No. 21-857

In the Supreme Court of the United States

MARCUS DEANGELO JONES, PETITIONER,

v.

DEWAYNE HENDRIX, WARDEN

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

BRIEF FOR HABEAS SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

ERIN M. CHOI
WEIL, GOTSHAL & MANGES LLP
200 Crescent Court
Suite 300
Dallas, Texas 75201

BRIAN G. LIEGEL
WEIL, GOTSHAL & MANGES LLP
1395 Brickell Avenue
Suite 1200
Miami, Florida 33131

GREGORY SILBERT
Counsel of Record
AARON J. CURTIS
OLIVIA WALSETH
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000
gregory.silbert@weil.com

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE* [1]

Amici curiae are legal scholars at universities across the country with expertise in habeas corpus and criminal law. They have collectively spent decades researching, studying, teaching, and writing about the writ of habeas corpus. *Amici* share an interest in seeing habeas law applied in a way that ensures the just and timely adjudication of claims.

The *amici* are Valena Beety (Arizona State University); John Blume (Cornell University); Erwin Chemerinsky (University of California, Berkeley); Eric M. Freedman (Hofstra University); Brandon Garrett (Duke University); Miriam Gohara (Yale University); Jonathan Hafetz (Seton Hall University); Brandon Hasbrouck (Washington and Lee University); Randy Hertz (New York University); Aziz Huq (University of Chicago); Sheri Lynn Johnson (Cornell University); Lee Kovarsky (University of Texas); Justin Marceau (University of Denver); Eve Brensike Primus (University of Michigan); Ira P. Robbins (American University); Jordan Steiker (University of Texas); Stephen I. Vladeck (University of Texas); and Larry Yackle (Boston University).[2]

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[1] Pursuant to S. Ct. Rule 37.6, counsel for all parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part and no person or entity other than the *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

[2] Institutions are listed for identification purposes only.

PRELIMINARY STATEMENT

An individual is mistakenly convicted of a crime in federal court and wrongly condemned to serve a lengthy prison sentence for acts that are not actually criminal under the law. He files a timely motion challenging his sentence under 28 U.S.C. § 2255, but because of an error in existing precedent, the district court that sentenced him denies his motion. The court of appeals, applying its governing (but incorrect) precedent, affirms. The court of appeals then denies rehearing and this Court denies his petition for a writ of certiorari. In a subsequent case brought by another defendant, however, this Court clarifies the law and rules in the defendant's favor on the exact same basis that our claimant raised in his Section 2255 motion.

What is our hypothetical claimant to do? Congress has provided the answer: Because Section 2255(e) contains a "saving clause," he may file a habeas corpus petition under Section 2241.

By its plain text, Section 2255(e) reaches individuals, like our hypothetical claimant, who previously sought relief to no avail: It applies to those who are "authorized to apply for relief by motion" under Section 2255 and who either "failed to apply for relief, by motion, to the court which sentenced" them *or* were "*denied … relief*" by "such court." 28 U.S.C. § 2255(e) (emphasis added). And, by its plain text, the saving clause reaches just the circumstances in our hypothetical, where the claimant came up short not due to his own failures but because the courts failed to give him the relief to which he was entitled. That is, it permits a prisoner to file a habeas petition if "the remedy by motion [under Section

2255] is inadequate or ineffective to test the legality of his detention." *Id.*

According to this Court's precedent, the Section 2255 process is inadequate or ineffective if the claimant does not have a *meaningful* opportunity to demonstrate that he is being wrongly imprisoned. At a minimum, that means the courts that reviewed his Section 2255 motion on the merits must have *at least had the power* to release him by correctly applying the law to the facts of his case. And in our hypothetical case, the courts that considered the motion on the merits did not have that power. Bound by incorrect precedent, they had no choice except to deny relief. The only courts that *could* have granted the motion—this Court and the en banc court of appeals—never reached the merits of the claimant's challenge because they denied discretionary review. And Section 2255(h) now forecloses him from filing a second motion. The Section 2255 process therefore provides the claimant no meaningful opportunity to demonstrate that he is imprisoned for a crime he did not commit. Thus, under a plain reading of the statutory text, the "remedy by motion is inadequate or ineffective to test the legality of his detention." *Id.*

Most courts of appeals that have reached the issue agree that the saving clause would apply in cases like our hypothetical. But three have read the statute more narrowly, contrary to its plain text. The Eighth, Tenth, and Eleventh Circuits would prohibit our hypothetical claimant from bringing his habeas corpus petition—and deny him all relief—simply because his original Section 2255 motion was denied (even though his position was correct and he pursued all procedural options available

to him). According to these courts, the saving clause applies only when a claimant was procedurally barred from bringing a Section 2255 motion in the first place. That interpretation defies the statute's text, which provides that the saving clause reaches claims by individuals "authorized" to bring Section 2255 motions who have already been "denied … relief." The statute's historical context confirms that habeas corpus remains available to our hypothetical claimant. And if any doubt remains, the doctrine of constitutional avoidance clinches it.

