No. 21-857

In the Supreme Court of the United States

MARCUS DEANGELO JONES,
PETITIONER,

v.

DEWAYNE HENDRIX,
WARDEN

ON A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I. Amicus Misunderstands Petitioner's Test And Section 2255(e)'s Purpose, Text, And Coverage

1. Because they misunderstand it, amicus and the government criticize petitioner's reading of what it means to "test" the legality of detention as "overbroad." Gov't Br. 41; see also Amicus Br. 37. But petitioner's reading—that the test must apply materially correct substantive law in analyzing whether to grant a motion to vacate—is both limited and principled and respects Section 2255(e)'s text. Because Section 2255(e) limits the saving clause to claims "test[ing] the legality of * * * detention," the clause does not, for example, provide a gateway for claims concerning the procedural legality of a conviction. Nor does it cover everyday legal errors, like the misapplication of law to facts. In short, it covers only the application of incorrect substantive law, not the misapplication of correct substantive law. And, of course, applying incorrect substantive law matters only if the errors are material to the case. Petitioner's textual view of the saving clause opens no floodgates.

2. Amicus broadly frames her reading of the saving clause with a peculiar view of its purpose.[1]

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[1] Amicus also mischaracterizes Section 2255 by repeatedly referring to its provisions as applying atextually to "collateral attacks." See, *e.g.*, Amicus Br. 3, 10, 11, 24, 26, 29. They do not. Those provisions all apply exclusively to 2255 motions, not to 2241 habeas petitions. In Section 2255(e), of course, Congress

According to her, it almost solely reflects concern that 2255 proceedings would sometimes "not be practicable * * * because of the necessity of [the prisoner's] presence at the hearing." Amicus Br. 4 (quoting Report of the Judicial Conference 24 (Sept. Sess. 1943)). In support, she points to the Administrative Office of the U.S. Courts' letter of transmittal to Congress and the Senate Report, Amicus Br. 4-5, and ties her argument up with this Court's recognition that Congress's ultimate enactment of 2255 "was modeled after" the Judicial Conference's original proposal, Amicus Br. 5 (quoting *United States* v. *Hayman*, 342 U.S. 205, 218 (1952)).

So far, so good. What amicus neglects to mention, however, is that the House expressly rejected this concern with practicability. It replaced language proposed by the Judicial Conference asking whether the remedy is "practicable" in light of the "necessity of [the prisoner's] presence at the hearing" with broader language asking whether the remedy is "inadequate or ineffective to test the legality of [the prisoner's] detention." See *Hayman*, 342 U.S. at 216-218. Although perhaps Section 2255 overall "was modeled after" the original proposal, the saving clause was not. Congress specifically rejected amicus's narrow concern with practicability in favor of asking whether a 2255 motion would adequately and effectively test the

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created an independent pathway to habeas relief. Those claims, like the one here, are not subject to rules that apply textually to 2255 motions.

legality of detention. *Triestman* v. *United States*, 124 F.3d 361, 374-375 (2d Cir. 1997).

Amicus's oddly truncated legislative history leads her to misunderstand the saving clause's purpose and use. To her, it operates only when the "sentencing court is not *practically accessible*" or the "prisoner's claim is not *legally cognizable*" there. Amicus Br. 16. She cites only one case to support her first contention and only one of the many cases that hold to the contrary[2]—although she concedes that by at least 1962 the contrary was the "prevailing rule." Amicus Br. 16-17. And she misunderstands the single case she cites in support of her misunderstanding of history. That case, *Stidham* v. *Swope*, did not grant saving-clause relief because of the practical difficulties of transportation but rather because the petition alleged two clear constitutional violations, see 82 F. Supp. 931, 931-932 (N.D. Cal 1949), and the 2255 proceeding

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[2] In fact, every court that had considered this issue rejected amicus's position. See, *e.g.*, *Crismond* v. *Blackwell*, 333 F.2d 374, 377 (3d Cir. 1964); *Adam* v. *Hagan*, 325 F.2d 719, 719 (5th Cir. 1963); *Williams* v. *United States*, 323 F.2d 672, 674 (10th Cir. 1963); *Smith* v. *Settle*, 302 F.2d 142, 143 (8th Cir. 1962); *Black* v. *United States*, 301 F.2d 418, 419 (10th Cir. 1962); *Edwards* v. *Walker*, 349 F. Supp. 1295, 1296 (C.D. Cal. 1972). Petitioner has also reviewed all 353 federal pre-AEDPA saving clause cases by searching for "inadequate or ineffective" within the citing references of § 2255 and imposing a date range of 1/1/1948-4/26/1996. Not one rested on the practicability of transporting prisoners to the sentencing court.

