No. 21-857

IN THE

Supreme Court of the United States

MARCUS DEANGELO JONES,
Petitioner,

vs.

DEWAYNE HENDRIX, Warden,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION SUPPORTING AFFIRMANCE

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QUESTION PRESENTED

Does 28 U. S. C. § 2255(e) permit a second collateral attack on a federal criminal judgment via habeas corpus in a class of cases that is not defined in the statute but is included in the class for which Congress forbade a second collateral attack via § 2255 itself?

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This case is another attempt to water down the habeas corpus reforms of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The impact

1. Respondent has consented to the filing of this brief. Petitioner has filed a blanket consent. No counsel for a party authored this brief in whole or in part. No counsel, party, or any person or entity other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

on finality of criminal judgments from such dilution is contrary to the interests of victims of crime that CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

In August 1999, petitioner Marcus Jones, a habitual criminal with 11 prior felony convictions, purchased a handgun at a pawnshop in Missouri. See Brief for Respondent 3, 34. A jury convicted him of making false statements to acquire a firearm and two counts of possessing a firearm as a felon. App. to Pet. For Cert. 2a.

The judgment was affirmed on appeal, but Jones was partially successful on his first motion to vacate under 28 U. S. C. § 2255. One of the duplicative possession counts was vacated, and he was resentenced. App. to Pet. For Cert. 2a. "Jones has since flooded the federal dockets with unsuccessful postconviction challenges, including numerous § 2255 motions and repeated petitions to the Supreme Court for review." App. to Pet. For Cert. 2a.

In 2019, this Court gave the felon-in-possession statute a new interpretation, contrary to the "interpretation that ha[d] been adopted by every single Court of Appeals to address the question." *Rehaif* v. *United States*, 588 U. S. __, 139 S. Ct. 2191, 2201, 204 L. Ed. 2d 594, 606 (2019) (Alito, J., dissenting). The Court held that "the word 'knowingly' applies both to the defendant's conduct and to the defendant's status. To convict a defendant, the Government therefore 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*., 139 S. Ct., at 2194, 204 L. Ed. 2d, at 599. On the facts of the case, there was virtually no chance that Rehaif was not actually aware of his status.

See *id*., 139 S. Ct., at 2201-2202, 204 L. Ed. 2d, at 607-608 (Alito, J., dissenting).

Because § 2255 bars successive motions in all cases but a few not pertinent here, Jones filed his *Rehaif* claim as a habeas corpus petition under 28 U. S. C. § 2241. App. to Pet. For Cert. 3a-4a. He claims that Congress's policy choice to disallow successive § 2255 motions in cases such as his renders the remedy "inadequate or ineffective to test the legality of his detention," thus triggering the saving clause of subdivision (e) of that section. The district court disagreed and dismissed his petition, and the Eighth Circuit affirmed. App. to Pet. For Cert. 4a.

SUMMARY OF ARGUMENT

The statute in this case should be interpreted straightforwardly, without the distortion introduced by the doctrine of avoiding constitutional doubt. There is no doubt. The landmark 1830 precedent of *Ex parte Watkins* establishes conclusively that in the Founding era the writ of habeas corpus could not be used to collaterally attack the final judgment of a court of general jurisdiction, which includes the federal trial courts. Attempts to minimize this decision as referring only to this Court's jurisdiction or making an exception for an inflated class of defects, which were deemed jurisdictional decades later, are specious.

The Suspension Clause as originally understood protected only the scope of habeas corpus as then known. A plausible Suspension Clause doubt could be raised only by abandoning the original understanding and adopting the view that the judiciary can change the meaning of constitutional provisions, i.e., the "living Constitution" view. This Court has rejected that view for other provisions of the Constitution, and it should

do so for all of them. Fidelity to principle forbids a "cafeteria originalism" whereby the Court picks and chooses which provisions of the Constitution will be interpreted according to their text as informed by history.

The parties and supporting *amici* ask this Court to rewrite the statute into something Congress would have had no reason to adopt. There is no reason for Congress to have created a class of cases subject to a second or subsequent collateral attack via habeas corpus but not § 2255. If Congress had wished to allow a second "bite at the apple" in these cases, it would simply have included them in the exceptions to the successive motion bar of § 2255(h).

Whether a remedy is adequate to test the legality of detention depends on what factors render a detention illegal. The "modified res judicata rule" of AEDPA alters what detentions are considered illegal for the purpose of collateral review, taking us partway back to *Watkins*. Detention pursuant to a judgment which is final on direct appeal, has survived an initial collateral review, and is not within the exceptions specified by Congress is not illegal for this purpose, even if there is error. The saving clause does not apply.