To be sure, the hypothetical described above diverges from the facts of Mr. Jones's case, but it highlights the flawed logic employed by those courts that have drawn the boundaries of the saving clause in the narrowest of terms. The saving clause must save something. And if it does not apply in our hypothetical claimant's case, then it does not apply at all. This Court should reject the incorrect, contra-textual interpretation adopted by the Eighth, Tenth, and Eleventh Circuits and instead recognize that the text of Section 2255(e) allows claimants to file habeas corpus petitions when they have been denied a meaningful opportunity to challenge the legality of their detention.

SUMMARY OF ARGUMENT

I.A. Section 2255(e)'s saving clause has a narrow reach. A claimant who is "authorized to apply for relief" under Section 2255 may resort to the saving clause only when the Section 2255 process is "inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). The Section 2255 process does not adequately and effectively test the legality of a claimant's detention if erroneous precedent at the time of his original Section

2255 motion dooms his claim of legal innocence from the start. In that circumstance, the court that hears his post-conviction motion lacks the power to order his release, and Section 2255 is nothing more than a theoretical remedy that offers him no meaningful opportunity to demonstrate that he is being wrongly imprisoned.

B. Section 2255's historical context confirms this natural reading of the statutory text. When Congress enacted Section 2241 in 1867, it expanded the scope of habeas corpus to encompass any case in which a prisoner is restrained of his liberty in violation of any law of the United States. And when Congress enacted Section 2255 several decades later, it did so not to modify the scope of federal habeas corpus law, but merely to ensure that the post-conviction proceedings took place at the site of sentencing, rather than the site of detention. Though Congress subsequently modified the law in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), it nonetheless left Section 2255(e) untouched. The saving clause therefore continues to protect those who are detained in violation of the law and have had no meaningful opportunity to challenge their wrongful detention by motion under Section 2255.

C. The doctrine of constitutional avoidance likewise requires this Court to adopt an interpretation of the saving clause that reaches legal-innocence claims that were barred by existing precedent at the time of a claimant's original Section 2255 motion. If the saving clause were interpreted more narrowly, Section 2255 would raise constitutional concerns under the Suspension Clause, the Due Process Clause, and the Eighth Amendment.

II.A. The Eighth, Tenth, and Eleventh Circuits have taken a narrower view and held that the saving clause is limited to cases where a prisoner's claim was *procedurally* barred at the time of his initial Section 2255 motion. But this view is contrary to the statute's plain text, which makes the saving clause applicable to prisoners "authorized" to bring Section 2255 motions who were "denied … relief." The courts of appeals have described only two circumstances in which this narrow interpretation of the saving clause would apply: where the sentencing court no longer exists, and where the claimant challenges only the manner in which his sentence is carried out (not the underlying conviction). But individuals in those circumstances have never been able to file Section 2255 motions. And unless a claimant "is authorized to apply for relief by [Section 2255] motion," the general bar on Section 2241 petitions (and the saving clause's exception to that general rule) does not apply in the first place. 28 U.S.C. § 2255(e).

B. Contrary to the Eighth, Tenth, and Eleventh Circuits, the saving clause must allow at least some *successive* claims—that is, habeas petitions by prisoners who already filed Section 2255 motions. Section 2255(e) expressly states that the saving clause is sometimes available after the sentencing court has already ruled on a claimant's initial Section 2255 motion and "denied him relief." Thus, this Court should reject the lower court's unnatural and contra-textual reading of the saving clause.

ARGUMENT

I. The Saving Clause Encompasses Previously Foreclosed Claims Of Legal Innocence That Are Now Available Because Of A Retroactive Clarification Of The Law

The saving clause applies, at a minimum, in cases where a retroactive clarification of law renders claimants legally innocent and their claims were foreclosed by the erroneous law when they filed their original Section 2255 motions. This is evident from the plain text of Section 2255, its historical context, and the doctrine of constitutional avoidance.

A. The Plain Text And Structure Of Section 2255(e) Show That The Saving Clause Reaches Some Successive Claims That Were Foreclosed When Claimants Filed Their Original Motions

1. "When construing a statutory provision, [the Court should] begin with the text." *Rutledge v. Pharm. Care Mgmt. Ass'n*, 141 S. Ct. 474, 483 (2020). Statutory interpretation must account for both "the specific context in which … language is used" and "the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). A statutory "provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme … because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988); *accord Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 321 (2014). Thus, when interpreting the statutory text, this Court must view the

saving clause within the broader context of Section 2255(e) and the statutory framework as a whole.

2. Section 2255(e) lays out three criteria that must be met before the saving clause comes into play.

First, the claimant must be "authorized to apply for relief by motion" under Section 2255. 28 U.S.C. § 2255(e). Section 2255(a) specifies who is authorized to "move the court" for relief. The claimant must be (1) "[a] prisoner in custody" (2) "under sentence of a court established by Act of Congress" (3) who is "claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States" (or certain other grounds). *Id.* § 2255(a). Only prisoners who meet all these requirements are eligible for relief under the saving clause.

