No. 21-6099

IN THE

Supreme Court of the United States

SANDCHASE CODY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND DUE PROCESS INSTITUTE AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE[1]

Founded in 1958, the National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. It has a nationwide membership of many thousands of direct members, up to 40,000 with affiliate members. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in this Court, and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

Due Process Institute is a nonprofit, bipartisan, public interest organization that works to honor, preserve, and restore procedural fairness in the criminal legal system because due process is the guiding principle that underlies the Constitution's solemn prom-

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[1] Pursuant to Supreme Court Rule 37.6, amici curiae state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from amici curiae, their members, and counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), Petitioner Sandchase Cody and Respondent United States of America received timely notice of amici curiae's intent to file this brief and have consented to its filing.

ises to "establish Justice" and to "secure the Blessings of Liberty." U.S. Const. pmbl. The organization takes a strong interest in ensuring the existence of meaningful post-conviction remedies for constitutional claims raised in criminal cases.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court held more than a century ago that federal habeas proceedings end with an order deciding whether custody is lawful—regardless of what proceedings might remain in the court whose judgment is under review. *In re Medley*, 134 U.S. 160, 173-74 (1890). Congress declined to alter that rule when it enacted 28 U.S.C. § 2255, and, for more than 70 years, federal law has authorized appeals from that statutory proceeding "as from a final judgment on application for a writ of habeas corpus." 28 U.S.C. § 2255(d). Congress later limited that jurisdiction—requiring a certificate of appealability ("COA") in order to appeal from "[t]he final order in a proceeding under section 2255," *id.* § 2253(c)(1)(B)—but did not amend the longstanding rule governing when such an order became final.

Without addressing the relevant text or history, the Eleventh Circuit held that, for purposes of the COA statute, a "proceeding under section 2255" extends beyond identifying a defect in custody—habeas's historic outer limit—to also include the process of choosing an appropriate remedy. *United States* v. *Cody*, 998 F.3d 912, 915-16 (11th Cir. 2021), *petition for cert. filed*, No. 21-6099 (U.S. Oct. 25, 2021). That holding creates a clear and acknowledged conflict with the Fourth and Sixth Circuits. *See Ajan* v. *United States*, 731 F.3d 629 (6th Cir. 2013); *United States* v. *Hadden*, 475 F.3d 652 (4th Cir. 2007). This Court's

review is needed to resolve that split and correct the Eleventh Circuit's misinterpretation of the statutes governing federal post-conviction review.

Amici write to emphasize two points in particular. First, the Eleventh Circuit's analysis is wrong as a matter of statutory text. The court of appeals erred by reading the jurisdictional *limits* in the Antiterrorism and Effective Death Penalty Act ("AEDPA") in isolation from—rather than *in pari materia* with—the jurisdictional *grants* that they were enacted to restrain. Read together, sections 2255 and 2253 communicate Congress's unambiguous intent that a "proceeding under section 2255" has the same scope as a traditional proceeding for habeas corpus. This Court's habeas precedents, in turn, make clear that the scope of that proceeding *does not* include selecting a remedy. That conclusion comes straight from the text, and avoids the need to resort to any of the extra-textual modes of construction that the Fourth and Sixth Circuits used. The Court thus can and should grant certiorari to resolve this case based on the text, and to resolve the confusion in the lower courts.

Second, review is warranted because requiring a COA prior to appellate review of a choice of remedy under § 2255(b) would be the functional equivalent of abolishing review altogether. COAs are available only for constitutional claims, but the choice of post-conviction remedy is an almost purely statutory procedure, and, as a practical matter, *no* COA could *ever* issue to a defendant in petitioner's position. Particularly in light of this Court's decisions in *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), and *United States* v. *Davis*, 139 S. Ct. 2319 (2019), review is warranted to assure that the hundreds or thousands of prisoners with meritorious claims under those cases can receive both the appeal to which they are enti-

tled, and the fullest opportunity to ensure that their sentence is actually in accordance with the law.

ARGUMENT

I. REVIEW IS NEEDED TO RESOLVE THE SPLIT CREATED BY THE ELEVENTH CIRCUIT'S MISINTERPRETATION OF SECTIONS 2253 AND 2255.

A. The certificate of appealability requirement should be interpreted *in pari materia* with 28 U.S.C. § 2255(d)—the grant of appellate jurisdiction it was enacted to limit.

