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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Under 28 U.S.C. § 2255, federal inmates can collaterally challenge their convictions on any ground cognizable on collateral review, with successive attacks limited to certain claims that indicate factual innocence or that rely on constitutional-law decisions made retroactive by this Court. 28 U.S.C. § 2255(h). 28 U.S.C. § 2255(e), however, also allows inmates to collaterally challenge their convictions outside this process through a traditional habeas action under 28 U.S.C. § 2241 whenever it "appears that the remedy by [§ 2255] motion is inadequate or ineffective to test the legality of [their] detention."

The question presented is whether federal inmates who did not—because established circuit precedent stood firmly against them—challenge their convictions on the ground that the statute of conviction did not criminalize their activity may apply for habeas relief under § 2241 after this Court later makes clear in a retroactively applicable decision that the circuit precedent was wrong and that they are legally innocent of the crime of conviction.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 8 F.4th 683. The memorandum opinion of the district court (Pet. App. 14a-29a) is not published in the Federal Supplement but is available at 2020 WL 10669427.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 2021. Pet. App. 1a. On October 29, 2021, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to and including Thursday, December 9, 2021, and the petition was filed on December 7, 2021. This Court granted the petition for certiorari on May 16, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are set forth at Pet. App. 30a-33a.

INTRODUCTION

Ordinarily a federal prisoner cannot challenge his conviction in a successive § 2255 motion to vacate on a ground he did not raise in his initial § 2255 proceeding unless that ground concerns newly discovered evidence strongly pointing to his factual innocence or a new, retroactive rule of constitutional law decided by this Court. See 28 U.S.C. § 2255(h). But what if after he filed his one permissible § 2255 motion this Court makes clear in another case that he is not guilty of the

offense and at the time of his § 2255 motion that interpretation was foreclosed by circuit precedent? When access to any collateral relief whatsoever is denied in this circumstance, the prisoner must serve a sentence for *no* crime—although he never had a meaningful opportunity to collaterally challenge it.

When Congress largely replaced habeas corpus for federal prisoners with the statutory motion to vacate in 1948, it enacted a saving clause that allows a prisoner (who is authorized to file under § 2255 and who has already filed a § 2255 motion or failed to file one) to petition for habeas corpus through § 2241 whenever the statutory remedy, 28 U.S.C. § 2255, is "inadequate or ineffective to test the legality of his detention." *Id.* § 2255(e). This move reflects in part a realization that "conviction and punishment for an act the law does not make criminal * * * 'inherently results in a complete miscarriage of justice' and 'presents exceptional circumstances' that justify collateral relief." *Davis* v. *United States*, 417 U.S. 333, 346-347 (1974) (cleaned up).

The saving clause is narrowly focused on the most important cases. It allows access to habeas relief through § 2241 only in those cases questioning "the *legality* of * * * detention." 28 U.S.C. § 2255(e). (emphasis added). It does not, like § 2255(a), broadly allow challenges "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, * * * or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." *Id.* § 2255(a). The saving clause is much narrower than § 2255(a)

and focuses only on the fundamental bottom line: did Congress authorize the prisoner's punishment.

This focus reflects the fundamental role of habeas. English courts would discharge a prisoner "if the commitment be * * * for a matter for which by law no man ought to be punished," 4 Matthew Bacon, *A New Abridgment of the Law* 585 (1736); see 2 Matthew Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown* 144 (1736) ("If it appear by the return of the writ that the party be wrongfully committed * * * for a cause for which a man ought not to be imprisoned, he shall be discharged or bailed."). And early American courts would do the same, recognizing that the convicting court simply had no jurisdiction to convict someone of activity that Congress had not declared a crime, *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812) (holding that federal courts lack jurisdiction to punish crimes not defined by statute); *United States* v. *New Bedford Bridge*, 27 F. Cas. 91, 103 (D. Mass. 1847) (No. 15,827) (Woodbridge, J., in chambers) (stating "it is considered that no acts done against [the government] can usually be punished as crimes without specific legislation" for in those cases the court does not "have jurisdiction of the offence") (cleaned up).

STATEMENT

1. In 1948, Congress largely replaced the petition for habeas corpus with the motion to vacate as the means for federal inmates to collaterally attack their convictions or sentences. See An Act to Revise, Codify, and Enact into Law Title 28 of the United States Code

Entitled "Judicial Code and Judiciary," Pub. L. No. 80-773, 62 Stat. 869, 967-968 (1948). A motion to vacate under § 2255 allows inmates to contest their sentences or convictions "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). Petitions for habeas corpus remained available under § 2241 only in a much smaller set of cases: where "the remedy by motion is inadequate or ineffective to test the *legality* of his detention." *Id.* § 2255(e) (emphasis added).

In 1996, Congress reformed the system of collateral review when it passed the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. AEDPA bars second or successive § 2255 motions unless a "panel of the appropriate court of appeals" certifies that they contain

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h).

But AEDPA did not alter the saving clause. AEDPA still allows inmates to file habeas petitions if they show that "the remedy by [§ 2255] motion is inadequate or ineffective to test the legality of [their] detention." 28 U.S.C. § 2255(e). The question presented concerns whether § 2255(e)'s saving clause applies in the circumstances of this case.

2. In 2000, petitioner Marcus Jones was convicted of two counts of possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1) and § 924(e), and one count of making false statements to acquire a firearm in violation of 18 U.S.C. § 922(a)(6) and § 924(a)(1)(B). See *United States* v. *Jones*, 266 F.3d 804, 807-808 (8th Cir. 2001). He was sentenced to 327 months' imprisonment on each of the felon in possession counts and 60 months on the false statement count, the sentences to run concurrently. *Id*. at 808.

At trial, Jones freely admitted he knew he had been convicted of a felony. He testified, in fact, that he had answered the felony question on the pawnshop owner's background check form with "a cursive yes." J.A. 49, 50. He believed, however, consistent with discussions he had at the time of his plea agreement, that the conviction had been later expunged. *Id*. at 49 (testifying that the state "gave me the [least time] that they could possibly give me and told me that in like five years from that day, that it could be possible that my record would be wiped clean"); see *id*. at 52 (testifying that, "once I finished [probation, I thought that the conviction] can be expunged from my record"). He directly testified, in fact, that he "thought [expungement] would be automatically done. * * * I

thought it would be automatically done * * * through the agreement." *Ibid*.

The original trial court considered such evidence to be legally irrelevant. Following then-prevailing Eighth Circuit precedent, the district court instructed the jury to consider only whether (1) Jones had been convicted of a felony; (2) Jones had knowingly possessed the gun; and (3) the firearm was transported across state lines. J.A. 68-69; see *United States* v. *Kind,* 194 F.3d 900, 907 (8th Cir. 1999) ("[I]t is well settled in this circuit that the government need only prove defendant's status as a convicted felon and knowing possession of the firearm."). The jury accordingly made no finding on whether Jones "knew he had the relevant status when he possessed [the gun]," *Rehaif* v. *United States*, 139 S. Ct. 2191, 2194 (2019). See J.A. 74-75 (verdict form).

On direct appeal, Jones challenged the sufficiency of the evidence for his felon-in-possession conviction, arguing, among other things, that he did not have knowledge of his prior conviction. *United States* v. *Jones*, 266 F.3d 804, 810 n.5 (8th Cir. 2001). The Eighth Circuit dismissed this contention, reaffirming that knowledge of status was not an element of the crime. *Ibid*. ("The only argument Jones makes concerning the sufficiency of the evidence [of his felon-in-possession conviction] is that he did not have knowledge of his prior felony convictions. The government need not prove knowledge, but only the fact of a prior felony conviction."). The Eighth Circuit affirmed both his conviction and sentence. *Id*. at 807.

Petitioner later filed a motion to vacate his sentence under 28 U.S.C. § 2255, which the district court dismissed. The court of appeals reversed, however, holding that his counsel was ineffective for not objecting to Jones's two felon-in-possession counts as duplicative. See *United States* v. *Jones*, 403 F.3d 604, 605 (8th Cir. 2005). On remand, the district court vacated one of Jones's felon-in-possession convictions and re-sentenced Jones. But the trial court denied his requests for a new sentencing hearing, for appointed counsel, and for a personal appearance in court. Jones appealed and the court of appeals affirmed. *United States* v. *Jones*, 185 Fed. Appx. 541, 542 (8th Cir. 2006) (per curiam).