"A statutory 'saving clause' (like the one in § 2255(e)) is a carve-out from the general requirements of a statute, and if the statute does not apply to begin with, then the 'saving clause' never comes into play." *McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1108–09 (11th Cir. 2017) (Jordan, J., concurring in part and dissenting in part). If the claimant has never been "authorized to apply for relief by motion" under Section 2255, then nothing bars a federal court from "entertain[ing]" an "application for a writ of habeas corpus" under Section 2241 in the first place. 28 U.S.C. § 2255(e). In those circumstances, there is nothing for the saving clause to save. As discussed below, the narrow view adopted by the Eighth Circuit in this case contravenes this textual prerequisite by only applying the saving clause in cases where claimants are *not* authorized to file motions under Section 2255.

Second, the saving clause is available when either (a) the claimant "has failed to apply for relief, by motion, to the court which sentenced him," or (b) "such court has denied him relief." *Id.* This provision "necessarily contemplates that the saving clause will be used to bring at least some types of second or successive claims." *McCarthan*, 851 F.3d at 1123 (Rosenbaum, J., dissenting). "The words 'such court' refer to 'the court which sentenced him,' so the words 'such court has denied him relief' unambiguously contemplate that a prisoner previously made at least a first § 2255 motion, and his sentencing court denied it." *Id.* at 1124 (footnote omitted). To be certain, Congress placed some limitations on successive Section 2255 motions in AEDPA. But that same Congress chose to leave in place the language in Section 2255(e) making the saving clause applicable after a court has "denied [a claimant] relief" under Section 2255. Thus, there must be at least some situations in which the saving clause "saves" successive claims that are otherwise precluded by AEDPA's limitations in Section 2255(h).

Third, the saving clause applies only when "the remedy by motion is inadequate or ineffective to test the legality of [the claimant's] detention." 28 U.S.C. § 2255(e). Viewing this text within the context of the statute as a whole, the phrase "remedy by motion is inadequate or ineffective" must mean there is a deficiency in the Section 2255 process, even though the sentencing court previously "denied [the claimant] relief" in a Section 2255 motion (or the claimant "failed to apply for relief"). *Id.* The statutory text thus recognizes that the denial of re-

lief (or failure to ask for relief) sometimes happens because Section 2255 is not adequate and effective to test the legality of detention.

3. This reading of the statute makes sense because "[w]hen Congress has intended to replace traditional habeas corpus with habeas-like substitutes, as was the case in [Section 2255], it has granted to the courts broad remedial powers to secure the historic office of the writ." *Boumediene v. Bush*, 553 U.S. 723, 776 (2008). Section 2255 "replaced traditional habeas corpus for federal prisoners (at least in the first instance) with a process that allowed the prisoner to file a motion with the sentencing court on the ground that his sentence was, *inter alia*, 'imposed in violation of the Constitution or laws of the United States.'" *Id.* at 774–75 (citation omitted). But this Court has instructed that a "substitute for habeas corpus" is "adequate" only if 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." *Id.* at 779 (emphasis added and citation omitted).[3] "And the habeas court must have the

[3] *See also* Brandon Hasbrouck, *Saving Justice: Why Sentencing Errors Fall Within the Savings Clause, 28 U.S.C. § 2255(e)*, 108 GEO. L.J. 287, 307–08 (2019) ("[T]he correct inquiry is whether the process afforded by section 2255 can fairly be described as providing 'a *meaningful* opportunity' for relief—a nominal opportunity … is constitutionally insufficient." (citation omitted)); *In re Davenport*, 147 F.3d 605, 609 (7th Cir. 1998) (An adequate remedy must "give a prisoner a reasonable opportunity to obtain a reliable judicial determination of the fundamental legality of his conviction and sentence.").

power to order the conditional release of an individual unlawfully detained ...." *Boumediene*, 553 U.S. at 779.[4]

Considering Section 2255(e) as a whole, the most natural reading of the statutory text is this: "the remedy by motion is inadequate or ineffective to test the legality of [a claimant's] detention" when the Section 2255 process does not give him a meaningful opportunity to demonstrate that he is being detained because of an erroneous interpretation of the law. If erroneous precedent at the time of his original motion precludes relief on the merits, then the court does not have the power to order his release. The Section 2255 motion is reduced to no more than a remedy in theory—one that offers the claimant no meaningful opportunity to test the legality of his detention.

This reading does not mean that every claimant whose original Section 2255 claim is foreclosed by precedent may resort to the saving clause. But, at a minimum, when a claimant sits in prison because of a court's error, not his own; when the courts that heard his meritorious Section 2255 motion had no power to grant it; and when a subsequent, retroactive clarification of the law proves him innocent—the Section 2255 process is

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[4] *See also Inadequate*, BLACK'S LAW DICTIONARY 902 (4th ed. 1951) ("Insufficient; disproportionate; lacking in effectiveness or in conformity to a prescribed standard or measure."); *Inadequate*, CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH 573 (3d ed. 1949) ("Not adequate (*to* purpose, *to* do); insufficient."); *Ineffective*, WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1934) ("Not producing, or incapable of producing, the intended effect; ineffectual; as, an *ineffective* appeal, effort."); *Ineffective*, CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH 588 (3d ed. 1949) ("Not producing the desired effect ....").

