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 COURT-APPOINTED *AMICUS CURIAE* IN SUPPORT OF JUDGMENT BELOW

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QUESTION PRESENTED

Whether the "remedy by motion" under 28 U.S.C. 2255 is "inadequate or ineffective to test the legality" of a federal prisoner's detention—and thus the prisoner may file a habeas corpus petition instead—if a statutory claim would have failed at the time of the prisoner's first Section 2255 motion but would now prevail under an intervening decision of this Court.

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STATEMENT OF INTEREST

By order dated June 28, 2022, this Court invited Morgan L. Ratner to brief and argue this case as *amicus curiae* in support of the judgment below.[1]

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions are reproduced in the appendix to this brief.

INTRODUCTION

In the 1940s, the federal judiciary had a problem. Because Congress had expanded the common-law writ of habeas corpus, the volume of habeas petitions was multiplying. And because a habeas petition must be filed in the place of confinement, the five districts that housed large federal prisons were overrun with filings. To solve that problem, the Judicial Conference of the United States proposed legislation, which Congress enacted in substantial part as 28 U.S.C. 2255. Section 2255 created a new procedure for postconviction review, under which a federal prisoner must file a 2255 motion in the sentencing court rather than a habeas petition in the district of confinement.

The new Section 2255 procedure largely mirrored existing habeas practice, but it shifted claims to the sentencing court and authorized challenges only to an inmate's conviction or sentence. Because those differences occasionally might matter, Congress added a

[1] No counsel for any party authored this brief in whole or in part, and no entity or person aside from *amicus curiae* and her law firm made a monetary contribution toward its preparation or submission.

"saving clause" to Section 2255. That clause provides that a federal inmate may file a habeas petition rather than a 2255 motion if "the remedy by motion is inadequate or ineffective to test the legality of his detention." 28 U.S.C. 2255(e). For the next 50 years, courts applied the saving clause sparingly to address circumstances in which the sentencing-court forum posed a practical problem—for example, because transporting the prisoner was too difficult, or because a territorial court had dissolved.

Things began to change after Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 105, 110 Stat. 1220. AEDPA imposed a host of new restrictions on state prisoners' habeas petitions and federal prisoners' 2255 motions, in an effort to enhance the finality of convictions. Among those new restrictions was Section 2255(h). Section 2255(h) prohibits second or successive 2255 motions unless they involve (1) newly discovered evidence that clearly establishes the prisoner's factual innocence, or (2) a new rule of constitutional law that this Court has made retroactive to cases on collateral review. Section 2255(h) does not include an exception for new statutory-interpretation decisions.

In AEDPA's wake, some litigants and courts breathed new life into Section 2255(e)'s saving clause. Instead of using it as a backstop for difficulties in reaching the sentencing court, they used it as a mechanism for circumventing AEDPA's procedural restrictions that they viewed as too onerous. In particular, because Section 2255(h) does not authorize second or successive motions based on intervening statutory-interpretation decisions, some courts concluded that they could route such claims through the saving

clause. They could thus escape the constraints of Section 2255(h) by converting those otherwise-forbidden second motions into habeas petitions.

That use of the saving clause was misguided from the start. It renders Congress's AEDPA amendments self-defeating because, when Section 2255's internal gatekeeping limits bar a prisoner's claim, the 2255 remedy becomes "inadequate" and the claim shifts to a habeas court instead. It nullifies Section 2255(h), which sets out the two—and only two—circumstances in which a federal prisoner may seek collateral relief for a second time. It creates inexplicable anomalies, such as sending initial statutory claims and all constitutional claims to the sentencing court, while sending second or successive statutory claims to a habeas court. And it has resulted in decades of uncertainty, as courts of appeals and the government have struggled to articulate the limits of their various atextual saving-clause theories.

In 2011, the Tenth Circuit broke from the pack, followed by the Eleventh Circuit in 2017 and the Eighth Circuit in the decision below. Those courts have properly returned to the text of Section 2255, and this Court should do the same. It should abandon the 25-year project to "fix" AEDPA's amendments and mitigate any harsh results that they may generate. Instead, the Court should leave it to Congress whether to expand the availability of second or successive motions under Section 2255(h).

STATEMENT

A. Legal Framework

1. In 1867, Congress expanded federal courts' habeas corpus jurisdiction, causing "a great increase" in habeas petitions. *United States* v. *Hayman*, 342 U.S.

205, 212 (1952); *see* 14 Stat. 385. This Court's decisions in the early 1900s further "enlarged the scope of the inquiry in habeas corpus proceedings." Report of the Habeas Corpus Committee of the Judicial Conference (June 7, 1943); *see Edwards* v. *Vannoy*, 141 S. Ct. 1547, 1568 (2021) (Gorsuch, J., concurring). As a result, between 1936 and 1945, the number of habeas petitions "nearly tripled." *Hayman*, 342 U.S. at 212 & n.13. The influx was worst for "the few District Courts in whose territorial jurisdiction major federal penal institutions [were] located," which "were required to handle an inordinate number of habeas corpus actions . . . because of the fortuitous concentration of federal prisoners within the district." *Id.* at 213-214.

In the early 1940s, the Judicial Conference responded by drafting legislation that would bar courts from considering federal prisoners' habeas petitions and would instead require federal prisoners to raise postconviction claims in a new motion procedure in the sentencing court. *See Hayman*, 342 U.S. at 214-215. The draft legislation would have excused the prohibition on habeas only if "it appears that it has not been or will not be practicable to have [the prisoner's] right to discharge from custody determined on such motion because of the necessity of his presence at the hearing, or for other reasons." Report of the Judicial Conference 24 (Sept. Sess. 1943).

The Director of the Administrative Office of U.S. Courts transmitted the proposal to Congress. In his transmittal letter, he explained that the legislation would permit resort to habeas "[o]nly when it is not practicable for the prisoner to have his right to release from custody presented on motion to the trial court because of his inability to be present at the

hearing or for other reasons." Letter from Henry P. Chandler (Director of the Admin. Office of U.S. Courts) to Sam Rayburn (Speaker of the House) (Mar. 2, 1944). In an accompanying memorandum, the Director gave the example of "a dangerous prisoner, who had been convicted in the Southern District of New York, [but] was confined in Alcatraz Penitentiary" in California. *Hayman*, 342 U.S. at 215 n.23 (citation omitted). The Senate Committee considering the Judicial Conference's proposal later reiterated that view, observing that the limited exception for habeas would temper the "main disadvantages of the motion remedy," such as the "risk during or expense of transporting the prisoner to the district where he was convicted." S. Rep. No. 1526, 80th Cong., 2d Sess. 2-3 (1948).

In 1948, Congress enacted 28 U.S.C. 2255, which was "modeled after" the Judicial Conference's proposal. *Hayman*, 342 U.S. at 218. Section 2255 establishes a procedure by which a federal prisoner "may move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. 2255(a). It bars federal prisoners from filing habeas petitions, subject to a limited exception:

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

28 U.S.C. 2255(e). The final clause of Section 2255(e) is known as the "saving clause."

2. Nearly 50 years later, Congress enacted AEDPA. AEDPA was designed to "encourag[e] finality" of criminal convictions by restricting collateral attacks and "streamlining federal habeas proceedings." *Rhines* v. *Weber*, 544 U.S. 269, 277 (2005). Consistent with that purpose, Congress imposed a variety of new gatekeeping limits on federal prisoners' 2255 motions and state prisoners' federal habeas petitions. As most relevant here, AEDPA added Section 2255(h), which prohibits a "second or successive motion" for 2255 relief unless a court of appeals certifies that it involves:

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

28 U.S.C. 2255(h).

Thus, after AEDPA's amendments to Section 2255, a federal prisoner who wishes to challenge his conviction or sentence must file a motion in the district court in which he was sentenced (subsection a). He may not file a second or successive motion unless there is newly discovered evidence of factual innocence or a new, retroactive rule of constitutional law (subsection h). And he may not file a habeas petition unless the remedy under Section 2255 is "inadequate

or ineffective to test the legality of his detention" (subsection e).

B. Factual Background

In August 1999, petitioner purchased a semi-automatic handgun from a pawnshop in Missouri. 266 F.3d at 808. He knew at the time that he had been convicted of a felony—as it turns out, 11 of them. *See id.* at 808, 810-811 & n.6. Petitioner was later charged and convicted on two counts of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g) and 18 U.S.C. 924(e)(1); and one count of making false statements to acquire a firearm, in violation of 18 U.S.C. 922(a)(6). 266 F.3d at 807-808; *see* 403 F.3d at 606; J.A. 74-75. The district court sentenced petitioner to 327 months of imprisonment, consisting of concurrent sentences of 327 months on each felon-in-possession count and 60 months on the false-statement count. Pet. App. 15a; *see* 2018 WL 2303783, at *1.

The court of appeals affirmed on direct appeal. 266 F.3d at 816. The court rejected petitioner's claim "that he did not have knowledge of his prior felony convictions," reasoning that "[t]he government need not prove knowledge, but only the fact of a prior felony conviction." *Id.* at 810 n.5. Petitioner did not seek en banc or Supreme Court review.