Over a decade after petitioner completed his initial § 2255 proceeding, this Court held that to convict under 18 U.S.C. § 922(g) the government must prove that the defendant knew both that he had a prohibited status and that he possessed a firearm. *Rehaif* v. *United States*, 139 S. Ct. 2191, 2194 (2019). Because *Rehaif* involved the interpretation of a statute and not a "new rule of constitutional law," petitioner could not challenge his conviction under § 922(g) in a new § 2255 motion. See 28 U.S.C. § 2255(h)(2). Petitioner instead petitioned for habeas corpus under 28 U.S.C. § 2241. Believing that § 2255(e)'s saving clause did not apply to retroactive interpretations of statutory law that require additional elements for criminal conviction, the district court held it had no jurisdiction and dismissed the petition. See Pet. App. 28a-29a.

Petitioner appealed, arguing "that he can use the saving clause and, if not, Congress has

unconstitutionally suspended the writ of habeas corpus." Pet. App. 4a. Believing him "wrong on both counts," *ibid.*, the Eighth Circuit affirmed.

The Eighth Circuit noted that when "Jones filed his first § 2255 motion, our precedent had already rejected a *Rehaif*-type argument. Now, although *Rehaif* might vindicate [Jones's claim], he cannot file a successive § 2255 motion in which to raise it. Caught in this Catch-22, Jones argues that § 2255's remedy is inadequate or ineffective." Pet. App. 5a. Acknowledging that eight other circuits "would allow a petitioner to invoke the saving clause in a case like Jones's," *ibid.*, while only two, "[t]he Tenth and Eleventh[,] would not," *id.* at 6a, the Eighth Circuit sided "with the Tenth and Eleventh Circuits," *ibid.*, in holding that § 2255(e) does not permit habeas relief based on a retroactively applicable statutory-interpretation decision, even if the new interpretation by this Court renders the applicant's conviction invalid, see *id.* at 4a-10a.

"[F]irst," it noted, under prior circuit precedent "§ 2255 is not inadequate or ineffective where a petitioner had *any opportunity* to present his claim beforehand." Pet. App. 4a-5a (quoting *Lee* v. *Sanders*, 943 F.3d 1145, 1147 (8th Cir. 2019) (emphasis added)). To the court, this was "because the saving clause asks whether § 2255's remedy is 'inadequate or ineffective to *test* the legality of [an inmate's] detention.' And 'to test' means 'to try.' Simply, the saving clause is interested in opportunity, not outcome." *Id.* at 6a (quoting 18 U.S.C. § 2255 and *McCarthan* v. *Director of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076,

1086 (11th Cir. 2017) (en banc), and citing *Prost* v. *Anderson*, 636 F.3d 578, 584 (10th Cir. 2011)).

"Here," the court held, "Jones could have raised his *Rehaif*-type argument either on direct appeal or in his initial § 2255 motion. Although our precedent was at that time against him, he nonetheless could have succeeded before the *en banc* court or before the Supreme Court. And, regardless, the question is whether Jones could have raised the argument, not whether he would have succeeded." Pet. App. 6a-7a (citing *Bousley* v. *United States*, 523 U.S. 614, 621-623 (1998)).

Second, the Eighth Circuit argued that "the saving clause is triggered only if § 2255's 'remedy' is inadequate or ineffective. 28 U.S.C. § 2255(e). 'Remedy' means '[t]he means of enforcing a right or preventing or redressing a wrong.'" Pet. App. 8a (quoting Black's Law Dictionary (11th ed. 2019)). "Thus, [i]t is the infirmity of the § 2255 remedy itself, not the failure to use it or prevail under it, that is determinative." *Ibid.* (quoting *Lee*, 943 F.3d at 1147).

In light of this interpretation, the Eighth Circuit held,

> § 2255's remedy was itself perfectly capable of facilitating Jones's argument. Jones argues that his conviction, and thus his sentence, is illegal under federal law. Section 2255 authorizes a motion challenging a sentence "upon the ground that the sentence was imposed in violation of the . . . laws of the United States." "[I]t may very well" have been the case that "circuit law [was]

> inadequate or deficient" when Jones filed his first § 2255 motion. "But that does not mean the § 2255 remedial vehicle is inadequate or ineffective to the task of testing the argument."

Pet. App 8a (quoting 18 U.S.C. § 2255(e) and *Prost*, 636 F.3d at 591). In other words, although substantive circuit law at the time was wrong, the remedy applying it was (at the time he filed his first § 2255 motion) nonetheless adequate and effective to test the legality of Jones's detention. As the Eighth Circuit put it, "Jones's identified problem is our now-defunct precedent, not § 2255's remedy." *Ibid.*

Third, the court noted that "§ 2255(h)(2) authorizes successive motions raising 'a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.'" Pet. App. 9a (quoting 18 U.S.C. § 2255(h)(2)). It believed, however, that "Jones's proposed interpretation of the saving clause would work an end run around this limitation by rewriting § 2255(h)(2) to remove the word 'constitutional.'" *Ibid.* Even if that reading "'aimed to fix a 'glitch' in § 2255(h)(2),'" *ibid.* (quoting *Chazen* v. *Marske*, 938 F.3d 851, 863 (7th Cir. 2019) (Barrett, J., concurring)), it held, "it is not our place to adopt a test that replaces the balance Congress reached with one of our own liking," *ibid.* (quoting *Prost*, 636 F.3d at 592).

The court next turned to Jones's other argument: that "[not being able to file] a habeas petition * * * would have the effect of suspending the right of habeas corpus as to him." Pet. App. 10a. "Looking to the writ

as it existed in 1789," *id.* at 11a, the court held that "the writ of habeas corpus would not have been available at all to prisoners like Jones [who had been] convicted of crime by a court of competent jurisdiction," *id.* at 12a (quoting *McCarthan*, 851 F.3d at 1094, and *Edwards* v. *Vannoy*, 141 S. Ct. 1547, 1563 (2021) (Thomas, J., concurring)). "Because Jones's argument would not have warranted habeas relief as the writ was understood in 1789, we cannot agree that his inability to raise it now violates the Suspension Clause." *Ibid.*

The court rejected Mr. Jones's Suspension Clause arguments for another reason too. Because he could have made a *Rehaif*-argument to the earlier court of appeals en banc and sought review of any negative decision there in this Court, "he did," it held, have "a meaningful opportunity to raise his [claim]." Pet. App. 13a.

SUMMARY OF ARGUMENT

Section 2255(e) allows a federal prisoner to file a common-law habeas petition in federal court under § 2241 whenever the petition's statutory successor, the motion to vacate, "is inadequate or ineffective to test the legality of [the prisoner's] detention." 28 U.S.C. § 2255(e). The Eighth Circuit interpreted this language to bar a prisoner from filing a habeas petition when, at some point in the past, he had the formal "opportunity," Pet. App. 6a, to raise his claim even if existing circuit precedent clearly foreclosed it on the merits. This strained reading of § 2255(e) contradicts

the text and raises several serious constitutional concerns.

I. In order to arrive at its holding, the Eighth Circuit had to misinterpret all three of § 2255(e)'s central terms: "test," "inadequate," and "ineffective." Relying on an arbitrarily truncated dictionary definition, the Eighth Circuit held that "'to test' means 'to try.'" Pet. App. 6a. "Simply, the saving clause is interested in [the] opportunity [to raise the issue], not [the] outcome." *Ibid*. That ignores, however, the weight of the full definition. According to that definition, "[t]o test" means "to try, put to the proof; ascertain the existence, genuineness, or quality of." *Test*, *Oxford English Dictionary* 220 (1st ed. 1933). A motion to vacate cannot "ascertain the existence, genuineness, or quality of" "the legality of [the prisoner's] detention" if it applies the incorrect substantive law.