"inadequate or ineffective" and the claimant may turn to the Great Writ to assert his legal-innocence claim. Without this safety valve, Section 2255 would require our justice system to imprison a person "for an act that the law does not make criminal" because of judicial error—even after the law has been clarified and applied retroactively—which would constitute "a complete miscarriage of justice." *Davis v. United States*, 417 U.S. 333, 346–47 (1974).[5] The saving clause exists to prevent claimants from being imprisoned—possibly for decades—for acts that do not violate United States law.

B. The Historical Context Of Section 2255 Confirms The Plain Meaning Of The Statutory Text

1. The historical context behind the enactment of Section 2255 confirms that the saving clause in Section 2255(e) applies, at a minimum, when an error in precedent denies legally innocent prisoners a meaningful opportunity to challenge their detention. While the Great Writ originated in England, *see* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *129, Congress's first word on the subject came in the Judiciary Act of 1789, *see United States v. Hayman*, 342 U.S. 205,

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[5] *See also Davenport*, 147 F.3d at 611 ("A federal prisoner should be permitted to seek habeas corpus only if he had no reasonable opportunity to obtain earlier judicial correction of a fundamental defect in his conviction or sentence because the law changed after his first 2255 motion."); *In re Dorsainvil*, 119 F.3d 245, 251 (3d Cir. 1997) ("[I]t is a 'complete miscarriage of justice' to punish a defendant for an act that the law does not make criminal … when the AEDPA amendment to § 2255 makes that collateral remedy unavailable." (quoting *Davis*, 417 U.S. at 346)).

210 (1952). This initial act "authorized all federal courts … to grant the writ of habeas corpus when prisoners were 'in custody, under or by colour of the authority of the United States, or [were] committed for trial before some court of the same.'" *Felker v. Turpin*, 518 U.S. 651, 659 (1996) (alteration in original) (quoting Judiciary Act of 1789, ch. 20, 1 Stat. 73, 82). Congress greatly expanded the scope of federal habeas corpus when it enacted Section 2241 in 1867, extending it to "all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." *Hayman*, 342 U.S. at 211 (citation omitted).

2. In 1948, Congress enacted Section 2255 to address "practical problems that had arisen in the administration of the federal courts' habeas corpus jurisdiction." *Id.* at 210. In particular, requiring claimants to file Section 2241 petitions in the jurisdictions in which they were imprisoned made collateral review more difficult because those locations were often "far from the scene of the facts, the homes of the witnesses and the records of the sentencing court." *Id.* at 214. Additionally, five district courts felt an "inordinate" share of the burden of habeas petitions because some of the country's largest federal penal institutions—Alcatraz, Atlanta, Leavenworth, McNeil Island, and Springfield Medical Center—were located within their territorial jurisdiction. *See id.* at 213–14 & n.18; Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 907–10 (1984) ("This concentration of prisoners in specific jurisdictions became a major factor in what the judiciary began to recognize as the habeas corpus 'problem.'").

To ease the burden, Congress enacted Section 2255 with the "sole purpose" to "minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum." *Hayman*, 342 U.S. at 219. "Nowhere in the history of Section 2255" is there "any purpose to impinge upon prisoners' rights of collateral attack upon their convictions." *Id*. Rather, as this Court has confirmed, the "historic context in which § 2255 was enacted" "conclusively" established "that the legislation was intended simply to provide in the sentencing court *a remedy exactly commensurate* with that which had previously been available by habeas corpus in the court of the district where the prisoner was confined." *Hill v. United States*, 368 U.S. 424, 427 (1962) (emphasis added).[6]

As this Court affirmed decades later, Section 2255 was "designed to strengthen, rather than dilute, the writ's protections." *Boumediene*, 553 U.S. at 776. The statute did not "eliminate[] traditional habeas corpus relief." *Id.* Instead, the "saving clause" ensured that "a writ of habeas corpus would be available if the alternative process proved inadequate or ineffective." *Id.* The clause, therefore, "preserve[d] habeas corpus review as

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[6] *See also* 2 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 41.2[a] (7th ed. 2020) ("As the history of section 2255 reflects, the legislative reform was motivated solely by a concern about the mechanics of processing federal prisoners' petitions and was not intended to alter the substance or scope of the traditional habeas corpus remedy."); Jonathan L. Hafetz, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 19 IMMIGR. & NAT'Y L. REV. 737, 770 n.252 (1998) (Section 2255 "was enacted in 1948 as an alternative to habeas corpus for federal prisoners and … affords the same relief.").

an avenue of last resort." *Id.* at 777; HERTZ & LIEBMAN, *supra* note 6, at § 41.2[b] ("Congress designed section 2255 to supplement and precede—but not entirely to supplant—the traditional habeas corpus remedy for federal prisoners.").

3. While the enactment of AEDPA "work[ed] substantial changes" to federal habeas corpus law, *see Felker*, 518 U.S. at 654, "AEDPA did not amend the 'safety-valve' clause in § 2255 that refers to the power of the federal courts to grant writs of habeas corpus pursuant to § 2241," *Dorsainvil*, 119 F.3d at 249; *see also McCarthan*, 851 F.3d at 1101 (Jordan, J., concurring in part and dissenting in part) ("The text of 28 U.S.C. § 2255(e) has remained unchanged since 1948, despite Congress' significant overhaul of federal collateral review in 1996."); *Davenport*, 147 F.3d at 609 ("Congress in enacting the Antiterrorism Act retained the safety hatch.").

