *In re* Jones, 226 F.3d 328, 333–34 (4th Cir. 2000) (agreeing with the rationale of its sister circuits and explaining its three-pronged test to determine the adequacy and effectiveness of § 2255); Wofford v. Scott, 177 F.3d 1236, 1242–44 (11th Cir. 1999) (adopting the Seventh Circuit's test as "better reasoned" than those of the Second and Third Circuits); *In re* Davenport, 147 F.3d 605, 611–12 (7th Cir. 1998) (rejecting the tests of the Second and Third Circuits as "too indefinite" and instead holding that a "federal prisoner should be permitted to seek habeas corpus only if he had no reasonable opportunity to obtain earlier judicial correction of a fundamental defect in his conviction or sentence because the law changed after his first 2255 motion").

45. *Reyes-Requena*, 243 F.3d at 903 ("The standards that these courts have articulated for the savings clause may not be framed in identical terms, but the following basic features are evident in most formulations: actual innocence and retroactivity.").

Circuit has most succinctly put it, these circuits will allow a second or successive collateral challenge via the savings clause and § 2241 when the petitioner has not had an "unobstructed procedural shot" at presenting his claim.[46] Circuits adopting this test have generally held the requisite "unobstructed procedural shot" to be absent when the petitioner faced adverse circuit or Supreme Court precedent at the time of his initial § 2255 motion, and after that motion, the relevant law changed in such a way that the conduct for which the petitioner was convicted is no longer criminal.[47]

c. The Ninth Circuit's "Novelty" Test

The Ninth Circuit has endorsed an expanded version of the "unobstructed procedural shot" test, and in doing so has adopted the most liberal test to determine the applicability of the savings clause to second and successive collateral challenges.[48] Ninth Circuit courts deciding whether a petitioner was previously afforded an "unobstructed procedural shot" will "consider (1) whether the legal basis for the petitioner's claim did not arise until after he had exhausted his direct appeal and first § 2255 motion; and (2) whether the law changed in any way relevant to petitioner's claim after that first § 2255 motion."[49] Thus, Ninth Circuit petitioners have access to § 2241 via the savings clause when they present a novel argument based on a material change in applicable law made effective after their initial § 2255 motion.[50] There is no explicit requirement that petitioners faced adverse circuit precedent at the time of the initial § 2255 motion.

Before *Prost v. Anderson*, the Tenth Circuit was a bystander to the tripartite circuit split regarding proper application of the savings clause to second and successive collateral challenges. In *Prost*, the court analyzed the savings clause and its associated inter-circuit jurisprudence.

## II. *PROST V. ANDERSON*

### *A. Facts and Procedural History*

In 1998, appellant Prost was indicted in the Eastern District of Missouri for his participation in a drug trafficking operation.[51] Prost pled guilty to one count of conspiring to distribute methamphetamine and two counts of conspiring to launder proceeds derived from a drug-dealing

46. *See Davenport*, 147 F.3d at 609 (rejecting the petition because the prisoner's initial § 2255 motion gave him "an unobstructed procedural shot at getting his sentence vacated").

47. *See, e.g.*, *In re* Jones, 226 F.3d 328, 333–34 (4th Cir. 2000).

48. *See* Harrison v. Ollison, 519 F.3d 952, 959 (9th Cir. 2008).

49. *Id.* at 960 (quoting Ivy v. Pontesso, 328 F.3d 1057, 1061 (9th Cir. 2003)) (internal quotation marks omitted).

50. *See id.*

51. Prost v. Anderson, 636 F.3d 578, 580 (10th Cir. 2011).

operation.[52] After his conviction, Prost filed a collateral challenge pursuant to 28 U.S.C. § 2255 seeking to have his sentence vacated, citing ineffective assistance of counsel.[53] The district court denied the motion, and the Eighth Circuit Court of Appeals affirmed.[54]

Nearly a decade after Prost's § 2255 motion was rejected, the Supreme Court's decision in *United States. v. Santos*[55] lit a potential spark in his otherwise extinguished appeals. In *Santos*, the Court interpreted the term "proceeds" in the context of an illegal lottery operation as meaning "profits" rather than merely "gross receipts."[56] Relying on *Santos* and arguing that the funds he laundered were merely the gross receipts of the drug-dealing operation, Prost filed a petition for habeas corpus pursuant to 28 U.S.C. § 2241 seeking to have his money laundering convictions overturned.[57] The petition was filed in the United States District Court for the District of Colorado, where Prost was imprisoned, due to the requirement that § 2241 petitions be brought in the district of incarceration.[58]