The Eighth Circuit held that the process available to petitioner was not "inadequate or ineffective" for similar reasons. Since Jones could have made his argument in his original § 2255 motion—even if the court would have clearly, wrongly, and inevitably rejected it—the "remedy was itself perfectly capable of facilitating Jones's argument." Pet. App. 8a. "'[I]t may very well' have been that 'circuit law [was] inadequate or deficient * * * [b]ut that does not mean the § 2255 vehicle is inadequate or ineffective to the task of *testing* the argument.'" *Ibid*. Putting aside for the moment whether applying incorrect substantive law can even "test" the legality of one's detention, this reading misunderstands the meaning of both "inadequate" and "ineffective." The former was a term

of equity and was long held to describe remedies where the common law courts would apply inappropriate substantive law or apply it incorrectly. The term "ineffective" is distinct in definition and usage from "inadequate." The dictionary definition of "ineffective," particularly when considered with the term's usage elsewhere in § 2255, shows that it encompasses a process "so clearly deficient as to render futile any effort to obtain relief." *Duckworth* v. *Serrano*, 454 U.S. 1, 2 (1981) (per curiam). Both terms argue strongly in favor of allowing saving-clause relief when the substantive law the court applies wrongly forecloses any relief.

The Eighth Circuit also denied saving-clause relief because it believed allowing it would "work an end run around" "§ 2255(h)(2)['s] authoriz[ation of] successive motions raising 'a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." Pet. App. 9a (quoting 28 U.S.C. § 2255(h)(2)). That misunderstands the statute. Section 2255(e) and § 2255(h) are doing different work, although there can be overlap. Since its creation, the saving clause that is currently at § 2255(e) has always preserved access to the habeas remedy when there is sufficient worry about whether a § 2255 motion would "test the *legality* of * * * detention," 28 U.S.C. § 2255(e) (emphasis added)—that is, when a § 2255 motion would not allow meaningful review of whether Congress did (or could) authorize the detention. Section 2255(h), which was created much more recently, creates a strict bar on second or successive § 2255 motions that applies to *all*

federal prisoners and *all* claims that are cognizable under the section, subject to two narrow exceptions. But nothing in § 2255(h) modifies § 2255(e), let alone impliedly and partially repeals it. So the class of persons for whom the habeas remedy was preserved in 1948 can still access that remedy.

Finally, the Eighth Circuit's reading of § 2255(e) violates one of the cardinal rules of statutory interpretation: it makes the saving clause superfluous. Other circuits taking its view have identified only two situations in which § 2255(e) would apply: courts-martial and challenges to denial of good time credits or parole release. But prisoners in either situation have recourse to § 2241 habeas directly. They need not invoke it through § 2255(e). The Eighth Circuit's reading "for the most part * * * gives [§ 2255(e)] no work to do," *Wooden* v. *United States*, 142 S. Ct. 1063, 1070 (2022), and for that reason must be rejected.

II. The Eighth Circuit's reading of § 2255 also raises four serious constitutional concerns. First, denying saving-clause relief in Jones's situation raises serious Suspension Clause concerns. The denial bars a prisoner any "meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." *Boumediene* v. *Bush*, 553 U.S. 723, 779 (2008) (citation omitted). It also violates the most traditional notion of habeas by denying Jones an opportunity to show that the court that convicted and sentenced him lacked jurisdiction. See *Edwards* v. *Vannoy*, 141 S. Ct. 1547, 1567-1569, 1573 (2021) (Gorsuch, J., concurring). At the time of the Founding, both English and American

courts extended habeas relief to those convicted of activity the law did not make criminal because, they held, courts lacked jurisdiction to convict them.

Second, the Eighth Circuit's reading of § 2255(e) likely violates fundamental principles of separation of powers. Denying saving-clause relief to Jones effectively allows the courts to usurp Congress's power to define crimes. By allowing a conviction to stand after it becomes clear Congress never criminalized the activity, the Eighth Circuit permits courts to assume power that Congress has not authorized.

Third, denying saving-clause relief in Jones's situation raises serious due process concerns. In *Fiore* v. *White*, this Court held that "the Due Process Clause of the Fourteenth Amendment forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt." 531 U.S. 225, 228-229 (2001) (per curiam). The same should hold true under the Fifth Amendment.

Finally, denying saving clause relief to someone convicted of no crime permits the sustention of cruel and unusual punishment in violation of the Eighth Amendment. Under any kind of proportionality analysis, see *Solum* v. *Helm*, 463 U.S. 277, 284 (1983) ("The final clause [of the Eighth Amendment] prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed."), punishment for no crime causes great concern. No matter how small the numerator of punishment, the denominator of crime is zero—a

situation which is not only constitutionally but mathematically impermissible.

ARGUMENT

I. THE EIGHTH CIRCUIT ERRED BY NOT ALLOWING PETITIONER TO FILE FOR HABEAS RELIEF UNDER 28 U.S.C. § 2255(E)'S SAVING CLAUSE

A. The Eighth Circuit's Strained Reading Of § 2255(e) Contravenes The Subsection's Plain Language And Arbitrarily Divorces Remedy From Substance

28 U.S.C. § 2255(e) allows inmates to pursue § 2241 relief whenever the § 2255 remedy itself "is inadequate or ineffective to test the legality of [their] detention[s]." 28 U.S.C. § 2255(e). The Eighth Circuit focused on the central term "test" and denied relief because petitioner had an "opportunity" to bring his claim on direct appeal or in his initial § 2255 motion, even if prior circuit precedent foreclosed it. Pet. App. 6a. "[T]o test," the Eighth Circuit reasoned, means solely "to try." *Ibid.* But the § 2255 remedy cannot "test" the legality of a detention at all, let alone adequately and effectively, if the court applies the wrong substantive law.

"[T]o construe what Congress has enacted[, a court must] begin, as always, with the language of the statute." *Duncan* v. *Walker*, 533 U.S. 167, 172 (2001) (citations omitted). And it is "the ordinary meaning at the time Congress enacted the statute" that governs. *Wisconsin Cent. Ltd.* v. *United States*, 138 S. Ct. 2067,

2070 (2018) (citation omitted). When Congress enacted § 2255(e) in 1948, the verb "test" meant [t]To put to the test or proof; to try *the truth, genuineness, or quality of by experiment, or by some principle or standard*." *Test*, *Webster's New International Dictionary of the English Language* 2609 (2d ed. 1941) (emphasis added). Black's Law Dictionary similarly defined it as "[t]o bring one to a trial and examination, or to ascertain the truth or the quality or fitness of a thing." *Test*, *Black's Law Dictionary* 1643 (4th ed. 1951).

The Eighth Circuit, by contrast, interpreted "to test" as simply "to try" relying on the Oxford English Dictionary. Pet. App. 6a. (quoting *McCarthan* v. *Director of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1086 (11th Cir. 2017) (en banc). Significantly, it quoted that definition only in part. The full entry reads quite differently: "to try, *put to the proof*; *to ascertain the existence, genuineness or quality of*." *Test*, 11 *Oxford English Dictionary* 220 (1st ed. 1933) (emphasis added). In other words, by truncating its chosen dictionary's definition and dropping the verb's required object, the Eighth Circuit changed the term's meaning. To "test" meant only that prisoners could formally raise the issue of "the legality of [their] detention[s]," not that the remedy had to actually "test" or "try" "the truth, genuineness, or quality" of thier legality. *Webster's*, *supra*, at 2609.

Testing a detention's legality necessarily requires applying the correct substantive law. Providing a formal "opportunity" to challenge one's detention while applying incorrect law in the process fails to "put [the claim] to the proof" or "to ascertain the existence,

genuineness or quality of" the detention's legality. This is not peculiar to collateral relief proceedings. A court that wrongly believed contracts could never be breached could hardly "test" a garden-variety contract claim. At most, it would procedurally entertain it.

Indeed, this idea is not even peculiar to law. Just imagine a schoolteacher "testing" a student's understanding with a good test but a wrong answer key. Even if the exam asks the relevant questions, if the right answers are marked as wrong and the wrong answers as right, the student fails. In such a situation, we would not say that the exam "tests" the student's skills or knowledge but that it was arbitrary. So too when a court applies the wrong legal standards in analyzing the legality of one's detention. When a § 2255 motion applies the wrong substantive law, it may "score," but it does not "test," just as an American driving exam that applied British rules of the road would not "test" the skill of an American driver. The process and the substance must work in tandem if the legality of an individual's detention is to be genuinely tested.