ARGUMENT

I. Congressional rollbacks of post-Founding extensions of habeas corpus present no substantial constitutional doubt.

At the time of the Founding, the writ of habeas corpus was not available to collaterally attack the final judgment of a court of general jurisdiction. See *Brown* v. *Davenport*, 596 U. S. __, 142 S. Ct. 1510, 1521, 212 L. Ed. 2d 463, 475 (2022); *Felker* v. *Turpin*, 518 U. S.

651, 663 (1996), citing *Ex parte Watkins*, 28 U. S. (3 Pet.) 193, 207 (1830). Such usage commenced, expanded, and contracted from the mid-nineteenth century onward by both legislation and case law. Yet each time Congress has enacted a law limiting collateral attack, opponents of the change have trotted out the Suspension Clause, asking the judiciary to strike it down. See, e.g., *United States* v. *Hayman*, 342 U. S. 205, 209 (1952); *Swain* v. *Pressley*, 430 U. S. 372, 379-380 (1977); *Felker*, *supra*, at 658. A frequent alternative argument is to give the reform a cramped interpretation that will defeat its purpose under the banner of "constitutional doubt." See, e.g., Liebman & Ryan, "Some Effectual Power": The Quantity and Quality of Decisionmaking Required of the Federal Courts, 98 Colum. L. Rev. 696, 872-873 (1998) (constitutional doubt argument under Article III to eviscerate 28 U. S. C. § 2254(d)); but see Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 950 (1998).

It is high time that this old warhorse was put out to pasture for good. Phantom constitutional doubts distort the process of interpretation of statutes. It is one thing to give a statute a strained interpretation to save it when it would otherwise be unconstitutional and void, but it is quite another to place a thumb on the scale and choose the less plausible of two interpretations merely to avoid a constitutional question, particularly when the constitutional argument is weak. See Nelson, Avoiding Constitutional Questions Versus Avoiding Unconstitutionality, 128 Harv. L. Rev. F. 331, 343 (2015). In this case, the correct answer is clear. Congress *may* authorize the use of habeas corpus for collateral attack, but it has no obligation to do so, as the First Congress did not. The Suspension Clause protects the writ as it was known at common law, but Congress has plenary power to roll back post-Founding expansions. Congress could

go all the way back to the *Watkins* rule and eliminate all collateral attacks from habeas corpus, or it can go part way back, as it did in 1996.

A. The Original Understanding.

Supporters of expansive collateral review regularly invoke the Great Writ "with the inevitable initial capitals," Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 142 (1970), either oblivious to the history or in denial of it. The historical Great Writ was simply not available for the purpose that habeas corpus is most often used today, and the celebrated procedure is irrelevant to the debate over collateral attack on final judgments. Petitioner tries to get around the historical limit by invoking the late-nineteenth century subterfuge of defining "jurisdictional" defects broadly, in this case to include a simple matter of statutory interpretation. See Brief for Petitioner 36. That effort cannot be squared with the original understanding.

In the Judiciary Act of 1789, Congress did not authorize appeals from felony convictions in the circuit courts, see *United States* v. *More*, 7 U. S. (3 Cranch) 159 (1805), but it did grant this Court jurisdiction in habeas corpus. See Judiciary Act of 1789, § 14, 1 Stat. 82. Nonetheless, for the first 41 years after enactment, not a single defendant even tried to use habeas corpus to obtain review of a conviction by that route. See Scheidegger, 98 Colum. L. Rev., at 929, n. 280; *Ex parte Watkins*, 28 U. S. (3 Pet.) 193, 199 (1830) ("*Watkins*"). Evidently, it was obvious to the lawyers of the founding generation that this route was not available. Pretrial commitment decisions could be reviewed via habeas corpus, see *Ex parte Bollman*, 8 U. S. (4 Cranch) 75, 100 (1807), but not final judgments. See *Watkins*, *supra*, at 208 (distinguishing *Bollman* and others on this basis).

When a creative defense attorney finally tried in *Watkins*, Chief Justice Marshall shot down the attempt in a definitive opinion that leaves no doubt on this subject.