In 2002, petitioner filed his first Section 2255 motion, which the district court denied. *See* 403 F.3d at 605. Petitioner did not again contend that he lacked the necessary knowledge to violate Section 922(g); instead, he challenged his indictment as multiplicitous. *Id.* The court of appeals agreed and reversed. *Id.* On remand, the district court vacated one of petitioner's felon-in-possession convictions but left his total sen-

tence unchanged. *See* 185 Fed. Appx. at 542. The court of appeals affirmed. *Id.*

In the years after his first, partially successful 2255 motion, petitioner "flooded the federal dockets with unsuccessful postconviction challenges, including numerous § 2255 motions and repeated petitions to the Supreme Court for review." Pet. App. 3a; *see* Pet. II-V; Br. in Opp. II-III. None of those filings led to further relief.

C. Procedural History

1. Nearly 20 years after petitioner was convicted, this Court decided *Rehaif* v. *United States*, 139 S. Ct. 2191 (2019). *Rehaif* held that in a Section 922(g) prosecution, the government "must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it." *Id.* at 2194. The Eighth Circuit, by contrast, had previously construed Section 922(g) not to require "the government to prove that the defendant knew he had a prohibited status." Pet. App. 3a.

After *Rehaif*, petitioner filed a habeas petition under 28 U.S.C. 2241 in the Eastern District of Arkansas, the district in which he was then confined, seeking vacatur of his remaining felon-in-possession conviction. J.A. 16-24; *see* Pet. App. 17a. Petitioner asserted that, "at the time he possessed the firearm giving rise to his conviction, he did not know he was a convicted felon or that his possession of a firearm was unlawful." Pet. App. 17a; *see* J.A. 25-29.

2. The district court dismissed petitioner's habeas petition for lack of jurisdiction. Pet. App. 14a-29a. The court determined that Section 2255(e) barred the petition and that petitioner could not rely on the

saving clause to raise a statutory claim based on a new Supreme Court decision. *Id.* at 18a-29a.

3. The court of appeals affirmed. Pet. App. 1a-13a. It likewise concluded that petitioner could not invoke Section 2255(e)'s saving clause to raise a new statutory-interpretation decision. *Id.* at 5a-6a. The court gave three main reasons. First, it explained that Section 2255 "is not [in]adequate or ineffective where a petitioner had any opportunity to present his claim beforehand." *Id.* at 6a (citation omitted). The court noted that petitioner "could have raised his *Rehaif*-type argument either on direct appeal or in his initial § 2255 motion." *Id.* Although circuit "precedent was at that time against" petitioner, "the question is whether [petitioner] could have raised the argument, not whether he would have succeeded." *Id.* at 6a-7a.

Second, the court of appeals observed that Section 2255 was "perfectly capable of facilitating" petitioner's claim. Pet. App. 8a. Although the court acknowledged that circuit law may have been wrong at the time petitioner filed his initial 2255 motion, "that does not mean the § 2255 remedial vehicle is inadequate or ineffective to the task of *testing* the argument." *Id.* (quoting *Prost* v. *Anderson*, 636 F.3d 578, 590 (10th Cir. 2011) (Gorsuch, J.)).

Third, the court of appeals reasoned that petitioner's construction of the saving clause conflicted with Section 2255(h)(2), which authorizes a second or successive 2255 motion for new, retroactive constitutional decisions. Pet. App. 9a. The court explained that petitioner "would work an end run around this limitation by rewriting § 2255(h)(2) to remove the word 'constitutional.'" *Id.*

SUMMARY OF ARGUMENT

The court of appeals correctly concluded that petitioner's habeas petition falls outside the saving clause in 28 U.S.C. 2255(e). The saving clause applies when "the remedy by motion"—that is, the postconviction-review procedure in the sentencing court—is "inadequate or ineffective to test" a federal prisoner's claim. 28 U.S.C. 2255(e). The 2255 remedy is inadequate or ineffective to test a claim when the sentencing court is not practically accessible or is not legally authorized to decide such a claim. It is not inadequate or ineffective when the sentencing court incorrectly resolves a claim on the merits, or when the court dismisses a claim that fails to comply with Section 2255's internal gatekeeping limits.

A. The text of the saving clause focuses on the "remedy by motion" that Congress established, not on whether a prisoner is entitled to relief under that remedy. The Section 2255 remedy has two distinct features: it occurs in the sentencing court, and it is limited to challenges to a prisoner's sentence. Congress thus provided a backstop to cover circumstances in which a prisoner cannot access his sentencing court, or challenges his detention rather than his sentence. In either circumstance, a habeas court is the more appropriate forum, and the saving clause redirects the prisoner there. For the first 50 years after Congress enacted Section 2255, courts applied the saving clause in only those two circumstances. Neither applies to petitioner's claim here.

Even if the text and history of Section 2255(e) were ambiguous, the remainder of Section 2255 would resolve any ambiguity. Congress specifically barred federal prisoners from filing repeat collateral attacks,

with two exceptions: newly discovered evidence establishing factual innocence, and "new rule[s] of constitutional law" that this Court has made retroactive. 28 U.S.C. 2255(h). A broad reading of the saving clause would add a third exception for new rules of statutory interpretation. But because Congress has already answered the question of when an inmate may bring a repeat collateral attack, this Court should not use a different, more general provision to modify that answer. It should be especially reluctant to do so when inmates would receive *more favorable* treatment under that third implied exception than under the two expressly authorized exceptions, because they could file habeas petitions rather than more tightly regulated 2255 motions.

The practical consequences of an expansive interpretation of the saving clause confirm that this Court should hew closely to the statutory text. A saving clause that routes second or successive statutory claims to habeas courts would divide similar claims among different forums—with no articulable justification, with considerable inefficiencies, and with complicated choice-of-law consequences. This Court should avoid charting that course, which several courts of appeals have already traveled and which has generated a slew of follow-on questions that those courts have been unable to answer in a principled way. The better course, as always, is for the Judiciary to let Congress address any statutory shortcomings, and to let the Executive Branch mitigate any injustice in the interim.

B. This Court should reject petitioner's and the government's contrary theories. Petitioner focuses on the merits of the sentencing court's decision in his initial Section 2255 motion. He asserts that if circuit

precedent erroneously foreclosed relief, then the 2255 process cannot truly "test" his claim, or is otherwise "inadequate." But the saving clause focuses on a remedial mechanism's ability to adjudicate a claim. Whether a court will arrive at the correct answer in the face of adverse circuit precedent is no different for a Section 2255 motion, a habeas petition, or any other remedy. Petitioner's outcome-focused approach also lacks any meaningful limiting principle.

The government correctly rejects petitioner's theory but incorrectly adopts a habeas-benchmark theory instead. In the government's view, the Section 2255 process is "inadequate" if an inmate would receive more favorable consideration in habeas. That view would make a hash out of Section 2255. It would mean that when Congress enacts internal gatekeeping limits on 2255 motions, it intends for those same limits to render Section 2255 "inadequate," unless Congress also modifies a largely defunct habeas procedure. And it would mean that, however clearly Section 2255(h) limits second or successive motions, inmates could bypass those limits by filing habeas petitions instead. To make matters worse, the government inconsistently applies its own test. For the most part, it compares Section 2255 to state prisoners' post-AEDPA habeas procedures. But when that benchmark would not justify its preferred result (because state prisoners cannot bring statutory claims), the government arbitrarily switches the comparator to federal prisoners' pre-AEDPA habeas procedures. If its theory cannot be defensibly cabined, that is a sign something has gone awry.

C. Finally, the canon of constitutional avoidance does not apply. The statutory text is clear, and the court of appeals' construction does not raise serious

doubt under any of the four constitutional provisions that petitioner invokes.

ARGUMENT

THE SAVING CLAUSE IN 28 U.S.C. 2255(e) DOES NOT APPLY TO PETITIONER'S CLAIM.

A. Section 2255 Is Not Inadequate Or Ineffective To Test The Legality Of Petitioner's Detention.

Congress created Section 2255 as a substitute for habeas corpus for federal prisoners seeking postconviction relief. *See Hayman*, 342 U.S. at 219. In an effort to funnel postconviction claims into that new procedure, Congress expressly prohibited courts from considering habeas petitions filed by federal prisoners who did not file 2255 motions, or whose motions had been denied. 28 U.S.C. 2255(e). The saving clause creates the sole exception to that rule, authorizing an inmate to file a habeas petition when "the remedy by motion" cannot adjudicate his postconviction claim. Just as it did in 1948, the saving clause ensures a back-up judicial forum if the sentencing court is inaccessible or if it is not authorized to hear a particular kind of claim.

Neither is true of petitioner's *Rehaif* claim. No practical obstacles prevent petitioner from seeking relief from his sentencing court, and that court is perfectly capable of handling challenges to the interpretation of a federal criminal statute. Instead, the only obstacle to petitioner's statutory-interpretation claim is Section 2255(h)'s second-or-successive bar—which textually and logically cannot render the Section 2255 remedy "inadequate." The court of appeals thus correctly concluded that the saving clause does not apply

and that it lacked jurisdiction over petitioner's habeas petition.