would in the court's view introduce delay *whether the prisoner was transported back to the sentencing court or not*, *id.* at 932. Believing that if the prisoner's 2255 motion proved unsuccessful he could then petition for habeas, which was likely to be granted, the court issued the writ. *Id.* at 932-933 ("If the decision be adverse in [the 2255] proceeding and the petitioner be found wrongly imprisoned when the habeas corpus proceeding is decided, every day of the long delay before the latter petition may be presented to me is wrongfully taken out of his free life."). Transportation issues have never been the saving clause's "central concern." Amicus Br. 17.

Amicus's other asserted purpose for the saving clause fares no better. Although she points to two cases in which a motion to vacate was not "*legally cognizable*" in the sentencing court, Amicus Br. 16, both cases were legal outliers and could hardly have represented one of Congress's central concerns. One concerned the dissolution of the only territorial court, that of the Panama Canal Zone, that Congress appears not to have provided a successor for. See Pet. Br. 32 n.2 (discussing *Edwards* v. *United States*, 1987 WL 7562, at *1 (E.D. N.Y. 1987) (unpublished)). The other concerned a situation where Congress had clearly provided a successor court to handle 2255 motions but that court wrongly refused to exercise jurisdiction. See *ibid.* (discussing *Spaulding* v. *Taylor*, 336 F.2d 192 (10th Cir. 1964)).

In short, amicus's claimed purposes for the safety clause do not withstand even slight scrutiny. As this

Court has held, the saving clause was meant to "strengthen * * * the writ's protections" and "uphold[] the statute[] against constitutional challenges." *Boumediene* v. *Bush*, 553 U.S. 723, 776 (2008).[3]

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[3] Amicus also argues that the saving clause exists for cases in which "no single sentencing court could fully resolve a prisoner's claim," Amicus Br. 17, again trying to establish a "central concern" with practicability. But both cases she cites held that Section 2255 simply did not apply to the prisoners' claims. See *Cohen* v. *United States*, 593 F.2d 766, 770-771 (6th Cir. 1979) ("Section 2255 * * * does not grant jurisdiction to a district court over all post conviction claims, but has been conceived to be limited to those claims which arise from the imposition of the sentence as distinguished from claims attacking the execution of the sentence. The latter claim is cognizable solely under § 2241. * * * Consequently, we must find that the District Court erred in holding that alternative relief was available to petitioner pursuant to 28 U.S.C. § 2255 and in failing to exercise jurisdiction under 28 U.S.C. § 2241.") (citation omitted); *Mead* v. *Parker*, 464 F.2d 1108, 1110-1111 (9th Cir. 1972) ("[Because a] claim that the supply of law books at the prison is so inadequate as to make it impossible for [prisoners] to prosecute their legal proceedings [does not satisfy Section 2255(a)'s authorization clause,] § 2255 does not, on its face, apply at all."). It is true that both cases went on further to explain that *even if* section 2255 were hypothetically to apply, habeas relief would be available through the saving clause, but both clearly speak in the subjunctive. See *Cohen*, 593 F.2d at 771 n.12 ("*Even if it was assumed* that subject matter jurisdiction over plaintiff's claims could be exercised under § 2255, we would find the District Court's failure to exercise its jurisdiction under § 2241 to be in error.") (emphasis added); *Mead*, 464 F.2d at 1111 ("*Even if we were to hold* * * * that this case falls within [Section 2255], that would not decide the question.") (emphasis added).

3. Recognizing that these few, improbable cases provide little support for her grand framing of the saving clause, amicus misreads that clause's text in order to widen its coverage. In her view, "*all* of the cases that fell within the saving clause from 1948 to 1996 share [a] common feature: the court in the district of confinement was a more logical forum than the sentencing court to hear the prisoner's challenge." Amicus Br. 18-19 (emphasis added). To support this breathtakingly broad proposition, she points to two types of cases habeas courts commonly entertain: (1) those "contest[ing] the execution of [a] sentence, including the computation of good-time credits, location of imprisonment, administration of parole, or imposition of detention conditions," *id.* at 18, and (2) courts-martial, *id.* at 20.