Orders under § 2255 are appealable under a special jurisdictional provision included in the statute itself. See *Andrews* v. *United States*, 373 U.S. 334, 338 (1963) (analyzing appellate jurisdiction under § 2255).[2] Now codified at § 2255(d), it provides that

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[2] In *Gonzalez* v. *Thaler*, 565 U.S. 134, 140 (2012), this Court noted that § 2253(a) also provides a "general grant of jurisdiction" to review district courts' decisions on post-conviction review. *See* 28 U.S.C. § 2253(a) ("In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held."). Pre-AEDPA, Section 2253(a) did not explicitly apply to § 2255 appeals. *See* 28 U.S.C. § 2253 (1994). Rather, that provision referred only to appeals from "a habeas corpus proceeding." *Id.*

There is no indication, however, that Congress intended in AEDPA to impliedly repeal § 2255(d) and overturn decades of case law (including this Court's decision in *Andrews*) applying it to determine the finality of orders under § 2255. Rather, it appears Congress meant only to make express in § 2253(a) what it had previously indicated by cross-reference. *Compare* 28 U.S.C. § 2253 (1995) (providing for appeal "[i]n a habeas corpus proceeding"), *with id.* § 2255 (providing for appeal "as from a

"[a]n appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus." 28 U.S.C. § 2255(d). When AEDPA withdrew the circuit courts' jurisdiction over appeals without a COA, it was § 2255(d) that provided the jurisdiction that AEDPA was curtailing.

The Eleventh Circuit's analysis ignored that pre-AEDPA jurisdictional backdrop. It instead interpreted § 2253's jurisdictional language exclusively by reference to the second sentence of § 2255(b), which provides the substantive standards that courts apply on collateral review of a federal criminal judgment. See *Cody*, 998 F.3d at 915-16; 28 U.S.C. § 2255(b) (defining which defects in a judgment or sentence are cognizable, and what relief is available, in a motion under § 2255).

That myopic approach was the wrong one. "[I]nterpretation of a phrase of uncertain reach is not confined to a single sentence when the text of the whole statute gives instruction as to its meaning." *Star Athletica, L.L.C.* v. *Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017) (alteration in original) (quoting *Maracich* v. *Spears*, 570 U.S. 48, 65 (2013)); see also *Caraco Pharm. Labs., Ltd.* v. *Novo Nordisk A/S*, 566 U.S. 399, 412 (2012) ("Statutory interpretation focuses on 'the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" (quoting *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997))).

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final judgment on application for a writ of habeas corpus"). "When Congress 'intends to effect a change' in existing law—in particular, a holding of this Court—it usually provides a clear statement of that objective." *Banister* v. *Davis*, 140 S. Ct. 1698, 1707 (2020).

This Court's "interpretive regime reads whole sections of a statute together to fix on the meaning of any one of them, and the last thing this approach would do," see *Lopez* v. *Gonzales*, 549 U.S. 47, 56 (2006), is interpret for jurisdictional purposes the phrase "final order in a [§ 2255] proceeding" *without considering the jurisdictional language found in § 2255 itself*. Put another way, the Eleventh Circuit's failure to account for § 2255(d) disregarded the "established rule of law, that all acts *in pari materia* are to be taken together, as if they were one law," such that "[i]f a thing contained in a subsequent statute, be within the reason of a former statute, it shall be taken to be within the meaning of [the earlier enactment]." *United States* v. *Freeman*, 44 U.S. (3 How.) 556, 564-65 (1845); see also *Wachovia Bank, N.A.* v. *Schmidt*, 546 U.S. 303, 315-16 (2006).

That § 2255(d)'s grant of jurisdiction and § 2253's corresponding jurisdictional constraint "[should be read] *in pari materia* is plain." *United States* v. *Stewart*, 311 U.S. 60, 64-65 (1940) (statutes were *in pari materia* when they "deal[t] with precisely the same subject matter"); cf. *Wachovia Bank*, 546 U.S. at 315-16 (holding that "venue and subject-matter jurisdiction are not concepts of the same order" for purposes of *in pari materia* canon). Indeed, this Court has previously held that AEDPA's limitations on appellate review should be interpreted "against the backdrop" of the jurisdictional grants they limit. *Gonzalez*, 565 U.S. at 142; cf. *Banister* v. *Davis*, 140 S. Ct. 1698, 1707 (2020) (reviewing traditional practice regarding second or successive petitions, and interpreting current statute in light of fact that "Congress passed AEDPA against this legal backdrop").

B. Under the habeas practice incorporated by § 2255(d), a "proceeding under § 2255" is over when the court resolves all claims regarding the legality of custody.