The district court dismissed the petition, holding that the proper post-conviction remedy for prisoners challenging the legality of their detention is 28 U.S.C. § 2255 rather than § 2241.[59] The court explained that § 2241 is available only when the remedy provided by § 2255 is "inadequate or ineffective."[60] The mere fact that Prost may be barred from bringing a second § 2255 petition did not make the remedy inadequate or ineffective because his argument could have been included in the initial § 2255 proceeding.[61]

### *B. Majority Opinion*

In a 2-1 decision, a panel of the Tenth Circuit Court of Appeals affirmed the district court decision.[62] The court held that the appropriate metric in determining § 2255's remedial adequacy in relation to second or successive challenges is whether the petitioner's argument could have been raised in the initial § 2255 motion.[63] Because Prost could have brought his statutory interpretation argument in his initial § 2255 pro-

52. *Id.*
53. Prost v. Wiley, No. 08-CV-02246-BNB, 2008 WL 4925667, at *1 (D. Colo. Nov. 13, 2008).
54. *Prost*, 636 F.3d at 580.
55. 553 U.S. 507 (2008).
56. *Id.* at 514.
57. *Prost*, 636 F.3d at 580–81.
58. *Id.* at 581.
59. Prost v. Wiley, No. 08-CV-02246-BNB, 2008 WL 4925667, at *1 (D. Colo. Nov. 13, 2008).
60. *Id.* at *1–2.
61. *Id.* at *2.
62. *Prost*, 636 F.3d at 598.
63. *Id.* at 584.

ceeding, the court reasoned, he was barred from accessing § 2241 via the savings clause.[64]

In support of its proffered metric, the majority gleaned five points from the context, history, and precedent underlying § 2255.[65] First looking to the plain language of the statute, the court found that § 2255 guarantees petitioners an opportunity to test their arguments but does not guarantee relief.[66] So long as petitioners are afforded a remedy via an initial motion, the court reasoned, the unavailability of a second motion does not render § 2255 inadequate or ineffective.[67] The court found further support for its holding by looking to the savings clause's "near neighbor," § 2255(h), which limits second or successive motions to those concerning newly discovered evidence or new constitutional rulings.[68] The absence of "new statutory interpretations" from the list, the court reasoned, was an intentional omission by Congress, necessary to further its goal of limiting federal collateral review.[69] Next, the court found its holding to be in harmony with the statute as a whole, which is ripe with a repeated "emphasis on providing a single opportunity to test arguments."[70] Viewed in the context of AEDPA, § 2255 limits prisoner access to § 2241 only in circumstances where the initial "motion was *itself* inadequate or ineffective to the task of providing the petitioner with a *chance* to *test* his sentence or conviction."[71] The court went on to analyze the history of the savings clause, finding that the congressional intent behind § 2255 was merely to alleviate the administrative burdens that had come to hinder habeas corpus proceedings, not to give prisoners "multiple bites at the apple."[72] Finally, the court found its decision to be consistent with past Tenth Circuit decisions, which have "recognized the narrowness" of the savings clause and "allowed resort to § 2241 sparingly, only when an adequate or effective means of testing a § 2255 petition was genuinely absent."[73]

Applying its newly adopted rule to the circumstances of Prost's case, the majority affirmed the district court and rejected Prost's motion.[74] The court found, and Prost offered, no evidence that he was precluded from bringing a statutory interpretation argument in his initial § 2255 proceeding.[75] The lack of relief was therefore caused by his own

64. *Id.* at 588.
65. *See id.* at 584.
66. *Id.* at 584–85.
67. *See id.*
68. *Id.* at 585.
69. *Id.* at 585–86.
70. *Id.* at 587.
71. *Id.*
72. *Id.* at 587–88.
73. *Id.* at 588.
74. *Id.*
75. *Id.*

failures rather than inadequacy or ineffectiveness of the § 2255 remedial mechanism as required to trigger the savings clause.[76]

The holding foreclosed from Tenth Circuit petitioners two alternative tests gleaned from other circuits and proffered by Prost to determine whether the savings clause may allow a second or successive collateral challenge.[77] The court first rejected the Ninth Circuit's "novelty test," which allows prisoners a second collateral petition when the initial § 2255 proceeding ends before the Supreme Court hands down a new and relevant statutory interpretation.[78] The court acknowledged the difficulty in imagining novel arguments, yet rejected the novelty test while reiterating that the true test lies in the procedural adequacy of the initial § 2255 motion.[79] Had Congress intended the savings clause to embrace the novelty test, the majority argued, it would have included "novel statutory interpretations" within subsection (h) rather than expressly limiting it to newly discovered evidence and new constitutional rulings.[80]

