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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 21-857, Jones versus Hendrix.

Mr. Ortiz.

ORAL ARGUMENT OF DANIEL R. ORTIZ
ON BEHALF OF THE PETITIONER

MR. ORTIZ: Mr. Chief Justice, and may it please the Court:

The Eighth Circuit ruled in this case that someone in prison for something the court later determines has never been a crime has no means to challenge his continued detention once his opportunity to file a 2255 motion runs out. He must remain in prison despite having done nothing wrong. But, as this Court held in Davis, conviction and punishment for an act that the law does not make criminal inherently results in a complete miscarriage of justice.

The Eighth Circuit's ruling is wrong for four separate reasons. First, it violates the text of 2255(e). Its key terms all indicate that traditional habeas relief should be available, that a prisoner should have one

1 opportunity to have the correct law applied to
2 his case. The Eighth Circuit held, however,
3 that so long as 2255 provides a purely formal
4 opportunity to raise an issue, it doesn't matter
5 whether the law applied is correct or wrong.
6 Prisoners in this situation, moreover, do not
7 even have that purely formal opportunity. They
8 will almost always be barred from raising the
9 issue in their initial 2255 motion.

10 Second, the Eighth Circuit made the
11 savings clause almost completely superfluous.
12 It identified two categories of cases where it
13 believed the saving clause applies. But the
14 savings clause actually applies to neither. In
15 both situations, the prisoner petitions under
16 2241 directly.

17 Third, the Eighth Circuit created four
18 independent constitutional difficulties. It
19 effectively suspended an important use of the
20 writ as originally understood, and it raised
21 substantial due process, separation of powers,
22 and Eighth Amendment concerns. It denied Jones
23 any opportunity to ever test his claim under
24 what has always been the correct law.

25 Finally, the Eighth Circuit wrongly

1 concluded that allowing savings clause relief
2 would undermine Section 2255(h). It does not.
3 The saving clause and 2255(h) are independent,
4 congressionally authorized routes to collateral
5 review, and nothing suggests that in enacting
6 Section 2255(h) in 1996 Congress intended to
7 repeal the savings clause. The Eighth Circuit's
8 repeal by implication isn't justified.

9 Your Honors, the Eighth Circuit here
10 moved that because the prisoner had a
11 theoretical right to raise an opportunity -- had
12 the right to raise an opportunity in his initial
13 2255 motion, which was for -- which
14 substantively was foreclosed under existing
15 circuit precedent, which this Court later
16 declared wrong, the possibility of en banc
17 review or a cert petition to this Court made his
18 quest to have the correct law applied real.

19 That's in effect -- that represents in
20 effect an ineffective or inadequate remedy to
21 test the -- the legality of the prisoner's
22 detention. There are three different problems
23 with this, Your Honors, with the --

24 CHIEF JUSTICE ROBERTS: Before you get
25 to those, counsel, it seems to me that you've

1 got a basic -- you -- and your friend has the
2 same type of conundrum. I mean, your problem,
3 of course, is that you're sort of undermining
4 AEDPA. You're allowing to be revived the sort
5 of claims that AEDPA wanted to preclude. And I
6 think it's a challenge to explain why that type
7 of result would prevail.

8 On the other hand, your friends have
9 the problem that you've already identified,
10 well, what's the savings clause for if there's
11 really nothing -- nothing to save.

12 And I guess, as an abstract matter
13 between those two types of problems, it seems to
14 me that you have the more -- more serious one
15 because it's really express. You know, these
16 claims you can't bring. And then there's an
17 exit and you say, well, you can bring them over
18 here. That -- that seems pretty -- that's a
19 hard reading to prevail on.

20 Your -- your friends, on the other
21 hand, it's sort of a less extravagant argument
22 to have to make. You've got a savings clause
23 and, you know, it doesn't save anything. It's
24 just there in case it's needed. I mean, it --
25 it's sort of not that -- it doesn't strike me as

1 -- as serious a conundrum.

2 MR. ORTIZ: Well, Your Honor, I think
3 that mistakes a bit the structure of 2255 and
4 the text and structure and purpose of 2255(h) in
5 particular. As I said in the opening, there's
6 no real indication, let alone by the clear
7 statement that this Court has required in cases
8 like McQuiggin and St. Cyr, that Congress
9 actually meant to constrict habe -- traditional
10 habeas jurisdiction in this way.

11 For sure, 2255(h)(1) and (2) limit the
12 reasons for which someone can pursue a
13 successive 2255 remedy. There's no indication
14 that they meant to foreclose recourse to
15 traditional habeas through 2255(e).

16 2255(a), Your Honor, sets up the 2255
17 process. 2255(e) serves as a gatekeeper,
18 determining what causes come into that process,
19 what kinds of cases come into that process, and
20 what ones go through 2241, the traditional
21 habeas route.

22 And 2255(h) says, once you're in the
23 traditional 20 -- motion to vacate process, when
24 and under what circumstances you're allowed a
25 second bite at that particular process. It

1 doesn't really affect the availability of
2 2255(e) relief which sends you to 2241 at all.

3 But, certainly, Your Honor, there is
4 no -- there is no -- there is not the clear
5 statement in 2255(h) that it is -- that it is
6 meant to repeal 20 -- parts of 2255(e) --

7 JUSTICE SOTOMAYOR: Counsel --

8 MR. ORTIZ: -- and this requires --

9 JUSTICE SOTOMAYOR: -- I'd like you to
10 go -- the Chief makes it an either/or. Most of
11 the court of appeals who have sided more with
12 you than with amici recognize that the savings
13 clause cannot be invoked every time a 2255(e) --
14 (h) applies without blowing it up. So you --
15 you have to have some limiting principle.

16 And the limiting principle that most
17 of the court of appeals have found is the one
18 proposed by the Government, which is that they
19 thread the needle by saying that innocence
20 claims should be one of the rare cases where the
21 savings clause is triggered because, otherwise,
22 there would be a fundamental miscarriage of
23 justice.

24 Now your brief did not go as far as
25 the Government in saying that. Are you

1 eschewing the Government's position, or are you
2 accepting it?

3 MR. ORTIZ: No, for purposes of this
4 case, Your Honor, we accept the Government's
5 position. We believe that there's not much
6 daylight between its position and ours on purely
7 statutory claims.

8 We do not -- not necessarily agree
9 with it across the board, for example, their
10 interpretation of when 2255(h)(2), for example,
11 does restrict habe -- traditional habeas relief
12 for, say, constitutional claims. But, in the
13 universe of statutory claims, there's really not
14 much daylight between -- on the ground between
15 their position and ours.

16 JUSTICE BARRETT: Counsel, did I
17 misunderstand your argument? I thought one of
18 the areas of daylight was that you thought it
19 would apply even when circuit precedent changed
20 as opposed to just when Supreme Court precedent
21 changed. Did I misunderstand that?

22 MR. ORTIZ: Sorry, Your Honor. I was
23 just referring to the comparator of -- in the
24 Government -- the Government's proposing to the
25 traditional habeas relief and the bench line.

1 There are two disagreements between us
2 and the Government, Your Honor, which are very
3 important. One is that under our view, a change
4 in circuit precedent, as you've identified,
5 Justice Barrett, should count for these
6 purposes. We believe they've misconstrued Davis
7 versus United States.

8 In that case, Your Honor, the change
9 by -- of law by this Court, the Gutknecht case,
10 happened while the Davis case was on direct
11 appeal in the Ninth Circuit, and then the Ninth
12 Circuit remanded the case to the district court
13 and the case came back up again.

14 And it was impossible for Gutknecht to
15 have represented the change in law that was
16 relevant there because it changed before the
17 direct proceedings were concluded. The change
18 in law that this Court itself identified was a
19 change in law of the Ninth Circuit in the Fox
20 case, which later interpreted -- Gutknecht, Your
21 Honor.

22 JUSTICE BARRETT: How do you propose
23 to handle some of the choice of law problems
24 that changes your theory that circuit precedent
25 changes count create?

1 MR. ORTIZ: In -- there are arguments
2 on both sides, Your Honor, which you identified
3 in your Chazen opinion while you were sitting on
4 the Seventh Circuit. In our view, the -- the
5 view that you gestured at is actually the
6 correct one, that the court should apply the law
7 of the sentencing circuit rather than its own.

8 And I know that is in some sense an
9 anomaly, but it's not a complete anomaly in our
10 system. For example, the Federal Circuit, I
11 believe, now applies the law of the circuit to
12 supplemental non-patent claims in cases that are
13 before it, so this would be no stranger than
14 that kind of thing.

15 And, certainly, each -- and it's
16 not -- the Federal Circuit has not been
17 authorized by Congress to do that. It's a rule
18 that it has developed under Federal Circuit
19 common law.

20 The other big difference between the
21 Government's view, Your Honor, and ours concerns
22 the actual innocence test. The Government says
23 that actual innocence should be a gateway
24 doctrine regulating all -- every -- everything
25 that goes through 2255(e).

1 Interestingly, though, all the support
2 the Government has cited for that -- Schlup,
3 McQuiggin, Bousley, and Kuhlmann -- all concern
4 abuse of the writ doctrine. And it's our
5 contention that the actual innocence test is one
6 way of getting over the abuse of the writ
7 doctrine in a 2241 proceeding or 2255 proceeding
8 when it is raised by the government.

9 But it is not the only way and should
10 not be created at or placed at the 2255 gateway
11 to 2241 as an absolute and singular requirement.
12 We believe that the traditional other gateways,
13 like cause and prejudice for procedural default,
14 should be available too.

15 And we believe that our client
16 actually would satisfy the procedural default
17 standard here and, if not, would actually --
18 could actually establish actual innocence, but
19 that should be a matter on remand from this
20 Court.