1. The Watkins Rule.

In his classic article, Professor Bator called *Ex parte Watkins* "the great case," establishing that, as of 1830, "substantive error on the part of a court of competent jurisdiction [did] not render a detention 'illegal' for purposes of habeas corpus ...." Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 466 (1963). Of course, exceptions were made later, see *id*., at 466-467, and they eventually swallowed the rule. See *id*., at 495; *Edwards* v. *Vannoy*, 593 U. S. __, 141 S. Ct. 1547, 1569-1570, 209 L. Ed. 2d 651, 675-676 (2021) (Gorsuch, J., concurring); Scheidegger, 98 Colum. L. Rev., at 933. But for the original understanding of the scope of habeas corpus, *Watkins* presents a formidable barrier to a constitutional doubt argument. Examination of that case in some detail is needed to see why the attempts to minimize it or evade it do not hold water.

The substance of Watkins's claim is not described in the opinion of this Court, and the reporter omitted it from the report of the argument. See *Watkins*, 28 U. S., at 198. Turning to the report of the circuit court proceeding, we see that it is not distinguishable from the claim made in the present case.

Tobias Watkins was a minor treasury official charged with fraudulently obtaining government funds for his own use. See *United States* v. *Watkins*, 28 F. Cas. 419, 424, 466-467 (No. 16,649) (CC DC 1829); *Watkins*, 28 U. S., at 195-196. Among his many objections during extensive pretrial proceedings, he claimed that this conduct had not been made criminal by any act of

Congress, and therefore the circuit court had no jurisdiction to try him for it. See 28 F. Cas., at 462, 465-466.

By this point, it was well established that the United States had no general criminal common law, and the only federal crimes are those declared as such by Congress, not the courts. *United States* v. *Hudson*, 11 U. S. (7 Cranch) 32, 34 (1812). No law like the present 18 U. S. C. § 641, making embezzlement of government funds a federal crime, had yet been enacted. However, in an act organizing the District of Columbia, commonly known as the District of Columbia Organic Act of 1801, Congress did provide that the laws of Maryland would remain in force in the portion of the District ceded by Maryland. See An Act Concerning the District of Columbia § 1, 2 Stat. 103 (1801). The same act established the Circuit Court for the District of Columbia, *id*., § 3, and gave it "cognizance of all crimes and offenses committed within said district ...." *Id*., § 5. Defense counsel argued that the Organic Act's adoption of Maryland law did not make Watkins's conduct a federal crime, as federal officials embezzling federal funds commit no offense against Maryland. See *Watkins*, 28 F. Cas., at 463.

The circuit court considered the objection and rejected it on the merits twice, holding that the case could be prosecuted as the offense was defined in Maryland common law. See *id*., at 424-425, 466. When Watkins challenged this judgment in this Court on habeas corpus, then, his underlying claim was not materially different from the claim being made in the present case. If his position on the merits were correct, he did not commit any act defined as a crime in any federal statute. If this amounted to a jurisdictional defect of the kind that allowed a collateral attack via habeas corpus at common law, cf. Brief for Petitioner 36-37, then this Court would have had to reach the

merits. It did not. Chief Justice Marshall's opinion proceeds carefully, step by step, and on its face it refutes the attempts that have been made to minimize or evade its clear and controlling holding that habeas did not lie to overturn a final judgment of a court of general criminal jurisdiction.

First, the opinion makes clear that the question was not one of this Court's jurisdiction to issue the writ in appropriate cases. That was well settled. "No doubt exists respecting the power; the question is, whether this be a case in which it ought to be exercised." See *Watkins*, 28 U. S., at 201. The answer to that question lay in the common law and the Habeas Corpus Act of 1679, see *id*., at 201-202, an answer that would be the same in any court which was asked to disregard the judgment of another court that it had no appellate authority to reverse.

The short answer is that the criminal case judgment is res judicata in the habeas court. "A judgment, in its nature, concludes the subject on which it is rendered, and pronounces the law of the case. The judgment of a court of record whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be." *Id*., at 202-203. Counsel for the petitioner admitted this was true as a general matter but argued for the same exception as the petitioner in the present case. "The counsel for the prisoner admit the application of these principles to a case in which the indictment alleges a crime cognizable in the court by which the judgment was pronounced; but they deny their application to a case in which the indictment charges an offence not punishable criminally according to the law of the land." *Id*., at 203; cf. Brief for Petitioner 36, 39 (same argument).

The *Watkins* Court's straightforward answer to this objection is that determining whether the offense

charged is punishable according to the law of the land is a question that a court of general jurisdiction has the authority to decide. *Watkins*, 28 U. S., at 203. For the purpose of determining reviewability on habeas corpus, it made no difference if that decision was right or wrong. "An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous." *Ibid*.