This is not to say, of course, that an instrument or process must be perfect to "test" some quality. Most tests produce some false positives and false negatives. At some point, however, producing false outcomes undermines the test's validity and it fails to be a test at all. Thus, a Covid "test" that applied a pregnancy, not Covid, reagent might "test" the subject for something but not for Covid—and the results would be completely inappropriate for managing any treatment the subject needed.

Even if such a mechanism could be thought in some odd way to "test" its object by arbitrarily "addressing" it, it would "test" it "inadequately or ineffectively." The saving clause in § 2255(e) is triggered by remedial inadequacy or ineffectiveness. Each of those terms has special meaning: remedial inadequacy is a centuries-old principle of equity jurisdiction and remedial ineffectiveness is a plain-language phrase enhancing the scope of § 2255(e). Further, Congress chose to broaden the scope of the saving clause by using the disjunctive "or." See *Loughrin* v. *United States*, 573 U.S. 351, 357 (2014) ("['Or'']s] ordinary use is almost always disjunctive, that is, the words it connects are to be given separate meanings.") (cleaned up). That means that the saving clause is triggered when the remedy is either inadequate, ineffective, or both. Reading the statute to align with the Eighth Circuit's construction would disrupt the deliberate balance Congress chose to incorporate into the statute.

As a term of art in equity jurisprudence, "inadequacy" of a remedy has always been understood broadly. And, "[w]here Congress employs a term of art obviously transplanted from another legal source, it brings the old soil with it." *George* v. *McDonough*, 142 S. Ct. 1953, 1959 (2022) (quoting *Taggart* v. *Lorenzen*, 139 S. Ct. 1795, 1801 (2019) (cleaned up). At Chancery, legal remedies might be inadequate for many reasons, including that (i) they were too expensive, J.H. Baker, *An Introduction to English Legal History* 120 (3d ed. 1990), (ii) the opposing party was too strong, *ibid*, (iii) the substantive law provided no remedy at all, see *id.* at 117, or (iv) the procedure for obtaining legal

remedies was unlikely to produce the correct result, *id.* at 118; see also F.W. Maitland, *Equity: A Course of Lectures* 7 (A.H. Chaytor & W.J. Whittaker eds., 2d ed. 1936). And because procedure and substance were intertwined at common law, Baker, *supra*, at 118, equity might intervene where either one produced an inadequate remedy, see Joseph Story, 1 *Commentaries on Equity Jurisprudence* 26-29 (4th ed. 1846).

Defects satisfying the inadequacy standard fell into two core categories. First, where the law courts failed to provide a needed procedure for the just resolution of cases, most notably access to relevant evidence. See, *e.g.*, *Brown* v. *Say* (Eng. Hen. VI), 1 *Calendars of the Proceedings in Chancery* xlvii (1827) (bill in equity to compel chaplain's testimony about deathbed statement); *Polgrenn* v. *Feara* (Eng. Hen. VI), *id.* at xxxix (bill in equity seeking access to necessary evidence, which common law courts could not provide); *John* v. *Earl of Oxford* (Eng. Hen. VI)¸ *id.* at xxvii (bill in equity seeking anticipatory preservation of necessary evidence).

Second, legal remedies could be inadequate in cases like Jones's where although a formal legal procedure existed it was ill-suited to arrive at a just result in a particular case. That could be because the procedures would not translate evidence into accurate judgments or because the procedure itself would be too burdensome to implement. "[T]he most frequent of the reasons [originally] alleged for the lack of remedy at the Common Law," in fact, concerned not its formal unavailability but "[t]he poverty, illness or imprisonment of the Plaintiff, his fear of the

Defendant, * * * and the mightiness of the Defendant and of his party compared with the weakness of the Plaintiff and his." D.M. Kerly, *An Historical Sketch of the Equitable Jurisdiction of the Court of Chancery* 71 (1890). Chancery held, for example, that even full jury trials, the paradigmatic example of civil justice, could sometimes provide an inadequate remedy. In *Qwyncy* v. *Landasdale* (Eng. Hen. VI), 1 *Calendars of the Proceedings in Chancery* at xxxii, for example, a plaintiff sought relief from Chancery because the local common law court would be unlikely to render judgment against the defendant, who had the power to select the jury, Kerly, *Historical Sketch* at 71. The jury's unlikeliness to accurately apply the law, not any formal defect of remedy, warranted the Chancellor's intercession. *Ibid.* If jury trials were thought inadequate when the law provided a remedy but it was thought unlikely to be correctly applied, then *a fortiori* a remedy is inadequate when the law itself is mistaken.

Individuals also sought equitable relief when a legal remedy was available but "inadequate" because it was burdensome or expensive. Some, for example, sought to vindicate defenses available in the common law courts in advance of suit, which the common law courts did not permit. *E.g.*, *Bief* v. *Dyer* (Eng. Rich. II), 1 *Calendars of the Proceedings in Chancery* at xi; *Walker* v. *William* (Eng. Hen. VI), 2 *Calendars of the Proceedings in Chancery* xxx (1830). The plaintiffs possessed valid legal defenses to some claim they anticipated would be filed in the near future but "preventative measures could not be taken" in the law

courts. Kerly, *Historical Sketch* at 74 (discussing defenses of forgery, fraud, and duress). Recognizing that preventing suit in the first place was cheaper and less burdensome than raising a defense at trial, these litigants sought a prototypical form of pre-enforcement anti-suit injunction. Again, the common-law proceedings would have ultimately resolved the plaintiff's injury, but that procedure was too burdensome to be seen as an adequate remedy.

As these cases show, Chancery held legal remedies inadequate when they provided a formal opportunity for relief if relief was likely to be wrongly withheld or just unduly expensive. Inadequacy swept very broadly. As a leading scholar of equitable remedies puts it, "the legal remedy almost never meets th[e adequacy] standard." Douglas Laycock, *The Death of the Irreparable Injury Rule* 22-23 (1991). Instead, the adequacy rule functions as

> a tiebreaker. If two remedies are equally complete, practical, and efficient, then the legal remedy will be used. That is true as far as it goes, and a far better approximation of reality than the usual statement that equitable remedies are unavailable if legal remedies are adequate. But to call the rule a tiebreaker puts the emphasis on the wrong point, because ties are so rare. One remedy is usually better than the other, and specific relief is granted or denied because of the difference.

Ibid. (footnotes omitted). And this Court has long agreed: "It is not enough that there is a remedy at law; it must be plain and adequate, or in other words, as

practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity." *Boyce's Ex'rs* v. *Grundy*, 28 U.S. (3 Pet.) 210, 215 (1830). To put it differently, in traditional practice, a legal remedy was inadequate whenever the equitable alternative might more accurately or efficiently carry into effect the law's directives. And, as shown, it did not matter whether the remedial inadequacy was found in the law's substance or in the procedure that applied it. Equity viewed the defect as the same. A remedy denied because the court would apply incorrect substantive law satisfies this standard.

These principles applied at the time of the Founding. Congress chose to retain the inadequacy standard in the Judiciary Act of 1789, 1 Stat. 73, § 16 (1789) ("Suits in equity shall not be sustained * * * in any case where plain, adequate and complete remedy may be had at law."), illustrating that "adequate remedy," and inversely "inadequate remedy," have been terms of art in American jurisprudence for two and a half centuries. That exact language remained on the books at the time § 2255(e) was enacted. See 28 U.S.C. § 384 (1946) (adding naught but an Oxford comma). Those statements of the American adequacy rule further equated adequacy with completeness, see *ibid.*, reinforcing Professor Laycock's conclusion: to be adequate in the sense understood in 1948, a legal remedy had to provide relief to the same extent as the equitable remedy, if granted.