21 JUSTICE GORSUCH: So, counsel, I
22 understand --

23 JUSTICE KAGAN: I --

24 JUSTICE GORSUCH: I'm -- I'm sorry.
25 Go ahead.

1 All right. If I understand, I just
2 want to make sure I -- I've got the points of
3 difference between you and the Government.

4 One is circuit foreclosure in your
5 view as opposed to Supreme Court foreclosure on
6 the Government's view.

7 MR. ORTIZ: Yes, Your Honor.

8 JUSTICE GORSUCH: Second is actual
9 innocence versus maybe something more than
10 actual innocence required.

11 And third is, I think, that you take
12 the position that absent adopting some form of
13 relief here, there would be serious
14 constitutional questions raised by the statute,
15 and the Government doesn't believe so.

16 Is -- is that -- is that a fair
17 summary?

18 MR. ORTIZ: That's a fair summary,
19 Your Honor.

20 JUSTICE GORSUCH: Okay. And -- and --
21 and then, with respect to what the savings
22 clause would do on -- on the amicus's reading,
23 you argue it would do too little work. But it
24 was adopted first in 1948, and it was done so
25 when habeas was shifted primarily from the

1 sentencing court to the court of confinement.

2 And -- and for -- for at least 50
3 years, the only purpose of that statute was to
4 ensure that if the sentencing court was
5 unavailable, court martials, the sentencing
6 court, you couldn't transfer the prisoner for
7 whatever reason, natural disasters or other --
8 COVID problems perhaps, that it -- there would
9 be some court available.

10 And -- and -- and so I guess I'm
11 unclear why after 50 years we would expect the
12 savings clause to do a great deal new work.

13 MR. ORTIZ: Well, first, Your Honor,
14 it wasn't doing some of the work that you've --
15 you and the court amici -- the Court-appointed
16 amicus have identified. It does not cover --

17 JUSTICE GORSUCH: It did in the Tenth
18 Circuit. I know -- I know that. I remember
19 that.

20 MR. ORTIZ: Well, Your Honor, this
21 Court itself in the Ortiz case very recently
22 declared that court martials preexisted the
23 Constitution let alone an act of Congress. They
24 are not established by an act of Congress. They
25 were recognized by Congress.

1 JUSTICE GORSUCH: Right. The
2 court martial is evanescent. It disappears.
3 There is no court to go back to. And so, at
4 least in Tenth Circuit and I believe in a lot of
5 other courts, in those cases, the court of
6 confinement was made available because there was
7 no sentencing court to go back to. So that was
8 one example. And natural disasters was another
9 example.

10 Are you aware of any others during the
11 50-year period between 1948 -- well, not 50
12 years, but almost 50 years, between 1948 and
13 1995?

14 MR. ORTIZ: Well, if I may just for a
15 moment push back a little bit on that?

16 JUSTICE GORSUCH: Of course.

17 MR. ORTIZ: I'm sorry, but, of course,
18 court martial -- habe -- traditional habeas
19 relief was available for court martials, but it
20 was not made available through 2255(e).

21 JUSTICE GORSUCH: No, of course, but
22 it --

23 MR. ORTIZ: Oh, okay.

24 JUSTICE GORSUCH: -- that did make
25 it -- 2255(e) was cited as an authority to send

1 those cases to the 2241 court.

2 MR. ORTIZ: Usually not, Your Honor.
3 Maybe in the Tenth Circuit it mistakenly was,
4 but they're not authorized --

5 JUSTICE GORSUCH: Mistakenly?

6 MR. ORTIZ: Well, they're not -- court
7 martial -- 2255 only authorizes people to pursue
8 2255 -- sorry, 2255(a) authorizes people to
9 pursue motions to vacate under 2255 only when
10 they're under sentence by a court established by
11 an act of Congress.

12 JUSTICE GORSUCH: I see.

13 MR. ORTIZ: And court martials are not
14 established --

15 JUSTICE GORSUCH: I follow you.

16 MR. ORTIZ: So 2255 was not a
17 question.

18 JUSTICE GORSUCH: Okay. So you're
19 saying that wasn't even available during the 50
20 years.

21 MR. ORTIZ: Right.

22 JUSTICE GORSUCH: Okay. So what was
23 it used for during those 50 years?

24 MR. ORTIZ: Well, there are two cases
25 we've been able to identify. One was where a

1 case was transferred from the -- sorry,
2 when some -- there's a conviction from the Court
3 of Appeals for the Panama -- sorry, from
4 the District -- the Court of the Panama Canal,
5 and another was when some courts were
6 transferred to the state courts of Alaska after
7 Alaska became a state, and the --

8 JUSTICE GORSUCH: Okay. Fine.

9 MR. ORTIZ: -- state courts refused --

10 JUSTICE GORSUCH: Whatever the
11 examples are, they were very limited, you'd
12 agree?

13 MR. ORTIZ: For sure, but that's
14 not -- but that doesn't indicate, Your Honor,
15 what Congress intended the scope of the savings
16 clause to be.

17 The savings clause, as this Court
18 itself described in Haymond and decade -- two --
19 no, a decade and a half later in Pressley was
20 meant to serve as a kind of constitutional
21 backstop so that there would never be any
22 constitutional doubt about the adequacy of 2255.
23 And so, as Congress -- Congress originally
24 intended in 1948 that as the contours of Section
25 2255 changed, it would never be placed under

1 constitutional pressure because 2255 would
2 always allow this out. So the scope --

3 JUSTICE GORSUCH: All right. That
4 takes us back to the constitutional disagreement
5 you have with the Government, though, right?

6 MR. ORTIZ: About whether only the --

7 JUSTICE GORSUCH: Whether -- whether
8 --

9 MR. ORTIZ: -- about the
10 constitutional doubt --

11 JUSTICE GORSUCH: -- whether this
12 scheme is required for constitutional purposes
13 that you're advocating.

14 MR. ORTIZ: Well, that was only one
15 purpose for the saving clause, Your Honor. The
16 other purpose this Court identified in Haymond
17 and I believe in Pressley as well was to prove
18 that it was -- to make sure that habeas overall,
19 either through 2255 or 2241, provided an
20 adequate remedy.

21 JUSTICE GORSUCH: Can I -- can I test
22 that proposition --

23 MR. ORTIZ: Yes.

24 JUSTICE GORSUCH: -- just for a
25 moment? So -- so you speak of the necessity for

1 an adequate and effective alternative, and you
2 suggest, if there's circuit foreclosure, then it
3 isn't an adequate or effective alternative.
4 But, when we speak of adequacy and effectiveness
5 in, for example, ineffective assistance claims,
6 we use those very terms, and we often find, and
7 these are often habeas cases, that counsel was
8 effective even if he lost. So why -- why should
9 a -- a victory be equivalent to effectiveness?

10 MR. ORTIZ: I'm sorry. I'm sorry,
11 Your Honor, we -- I must have misexplained or
12 inadequately explained things in our briefing.
13 We do not claim that an adequate remedy
14 guarantees a prisoner's victory. We believe
15 that it guarantees that the correct law be
16 applied to his case at least once. And that has
17 not been the case here.

18 JUSTICE GORSUCH: Okay. Thank you.

19 MR. ORTIZ: It has not been possible.
20 In fact --

21 JUSTICE SOTOMAYOR: Counsel, you do
22 mention -- in -- in response to Justice Gorsuch,
23 you talk about the couple of cases, but in your
24 reply brief, you said that you had reviewed all
25 353 saving clause cases prior to AEDPA, and you

1 only found the two. Could you please tell me
2 what the others involved?

3 MR. ORTIZ: Sorry. We -- we looked
4 for cases, Your Honor, that -- we did -- we did
5 a search for ones that used the term so we could
6 try to catch anything where the term came up.

7 JUSTICE SOTOMAYOR: Right.

8 MR. ORTIZ: And then we went through
9 all those cases and we looked for ones where it
10 was actually used. And we -- the other -- we
11 found all these --

12 JUSTICE SOTOMAYOR: Which term were
13 you using? Were you using the 2255(e), the
14 savings clause?

15 MR. ORTIZ: Yes, we were using the
16 search that is described in that footnote.

17 JUSTICE SOTOMAYOR: Oh, okay.

18 MR. ORTIZ: So there were lots --
19 there were two -- there were 253 or whatever it
20 was examples of where it was sort of invoked.

21 JUSTICE SOTOMAYOR: Right.

22 MR. ORTIZ: But there were only two
23 where it appeared that it was actually used.

24 JUSTICE SOTOMAYOR: I see. So the
25 others, it wasn't used?

1 MR. ORTIZ: Right.

2 JUSTICE SOTOMAYOR: Okay.

3 MR. ORTIZ: Yeah. Yeah.

4 JUSTICE SOTOMAYOR: That's what I
5 meant.

6 MR. ORTIZ: But, in -- in this case,
7 Your Honor, people in Mr. Jones's position don't
8 even get the formal opportunity often to raise
9 their claim in the initial habeas proceeding
10 even in the hope that later on they might be
11 able to petition the court which has -- has --
12 has -- has foreclosed their -- them on the
13 substance.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 MR. ORTIZ: It changes the --

17 CHIEF JUSTICE ROBERTS: I'm sorry.
18 Finish your sentence.

19 MR. ORTIZ: It changes the view en
20 banc. Sorry. Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you.
22 Justice Thomas?

23 Justice Alito?

24 JUSTICE ALITO: Is it odd that
25 2255(h)(2) mentions only new rules of

1 constitutional law rather than new
2 interpretations of the statute?

3 MR. ORTIZ: Your Honor, Congress in
4 that took the -- we believe that what Congress
5 did there is it took the language from this --
6 this Court had developed in McCleskey versus
7 Zant on actual innocence and basically codified
8 it. So it was taking that one item, that one
9 piece of doctrine, and just writing it into the
10 statute, with some -- some changes, of course.
11 But that's basically what it did, and it didn't
12 mean to actually address all the other types of
13 claims available.