The problem is that habeas courts hear these cases directly under 28 U.S.C. § 2241, not by virtue of Section 2255's saving clause. As amicus Habeas Scholars explain in detail, Section 2255(e) itself makes clear that these cases cannot arise under the saving clause. See Habeas Scholars Amicus Br. 8. The first words of Section 2255(e), its authorization clause, limit saving-clause relief to cases where the habeas applicant "is authorized to apply for relief by motion pursuant to this section" yet cannot for various reasons succeed. 28 U.S.C. § 2255(e). Neither of amicus's two categories of cases, however, is authorized by Section 2255(a) and so cannot be cognizable in habeas by virtue of the saving clause.

Take first those cases challenging the execution, rather than the legality, of a sentence. They do not come under any of the heads of Section 2255's overall authorization clause. They do not

> claim[] 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.

28 U.S.C. § 2255(a). A habeas applicant making an execution claim is thus not "authorized to apply for relief by motion pursuant to [Section 2255]," 28 U.S.C. § 2255(e), and cannot seek any saving-clause relief. Fortunately for the applicant, she does not need Section 2255(e). Common-law habeas relief is directly available.

Amicus's other signal category—challenges to courts-martial—fails Section 2255(e)'s authorization clause for a different reason. That clause covers only "prisoner[s] in custody under sentence of a court established by Act of Congress." 28 U.S.C. § 2255(a). But courts-martial are not established by an "Act of Congress." Amicus recognizes this difficulty and argues that "[a] military court * * * would *seem* to be 'a court established by Act of Congress.'" Amicus Br. 20 (quoting 28 U.S.C. § 2255(a)) (emphasis added). But "seem" will not do. She points to no "Act of Congress" establishing courts-martial. Instead, she plucks a

single sentence from *Solorio* v. *United States*, 483 U.S. 435 (1987), which "explain[s] that Congress 'empowered courts-martial to try servicemen for the crimes proscribed by the [Uniform Code of Military Justice.]'" Amicus Br. 20 (quoting *Solorio*, 483 U.S. at 438-439). Her quotation is accurate, but it does not bear at all on whether Congress *established* courts-martial. It merely notes that Congress granted already-established courts-martial jurisdiction to hear such cases.

Congress can, of course, regulate courts-martial and has done so since 1789 through a series of War Acts and the Uniform Code of Military Justice. See, *e.g.*, Act to Ascertain and Fix the Military Establishment of the United States, 1 Stat. 483 (1796). But, as this Court has noted,

> The court-martial is in fact older than the Constitution. * * * When it came time to draft a new charter, the Framers recognized and sanctioned existing military jurisdiction[. A]nd by granting legislative power to make Rules for the Government and Regulation of the land and naval Forces, the Framers also authorized Congress to carry forward courts-martial. * * * The very first Congress continued the court-martial system as it then operated.

Ortiz v. *United States*, 138 S. Ct. 2165, 2175 (2018) (cleaned up); accord *id.* at 2190 (Alito, J., dissenting) ("Courts-martial are older than the Republic."). And the leading nineteenth-century military law treatise agrees: "Congress did not originally create the court-

martial, but * * * continued it in existence as previously established. Thus, [courts-martials are] in fact older than the Constitution." William Winthrop, *Military Law and Precedents* 51 (1896). Courts-martial, unlike some other military courts, see 10 U.S.C. § 941 ("There is a court of record known as the United States Court of Appeals for the Armed Forces. The court is established under article I of the Constitution."), have not been established by Act of Congress. Thus, habeas actions challenging the results of courts-martial are not cognizable by virtue of the saving clause. They arise directly under 28 U.S.C. § 2241.