Congress' decision to leave the saving clause untouched indicates its endorsement of this Court's previous interpretations of the provision. *See Banister v. Davis*, 140 S. Ct. 1698, 1707 (2020) ("When Congress intends to effect a change in existing law—in particular, a holding of this Court—it usually provides a clear statement of that objective." (citation omitted)); *Holder v. Hall*, 512 U.S. 874, 920 (1994) (Thomas, J., concurring) ("[R]eenactment of specific statutory language is intended to include a 'settled judicial interpretation' of that language." (citation omitted)); *see also Holland v. Florida*, 560 U.S. 631, 649 (2010) ("The importance of the Great Writ, the only writ explicitly protected by the Constitution, Art. I, § 9, cl. 2, along with congressional efforts to harmonize the new statute with prior law,

counsels hesitancy before interpreting AEDPA's statutory silence as indicating a congressional intent to close courthouse doors ….").

This is significant because before AEDPA's enactment, this Court had clearly established that the saving clause allows a prisoner access to the traditional habeas process if Section 2255 fails to provide a meaningful opportunity for relief.[7] Congress' decision to retain the saving clause, accordingly, indicates its decision to carry forward this pre-AEDPA understanding of the provision. And before AEDPA, the saving clause ensured there would be collateral review for individuals convicted for acts that the law does not make criminal who assert claims of legal innocence based on a subsequent clarification of the crime of conviction.

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[7] *See, e.g.*, *Hayman*, 342 U.S. at 219, 223 ("Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions…. In a case where the Section 2255 procedure is shown to be 'inadequate or ineffective', the Section provides that the habeas corpus remedy shall remain open to afford the necessary hearing."); *see also* Leah M. Litman, *Legal Innocence and Federal Habeas*, 104 VA. L. REV. 417, 487 (2018) ("When Congress originally enacted Section 2255 and also when it later enacted the AEDPA, there was a long history of special solicitude for habeas petitions that challenge the legality of the statute under which the defendant was convicted or sentenced, and whether the defendant had been sentenced to a term of imprisonment that was not lawfully authorized by the statute of his conviction.").

C. The Doctrine Of Constitutional Avoidance Further Supports The Natural Reading Of The Statutory Text

1. If any doubt remains, the doctrine of constitutional avoidance requires the Court to interpret the saving clause to reach, at a minimum, legal-innocence claims by prisoners who lacked a meaningful opportunity for relief under Section 2255 because of existing precedent at the time of their original motions. Under that doctrine, courts must "avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." *Gomez v. United States*, 490 U.S. 858, 864 (1989).

If the saving clause were interpreted too narrowly, Section 2255 would engender constitutional issues. This Court has "placed explicit reliance upon [the saving clause] in upholding [Section 2255] against constitutional challenges." *Boumediene*, 553 U.S. at 776; *see Hayman*, 342 U.S. at 223 (finding it unnecessary to "reach constitutional questions" because the saving clause "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'").

In the first case to adopt a narrow reading of the saving clause, then-Judge Gorsuch recognized that a broader application might be necessary in some circumstances "to avoid serious constitutional questions." *Prost v. Anderson*, 636 F.3d 578, 594 (10th Cir. 2011). It was only because the claimant in that case failed to "develop

any [constitutional] argument" or "identify what provision of the Constitution he thinks would be offended" that the Tenth Circuit opted to "leave these constitutional questions for another day and another case." *Id.*

The Second and Third Circuits have gone further, specifically holding that the saving clause is available where "the failure to allow for collateral review would raise serious constitutional questions." *Triestman v. United States*, 124 F.3d 361, 377 (2d Cir. 1997); *Dorsainvil*, 119 F.3d at 248 ("Were no other avenue of judicial review available for a party who claims that s/he is factually or legally innocent as a result of a previously unavailable statutory interpretation, we would be faced with a thorny constitutional issue.").

2. A narrow reading of the saving clause—like one that makes habeas corpus available only to prisoners who were procedurally barred from bringing Section 2255 motions—would raise a wide array of constitutional concerns.

First, it would place Section 2255 in conflict with the Suspension Clause, which "ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the 'delicate balance of governance' that is itself the surest safeguard of liberty." *Boumediene*, 553 U.S. at 745 (citation omitted); *accord Davenport*, 147 F.3d at 609 ("If in a particular case section 2255 as amended by the Act does not provide an adequate substitute for habeas corpus, the prisoner can seek habeas corpus, and so he cannot complain that the limitations in 2255 suspended whatever constitutional right he might have had, under the suspension clause or conceivably under the due process

clause, to be allowed to seek habeas corpus."); *Reyes-Requena v. United States*, 243 F.3d 893, 901 n.19 (5th Cir. 2001) ("[I]f Congress had not included the savings clause in § 2255, it is arguable that a problem would exist under the Suspension Clause."). "[T]he writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers. The test for determining the scope of [the Suspension Clause] must not be subject to manipulation by those whose power it is designed to restrain" (*i.e.*, Congress). *Boumediene*, 553 U.S. at 765–66.