14 But, certainly, Your Honor, there
15 isn't the clear statement that this Court
16 requires before constricting habeas jurisdiction
17 that Congress meant to repeal 2255(e) in
18 enacting 2255(h).

19 CHIEF JUSTICE ROBERTS: Justice
20 Sotomayor?

21 JUSTICE SOTOMAYOR: No, thank you.

22 CHIEF JUSTICE ROBERTS: Justice Kagan?
23 Justice Jackson?

24 JUSTICE JACKSON: Yes, I have a
25 question that just arises out of something you

1 said at the beginning that I thought was very
2 interesting. I have been focusing in on the
3 interaction between (e) and (h) because I think
4 the sort of questions presented in this case
5 teed up that way in a certain way. And, you
6 know, there's the savings clause, what does
7 ineffective mean as it relates to what's
8 happening in (h), and what -- who has the better
9 interpretation about that.

10 What you said at the beginning that I
11 found very interesting was this interpretation
12 exercise needs to be taken in the light of the
13 entirety of 2255 and what is going on in each
14 provision. You know, please interpret it
15 related to the structure of this statute. You
16 said that (a) sets up the process, it gives us
17 the motion, it creates the whole scheme. Then
18 sort of, I guess -- I'm just trying to do it
19 right here on -- on the stand -- (b), (c), (d),
20 it looks like, is talking about procedural
21 matters when the motion is properly entertained.
22 And if you were a court and you were sort of
23 going through in order, I think this is maybe
24 how you would approach it in actual application.
25 When you get to (e), the question is, okay, so

1 what about habeas? Can people still be, you
2 know, filing a habeas motion while this is going
3 on? And you find the answer there about that.
4 And then you keep moving on. You know, statute
5 of limitations is in (f), and then you get to
6 (h). It's the gatekeeper, you said. Can -- is
7 this a successive motion, the court is asking at
8 this point, and if so, can I proceed?

9 If we think about it in that way, then
10 it's sort of like (e) is not really interacting
11 with (h) and -- and saying anything about
12 whether habeas rights would still exist for the
13 purpose of this case. Am I right in sort of how
14 I'm starting to -- to --

15 MR. ORTIZ: No, you --

16 JUSTICE JACKSON: -- to view this?

17 MR. ORTIZ: -- you are right, Your
18 Honor, with one -- I would --

19 JUSTICE JACKSON: Yes.

20 MR. ORTIZ: -- qualify one thing you
21 said --

22 JUSTICE JACKSON: Please.

23 MR. ORTIZ: -- which is that 2255(h)
24 is the gatekeeper for a particular thing,
25 successive 2255 motions. 2255(e), on the other

1 hand, is a different type of gatekeeper. In
2 some ways, it's the most important provision in
3 2255 because it determines whether you get into
4 2255 at all or you start over at 2241 or you
5 maybe, you know, come -- what we've been talking
6 about is you come in through the 2255(e)
7 gateway. But, actually, 2255(e) is the traffic
8 cop here directing --

9 JUSTICE JACKSON: I see. So, at the
10 beginning, we just sort of have these claims and
11 we're like which is the right world that we need
12 to be in, the 2255 world or the 2241 world? And
13 (e) is doing that work?

14 MR. ORTIZ: Yes, Your Honor.

15 JUSTICE JACKSON: And then, once we're
16 in the right world, we keep on going with
17 respect to the application of statute of
18 limitations or is this a successive motion or
19 whatever?

20 MR. ORTIZ: Yes, Your Honor.

21 JUSTICE JACKSON: Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Mr. Feigin.

25

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2

3

ORAL ARGUMENT OF ERIC J. FEIGIN

4

ON BEHALF OF THE RESPONDENT

5

IN SUPPORT OF AFFIRMANCE

6

MR. FEIGIN: Thank you, Mr. Chief

7

Justice, and may it please the Court:

8

As you point out, Mr. Chief Justice,

9

this case presents something of a conundrum, and

10

it's no secret that it's one that we've

11

struggled with. And what makes this case

12

difficult is the -- the key phrase, "inadequate

13

or ineffective to test the legality" of his

14

detention, obviously requires some comparator

15

benchmark, and it can be a little bit difficult

16

to identify what the proper benchmark is.

17

And for a long time, we and the lower

18

courts were operating under the assumption that

19

the choices were between kind of indeterminate

20

notions of fairness, which is I still think what

21

Petitioner is offering, and kind of an unhelpful

22

self comparison where what you see is what you

23

get with 2255, which is I think what the court

24

of appeals did and what amicus is defending.

25

But I think this Court's cases, when

1 we took a fresh look at this, in Haymond and
2 Sanders, read the text in a third and much
3 better way that makes federal habeas corpus the
4 comparator. The saving clause quite literally
5 saves those lingering applications of habeas
6 corpus that Congress has never withdrawn and
7 that Section 25's motions remedy doesn't itself
8 cover. And one of those is statutory claims of
9 actual innocence by a prisoner who can rely on
10 an intervening decision of this Court.

11 Now I think the critical interpretive
12 question in this case is the negative
13 implication of Section 2255(h), which doesn't
14 actually mention habeas. To what degree did
15 Section 2255(h) not only restrict the motion
16 remedy to which it expressly refers but also
17 provide the kind of clear statement that's
18 necessary to withdraw the habeas remedy as well?

19 And I think a couple of things that
20 might be useful to explain why we think it
21 doesn't withdraw the habeas remedy for the
22 statutory claims would be to discuss a little
23 bit how you figure out what the current scope of
24 federal habeas is and what -- the kinds of
25 statutory claims we're talking about here. But

1 I realize the Court has already indulged me, and
2 I, of course, defer to the --

3 JUSTICE JACKSON: Can I ask a --

4 MR. FEIGIN: -- Court's questions.

5 JUSTICE JACKSON: Sorry. Does anybody
6 else have a question?

7 Can -- can I ask you, Mr. Feigin,
8 about whether or not the ordering question that
9 I just spoke with Petitioner's counsel about
10 also helps a little bit with the negative
11 implication?

12 In other words, if we review (e) in
13 the order of things as a court applying these
14 principles or this statute as doing work to tell
15 us should we be in 2241 or should we be in 2255,
16 does that help in terms of what we can later
17 draw from (h)?

18 MR. FEIGIN: Well, Your Honor, I don't
19 know that it -- I mean, I think that it is one
20 helpful way to think about it, but I think the
21 critical question is just the operation of
22 2255(e) in itself in how it answers that
23 question.

24 And I think what it says is that in --
25 for constitutional purposes and because Congress

1 wasn't trying to withdraw the habeas remedy
2 insofar as it might disadvantage federal
3 prisoners when it was setting up this new system
4 in 1948, what it's telling us is that it keeps
5 the contours of the federal habeas remedy.

6 JUSTICE JACKSON: And -- and -- and
7 before -- before, that remedy would have allowed
8 for a person in Mr. Jones's situation to claim
9 miscarriage of justice and bring this claim?

10 MR. FEIGIN: Yes, and I think we see
11 that from Davis, which, you know, essentially is
12 this situation. It came up under 2255, but it
13 referred back to traditional habeas principles,
14 and I -- I don't know that there's really any
15 dispute about statutory claims like this being
16 covered. And I --

17 JUSTICE GORSUCH: Mr. Feigin --

18 JUSTICE ALITO: Well, you mentioned
19 that --

20 JUSTICE GORSUCH: I'm sorry. Go
21 ahead, please.

22 JUSTICE ALITO: You mentioned that one
23 of the situations in which your interpretation
24 would apply is where this Court has
25 reinterpreted the meaning of a substantive

1 criminal provision.

2 Where else would it apply?

3 MR. FEIGIN: Well, Your Honor, I think
4 it could potentially cover some of the
5 situations the amicus has identified, although
6 some of them I think, frankly, wouldn't even
7 fall into 2255 in the first place.

8 Federal habeas corpus is really
9 divided into three parts. The first one is like
10 challenges to conditions of confinement or good
11 time credits, things that challenge the
12 execution of the sentence rather than its
13 imposition. Those don't even come into 2255 in
14 the first place, and there's really no need for
15 any -- anything to exclude them.

16 JUSTICE ALITO: Well, when you --

17 MR. FEIGIN: They just automatically
18 go to habeas.

19 JUSTICE ALITO: -- when you speak
20 about -- when you speak about the traditional
21 scope of federal habeas corpus, at what point in
22 time are we supposed to look?

23 MR. FEIGIN: So, Your Honor, you look
24 at federal habeas corpus now, and the body of
25 federal habeas corpus now can be informed by

1 Section 2255 itself and its limits and the
2 limits that Congress has imposed on state
3 prisoners through 2244. And if I could just
4 take a second to explain why that is.

5 I think there are certain
6 circumstances in which we can draw negative
7 implications from 2255, particularly when
8 they're reinforced by 2244, which the explicit
9 limitations on constitutional and factual claims
10 in 2255(h) definitely are because they are
11 mirrored in 2244(b).

12 And, in fact, which is -- and 2244 is
13 expressly cross-referenced in 2255(h), and then,
14 if you look at 2244, it has a provision,
15 2244(a). 2244(a) literally only applies to a
16 second or further habeas petition that a federal
17 prisoner might file, so it doesn't literally
18 apply to a 2255 motion followed by habeas
19 petition.