4. Amicus also mistakes the meaning of the saving clause's three central terms: "inadequate," "ineffective," and "test." As she reads them, the saving clause "is a guarantee of 'opportunity, not outcome.'" Amicus Br. 22 (quoting Pet. App. 6a). To the extent she means that the saving clause does not allow resort to common-law habeas whenever the sentencing court would deny a 2255 motion after applying the correct substantive law, petitioner agrees. To the extent, however, that she would deny saving-clause relief when a court would in an earlier 2255 motion have applied incorrect substantive law that would have wrongly sustained the legality of a petitioner's detention, she errs. The "opportunity" to test the legality of detention must be real, not purely formal. A court that allowed a petitioner to apply for 2255 relief but, for example, applied the simple substantive rule that "the prisoner always loses" whatever the claim

could not be said to have adequately and effectively tested the legality of detention even though it provided a purely formal remedial "opportunity" to file a motion. If the remedy would have wrongly denied relief because it would have applied incorrect substantive law, it is "inadequately" and "ineffectively" "test[ing]" the legality of detention.[4] If the Court prefers petitioner's alternative argument that the saving clause's use of the present tense "is" covers any jurisdictionally barred 2255 motion, see Pet. Br. 27, then as amicus National Association of Criminal Defense Lawyers' brief makes clear a 2255 motion cannot "test" the legality of detention at all. NACDL Amicus Br. 4-8.

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[4] Amicus offers a tortured explanation of the saving clause's key terms. Take "inadequate." Despite historical evidence and academic understanding to the contrary, see, *e.g.*, Brandon Hasbrouck, *Saving Justice: Why Sentencing Errors Fall Within the Savings Clause, 28 U.S.C. § 2255(e)*, 108 Geo. L.J. 287, 312 (2019) ("The term 'inadequate' is a term of art that appears in our equity jurisprudence, which finds in habeas corpus a comfortable home."), amicus argues that there is "no reason to think that Congress intended to borrow a term of art from that context when it used the word 'inadequate' in a postconviction-review statute." Amicus Br. 37. Instead, she manufactures a "quotation" from *Ex parte Hawk*, 321 U.S. 114 (1944), stating that "where courts 'have considered and adjudicated the merits of [a claimant's] contentions,' the remedy is not 'inadequate.'" Amicus Br. 38 (quoting *Hawk*, 321 U.S. at 118). In *Ex parte Hawk*, 109 words separate the two parts of this "quotation" and the two parts concern very different things—neither of which is relevant to this case. This reach for authority reveals how strained it is.

Amicus also leans heavily on a single sentence from *Bousley* v. *United States*, 523 U.S. 614 (1998), to argue that even if seeking 2255 relief would be completely futile (because the sentencing court would apply incorrect substantive law) the remedy is still not "inadequate or ineffective to test the legality of detention." See Amicus Br. 22. She misunderstands, however, the significance of that sentence. As its context makes clear, this statement concerns the common-law doctrine of procedural default—an affirmative defense that the government can raise in response to a Section 2255 motion or habeas petition—not habeas jurisdiction. The question was whether the prisoner could raise in a 2255 motion a claim he had not raised on direct appeal even though that claim "was most surely not a novel one [and] at the time of petitioner's plea, the Federal Reporters were replete with cases involving challenges" based on that claim. *Bousley*, 523 U.S. at 621-623 (cleaned up). It had nothing to do with whether a motion to vacate would be inadequate or ineffective to test the legality of one's detention.

II. Saving-Clause Relief Would Not Provide An End Run Around Section 2255(h) Or Create Difficult Issues For The Courts

1. Amicus argues that allowing saving-clause relief for statutory claims would subvert congressional intent by privileging statutory claims over the sole intended "exceptions" to Section 2255's general bar on second 2255 motions. See Amicus Br. 29-31. That again misunderstands § 2255(e)'s purpose and role.

First, the saving clause is not meant to function as an exception to Section 2255's requirements. It serves as an independent, congressionally authorized gateway for a small group of claims cognizable under Section 2241 and thus not subject to Section 2255's requirements in the first place.

Second, amicus's end-run argument proves too much. It would cast doubt on *every* application of Section 2255(e), even those she herself would allow. Under her reading of Section 2255(e)'s coverage, for example, a court-martialed service member, a prisoner challenging her conditions of detention, and a prisoner whose transportation back to the sentencing court for a necessary hearing would be logistically inconvenient, would all be able to seek habeas relief without satisfying Section 2255's various procedural limitations even if they did not fall under either of Section 2255(h)'s two express exceptions. But she does not object to that.