Secondly, the majority rejected Prost's submission that petitioners should be allowed a second collateral challenge when the substance of that challenge was erroneously foreclosed under circuit law at the time of the initial § 2255 motion.[81] The court acknowledged that circuit precedent may sometimes require judges to reject otherwise meritorious arguments, but deemed such a possibility the result of legal error rather than inadequacy in the § 2255 remedial mechanism.[82] Prost was free, as the *Santos* defendant was, to include a statutory interpretation argument in his initial § 2255 motion and challenge any existing adverse circuit precedent all the way to the Supreme Court.[83] The court noted the multitude of "instances where the Supreme Court has rewarded litigants who took the trouble to challenge adverse circuit precedent" as evidence § 2255 is an adequate remedial mechanism even when adverse law exists.[84]

The majority concluded with an acknowledgment that the savings clause may be available to petitioners when necessary to avoid "serious constitutional questions."[85] However, because Prost declined to pursue a constitutional argument in his motion, the court declined to rule on the issue.[86]

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76. *See id.*
77. *Id.* at 595.
78. *Id.* at 589.
79. *Id.*
80. *Id.*
81. *Id.* at 590.
82. *Id.*
83. *Id.* at 590–91.
84. *Id.*
85. *Id.* at 594.
86. *Id.*

### C. Concurring Opinion

Judge Seymour agreed with the majority on the result but vehemently disagreed with its rationale.[87] Rather than delving into an analysis of inter-circuit law, Judge Seymour would have limited the opinion to a conclusion that Prost faced no adverse circuit precedent at the time of his first motion, and thus had an "adequate and effective opportunity to test the legality of his conviction" with his initial § 2255 motion.[88] Thus, reasoned Judge Seymour, the savings clause plainly did not apply, and Prost was precluded from accessing § 2241.[89]

The heart of the disagreement between the majority and concurrence lay in the merits of the erroneous circuit foreclosure test.[90] In her concurring opinion, Judge Seymour intimated that she would accept the erroneous circuit foreclosure test in the context of an actual innocence claim.[91] She relied on the Supreme Court's position that claims of actual innocence are worthy of careful scrutiny, even when brought in a second or successive collateral attack.[92] Instead, the court entered "uncharted territory to reject any circuit foreclosure test . . . reaching a conclusion contrary to every other circuit that has decided this question."[93] Thus, claimed Judge Seymour, the majority decision created a circuit split.[94]

The concurrence also sharply contended that the majority violated the "cardinal principal of judicial restraint . . . [that] if it is not necessary to decide more, it is necessary not to decide more."[95] Because rejecting the erroneous circuit foreclosure test was not necessary to reach its ultimate conclusion, the court should not have done so.[96] She noted that "[s]ignificantly . . . not even the government" asked the court to reject the circuit foreclosure test.[97] Furthermore, contended Judge Seymour, the parties did not adequately present the circuit foreclosure test.[98] Thus, the majority opinion "[flew] in the face of judicial restraint."[99]

## III. ANALYSIS

The court in *Prost v. Anderson* correctly concluded that Congress did not intend for successive collateral challenges based on relevant

87. *Id.* at 598-99 (Seymour, J., concurring).
88. *Id.* at 599.
89. *See id.* at 598–99.
90. *See id.* at 599-603.
91. *See id.* at 601 (recognizing that "every other circuit" has reached a similar conclusion, and the Tenth Circuit had "favorably recognized this position" in a prior decision).
92. *Id.* at 600-01.
93. *Id.* at 603.
94. *Id.* at 599.
95. *Id.* (quoting Morse v. Frederick, 551 U.S. 393, 431 (2007) (Breyer, J., concurring in part and dissenting in part)) (internal quotation marks omitted).
96. *See id.* at 602.
97. *Id.*
98. *Id.* at 603.
99. *Id.* at 599.

changes in statutory law to be within the purview of § 2255's savings clause. Contrary holdings of other circuits have relied on an incomplete reading of the savings clause and the subsection in which it resides. To alleviate the tripartite circuit split that has developed around this enigmatic clause, the Supreme Court must step-in and overturn fifteen years of erroneous savings clause jurisprudence across circuits.

### *A. Spirit and Purpose of the Current § 2255*

Although Congress has provided few meaningful clues regarding the intended application of the savings clause, the Tenth Circuit's analysis is consistent with the history and context of § 2255 as a whole. The language of the statute, both in what it does and does not state, leaves little doubt that petitioners may reach the savings clause only in the narrowest of circumstances. The restrictions placed on second and successive collateral challenges ensure that courts are not encumbered by the administrative problems that led to § 2255's initial enactment and played a role in the AEDPA amendments. In *Prost*, the Tenth Circuit correctly analyzed the post-AEDPA statute as Congress intended it to apply. Its reading conforms to the legislative intent from both a textual and practical standpoint.