1. When the statute is properly read as a whole, the answer to the question presented is clear. Section 2253 requires a COA before an appeal is allowed from "the *final order*" in either a federal prisoner's "proceeding under section 2255," or a state prisoner's "habeas corpus proceeding." 28 U.S.C. § 2253(c)(1)(A)-(B) (emphasis added). The same section limits appellate review of both types of post-conviction proceeding to only "the *final order*." *Id.* § 2253(a) (emphasis added).

On habeas review under 28 U.S.C. § 2254, where any order granting relief will ultimately require action by a separate state court, identifying the final federal order is straightforward. Petitioner here presents the question of how to draw that line in a § 2255 proceeding—where a single district judge determines custody's legality and then identifies and implements an appropriate remedy.

Section 2255(d) provides the answer. To begin with, it authorizes appeals from "*the order entered on the* [*§ 2255*] *motion*." *Id.* § 2255(d) (emphasis added). Because Congress left that language in place when it amended § 2253(a) to expressly limit appellate review of a § 2255 proceeding to "the final order," *id.* § 2253(a); see Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, tit. I, sec. 102, § 2253, 110 Stat. 1214, 1217-18 (amending § 2253(a)); see also *supra* n. 2, it must have understood the appealable "order entered on the motion" in § 2255(d) as equivalent to the appealable "final order" in § 2253(a)—and therefore the "final order" subject to the COA requirement in § 2253(c)(1)(B), see *Epic*

Sys. Corp. v. *Lewis*, 138 S. Ct. 1612, 1619 (2018) ("It is this Court's duty to interpret Congress's statutes as a harmonious whole rather than at war with one another.").

That equivalence is useful here because, unlike § 2253, the text of § 2255(d) makes clear how Congress intended to define the final order entered in a § 2255 proceeding—as equivalent to "a final judgment on application for a writ of habeas corpus." 28 U.S.C. § 2255(d).

2. That statutory command is sufficient to resolve the question presented, and the Court should grant certiorari in order to do so. A "proceeding under § 2255" is concluded once the district court determines the legality of the movant's custody. All subsequent proceedings—including the choice of remedy—are necessarily part of the criminal docket, subject to appeal as of right.

By the time of § 2255's enactment, it was well-established that a habeas court's powers were limited to determining whether the petitioner was legally confined and, if he was not, ordering his release. Determining the extent to which the defective judgment could be corrected, or the defendant lawfully retried, was a matter for whichever authority properly had jurisdiction of the underlying case. See, *e.g.*, *Mahler* v. *Eby*, 264 U.S. 32, 46 (1924) (granting writ, but delaying alien's discharge from detention until the Secretary of Labor chose between reopening proceedings and correcting his defective ruling on the existing record); *Collins* v. *Miller*, 252 U.S. 364, 368-70 (1920) (where habeas court continued to assert jurisdiction over the prisoner, and had not actually ordered his discharge—conditionally or otherwise—an order purporting to "grant" the writ and order a new hearing before a court commissioner was non-final); *In re*

Bonner, 151 U.S. 242, 259-62 (1894) ("[W]here the punishment imposed, in the mode, extent, or place of its execution, has exceeded the law, [the habeas court may] have it corrected by calling the attention of the [original] court to such excess. . . . [The habeas court] might well delay the discharge of the petitioner . . . to have him taken before the court where the judgment was rendered, that the defects . . . in that judgment may be corrected [by that original court]."); *In re Medley*, 134 U.S. at 173-74 ("[U]nder the writ of *habeas corpus* we cannot do anything else than discharge the prisoner from the wrongful confinement . . . , and it is neither our inclination nor our duty to decide what the [state] court may or what it may not do in regard to the case as it stands.").

This Court's decisions following § 2255 are in accord. See, *e.g.*, *Magwood* v. *Patterson*, 561 U.S. 320, 332-33 (2010) ("A [post-conviction] petitioner is applying for something: His petition 'seeks *invalidation* (in whole or in part) *of the judgment* authorizing the prisoner's confinement.'"); *Wilkinson* v. *Dotson*, 544 U.S. 74, 83 (2005) ("[T]he fact that the State may seek a *new* judgment (through a new trial or a new sentencing proceeding) is beside the point.").

In addition to "historical habeas doctrine and practice," defining the final order in a § 2255 proceeding as equivalent to a final habeas order is also consistent with "AEDPA's own purposes." *Banister*, 140 S. Ct. at 1705-06 (identifying sources of guidance in construing AEDPA). Section 2255 was intended primarily to resolve "practical difficulties" arising when prisoners filed traditional habeas applications in their districts of confinement. *United States* v. *Hayman*, 342 U.S. 205, 210-19 (1952) (explaining problems that arose when habeas claims were concentrated in districts containing federal prisons, far from the

evidence and witnesses for many petitioners). The purpose of the statute was "to provide in the sentencing court a remedy *exactly commensurate* with that which had previously been available by habeas." *Sanders* v. *United States*, 373 U.S. 1, 13-14 (1963) (emphasis added). As this Court has explained in a related context, "Congress passed AEDPA against this legal backdrop, and did nothing to change it" with respect to the question presented here. *Banister*, 140 S. Ct. at 1707. "AEDPA of course made the limits on entertaining [appeals from final § 2255 orders] more stringent than before. But the statute did not redefine what qualifies as a [final order] . . . ." *Id.* (citation omitted).