2. Amicus worries that allowing *Rehaif* claims through the saving clause will illogically distribute cases between sentencing and habeas courts. Amicus Br. 32. But Congress did not enact the maximize-convenience-at-all-costs statute that amicus prefers. While amicus might have struck a different balance, Congress created a "safety hatch" to ensure Section 2255 provided "an adequate substitute" for habeas and to "block any argument that Congress was suspending the writ." *In re Davenport*, 147 F.3d 605, 609 (7th Cir. 1998); see also *Boumediene*, 553 U.S. at 776. Surely amicus is correct that choice-of-law questions would

sometimes arise, Amicus Br. 34, but that is an inherent feature of "a diverse legal system such as our own." *Shaffer* v. *Heitner*, 433 U.S. 186, 225 (1977) (Brennan, J., concurring in part). And in any event, the same questions would arise under amicus's theory when the court of conviction and sentencing court are in different circuits.

In a puzzling attempt to divert attention to the reasoning of some courts of appeals instead of petitioner, amicus next lists various questions raised by the "[s]everal tests [that] have developed" in the circuit courts. Amicus Br. 34-36. Thankfully, Jones has not proposed one of these circuit tests and the test he *has* proposed makes amicus's questions evaporate. Jones interprets the saving clause to allow a claim challenging the legality of a prisoner's detention to proceed in habeas when binding precedent foreclosed the claim at the time of the prisoner's § 2255 motion but would no longer foreclose the claim under present law. Pet. Br. 13. There is no need to ask—as a threshold matter—whether the prisoner can show "actual innocence," whether an intervening decision is "new," whether the court "addressed similar questions unfavorably," or whether the prisoner had an "affirmative basis" to make the claim. Amicus Br. 36. And because the saving clause applies to all claims challenging a prisoner's "*detention*," not just "conviction," it plainly includes claims challenging the validity of a sentence. 28 U.S.C. § 2255(e) (emphasis added).

III. The Government And Amicus Fail To Grapple With Substantial Constitutional Concerns

1. The government, Gov't Br. 44-47, and amicus, Amicus Br. 44-49, largely ignore petitioner's Suspension Clause arguments. Both wave away discussion of the Suspension Clause by invoking history. Yet, without explanation, neither shows interest in the body of eighteenth-century case law confirming the availability of habeas relief to those imprisoned for non-criminal conduct.[5] See Pet. Br. 37-

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[5] Amicus Criminal Justice Legal Foundation (CJLF) tries to address this history but fails. It distinguishes the cases on various grounds, like whether they involve felonies, CJLF Amicus Br. 11-13, or whether they involve superior or inferior courts, *id*. at 11. First, CJLF is correct that the Habeas Act of 1679 denied statutory relief in felony cases. CJLF Br. 11-12. But it did not similarly restrict common-law habeas, which continued to apply. "[T]he 1679 Act did not *limit* habeas relief to prisoners eligible for the statutory writ the 1679 Act created. * * * [T]he common-law writ remained intact." Lee Kovarsky, *A Constitutional Theory of Habeas Power*, 99 Va. L. Rev. 753, 799 (2013); see also Stephen I. Vladeck, *The New Habeas Revisionism*, 124 Harv. L. Rev. 941, 955 (2011) (same). CJLF is simply mistaken "that collateral attack on felony convictions was [not] deemed a fundamental aspect of habeas corpus." CJLF Br. 12.

Second, CJLF tries to dismiss the many eighteenth-century English cases that show the English courts granted habeas relief when an element of the crime was not alleged or proved. It claims (i) that habeas review extended only to criminal convictions of "inferior courts," not to "judgment[s] of a court of general jurisdiction, CJLF Amicus Br. 11, and (ii) that "[t]he lower federal courts are not inferior courts in this sense[, but] are courts of general jurisdiction," *ibid*. But the principal American case it cites as authority for this proposition, see CJLF Br. 10, *Kempe's*

39. Nor does either even cite *Bushell's Case*, (1670) 124 Eng. Rep. 1006, 1007-1009 (C.P.), the leading example of an English court near the time of the Founding discharging a prisoner based on a claim similar to petitioner's.[6]

Lessee v. *Kennedy*, 9 U.S. (5 Cranch) 173 (1809), disproves it. Although that case did hold, as CJLF argues, that "inferior courts" are "courts of a special and limited jurisdiction," it further held that "[t]he courts of the United States are *all* of limited jurisdiction," *id*. at 185 (emphasis added). Under CJLF's own reasoning, then, habeas relief should have been available at that time in a case like this and *Ex parte Watkins*, 28 U.S. (3 Pet.) 193 (1830), does not stand to the contrary.