#### 1. AEDPA's Dramatic Changes

A comparison of the pre-AEDPA and post-AEDPA statutory language illustrates that Congress intended the amendments to dramatically limit second and successive collateral challenges. Before the AEDPA amendments, § 2255 provided that courts "shall not be required to entertain a second or successive motion for similar relief [on] behalf of the same prisoner."[100] The equivocal language of the statute lent substantial deference to the judgment of courts. Even more, the wording of the statute in its previous form indicated that Congress's intended default at that time was to allow second and successive collateral challenges on all potentially meritorious grounds. This intention was recognized and carried out by the courts.[101] In essence, the prior version of the statute created an open pathway for second and successive motions that *could* be closed at the discretion of the court, but, by default, would remain open. The drafters could have easily avoided this result if they had simply instructed that courts "may" hear second and successive challenges. This unchosen formulation would have closed the door to such challenges but given courts the power to open the door when justice so required. The "may" modifier would have acted as justifiable cause for hearing motions that would, in

100. Triestman v. United States, 124 F.3d 361, 368 (2d Cir. 1997) (quoting 28 U.S.C. § 2255 (1996)).

101. *See, e.g., id.* (explaining that second or successive collateral challenges brought under the pre-AEDPA version of § 2255 should be heard "where the ends of justice would . . . be served by reaching the merits of the subsequent application." (quoting Barton v. United States, 791 F.3d 265, 266–67 (2d Cir. 1986)) (internal quotation marks omitted)).

normal circumstances, be denied. Instead, Congress drafted the previous version of § 2255 in a way that allowed courts to liberally hear second and successive collateral challenges.

With the AEDPA amendments, Congress dramatically altered the circumstances in which courts may hear second or successive collateral motions. In sharp contrast to the open-ended language of the previous statute, Congress directed courts to specific and exclusive instances in which such challenges may be heard. The statute now provides:

> A second or successive motion must be certified in section 2244 by a panel of the appropriate court of appeals to contain—
>
> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.[102]

The revised statutory language leaves little doubt that Congress intended to allow second and successive collateral petitions only in the most extraordinary of circumstances. Deference to the courts was largely eliminated. Petitioners meeting neither of the two narrow criteria denoted by Congress were limited to one, and only one, bite at the apple.

Nonetheless, some courts have re-captured a portion of that deference by way of the savings clause and its "inadequate or ineffective" language. By allowing access to § 2241 via the savings clause, courts have created alternative circumstances in which second and successive collateral challenges may be heard. But this may be more latitude than Congress intended. The entirety of the subsection in which the "inadequate or ineffective" language resides is as follows:

> An application for a writ of habeas corpus in behalf of a prisoner *who is authorized to apply* for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.[103]

Two issues relating to this subsection cast doubt over courts' reliance on it to allow second and successive challenges. First, the savings clause is prefaced with the restriction that it applies only to "a prisoner

102. 28 U.S.C. § 2255(h) (2008).
103. § 2255(e) (2008) (emphasis added).

who is authorized to apply for relief by motion pursuant to this section." By the very restrictions contained in the statute, a prisoner who has already brought a § 2255 motion is *not* authorized to bring a subsequent motion. Rather, the petitioner must appeal to a panel of the court of appeals, which will then issue an order to "grant or deny the authorization."[104] The authorization will be granted only if there is a prima facie showing that the application contains newly discovered evidence or a new constitutional rule.[105] Therefore, utilizing the savings clause to allow unauthorized successive petitions involves a circularity that contradicts the plain language of the statute. The savings clause is impliedly being used to authorize petitions that are otherwise unauthorized and outside its reach. This cannot be what Congress intended. More likely, Congress included the savings clause as a resort to § 2241 when the *initial* § 2255 motion is inadequate or ineffective, as when a military prisoner seeks to challenge the result of a court martial that has since dissolved.[106] In these circumstances, the petitioner is "authorized to apply for relief pursuant to" § 2255, and the savings clause rightfully applies.

The placement of the savings clause in relation to the entirety of § 2255 also casts doubt over its use as an alternative mechanism by which petitioners may bring a second or successive collateral challenge. The savings clause resides in subsection (e) of § 2255, while the restriction on successive challenges is found in subsection (h). It seems illogical that Congress would provide the exception before announcing the rule. Congress could have just as easily, and with much less resulting confusion, included the savings clause (or a duplicate thereof) within subsection (h) if it intended for successive challenges to be within its purview. Instead, Congress likely constructed the statute in its amended form because it never intended to make the savings clause a back-door escape from the restrictions on second and successive challenges.