3. Construing "a proceeding under section 2255" to include only what would be necessary to a final habeas judgment is also consistent with the text of § 2255(b). Two substantive consequences follow from a successful § 2255 motion. First, "the court shall vacate and set the judgment aside." 28 U.S.C. § 2255(b). That is all the relief—invalidating a judgment under which the prisoner cannot be lawfully confined—that would be available in a traditional habeas proceeding. Granting it therefore concludes the "proceeding under section 2255." Second, the court chooses "as may appear appropriate" one of four remedial options that the statute allows—"discharge the prisoner," "resentence him," "grant a new trial," or "correct the sentence." 28 U.S.C. § 2255(b). In a traditional habeas proceeding, the choice among those remedies would be firmly committed to the original tribunal. That choice, and all that follows it, is part of the underlying criminal case—not the § 2255 proceeding. See *supra* Part B.2.

The text of § 2255(b) itself divides along that same line. It provides that, if a movant prevails on the mer-

its, "the court shall vacate and set the judgment aside ***and*** shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. § 2255(b) (emphasis added). That provision is structured as two clauses, separated by a coordinating "and" and sharing a subject ("the court"), but each otherwise standing on its own. The imperative "shall" is repeated on either side of the central conjunction, with each instance modifying a separate set of infinitive verbs, and the prepositional phrase "as may be appropriate" modifying only the second clause. Not accidentally, that grammatical divide—between a post-conviction court's duty to vacate an unlawful judgment and the original court's discretion in whether and how to fashion a new one—mirrors the habeas remedies Congress meant to reproduce across § 2255 as a whole.

The Eleventh Circuit failed to account for that context. Instead it isolated the final two clauses of § 2255(b), reasoning that because they appear in § 2255, they must be part of the "proceeding under [that] section" for purposes of appellate jurisdiction under § 2253. *Cody*, 998 F.3d at 915-16. Section 2255(d) expressly instructs, however, that "the order entered on the [§ 2255] motion" is appealable "as from a final [habeas] judgment." 28 U.S.C. § 2255(d). Put simply, the text of § 2255 itself directs that appellate jurisdiction be measured against historic practice rather than the precise language of the provision. See also *Banister*, 140 S. Ct. at 1705-06 (noting that prior practice is informative when interpreting "term[s] of art" in AEDPA that are "not self-defining"). The decision below disregarded that plain command and created a circuit split in the process. Certiorari is warranted to resolve it.

4. There is a particularly acute need for this Court's review because on the other side of that split, the Fourth and Sixth Circuits reached the right result for the wrong reasons. Rather than relying on the language and history of the statutes at issue, each court took an extratextual approach to sections 2253 and 2255 that is not a tenable model for other circuits to follow.

In *Hadden*, 475 F.3d 652, the Fourth Circuit initially observed that the text authorizing courts to either "resentence" a successful movant or "correct [his] sentence" appears in § 2255(b), *id.* at 662-63, but that the most literal reading of that text in isolation—one that included resentencing and correction within the § 2255 proceeding itself—would "prevent the defendant from ever obtaining direct appellate review of his new sentence," *id.* at 663-64. But rather than look to the surrounding statutory language for guidance, the court developed its own "somewhat novel" interpretation with no apparent textual roots. *Id.* at 664. It concluded that "resentencing or correction of [a] prisoner's sentence . . . is a hybrid order that is both part of the petitioner's § 2255 proceeding and part of his criminal case," and determined based on its own sense of statutory purpose and policy that a district court's choice of remedy fell on the criminal side of that line. *Id.* at 664-65.

In *Ajan*, 731 F.3d 629, the Sixth Circuit followed essentially the same extratextual approach. Citing the Fourth Circuit's decision in *Hadden*, and relying on the fact that the defendant had only appealed from his amended criminal judgment, it held that a challenge to the district court's choice of remedy was an "appeal[] [of] a new criminal sentence" not requiring a COA. *Id.* at 631-32.

There is a clear conflict in the courts of appeals. Even the circuits to reach the correct result have come unmoored from crucial statutory text and history. This Court's review is needed.

