No. 20-1233

IN THE

Supreme Court of the United States

JOHNNY GATEWOOD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONER

Michael Pepson
Counsel of Record
AMERICANS FOR PROSPERITY FOUNDATION
1310 N. Courthouse Road, Ste. 700
Arlington, VA 22201
(571) 329-4529
mpepson@afphq.org

Counsel for Amicus Curiae

April 7, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Under Supreme Court Rule 37.2, Americans for Prosperity Foundation ("AFPF") respectfully submits this *amicus curiae* brief in support of Petitioner.[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. One of those key ideas is the separation of powers vital to liberty. As part of this mission, it appears as *amicus curiae* before federal and state courts.

AFPF is interested in this case because it believes that judicially created barriers to review of meritorious constitutional claims, including in the habeas context, should not exist. AFPF strongly believes in second chances—everyone has a gift and something to offer to society, people can change, and incarcerated persons who do not pose a danger to public safety and have paid their debt to society deserve a chance to rejoin their families and become contributing members of society.

---

[1] All parties consented to the filing of this brief after receiving timely notice. No counsel for a party authored this brief in whole or in part and no person other than *amicus* or its counsel made any monetary contributions intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

"The writ of habeas corpus stands as a safeguard against imprisonment of those held in violation of the law." *Harrington v. Richter*, 562 U.S. 86, 91 (2011). Accordingly, habeas relief should not be limited by happenstance and extra-statutory judge-made law. At present, it is. That is fundamentally unfair.

While the issues presented by this Petition involve arcane, superficially dry legal doctrines, the real-world stakes are quite high and radiate far beyond this particular case. As Petitioner explains, *see* Pet. 5, 32, the questions presented by this case affect hundreds, if not thousands, of incarcerated persons who were sentenced under statutory mandatory minimum provisions this Court has found to be unconstitutional. If the decision below is allowed to stand, these individuals who were sentenced under the unconstitutional residual clauses of a variety of draconian sentencing statutes, or the formerly mandatory sentencing guidelines, will not be able to seek a resentencing—even those who are serving a mandatory life sentence based on the unconstitutional sentencing enhancements. That is wrong.

To the hundreds, if not thousands, of incarcerated persons affected by the questions presented by this case, this matters a great deal, for the "prospect of additional time behind bars is not some theoretical or mathematical concept[.]" *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1907 (2018) (cleaned up). It is likely that centuries, if not millennia, of prison time are on the line, all at taxpayer expense. And it is fundamentally unfair that individuals sentenced

under unconstitutional statutes should not be allowed to seek a resentencing solely because their attorney was not an unusually skilled constitutional law visionary able to meet the Sixth Circuit's impossibly high, judge-made procedural requirements for preserving a claim for habeas review. These individuals should not be punished for not being fortunate enough to have the resources to retain Justice Scalia-caliber representation. *See* Pet. 31.

But that is exactly what the Sixth Circuit's decision would require. That result is particularly unfair and arbitrary given that, as Petitioner explains, other incarcerated persons who, by chance, were convicted and sentenced a few hundred miles away *are* allowed to seeking a resentencing under the circumstances presented by this case. This Court should correct this injustice, which is also contrary to this Court's precedent.

The Sixth Circuit purported to rely on the judicially created "cause and prejudice" standard articulated by this Court. But, in doing so, it erred by ignoring the controlling precedent of *Reed v. Ross*, 468 U.S. 1 (1984), misled by a misreading of *Bousley v. United States*, 523 U.S. 614 (1998), a decision that itself appears to have rested upon thin reasoning.

As Petitioner explains, the circuits are deeply divided on whether cause exists to excuse a habeas petitioner's procedural default when near-unanimous circuit precedent foreclosed the petitioner's claim, or when this Court explicitly overrules one of its precedents. The source of this confusion is an overreading of *Bousley* to narrow *Reed*, which remains

controlling. This case provides an ideal vehicle to resolve deep, intractable circuit splits identified by the Petition, which are of national importance. This case also provides an ideal vehicle to reexamine the underlying source of the lower court confusion, *Bousley*, and properly narrow or clarify the scope and holding of that decision.

Mr. Gatewood should not be denied his day in Court by erroneous application of the "cause and prejudice" doctrine—itself of dubious pedigree—beyond what this Court's precedent allows. The Court should grant Mr. Gatewood's petition to reject the Sixth Circuit's gloss on the procedural default doctrine, which tacks onto the "cause and prejudice" analysis a new requirement that defense attorneys either practice haruspicy or raise all conceivable arguments—even those destined to fail—to preserve claims for habeas review. This rule is deeply unfair to defendants, undermines judicial efficiency, and blinks reality. The Court should correct the error.