2. The Choice to Omit Statutory Interpretations

As discussed above, the AEDPA-revised version of § 2255 allows courts to hear second and successive collateral challenges only when they pertain to newly discovered evidence or new constitutional rulings. New statutory interpretations, like the one at issue in *Prost*, are conspicuously absent from this short list of allowable challenges. Thus, to square the argument that the revised § 2255 allows for secondary collateral challenges in situations similar to *Prost*, one must first accept that Congress chose to relegate changes in statutory law to the catch-all savings clause rather than explicitly provide for them in subsection (h). Even setting aside the contrary evidence discussed in the prior section, this is a difficult argument to accept. Congress is undoubtedly aware that it is the

104. 28 U.S.C. § 2244(b)(3)(D) (2006).
105. § 2244(b)(3)(C).
106. Prost v. Anderson, 636 F.3d 578, 588 (10th Cir. 2011).

courts' duty to interpret ambiguous statutes and that, as in *Santos*, the Supreme Court will sometimes effect a change in law. Indeed, it purposefully included the "constitutional" modifier rather than generically allowing any "new rule of law" to trigger a second or successive challenge. The choice to omit changes in statutory law from the grace of subsection (h) is thus more likely an intentional act by Congress that should be recognized by the courts.

But the question remains: why would Congress choose to intentionally deny secondary collateral challenges pertaining to relevant changes in law, creating situations where prisoners may remain in jail for crimes the Supreme Court has deemed non-existent? One likely reason involves the indefinite nature of statutory law and the language upon which it is composed. Unlike the supremacy of constitutional law and the definite nature of DNA testing and other forms of newly discovered evidence, statutory interpretations are amorphous and constantly evolving. The circumstances surrounding *Prost* perfectly illustrate this point. While defining the term "proceeds" in *Santos*, the Supreme Court recognized the "inherent ambiguity" of the word, which Congress has sometimes intended to mean "profits" and sometimes "receipts."[107] After failing to find a definitive answer in the legislative history underlying the statute, the Court, in a plurality opinion, based its decision on the rule of lenity.[108] But not long after the decision, Congress deemed the *Santos* plurality's definition inaccurate and amended the statute's meaning of "proceeds" to specifically include "gross receipts."[109]

Notwithstanding the speed at which Congress moved to correct the Court's erroneous interpretation, *Prost* and similar cases still fell under the previous version of the statute, the *Santos* decision, and the incorrect definition of "proceeds."[110] One must pause to consider the ultimate result of *Prost* had Congress included statutory interpretation arguments within the purview of the savings clause: after admitting to, being convicted of, and exhausting all other available appeals for his role in the drug trafficking and money laundering scheme, Prost likely would have been exonerated by a short-lived and erroneous interpretation of the word "proceeds." Congress presumably deemed such results unacceptable and crafted the revised § 2255 in a way that prevents opportunistic criminals from gaining a fortuitous and unwarranted escape from their criminal conduct.

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107. United States v. Santos, 553 U.S. 507, 511–12, 514 (2008) (explaining that, when a statute may reasonably be interpreted in two different ways, the "tie must go to the defendant").

108. *Id.* at 514. ("The rule of lenity requires that ambiguous criminal statutes be construed in favor of the defendant."); *see also* Fowler v. United States, 131 S. Ct. 2045, 2055 (2011).

109. *Prost*, 636 F.3d at 580 n.1.

110. *Id.*

*B. Propagation of Error Across Circuits*

Without exception, the circuits have ignored the textual evidence that Congress intended second and successive collateral challenges to be wholly outside the purview of the savings clause while focusing on the circumstances in which § 2255 might be "inadequate or ineffective" in relation to such challenges. This fatal error originated concurrently in the Second and Third Circuits soon after the AEDPA amendments were enacted. Masked by the otherwise thorough and logical holdings of these decisions, the error gradually infiltrated the law of other circuits as those courts looked to helpful precedent when faced with the same issue. This error is a main cause of the state of savings clause jurisprudence today: a sharp split between circuits centered around the meaning of "inadequate and ineffective" that ignores the remainder of the subsection. To alleviate the split, the original error must be confronted and corrected.

1. An Incomplete Reading of the Savings Clause

Shortly after the § 2255 AEDPA amendments were enacted, the Second Circuit decided *Triestman v. United States*,[111] and the Third Circuit decided *In re Dorsainvil*.[112] The issue in both cases, as in *Prost*, was whether § 2255 allows a petitioner a secondary collateral challenge after a relevant change in law.[113] A number of other circuits had confronted precisely the same issue, but limited their holdings to denial of the secondary collateral challenge because the change in law was not of constitutional dimension as required by § 2255(h).[114] The Second and Third Circuits went further, and in doing so became the first courts to consider whether the savings clause might afford petitioners a second or successive collateral challenge.[115]