Second, a narrow interpretation of the saving clause that prevents a claimant from challenging a conviction based on a retroactive clarification of law raises due process concerns. *See Triestman*, 124 F.3d at 379 ("[D]ue process questions would arise with respect to the AEDPA if we were to conclude that, by amending § 2255, Congress had denied Triestman the right to collateral review in this case."); *Davenport*, 147 F.3d at 609 (similar); Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333, 383–84 (2006) ("[T]o hold someone in detention without affording her a judicial forum to test whether the detention is lawful … is the very essence of a deprivation of liberty without due process." (citation omitted)).

Third, a narrow interpretation of the saving clause that results in the continued incarceration of an innocent person due to judicial error raises Eighth Amendment concerns. There is a "distinct possibility that the continued incarceration of an innocent person violates the Eighth Amendment," and "for that reason, such a person must have recourse to the judicial system." *Triestman*, 124 F.3d at 379 (citation omitted).

When a post-conviction clarification of the law gives rise to a claim of legal innocence, continued incarceration of the claimant raises serious constitutional concerns. To avoid these questions, the Court should read the saving clause to encompass, at a minimum, successive claims of legal innocence by prisoners whose claims were previously foreclosed by precedent. A contrary approach would leave people to languish in prison for decades without any meaningful opportunity for review.

II. A Narrow Reading Of The Saving Clause Would Conflict With The Statutory Text

The Eighth, Tenth, and Eleventh Circuits have held that the saving clause applies only when an initial Section 2255 motion would be procedurally barred, and that the clause cannot be invoked to bring successive claims. A plain-text reading of the clause demonstrates that this narrow interpretation is wrong.

A. The Saving Clause Is Not Limited To Cases Where Section 2255 Motions Were Procedurally Barred

1. According to the Eighth, Tenth, and Eleventh Circuits, "the saving clause permits a prisoner to bring a claim in a petition for habeas corpus" only if the claim "could not have been raised in his initial [Section 2255] motion to vacate." *McCarthan*, 851 F.3d at 1087; *accord Jones v. Hendrix*, 8 F.4th 683, 687 (8th Cir. 2021), *cert. granted*, No. 21-857, 2022 WL 1528372 (U.S. May 16, 2022); *Prost*, 636 F.3d at 584. As these courts read it, the clause reaches only a claimant who is *not* authorized to seek relief under Section 2255. But that is not what Section 2255(e) says. It bars courts from "entertain[ing]"

habeas petitions—*unless* saved by the saving clause—when the claimant "*is* authorized to apply for [Section 2255] relief." 28 U.S.C. § 2255(e) (emphasis added).

The narrow interpretation of the saving clause rests on a dubious reading of the term "remedy," which, according to the Eighth, Tenth, and Eleventh Circuits, "must refer to the available process—not substantive relief." *McCarthan*, 851 F.3d at 1086; *accord Jones*, 8 F.4th at 688; *Prost*, 636 F.3d at 584–85. These courts conclude that the Section 2255 *remedy* (read: process) is not "inadequate or ineffective" even when Section 2255 *relief* is foreclosed by an erroneous, binding precedent.

As an initial matter, this unnatural interpretation of "remedy" is inconsistent with the ordinary usage of that term in legal contexts. In the past two terms alone, every sitting member of this Court used the term "remedy" interchangeably with the term "relief."[8] The Court

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[8] *See Brown v. Davenport*, 142 S. Ct. 1510, 1523–24 (2022) ("[A] state prisoner should not receive federal habeas *relief* based on trial error unless he can show the error had a substantial and injurious effect or influence on the verdict…. [U]ndoing a final state-court judgment is an extraordinary *remedy* …." (emphasis added and citations omitted)); *id.* at 1533 (Kagan, J., dissenting) ("[T]he Court described how judicial decisions had expanded the availability of habeas relief to include challenges to final convictions…. The Court cited a string of 19th- and early 20th-century cases to illustrate how habeas had expanded to remedy convictions …." (cleaned up)); *Ramirez v. Collier*, 142 S. Ct. 1264, 1268 (2022) ("Ramirez is likely to suffer irreparable harm absent injunctive relief …. This is a spiritual harm that compensation paid to his estate would not remedy."); *In re Whole Woman's Health*, 142 S. Ct. 701, 704 (2022) (Sotomayor, J., dissenting) ("Mandamus relief is an extraordinary remedy appropriate for the exceptional circumstances now before this Court …." (citation omitted)); *TransUnion LLC v. Ramirez*, 141 S.

likewise used "remedy" to mean "relief" when Section 2255(e) was first enacted in 1948.[9] In other statutes,