ARGUMENT

I. THE SIXTH CIRCUIT MISREAD AND EXPANDED *BOUSLEY*, INSTEAD OF PROPERLY APPLYING *REED*, WHICH REMAINS CONTROLLING.

Under the judge-made procedural default doctrine, "claims not raised on direct appeal may not be raised on collateral review unless the petitioner shows cause and prejudice." *Massaro v. United States*, 538 U.S. 500, 504 (2003). The Sixth Circuit's decision not only requires petitioners to meet the rigorous statutory requirements for federal habeas relief, but also layers onto the additional procedural default hurdle a new

requirement. Under the Sixth Circuit's judicial gloss, "cause" can only be satisfied where newly-recognized bases for relief that were foreclosed by a wall of precedent at trial and on direct appeal were nonetheless preserved at trial and on appeal, even though these arguments would likely have been viewed as frivolous by the courts at that time. Where did this judicial gloss come from?

At bottom, the Sixth Circuit's creation of this new and insurmountable procedural hurdle rests on a overreading of Supreme Court precedent that is itself the product of historical accident. The Sixth Circuit uncritically accepted and relied on lower court decisions interpretating *Bousley,* 523 U.S. 614, to narrow *Reed*, 468 U.S. 1, thus improperly bypassing binding precedent in favor of an expansive theory born of a footnote. The tortuous path from a footnote to *Bousley* is important to understanding how a single statement in that decision blossomed into a body of court precedent that overwhelmed the controlling precedent of *Reed.*

As the starting point, "[t]he procedural default rule is neither a statutory nor a constitutional requirement[.]" *Massaro*, 538 U.S. at 504. Instead, the doctrine generally, and the "cause and prejudice" standard specifically, are judge-created procedural barriers to incarcerated persons raising potentially meritorious constitutional claims. *See Murray v. Carrier*, 477 U.S. 478, 517 (1986) (Brennan, J., dissenting).

The "cause and prejudice" doctrine largely traces its genesis to this Court's decision *Wainwright v. Sykes*, 433 U.S. 72, 86–87 (1977), which involved a

collateral challenge to a *state court* conviction.[2] In *Wainwright v. Sykes*, the Court suggested considerations of comity and federalism counseled in favor of this doctrine. *See id.* at 82–86. And like the procedural default rule generally, "[t]he 'cause and prejudice' rule of *Wainwright v. Sykes* . . . is [a] judicially created restriction that is not required—or even suggested—by the habeas statute itself[.]" *Murray*, 477 U.S. at 517 (Brennan, J., dissenting).

But the story begins several years earlier in the context of a habeas petition brought under Section 2555 in a case involving former Federal Rule of Criminal Procedure 12(b)(2), *Davis v. United States*, 411 U.S. 233 (1973).[3] "*Davis* did not rest on an interpretation of the habeas statute[.]" Jordan Steiker, *Innocence and Federal Habeas*, 41 UCLA L. Rev. 303, 329 (1993). Instead, in *Davis* the Court was "called upon to determine the effect of Rule 12 (b)(2) . . . on a post-conviction motion for relief which raises for the first time a claim of unconstitutional discrimination in the composition of a grand jury." 411 U.S. at 234; *see also Sykes*, 433 U.S. at 99 n.1 (Brennan, J., dissenting). *See generally* Steiker, 41 UCLA L. Rev. at 327–332 (examining in detail the development of case law leading to *Wainwright v.*

---

[2] The rule announced in *Wainwright v. Sykes* appears to have been driven by concerns about defense attorney "sandbagging." *See* 433 U.S. at 89–90. Here, those concerns should not apply, as there is no suggestion of gamesmanship.

[3] Rule 12(b)(2) has since been amended.

Sykes).[4] *Davis* held, as a matter of statutory interpretation, that in federal criminal cases "the waiver standard expressed in Rule 12 (b)(2) governs an untimely claim of grand jury discrimination, not only during the criminal proceeding, but also later on collateral review," 411 U.S. at 242, thereby sowing the seeds that would ultimately germinate into the "cause-and-prejudice" standard.[5] *See* Henry J. Bemporad & Sarah P. Kelly, *Novel Issues, Futile Issues, and Appellate Advocacy: The Troubling Lessons of* Bousley v. United States, 35 St. Mary's L. J. 93, 97 n.19 (2003).