20 But one thing that it does is it
21 points back at 2255 for the relevant
22 limitations. Those relevant limitations include
23 -- this gets back to Justice Jackson's point --
24 2255(h), which limits successive or abusive
25 constitutional and factual claims but doesn't

1 say anything about statutory claims --

2 JUSTICE KAGAN: Suppose it did, Mr.
3 Feigin.

4 MR. FEIGIN: -- and it includes (e).
5 I'm sorry --

6 JUSTICE KAGAN: I'm sorry.

7 MR. FEIGIN: -- Justice Kagan. I'm
8 sorry. And it includes --

9 JUSTICE KAGAN: Finish your sentence.

10 MR. FEIGIN: -- and it includes (e),
11 which is the critical provision that we're
12 interpreting here. I'm sorry, Justice Kagan.

13 JUSTICE KAGAN: No, no, no. You know,
14 suppose 2255(h) did include a specific provision
15 that said you can't bring a successive 2255
16 motion based on an intervening statutory change.

17 Would then there be a strong negative
18 implication?

19 MR. FEIGIN: Yes, I think there would
20 because then we'd be in this third category.
21 Like I've mentioned two of the three categories
22 of federal habeas claims. One is these -- one
23 is about execution of the sentence. We're not
24 really talking about that here. One is federal
25 prisoner claims that have analogues to state

1 claims, and I just described a little bit about
2 how those might shake out.

3 And then we're talking about a kind of
4 claim -- a statutory claim that's really unique
5 to federal prisoners, and I think where Congress
6 has expressly precluded it and clearly focused
7 on it, then --

8 JUSTICE KAGAN: Right. I mean, I
9 guess --

10 MR. FEIGIN: -- that would be a much
11 more difficult case today.

12 JUSTICE KAGAN: It's much more
13 difficult.

14 MR. FEIGIN: Yes.

15 JUSTICE KAGAN: And you would -- you
16 -- let me make sure I understand your answer.
17 You would answer it the reverse way.

18 MR. FEIGIN: I think we probably
19 would, yeah, Justice Kagan.

20 JUSTICE KAGAN: Yeah. And that's so
21 even though it would refer only to 2255 motions
22 and not to habeas, right?

23 MR. FEIGIN: Yeah, I think our
24 critical point here, Your Honor, isn't that 2255
25 can say nothing about the withdrawal of the

1 federal habeas remedy. It's just that as this
2 Court has stated in multiple recent cases, like
3 McQuiggin and Holland, it requires something of
4 a -- a clear statement or a bright light
5 indicator to withdraw the federal habeas remedy.

6 And I think you have that for the
7 stuff that Congress clearly focused on, but we
8 don't have that for the kinds of claims -- the
9 kinds of statutory claims that we're talking
10 about here.

11 Those are actually quite different
12 from what Congress might have been thinking
13 about even in 2255(f)(3), for example, which
14 imposes a statute of limitations that doesn't
15 include the word "constitutional" like 2244's
16 does, where you can often have a claim based on
17 a statutory right that is framed in
18 constitutional terms.

19 The kinds of Rehaif claims we see on
20 first 2255s aren't these kinds of statutory
21 claims which essentially are claims of actual
22 innocence in merits form. What they are are
23 claims of an unknowing plea, mirroring what
24 happened in Bousley, and they're claims about
25 the jury instructions which sound in the Sixth

1 Amendment.

2 So you've got Fifth and Sixth
3 Amendment claims that can be based on a
4 statutory right, and that might have been what
5 Congress was thinking about.

6 JUSTICE GORSUCH: Mr. -- Mr. Feigin --

7 MR. FEIGIN: Yeah.

8 JUSTICE GORSUCH: -- what -- how are
9 we -- what are we supposed to make of the fact
10 that the Government's position before 1998
11 appeared to be that of the Petitioner's, that
12 either circuit foreclosure test was sufficient
13 to invoke the savings clause or that there were
14 constitutional problems with interpreting the
15 savings clause otherwise.

16 Then, from 1998 to 2017, I think, if
17 I've got it right, the Government took the
18 opposite view, the view of the amicus, that the
19 circuit foreclosure test, neither of those tests
20 work and that the savings clause should be
21 measured about whether it's effective and
22 adequate to raise the argument, that the
23 baseline would be implicit in the text or
24 explicit in the test -- text.

25 And now, for the first time, the

1 Government's coming up with a completely new
2 theory that no circuit courts adopted and
3 neither side in this litigation pursues.

4 What are we supposed to make of that?

5 MR. FEIGIN: Well, Justice Gorsuch,
6 just --

7 JUSTICE GORSUCH: I mean, it's a
8 clever argument, but the -- the brief discusses
9 it as the natural reading of the statute, but --
10 but no circuit court over the last 50 years has
11 read it that way.

12 MR. FEIGIN: Well, Your Honor, I -- I
13 -- I -- I think the -- you're correct that we
14 shifted positions. There's a -- I think your
15 chronology, in candor, we've shifted around a
16 little bit more.

17 JUSTICE GORSUCH: Even more than I
18 described?

19 MR. FEIGIN: Yeah.

20 JUSTICE GORSUCH: I've been generous.

21 (Laughter.)

22 MR. FEIGIN: I -- I just --

23 JUSTICE GORSUCH: Okay. Just --

24 MR. FEIGIN: -- to -- to be completely
25 candid --

1 JUSTICE GORSUCH: -- just as I was
2 generous to Petitioners about -- about court
3 martials, and, apparently, those are not
4 permitted either, but okay.

5 MR. FEIGIN: I just want to be
6 completely up front with the Court about that.

7 But I think the bottom line, Your
8 Honor, is the way we're interpreting it now is
9 the way that the Court actually interpreted it
10 itself in Haymond and Sanders, and I think it's
11 mirrored in Swain against Pressley, which
12 interpreted the analogous D.C. provision, and in
13 Boumediene, which is that the saving clause
14 essentially makes sure that federal prisoners
15 weren't disadvantaged by the adoption of this
16 new remedy, they weren't substantively
17 disadvantaged or procedurally disadvantaged.

18 And in doing so, it ensures that there
19 aren't going to be any constitutional problems.
20 We don't think there would be any constitutional
21 problems in these particular circumstances under
22 Felker against Turpin, but even if there were,
23 the easiest way to make sure there's no
24 constitutional problems with the withdrawal of
25 habeas is to keep a residue of habeas where they

1 might inadvertently have missed something --

2 JUSTICE GORSUCH: Then I'd like to
3 return to --

4 MR. FEIGIN: -- that's -- yeah.

5 JUSTICE GORSUCH: -- Justice Alito's
6 question, which is you ask us to use the
7 baseline of habeas as it existed between about
8 1948 and 1995 and ignore what happened after
9 1995 and before Brown -- well, I guess 1953,
10 though you do pluck a couple of cases before
11 Brown. It seems a bit of a -- a bespoke reading
12 of habeas.

13 MR. FEIGIN: It -- it would be, Your
14 Honor, but let me clarify that is not actually
15 our reading of habeas. We think that the -- you
16 look to the federal habeas remedy now. And as I
17 was trying to describe in response to Justice
18 Alito, figuring out the contours of the federal
19 habeas remedy now, you would look at traditional
20 habeas, so things like Davis would tell you
21 something.

22 JUSTICE GORSUCH: Should we look at
23 before Brown, in which it was mostly
24 jurisdictional, that habeas was limited to
25 jurisdictional questions?

1 MR. FEIGIN: Well, Your Honor, I
2 don't --

3 JUSTICE GORSUCH: Does that inform our
4 analysis --

5 MR. FEIGIN: -- I don't think --

6 JUSTICE GORSUCH: -- or should we
7 ignore that?

8 MR. FEIGIN: I think you would look at
9 federal habeas as it exists today, which would
10 -- which -- to the extent the before Brown cases
11 aren't kind of superseded by some of the later
12 ones, that would be the -- you could potentially
13 look at them.

14 But we do think -- and I just want to
15 be very clear on this. We do think that it is
16 informed, as this Court has said, by the
17 statutes that this Court has enacted. And it
18 can be informed by Section 2255, particularly in
19 its provisions like 2255(h) or its statutes of
20 -- statute of limitations that are also mirrored
21 in state habeas, because that gives us a very
22 clear indication that habeas, as it stands
23 today, does not allow those kinds of claims, the
24 kinds of constitutional and factual claims that
25 I still think my friend the Petitioner's

1 approach might in theory allow.

2 But one thing Congress did not speak
3 to were the kind of statutory claims that you
4 see in Davis, that everyone agrees were
5 available in traditional habeas. We don't have
6 that kind of clear statement. And the kinds of
7 claims we're talking about here are claims that
8 someone is in prison, potentially for the rest
9 of his life, for conduct that Congress itself,
10 according to this Court, never wanted to make
11 criminal in the first place.

12 JUSTICE ALITO: Do you -- do you have
13 any concern about the complexity of the rule
14 that you are advocating? If it were limited
15 strictly to a situation like Rehaif, fine,
16 everybody could understand that. But are -- are
17 you concerned that every federal prisoner who
18 wants to bring a successive or -- a successive
19 motion is going to claim that this falls within
20 the traditional scope of habeas, and this would
21 be an escape clause that will be invoked again
22 and again and again, and all the district judges
23 are going to have to analyze the traditional
24 scope of -- of habeas and see whether the claim
25 actually falls within that?

1 MR. FEIGIN: No, Your Honor, we're not
2 worried about that for two reasons. Number one
3 is, as I've described the -- the world of -- of
4 habeas, there -- the condition of confinement
5 claims are already dealt with in 2241, and then,
6 on merits claims, we have the constitutional and
7 factual claims that are like state habeas.
8 Those are already addressed. We've dealt with
9 those. And then we're just left with these
10 kinds of statutory claims. The only kinds of
11 statutory claims that you could possibly ever
12 bring under successive and abuse of the writ
13 doctrine are going to be claims based on
14 intervening decision of this Court, and that's
15 going to be a set of claims, but that gets to my
16 second reason, which is, under both successive
17 habeas petition doctrine under Coleman or abuse
18 of the writ doctrine under McCleskey, for
19 example, you will see that that requires -- is
20 going to require a showing of actual innocence
21 that's going to be very hard to make and can get
22 knocked out pretty easily at the threshold.