Watkins makes two important distinctions which petitioner glosses over. First, it distinguishes decisions of "inferior courts." For the purpose of collateral attack, this term refers to inferior courts in a technical sense, not merely a lower court from which an appeal lies. *Watkins* quoted extensively from *Kempe's Lessee* v. *Kennedy*, 9 U. S. (5 Cranch) 173 (1809), which had discussed that concept at some length. The technical sense applies to " 'courts of special and limited jurisdiction' " whose jurisdiction must be shown and cannot be presumed. *Watkins*, 28 U. S., at 205. The lower federal courts are not inferior courts in this sense. They are courts of general jurisdiction.

> "The judgment of the circuit court in a criminal case is of itself evidence of its own legality, and requires for its support no inspection of the indictments on which it is founded. The law trusts that court with the whole subject, and has not confided to this court the power of revising its decisions. *We cannot usurp that power by the instrumentality of the writ of habeas corpus.*" *Id*., at 207 (emphasis added).

Second, *Watkins* distinguishes final judgments in criminal cases from pretrial commitments. The Court's previous habeas corpus cases reaching the merits were all pretrial commitment cases. See *id*., at 207-208.

Petitioner cites a number of English cases as supposedly authorizing review of the merits in cases such as this one, but he fails to identify a single case as unambiguously using habeas corpus to collaterally attack a final judgment of a court of general jurisdiction. It is sometimes difficult to tell from the very brief reports in these cases, but they appear to be inferior tribunals, nonfinal decisions, or both. For example, in *Rex* v. *Hall*, 97 Eng. Rep. 1022 (K. B. 1765), the petitioner was committed and perhaps convicted "by two Surrey-justices." He was declared "a rogue and a vagabond" for deserting and not supporting his family. No doubt the judges of the superior courts were skeptical of commitments by justices of the peace and were inclined to review them *de novo*, but that does not negate the *Watkins* rule. *Rex* v. *Brown*, 101 Eng. Rep. 1247 (K. B. 1798), is another rogue and vagabond committed by a justice of the peace. *Rex* v. *Catherall*, 93 Eng. Rep. 927 (K. B. 1730), does not specify the nature of the committing court, but as it appears to be a petty offense it may well have been an inferior one. *Rex* v. *Hall*, 98 Eng. Rep. 967 (K. B. 1774), is another justice of the peace case, where the petitioner was committed until he paid the damages for cutting down a tree. *Rex* v. *Collier*, 95 Eng. Rep. 647 (K. B. 1752), is a very brief report of another justice of the peace case, and apparently a contempt case. See the discussion of *Bushell's Case*, *infra* at 13.

In any case, these are all petty offenses. Conspicuously absent is a citation to a single case of habeas corpus being used to collaterally attack a judgment in a felony case. That distinction matters, as *Watkins* noted that the Habeas Corpus Act of 1679 "may be referred to as describing the cases in which relief is, in England, afforded by this writ to a person detained in custody" and noted that the law of England on the subject "is in a considerable degree incorporated into our own." 28

U. S., at 202. The act expressly excluded persons convicted of felonies. See *ibid*. It was widely copied by state legislatures in America in the founding era. Twelve of the thirteen original states copied it, and all twelve followed the exclusion of felony convicts. See Oaks, Habeas Corpus in the States: 1776-1865, 32 U. Chi. L. Rev. 243, 254 (1965). Early state court cases denied habeas relief on this ground. See *id*., at 262-263. This near unanimity of the original states cannot be squared with the notion that collateral attack on felony convictions was deemed a fundamental aspect of habeas corpus.

Watkins conclusively establishes that the final judgment of a court of general criminal jurisdiction was *res judicata* as to the legality of detention under that judgment in a habeas corpus proceeding in the Founding era. An act of Congress granting equal or lesser finality to criminal judgments today does not impair any function of habeas corpus as originally understood and therefore cannot possibly be contrary to the Suspension Clause as originally understood.

2. Red Herrings.

Petitioner attempts to diminish the broad *Watkins* precedent, claiming that it was actually a narrow one that is distinguishable from this case. See Brief for Petitioner 39-40. The discussion largely tracks, though it does not cite, the notorious distortion of

history in *Fay* v. *Noia*, 372 U. S. 391 (1963).[2] He is incorrect on all grounds.

Petitioner echoes *Noia*'s misinterpretation of *Bushell's Case*, compare Brief for Petitioner 39 with *Noia*, 372 U. S., at 403-404, omitting the inconvenient truth that it was a contempt case and expressly distinguished cases of conviction of felony. Professor Oaks thoroughly demolished that myth long ago, see Oaks, 64 Mich. L. Rev., at 461-467, and nothing further need be added.