1. The text of Section 2255(e) focuses on opportunity, not results.

The saving clause applies only if "the remedy by motion is inadequate or ineffective to test the legality of [a federal prisoner's] detention." 28 U.S.C. 2255(e). The statute specifies both *what* must be inadequate or ineffective ("the remedy by motion"), and what it must be inadequate or ineffective *to do* ("to test the legality of his detention"). Both answers indicate that the saving clause focuses on whether the Section 2255 procedure is capable of adjudicating a federal prisoner's challenge to his sentence—not on whether the prisoner will prevail in that challenge.

a. Section 2255 is inadequate or ineffective only if a sentencing court cannot adjudicate a prisoner's claim.

i. The text of the saving clause makes clear that the Section 2255 "remedy by motion" is "inadequate or ineffective" only when the sentencing court cannot adjudicate an inmate's claim. A "remedy" is "[t]he means employed to enforce a right or redress an injury." *Bouvier's Law Dictionary* 1044 (1948 ed.); *see Black's Law Dictionary* 1526 (1933 ed.) (similar). And that means is "inadequate" or "ineffective" when it is "not equal to requirement" or "[o]f such a nature as not to produce any, or the intended, effect." V *Oxford English Dictionary* 132, 239 (1933 ed.). The saving clause specifies that the "requirement" or "intended effect" of Section 2255's postconviction-review scheme is "to test" a federal prisoner's postconviction claim. Putting all that together, Congress directed courts to examine whether the Section 2255 mecha-

nism is up to the task of adjudicating a prisoner's postconviction claim. If it is not, then the saving clause allows the prisoner to file a habeas petition in the district of confinement instead.

Congress's choice of the word "remedy" rather than the word "relief" underscores its focus on process over results. The 2255 remedy by motion is capable of addressing a claim even if the prisoner is unlikely to win relief on that claim in a particular court at a particular time. Section 2255 elsewhere addresses circumstances in which, on the merits, "the prisoner is entitled to no relief," or a sentencing court "has denied him relief." 28 U.S.C. 2255(b), (e). But Congress did not mention "relief" in the saving clause.

That critical distinction between remedy and relief appears throughout Congress's comprehensive postconviction scheme. To take one example, Section 2254 requires a state prisoner to "exhaust[] the remedies available" in state court before filing a federal habeas petition. 28 U.S.C. 2254(b)(1)(A). That provision necessarily applies when a state prisoner has an available process for testing his conviction but fails to obtain substantive relief through that process. Section 2255(e) uses the word "remedy" in the same way. Indeed, Congress's focus on process is especially clear in Section 2255(e) because Congress did not use the bare term "remedy," but rather the phrase "remedy by motion," which is plainly not interchangeable with the term "relief."

ii. Rather than focusing on a federal inmate's entitlement to relief, the saving clause reflects Congress's concern that some inmates might be unable to pursue Section 2255 claims because of the sentencing-court forum. Congress required inmates to file a 2255 motion in "the court which imposed the sentence,"

28 U.S.C. 2255(a), rather than in the district of confinement. And it gave sentencing courts a narrower mandate than habeas courts, authorizing 2255 motions only for those claims asserting that "the sentence was imposed in violation of the Constitution or laws of the United States," "the court was without jurisdiction to impose such sentence," or "the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." *Id.* To account for those limitations, the saving clause allows prisoners to pursue habeas relief in two circumstances: (1) a prisoner's sentencing court is not *practically accessible*, or (2) a prisoner's claim is not *legally cognizable* in a sentencing court. For the first 50 years after Congress enacted Section 2255, the saving clause applied in only those two circumstances.

First, the sentencing-court forum can be practically inaccessible in multiple ways. Most fundamentally, the sentencing court may no longer exist at the time a 2255 motion would be filed. Dissolution was a particular risk with territorial courts. *See Spaulding* v. *Taylor*, 336 F.2d 192, 193 (10th Cir. 1964) (2255 ineffective after Alaska territorial court dissolved); *Edwards* v. *United States*, No. 87C114, 1987 WL 7562 (E.D.N.Y. Feb. 9, 1987) (2255 inadequate after Panama Canal Zone district court dissolved). With courts martial, too, "the sentencing court literally dissolves after sentencing and is no longer available to test a prisoner's collateral attack." *Prost*, 636 F.3d at 588.

A sentencing court might also be inaccessible if, as the Judicial Conference feared, an inmate's presence is required at a hearing and the inmate cannot safely or reasonably be transported to a distant court. *See, e.g.*, *Stidham* v. *Swope*, 82 F. Supp. 931, 932-933 (N.D. Cal. 1949) (2255 inadequate because the prisoner was

"in Alcatraz Penitentiary upwards of 1,500 miles from the sentencing court," and travel by railroad to reach the sentencing court "well could be two weeks"); *but see Black* v. *United States*, 301 F.2d 418, 419 (10th Cir. 1962) (now-prevailing rule that "mere distance between the place of detention" and the sentencing court is insufficient to trigger the saving clause). Section 2255 was enacted, after all, in 1948—eight years before President Eisenhower signed legislation funding the Interstate Highway System—and transportation difficulties were the central concern of both the Judicial Conference and legislators. *See* pp. 4-5, *supra*.

Second, the saving clause protects claims that fall within a gap in sentencing courts' legal authority. For example, the saving clause permits resort to habeas when no single sentencing court could fully resolve a prisoner's claim. *See, e.g.*, *Cohen* v. *United States*, 593 F.2d 766, 771 n.12 (6th Cir. 1979) (2255 inadequate if it would require prisoner "to seek relief in three actions in three courts, none of which could grant complete relief"); *cf. Mead* v. *Parker*, 464 F.2d 1108, 1111 (9th Cir. 1972) (2255 inadequate if "the result could be the filing of 27 separate motions in 27 different district courts").

The saving clause also ensures that a prisoner may challenge "the legality of his detention," 28 U.S.C. 2255(e), even if he does not challenge the "sentence . . . imposed," 28 U.S.C. 2255(a). Because the "'detention' of a prisoner encompasses much more than a criminal 'sentence,'" the saving clause guarantees a judicial forum for detention-based claims that are not cognizable in the 2255 process. *Samak* v. *Warden, FCC Coleman-Medium*, 766 F.3d 1271, 1280 (11th Cir. 2014) (Pryor, J., concurring). For example, an inmate might contend that he is still being detained after his

sentence has expired. *See, e.g.*, *Davis* v. *Willingham*, 415 F.2d 344, 345 (10th Cir. 1969). Or he might contest the execution of his sentence, including the computation of good-time credits, location of imprisonment, administration of parole, or imposition of detention conditions. *See, e.g.*, *United States* v. *Jalili*, 925 F.2d 889, 893-894 (6th Cir. 1991); *Cox* v. *Warden, Fed. Det. Center*, 911 F.2d 1111, 1113-1114 (5th Cir. 1990); *Hajduk* v. *United States*, 764 F.2d 795, 796 (11th Cir. 1985) (per curiam); *United States* v. *Huss*, 520 F.2d 598, 603-604 (2d Cir. 1975). Although courts have not always cited the saving clause when considering such claims in habeas, the saving clause ensures that Section 2255(e) is not construed to bar them.[2]

Congress's decision to exclude detention-focused claims from Section 2255 makes sense, because a habeas petition is a more natural fit to address challenges to the execution (rather than the imposition) of a sentence. The place of confinement is where the challenged executive behavior occurs. And the sentencing court has no stake in or specialized knowledge of the matter because the inmate is not seeking to disturb the sentence that the court imposed. The saving clause thus redirects such claims to the traditional habeas process. Unsurprisingly, all of the cases that fell within the saving clause from 1948 to 1996 share

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[2] It is an open question whether a prisoner can file a 2255 motion challenging a sentence imposed in violation of a treaty, which is not among the grounds expressly listed in 28 U.S.C. 2255(a) but is expressly listed in 28 U.S.C. 2241(c)(3). *See, e.g.*, *Darby* v. *Hawk-Sawyer*, 405 F.3d 942, 945-946 (11th Cir. 2005) (declining to address the question). If treaty-based claims are not cognizable in a 2255 motion, then they also trigger the saving clause and can be raised in a habeas petition. The same is true for act-of-state claims. *See* 28 U.S.C. 2241(c)(4).

that common feature: the court in the district of confinement was a more logical forum than the sentencing court to hear the prisoner's challenge.

iii. This Court's decisions reflect the widely held pre-AEDPA understanding that the saving clause compensates for deficiencies in the Section 2255 remedy in sentencing court. Most notably, in *Hayman*, the Court confronted the question whether a 2255 motion was inadequate or ineffective because the sentencing court had felt constrained to conduct an extensive evidentiary hearing without the prisoner. 342 U.S. at 208-209. The Court rejected the premise that Section 2255 authorized *ex parte* hearings and concluded that the sentencing court had the power to conduct "the necessary hearing," with the prisoner present. *Id.* at 223; *see id.* at 219-223. Although the Court ultimately did not need to construe the saving clause, it assumed that the 2255 "remedy by motion" might have been inadequate if, contrary to the Court's holding, the sentencing court lacked the power to conduct an evidentiary hearing when one was necessary to adjudicate the claim. *See id.* at 223-224.