23 JUSTICE ALITO: Well, let's say I'm a
24 -- I'm a district judge and I've -- I haven't
25 dealt with this problem before. Give me your

1 best summary of the rule that I should apply
2 when I get a -- when I get an effort to -- to
3 file a second or successive habeas petition.

4 MR. FEIGIN: Well, Your Honor,
5 honestly, I-- I can't tell you that it's
6 impossible that there's some implication we
7 haven't foreseen, but we really think this is,
8 as far as merits claims go, essentially a
9 category -- probably a category of one.

10 So you look to see whether it is the
11 type of claim that we're dealing with here, a
12 purely statutory claim that asserts that
13 somebody is in prison for something that
14 Congress never made a crime. If so, can that
15 person make a -- make the threshold necessary
16 showing of actual factual innocence under
17 Bousley, which can take into account not just
18 the evidence that was presented at trial but all
19 the evidence that could have been presented.
20 And we state in our brief, and I'm happy to
21 restate here, all the reasons why Petitioner
22 can't even get a toe in the door.

23 JUSTICE JACKSON: Could I just clarify
24 what you mean by "actual factual innocence?"
25 So, when you have such a person and they're in

1 jail for conduct that Congress, we now know,
2 says was not criminal, what is the factual
3 showing that -- that they didn't do the thing
4 that Congress says is not criminal? What --

5 MR. FEIGIN: Well --

6 JUSTICE JACKSON: -- factual showing
7 do they have to make?

8 MR. FEIGIN: -- it's the question of
9 the conduct, Your Honor. So it's different from
10 a sufficiency review, for example, because,
11 under Rehaif, we were never required to
12 introduce evidence of someone's knowledge of
13 their prior felon status. Before Rehaif, we --
14 the circuits weren't requiring us to do that, so
15 there will be a lot of cases where we didn't
16 actually introduce that evidence. We'll have
17 plenty of evidence if that's true, and, here, we
18 actually have both trial evidence and extraneous
19 evidence. But this is going to include like
20 kinds of things, like stuff that came up at plea
21 negotiations, which the sentencing court never
22 saw, which is actually a reason why Congress
23 wouldn't have found it particularly important to
24 this --

25 JUSTICE JACKSON: I see. So it's just

1 an opportunity for the government to introduce
2 the evidence on whatever the new legal standard
3 is?

4 MR. FEIGIN: Yes, Your Honor, and I
5 think Bousley is incredibly clear on -- on that
6 particular point.

7 JUSTICE BARRETT: What about --

8 JUSTICE KAGAN: Mister --

9 JUSTICE BARRETT: -- ACCA claims? I
10 mean, I -- I think Rehaif claims, sure, it seems
11 like that would be pretty narrow under view --
12 under review, but, I mean, we have a lot of ACCA
13 cases, so when you think about Mathis, I mean --
14 all of the cases that apply the categorical
15 approach then kind of can lead to these problems
16 in the district courts under the Government's
17 view, it seems to me. That would be much
18 harder, kind of to Justice Alito's point, for
19 district courts to unwind.

20 MR. FEIGIN: Well, a couple points on
21 that, Your Honor. Number one is that, you know,
22 you may or may not agree with us on this
23 extending to statutory maxima, but that's not
24 squarely presented in this case. Number two,
25 Mathis in particular is an old rule. Number

1 three, this Court, in the death penalty context
2 in Sawyer, suggested an even higher actual
3 innocence showing it -- may be necessary for
4 sentencing-type claims.

5 And the -- I'd further -- I'd further
6 add to this that we've already been dealing with
7 a lot of ACCA claims under the circuits'
8 somewhat more amorphous approach, and it's
9 generally not -- hasn't proven that difficult to
10 apply because it's a purely legal inquiry as to
11 the qualification of various ACCA predicates.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Justice Thomas?

15 Justice Sotomayor?

16 JUSTICE SOTOMAYOR: I -- I am a little
17 bit concerned with your answer to Justice Kagan.
18 You seem to suggest that a congressional clear
19 statement rule could include something very --
20 plain statement rule could include something
21 indirect like 2255(h) says you can't have a
22 successive petition on this issue, that that
23 would eliminate 2241 and that that wouldn't
24 create a -- a constitutional problem.

25 And -- and by that, I mean, is someone

1 who's completely innocent of the charge, given
2 your wide definition of innocence, okay, there
3 is no way to look at what they did as fitting
4 the statutory terms that have now been described
5 by this Court. There's no inference that could
6 be drawn from the evidence that they did it.
7 They're completely innocent. You're suggesting
8 that that wouldn't create a Fifth and Eighth
9 Amendment problem.

10 MR. FEIGIN: Well, first of all, Your
11 Honor, I wouldn't say that that's a wide
12 definition of innocence. But the other thing I
13 would say is --

14 JUSTICE SOTOMAYOR: I'm -- I'm spot --

15 MR. FEIGIN: Yes. Sorry.

16 JUSTICE SOTOMAYOR: -- I'm, using the
17 words of my colleague, Justice Gorsuch, I'm
18 spotting you that. So I spot it for you and --
19 and accept that, all right? But totally
20 innocent under any definition you use?

21 MR. FEIGIN: Well, Your Honor, I don't
22 think there's a problem with that here because
23 what we're talking about is whether Congress is
24 required to give a further shot at collateral
25 review in these circumstances. I think Felker

1 against Turpin is quite clear that when it
2 looked at the parallel limitations in 2244(b),
3 that Congress is free to statutorily alter the
4 abuse of the writ and I think, by analogy, the
5 successive writ doctrines to preclude relief in
6 these circumstances. I mean, these cases do
7 have to reach conclusion at some point, and if
8 Congress decides and where it's evident that it
9 has decided that, look, you know, you're just
10 not going to be able to bring these kinds of
11 claims anymore, then I think Congress's judgment
12 is within its constitutional authority.

13 Our point here is that Congress just
14 hasn't made that judgment, and, in fact, it's
15 got the saving clause specifically just to make
16 sure that whatever the federal habeas remedy
17 would allow is still there, and that's the kind
18 of claim that we're talking about here today.

19 JUSTICE SOTOMAYOR: Extraordinary.
20 Okay.

21 CHIEF JUSTICE ROBERTS: Justice Kagan?

22 JUSTICE KAGAN: So just going on on
23 this question of what to draw from 2255(h), one
24 of amicus's points is that your argument creates
25 a kind of weird situation where the statutory

1 claims, because they're in habeas, are -- face
2 fewer procedural obstacles than the
3 constitutional and factual claims under 2255.

4 And there's a difference between you
5 on the exact scope of the differences, but I
6 think it's at least true that in habeas you
7 don't have the certificate of appealability and
8 you don't have that pre-filing certification.

9 And so the question becomes, like, why
10 would we think that Congress created a world
11 where the statutory claims are actually easier
12 to bring or face fewer procedural obstacles than
13 the constitutional and factual claims.

14 MR. FEIGIN: Well, Your Honor, I'm not
15 quite sure it's correct to think that there are
16 fewer obstacles, but if we're asking what
17 Congress thought, I mean, I would first
18 emphasize we're just proceeding from the text
19 here, but -- and this Court's precedents.

20 JUSTICE KAGAN: Well, but the -- I
21 mean, the text --

22 MR. FEIGIN: But --

23 JUSTICE KAGAN: -- the question in the
24 text I think is what the negative implication of
25 2255 is, and that's the kind of critical issue.

1 MR. FEIGIN: So, Your Honor, let me
2 pose a couple of different answers to your
3 question, because, like, obviously, I can't tell
4 you exactly what Congress might have been
5 thinking.

6 One thing it might have been thinking,
7 as Justice Barrett pointed out in her separate
8 writing in Chazen, is perhaps it overlooked
9 this, which is fairly realistic because this
10 language was drafted before Bailey against
11 United States, which was kind of a watershed of
12 a statutory interpretation case that applied to
13 a large number of criminal convictions.

14 It wasn't until a couple years later
15 in Bousley that it was clear how a case like
16 that would shake out retroactively, and even
17 then, Congress was probably thinking about Fifth
18 and Sixth Amendment claims, not pure statutory
19 claims.

20 But, if Congress was thinking about
21 this, I think it might have been thinking a few
22 different things. Number one is, first of all,
23 actually, these kinds of claims are
24 disadvantaged to some degree because what
25 2255(h) does is just removes all the successive

1 and abuse of the writ doctrine problems, so you
2 don't actually have to make a showing of actual
3 innocence just as a gateway under 2255(h).

4 And then you've got the point that I
5 was discussing with Justice Jackson, which is
6 that this -- these kinds of claims aren't really
7 the kinds of claims where you care very much
8 whether they go to the sentencing court or not
9 because, as this Court made clear in Bousley and
10 House and Schlup, they involve a lot of
11 extra-record evidence that, you know, under Rule
12 11, for example, with plea negotiations, the
13 sentencing courts never seen.

14 And that in turn would have forced
15 Congress, if it were trying to include these
16 claims under (3) -- under (h), like a new
17 (h)(3), to kind of grapple with some difficult
18 issues and maybe rejigger its structure of
19 habeas, which is kind of unwieldy as it is, even
20 more because, first of all, it's a little hard
21 to get a court of appeals to figure out how to
22 certify that in the 30 days that the 2244
23 procedures require.

24 And then, when we're talking about the
25 certificate of appealability problem, if we're

1 talking about a first 2255, every Rehaif
2 claimant is going to pair a statutory claim with
3 a Fifth Amendment claim or a Sixth Amendment
4 claim.