Petitioner claims that *Watkins* is really about this Court's original habeas jurisdiction rather than about principles of habeas corpus as collateral review generally and therefore not applicable to the lower federal courts. See Brief for Petitioner 40. That is not correct. The *Marbury*[3] original jurisdiction problem had been resolved many years earlier in *Ex parte Bollman*, 8 U. S. (4 Cranch) 75 (1807). See Scheidegger, 98 Colum. L. Rev., at 928-929. The *Watkins* opinion unmistakably says that the issue is *not* this Court's original habeas corpus jurisdiction but rather the propriety of using the writ for this purpose under general principles of habeas corpus law. "No doubt exists respecting the power; the question is, whether this be a case in which it ought to be exercised." *Wat-*

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2. The *Noia* opinion's "departure from history" was obvious at the time. See *id*., at 449 (Harlan, J., dissenting); Oaks, Legal History in the High Court: Habeas Corpus, 64 Mich. L. Rev. 451, 472 (1966) (describing *Noia* and two other decisions as "a regal patchwork of history that, on close examination, proves as embarrassingly illusory as the Emperor's new clothes"). *Noia* was effectively overruled as to its main holding in *Wainwright* v. *Sykes*, 433 U. S. 72, 87-88 (1977), and *Coleman* v. *Thompson*, 501 U. S. 722, 750 (1991).

3. *Marbury* v. *Madison*, 5 U. S. (1 Cranch) 137 (1803).

kins, 28 U. S., at 201. The fact that the Court had no appellate jurisdiction to reverse the final judgment of a circuit court is not unique to habeas corpus cases in this Court but applies any time habeas corpus is used as a collateral attack rather than in conjunction with a direct review power.[4] Petitioner asserts without citation that the principle did not apply to lower federal courts, Brief for Petitioner 40, but on its face it would apply when a judgment of one circuit court was challenged in a habeas corpus proceeding before another judge or court, and it was so understood. See, e.g., *In re Callicot*, 4 F. Cas. 1075, 1076 (No. 2,323) (CC EDNY 1870) (judgment of circuit court challenged in proceeding before individual circuit judge, no power to review, citing *Watkins*).

Petitioner asserts without citation that *Watkins* merely involves a "presumptive[] credit" of jurisdiction. See Brief for Petitioner 39. There is no point page for this assertion, probably because *Watkins* says no such thing. It says the trial court's decision on the jurisdictional point is binding and conclusive. See *Watkins*, 28 U. S., at 203, 206. Petitioner says that this presumption does not apply when the petitioner claims the "particular charge ... was not a crime." Brief for Petitioner 39. Again, there is no point page or quote to support this assertion, probably because *Watkins* expressly says just the opposite. See 28 U. S., at 203; see *supra*, at 9; see also, Scheidegger, 98 Colum. L. Rev., at 930.

Petitioner asserts that "[t]his Court has, in fact, expressly rejected the Eighth Circuit's overly broad and *ahistorical* view" of *Watkins*, citing *late* nineteenth

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4. Habeas corpus was sometimes used together with a writ of certiorari by courts authorized to review lower court decisions via that procedure. See Oaks, Habeas Corpus in the States: 1776-1860, 32 U. Chi. L. Rev. 243, 259 (1965).

century cases. Brief for Petitioner 40 (emphasis added). It is undeniably true that the Court departed from the *Watkins* rule in that era. That history is well known. See Scheidegger, 98 Colum. L. Rev., at 932-933. But that does not make the Eighth Circuit's description of the understanding in the *early* nineteenth century "ahistorical." That description of the Founding Era understanding is correct. See *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, 597 U. S. __, 142 S. Ct. 2111, 2136, 213 L. Ed. 2d 387, 417 (2022) ("guard against giving postenactment history more weight than it can rightly bear").

B. Original Understanding Versus Living Constitution.

Since *Felker* v. *Turpin*, 518 U. S., at 663-664, at least, the Court has understood that a Suspension Clause argument for a constitutional right to collaterally attack final judgments via habeas corpus could be sustained, if at all, only if the Suspension Clause meant something different and broader than it meant in 1789.[5] *Felker* made that assumption for the purpose of argument, presumably because the statute passed muster even under a broader standard, and the Court generally avoids deciding constitutional questions when it is not necessary to do so. But over a quarter century has passed since *Felker*, and it is more clear now that fidelity to the text as informed by history, also known as original understanding, is a fundamental matter of principle.

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5. The notion that courts may legitimately add meanings to constitutional provisions that they did not have when ratified is sometimes called the "living Constitution" view. But a Constitution with provisions that acquire fixed meanings upon adoption is not "dead." The people can change it when a broad enough consensus is reached that it should be changed. See U. S. Const., art. V.