II. THE ELEVENTH CIRCUIT'S DECISION WOULD CLOSE THE COURTS OF APPEALS ENTIRELY TO DEFENDANTS ENTITLED TO RESENTENCING BASED ON *JOHNSON* V. *UNITED STATES* AND *UNITED STATES* V. *DAVIS*.

Certiorari is especially warranted because, in addition to being textually wrong, the rule adopted below—requiring a COA to review crucial decisions of a type that will rarely if ever generate constitutional claims—has intolerable practical effects that must be remedied. To wit, the Eleventh Circuit's rule effectively eliminates appellate review of decisions denying requests for resentencing based on *Johnson*, 135 S. Ct. 2551, and *Davis*, 139 S. Ct. 2319.

In both those cases, the Court held unconstitutionally vague a residual clause under which thousands of defendants, over several decades, had been sentenced to draconian prison sentences based on an arbitrary determination that they had committed a categorically violent offense. See *Johnson*, 135 S. Ct. at 2555-56, 2563 (invalidating 18 U.S.C. § 924(e)(2)(B)); *Davis*, 139 S. Ct. at 2323-24 (invalidating 18 U.S.C. § 924(c)(3)). This Court subsequently held that *Johnson* announced a substantive rule applicable on collateral review. *Welch* v. *United States*, 136 S. Ct. 1257 (2016). The First, Fourth, Fifth, Sixth, Tenth, and Eleventh Circuits have extended that conclusion to *Davis*. See *King* v. *United States*, 965 F.3d 60 (1st Cir. 2020); *In re Thomas*, 988 F.3d 783 (4th Cir. 2021); *United States* v. *Reece*, 938 F.3d 630 (5th Cir. 2019); *In re Franklin*, 950 F.3d 909 (6th Cir. 2020)

(per curiam); *United States* v. *Bowen*, 936 F.3d 1091 (10th Cir. 2019); *In re Hammoud*, 931 F.3d 1032 (11th Cir. 2019).

Petitioner is merely one of numerous *Johnson* defendants still percolating through the federal courts years after that decision, whose cases are quickly being joined by many more under *Davis*. See, *e.g.*, *supra* at 13-14; see also *Davis*, 139 S. Ct. at 2333 (noting that 18 U.S.C. § 924(c)(3)(B) was "used in 'tens of thousands of federal prosecutions'" over more than three decades between enactment and invalidation). Indeed, in the months following this Court's determination that *Johnson* applied on collateral review, the Eleventh Circuit *alone* received nearly 2,000 applications for leave to file second or successive petitions based on that decision—a figure including only the fraction of prisoners convicted in that circuit who had previously sought § 2255 relief. See *In re Jones*, 830 F.3d 1295, 1301-02 (11th Cir. 2016) (Rosenbaum and J. Pryor, JJ., concurring in result); see also Conrad Kahn & Danli Song, *A Touchy Subject: The Eleventh Circuit's Tug-of-War Over What Constitutes Violent "Physical Force,"* 72 U. MIAMI L. REV. 1130, 1141-46 (2018) (describing flood of § 2255 petitions filed in Eleventh Circuit under *Johnson*). The upshot is that the question presented here is likely to recur hundreds—if not thousands—of times over the coming years, as § 2255 petitioners seek resentencing under *Johnson* and *Davis* but receive bare corrections instead.

Absent intervention by this Court, appeals from many such decisions will, for practical purposes, be abolished in the Eleventh Circuit. That is so because, by statute, a COA is available only for constitutional claims. 28 U.S.C. § 2253(c)(2). When a district court vacates one count of a multi-count conviction, however, Eleventh Circuit law generally treats the discre-

tionary decision *not* to further modify the original sentence as a purely statutory one. See *United States* v. *Thomason*, 940 F.3d 1166, 1172-73 (11th Cir. 2019) (holding that such a modification is not "critical stage" for which due process requires a hearing), *cert. denied*, 140 S. Ct. 1213 (2020). Other courts of appeals have reached the same conclusion. See, *e.g.*, *Troiano* v. *United States*, 918 F.3d 1082, 1086-87 (9th Cir. 2019); *Ajan*, 731 F.3d at 633-34; *Hadden*, 475 F.3d at 668-69; *Rust* v. *United States*, 725 F.2d 1153, 1154 (8th Cir. 1984) (per curiam).

The ruling below, if allowed to stand, would render crucial remedial decisions unreviewable and leave prisoners unable to challenge even gross abuses of discretion. That cannot be what Congress intended, and is not an injustice this Court should allow to persist.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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