[6] CJLF tries to distinguish *Bushell's Case* on the ground that it involved a contempt proceeding. CJLF Br. 13. That is beside the point. CJLF points to no English or early American case holding that habeas was uniquely available in contempt cases and none of the major early commentators discusses contempt as a special circumstance warranting habeas relief. See 3 William Blackstone, *Commentaries* *129-138; 3 Joseph Story, *Commentaries on the Constitution of the United States* 206-209 (1833). CJLF's single authority for dismissing petitioner's reading of that case, moreover, undercuts CJLF's own argument. Although *Bushell's Case* may not authorize "issuance of the writ [for] some abstract violation of 'fundamental law' or 'whatever society deems to be an intolerable restraint,'" Dallin H. Oaks, *Legal History in the High Court—Habeas Corpus*, 64 Mich. L. Rev. 451, 467 (1966), an argument petitioner does not make, the case does, that same authority argues, hold that habeas is appropriate when a court punishes "jurors [for giving] their verdict corruptly" without requiring "some element of corruption," *ibid*.; see *id*. at 467 n.83 (quoting holding from *Bushell's Case*). In other words, when the convicting court did not require a showing of the necessary mens rea—exactly the case here—habeas was appropriate.

Amicus announces instead that "legal errors in construing a crime's elements do not defeat jurisdiction." Amicus Br. 46. Whatever the current validity of this claim, it does not describe practice at the Founding. *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32 (1812), held both that under our separation of powers only Congress, not courts, can define crimes, *id.* at 33-34, and that courts lack subject matter jurisdiction to try crimes not defined by Congress, *id.* at 34 (holding that although courts and the government have certain implied powers it does "not follow that the Courts of that Government are vested with jurisdiction over any particular act done by an individual in supposed violation of the peace and dignity of the sovereign power. The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence."). At the Founding, then, a court lacked subject matter jurisdiction to punish any activity not criminalized by Congress.

Subject matter jurisdiction, moreover, was not then a single, monolithic concept. As this Court has long held,

> there must be jurisdiction to give the judgment rendered, as well as to hear and determine the cause. If a magistrate having authority to fine for assault and battery should sentence the offender to be imprisoned in the penitentiary, or to suffer the punishment prescribed for homicide, his judgment

> would be as much a nullity as if the preliminary jurisdiction to hear and determine had not existed.

Ex parte Reed, 100 U.S. (10 Otto) 13, 23 (1879). And, the Court immediately continued, "[*e*]*very* act of a court beyond its jurisdiction is void." *Ibid.* (citation omitted; emphasis added). Jurisdiction to convict and sentence, just like remedial jurisdiction, runs to the courts' jurisdiction over the subject matter. See *California* v. *Grace Brethren Church*, 457 U.S. 393, 417-419 (1982) (refusing to reach a claim's merits when "no federal district court had jurisdiction," as the Tax Injunction Act barred "jurisdiction to issue injunctive or declaratory relief").

2. The government and amicus's avoidance does not end there. Each allocates just over a single page to address due process, the separation of powers, and the Eighth Amendment. See Gov't Br. 45-46; Amicus Br. 47-48. And neither engages with *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298 (1994). In *Rivers*, this Court explained that when it "construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law." *Id.* at 313 n.12. *Rehaif* thus announced what 18 U.S.C. § 922(g) has "always meant," including when Jones was tried. *Ibid.* But the district court, bound by erroneous circuit precedent, rejected Jones's argument that the government had to prove his knowledge of his felon status. See J.A. 68-69. And when Jones appealed, the Eighth Circuit did the same. *United States* v. *Jones*, 266 F.3d 804, 810 n.5 (8th Cir. 2001).