Case law illustrates the same: the principles defining inadequacy remained unchanged in the early republic. *See Gaines* v. *Relf*, 40 U.S. (15 Pet.) 9, 15

(1841) (maintaining principles of equity from English law, but for those changes Congress saw fit to make). For example, expense, uncertainty, and impotence all remained valid reasons to find a legal remedy inadequate. *United States ex rel. Dunlap* v. *Black*, 128 U.S. 40, 52 (1888). As was the risk of a multiplicity of suits, *Carroll* v. *Safford*, 44 U.S. (3 How.) 441, 463 (1845), or repetition of the injury, *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738, 842 (1824). And while the law and equity dockets of the federal courts were merged by adoption of the Federal Rules of Civil Procedure, see Fed. R. Civ. P. 2 ("There is one form of action—the civil action."), that merger left the principles governing equity generally intact, *see id.* advisory committee's note 2 to 1937 rules.

These uses of the word inadequate would have been familiar to the drafters of § 2255(e). Even at the time it was drafted, these concepts of remedial inadequacy remained potent. Around this time, for example, this Court held legal remedies inadequate when they did not address all the claims for relief in a complaint. *Hillsborough Twp.* v. *Cromwell*, 326 U.S. 620, 629 (1946). Or where a judgment debtor would be insolvent and thus unable to pay a prevailing plaintiff. *Deckert* v. *Independence Shares Corp.*, 311 U.S. 282, 290 (1940). This Court also held remedies inadequate when they were unavailable *in practice*, if not in theory. *Ex Parte Hawk*, 321 U.S. 114, 118 (1944) (per curiam) (allowing recourse to habeas corpus where state remedies "prove[] in practice unavailable or seriously inadequate * * * else [petitioner] would be remediless"). And some members of this Court

believed that remedies might be made inadequate by the difficulty of knowing which to select. See *Marino* v. *Ragen*, 332 U.S. 561, 569-570 (1947) (Rutledge, J., concurring) ("Experience has shown beyond all doubt that, in any practical sense, the remedies available [in the state] are inadequate. Whether this is true because in fact no remedy exists, or because every remedy is so limited as to be inadequate, or *because the procedural problem of selecting the proper one is so difficult*, is beside the point.") (emphasis added). It was against these centuries-old background principles that Congress chose to use the word "inadequate" in § 2255(e).

In addition to enabling relief where § 2255 is "inadequate," the saving clause also makes relief available where § 2255 is "ineffective." 28 U.S.C. § 2255(e). The use of "or" makes clear that this *expands*, not *contracts*, the availability of traditional habeas. See *Loughrin* v. *United States*, 573 U.S. 351, 357 (2014) ("['Or'']s] ordinary use is almost always disjunctive, that is, the words it connects are to be given separate meanings.").

When the saving clause was enacted, Congress and the public alike would have understood the meaning of "ineffective": "Not producing, or incapable of producing, the intended effect * * * [n]ot capable of performing the required work or duties," *Ineffective*, *Webster's New International Dictionary of the English Language* 1271 (2d ed. 1941), or "[n]ot producing the desired effect," *Ineffective*, *The Concise Oxford Dictionary of Current English* 583 (3d ed. 1944). These definitions all focused on whether the process actually

achieved what it was designed to do, not whether it provided a purely formal opportunity to ask the question. The § 2255 remedy is thus "ineffective" when it does not accurately "test the legality of [a] prisoner's detention," 28 U.S.C. § 2255(e), even if it procedurally allows her to make fruitless arguments previously foreclosed by circuit precedent.

This understanding of "ineffective," moreover, respects the "standard principle of statutory construction * * * that identical words and phrases within the same statute should normally be given the same meaning." *Powerex Corp.* v. *Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007); see also A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 252 (2012). Consider § 2254(b). That provision allows bypass of state-court exhaustion requirements where state processes are "ineffective to protect the rights of" the applicant. 28 U.S.C. § 2254(b)(1)(B)(ii). As this Court has noted, it would be inconsistent with the text of the statute to require state court review of claims "whose results have been effectively predetermined." *Castille* v. *Peoples*, 489 U.S. 346, 350 (1989). In particular, this Court has held that "it is not necessary for a [§ 2254] petitioner to ask the state for collateral relief, based upon the same evidence and issues already decided by direct review," *ibid.* (cleaned up), which is exactly the situation here. See *United States* v. *Jones*, 266 F.3d 804, 810 n.5 (8th Cir. 2001) (rejecting sufficiency-of-the-evidence challenge "that [Jones] did not have knowledge of his prior felony convictions [because t]he government need not prove

knowledge, but only the fact of a prior felony conviction.").

The Eighth Circuit misconstrued the text of the saving clause in yet another way. It reads out "is" from § 2255(e). The saving clause allows recourse to traditional habeas whenever "the remedy by motion *is* inadequate or ineffective to test the legality of his detention," 28 U.S.C. § 2255(e) (emphasis added), not when it "*was*." In originally enacting § 2255(e), Congress carefully distinguished tenses. Its authorization clause uses the past tense twice, see *ibid.* ("has failed" and "has denied"), while the saving clause uses the present tense. This difference means that a court should determine whether a motion to vacate "is inadequate or ineffective to test the legality of [a prisoner's] detention" at the time he files it, not when he might have filed a previous motion. The improbable, if formal, availability of relief at that earlier time through en banc overruling of well-settled circuit precedent or Supreme Court review is simply irrelevant at the time the time the subsequent motion "is" filed. At that point, the district court simply lacks jurisdiction to entertain any § 2255 motion and there is no "test" at all.[1]

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[1] Petitioner expects the National Association of Criminal Defense Lawyers to submit an amicus brief to the Court laying out this argument in detail. If this Court accepts this view, a jurisdictionally barred § 2255 motion would be "inadequate or ineffective to test the legality of [the prisoner's] detention" under any conception of those words.

B. Providing Saving-Clause Relief For Statutory Claims Does Not "Work An End Run Around" § 2255(h)'s Authorization Of Successive Petitions For New But Retroactive Rules Of Constitutional Law Decided By This Court

The Eighth Circuit rejected this plain reading of § 2255(e) for another reason. It believed that allowing saving-clause relief for statutory claims would "work an end run around" "§ 2255(h)(2)['s] authoriz[ation of] successive motions raising 'a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.'" Pet. App. 9a (quoting 28 U.S.C. § 2255(h)(2)). It reasoned that "Jones's proposed interpretation of the saving clause would [effectively] remove the word 'constitutional'" from the statutory text, *ibid.*, thereby doing violence to the statute. But that understanding mistakes the statute, particularly the different purposes of subsections § 2255(e) and § 2255(h).

Section 2255(e) makes § 2255 the exclusive remedy for federal prisoners challenging their detention subject to an exception, the saving clause. Section 2255(e)'s saving-clause exception is a narrow, but important, one. It allows a prisoner who either failed to move for § 2255 relief or whose motion was denied to petition for habeas relief under § 2241 when a § 2255 motion is "inadequate or ineffective to test the *legality* of [the prisoner's] detention." 28 U.S.C. § 2255(e) (emphasis added). The saving clause does not allow recourse to habeas relief for the broad array of claims prisoners can make through a § 2255 motion: "that the sentence was imposed in violation of the

Constitution or laws of the United States, * * * or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack," *id.* § 2255(a). Nor does it allow recourse to habeas even when a challenge goes to the legality of detention when § 2255's motion to vacate can adequately and effectively test legality. It is only when the new remedy-by-motion cannot well handle this narrow and specific challenge to the *legality* of detention that the saving clause opens up access to § 2241. Congress thus recognized the fundamental importance of these claims, ones asking whether Congress did (or could) authorize the prisoner's punishment. It wanted to make sure that the § 2255's motion to vacate never restricted or weakened review of this important type of claim.

Section 2255(h) does something very different. It prohibits second or successive § 2255 motions for all movants subject to two enumerated exceptions, which also apply to all movants. In these two narrow categories of cases, it allows a prisoner to invoke the same § 2255-process more than once.

Furthermore, nothing in § 2255(h), which was enacted nearly 50 years after § 2255(e), purports to limit, modify, or amend the earlier section. That makes sense. They do two different things. Section 2255(h) does not, as the Eighth Circuit seemed to believe, impliedly partially repeal § 2255(e)'s saving clause. It certainly does not do so with the "particularly clear statement" this Court requires to bar habeas review. See *Demore* v. *Kim*, 538 U.S. 510, 517 (2003) ("[W]here a provision * * * is claimed to bar

habeas review, the Court has required a particularly clear statement tht such is Congress's intent."). Allowing access to traditional habeas in Jones's circumstances does not amount to "an end run around" § 2255(h).