New York State Rifle & Pistol Assn., Inc. v. *Bruen*, 597 U. S. __, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022), illustrates the fundamental nature of original understanding with its rejection of the two-step approach used in Second Amendment cases by the courts of appeals. "At the first step, the government may justify its regulation by 'establish[ing] that the challenged law regulates activity falling outside the scope of the right as originally understood.' " *Id*., 142 S. Ct., at 2126, 213 L. Ed. 2d, at 405 (quoting *Kanter* v. *Barr*, 919 F. 3d 437, 441 (CA7 2019)). If so, " 'the analysis can stop there.' " *Ibid*. (quoting *United States* v. *Greeno*, 679 F. 3d 510, 518 (CA6 2012)). If not, the courts of appeals went on to a second step, asking about narrow tailoring and compelling government interests. *Id*., 142 S. Ct., at 2126, 213 L. Ed. 2d, at 406. That was "one step too many." *Id*., 142 S. Ct., at 2127, 213 L. Ed. 2d, at 406. Text and history are controlling regarding the scope of the constitutional right, an approach the Court found "accords with how we protect other constitutional rights." *Id*., 142 S. Ct., at 2129-2130, 213 L. Ed. 2d, at 409.

To interpret the Suspension Clause to give constitutionally protected status to uses of the writ unknown in 1789 would require an exercise in cafeteria originalism. The Court would have to say that the text as originally understood is controlling for some provisions of the Constitution but can yield to postenactment history or perceived policy imperatives in the present for other provisions. To be sure, there is some support in this Court's cases for cafeteria originalism. *Miller* v. *Alabama*, 567 U. S. 460, 469 (2012), was candid in declaring the Court's decisions under the Eighth Amendment free of the inconvenient "historical prism." But see *id*., at 506 (Thomas, J., dissenting) (line of cases on which *Miller* is based "finds 'no support in the text and history of the Eighth Amendment' ").

But candor, however commendable, does not make principle. The legitimate basis of judicial review of statutes is that the legislature may not exceed the limits laid down by the people, and the rules laid down in the Constitution are permanent. See *Marbury* v. *Madison*, 5 U. S., at 176. Under the original Constitution as understood when it was ratified, Congress could have expanded the scope of habeas corpus beyond the scope as it then existed, but it chose not to, and its choice was constitutional. By what mechanism did Congress lose the authority it had then? The Suspension Clause has not been amended. The choice remains one for Congress to make.

The same principle also disposes of the due process and Eighth Amendment arguments, which are exceedingly weak to begin with. See Brief for Court-Appointed *Amicus Curiae* 47-48. Under the Judiciary Act of 1789, a felony conviction in circuit court received no review at all. There was no appeal, see *supra*, at 8, and not even one collateral review. Certainly, then, a system that provides both an appeal and one collateral review is constitutional.

The notion of cafeteria originalism should be expressly rejected. The original understanding defines the scope of the Suspension Clause as it does other provisions of the Constitution. There is no constitutional doubt in this case.

II. The parties and supporting *amici* ask this Court to add a nonsensical amendment to the statute, one Congress would have no reason to enact.

The court-appointed *amicus curiae* has thoroughly briefed the statutory interpretation aspect of the case, and *amicus* CJLF need add only a few words. The

parties and the "top side" *amici* ask this Court to amend, not interpret, the statute, and none of the various proposals are anything that Congress would have had a reason to enact.

In 1948, Congress adopted a new collateral review procedure that was congruent with habeas corpus in terms of what claims could be considered. See *United States* v. *Hayman*, 342 U. S. 205, 217 (1952). The main difference was venue. Holding evidentiary hearings in the district of confinement was inconvenient for witnesses and heavily impacted the district courts in the districts where the main federal prisons were located. See *id*., at 213-214. But there are always trade-offs, and the Judicial Conference, as proponent of the change, foresaw a downside. "The main disadvantages of the motion remedy are as follows: The risk during or the expense of transporting the prisoner to the District where he was convicted; and the incentive to file baseless motions in order to have a 'joy ride' away from the prison at Government expense." *Id*., at 217, n. 25 (quoting Judicial Conference Committee Statement).

The last paragraph of the original section, now subdivision (e), precluded habeas corpus for those eligible for the new motion, albeit with a safety valve. This paragraph, then and now, applies to prisoners "authorized to apply for relief, by motion," i.e., those with claims within the scope of the first paragraph, now subdivision (a). It applies to those who failed to make a § 2255 motion and to those who made a § 2255 motion and were denied. The safety valve added to the end of the sentence precluding habeas corpus relief allowed it nonetheless in those cases where "the remedy by motion is inadequate or ineffective to test the legality of [the prisoner's] detention."