Swain v. *Pressley*, 430 U.S. 372 (1977), reflects the same understanding of the saving clause as a backstop for a sentencing court's deficiencies. In that case, the Court considered a statute establishing a District of Columbia motion procedure that was "deliberately patterned after" Section 2255. *Id.* at 377. The Court concluded that the quasi-2255 mechanism was adequate even though the judges of the D.C. sentencing court were appointed under Article I rather than Article III of the Constitution. *Id.* at 383. Because those judges remained "fully competent to decide federal constitutional issues," this Court found no reason to believe that "the remedy afforded by that

court is 'inadequate or ineffective.'" *Id.* Again, the Court focused on the sentencing court's ability to adjudicate a prisoner's claim.

iv. Reading the saving clause to have the same scope today as it did during its first 50 years would not render it superfluous. *Contra* Pet. Br. 30-33; U.S. Br. 37-38.

First, the saving clause indisputably has *some* content. Everyone agrees that the saving clause at least applies when recourse to the sentencing court is practically infeasible. *See* Pet. Br. 33; U.S. Br. 38. Such infeasibility may be rare in the modern world, but that "does not imply that we should give [the saving clause] new work to do." *Webster* v. *Daniels*, 784 F.3d 1123, 1153 (7th Cir. 2015) (en banc) (Easterbrook, J., dissenting).

Disagreement exists about how broadly the saving clause applies in other contexts. Although the Court need not resolve those disputes to give the clause content, they illustrate that it remains a limited but important backstop. Petitioner suggests (at 31) that the saving clause does not apply to the hundreds of courts martial that dissolve each year after a conviction. A military court, however, would seem to be "a court established by Act of Congress" within the meaning of 28 U.S.C. 2255(a) and thus covered by the saving clause. *See Solorio* v. *United States*, 483 U.S. 435 (1987) (explaining that Congress "empowered courts-martial to try servicemen for the crimes proscribed by the [Uniform Code of Military Justice]"). The saving clause protects a broad category of detention-based claims, too, because Section 2255(e)'s reference to a "prisoner who is authorized to apply for relief by motion pursuant to this section" might otherwise be read to foreclose any claim by a federal prisoner. *Compare*

McCarthan v. *Director of Goodwill Industries-Suncoast, Inc.*, 851 F.3d 1076, 1093 (11th Cir. 2017) (en banc), *with id.* at 1125 (Rosenbaum, J., dissenting).

Second, however much content the saving clause has, any accusation of superfluity suffers from a fatal logical flaw: for nearly 50 years, the saving clause operated exactly as it does under the decision below. Petitioner asserts (at 32 n.2) that the court of appeals' reading would unduly limit the saving clause to "unusual occurrences," but neither he nor the government identifies any broader application of the saving clause from Section 2255(e)'s enactment in 1948 to AEDPA's enactment in 1996. Instead, in their view, when Congress added AEDPA's strict gatekeeping limits to cut back on 2255 motions, the saving clause expanded to counteract at least some of those new limits by authorizing more habeas petitions. But if the saving clause operated narrowly for its first 50 years, no canon of statutory interpretation requires that it now be given a broader scope after AEDPA's amendments.

b. Section 2255 is adequate and effective to challenge a trial court's interpretation of a federal criminal statute.

Petitioner's *Rehaif* claim does not fall within the saving clause because the Section 2255 procedure was and is fully capable of addressing that claim. "When trying to ascertain whether something is 'inadequate or ineffective,' after all, we usually ask: inadequate or ineffective to *what task*?" *Prost*, 636 F.3d at 584. The saving clause's answer is that the 2255 procedure must be able "to test the legality of [the prisoner's] detention." 28 U.S.C. 2255(e). "To test" means "[t]o

subject to a test of any kind; to try, put to the proof; to ascertain the existence, genuineness, or quality of." XI *Oxford English Dictionary* 220 (1933 ed.). "To test" does not mean "to win," or even "to have a substantial probability of winning." It is a guarantee of "opportunity, not outcome." Pet. App. 6a.

i. The Section 2255 "remedy by motion" is capable of testing petitioner's claim that his conviction under 18 U.S.C. 922(g) required the government to prove knowledge of his felon status. A prisoner may bring a Section 2255 motion contending that his "sentence was imposed in violation of the . . . laws of the United States." 28 U.S.C. 2255(a). This Court has clarified that federal statutory claims involving fundamental defects are cognizable under Section 2255. *See Davis* v. *United States*, 417 U.S. 333, 345-346 (1974). Petitioner's sentencing court could therefore adjudicate his statutory claim and, if the claim were successful, could provide full relief by "vacat[ing] and set[ting] the judgment aside." 28 U.S.C. 2255(b). And to state the obvious, that sentencing court—the Western District of Missouri—is still operating and is available to decide 2255 motions.

For those reasons, it is undisputed that petitioner could have raised his current statutory claim in his initial 2255 motion, as he did in his direct appeal. *See* 266 F.3d at 810 n.5. Regardless of the practical unlikelihood that the challenge would have succeeded within the Eighth Circuit at that time, the 2255 remedy was neither inadequate nor ineffective to test that claim. *Cf. Bousley* v. *United States*, 523 U.S. 614, 623 (1998) (concluding that "futility cannot constitute cause [to excuse a procedural default] if it means simply that a claim was unacceptable to that particular court at that particular time") (quotation marks

omitted). It is also undisputed that petitioner's sentencing court is still accessible and is able to afford complete relief on any 2255 motion that might be properly filed today. After all, courts within the Eighth Circuit have adjudicated numerous 2255 motions raising *Rehaif* claims.[3]

ii. As a result, the only real barrier to petitioner's claim—and the only potential "deficiency" in the Section 2255 remedy—is Section 2255(h)'s second-or-successive bar. *See Chazen* v. *Marske*, 938 F.3d 851, 864 (7th Cir. 2019) (Barrett, J., concurring) (observing that any "'structural problem' in § 2255 is that § 2255(h)(2) doesn't authorize second or successive motions based on statutory claims"). But that bar does not trigger the saving clause for several reasons.

First, as the pre-1996 understanding of the saving clause illustrates, Section 2255 is "inadequate or ineffective" only when the sentencing court is inaccessible, whether because of practical barriers or legal limits on its authority. Again, petitioner's sentencing court is practically accessible to him, and Section 2255(a) authorizes that court to adjudicate a statutory claim challenging his sentence. A 2255 motion raising petitioner's *Rehaif* claim could thus be adjudicated, even if it would ultimately "be dismissed" for failure to comply with statutory limits on repeat filings. 28 U.S.C. 2244(b)(2); *see* 28 U.S.C. 2255(h).

Second, the likelihood that petitioner's specific 2255 motion, if filed, would be dismissed—whether because it is impermissibly successive under Section

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[3] *See, e.g.*, *Liggins* v. *United States*, No. 4:21-CV-00603, 2021 WL 4819572, at *5 (E.D. Mo. Oct. 14, 2021); *United States* v. *Dotstry*, No. 16-CR-346, 2021 WL 2379478, at *7-8 (D. Minn. June 10, 2021); *United States* v. *Myers,* No. 5:16-CR-50055, 2021 WL 2604066, at *3 (W.D. Ark. June 9, 2021).

2255(h) or because it is untimely under Section 2255(f)'s one-year limitations period—has no bearing on whether "*the remedy by motion*" is inadequate. The saving clause does not guarantee that a sentencing court will grant relief on any particular motion, including one that is improperly filed, so long as the 2255 process is generally capable of adjudicating the claim that the prisoner seeks to raise.

Third, as a matter of common sense, Section 2255(h) cannot be the source of any remedial inadequacy within the meaning of the saving clause. To construe the statute that way would mean that when Congress added internal gatekeeping limits on Section 2255 motions—including a bar on most second or successive motions, a one-year statute of limitations, a requirement to obtain a certificate of appealability, and a limit on the types of claims subject to appeal—it simultaneously made Section 2255 "inadequate." Under that theory, AEDPA's amendments would be self-defeating. Congress would have succeeded not in limiting collateral attacks but in enacting a set of obliquely worded forum-shifting provisions, which transfer Congress's disfavored claims from the sentencing court to a habeas court.

Put mildly, "it would not be sensible to read [Section 2255(h)] as making § 2255 'inadequate or ineffective' and thus nullifying itself." *Taylor* v. *Gilkey*, 314 F.3d 832, 835 (7th Cir. 2002). Even the courts of appeals that have adopted some variant of petitioner's theory have rejected that reasoning, though they have nevertheless carved out various unprincipled exceptions to AEDPA's internal gatekeeping limits. *See, e.g.*, *United States* v. *Barrett*, 178 F.3d 34, 50 (1st Cir. 1999) (if the saving clause applies "merely because a petitioner cannot meet the AEDPA 'second or succes-

sive' requirements," AEDPA's amendments would be "a meaningless gesture"); *Triestman* v. *United States*, 124 F.3d 361, 376 (2d Cir. 1997) (if "any prisoner who is prevented from bringing" a 2255 motion could instead file a habeas petition, "Congress would have accomplished nothing at all in its attempts—through statutes like the AEDPA—to place limits on federal collateral review"); *In re Dorsainvil*, 119 F.3d 245, 251 (3d Cir. 1997) (if the 2255 remedy is inadequate whenever an inmate "is unable to meet the stringent gatekeeping requirements of the amended § 2255," that "would effectively eviscerate Congress's intent"). It is nonsensical to attribute a self-defeating intent to the 1996 Congress that enacted AEDPA. And it is equally nonsensical to attribute to the 1948 Congress an intent to protect federal inmates from any future internal gatekeeping rules like AEDPA's, as opposed to protecting those inmates from the vagaries of sentencing-court availability.