In short, Jones has *never* had the opportunity to test his claim under what has *always* been the correct law. And under the Eighth Circuit's ruling, he never will. At the very least, this must raise substantial due process, separation of powers, and Eighth Amendment concerns. Indeed, in the analogous context of postconviction inadequate assistance of counsel claims, this Court acknowledged that when a system, by "its structure, design, and operation" does not provide "a meaningful opportunity to present a claim," "critical[]" rights are implicated. *Trevino* v. *Thaler*, 569 U.S. 413, 428 (2013). And a "theoretically available procedural alternative" makes no difference if using it successfully is "difficult, and in the typical case all but impossible." *Id.* at 427.

IV. The Government Erroneously Reads § 2255(e) To Apply Only To Intervening Decisions By This Court

The government relies on *Davis* v. *United States*, 417 U.S. 333 (1974), to assert that only this Court's decisions qualify as an "intervening change in the substantive law." Gov't Br. 20-22. *Davis*, however, supports the opposite. During Davis's direct appeal of his criminal conviction to the Ninth Circuit, this Court decided *Gutknecht* v. *United States*, 396 U.S. 295 (1970), which concerned a related issue. The Ninth Circuit remanded Davis's case to the district court for "consideration . . . in the light of * * * *Gutknecht*," *Davis*, 417 U.S. at 338, and, on remand, the district court held "that *Gutknecht* * * * did not affect his

conviction." *Id.* at 339. The Ninth Circuit affirmed. *Ibid.*

Later in *United States* v. *Fox,* 454 F.2d 593 (9th Cir. 1971), a case "virtually identical" to Davis's, *Davis*, 417 U.S. at 339, the Ninth Circuit held for the defendant, *id.* at 339-340. Davis then filed a 2255 motion, arguing that the Ninth Circuit "had in the *Fox* case effected a change in the law of that Circuit after the affirmance of his conviction, and that its holding in *Fox* required his conviction to be set aside." *Id.* at 341. The district court denied the motion and the Ninth Circuit affirmed "on the ground that '(t)he decision on the direct appeal is the law of the case,' and that therefore any 'new law, or change in law' resulting from * * * *Fox* would 'not (be) applied.'" *Ibid.* This Court granted certiorari "[b]ecause the case present[ed] a seemingly important question concerning the extent to which relief under 28 U.S.C. § 2255 is available by reason of an intervening change in the law." *Ibid.*

The change in law, though, came from the Ninth Circuit's *Fox* decision, not this Court's decision in *Gutknecht*. As this Court framed the issue, "[t]he *sole* issue before the Court * * * is the propriety of the Court of Appeals' judgment that a change in the law *of that Circuit* after the petitioner's conviction may not be successfully asserted by him in a § 2255 proceeding." *Davis*, 417 U.S. at 341 (emphasis added); see also *id.* at 347 (Powell, J., concurring in part and dissenting in part) ("I agree with the Court's holding that review under 28 U.S.C. § 2255 is available to petitioner, due to the intervening change in *the law of*

the Circuit.") (emphasis added). In short, the government is asking this Court to overrule *Davis*, not apply it.

V. Jones Need Not Prove Actual Innocence

1. The government repeatedly suggests that pre-AEDPA abuse-of-the-writ principles allowed petitioners to seek habeas only after "a threshold showing of actual innocence." Gov't Br. 40. For starters, the government waived this defense by not raising it below and focusing entirely on whether Section 2255(e) provided jurisdiction. If this Court does not consider the defense waived, however, it should remand the case to the court of appeals for consideration in the first instance. This Court is "a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

Just as important, the government is wrong on the merits. Under traditional abuse-of-the-writ doctrine, prisoners could excuse an earlier failure to raise a claim in two ways: showing (1) "cause for failing to raise it and prejudice therefrom" or (2) that "a fundamental miscarriage of justice would result from a failure to entertain the claim," which required a "colorable showing of factual innocence." *McCleskey* v. *Zant*, 499 U.S. 467, 494-495 (1991) (cleaned up). This Court made clear that a prisoner could use either pathway, see *id.* at 495, and the government admits as much, Gov't Br. 23 n.* ("A prisoner * * * could also excuse that default by showing cause for failing to raise it and prejudice therefrom.") (cleaned up).