The majority in *Triestman* held that petitioners may access the savings clause when § 2255 is unavailable and the failure to provide collateral review would "raise serious constitutional questions."[116] Although this test may very well be the correct criteria by which to apply the savings clause, the court based its holding, in part, on an incomplete reading of the statute. By focusing exclusively on the final twenty words of subsection (e), in which the "inadequate or ineffective" language resides, the court erroneously extended access to the savings clause to *any prisoner*. The court failed to recognize that the savings clause is explicitly limited to prisoners who are "*authorized* to apply for relief pursuant" to § 2255.[117]

111. 124 F.3d 361 (2d Cir. 1997).
112. 119 F.3d 245 (3d Cir. 1997).
113. *See Triestman*, 124 F.3d at 363; *In re Dorsainvil*, 119 F.3d at 246.
114. *Triestman*, 124 F.3d at 369.
115. *See id.* at 370.
116. *Id.* at 377.
117. 28 U.S.C. § 2255(e) (2008) (emphasis added).

As the Second Circuit considered the *Triestman* case, the Third Circuit analyzed precisely the same issue in *Dorsainvil*.[118] There, the court opined that it would face "a thorny constitutional issue" if a prisoner claiming innocence based on a relevant change in law was left with no judicial recourse.[119] The court reasoned that these potential constitutional issues could be avoided by resort to the § 2255 savings clause.[120] Like the Second Circuit did in *Triestman*, the court reached its conclusion by focusing exclusively on the final clause in subsection (e) while completely ignoring its explicit limitation to authorized prisoners.[121]

The courts in both *Triestman* and *Dorsainvil* began their analyses by concluding that the respective petitioners met neither of the two criteria denoted in subsection (h), thereby indirectly recognizing that the petitioners were *not* authorized to bring a second § 2255 motion.[122] By the plain language of subsection (e), this would preclude the petitioners from accessing the savings clause. But the courts failed to connect the dots. Instead, their holdings laid the foundation for fifteen years of erroneous savings clause jurisprudence.

2. Cause and Effect

The incomplete reading of the Second and Third Circuits appears to have been caused by their overreliance on prior Supreme Court decisions that analyzed the pre-AEDPA version of § 2255. Both *Triestman* and *Dorsainvil* extensively cite *Hayman*[123] and *Davis*,[124] two Supreme Court cases that analyzed the savings clause in its pre-AEDPA form. For example, the *Triestman* Court found it "highly significant that the [Supreme] Court noted that, because of the habeas-preserving language of § 2255, it did not need to, and so would not, reach the constitutional issues presented to it."[125] But at the time *Hayman* was decided, § 2255 contained no restrictions on second and successive challenges, and thus the "habeas-preserving language," i.e. the savings clause, was available in a much greater capacity. The court also relied on *Davis* to suggest that "both habeas and § 2255 had always been available" to petitioners faced with an intervening change in law.[126] That may very well have been true before 1996. But the post-AEDPA statute contains first-of-its-kind restrictions on second and successive collateral challenges, rendering the

118. *Triestman*, 124 F.3d at 370 n.10.
119. *In re Dorsainvil*, 119 F.3d at 248.
120. *See id.* at 251.
121. *See id.* at 249–52.
122. *Id.* at 248 ("Dorsainvil has failed to satisfy either prong of § 2255 as amended."); *Triestman*, 124 F.3d at 371 ("Triestman does not appear to have shown the existence of newly discovered evidence or of a new rule of constitutional law that applies retroactively to his case . . . .").
123. United States v. Hayman, 342 U.S. 205 (1952).
124. Davis v. United States, 417 U.S. 333 (1974).
125. Triestman v. United States, 124 F.3d 361, 378 n.20 (2d Cir. 1997).
126. *Id.* at 374.

*Triestman* court's reliance on decades-old rationale misleading and erroneous.

The *Dorsainvil* court erred in a similar way. It analogized to *Davis* and reasoned that, because the circumstances of the two cases were substantially similar, "[t]here is no reason why § 2241 would not be available."[127] However, although the facts of the cases may have been similar, the statutes under which the cases were analyzed were significantly different. Thus, the court plucked an analysis of the savings clause conducted in one era of the statute and inserted that rationale into an entirely different era. But the statute, by then, had dramatically changed. The rationale used by the Supreme Court before the AEDPA is no longer compatible with the modern version of § 2255 and the savings clause.

In the years since the Second and Third Circuits put forth their incomplete readings of the savings clause, their error has propagated throughout the circuits. Shortly after *Triestman* and *Dorsainvil* were decided, the Seventh Circuit entered the fray and analyzed the savings clause under similar facts.[128] There, the court cited both *Triestman* and *Dorsainvil* in interpreting the "inadequate or ineffective" language.[129] Unlike its sister circuits, the *Davenport* court acknowledged subsection (e)'s limitation to authorized petitioners but dismissed this language as referring to all *federal* prisoners.[130] This explanation is plausible if the "authorized" modifier was meant to differentiate § 2255 from § 2254, its companion statute for state prisoners. But the contradiction in the statute's plain language was still either ignored or not recognized. Federal prisoners bringing second and successive collateral challenges not pertaining to new evidence or constitutional rules are, by the statute's own restrictions, not authorized to do so.