2. The remainder of Section 2255 resolves any ambiguity.

Even if the saving clause were ambiguous in isolation, it is clear in context. This Court construes statutory terms "in their context and with a view to their place in the overall statutory scheme." *Davis* v. *Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989). And "one of the most basic interpretive canons [is] that a statute should be construed so that effect is given to all its provisions." *Corley* v. *United States*, 556 U.S. 303, 314 (2009) (internal quotation marks and alteration omitted). That is true even if, as here, the different subsections of a statute were enacted at different times. This Court still "interpret[s] a statutory text in light of surrounding texts that happen to have

been subsequently enacted" in order to "reconcil[e] many laws enacted over time, and get[] them to 'make sense' in combination." *United States* v. *Fausto*, 484 U.S. 439, 453 (1988); *see* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 180 (2012) (describing "[t]he imperative of harmony among provisions" as "more categorical than most other canons of construction"). Here, both Section 2255(h) and AEDPA's overarching hierarchy confirm the court of appeals' interpretation of the saving clause.

a. Section 2255(e) must be harmonized with Section 2255(h), located just three short subsections away. Section 2255(h) forecloses federal prisoners who have already pursued one 2255 motion from further collateral attacks, except when a prisoner relies on: (1) "newly discovered evidence" that establishes factual innocence, 28 U.S.C. 2255(h)(1); or (2) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," 28 U.S.C. 2255(h)(2). That's it. The logical inference from Congress's inclusion of those two exceptions is that they are the *only* exceptions, and that an inmate who previously filed a 2255 motion cannot pursue a second collateral attack for any other reason.

In addition to that general inference from Section 2255(h), Section 2255(h)(2) specifically indicates that new non-constitutional decisions do not justify an additional round of collateral review. In Section 2255(h)(2), Congress authorized a fresh collateral attack after an intervening, retroactive Supreme Court decision establishing "a new rule *of constitutional law*." Congress could have easily omitted the italicized language, as it did in Section 2255(f)(3).

See pp. 28-29, *infra*. Instead, its inclusion of the phrase "of constitutional law" makes clear that it did not authorize a fresh collateral attack after an intervening, retroactive Supreme Court decision establishing a new rule *of non-constitutional law*. That is the whole point of the condition.

Under petitioner's and the government's theories, by contrast, Section 2255(e)'s saving clause would nullify the careful limits that Congress spelled out in Section 2255(h). In their view, there are at least three ways to earn a fresh collateral attack: (1) newly discovered evidence; (2) a retroactive new rule of constitutional law; or (3) a retroactive new rule of statutory interpretation. Two of those are expressly authorized by Section 2255(h) and must be brought in a 2255 motion, while the third is implied through Section 2255(e)'s saving clause and is inexplicably transformed into a habeas petition. That is not how Congress legislates. "How often to rerun a search for error is a question to which [Section 2255(h)] speaks directly." *Taylor*, 314 F.3d at 835. Because Congress has directly answered that question in one subsection, this Court should not construe another subsection to obliquely provide a different answer. *See R.J. Reynolds Tobacco Co.* v. *Durham County*, 479 U.S. 130, 155 (1986) ("It strains reason to think that, although Congress could have directly" legislated on an issue, "Congress decided to achieve the same effect in a more roundabout fashion.").

b. Congress's choice to limit Section 2255(h) to two categories was just that—a conscious choice. Congress did not forget about new statutory-interpretation decisions; it merely declined to disturb the finality of a conviction in those circumstances.

The scope of Section 2255(a) is the first indication. The statute authorizes a federal inmate to seek postconviction relief if he "claim[s] the right to be released upon the ground that the sentence was imposed in violation of the Constitution or *laws of the United States*." 28 U.S.C. 2255(a) (emphasis added). Applying that text in *Davis*—decided two decades before Congress added Section 2255(h)—this Court concluded that an inmate could file a 2255 motion challenging his sentence in light of an intervening statutory-interpretation decision. 417 U.S. at 345-347. Given both the text of Section 2255(a) and its subsequent construction in *Davis*, Congress "was undoubtedly aware" when it enacted Section 2255(h) that prisoners might wish to press statutory-interpretation arguments in second or successive motions. *Prost*, 636 F.3d at 585.

Section 2255(f)'s statute of limitations reinforces that conclusion. The one-year limitations period was enacted alongside Section 2255(h)(2), and it runs (as relevant here) from "the date on which the right asserted was initially recognized by the Supreme Court, *if that right has been newly recognized* by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. 2255(f)(3) (emphasis added). Like Section 2255(h), Section 2255(f) recognizes the possibility that intervening Supreme Court decisions may prompt a postconviction claim. Unlike Section 2255(h), however, Section 2255(f)—which applies to both initial and successive motions—is not limited to "new rule[s] of constitutional law." 28 U.S.C. 2255(h)(2). This Court ordinarily presumes that such differences are intentional. *See Russello* v. *United States*, 464 U.S. 16, 23 (1983). And the best inference from those differently worded provisions is

that Congress was aware of the possibility that intervening Supreme Court decisions could affect both statutory interpretations and constitutional rights. It accounted for both sets of decisions in the limitations period but elected to authorize second or successive motions only for new constitutional rules. *See Prost*, 636 F.3d at 585-586.

c. An expansive reading of the saving clause would not only authorize a third category of second-or-successive filings, but it would invert the hierarchy that Congress embraced throughout AEDPA. Congress consistently prioritized constitutional claims, while placing statutory claims on a lower rung. Section 2253, for instance, authorizes an appeal only for a habeas petitioner or 2255 movant who "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). No appeal is available for a pure statutory claim. *Id.* Section 2255(h)(2) reflects the same special solicitude for constitutional claims. Prisoners raising constitutional claims can thus appeal under Section 2253 and can, if a constitutional decision is retroactive, file a fresh collateral attack under Section 2255(h). Prisoners raising statutory claims, by contrast, can neither appeal nor file repeat collateral attacks raising such claims. AEDPA thus reflects that Congress viewed statutory claims as deserving of fewer layers of error correction.

If the saving clause were to extend to second or successive statutory claims barred by Section 2255(h), however, the hierarchy would be flipped. Inmates who raise statutory claims would be *better off* than inmates who raise constitutional claims via the express exception in Section 2255(h)(2). That is because an inmate who invokes the saving clause and files a habeas petition under Section 2241 circumvents sev-

eral other internal gatekeeping limits that constrain 2255 motions.

First, and perhaps most notably, a one-year statute of limitations applies to Section 2255 motions. 28 U.S.C. 2255(f). That limitations period can be "harsh." *Dodd* v. *United States*, 545 U.S. 353, 359 (2005). For example, because of the usual delay in declaring a constitutional right retroactive, inmates who "file[] a second or successive motion seeking to take advantage of a new rule of constitutional law"—as expressly permitted in Section 2255(h)(2)—will be time-barred in all but "rare case[s]." *Id.* Meanwhile, inmates who raise second or successive statutory claims in a habeas petition, rather than a 2255 motion, will not face any express limitations period. *Cf.* 28 U.S.C. 2255(f) (federal prisoners' 2255 motions); 28 U.S.C. 2244(d)(1) (state prisoners' habeas petitions).

Second, a court of appeals must certify that any second or successive 2255 motion satisfies AEDPA's various gatekeeping requirements. 28 U.S.C. 2255(h). No such certification process applies to habeas petitions.

Third, if an inmate's 2255 motion is denied, he may appeal only if a court issues a certificate of appealability. 28 U.S.C. 2253(c)(1). And a certificate of appealability is not available for pure statutory claims. 28 U.S.C. 2253(c)(2). If an inmate uses the saving clause to file a habeas petition, however, he may appeal the denial of a pure statutory claim. *Cf.* 28 U.S.C. 2253(c)(1)(B) (federal prisoners' 2255 motions); 28 U.S.C. 2253(c)(1)(A) (state prisoners' habeas petitions).

Fourth, a second or successive 2255 motion based on a new rule of constitutional law may rely only on decisions of this Court. 28 U.S.C. 2255(h)(2). By con-

trast, some courts of appeals have extended the saving clause to statutory claims based on new court of appeals decisions—meaning that a prisoner needs only an intervening court of appeals decision to bring an unenumerated statutory claim, but needs an intervening decision of this Court to bring an enumerated constitutional claim. *See, e.g.*, *Beason* v. *Marske*, 926 F.3d 932, 935 (7th Cir. 2019); *United States* v. *Wheeler*, 886 F.3d 415, 428-429 (4th Cir. 2018).

The upshot is that extending the saving clause to second or successive statutory claims would afford a far "*superior* remedy" to the very claims that Congress elected not to prioritize, and for which Congress apparently did not believe that additional error correction trumped finality. *McCarthan*, 851 F.3d at 1091. That is not a mere "policy concern," as the government suggests (at 39); it is a fundamental statutory-interpretation problem. This Court generally "resist[s] attributing to Congress an intention to render a statute so internally inconsistent." *Greenlaw* v. *United States*, 554 U.S. 237, 251 (2008).