Curiously, while *Davis* rested on statutory interpretation of then-Federal Rule of Criminal Procedure 12(b)(2) in the Section 2255 context, it was subsequently imported into the Section 2254 context in *Francis v. Henderson*, 425 U.S. 536 (1976), despite the fact that a *state* statute was at issue in *Francis*. Thus, "in *Francis v. Henderson*, a controlling congressional expression of intent no longer was available, and the Court therefore employed the shibboleth of 'considerations of comity and federalism' to justify application of *Davis* to a § 2254 proceeding."

---

[4] As Professor Steiker has explained, "*Sykes* is most important … in confirming the Court's untethered policy role in deciding when to enforce state forfeitures." Steiker, 41 UCLA L. Rev. at 332.

[5] Prior to *Davis*, the deliberate bypass rule announced in *Fay v. Noia*, 372 U.S. 391 (1963), applied to state procedural defaults. "The retreat from *Noia*'s deliberate bypass standard began with *Davis v. United States*." Steiker, 41 UCLA L. Rev. at 327. "Davis's adoption of a more stringent standard than deliberate bypass rested on the premise that habeas for federal prisoners was fundamentally different from habeas for state prisoners[.]" *Id.* at 329.

Sykes, 433 U.S. at 99 n.1 (Brennan, J., dissenting) (quoting *Francis*, 425 U.S. at 541). As Professor Steiker has explained: "*Francis*'s adoption of the 'cause-and-prejudice' standard, then, is plainly attributable to historical accident. It rests on the questionable premise that federal habeas for state prisoners should be discerned in light of the Federal Rules of Criminal Procedure, and it ultimately relies on a substantial misreading of prior cases involving grand jury claims."[6] Steiker, 41 UCLA L. Rev. at 330.

As this historical accident suggests, there is reason to think this doctrine is not rooted in statutory interpretation, but instead, is the result of a subtle, iterative exercise in judicial lawmaking. As Professor Steiker has put it, the cause-and-prejudice doctrine does indeed have a "dubious pedigree." Steiker, 41 UCLA L. Rev. at 330. From there the "cause" prong was further refined, narrowing the availability of habeas relief, based on the continued conflation of Section 2254 petitions, which implicated federalism and comity concerns, with Section 2255 petitions, which did not. This error set the stage for *Bousley*.

---

[6] As Professor Steiker has explained: "*Francis* also advanced a strangely qualified principle of federalism. . . . [I]n the name of federalism, state rules were respected only to the extent that they were no more onerous than their federal counterparts[.]" Steiker, 41 UCLA L. Rev. at 329 n.115.

A. *Bousley* Uncritically Relies on and Imports a Parenthetical Explanation of a Dissent in a Ninth Circuit Panel Decision Found in Footnote 35 of *Engle v. Isaac*.

In 1982, the Court decided *Engle v. Isaac*, 456 U.S. 107 (1982), which arose in the context of a Section 2254 habeas petition challenging a state conviction. According to the Court: "Federal habeas challenges to *state convictions* . . . entail greater finality problems and special comity concerns." *Id.* at 134 (emphasis added). And "the futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial. If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not *bypass the state courts* simply because he thinks they will be unsympathetic to the claim." *Id.* at 130 (emphasis added).[7] That statement was supported by footnote 35, which, as relevant here, cites a dissent from a Ninth Circuit panel decision: "*See* . . . *Myers v. Washington*, 646 F.2d 355, 364 (CA9 1981) (Poole, J., dissenting) (futility cannot constitute cause if it means simply that a claim was 'unacceptable to that particular court at that particular time'), cert. pending, No. 81-1056." *Id.* at 130 n.35.

This footnote's parenthetical explanation of Judge Poole's dissent in *Myers* would take on a life of its own divorced from its specific origin, and notwithstanding

---

[7] *But cf. id.* at 131 ("We might hesitate to adopt a rule that would require trial counsel either to exercise extraordinary vision or to object to every aspect of the proceedings in the hope that some aspect might mask a latent constitutional claim.").

the subsequent fate of that case,[8] ultimately forming the basis for a body of lower court jurisprudence culminating in the Sixth Circuit panel decision at issue here.[9]

By contrast, two years after *Engle*, in *Reed v. Ross*, which involved a state conviction, this Court held "that where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures." 468 U.S. at 16. In so holding, the *Reed* majority observed:

> Just as it is reasonable to assume that a competent lawyer will fail to perceive the possibility of raising . . . a claim [for which there was no reasonable basis in existing law], it is also reasonable to assume that a court will similarly fail to appreciate the claim. . . . Despite the fact that a constitutional concept may ultimately enjoy general acceptance . . .