From there, the decisions in *Triestman*, *Dorsainvil*, and *Davenport* spread to other circuits. The Fourth, Fifth, and Eleventh Circuits all formulated rules pertaining to the savings clause based, at least in part, on an analysis of these prior cases.[131] Regardless of whether this incomplete reading has been a simple oversight or an intentional re-scoping of the savings clause, the result is contrary to the plain language of the statute. Indeed, in its *Triestman* holding, the Second Circuit acknowledged the "cardinal principle of statutory interpretation that courts must give effect, if possible, to every clause and word of a statute."[132] But in the years since the incomplete reading was first put forth, no court has done pre-

127. *In re Dorsainvil*, 119 F.3d at 251.

128. *See In re* Davenport, 147 F.3d 605, 607 (7th Cir. 1998).

129. *See id.* at 610–11.

130. *Id.* at 608.

131. *See In re* Jones, 226 F.3d 328, 333–34 (4th Cir. 2000); Reyes-Requena v. United States, 243 F.3d 893, 902–03 (5th Cir. 2001); Wofford v. Scott, 177 F.3d 1236, 1242–44 (11th Cir. 1999).

132. Triestman v. United States, 124 F.3d 361, 375 (2d Cir. 1997) (quoting United States v. Menasche, 348 U.S. 528, 538–39 (1955)) (internal quotation marks omitted).

cisely that. In all likelihood, the error will continue to propagate unless and until the Supreme Court steps in to quash it.

### *C. The Supreme Court's Time*

As the majority pointed out in *Prost*, the Tenth Circuit's decision was the latest in an "already messy field" of savings clause jurisprudence.[133] The Supreme Court should capitalize on this opportunity to clean up the mess and resolve the circuit split. If it does so, it must address three lingering issues. First, it must decide whether petitions lacking constitutional arguments and newly discovered evidence are within the purview of the savings clause. Second, it must determine the proper breadth of the savings clause's "inadequate or ineffective" language. Third, depending on its analysis of these first two issues, the Court should address the constitutionality of the AEDPA's severe limitations on second and successive collateral challenges.

#### 1. Whether Otherwise Unauthorized Petitions May Properly Be Heard Via the Savings Clause and § 2241

As discussed above, subsection (e) of § 2255 begins with the qualification that it applies only to petitioners "authorized to apply for relief." If the Supreme Court reads the entirety of this subsection literally, thereby precluding application of the savings clause to non-authorized second and successive petitions, the lower courts' years of savings clause jurisprudence will have been an exercise in futility. The Court may very well settle the circuit split by concluding that all circuits thus far have been wrong: the savings clause is not applicable to second and successive collateral challenges that do not pertain to new constitutional rules or newly discovered evidence because, by the plain language of the statute, those challenges are not authorized to be saved.

However, the Court may avoid this result by concluding, like the Seventh Circuit did in *Davenport*, that the preamble to the savings clause was only meant to differentiate between federal and state prisoners.[134] Although this interpretation is contrary to the plain language of the statute, the Court could get around the issue by declaring the language ambiguous. Depending on its analysis of the constitutionality of successor limits, the Court may reach this result. If an unconstitutional reading of the statute can be avoided by construing the phrase "prisoner who is authorized" to refer simply to federal rather than state prisoners, the Court may do just that.[135]

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133. Prost v. Anderson, 636 F.3d 578, 594 (10th Cir. 2011).

134. *In re* Davenport, 147 F.3d 605, 608–09 (7th Cir. 1998).

135. *See, e.g.*, Swain v. Pressley, 430 U.S. 372, 378 n.11 (1977) (discussing the "cardinal principle" of statutory construction that the "Court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided").

But this is an improper course. The canons of statutory construction should not be used as justification for judicial statutory re-construction. When, as here, a statute plainly says one thing, the Court must read it that way, regardless of potential constitutional conflict. Failure to do so would violate the separation of powers and make the Court de facto drafters of legislation.

2. Under What Circumstances Is § 2255 Inadequate or Ineffective to Test the Legality of a Prisoner's Detention?

The Supreme Court should rule on the proper application of the savings clause regardless of how it decides the first issue. If the Court interprets the plain language of the statute as advocated above, it could conceivably skip to the constitutionality of that interpretation and wholly avoid this issue. But post-AEDPA savings clause jurisprudence has focused almost solely on the proper interpretation of the savings clause, and the Court's failure to address the issue would leave a cloud of uncertainty hanging over the circuit courts.