What kinds of cases did the Judicial Conference, and presumably Congress, have in mind? There is no mystery. They were primarily concerned about cases where "it is not practicable for the prisoner to have his motion determined in the trial court because of his inability to be present at the hearing," while also acknowledging there could be other reasons. *United States* v. *Hayman*, 342 U. S., at 215, n. 23 (quoting memorandum attached to letter of transmittal from Judicial Conference to Congress). The concern was *procedural* inadequacies. The scope of claims cognizable under § 2255 could not have been the concern because the two remedies had the same scope for prisoners collaterally attacking their criminal judgments.

Because Congress had created a new procedure with no new rules to guide it, it was not clear in 1948 what process would be provided. An example of procedural inadequacy can be found in the district court proceedings in *Hayman* itself. The district court received testimony without notice to or presence of Hayman himself. Without counsel, there was no one present to argue or testify for him. See *id*., at 208-209. This is obviously inadequate. The Ninth Circuit held that it was nonetheless proper under the statute but declared the statute unconstitutional. See *id*., at 209. This Court reversed, holding that district courts should use their powers under the All Writs Act to obtain the presence of the movant when needed. See *id*., at 219-223.

Hayman was 70 years ago. Today the procedures under § 2255 are well established. There is a set of rules parallel to the rules that apply to state prisoner habeas corpus proceedings. See generally Rules Governing Section 2255 Proceedings for the United States District Court, 28 U. S. C. foll. § 2255 (2020). A prisoner too dangerous to transport might appear remotely. The

possible procedural inadequacies of a novel procedure that Congress guarded against have faded with time.

While it is generally true that statutes are construed so that no language is superfluous, see *Wooden* v. *United States*, 595 U. S. __, 142 S. Ct. 1063, 1070, 212 L. Ed. 2d 187, 195 (2022), a safety valve is a special case. A circuit breaker may sit in a house's electrical wiring for 50 years without tripping if the insulation remains intact and the occupants do not overload the circuit. That does not mean it is superfluous. Its purpose is to be there "just in case." If everything else works as it should, that "case" will never arise. An argument that someone must qualify for the "inadequate or ineffective" exception is not valid. Cf. Brief for Petitioner 14. It is perfectly okay if this circuit breaker never trips.

In the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Congress restricted collateral review of criminal judgments in a variety of ways, and it cracked down particularly hard on successive petitions, both habeas corpus for state prisoners and § 2255 for federal prisoners. See 28 U. S. C. §§ 2244(b), 2255(h).[6]

Both of these parallel provisions, on their face, divide second and successive collateral attacks into two categories. The bulk of such attacks fall in the first group, which are disallowed. Two narrow exceptions define a second group, which are allowed. See 28

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6. For convenience of reference, we use the subdivision designations added in 2008. See 121 Stat. 2545. As amended by AEDPA, § 2255 still had a long list of unnumbered paragraphs. The exceptions for state prisoners are somewhat narrower than those for federal prisoners, as they apply only to new claims. Repeated claims by state prisoners are barred without exception. See 28 U. S. C. § 2244(b)(1).

U. S. C. §§ 2244(b)(2)(A), (B), 2255(h)(1), (2). At the time the bill was enacted, it was well understood that the purpose of these provisions was to limit collateral attacks to "one bite out of the apple" in nearly all cases. See 142 Cong. Rec. 7552-7553 (Apr. 16, 1996) (remarks of Sen. Biden); *id*., at 7574, col. 1 (remarks of Sen. Gorton); *id*., at 7784, col. 3 (Apr. 17, 1996) (remarks of Sen. Kennedy).

But now this Court is told that subdivision (h), added by AEDPA, in conjunction with the unamended subdivision (e) has actually divided successive claims into three groups, not two. Successive motion claims that qualify for an exception still go forward under § 2255. Some claims (varying among the various proposals of the parties and *amici*) that are barred by § 2255(h) on its face actually are barred. But some, they all say, will go forward under habeas corpus petitions, meaning in essence that Congress repealed the 1948 procedural reform for this class of claims, kicking them out of motions to vacate and back into habeas corpus, to be filed and heard in the district of confinement rather than the district of conviction. See *Rumsfeld* v. *Padilla*, 542 U. S. 426, 434, 442 (2004) (immediate custodian is proper respondent; court must have personal jurisdiction over custodian).