C. The Eighth Circuit's Reading Makes § 2255(e)'s Saving Clause Essentially Superfluous

As this Court has long recognized, courts "must normally seek to construe Congress's work 'so that effect is given to all provisions, so that no part will be inoperative or superfluous, void or insignificant.'" *Ysleta Del Sur Pueblo* v. *Texas*, 142 S. Ct. 1929, 1939 (2022) (quoting *Corley* v. *United States*, 556 U.S. 303, 314 (2009) (internal quotation marks omitted)). And it has followed this canon when a reading would not make a provision "wholly superfluous [but] for the most part * * * give[it] no work to do." *Wooden* v. *United States*, 142 S. Ct. 1063, 1070 (2022). The Eighth Circuit's view, however, violates this "longstanding canon[] of statutory construction." *Ysleta Del Sur Pueblo*, 142 S. Ct. at 1939.

The two other circuits taking the same view (and the government when it argued for that view) were able to identify only two situations when the saving clause would apply: (1) where the sentencing court has dissolved, thus making § 2255 relief impossible and (2) where the prisoner has been denied good time credits or parole release. In nearly all these situations, however, the prisoner can just use § 2241 in the first instance, without resort to the saving clause at all. For

example, the most common instance of a sentencing court's dissolution is a court-martial. *Cf. Prost* v. *Anderson*, 636 F.3d 578, 588 (10th Cir. 2011). Yet, even though courts-martial dissolve upon conclusion of the proceeding for which they are called, *Runkle* v. *United States,* 122 U.S. 543, 555-556 (1887), a prisoner can bring a motion through § 2241 directly, without needing § 2255(e), see *Clinton* v. *Goldsmith,* 526 U.S. 529, 537 n.11 (1999) ("[O]nce a criminal conviction has been finally reviewed within the military system, and a servicemember in custody has exhausted other avenues provided * * * he is entitled to bring a habeas corpus petition, see 28 U.S.C. § 2241(c)"); *Burns* v. *Wilson,* 346 U.S. 137, 139 n.1 (1953) (citing to § 2241 without going through the saving clause for the proposition that "Congress has charged [federal civil courts] with the exercise of [the] power" to "review the judgment of a court-martial in a habeas corpus proceeding"). Similarly, prisoners bringing motions challenging denial of good time credits and parole release can use § 2241 directly without going through the § 2255(e) gateway. See *Preiser* v. *Rodriguez*, 411 U.S. 475, 487-488 (1973) (good-time credits); *Morrisey* v. *Brewer*, 408 U.S. 471 (1972) (parole).

Thus, under the Eighth Circuit's reading, § 2255(e) has independent force only when a court other than a court-martial has been dissolved after sentencing. These cases are few and far between. Outside of courts-martial, courts rarely dissolve. And, when they do, both prior to and after enacting § 2255, Congress has typically directed a new tribunal to hear the previously decided cases. See, *e.g.*, "An Act to

Implement the Recommendations of the Federal Courts Study Committee, and for Other Purposes, Pub. L. No. 102- 572, § 102(d)-(e), 106 Stat. 4506, 4507 (1992) (abolishing the Temporary Emergency Court of Appeals); An Act to Provide for the Admission of the State of Hawaii into the Union, Pub. L. No. 86-3, 73 Stat. 4 §§ 12-13 (1959) (providing for cases from the Hawaii territorial courts); An Act to Provide for the Admission of the State of Alaska into the Union, Pub. L. No. 85-508, 72 Stat. 339, §§ 13-14 (1958) (providing for cases from the Alaska territorial courts); An Act to Provide for the Suits, Judgements, and Business of the United States Provisional Court for the State of Louisiana, 14 Stat. 344, § 3 (1866) (providing for cases from the Civil War-era Provisional Court of Louisiana).[2]

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[2] The only example after § 2255(e) was enacted that petitioner has found of Congress dissolving a sentencing court and not providing sufficiently clear instruction is the dissolution of the Panama Canal Zone District Court. *See Egle* v. *Egle,* 715 F.2d 999, 1012 (5th Cir. 1983). When a prisoner convicted by the Canal Zone District Court sought habeas relief after Congress abolished the court, § 2255(e) did provide saving-clause relief. *Edwards* v. *United States,* 1987 WL 7562, at *1 (E.D. N.Y. 1987) (unpublished). Petitioner has also found one case where a court allowed saving-clause relief when an Act of Congress dissolving a sentencing court *did* provide clear instruction but the state courts to which jurisdiction was transferred refused to exercise it. See *Spaulding* v. *Taylor,* 336 F.2d 192 (10th Cir. 1964). It is difficult to believe that Congress created § 2255(e) merely to deal with these unusual occurrences. In addition, at the time Congress passed § 2255, it already had created a statutory scheme to automatically deal with on-going cases in which a new district or court was created or a geographical area was transferred from

Under the Eighth Circuit's view, § 2255(e) provides relief not otherwise available only when a non-court-martial has dissolved and Congress has not given another court jurisdiction. That almost never happens. Even if limited to the narrow set of claims testing the "legality" of a prisoner's detention, the saving clause must do more work than that. This Court should reject the Eighth Circuit's attempt to transfigure the plain text of § 2255(e).

II. THE EIGHTH CIRCUIT'S INTERPRETATION OF THE SAVING CLAUSE RAISES SERIOUS CONSTITUTIONAL CONCERNS

"[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail." *Clark* v. *Suarez Martinez*, 543 U.S. 371, 380-381 (2005). This canon of constitutional avoidance "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts. The canon is thus a means of giving effect to congressional intent, not of subverting it." *Id*. at 381-382 (internal citations omitted). The Eighth Circuit's narrow and disputed interpretation of § 2255(e) raises four serious constitutional issues and puts the constitutionality of Jones's imprisonment in

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one district to another. See 28 U.S.C. § 1405. When Congress created § 2255(e), it must have had in mind a greater range of cases than these few oddballs.

doubt. In order to comply with this invaluable canon, this Court should give effect to the broader reading and so respect Congress's work.

A. The Eighth Circuit's Reading Violates The Suspension Clause

First, the Eighth Circuit's view stands in much tension with the Suspension Clause. This provision guarantees access to habeas corpus "unless when in Cases of Rebellion or Invasion the public Safety may require it[s suspension]." U.S. Const. art. I, § 9, cl.2. And its guarantee is more than formal: it "entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." *Boumediene* v. *Bush*, 553 U.S. 723, 779 (2008) (cleaned up). But denying saving-clause relief in statutory cases denies the prisoner any such "meaningful opportunity." *Supra*, pp. 17-19. It allows him to make only a formal application for relief substantively foreclosed by mistaken circuit precedent. He cannot begin to demonstrate that he is in prison for no crime.[3]

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[3] Allowing such challenges should not prove disruptive to the federal system. First, they concern an important, but very limited set of cases: those going to "the legality of [a prisoner's] detention." 28 U.S.C. § 2255(e). The saving clause does not allow recourse to § 2241 for the vast majority of claims § 2255 itself allows prisoners to raise. *Compare* § 2255(e) (limiting recourse to § 2241 to those claims going to "the legality of * * * detention") *with id.* § 2255(a) (allowing prisoner to "move the court which imposed [his] sentence to vacate, set aside or correct the sentence" "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, * * * or that the

For a remedy to provide prisoners with such a "meaningful opportunity," moreover, they must be able to make their claims at a meaningful *time*—that is, once this Court has made clear that the offense for which they are being imprisoned was never a criminal act. See *Bousley* v. *United States*, 523 U.S. 614, 621 (1998) ("[I]t would be inconsistent with the doctrinal underpinnings of habeas review to preclude petitioner

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sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack"). Prisoners cannot, for example, seek access to habeas relief through the saving clause for claims that their trials violated statutory procedural requirements.