3. An expansive reading of the saving clause would lead to illogical and unadministrable results.

An expansive reading of the saving clause would also lead to several practical problems. It would (1) reintroduce many of the logistical difficulties that Congress sought to avoid in the 1940s, (2) divide claims between two different forums for no logical reason, and (3) create a host of follow-on questions for this Court to grapple with in the future. Those practical concerns underscore the consequences of departing from Section 2255's text.

a. A broad view of the saving clause would reintroduce many of the problems that Congress attempted to solve in 1948. Congress believed that Section 2255 would "minimize" the "practical difficulties that had arisen in administering the habeas corpus jurisdiction" by "affording the same rights in another and more convenient forum." *Hayman*, 342 U.S. at 219. Those difficulties included that habeas courts often were located "far from the scene of the facts" and "the homes of the witnesses," lacked the records and familiarity with the issues that sentencing courts enjoyed, and shouldered a disproportionate caseload because of the "fortuitous concentration of federal prisoners within the district." *Id.* at 212-214.

Applying the saving clause here would "channel[] federal prisoners' postconviction challenges back into the traditional habeas system" and "resurrect[] the very problems § 2255 was supposed to put to rest." *Wright* v. *Spaulding*, 939 F.3d 695, 707 (6th Cir. 2019) (Thapar, J., concurring). Those districts that house the most federal prisoners would again face a disproportionate burden. Although the numbers may not be as dramatic as in the 1940s, five federal districts currently house nearly 25% of all federal inmates.[4] If this Court were to adopt a broad view of the saving clause, those districts would see a disproportionate jump in their workload after a decision like *Rehaif*. That would be true under both petitioner's broader theory and the

[4] *See* Federal Bureau of Prisons, *Population Statistics*, https://www.bop.gov/about/statistics/population_statistics.jsp (last visited Sept. 12, 2022). To calculate that percentage, select "Generate Report," aggregate the prison population by judicial district, and divide the sum of the five most populous districts by the total BOP prisoner population.

government's narrower one, as those courts would either field more habeas petitions or field more threshold disputes about actual innocence. *See* U.S. Br. 24.

Moreover, habeas courts would be tasked with deciding questions that sentencing courts are often better equipped to handle. Take this case—or almost any case involving a *Rehaif* claim. The argument typically turns on whether a defendant knew of his prohibited status, though that element was not charged. *See* U.S. Br. 32-35. The sentencing court is already familiar with the trial record, the inmate's criminal record, and the defense's theory of the case. But under a broad view of the saving clause, the habeas court would instead decide that fact-intensive claim, forgoing the efficiencies of sentencing-court adjudication. And if the saving clause were to extend beyond invalid convictions to invalid sentences, those problems would multiply. A habeas court would be required to conduct a resentencing, despite dubious authority to do so and despite knowing far less than the sentencing court "about the defendant, the case, and the local community." *Wright*, 939 F.3d at 708 (Thapar, J., concurring).

b. An expansive saving clause not only would produce inefficiencies, but would do so without any decipherable logic to the distribution of cases between sentencing courts and habeas courts. Under petitioner's or the government's regimes, a federal inmate asserting a *Rehaif* claim in his initial 2255 motion would file in the sentencing court. Meanwhile, a federal inmate asserting a *Rehaif* claim in his would-be second 2255 motion would switch to a habeas petition and file in the district of confinement. The defendant would switch, too. In an initial motion, the inmate would sue the United States Attorney (who participated in his

conviction and sentencing); in a second-motion-qua-habeas-petition, he would sue the warden of the prison in which he is held (who is a defendant by happenstance).

Choice-of-law principles would further complicate things. Under petitioner's theory, if the habeas court and sentencing court are located in different circuits, the habeas court would need to assess whether *another* circuit's law would have foreclosed a claim at the time of the initial 2255 motion. *See Samak*, 766 F.3d at 1281 (Pryor, J., concurring) (criticizing the "[s]trange" result that the Eleventh Circuit "must now review the law of the Fifth Circuit to determine whether any decision of the Supreme Court has 'busted' precedents of that circuit court"). Choice-of-law questions would also arise if different circuits implement this Court's statutory-interpretation decisions differently. For example, before *Greer* v. *United States*, 141 S. Ct. 2090 (2021), courts of appeals consulted the trial record in different ways in reviewing a forfeited *Rehaif* claim—meaning that such a claim might succeed in a sentencing court but not in a habeas court, or vice versa. A habeas court could avoid that discrepancy only by applying the law of the circuit in which the sentencing court sits, which courts have inconsistently done and the government has inconsistently urged. *See, e.g.*, *Chazen*, 938 F.3d at 865-866 (Barrett, J., concurring).

c. Extending the saving clause to second or successive statutory claims would mire this Court in further complexities. That has become apparent over the last 25 years, as the courts of appeals in petitioner's camp have struggled to articulate a consistent theory. Several tests have developed, including the Ninth Circuit's novelty test, the Seventh Circuit's circuit-

precedent-foreclosure test, and the Second Circuit's constitutional-doubt test. *See Prost*, 636 F.3d at 592; *see also* Pet. 8-13. Even those three tests disguise the variability that persists within those circuits. The Seventh Circuit, for example, has "stated the 'saving clause' test in so many different ways that it is hard to identify exactly what it requires." *Chazen*, 938 F.3d at 863 (Barrett, J., concurring). And before the Eleventh Circuit abandoned its similar test, that test had become "a monster of [the court's] creation, untethered to the text" and with "no principled basis for determining its ultimate reach." *Cortes-Morales* v. *Hastings*, 827 F.3d 1009, 1016 (11th Cir. 2016) (Pryor, J., concurring).

Here are some questions that a broad reading of the saving clause generates and that courts of appeals have struggled to answer:

- Does the saving clause cover only an erroneous conviction, or does it extend to a sentence that exceeds the statutory maximum? *Compare Hill* v. *Masters*, 836 F.3d 591, 596 (6th Cir. 2016), *with In re Bradford*, 660 F.3d 226, 230 (5th Cir. 2011).
- What about a sentence with an incorrect mandatory minimum? *See United States* v. *Wheeler*, 734 Fed. Appx. 892, 896 (4th Cir. 2018).
- What about a mandatory Sentencing Guidelines error? *Compare Brown* v. *Caraway*, 719 F.3d 583, 588 (7th Cir. 2013), *with Gilbert* v. *United States*, 640 F.3d 1293, 1307 (11th Cir. 2011) (en banc).
- Does the saving clause apply only after an intervening decision of this Court, or does it apply if a court of appeals reconsiders its own precedent? *Compare Wheeler*, 886 F.3d at 428-429,

with Hueso v. *Barnhart*, 948 F.3d 324, 326 (6th Cir. 2020).

- Does an inmate need to prove his actual innocence before resorting to the saving clause? *Compare Triestman*, 124 F.3d at 365 n.2, *with Wooten* v. *Cauley*, 677 F.3d 303, 311 (6th Cir. 2012).
- In response to a claim of innocence, can the government introduce its own evidence of guilt? *Compare Santillana* v. *Upton*, 846 F.3d 779, 784 (5th Cir. 2017), *with Martin* v. *Perez*, 319 F.3d 799, 804 (6th Cir. 2003).
- Can the saving clause be used to escape other restrictions in Section 2255(h), such as the clear-and-convincing threshold for newly discovered evidence? *See Webster*, 784 F.3d at 1140.
- Can the saving clause be used to escape other procedural bars in Section 2255, such as the statute of limitations? *Cf. McCarthan*, 851 F.3d at 1091.
- Must a statutory interpretation be "new" within the meaning of *Teague* v. *Lane*, 489 U.S. 288 (1989), to trigger the saving clause? *Compare Wright*, 939 F.3d at 705 n.7 (Thapar, J., concurring), *with Chazen*, 938 F.3d at 866 (Barrett, J., concurring).
- Is a claim sufficiently foreclosed at the time of the initial Section 2255 motion if the court of appeals had addressed similar questions unfavorably but had not squarely decided the question at issue? *Cf. Prost*, 636 F.3d at 595.
- What if the relevant court of appeals had not foreclosed the claim, but the prisoner lacked an affirmative basis to make it? *Compare Stephens* v. *Herrera*, 464 F.3d 895, 898 (9th Cir. 2006),

with Reyes-Requena v. *United States*, 243 F.3d 893, 904 (5th Cir. 2001).

Although the government purports to answer some of these questions, its answers lack clear internal logic. For example, under the government's current view (at 31), an incorrect conviction and an incorrect statutory maximum—but not an incorrect mandatory minimum—would justify saving-clause relief. No court of appeals has drawn the same line. And while the government offers its current views on whether a change in this Court's law is required (at 21-22) and what sort of evidence of guilt it can introduce (at 24), there is little assurance that lower courts would adopt those views. Such questions would thus inevitably return to this Court, unless the Court leaves the responsibility for "fixing" the scope of Section 2255(h) with Congress.