2. Jones has cause for failing to raise his *Rehaif* claim in his first 2255 motion—it would have been novel. Lower courts uniformly applied a no-scienter interpretation of § 922(g)'s felon-status element "for more than 30 years" prior to *Rehaif* v. *United States*. 139 S. Ct. 2191, 2201 (2019) (Alito, J., dissenting). *Reed* v. *Ross*, 468 U.S. 1, 15 (1984), held that a prisoner satisfies cause when "there was no reasonable basis in existing law" for raising his claim. "[O]vertur[ning] a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved" qualifies as a situation in which prior litigants had "no reasonable basis in existing law" for pressing their claims. *Id.* at 17 (cleaned up). *Rehaif* is a paradigm of the disruptive decision *Reed* contemplated. It overturned a "long-established interpretation" "adopted by every single Court of Appeals to address the question." *Rehaif*, 139 S. Ct. at 2201 (Alito, J., dissenting). Before *Rehaif*, petitioner's claim would have been a frivolous pipe dream.

The government reads *Bousley* v. *United States*, 523 U.S. 614 (1998), for more than it is worth. See Gov't Br. 23 n.*. *Bousley* held only that "futility cannot constitute cause if it means simply that a claim was 'unacceptable to that *particular* court at that *particular* time.'" *Bousley*, 523 U.S. at 623 (emphasis added). Before *Rehaif*, Jones' claim was unacceptable to *every* court *for decades*. The law was far less settled at the time of Bousley's conviction for "use" of a firearm in relation to drug trafficking. See *Bailey* v. *United*

States, 516 U.S. 137, 142 (1995). The circuits were "in conflict both in the standards they [had] articulated" and "in the results they [had] reached." *Ibid.* Because Bousley's claim was not in conflict with a "near-unanimous body of lower court authority," *Reed* was inapposite. 468 U.S. at 17.

Jones had another strong reason for not raising his *Rehaif* claim in his initial 2255 motion: the Eighth Circuit had already rejected it on direct appeal. *Jones*, 266 F.3d at 810 n.5 ("The only argument Jones makes * * * is that he did not have knowledge of his prior felony convictions. The government need not prove knowledge."). "[C]laims will ordinarily not be entertained under § 2255 that have already been rejected on direct review." *Reed* v. *Farley*, 512 U.S. 339, 358 (1994) (Scalia, J., concurring). This Court has only recognized a single exception: "upon showing an intervening change in the law." *Davis*, 417 U.S. at 342. That exception did not apply at the time of petitioner's 2255 motion because *Rehaif* had not yet been decided.

3. Whether Jones suffered "actual prejudice" from the jury's failure to apply the correct law would be best decided by a court of first impression. Jones must show "there is a reasonable probability that the jury would have returned a different verdict" had they applied the correct rule. *Strickler* v. *Greene*, 527 U.S. 263, 296 (1999). This inquiry is fact-dominated. See *United States* v. *Frady*, 456 U.S. 152, 171-173 (1982). The record contains little information regarding petitioner's state of mind. The Court need not—and should not—reach beyond the legal issues before it to

conduct a purely speculative inquiry on an incomplete record.

4. This Court should also leave any question over petitioner's actual innocence to a court of first impression. State of mind was not at issue in Jones's trial. The jury was not instructed that it should consider it. See J.A. 68-69. The record is insufficient to decide whether Jones knew his felony status precluded him from lawfully possessing a weapon. The government relies on the Eighth Circuit's 2001 opinion—which, out of context, looks something like a smoking gun. But when the Eighth Circuit stated that "[Jones] knew that he was not supposed to have a gun," *Jones*, 266 F.3d at 808, they were paraphrasing the testimony of the arresting officer, who himself was paraphrasing Jones. And the court of appeals and the Solicitor General also failed to acknowledge that Jones denied making that statement under oath. See *United States* v. *Jones*, No. 00-04010-01-CRC-SOW, 07/25/2000 Tr. at 241:10-13 ("No, I didn't tell him all that."). That statement—disputed and never passed on by a jury—is not enough. Both parties should have the chance to present evidence on Jones's state of mind.

CONCLUSION

For the foregoing reasons and those stated in petitioner's opening brief, the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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