Second, such challenges do not raise any federalism concerns. See *Shinn* v. *Ramirez*, 142 S. Ct. 1718, 1730-1731 (2022) (describing the "significant costs" of federal habeas review of state sentences). These cases all concern *federal* court review of *federal* detention by *federal* officers—something the federal courts have done from the Founding. See *United States* v. *Hayman*, 342 U.S. 205, 210 (1952) ("Power to issue the writ of habeas corpus, the most celebrated writ in the English law, was granted to the federal courts in the Judiciary Act of 1789.") (cleaned up).

Third, any finality interest is attenuated in the context of claims that go to the substantive illegality of detention. There is no need for retrial. *See Montgomery* v. *Louisiana*, 577 U.S. 190, 205 (2016). And habeas relief in this circumstance does not "cost[] society the right to punish admitted offenders." *Shinn*, 142 S. Ct. at 1731 (internal quotation marks omitted); *see also Edwards v. Vannoy*, 141 S. Ct. 1547, 1554 (2021) ("When previously convicted perpetrators of violent crimes go free merely because the evidence needed to conduct a re-trial has become stale or is no longer available, the public suffers, as do the victims").

from relying on [an intervening decision.]"). But the Eighth Circuit's rule denies exactly this.

The Eighth Circuit held that denying Jones recourse to traditional habeas did not violate the Suspension Clause because "the Suspension Clause refers to [the] specific legal instrument that existed [in 1789]." Pet. App. 11a. In its view, "the writ was simply not available at all to one convicted of crime by a court of competent jurisdiction." *Id*. at 12a.

But even if the Eighth Circuit were correct in its interpretation of the scope of the Suspension Clause—and it admitted that "[t]he Supreme Court has not yet decided this question," Pet. App. 10a (citation omitted)—Jones's incarceration still poses constitutional concerns. His claim *does* run to the courts' jurisdiction. This Court has long recognized that a federal court acts without jurisdiction when it convicts and sentences a defendant whose conduct Congress has not made criminal. See *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812) (holding that federal courts lack jurisdiction to punish crimes not defined by statute); *United States* v. *New Bedford Bridge*, 27 F. Cas. 91, 103 (D. Mass. 1847) (No. 15,827) (Woodbridge, J., in chambers) (stating "it is considered that no acts done against [the government] can usually be punished as crimes without specific legislation" for in those cases the court does not "have jurisdiction of the offence") (cleaned up); *United States* v. *Hall*, 98 U.S. 343, 345 (1878) ("[C]ourts possess no jurisdiction over crimes and offences committed against the authority of the United States, except what is given to them by the power that created them."); *Pettibone* v. *United*

States, 148 U.S. 197, 203 (1893) ("The courts of the United States have no jurisdiction over offenses not made punishable by the Constitution, laws, or treaties of the United States."); *In re Bonner*, 151 U.S. 242, 257 (1894) ("It is plain that [a trial] court has jurisdiction to render a particular judgment only when the offense charged is within the class of offenses placed by the law under its jurisdiction."). At bottom, even if the Eighth Circuit's understanding of the limits of habeas review at the time of the Founding were correct, it applied an ahistorical, modern view of "jurisdiction." That cannot do. From the Founding until now courts have never enjoyed "jurisdiction" to punish people for crimes Congress did not create. That represents a defect going to the "court[s'] very power to hear a case." *Reed Elsevier, Inc.* v. *Muchnick,* 559 U.S. 154, 165 n.5 (2010) ("'[J]urisdiction' properly refers to a court's power to hear a case.") (cleaned up).

This Court's decision in *Rehaif* v. *United States*, 139 S. Ct. 2191 (2019), made apparent that the district court lacked jurisdiction to convict and sentence Jones for his non-criminal conduct: possession of a firearm under a lower mens rea standard than that actually required by 18 U.S.C. § 924(a)(2). Thus, habeas relief in a case like this is indeed being used to "attack convictions and sentences entered by a court without jurisdiction," *United States* v. *Addonizio*, 442 U.S. 178, 185 (1979). In order to vindicate the most traditional understanding of the Suspension Clause, Jones must be allowed to petition for habeas relief.

This historical understanding follows longstanding practice at English common law. Eighteenth-century

treatises, for example, recognize that English courts would discharge a prisoner "if the commitment be * * * for a matter for which by law no man ought to be punished." 4 Matthew Bacon, *A New Abridgment of the Law* 585 (1736); see 2 Matthew Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown* 144 (1736) ("If it appear by the return of the writ that the party be wrongfully committed * * * for a cause for which a man ought not to be imprisoned, he shall be discharged or bailed."); Charles Pratt, *An Inquiry Into the Nature and Effect of the Writ of Habeas Corpus* 15 (2d ed. 1758) (similar). And English courts at this time granted habeas relief when a court convicted someone of conduct that was not a crime. In *Rex* v. *Hall*, for example, Lord Mansfield held that the trial court's failure to allege and prove a necessary element of the crime was "sufficient to invalidate the [habeas petitioner's] commitment" and discharged him. (1765) 97 Eng. Rep. 1022 (K.B.); see also *Rex* v. *Brown*, (1798) 101 Eng. Rep. 1247 (K.B.) (per curiam) (discharging prisoner because habeas return did not indicate he was apprehended with tools for breaking and entering, a necessary element of the crime); *Rex* v. *Catherall*, (1730) 93 Eng. Rep. 927 (K.B.) (discharging prisoner because conviction did not specify amount of money he embezzled). Lord Mansfield similarly discharged prisoners when the court of conviction sentenced beyond the statute of conviction. See *Rex* v *Hall*, (1774) 98 Eng. Rep. 967 (K.B.) (granting habeas relief for illegal sentence); see also *Rex* v. *Collier*, (1752) 95 Eng. Rep. 647 (K.B.) (per curiam) (same).

Bushell's Case, (1691) 124 Eng. Rep. 1006 (C.P.), is the most famous example. It concerned the imprisonment of Bushell, a juror who acquitted William Penn and others of "assembling unlawfully and tumultuously," for finding against the "manifest evidence." *Id.* at 1007. The habeas court discharged Bushell because "charging [Bushell] to have acquitted Penn and Mead[] against full and manifest evidence * * * without saying that [he] did know and believe that evidence to be full and manifest against the indicted persons[] is no cause of fine and imprisonment." *Id.* at 1009. In other words, the court discharged Bushell because the convicting court did not charge the required mens rea for a necessary element of the crime—exactly the same failure as in Jones's case. In both cases, habeas relief is appropriate.

The Eighth Circuit rejected this consistent historical precedent, believing that *Ex parte Watkins*, 28 U.S. (3 Pet.) 193 (1830), held that whenever a convicting court had "general criminal jurisdiction" the writ could not issue. Pet. App. 12a. But *Ex parte Watkins* does not reach so far for three reasons. First, it held merely that a habeas court had to presumptively credit jurisdiction in a specific case when the convicting court enjoyed "general criminal jurisdiction," not that it had to credit such jurisdiction when, as here, the Supreme Court itself had held that no jurisdiction existed over a particular charge because it was not a crime. The two situations are very different. Second, Congress had at that time denied the Court any "jurisdiction in criminal cases,"

Watkins, 28 U.S. at 201, coming from the District of Columbia, see *United States* v. *More*, 7 U.S. (3 Cranch) 159, 172-174 (1805) (dismissing writ of error in criminal case coming from the District because "this court ha[s] no jurisdiction of the case"). The Court, it believed, "could not revise th[e] judgment[,] could not reverse or affirm it, [even if] the record [were] brought up directly by writ of error." *Watkins*, 28 U.S. at 201. Third, *Watkins* concerned the Court's original habeas jurisdiction, not that of the lower federal courts. Its granting of the writ, it held, would be "in the nature of a writ of error," *id.* at 202, over which Congress had denied it jurisdiction.

This Court has, in fact, expressly rejected the Eighth Circuit's overly broad and ahistorical view of "general criminal jurisdiction" in *Watkins*. In *Ex parte Yarbrough*, this Court explained the law:

> That this court has no general authority to review on error or appeal the judgments of the Circuit Courts of the United States in cases within their criminal jurisdiction is beyond question; but it is equally well settled that when a prisoner is held under the sentence of any court of the United States in regard to a matter wholly beyond or without the jurisdiction of that court, it is not only within the authority of the Supreme Court, but it is its duty, to inquire into the cause of commitment when the matter is properly brought to its attention, and if found to be as charged, a matter of which such court had no jurisdiction, to discharge the prisoner from confinement.