B. Petitioner's And The Government's Contrary Theories Lack Merit.

1. Petitioner's outcome-focused theory is textually unsound and logically unbounded.

Petitioner advocates an outcome-focused approach (at 16) under which "the § 2255 remedy cannot 'test' the legality of a detention," and thus the saving clause applies, whenever a sentencing court "applies the wrong substantive law." That approach cannot be squared with the remedy-focused text of the saving clause. *See* pp. 14-15, *supra*.

a. Petitioner relies heavily (at 19-25) on a discussion of the adequacy of remedies in historical equity jurisprudence. As an initial matter, he offers no reason to think that Congress intended to borrow a term of art from that context when it used the word "inadequate" in a postconviction-review statute. But even

indulging that premise, petitioner's historical authorities do not support his argument that a remedy is inadequate whenever a party is unlikely to prevail on the merits. Instead, courts have long defined an inadequate remedy as one that is procedurally deficient, not one in which a court applies an incorrect substantive standard. *See, e.g.*, *Ex parte Hawk*, 321 U.S. 114, 118 (1944) (where courts "have considered and adjudicated the merits of [a claimant's] contentions," the remedy is not "inadequate").

Petitioner also focuses (at 17-18) on the word "test," but wrenches it out of its statutory context. In particular, he relies on a hypothetical (at 18) in which an exam is inadequate to "test" a student's knowledge if the answer key is wrong. But the analogy is misplaced. If incorrect circuit precedent is the faulty answer key, that answer key will be wrong no matter which remedy a litigant pursues—a Section 2255 motion, a habeas petition, or a direct appeal. That tells us nothing about whether Section 2255 is a deficient remedy. So the better analogy is: assume that a history teacher incorrectly believes that John Marshall was the first Chief Justice. Is a multiple-choice exam any more inadequate than a fill-in-the-blank exam to "test" a student's knowledge of the early Supreme Court? Certainly not. The teacher might grade the exam incorrectly either way, but that has nothing to do with the suitability of the exam format.

Nor does petitioner grapple with the full implications of his argument (at 17) that "[t]esting a detention's legality necessarily requires applying the correct substantive law" or (at 22) that Section 2255 is inadequate if relief is "likely to be wrongly withheld." It is unclear why, under petitioner's theory, a prisoner can assert that a court of appeals applied incorrect

substantive law only after a later Supreme Court decision. Section 2255 would seem to be just as "inadequate or ineffective" whenever circuit precedent compels rejection of his 2255 motion and the prisoner disagrees with that precedent. But petitioner does not embrace the conclusion that follows: that adverse circuit precedent alone could trigger the saving clause, allowing even an inmate filing an initial 2255 motion to file a habeas petition instead, if he is incarcerated in a circuit with friendlier precedent. Congress undoubtedly did not intend—and this Court should not endorse—that forum-shopping result.

b. At the end of his textual argument, petitioner briefly observes (at 27) that the saving clause uses the present-tense "is." That observation confirms that his real dispute is not with pre-*Rehaif* Eighth Circuit precedent but with Section 2255(h)'s second-or-successive bar. If, as petitioner states (*id.*), the saving clause depends on whether the 2255 remedy is inadequate "at the time he files [a motion], not when he might have filed a previous motion," then any previously incorrect circuit precedent is beside the point. When petitioner filed his habeas petition, the Eighth Circuit had a fully accurate "answer key." At that point, Section 2255(h)'s second-or-successive bar was the only reason that petitioner's sentencing court would have denied him relief and, in petitioner's view, "there is no 'test' at all." *Id.* As already explained, however, Section 2255(h) can neither textually nor logically be the source of inadequacy under Section 2255(e). *See* pp. 23-25, *supra*.

2. The government's habeas-benchmark theory contravenes AEDPA and rests on arbitrary limiting principles.

The government offers a new theory that differs from petitioner's, from its three previous positions, and from any federal court's view. That untested theory gets some things right. The government correctly rejects (at 41-44) petitioner's merits-focused arguments. And it correctly acknowledges (at 16) that the saving clause does not "unqualifiedly authorize resort to habeas any time some legal bar precludes Section 2255 relief." Those two correct premises should end the matter, but the government resists their logical conclusion in favor of a path to relief for certain claims barred by Section 2255(h).

a. The government's new theory (at 15, 19) is that Section 2255 is "inadequate or ineffective" if it is not identical in scope to habeas. That habeas comparison, however, appears nowhere in the statutory text. The government simply assumes (at 16) that the phrase "inadequate or ineffective" uses a specific alternative remedy as a "benchmark." But Congress's inclusion of the additional phrase "to test" indicates a more straightforward measure of a remedy's adequacy and effectiveness: whether a court is accessible and able to adjudicate a claim. In the Section 2255 context, a sentencing court is accessible and able to adjudicate an inmate's claim even if that claim is destined to lose—whether because of circuit precedent (contra petitioner's theory), or because of internal gatekeeping requirements like AEDPA's one-year limitations period or its second-or-successive bar (contra the government's theory).

The government's habeas-benchmark theory also makes no sense. There is no apparent reason to look

to a remedy that Congress largely eliminated, at least for federal prisoners, nearly 75 years ago. Section 2255 and habeas corpus may have been roughly equivalent when Section 2255 was crafted in 1948. But once Congress put the 2255 remedy in place, it remained free to narrow that remedy and to limit federal prisoners' postconviction challenges. Over the next 75 years, it did so by restricting the Section 2255 process, not by restricting a defunct habeas process. Yet the government's habeas-benchmark theory would nullify any post-1948 restrictions on federal prisoners' postconviction challenges, unless Congress also bothered to restrict an old habeas scheme that generally no longer applied.

Moreover, the government cannot get around the fact that Section 2255(h) identifies only two categories of permissible second or successive collateral attacks. Those limits on Section 2255 motions, the government says (at 28), do not "justif[y] an inference that Congress silently repealed the traditional habeas remedy" for statutory claims. That reasoning is remarkable. It would apparently make no difference to the government if Section 2255(h) *expressly barred* a second or successive claim based on a new rule of statutory interpretation; a prisoner could just use habeas instead. The court of appeals drew the far more natural inference that when Congress foreclosed repeat 2255 motions for non-constitutional claims, it did not reroute the foreclosed claims to habeas. *See* Pet. App. 9a. Multiple canons of statutory construction—including the principle that the specific controls the general, the canon of *expressio unius*, and the presumption that all provisions be given effect—support that inference. Indeed, the government elsewhere acknowledges (at 8) that using the saving clause to au-

thorize repeat collateral attacks that Section 2255(h) forecloses would "evade Section 2255(h)'s limits."

b. The government's new theory is also internally inconsistent. The government does not identify a uniform "habeas benchmark" against which Section 2255 should be measured. Instead, it invokes two different eras and types of habeas proceedings, and switches between them when necessary to justify its preferred result of permitting second or successive statutory claims without undermining AEDPA's other limits.

For the most part, the government adopts as a benchmark (at 26-27, 39) the *post*-AEDPA federal habeas process available to *state* prisoners. It presumably does so to avoid eviscerating all of AEDPA's internal gatekeeping limits. For example, Section 2255(h) specifically identifies which factual and constitutional claims may be raised in a second or successive motion. The government assures the Court (at 26) that, under its theory, "the saving clause would provide no recourse" to an inmate raising "a factual claim falling outside Section 2255(h)(1) or a constitutional claim falling outside Section 2255(h)(2)" because state prisoners are subject to analogous restrictions in their federal habeas petitions. *See* 28 U.S.C. 2244(b). The government would presumably say the same for motions filed outside Section 2255's one-year limitations period. *Compare* 28 U.S.C. 2255(f), *with* 28 U.S.C. 2244(d). The state-prisoner comparator makes little sense as a logical matter: why should courts treat AEDPA's gatekeeping limits on state prisoners as the paradigm of remedial adequacy, but ignore any different gatekeeping limits that AEDPA imposes directly on federal prisoners? But it at least has the salutary effect of cabining the government's theory.

The problem for the government, however, is that state prisoners cannot bring statutory claims at all. As it briefly acknowledges (at 28), a "state prisoner by definition has not been convicted under a federal statute" and cannot raise a "pure statutory claim . . . in federal habeas." So if the government were to stick with its state-prisoner comparator, it would hit a dead end. The government thus pivots and substitutes a different habeas benchmark for statutory claims only: "*pre*-AEDPA habeas principles" governing *federal* prisoners. U.S. Br. 23 (emphasis added). The fact that the government cannot simultaneously cabin the scope of its theory and achieve its desired result—while applying a single, consistent benchmark—demonstrates the illogic of that theory in the first place.

c. The primary support for the government's theory is a line of dicta in *Sanders* v. *United States*, 373 U.S. 1 (1963). *See* U.S. Br. 17, 29, 38, 39. In *Sanders*, the Court concluded that the same *res judicata* rules applied to pre-AEDPA Section 2255 motions as to habeas petitions. 373 U.S. at 12-14. The Court then noted in tentative dicta that, if Section 2255 had imposed more stringent rules, those rules "would probably prove to be completely ineffectual" anyway because a "prisoner barred by *res judicata* would seem as a consequence to have an 'inadequate or ineffective' remedy" under the saving clause. *Id.* at 14-15. *Sanders*'s holding about postconviction *res judicata* principles did not survive later statutory and judicial developments. *See, e.g.*, *Felker* v. *Turpin*, 518 U.S. 651, 664 (1996); *McCleskey* v. *Zant*, 499 U.S. 467, 485-490 (1991). This Court has also discarded *Sanders*'s approach to statutory interpretation, including its reasoning that the statutory "language

cannot be taken literally." 373 U.S. at 12-13. Because both the holding and reasoning of the decision have been repudiated, its unreasoned dicta merits no weight.

d. If the government perceives unfairness in how Section 2255 currently operates, it has multiple tools at its disposal. The Department of Justice has previously proposed legislation to Congress that would expand Section 2255(h) to "enable some prisoners to benefit from later, non-constitutional rules announced by the Supreme Court." U.S. Br. 52, *United States* v. *Wheeler*, No. 16-6073 (4th Cir. Oct. 6, 2017). Until Congress acts, or if it chooses not to, "such prisoners are entitled to seek executive clemency." *Id.* at 52-53. Given the Department's current view, there is no obvious reason why it would not recommend, and the President would not grant, clemency to the small group of federal prisoners who it believes are subject to "fundamentally unjust incarceration." U.S. Br. 24 (citation omitted).