5 You can't do that on a successive
6 motion because you're not going -- because those
7 are going to be old constitutional rules. The
8 Fifth Amendment knowing plea rule and the right
9 to jury instructions, those aren't new. They've
10 been there since time immemorial.

11 So they're just bringing a raw
12 statutory claim. You'd have to make some kind
13 of adjustment to the certificate of
14 appealability, and I think Congress probably
15 wasn't troubled by this because, for the same
16 reason it might have overlooked it, it just
17 didn't think that this was a huge -- going to be
18 a huge class of claims.

19 It may have been wrong about that.
20 The class may have been larger than it thought,
21 but I don't think it was being unreasonable,
22 particularly because I think everyone is in
23 agreement that if Hannibal Lecter is too
24 dangerous to move, he gets -- he can avoid 2255
25 as well.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Justice Jackson?

4 Okay. Thank you, counsel.

5 MR. FEIGIN: Thank you.

6 CHIEF JUSTICE ROBERTS: Ms. Ratner.

7 ORAL ARGUMENT OF MORGAN L. RATNER

8 COURT-APPOINTED AMICUS CURIAE

9 IN SUPPORT OF THE JUDGMENT BELOW

10 MS. RATNER: Mr. Chief Justice, and
11 may it please the Court:

12 The simplest reading of the saving
13 clause is the best one. The 2255 remedy is
14 adequate and effective to test a claim when the
15 sentencing court can fairly adjudicate that
16 claim. That means the inmate can get to
17 sentencing court, the court can hear the
18 relevant kind of claim, and the court has the
19 basic procedures it needs to decide the claim.

20 That's the commonsense approach that
21 this Court took in Haymond and Swain, and that's
22 how the saving clause applied for nearly 50
23 years from 1948 to 1996.

24 Petitioner and the Government want the
25 saving clause to mean something dramatically

1 different after 1996, but their theories run
2 head long not just into history but into Section
3 2255(h).

4 In (h), Congress said exactly when it
5 wanted to allow repeat collateral attacks and
6 not just that, (h)(2) was even more specific and
7 shows that Congress thought about when to allow
8 new claims after intervening decisions of this
9 Court. It chose constitutional decisions and
10 not statutory ones.

11 On top of all that, this Court
12 generally assumes that Congress acts rationally,
13 and neither Petitioner nor the Government has
14 any answer to a few really basic questions about
15 why Congress would have acted the way they think
16 it did.

17 One, why would Congress specify when
18 to allow repeat factual or constitutional claims
19 but would silently handle statutory claims by
20 sending them on a detour through the saving
21 clause?

22 Two, why would Congress send first
23 statutory claims to sentencing court but second
24 statutory claims to habeas court?

25 And three, as Justice Kagan's question

1 just alluded to and I don't think the Government
2 gave any real answer to, why would Congress give
3 better procedural treatment to repeat statutory
4 claims than to the constitutional claims it
5 elsewhere favored?

6 JUSTICE JACKSON: But don't those
7 questions all assume that Congress was thinking
8 about this problem?

9 I mean, I think one of the things that
10 Justice Barrett pointed out in her prior opinion
11 and that others have commented on is that there
12 could be the implication that they were copying
13 language from another framework dealing with
14 prisoners who don't have statutory claims and
15 that they overlooked the particular questions
16 that you pose in this case.

17 MS. RATNER: So, Justice Jackson, and
18 with all due respect to that suggestion in your
19 opinion, Justice Barrett, I think that every
20 indication is to the contrary.

21 If we look to the text, there are
22 specific areas in 2255 where Congress talked
23 about rules more generally, like in the statute
24 of limitations. And then, in 2255(h), it
25 narrows that to rules of constitutional law.

1 I think that's a pretty good
2 indication that it knew there would be some
3 claims that weren't constitutional ones, but it
4 just talked about constitutional ones in (h).

5 I think, generally, this Court assumes
6 that Congress is aware of its precedents. I
7 would think Congress would be aware of an
8 important precedent like Davis.

9 JUSTICE JACKSON: But let me ask you
10 this then. Why isn't -- isn't there another why
11 question then that comes from your reading,
12 which is, in a situation in which we have (h)
13 and (h) is surely saving some things from
14 elimination as successive petitions, the things
15 it's saving seem to be situations that are very
16 much like this one.

17 They -- they're -- they're saying you
18 can bring a second and successive petition if
19 there's newly discovered evidence or if there's
20 a new rule of constitutional law that's made
21 retroactive and therefore would apply to you.

22 Those two kinds of scenarios in which
23 Congress is making very clear that they wanted
24 people to be able to get past the second or
25 successive bar seem to me to be substantively

1 very similar to what is happening here to Mr.
2 Jones.

3 So my question is, why would Congress
4 have drawn the line to keep Mr. Jones out of the
5 second and successive passthrough but -- but
6 allowed for these other people to keep going?

7 MS. RATNER: So, first, as a matter of
8 statutory interpretation, I -- I do think you
9 should be drawing the inference that when
10 Congress has talked about similar things with
11 specificity and then left this one out, that
12 should be given some meaning.

13 You know, in terms of why, I think the
14 best explanation is -- is really twofold. I
15 mean, first, these are really the claims of the
16 most recent vintage. They were not recognized
17 as a basis for post-conviction relief until
18 Davis in 1974. So I could imagine Congress
19 taking a little bit of a last-in-first-out
20 approach when it cut down on claims in AEDPA.

21 I think, relatedly, we see throughout
22 AEDPA that Congress just thought that
23 constitutional claims were more important than
24 statutory ones. We see that in certificates of
25 appealability. It allows for appeals of

1 constitutional claims but not statutory ones.

2 JUSTICE JACKSON: But who's --

3 JUSTICE KAGAN: Why wouldn't Congress
4 have just said, and -- and -- and -- and these
5 statutory claims are precluded? I mean,
6 Congress did not say that. It knows that it has
7 a savings clause. It knows that the statutory
8 claims under the savings clause are going into
9 the habeas court. Why not just say it?

10 MS. RATNER: So I -- you know, I --
11 let me take the saving clause part separate.
12 Why not say it? I -- I think they probably
13 would think it's pretty obvious. When -- when I
14 tell my kids they can have a second snack but
15 only if it's fruits or vegetables, I don't
16 usually feel the need to say, but definitely not
17 ice cream. I feel like --

18 JUSTICE KAGAN: Yeah, a --

19 MS. RATNER: -- that's pretty well
20 implicit.

21 JUSTICE KAGAN: -- different
22 situation --

23 MS. RATNER: And --

24 (Laughter.)

25 JUSTICE KAGAN: -- I mean, because

1 whatever --

2 MS. RATNER: Well, I agree with that.

3 JUSTICE JACKSON: What if they had ice
4 cream before?

5 MS. RATNER: I agree with that.

6 JUSTICE JACKSON: But what if they had
7 ice cream before? What --

8 JUSTICE KAGAN: Whatever (h) means, I
9 mean, it's -- it's referring to -- it's
10 referring to 2255 motions, and -- and so you
11 have to make the jump to habeas, and the savings
12 clause tells you when and where to make the
13 jump. And without 2255(h), that jump would have
14 been made for statutory claims. So why not say
15 in 2255, and we mean statutory claims too?

16 MS. RATNER: So here are two things
17 that I think are really important historically.
18 These claims had never been brought in habeas.
19 They were not recognized again until 1974 in
20 Davis, and so they had only been brought in 2255
21 motions. And so I -- I think that maybe there
22 wasn't the natural thought then, oh, well,
23 they're just going to get -- they're going to
24 get sort of circumvented around, sent on a
25 detour into this habeas area where they had

1 never been. I -- I think that's part of it.

2 I mean, I do think the other part is
3 how the saving clause itself had applied
4 historically. I think Congress would have been
5 very surprised to learn that, after 1996, courts
6 would take the saving clause which had been a
7 true backstop in circumstances like a dissolving
8 sentencing court. In Haymond, the government
9 gave examples that it was probably there in case
10 there was war cutting off certain courts or in
11 case there was an execution where someone
12 couldn't get to a sentencing court fast enough.
13 It was a true backstop. And that was the
14 landscape that Congress was operating --

15 JUSTICE SOTOMAYOR: Counsel --

16 MS. RATNER: -- against.

17 JUSTICE SOTOMAYOR: -- I guess what
18 the Government would say and I think is the most
19 compelling argument is that the savings clause
20 specifically contemplates that a district court
21 would have denied relief in an initial 2255
22 petition. And so the question is, having
23 accepted that, what are the situations in which
24 it would believe 2241 would come into play? And
25 that is when traditional habeas relief would

1 have been granted. Putting aside the
2 Petitioner's belief that it's the same as cause
3 and effect, because I don't think so. I think
4 miscarriage of justice stood on its own.

5 I look at the words of the statute and
6 see that it explicitly does not preclude
7 traditional 2241 relief. That includes cases
8 that are defined as miscarriage of justices. I
9 don't know that I need to find a reason why
10 Congress didn't include statutory claims. It
11 didn't. And so I look at what the words of the
12 two sections are, and I say traditional habeas
13 relief applies.

14 MS. RATNER: So --

15 JUSTICE SOTOMAYOR: If there's a
16 miscarriage of justice here -- the Government
17 says there's not. It's agreeing with you on the
18 outcome of this case, and that's it.

19 MS. RATNER: So --

20 JUSTICE SOTOMAYOR: Why isn't that
21 enough? Why do I have to care about whether or
22 not why Congress didn't do it? It just didn't
23 do it.

24 MS. RATNER: Well, Justice Sotomayor,
25 I think the question then is just circling back

1 to what negative implications are we reading
2 from 2255(h) there? And --

3 JUSTICE SOTOMAYOR: No, I'm reading
4 the positive implications. 2241 does not
5 preclude and has always included miscarriage of
6 justice cases. Whether that's something that's
7 come up in Davis or Bailey or after Congress
8 wrote the words or didn't write the words, it
9 just didn't preclude that explicitly.