110 U.S. 651, 653 (1884) (The Ku Klux Cases) (citations omitted). It then held that claims that indictments were insufficient "must necessarily be decided by the court in which the case originates, and is therefore clearly within its jurisdiction [even if erroneously decided,] which cannot be looked into on a writ of *habeas corpus*[.] * * * This principle is decided in *Ex parte Tobias Watkins*." *Id*. at 654. It then distinguished those claims from "the more important question * * * whether the law of Congress * * * under which the prisoners are held, is warranted by the Constitution, or being without such warrant, is null and void." *Ibid*. That question, it believed, was not decided by *Watkins*, and it held that "[i]f the law which defines the offence and prescribes its punishment is void, the court was *without jurisdiction* and the prisoners must be discharged." *Ibid*. (emphasis added). In other words, a court is without jurisdiction to convict under an unconstitutional statute and the habeas court must discharge the prisoner.

That principle applies *a fortiori* to convictions for activities Congress has never even criminalized. It even applies to sentences. In *Ex parte Lange*, for example, this Court held that a lower "court [that] had jurisdiction of the person of the prisoner, and of the offence under the statute," 85 U.S. (18 Wall.) 163, 176 (1873), could not vacate an illegal sentence and impose a legal one once the prisoner had satisfied that part of the original sentence that was legal, *id*. at 178. It reasoned that the Double Jeopardy Clause deprived the court of jurisdiction to do so. As it explained, "[i]f a justice of the peace, having jurisdiction to fine for a

misdemeanor, and with the party charged properly before him, should render a judgment that he be hung, it would simply be void. Why void? Because he had no power to render such a judgment." *Id*. at 176; see also *Ex parte Page*, 49 Mo. 291, 294 (1872) ("The record proper shows that the judgment of the court in passing sentence was illegal; that it was not simply erroneous or irregular, but absolutely void, as exceeding the jurisdiction of the court and not being the exercise of an authority prescribed by law.").

Felker v. *Turpin*, 518 U.S. 651 (1996), is not to the contrary. It ultimately upheld Congress's "new restrictions on successive petitions" because they were "well within the compass of" the "complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions" that regulate access to the habeas process. *Id*. at 664 (cleaned up). The same cannot be said of the Eighth Circuit's restriction of the saving clause. It denies meaningful access to collateral relief even when the sentencing court lacked jurisdiction, the core of traditional habeas.

B. The Eighth Circuit's Reading Violates Separation of Powers

Fundamental constitutional separation-of-powers principles deny federal courts jurisdiction over non-existent crimes. In the federal system, the exclusive power to define criminal acts resides with Congress. There is neither a federal common law of crimes, *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32 (1812), nor power vested in the judiciary to create criminal

offenses through construction of statutes, *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). See *United States* v. *Lanier*, 520 U.S. 259, 267 n.6 (1997) ("Federal crimes are defined by Congress, not the courts."). While lower federal courts may reach varying conclusions about the scope of a substantive criminal statute, a holding by this Court that a criminal statute does not extend to certain conduct "is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 312-313 (1994). "[W]hen this Court 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.

In this case, the district court and the court of appeals violated the separation of powers by usurping Congress's authority to define crime. *Rehaif* made clear that Jones's conviction was not based upon any crime enacted by Congress, but rather a crime created by the courts alone—a crime that they had no power to create. Denying Jones collateral relief in these circumstances would allow the judiciary to arrogate power that belongs to Congress alone.

C. The Eighth Circuit's Reading Raises Serious Fifth Amendment Due Process Concerns

Denying a remedy to an individual convicted of a non-existent crime violates the Due Process Clause. U.S. Const. amend V. This Court has already held that "the Due Process Clause of the Fourteenth

Amendment forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt." *Fiore* v. *White*, 531 U.S. 225, 228-229 (2001) (per curiam). In that analogous case, this Court held that continued incarceration of a habeas petitioner convicted under a statute later clarified by the state supreme court in a different case to contain a new, unproved element violated his constitutional rights. *Id.* at 229. The trial court failed to prove "a basic element of the crime of which [the defendant] was convicted" and the government "presented no evidence whatsoever to prove that basic element." *Ibid.* The Court described the existence of a constitutional violation as the "simple, inevitable conclusion," *ibid.*, and it has since reaffirmed this understanding of the Due Process Clause, *Bunkley* v. *Florida*, 538 U.S. 835, 839-840 (2003) (per curiam) (explicitly endorsing and applying *Fiore* and noting that "[b]ecause Pennsylvania law—as interpreted by the later State Supreme Court decision—made clear that Fiore's conduct did not violate an element of the statute, his conviction did not satisfy the strictures of the Due Process Clause.").

Jones seeks a remedy for a similar clarification of the law by this Court. As in *Fiore*, where the prosecution did not "prove th[e] basic element" that the petitioner lacked a permit, 531 U.S. at 229, here the prosecution failed to prove basic mens rea. Following circuit precedent, the district court did not instruct the jury that Jones had to know he was a felon, J.A. 68-69, and the jury did not find that, J.A. 74-75 (verdict form). Under *Fiore*, this failure to prove

a necessary element violates due process. And as this Court has recognized, "conviction and punishment * * * for an act that the law does not make criminal * * * inherently results in a complete miscarriage of justice and present(s) exceptional circumstances that justify collateral relief under § 2255." *Davis* v. *United States*, 417 U.S. 333, 346-347 (1974) (internal quotation marks omitted).

D. The Eighth Circuit's Reading Permits Sustention Of Cruel And Unusual Punishment

The Eighth Circuit's narrow interpretation of the saving clause may very well allow for the persistence of "cruel and unusual punishment[]," prohibited by the Eighth Amendment. U.S. Const amend. VIII. This Court has time and again held that the Constitution bars punishment in the absence of criminal action. See, *e.g.*, *Robinson* v. *California*, 370 U.S. 660, 666 (1962) ("[A] law which made a criminal offense of [being mentally or physically ill] would doubtless be universally thought to be an infliction of cruel and unusual punishment."); *Powell* v. *Texas*, 392 U.S. 514, 533 (1968) (plurality opinion) ("criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing").

As *Rehaif* made clear, the court convicted Jones for an act that was not a crime: possession of a gun without him knowing he was a felon. Because Jones did not commit any defined crime, his incarceration runs afoul of the Eighth Amendment. *Cf. Robinson*,

370 U.S. at 666 ("We hold that a state law which imprisons [an addict] as a criminal, *even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there*, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment.") (emphasis added).

The Constitution's requirement that a punishment be proportional to the wrong committed further underscores the point. If disproportionate punishment violates the Eighth Amendment, punishment for no crime whatsoever would do so *a fortiori*. Under proportionality analysis, punishing someone like Jones who has been convicted of no criminal activity represents division by zero. No matter what the punishment (the nominator) the denominator (no crime) makes it out of bounds. Barring collateral relief would thus violate the Eighth Amendment. See *Herrera* v. *Collins*, 506 U.S. 390, 432 n.2 (1993) (Blackmun, J., dissenting) ("It also may violate the Eighth Amendment to imprison someone who is actually innocent.").

Congress included the "inadequate or ineffective to test" language to ensure that § 2255's new form of collateral review was constitutional. See *United States* v. *Hayman*, 342 U.S. 205, 223 (1952) ("[W]e do not reach constitutional questions" because "Section [§ 2255(e)] provides that the habeas corpus remedy shall remain open to afford the necessary hearing" "where the Section 2255 procedure is shown to be 'inadequate or ineffective.'"); see *Boumediene* v. *Bush*, 553 U.S. 723, 776 (2008) (noting that this Court has long "placed explicit reliance upon [saving clauses] in

upholding [habeas] statutes against constitutional challenges."). The Eighth Circuit's narrow interpretation of the saving clause contravenes this legislative mandate by raising difficult constitutional questions under the Eighth Amendment, the Due Process Clause, separation of powers principles, and the Suspension Clause. By adopting a broader reading, this Court can avoid these concerns and ensure the constitutionality of § 2255, thus comporting with the intent of Congress.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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