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Ct. 2190, 2203 (2021) ("[T]o establish standing, a plaintiff must show … that the injury would likely be redressed by judicial relief. If the plaintiff does not claim to have suffered an injury that the defendant caused and the court can remedy, there is no case or controversy for the federal court to resolve." (citations omitted)); *Collins v. Yellen*, 141 S. Ct. 1761, 1770 (2021) ("[W]e remand for further proceedings to determine what remedy, if any, the shareholders are entitled to receive on their constitutional claim."); *Florida v. Georgia*, 141 S. Ct. 1175, 1179 (2021) ("As a remedy, Florida seeks an order requiring Georgia to reduce its consumption of Basin waters. Florida does not seek relief against the Corps."); *Tanzin v. Tanvir*, 141 S. Ct. 486, 492 (2020) ("A damages remedy is not just 'appropriate' relief as viewed through the lens of suits against Government employees. It is also the *only* form of relief that can remedy some RFRA violations."); *Amobi v. Brown*, No. 08-CV-1501(KBJ), 2021 WL 3722710, at *11 (D.D.C. Aug. 23, 2021) ("[T]hat is especially true where, as here, the plaintiff has not provided the Court with any reason to believe that the relief that his complaint requests is the *only* type of remedy that could *possibly* redress his alleged injuries.").

[9] *See, e.g.*, *United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 119 (1947) ("Declaratory relief is the singular remedy available here to preserve the status quo while the constitutional rights of these appellants … are determined."); *Porter v. Warner Holding Co.*, 328 U.S. 395, 399 (1946) ("[T]he term 'other order' contemplates a remedy other than that of an injunction or restraining order, a remedy entered in the exercise of the District Court's equitable discretion."); *Carolene Prods. Co. v. United States*, 323 U.S. 18, 29 (1944) ("In dealing with the evils of filled milk, Congress reached the conclusion that labeling was not an adequate remedy for deception."); *Interstate Com. Comm'n v. Inland Waterways Corp.*, 319 U.S. 671, 695 n.6 (1943) ("If there is a discrimination against truck shippers, the remedy is an improvement of their situation, not a destruction of barge shipping.").

Congress too has used remedy and relief interchangeably.[10] There is no reason to think "remedy" in Section 2225(e) must be given the cramped reading on which the narrow interpretation of the saving clause depends.[11]

But even if remedy means only process, the narrow interpretation of the clause cannot be right. When Congress enacted the saving clause—and chose to leave it in place after AEDPA—it surely intended that the clause would save *something*. Under the narrow interpretation, the saving clause does no work at all because it would never apply to any petition in need of saving. So the narrow interpretation is wrong.

2. According to the Tenth and Eleventh Circuits, there appear to be only two circumstances in which a procedural bar to Section 2255 relief would apply, bringing the saving clause into play: (1) where the claimant was sentenced by a court or ad hoc military tribunal that no longer exists (making it impossible to file a motion with the sentencing court); and (2) where the claimant challenges the manner in which his sentence is carried out (as opposed to the fact of conviction or sentence). *See McCarthan*, 851 F.3d at 1092–93.

The problem with limiting the saving clause to these circumstances—or any circumstance where a Section

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[10] *See, e.g.*, 12 U.S.C. § 3755(b)(2) (2012) ("[O]ther remed[ies] … includ[e] … relief under an assignment of rents.").

[11] *See* Litman, *supra* note 7, at 488 ("Section 2255(e)'s use of the word 'remedy' does not signify that it is irrelevant whether a prisoner is able to obtain *relief* under Section 2255. Congress frequently uses relief to signify the result of a remedy; the two terms are not so distinct.").

2255 motion is procedurally barred—is that the individuals whose claims would be saved "were never 'authorized to apply for [Section 2255] relief …' in the first place." *Id.* at 1108 (Jordan, J., concurring in part and dissenting in part) (quoting 28 U.S.C. § 2255(e)). But Section 2255(e) only bars—and therefore the saving clause can only save—habeas petitions by individuals authorized to seek Section 2255 relief.

Like other prisoners, individuals sentenced in military tribunals are entitled to post-conviction review, but under existing precedent, that review is not available under Section 2255, "which is reserved for federal prisoners convicted in, and sentenced by, federal courts." *Id.* at 1109. Instead, "the proper means for [a military claimant] to collaterally challenge his … military conviction is to file a § 2241 petition for a writ of habeas corpus." *Ackerman v. Novak*, 483 F.3d 647, 649 (10th Cir. 2007); *accord Clinton v. Goldsmith*, 526 U.S. 529, 537 n.11 (1999). A military tribunal is "a special body convened for a specific purpose, and when that purpose is accomplished its duties are concluded and the court is dissolved." *McClaughry v. Deming*, 186 U.S. 49, 64 (1902). Thus, a military tribunal is not a "court established by Act of Congress," 28 U.S.C. § 2255(a), and a military claimant "cannot use § 2255 because his military tribunal has dissolved and cannot entertain a collateral attack," *McCarthan*, 851 F.3d at 1110 (Jordan, J., concurring in part and dissenting in part). As a result, a military claimant does not meet the prerequisites "to apply for relief by motion" under Section 2255. The same is true of any claimant whose sentencing court has been dissolved—there is no way for that person to file a Section 2255 motion.