10 MS. RATNER: So maybe this is a
11 helpful way to frame this: It -- the rules for
12 second or successive 2255 motions used to be
13 evaluated by, is this a miscarriage of justice
14 or would this violate the ends of justice
15 exception? And what 2255(h) did was cut back on
16 that by essentially codifying what Congress
17 thought counted as sufficient miscarriages of
18 justice. And so I do think that it --

19 JUSTICE SOTOMAYOR: But it didn't say
20 that. It gave two examples and didn't preclude
21 all the others that fell under traditional
22 habeas.

23 MS. RATNER: And so then the question
24 is, should the Court read 2255's limits as just
25 all being self-defeating to the extent that

1 something would have been --

2 JUSTICE SOTOMAYOR: No, but you're --

3 MS. RATNER: -- available previously

4 --

5 JUSTICE SOTOMAYOR: -- reading it

6 right now --

7 MS. RATNER: -- and --

8 JUSTICE SOTOMAYOR: -- in a way that
9 gives no meaning to it at all because I don't
10 think -- you say it applies to cases that
11 wouldn't be 2255 situations.

12 MS. RATNER: I want to make sure I
13 understand your question. I -- I think maybe
14 you're saying a circumstance in which the saving
15 clause would apply for a second filing --

16 JUSTICE SOTOMAYOR: Yes, exactly.

17 MS. RATNER: -- if that's what you
18 mean, I think the circumstances would be just
19 the same as when it would apply for a
20 first filing.

21 JUSTICE SOTOMAYOR: Well, but --

22 MS. RATNER: But --

23 JUSTICE SOTOMAYOR: -- the problem is
24 that those circumstances today would mean you
25 wouldn't be in 2255 at all. You'd be in 2244.

1 MS. RATNER: So let me give an
2 example that maybe will make clear --

3 JUSTICE SOTOMAYOR: I'm sorry. 2241.

4 MS. RATNER: -- you know, there could
5 be someone who filed a first 2255 motion, and
6 then they are authorized under 2255(h) to file a
7 second, but now it is difficult or impossible to
8 get to a sentencing court for whatever reason.
9 The saving clause would apply in that context,
10 just as it would apply initially.

11 And, again, that's the way that it
12 applied historically. There's a much more
13 concerning type of superfluity on the other
14 side, which is that the saving clause really
15 didn't do anything for 50 years except to lie in
16 wait to spring into action and nullify a future
17 congressional amendment. And -- and that's
18 really what the vision of the saving clause
19 under both Petitioner and the Government's
20 theory here is. I mean, I -- I fully take the
21 point --

22 JUSTICE SOTOMAYOR: Thank you,
23 counsel.

24 MS. RATNER: I --

25 JUSTICE JACKSON: Can I ask, does the

1 rule of lenity have any role to play here? I
2 mean, it seems like we're asking a lot of
3 questions about what it is that the Government
4 or Congress wanted in this particular situation,
5 and what I don't know is why our confusion about
6 that should be interpreted in such a way as to
7 weigh against the criminal defendant who'd be
8 sitting in jail for conduct that Congress says
9 is not a crime. So, if we don't know -- if we
10 don't know, like, the situation exactly what
11 Congress is doing, why wouldn't we set up the
12 interpretive scheme to say, as many courts have,
13 as you -- as you pointed out, we're going to
14 read this to allow this person to bring another
15 habeas petition, and if Congress thinks that's
16 wrong, they can change it, clearly?

17 MS. RATNER: So the rule of lenity is
18 a principle of construction of penal statutes.
19 This Court has never applied it in circumstances
20 sort of assessing the general availability of
21 review here. So I don't -- I don't think that
22 that has any formal applicability.

23 And I think, generally, the sort of
24 clear statement rule that both sides are -- are
25 pushing on here doesn't really apply here where

1 what we're talking about is Congress shaping an
2 existing equitable doctrine. What the Court was
3 concerned about in cases like McQuiggin and
4 Holland is sort of that Congress had forgotten
5 about this equitable doctrine -- doctrine. But,
6 as -- as I alluded to before in my conversation
7 with Justice Sotomayor, what 2255(h) represents
8 is the congressional codification of an evolving
9 abuse of the writ doctrine. That's how this
10 Court described it in cases like Felker. And so
11 this isn't a circumstance where there's sort of
12 a body of law Congress forgot about. They've
13 sort of codified the specific rules that they
14 want to apply.

15 JUSTICE JACKSON: But -- but
16 Mr. Feigin says and they included the savings
17 clause to make sure that in that codification
18 they didn't forget anything. And so, when you
19 then enter into this new world and there's
20 confusion about whether this thing is actually
21 in there, why shouldn't we interpret it to,
22 consistent with the savings clause, allow it to
23 proceed? They didn't speak to it and they were
24 trying to codify, and when we get there, we
25 don't see a clear statement that says this is

1 either in or out, so then why wouldn't our
2 position be, Congress, you have to tell us
3 clearly that you meant to keep this out,
4 especially when we see other provisions that
5 look very similar that you are allowing to go
6 forward?

7 MS. RATNER: Because Congress acted
8 against a backdrop of a saving clause that
9 didn't look like that, right, they wouldn't have
10 expected the saving clause to swoop in and
11 provide a remedy here. It had never applied in
12 those circumstances for almost half a century.
13 And so to treat the saving clause as doing
14 something new as a way of kind of wedging an
15 actual innocence exception into a statute I -- I
16 think is not consistent with the framing there.

17 JUSTICE KAGAN: But I'm just wondering
18 whether, you know, Congress wanted to enact the
19 savings clause, rather than having particular
20 applications in mind, actually thought exactly
21 what the savings clause says.

22 Whenever, this is ineffective as
23 compared to the traditional habeas remedy. So
24 your interpretation, which is, you know, is it
25 practically available and is it practically

1 accessible and what's -- what's the other one
2 you used, is it --

3 MS. RATNER: Do you have the
4 procedures you need?

5 JUSTICE KAGAN: You know, legally
6 cognizable, as I think, it feels very
7 jerry-rigged. It feels as though you're sort of
8 taking these out of thin air when the text
9 doesn't say anything about them.

10 And, you know, you're -- you're trying
11 to give some substance to the savings clause,
12 but the savings clause just expresses a very
13 simple principle, which is when, you know, the
14 2255 motion isn't working, the habeas court
15 takes over.

16 MS. RATNER: I think I don't really
17 quibble with that principle, but the question of
18 when it's not really working I think relates to
19 is there a problem with the sentencing court.

20 That's what Congress changed in 1948,
21 the venue. It put things in the sentencing
22 court. It didn't change the scope. So it was
23 worried about problems with that venue, and I
24 think the idea that what it actually does is
25 counteract any limitations that a future

1 Congress would put on 2255 is not really a
2 sensible way to read that.

3 I mean, I think if we thought of
4 the -- the statute of limitations, for example,
5 as a different provision, in 2255, there's a
6 one-year statute of limitations. There's no
7 statute of limitations for federal habeas.

8 It would be quite surprising to
9 Congress, I think, to learn that when it put
10 that one-year statute of limitations, that was
11 really just a venue-shifting provision. If you
12 file within one year, you stay in 2255, but
13 after a year, you're going to get circled around
14 to habeas instead because now 2255 is inadequate
15 or ineffective.

16 And if that's true for a statute of
17 limitations principle, I think the same should
18 be true for (h), which is really just a
19 statutory res judicata principle.

20 You know, I do understand the general
21 concern by the Court here about harshness. This
22 Court looked at 2255(h) and said Dodd is
23 harsh -- excuse me, said in Dodd it looked at
24 2255(h) and said AEDPA and 2255(h) are harsh,
25 but they are not absurd, and so it had to apply

1 them as is.

2 And I think it's important to recall
3 that there is a backstop here and it's executive
4 clemency. I know that the Government says, you
5 know, look, it's too easy to cry clemency in
6 every case, but this is a very unusual set of
7 cases that the Government handled exclusively by
8 executive clemency until 1974, and after AEDPA
9 in 1996, the first thing the Government told
10 courts was, if courts step back, we're ready to
11 step up again.

12 This has been our prerogative for most
13 of the nation's history. And I do think that
14 should give the Court some comfort here, even if
15 it wouldn't make the same judgment calls that
16 Congress made in 2255.

17 JUSTICE JACKSON: Can I just ask one
18 more thing? You said 2255 -- you sort of agreed
19 with Justice Kagan's premise that maybe the
20 savings clause is generally about when is 2255
21 not working, and you suggested a couple of
22 situations in which that wouldn't be -- when it
23 wouldn't work because the court is not there or
24 because the nature of the relief is such that
25 you couldn't get it or some sort of technical

1 situations like that.

2 What I'm still not so clear on is why
3 2555 could not be working if, because of one of
4 its provisions, it's, you know, unconstitutional
5 or it doesn't allow you or doesn't allow for
6 actually innocent people to have one clear shot
7 at relief.

8 Like why isn't that a species of 2255
9 is not working and, therefore, you need to be in
10 the habeas lane?

11 MS. RATNER: So let me for just a
12 moment put aside the constitutional point as
13 I -- I think there's really no argument that
14 we're even in a realm of unconstitutionality
15 here and -- and just focus on the rest.

16 The problem is that what we are
17 talking about in 2255(h) or with a statute of
18 limitations are really ordinary procedural
19 limits. 2255(h) is effectively a res judicata
20 provision. And I think it would be very
21 surprising for this Court to say that when an
22 ordinary res judicata provision is applied, when
23 an ordinary statute of limitations is applied,
24 those render a procedure inadequate
25 or ineffective.