---

[8] The panel decision in *Myers* was vacated and remanded by this Court in light of *Engle* and *United States v. Frady*, 456 U.S. 152 (1982), a case primarily relating to the "prejudice" prong, which is not at issue here. *See Washington v. Myers,* 456 U.S. 921 (1982) (GVR). Oddly, on remand, the panel found that "neither *Isaac* [*v. Engle*] nor Frady requires—or even reasonably suggests—reversing the prior decision. *See Myers v. Washington,* 702 F.2d 766, 767 (9th Cir. 1983). Judge Poole again dissented.

[9] Ironically, as Justice Stevens noted in *Engle*: "[T]he Court's preoccupation with procedural hurdles is more likely to complicate than to simplify the processing of habeas corpus petitions by federal judges." *Id.* at 136 (Stevens, J., concurring in part, dissenting in part). And sure enough, so it has.

> when the concept is in its embryonic stage, it will, by hypothesis, be rejected by most courts. . . .

Id. at 15. The *Reed* majority added that "if we were to hold that the novelty of a constitutional question does not give rise to cause for counsel's failure to raise it, we might actually disrupt state-court proceedings by encouraging defense counsel to include any and all remotely plausible constitutional claims that could, some day, gain recognition." *Id.* at 15–16.

In light of this practical reality, the *Reed* Court announced a sensible rule. Under *Reed*, a claim is novel where a Supreme Court decision: (1) "explicitly overrule[s] one of th[e] Court's precedents"; (2) "may overturn[] a longstanding and widespread practice to which th[e] Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved"; or (3) "disapprove[s] a practice that th[e] Court arguably has sanctioned in prior cases."[10] *Id.* at 17 (internal citations omitted). As Petitioner explains, this rule makes sense. *See* Pet. 28–30. And Mr. Gatewood's constitutional claim meets this test. See Pet. 28–30.

That brings us to *Bousley*, 523 U.S. 614, which formed the basis of the Sixth Circuit's holding. *See*

---

[10] In *Reed*, the dissent emphasized comity as underlying this cause and prejudice doctrine as applied to state convictions. *See Reed*, 468 U.S. at 21 (Rehnquist, J., dissenting). Neither the majority nor the dissent in *Reed* appear to have discussed or mentioned *Engle* footnote 35, which would have been expected if it had particular relevance to the issues presented in *Reed*.

Pet. App. 8a–9a. In *Bousley*, *Engle* footnote 35's parenthetical characterization of Judge Poole's dissent in *Myers* reenters the scene. It is the parenthetical explanation of Judge Poole's dissent in *Myers* that is the source of *Bousley*'s dicta that courts like the Sixth Circuit panel here have seized upon to conclude that *Bousley* narrowed *Reed*.

In rejecting the petitioner's "cause" arguments, the Court wrote: "As we clearly stated in *Engle v. Isaac*, . . . 'futility cannot constitute cause if it means simply that a claim was 'unacceptable to that particular court at that particular time.'" 523 U.S. at 623 (citing *Engle*, 456 U.S. at 130 n. 35).[11] But *Engle* did not clearly state that proposition. And the *Bousley* Court simply quoted from *Engle* footnote 35's characterization of Judge Poole's dissent in *Myers*. It far from clear how a "*see*" citation to a parenthetical explanation of a dissent in a circuit panel decision, that emphasizes twice the "particular" nature of the illustration, in a case that was subsequently summarily vacated and remanded by this Court, can constitute the holding of a different case or even meaningful dicta.

As Justice Gorsuch recently observed: "[W]hatever utility it may have, dicta cannot bind future courts. This ancient rule serves important purposes. A passage unnecessary to the outcome may not be fully considered. Parties with little at stake in a hypothetical question may afford it little or no adversarial testing. And, of course, federal courts possess no authority to issue rulings beyond the cases

---

[11] *See also id.* at 625 (Stevens, J., concurring in part, dissenting in part) (noting that these are "judge-made rules").

and controversies before them." *Torres v. Madrid*, 592 U.S. ____ (2021) (Gorsuch, J., dissenting) (slip op., at 4–5). Yet *Bousley* elevated the language from *Engle* footnote 35 (a case decided two years before *Reed*) without any reasoned explanation, and without providing meaningful context to the lower courts as to the origin of this statement.