Language parsing aside, why on earth would Congress have created such a category and enacted such a retrograde statute? There is no controversy at this point that the district of conviction is the superior venue. There is no benefit to the government in moving the cases to the district of confinement. "Congress has provided the answer," the *amici* who anoint themselves the "Habeas Scholars" assure the Court. See Brief for Habeas Scholars as *Amici Curiae* 2. *Why* would Congress provide such a convoluted answer? If a second category of collateral attacks is to go forward, why not

just expand the exception in subdivision (h) to let them go forward under § 2255?

There is no good answer to these questions because Congress intended nothing of the sort. Congress adopted similar limitations for state and federal prisoners with the intent that all claims not qualifying for an exception would be limited to the first petition or motion. The simple answer is the right one.

Petitioner advances the astonishing suggestion that every federal prisoner who could have sought habeas corpus before 1948 can invoke that procedure if a second or subsequent § 2255 motion is barred by subdivision (h) of that section. See Brief for Petitioner 14. In other words, AEDPA did not limit collateral reviews by amending the section *at all* but accomplished little more than a pointless and counterproductive change of venue. He may have little choice but to make an audacious claim, given that he is so obviously guilty that an exception for the actually innocent would do him no good. See Brief for the United States 34. Yet it is perfectly obvious to everyone who was involved in the debate and has litigated the successive petition rule since that Congress did intend a broad and strong limit on successive petitions.

More restrained proposals posit the hypothetical case of a prisoner who is demonstrably, actually innocent. See Brief for Respondent 19 ("true factual innocence"); Brief for Habeas Scholars as *Amici Curiae* 4, 7 ("legal innocence," acknowledging that does not include the present case). As a matter of policy, there is much to be said for a broad exception for actual innocence. See, e.g., Cal. Penal Code § 1509(d). But Congress chose not to write AEPDA's actual innocence exception broadly. The Government argues that Congress must speak clearly to preclude collateral relief. Brief for Respondent 8. Congress said that successive § 2255

motions cannot go forward unless an exception applies, and the actual innocence exception is limited to newly discovered evidence, not newly "discovered" interpretations of statutes. That is clear.

The result may be harsh in some future case that is very different from the present one. The Court encountered a similar potential in *Dodd* v. *United States*, 545 U. S. 353, 359 (2005). The answer was then and should be now that the Court is not free to rewrite a statute to avoid such results. "The disposition required by the text here, though strict, is not absurd. It is for Congress, not this Court, to amend the statute if it believes that the interplay of ¶¶ 8(2) and 6(3)[7] of § 2255 unduly restricts federal prisoners' ability to file second or successive motions." *Id*., at 359-360. The Executive branch also has substantial capacity to mitigate any harshness in the few, rare cases of actual innocence through executive clemency or waiving a nonjurisdictional procedural bar to judicial relief.

Whether a procedure is adequate to "test the legality of ... detention" depends on what factors can render detention illegal. The answers have changed throughout history and vary according to the stage of proceedings. In the Founding Era, detention pursuant to a final judgment of a court of general jurisdiction was *per se* legal under the *Watkins* rule, as discussed in Part I. Defects that would have been sufficient to render detention illegal and warrant habeas corpus relief from a pretrial commitment were not sufficient after trial and judgment, including a claim that the defendant's conduct was not a crime. This was a rule of res judicata. In this Court's pre-AEDPA case law as well, the standards for judging whether an error was so severe as to

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7. Present subdivisions (h)(2) and (f)(3), the successive petition rule and the statute of limitations.

warrant overturning a judgment already final on direct review, i.e., whether detention under the judgment is illegal, are different from the standards that apply before finality. See *Teague* v. *Lane*, 489 U. S. 288, 310 (1989) (retroactivity); *Brecht* v. *Abrahamson*, 507 U. S. 619, 637 (1992) (harmless error).

Congress could have gone all the way back to *Watkins*. There is no constitutional doubt. Congress chose instead to enact a more limited "modified res judicata rule." See *Felker* v. *Turpin*, 518 U. S. 651, 664 (1996). The modified rule gives the completion of one collateral attack additional preclusive force, further narrowing the scope of defects that will be deemed to render detention illegal. At that point, we are back to *Watkins* subject only to the exceptions that Congress wrote into the statute and no others. If a court hearing a successive § 2255 motion or deciding whether to authorize the filing of one decides that the movant cannot qualify for an exception, that court has tested the legality of detention and found it legal under the standards prescribed by Congress. There is no inadequacy. The saving clause does not apply.

CONCLUSION

The decision of the Court of Appeals for the Eighth Circuit should be affirmed.

September, 2022

Respectfully submitted,

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