Similarly, a claimant challenging the manner in which his sentence is carried out, rather than the conviction or sentence itself, is not "authorized to apply for relief" under Section 2255. "In fact, prisoners challenging determinations about parole or good-time credits have always had to proceed under § 2241 and have never been able to file motions to vacate under § 2255." *Id.* at 1109. For instance, a challenge to a parole decision "cannot be brought pursuant to 28 U.S.C. § 2255" because it is "a challenge to the lawfulness of the parole commission's actions, not the lawfulness of the sentence imposed by the court." *Hajduk v. United States*, 764 F.2d 795, 796 (11th Cir. 1985); *see also, e.g.*, *Granville v. Hogan*, 591 F.2d 323, 324 (5th Cir. 1979) (good-time credits); *Gomori v. Arnold*, 533 F.2d 871, 874–75 (3d Cir. 1976) (calculation of release date); *Halprin v. United States*, 295 F.2d 458, 459 (9th Cir. 1961) (parole).

In both scenarios, the claimants' Section 2241 petitions are not barred by Section 2255(e) because the claimants have never been "authorized to apply for relief by motion" under Section 2255. And if their petitions were never barred by Section 2255(e) to begin with, then there is nothing for the saving clause to "save." Thus, under the Eighth, Tenth, and Eleventh Circuits' narrow reading, the saving clause does not actually do anything. And that can't be right because the saving clause must save *something*. *See Boumediene*, 553 U.S. at 776 (explaining that the saving clause "provid[ed] that a writ of habeas corpus would be available if the alternative process proved inadequate or ineffective"); *McCarthan*, 851 F.3d at 1106 (Jordan, J., concurring in part and dissenting in part) ("[T]he 'saving clause' of § 2255(e) must have some meaning."). The Eighth,

Tenth, and Eleventh Circuits' interpretations of the clause improperly excise it from the statute. *See Setser v. United States*, 566 U.S. 231, 239 (2012) (courts should give effect to every clause of a statute).

B. The Saving Clause Sometimes Applies To Successive Claims

The narrow interpretation also holds that the saving clause cannot be used to bring successive claims because the clause applies only when it would have been impossible for claimants to challenge the legality of their detention in "an initial § 2255 motion." *Prost*, 636 F.3d at 584. But this reading barring successive claims is contrary to Section 2255(e)'s plain text, which expressly states that the saving clause will sometimes be available after the sentencing court previously "denied [the prisoner] relief." Courts must "give effect … to every clause and word" of a statute. *Setser*, 566 U.S. at 239 (citation omitted). Any reading of the saving clause that precludes courts from considering second or successive claims would fail this test. Section 2255(e) bars habeas petitions if the claimant's sentencing court "has denied him [Section 2255] relief, *unless*" the saving clause applies. 28 U.S.C. § 2255(e) (emphasis added). The saving clause thus necessarily saves at least some habeas petitions *after* claimants were denied Section 2255 relief—in other words, petitions involving successive claims.

In *McCarthan*, the Eleventh Circuit suggested that Congress *implicitly* limited the saving clause when it *explicitly* limited successive Section 2255 motions in AEDPA: "The specific language of section 2255(h), enacted nearly 50 years after the saving clause, limits the reach of the saving clause." *McCarthan*, 851 F.3d at

1090. That is an implausible inference to draw from Congress' decision to leave the saving clause's text *unchanged*. Congress knew exactly how to place limitations on successive claims; it did so expressly in AEDPA for claims under Section 2255. That Congress chose not to add similar restrictions to the saving clause shows that Congress intended the clause to remain intact and apply in at least some circumstances where claimants were previously denied Section 2255 relief. *See Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2071 (2018) ("We usually 'presume differences in language like this convey differences in meaning.'" (citation omitted)); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012) ("Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally.").

The Eleventh Circuit's premise that the saving clause automatically mirrors every new limitation on Section 2255 motions also misconceives the clause's important role in the statutory scheme. The saving clause is a failsafe mechanism. It ensures that—when a Section 2255 motion is "*inadequate* or *ineffective*"—the Great Writ remains available to safeguard a prisoner's interest in liberty from arbitrary detention. Congress preserved the saving clause to allow a narrow category of individuals to obtain "habeas corpus review as an avenue of last resort." *Boumediene*, 553 U.S. at 777. Without this safety valve, Section 2255 might well be unconstitutional. *See supra* Section I.C; *Boumediene*, 553 U.S. at 776; *Hayman*, 342 U.S. at 223. The saving clause cannot fulfill its essential purpose if it implicitly incorporates all of Section 2255's limitations.

CONCLUSION

The Court should interpret the saving clause, consistent with its plain text, to permit habeas corpus petitions, at a minimum, in cases where prisoners have claims of legal innocence based on a retroactive clarification of the law and those claims were foreclosed by law when they filed their original Section 2255 motions.

Respectfully submitted,

/s/ Gregory Silbert

GREGORY SILBERT
Counsel of Record
AARON J. CURTIS
OLIVIA WALSETH
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000
gregory.silbert@weil.com

ERIN M. CHOI
WEIL, GOTSHAL & MANGES LLP
200 Crescent Court, Suite 300
Dallas, Texas 75201
(214) 746-7700

BRIAN G. LIEGEL
WEIL, GOTSHAL & MANGES LLP
1395 Brickell Avenue, Suite 1200
Miami, Florida 33131
(305) 577-3100

Counsel for Amici Curiae

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