Oddly, *Bousley* arose in the Section 2255 context and involved a federal conviction, yet it placed great weight on *Engle*, which was a Section 2254 case involving a state conviction. And the *Engle* majority emphasized considerations of federalism that apply in that state law context: "Federal habeas challenges to state convictions . . . entail greater finality problems and special comity concerns." 456 U.S. at 134. But "comity and federalism concerns are absent when federal prisoners seek collateral review in federal court under § 2255[.]" Sarah French Russell, *Reluctance to Resentence: Courts, Congress, and Collateral Review*, 91 N.C.L. Rev. 79, 84 (2012). And thus, whatever nuance may lurk below the surface of *Engle* footnote 35, it should not disturb the constitutionally coherent framework of *Reed*.

B. Lower Federal Courts Misinterpret *Bousley*'s Characterization of *Engle* Footnote 35 to Narrow *Reed*.

Lower federal courts subsequently began to seize upon and expand on *Bousley*'s characterization of *Engle* footnote 35 (which, itself dicta, did not purport to *sub silentio* abrogate or narrow *Reed*). *See, e.g.*, *Wheeler v. United States,* 329 F. App'x 632, 635 (6th Cir. 2009); *Daniels v. United States*, 254 F.3d 1180, 1191 (10th Cir. 2001); *Simpson v. Matesanz*, 175 F.3d

200, 211 (1st Cir. 1999). The Sixth Circuit decision at issue here relied upon this exact precedent. *See* Pet. App. 8a–9a.

But the Sixth Circuit panel went even further than this errant precedent by imposing an additional hurdle that amounts to tilting at windmills. According to the panel: "Even the alignment of the circuits against a particular legal argument does not equate to cause for procedurally defaulting it. Instead, we suggested that [u]nless the Supreme Court has decisively foreclosed an argument, declarations of its futility are premature. Gatewood therefore cannot establish cause by showing that his vagueness claim cut against the current of federal circuit precedent at the time of his direct appeal." Pet. App. 10a (cleaned up). The panel stated if "at the time of default, the Supreme Court *had not yet foreclosed an argument*, the argument was not by definition futile, because at that time state courts, lower federal courts, and the Supreme Court itself still remained free to adopt it." Pet. App. 14a (cleaned up and emphasis added).

In so doing, the Sixth Circuit mistakenly expanded *Bousley* to erect an impenetrable barrier to review of Mr. Gatewood's meritorious constitutional claims, while ignoring this Court's controlling precedent in *Reed*. This Court should correct that error.

II. BECAUSE MR. GATEWOOD INDISPUTABLY MET ALL STATUTORY REQUIREMENTS FOR *HABEAS* REVIEW, HE SHOULD GET HIS DAY IN COURT.

The Sixth Circuit's impossibly high "cause" standard is not only contrary to *Reed* but also layers onto Section 2255's already onerous statutory

requirements an additional judicial roadblock that stands in tension with the statutory scheme itself. It is primarily Congress's role to set the parameters of habeas relief, which should not be precluded by application of insurmountable judge-made barriers that deny the relief that Congress intended to confer.

"Within the very broad limits set by the Suspension Clause, the federal writ of habeas corpus is governed by statute." *Schlup v. Delo*, 513 U.S. 298, 343 (1995) (Scalia, J., dissenting) (citing U.S. Const., Art. I, § 9, cl. 2). As then-Judge Gorsuch has explained:

> Even though a criminal conviction is generally said to be "final" after it is tested through trial and appeal, Congress is free to provide still further safeguards against wrongful convictions. And Congress has done just that in many statutes over the course of our history. Most relevant for purposes of this case, in 28 U.S.C. § 2255 Congress has chosen to afford every federal prisoner the opportunity to launch at least one collateral attack to any aspect of his conviction or sentence.

Prost v. Anderson, 636 F.3d 578, 583 (10th Cir. 2011). And as Justice Brennan has explained, "[t]he 'cause and prejudice' rule *of Wainwright v. Sykes*" . . . is [a] judicially created restriction that is not required—or even suggested—by the habeas statute itself[.]" *Murray*, 477 U.S. at 517 (Brennan, J., dissenting).