1 JUSTICE JACKSON: But, in those
2 situations, isn't there a previous time in which
3 you've had the chance to make your case? I
4 understand what you're saying if it was actually
5 operating like an ordinary res judicata
6 provision, you -- you know, an ordinary statute
7 of limitations where the person had an
8 opportunity because the claim existed and they
9 didn't bring it, so too bad, so sad.

10 But what I'm worried about is 2255
11 being read to operate to preclude people who
12 never had the chance to make this claim to be
13 able to make it. You're putting those same
14 limits on it. And I'm wondering, isn't that a
15 situation in which 2255 is not working such that
16 we need the savings clause?

17 MS. RATNER: So, no, Justice Jackson,
18 and this is an ordinary res judicata provision.
19 This Court said I believe in the '80s or '90s in
20 Federated Department Stores against Moitie that
21 res judicata operates even if there has been a
22 subsequent claim, a subsequent change in the law
23 that shows that a prior decision is wrong, that
24 res judicata is -- there's no exception to res
25 judicata in those circumstances. So the fact

1 that 2255(h) would apply a similar approach and
2 then allow certain very specific exceptions I --
3 I don't think is inconsistent with that
4 tradition or enough to say that this is an
5 inadequate procedure.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Justice Thomas.

9 JUSTICE THOMAS: Yes, counsel, could
10 you take a step back and before Davis and before
11 AEDPA? I think we spent a lot of time spinning
12 a little -- a lot of different parts. What was
13 2255 designed to address, what problems, and how
14 did it work?

15 MS. RATNER: Sure. So I -- I think
16 everyone is on the same page that 2255 was
17 designed to address kind of an influx in claims
18 in habeas court as a result of some expansions
19 of habeas both congressional and judicial. And
20 so what -- I -- I -- I think the key in
21 understanding the -- the savings clause is what
22 Congress did was not to attempt to change the
23 scope of habeas as it existed in 1948. It
24 wanted to change the venue. It wanted to make
25 things more convenient and move them to

1 sentencing court.

2 And so, if you think of it that way,
3 the saving clause is sort of a natural pair,
4 that it comes and saves the circumstances in
5 which there's a problem with the sentencing
6 court as opposed to the habeas court. And I
7 don't think that that -- that sort of analogy
8 extends to future procedural limits that
9 Congress may put on it.

10 CHIEF JUSTICE ROBERTS: Justice Alito?
11 Justice Sotomayor?

12 JUSTICE SOTOMAYOR: Except that
13 Congress didn't choose practical problems.
14 Those were -- was a proposal and they rejected
15 that proposal. They had broader language than
16 that proposal. So it wasn't just practical
17 problems. I thought we have said that in 1948
18 Congress was thinking about the venue issue but
19 that it wanted to preserve all traditional
20 habeas remedies. It wasn't looking to limit
21 them at that time.

22 MS. RATNER: So let me just take the
23 two parts of that question. The first is I -- I
24 wouldn't give too much meaning to the different
25 language here because this wasn't sort of a

1 direct amendment of the Judicial Conference's
2 proposal. If anything, there were
3 contemporaneous suggestions that Congress chose
4 inadequate or ineffective because the Judicial
5 Conference's proposal was a little bit too
6 loose. It said practicable or for other
7 reasons, and there were concerns that courts
8 might engage in almost a balancing test similar
9 to forum non conveniens of is this convenient to
10 be in sentencing court versus habeas court. So
11 Congress wanted to make sure it was true in
12 feasibility and for that reason chose inadequate
13 or ineffective. I think that's probably the
14 most consistent with the textual and historical
15 narrative here.

16 As for what this Court has said, I --
17 I totally agree that in Haymond it suggested
18 that at the time as of 1948, these -- the remedy
19 in sentencing court was contemporaneous -- was
20 more or less identical to the remedy in habeas,
21 but that wasn't its benchmark for inadequacy.
22 When the Court later in the opinion went to
23 decide whether this was inadequate, it did
24 something much more like what I did at the start
25 of my argument and said, well, you kind of need

1 a hearing here, you can get a hearing, so it
2 seems adequate to us.

3 The same is true in Swain. In fact, I
4 don't even think Swain would survive the
5 Government's theory because there was a
6 difference between habeas and sentencing court
7 there, but the analysis was the same.

8 CHIEF JUSTICE ROBERTS: Justice Kagan?

9 JUSTICE KAGAN: Yeah. Just along the
10 same lines, I -- I -- I mean, Congress did
11 reject language that more fits your argument
12 here. And you're saying, well, we're taking
13 this general language, which basically says, if
14 it's not working here, go there. We're taking
15 this general language and we're saying -- and
16 you're saying that that is true when it's not
17 practically accessible; that is true when it's
18 not legally cognizable in the 2255 forum.

19 Why not also when it's
20 jurisdictionally barred in the 2255 forum? I
21 mean, how is that any less it's not working over
22 here, so you should go over there and get the
23 traditional benefit of the habeas court?

24 MS. RATNER: Yeah. So I think that
25 it's jurisdictionally barred just sort of

1 overlooks what the full question here is, which
2 is, is a remedy that offers you a prior full and
3 fair opportunity but now bars you because of an
4 ordinary application of res judicata, is that
5 remedy inadequate or ineffective?

6 And I really do think courts around
7 the country would be quite surprised to hear
8 that whenever they apply Wright and Miller on
9 res judicata that they are becoming inadequate
10 and ineffective. And that's why there is a
11 basic difference between procedural limits in
12 2255, which can't be the source of inadequacy
13 without just nullifying everything that Congress
14 has done and the more fundamental question of
15 can you get to this Court, can this Court hear
16 these types of claims.

17 CHIEF JUSTICE ROBERTS: Justice
18 Gorsuch?

19 Justice Kavanaugh?

20 Justice Barrett?

21 JUSTICE JACKSON: Just one final
22 thing. I think the confusion that I'm having is
23 that there appears to be common ground between
24 you and the other side that Congress -- what
25 Congress was trying to do was not change the

1 scope of habeas. And there also seems to be
2 common ground, I think, that if you apply these
3 procedural limits, you are changing the scope of
4 habeas because you're cutting off claims that
5 you could have previously brought.

6 So that brings me to the question of
7 don't we need a clear statement from Congress
8 that, given its original intentions and the
9 effect of the application of what you say is
10 just an ordinary procedural rule, don't we need
11 a clear statement that that's what they
12 intended? And why not?

13 MS. RATNER: So, Justice Jackson, with
14 respect to your first point, I think there is
15 common ground that in 1948 Congress wanted these
16 to be effectively the same. I guess we differ
17 in that I don't believe that Congress in 1948
18 handcuffed a future Congress from preventing any
19 limits on 2255 without going back and revising
20 an essentially defunct habeas remedy at that
21 point, although I should flag, if the Court is
22 considering going down that path, it is going to
23 grapple -- have to grapple with the provision
24 2244(a) that the Government mentioned, and, in
25 fact, it did in AEDPA revise the availability of

1 second or successive habeas applications.

2 But, you know, putting that to the
3 side and asking your -- your more general --
4 answering your more general question, there is a
5 clear statement here in 2255(h), it could not be
6 clearer, that Congress set forth precisely the
7 circumstances in which it wanted to allow a
8 second claim. And, ordinarily, this Court would
9 draw a clear negative implication, as I think
10 the Government does, for the conditions of
11 (h)(1) and (h)(2) but just not for (h) overall.

12 I -- I think, beyond that, there's no
13 kind of overarching clear statement rule that
14 would apply here, and, certainly, if -- if the
15 provision was clear enough in Dodd, I think it's
16 clear enough here as well.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Mr. Ortiz, rebuttal.

20 REBUTTAL ARGUMENT OF DANIEL R. ORTIZ
21 ON BEHALF OF THE PETITIONER

22 MR. ORTIZ: Your Honors, I just have
23 three basic quick points. The first is that
24 it's -- one of the reasons for a savings clause
25 of this type is that Congress doesn't have to

1 actually think of everything. If, for example,
2 Congress in 1996 had added (h)(1) but not
3 (h)(2), I doubt that anyone would believe that
4 it categorically excluded review of all new
5 constitutional claims of innocence.

6 Also, discrepancies between
7 traditional habeas procedure and standards under
8 those of 2255 are a feature, not a bug, of a
9 savings clause like this, and Congress can
10 always change things subject to constitutional
11 constraints.

12 Second, Your Honor, I just want to
13 point out that a petitioner in Mr. Jones's
14 situation cannot actually raise, as the Eighth
15 Circuit believed, his claim of statutory
16 innocence in his initial 2255 motion. If he had
17 raised it on direct appeal, as Mr. Jones had, it
18 would be foreclosed by the law of the case
19 doctrine. If he had not raised it in his
20 initial 2255 motion, it would be barred by
21 procedural default. So there's no way really to
22 get the claim into district court in the first
23 place.

24 But, if somehow he had actually gotten
25 into district court in the first place, it would

1 be barred by 2253(c)(2), which allows the court
2 of appeals to certify only constitutional
3 questions, not statutory questions. So the hope
4 of actually asking for an en banc to overturn
5 the foreclosing circuit precedent is pretty
6 hopeless, as is the hope for a cert grant.

7 Also, finally, Your Honors, I'd like
8 to point out that there's no real prospect of
9 opening up the floodgates here. This is a very
10 narrow -- under anyone's standards, this is a
11 very narrow category of cases but also a
12 fundamentally very important one.

13 Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Ms. Ratner, this Court appointed you
17 to brief and argue this case as an amicus curiae
18 in support of the judgment below. You have ably
19 discharged that responsibility, for which we are
20 grateful.

21 The case is submitted.

22 (Whereupon, at 11:22 a.m., the case
23 was submitted.)

24

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Official

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