The circuits are in general agreement that the proper test involves whether the petitioner has had an unobstructed procedural shot at presenting his claim, or as the Tenth Circuit put it, whether the petitioner could have presented his claim in a prior § 2255 motion. The Court should affirm this test as proper. In doing so, the Court should acknowledge that petitioners can bring unobstructed statutory interpretation arguments in initial § 2255 motions regardless of established law at the time of those proceedings. The nature of statutory interpretation requires that *someone* present the argument before the courts can define the law. If petitioners were in fact precluded from presenting these arguments, Congress would have exclusive ability to modify the law. As exemplified by *Santos*, *Bailey*,[136] and others, this is not the case. Petitioners may challenge any aspect or interpretation of a statute, regardless of preexisting law. Hence, the successor limits of subsection (h), paired with the "authorized petitioner" preface to the savings clause, do not establish an unconstitutional suspension of the writ of habeas corpus.

Congress undoubtedly recognized this fact when structuring the AEDPA amendments to § 2255, and structured the statute in such a way to preclude statutory interpretation arguments from second and successive collateral petitions. Harshness aside, that is the prerogative of Congress. However, whether such a construction violates any principles embodied in the constitution is another matter. And it is the prerogative of the Court to decide this question.

136. Bailey v. United States, 516 U.S. 137 (1995).

3. Whether the Unavailability of Collateral Review to Prisoners Confined for Actions Subsequently Deemed Non-Criminal Renders § 2255 Unconstitutional

Regardless of the textual evidence provided by Congress that the savings clause was not intended to apply to second and successive collateral challenges, such a construction may conflict with the constitution. Thus far, lower courts have made a presumption of constitutionality based upon Supreme Court decisions that found § 2255 to be constitutional due, in part, to the saving function of the "inadequate or ineffective" language.[137] As a result, a focus has been placed on proper application of the savings clause, while the constitutional questions inherent in its availability have been examined only superficially.[138] But the reliance on pre-AEDPA decisions like *Hayman* is misplaced. In those decisions, the Court held that the savings clause avoided any potential constitutional issues that might have otherwise existed with the *pre-AEDPA* version of § 2255. The AEDPA amendments dramatically altered both § 2255 as a whole and the savings clause's function in it. The Court must therefore determine whether the post-AEDPA statute is unconstitutional if it finds that the savings clause does not apply to second and successive collateral challenges based upon either of the two issues discussed above.

The resolution of this issue should coincide closely with the Court's holding in respect to the second issue above. If the Court holds, as advocated above, that petitioners are unobstructed from presenting arguments contrary to established law with an initial § 2255 motion, the statute should necessarily be found constitutional. The multiple layers of direct and collateral review upon which the judicial system is structured guarantee petitioners an opportunity to present all arguments they deem potentially meritorious. The constitution guarantees no more.[139] The onus is on petitioners to find and put forth those arguments.

If, however, the Court finds that (1) § 2255 as amended by the AEDPA prohibits successive challenges based on changes in non-constitutional law, *and* (2) that such petitioners have not had an unobstructed procedural shot at presenting the claim, it must strike the statute down as unconstitutional. The implications of such a finding would mean that petitioners, having exhausted their sole § 2255 motion, would remain incarcerated for non-existent crimes without judicial recourse through no fault of their own. Although the Supreme Court generally

137. *See, e.g.*, *In re* Dorsainvil, 119 F.3d 245, 249–50 (3d Cir. 1997) (discussing the Supreme Court's analysis of the savings clause in *United States v. Hayman* and *Swain v. Pressley*).

138. *See* Prost v. Anderson, 636 F.3d 578, 593–94 (10th Cir. 2011) (recognizing the constitutional issues, but "declin[ing] to pursue [them] in this particular case").

139. *See* Wofford v. Scott, 177 F.3d 1236, 1244 ("All the Constitution requires, if it requires that much, is that the procedural opportunity have existed.").

lends deference to Congress in controlling the scope of habeas corpus,[140] it must intervene if it finds these two conditions satisfied.

## CONCLUSION

When § 2255 proves to be an inadequate or ineffective mechanism by which petitioners may collaterally challenge their convictions and sentences, its savings clause allows petitioners resort to the habeas relief afforded by § 2241. However, the textual evidence provided by Congress casts a dark shadow over courts' reliance on this savings clause to allow second and successive collateral petitions. In *Prost v. Anderson*, the Tenth Circuit reached the correct result, even if its analysis was incomplete. It is now up to the Supreme Court to settle the circuit split and decide whether the savings clause is applicable to second and successive collateral challenges, and if not, whether § 2255's prohibition on such challenges conflicts with the Constitution.

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140. Felker v. Turpin, 518 U.S. 651, 664 (1996).

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