As a majority of this Court recently reminded the Department, "the Constitution affords the Executive Branch authority to unilaterally provide relief" to federal prisoners "if the Executive wishes to do so." *Grzegorczyk* v. *United States*, 142 S. Ct. 2580, 2581 (2022) (statement of Kavanaugh, J., respecting the denial of certiorari). But if both Congress and the Executive decline to act, the Executive cannot "enlist the Judiciary," *id.*, to distort the plain meaning of statutory text instead.

C. Petitioner's Constitutional Concerns Are Unfounded.

Finally, petitioner devotes (at 33-47) a substantial portion of his brief to the canon of constitutional

avoidance. That canon "comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction." *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 842 (2018) (quoting *Clark* v. *Martinez*, 543 U.S. 371, 385 (2005)). For the reasons above, petitioner's construction of the saving clause is at odds with the text, statutory structure, history, and common sense. In the absence of genuine ambiguity, "the canon simply has no application." *Id.* (citation omitted).

It is particularly critical that the Court apply Section 2255's plain text because direct constitutional adjudication and the application of constitutional avoidance would lead to different outcomes. If the Court were to apply avoidance here, it would wedge claims like petitioner's into Section 2255(e)'s saving clause, which in turn would send them to a procedurally more lenient habeas court. *See* pp. 29-31, *supra*. If, by contrast, an inmate directly challenged Section 2255(h)'s second-or-successive bar, he could at most obtain the right to file a repeat 2255 motion. Constitutional avoidance, in other words, would lead to more dramatic results than a constitutional challenge.

In any event, even if the saving clause were susceptible to multiple reasonable constructions, and even if it were otherwise appropriate to apply constitutional avoidance, the doctrine comes into play only when there are "serious constitutional doubts." *Clark*, 543 U.S. at 381. Petitioner identifies four potential constitutional problems, but none is substantial.

1. Section 2255(h)'s restrictions on second or successive motions are consistent with the Suspension Clause, U.S. Const. Art. I, § 9, Cl. 2. The Suspension Clause, "at a minimum, 'protects the writ as it existed

in 1789,' when the Constitution was adopted." *Department of Homeland Sec.* v. *Thuraissigiam*, 140 S. Ct. 1959, 1969 (2020) (quoting *INS* v. *St. Cyr*, 533 U.S. 289, 301 (2001)). In 1789, "the writ of habeas corpus would not have been available at all to prisoners" like petitioner to raise a postconviction challenge. *McCarthan*, 851 F.3d at 1094. Rather, "the common-law rule" was that "a judgment of conviction after trial was 'conclusive on all the world,'" except "if the court of conviction lacked jurisdiction over the defendant or his offense." *Brown* v. *Davenport*, 142 S. Ct. 1510, 1521 (2022).

Petitioner invokes that exception here (at 36-42), framing the sentencing court's erroneous construction of Section 922(g) as a lack of "jurisdiction." But the sentencing court had jurisdiction to convict petitioner under Section 922(g) because a violation of that statute is an "offense[] against the laws of the United States." 18 U.S.C. 3231; *see United States* v. *Baucum*, 80 F.3d 539, 540 (D.C. Cir. 1996). Although "the line between mere errors and jurisdictional defects was not always a 'luminous beacon,'" *Brown*, 142 S. Ct. at 1521 (citation omitted), it is well-established that legal errors in construing a crime's elements do not defeat a court's jurisdiction. *See, e.g.*, *In re Eckart*, 166 U.S. 481, 482-483 (1897); *Ex parte Coy*, 127 U.S. 731, 756 (1888); *Ex parte Yarborough*, 110 U.S. 651, 654 (1884); *Ex parte Parks*, 93 U.S. 18, 20 (1876); *Ex parte Watkins*, 28 U.S. 193, 209 (1830). The prevailing early understanding in this Court was thus that the writ of habeas corpus "did not extend to cases of imprisonment after conviction, under sentences of competent tribunals." *Ex parte Yerger*, 75 U.S. 85, 101 (1868); *see Hayman*, 342 U.S. at 211; *Watkins*,

28 U.S. at 202-203; *Ex parte Kearney*, 20 U.S. 38, 42-45 (1822).

Even if petitioner's asserted error were "jurisdictional," the Suspension Clause would at most preserve petitioner's ability to bring a *first* 2255 motion raising the claim. The Suspension Clause says nothing about Section 2255(h)'s limit on *second* 2255 motions. In *Felker*, *supra*, this Court held as much in an analogous context. The Court determined that AEDPA's nearly identical limits on state prisoners' second or successive habeas petitions, *see* 28 U.S.C. 2244(b), "do not amount to a 'suspension' of the writ." 518 U.S. at 664. Rather, "judgments about the proper scope of the writ are normally for Congress to make" because Congress is best suited to select the point in the postconviction-review process at which finality concerns prevail over error correction. *Id.* (citation omitted). The parallel limits on federal prisoners' second or successive 2255 motions are likewise constitutionally sound.

2. Applying Section 2255(e) in accordance with its plain terms is also consistent with constitutional separation-of-powers principles. Petitioner asserts (at 43) that the lower courts here "usurp[ed] Congress's authority to define crime." They did no such thing. Petitioner was convicted of violating 18 U.S.C. 922(g), a crime defined by Congress. Federal courts construe federal statutes, including Section 922(g), as part of their constitutionally prescribed roles. *See Parks*, 93 U.S. at 20. Lower courts may sometimes get the answer wrong, but they do not contravene the separation of powers when they do.

3. Nor do Section 2255's limits violate the Fifth Amendment's Due Process Clause. *See* Pet. Br. 43-45. A statute conflicts with due process only when "it

offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina* v. *California*, 505 U.S. 437, 445 (1992) (quoting *Patterson* v. *New York*, 432 U.S. 197, 201-202 (1977)). This Court has never held that an individual who is convicted of a crime has a due process right to a direct appeal, let alone an initial round of postconviction review, let alone a second round of postconviction review. *See Halbert* v. *Michigan*, 545 U.S. 605, 610 (2005); *United States* v. *MacCollom*, 426 U.S. 317, 323 (1976) (plurality opinion); *McKane* v. *Durston*, 153 U.S. 684, 687 (1894); *see also Murray* v. *Giarratano*, 492 U.S. 1, 10 (1989) (plurality opinion); *Pennsylvania* v. *Finley*, 481 U.S. 551, 557 (1987). The primary decision on which petitioner relies (at 43-44), *Fiore* v. *White*, 531 U.S. 225 (2001) (per curiam), has nothing to do with a prisoner's entitlement to postconviction review, but rather involved a due process claim of error at trial, *see id.* at 228-229.

4. Lastly, the Eighth Amendment's ban on cruel and unusual punishments is irrelevant. *See* Pet. Br. 45-47. Petitioner's Eighth Amendment argument "must be evaluated in the light of the previous proceedings in this case." *Herrera* v. *Collins*, 506 U.S. 390, 398 (1993). Petitioner was convicted of violating Section 922(g). J.A. 74-75. He thus "does not come before the Court as one who is 'innocent,'" but instead "as one who has been convicted by due process of law." *Herrera*, 506 U.S. at 399-400. Under *Herrera*, petitioner's conviction forecloses any Eighth Amendment claim based on innocence. *Id.* at 400.

* * *

The constitutional-avoidance canon does not apply here, and this Court should be particularly reluctant

to invoke it because it would lead to a different substantive outcome than a direct constitutional challenge. Instead, the Court should apply Section 2255(e) and Section 2255(h) in accordance with their plain terms. "It is for Congress, not this Court, to amend the statute" if it believes that Section 2255(h) "unduly restricts federal prisoners' ability to file second or successive motions." *Dodd*, 545 U.S. at 359-360.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below.

Respectfully submitted.

ALEXIS C. HOLMES
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APPENDIX

1. 28 U.S.C. 2244 provides:

Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be

sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by

the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

2. 28 U.S.C. 2253 provides:

Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

3. 28 U.S.C. 2254 provides:

State custody; remedies in federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the

burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the

existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

4. 28 U.S.C. 2255 provides:

Federal custody; remedies on motion attacking sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress 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 that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is

otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is

inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.