"[J]udgments about the proper scope of the writ are normally for Congress to make." *Felker v. Turpin*, 518 U.S. 651, 664 (1996) (cleaned up). 28 U.S.C. § 2255 sets forth numerous statutory restrictions on the availability of habeas review, including a one-year statute of limitations subject to narrow statutory exceptions, *see id.* § 2255(f), and a general bar against "second or successive" habeas petitions, *see id.* §§2244, 2255(h). These are fairly onerous and complex statutory restrictions that in themselves provide meaningful guardrails against abuse of the writ.

None of these actual statutory restrictions are at issue in this case. First, there is no dispute that Mr. Gatewood's § 2255 motion was timely filed. *See* Pet. App. 5a–6a. Second, this is Mr. Gatewood's *first* habeas petition, which is not subject to § 2255(h)'s strictures. The fact that Mr. Gatewood waited until many years after his conviction was final to file his first § 2255 motion at a time when he had a meritorious legal argument does not change this and, in fact, shows prudent restraint to conserve scarce judicial resources, not an abuse of the writ.

Having met the statutory requirements, Mr. Gatewood should not also be required to confront a new obstacle in the form of extra-statutory procedural demands. "Outside the habeas context, as inside, the Supreme Court has held that adverse circuit precedent doesn't authorize courts of appeals to create out of whole cloth exceptions to duly enacted statutes or rules." *Prost*, 636 F.3d at 592 n.11. After all, the "proper role of the judiciary . . . [is] to apply, not amend, the work of the People's representatives." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1726 (2017). But here, as shown above, the

Sixth Circuit did just that—forcing Mr. Gatewood to meet a newly minted and unworkably high judge-made standard to get his day in court, even though there is no dispute that he met *all* of the actual statutory requirements of § 2255. That, standing alone, should be enough.

III. THE SIXTH CIRCUIT'S STANDARD IS UNWORKABLE, INEFFICIENT, AND UNJUST.

Mr. Gatewood, and those similarly situated, should not be denied their day in Court based on a judge-made procedural rule that would require their defense attorneys to be Nostradamus, or, willing to take a scattershot approach to appellate advocacy. Nor should defendants' fates be tied to the quality of their attorneys' powers of divination.

To illustrate why the Sixth Circuit's rule sets an impossibly high and unjust bar to review, consider the following analogies. One might expect a reasonably competent skier to be able to handle a black diamond slope in most conditions, but that does not make it reasonable to expect every skier to be a Bode Miller. Nor would be it reasonable to expect even the best professional baseball pitchers to throw no-hitters every single game, or even the best professional golfers to get holes in one on every par three. But that is the level of performance that the Sixth Circuit expects from attorneys to preserve claims like Mr. Gatewood's for habeas review, *and in every single case*. Even teams of the most diligent, competent, experienced attorneys—who might possibly be able to meet the Sixth Circuit's test *some of the time*—would often fall short. That cannot be the law.

The Sixth Circuit's rule is not only unrealistic but wildly inefficient. As it currently stands, U.S. Courts of Appeals are already burdened by a heavy case load and voluminous filings. Thus, the Federal Rules of Appellate Procedure, like this Court's Rules, contain page and word count limitations. Indeed, many circuits, by circuit rule, strongly discourage even the filing of petitions for rehearing en banc, also requiring certain certifications by counsel to the effect that, after careful study, counsel has determined that the arguments are not frivolous. And effective appellate advocacy must be focused on the few arguments most likely to prevail—creative lawyering against a wall of binding precedent is often counterproductive and may even damage the reputation of the lawyers involved. *See also* Bemporad & Kelly, 35 St. Mary's L.J. at 94–97, 105–06, 112–13 (discussing practical appellate advocacy problems caused by lower court precedent broadly interpreting *Bousley*).

As Judge Haynsworth of the Fourth Circuit observed in 1983: "Appellate courts are already overburdened with meritless and frivolous cases and contentions, and an effective appellate lawyer does not dilute meritorious claims with frivolous ones. Lawyers representing appellants should be encouraged to limit their contentions on appeal at least to those which may be legitimately regarded as debatable." *Ross v. Reed*, 704 F.2d 705, 708 (4th Cir. 1983), *aff'd in relevant part sub nom.*, *Reed v. Ross*,

468 U.S. 1 (1984).[12] That very practical observation remains true today.

The judge-made procedural default doctrine is intended, in part, to conserve judicial resources. *See Massaro*, 538 U.S. at 504. The Sixth Circuit's rule has the opposite effect. It "would be pointless (and indeed wasteful)" to require defense attorneys to raise arguments foreclosed by circuit authority at the district court. *English v. United States*, 42 F.3d 473, 479 (9th Cir. 1994). Likewise, "the burden placed upon lawyers and appellate courts would be heavy." *Ross*, 704 F.2d at 708. "[C]ounsel on appeal would be obligated to raise and argue every conceivable constitutional claim, no matter how farfetched, in order to preserve a right for post-conviction relief upon some future, unforeseen development in the law." *Id.* That makes no sense.

Worse, under the Sixth Circuit's rule, district court judges and circuit panels would be forced to reject habeas petitions raising meritorious constitutional claims, filed in compliance with all applicable statutory procedural requirements. As Judge Nygaard of the Third Circuit has broadly observed:

---

[12] To the extent *Bousley* is interpreted to narrow *Reed*, there is reason to fear that competent "defense counsel will have no choice but to file one 'kitchen sink' brief after another, raising even the most fanciful defenses that could be imagined based on long-term logical implications from existing precedents." *United States v. Smith*, 250 F.3d 1073, 1077 (7th Cir. 2001) (Wood, J., dissenting from denial of rehearing en banc).

> I constantly counsel myself and my law clerks that somewhere in the mass of usually convoluted, often marginally-comprehensible pro se habeas petitions, there is another Clarence Earl Gideon, or one of the other faceless names for whom we do issue the Great Writ. Searching for those meritorious petitions is not only our duty, it is one of our most important.

United States v. Bendolph, 409 F.3d 155, 177 (3d Cir. 2005) (en banc) (Nygaard, J., concurring in part and dissenting in part). When a court finds a meritorious petition, it should address the merits of the petition and grant appropriate habeas relief. Meritorious petitions that comply with the *statutory* requirements for habeas relief should not be discarded based on judge-made law making those onerous requirements even more difficult to meet.

IV. REVERSING THE SIXTH CIRCUIT WOULD NOT CAUSE FLOODGATES PROBLEMS.

Reversing the Sixth Circuit would not open Pandora's box, particularly as applied to this Court's sentencing jurisprudence. To begin with, as Professor Russell has explained: "Concerns about finality are much less pressing when a court reconsiders the length of a sentence rather than the validity of a conviction." Russell, 91 N.C. L. Rev. at 82–83. And "[t]here are the obvious costs [to finality]: first, to the prisoner . . . , and second, to the state for the fiscal cost of continu[ed] incarcerat[ion] . . . . But broader questions about the legitimacy of the system are also raised when the system does not correct clear injustices that are easy to fix." *Id.* at 87. So too here.

Moreover, this Court itself may limit the circumstances in which relief is available under the circumstances presented by this case, as it is *this* Court that decides on a case-by-case basis whether its decisions will be retroactive, which is a precondition for reopening the one-year statute of limitations for filing § 2255 motions. *See* 28 U.S.C. § 2255(f)(3). *Cf. id.* § 2254(e)(2)(A)(i) (analogous provision for state court convictions).

Incarcerated persons will *only* be able to meet 28 U.S.C. § 2255(f)'s limitations period based on this Court's newly announced precedent if it fits the criteria for retractive application under *Teague v. Lane*, 489 U.S. 288 (1989)—a limited subcategory to be sure, including as in *Welch v. United States*, 136 S. Ct. 1257 (2016), a new *substantive* rule relating to "the power to exact a penalty that has not been authorized by any valid criminal statute," *id.* at 1268.[13] Under these limited circumstances, it makes no sense to add on top of all other obstacles to habeas relief another judge-made barrier that is impossibly high to meet.

CONCLUSION

For these reasons, and those described by the Petitioner, this Court should grant the Petition for a writ of certiorari to the United States Court of Appeals

---

[13] "New substantive rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish." *Schriro v. Summerlin*, 542 U.S. 348, 351–52 (2004) (cleaned up).

for the Sixth Circuit to resolve both questions presented.

Respectfully submitted,

Michael Pepson
Counsel of Record
AMERICANS FOR PROSPERITY FOUNDATION
1310 N. Courthouse Road, Ste. 700
Arlington, VA 22201
(571) 329-4529
mpepson@afphq.org

Counsel for Amicus Curiae

April 7, 2021