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

REPLY BRIEF FOR THE RESPONDENT

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The saving clause in 28 U.S.C. 2255(e) allows a federal prisoner to file a habeas petition if the remedy by motion in Section 2255 "is inadequate or ineffective to test the legality of his detention." The government's brief explained that text, history, and precedent show that the yardstick for measuring Section 2255's adequacy and efficacy is the habeas remedy for which Section 2255 substituted. The saving clause thus allows a federal prisoner to file a habeas petition if Section 2255 does not permit consideration of a claim that would be cognizable in habeas. And under the relevant habeas principles, saving-clause relief is available to a narrow class of prisoners who can show that an intervening statutory decision of this Court makes clear that they are in prison for conduct that is not a crime.

The court of appeals, in contrast, held that Congress implicitly decided to keep those people in prison without any judicial remedy—sometimes for the rest of their

lives—even if they can establish their actual innocence. The Court-appointed amicus tasked with defending the court of appeals' holding fails to show that Congress did so—much less that it did so with the clarity this Court should demand before construing a statute to impose such a manifest injustice.

Amicus principally construes the saving clause to apply only when some practical obstacle precludes Section 2255 relief or when a prisoner challenges an aspect of his detention other than his conviction and sentence. Amicus reverse-engineers those categories to capture the circumstances when the clause was invoked in the first decades after its enactment. But the clause's language is not limited to those circumstances. To the contrary, this Court has repeatedly recognized that the clause serves to ensure that federal prisoners have remedies equivalent to habeas.

Amicus relies heavily on the 1996 amendments adopting Section 2255(h)'s restrictions on second or successive Section 2255 motions. In essence, amicus maintains that because Congress did not authorize second or successive motions based on intervening statutory decisions, it implicitly foreclosed saving-clause relief based on such decisions as well. But that inference is unwarranted: The 1996 Congress left the saving clause untouched, and it should not be presumed to have silently repealed the traditional habeas remedy for the limited and uniquely compelling group of prisoners who can establish their actual innocence based on a new statutory decision of this Court.

A. The Saving Clause Preserves Habeas Relief For Prisoners Who Show Actual Innocence Based On An Intervening Statutory-Interpretation Decision Of This Court

As the government has explained (Br. 12-19), text, history, and precedent make clear that the Section 2255 motion remedy "is inadequate or ineffective" when it does not permit a prisoner to test the legality of his detention in circumstances where habeas principles would permit such a test. 28 U.S.C. 2255(e). One of the rare circumstances when that occurs is when a prisoner who has already filed an initial Section 2255 motion can establish his actual innocence based on an intervening decision of this Court narrowing the scope of the statute of conviction. See Gov't Br. 19-32. Amicus's objections to that understanding of the saving clause are unsound.

1. The habeas remedy provides the benchmark for determining whether the Section 2255 remedy is adequate and effective

Amicus objects to the "habeas comparison," asserting that it "appears nowhere in the statutory text" and that "[t]here is no apparent reason to look to a remedy that Congress largely eliminated, at least for federal prisoners, nearly 75 years ago" when it enacted Section 2255. Amicus Br. 40-41. Neither assertion has merit.

The text of Section 2255(e), which includes the saving clause, not only contains, but begins with, an explicit reference to habeas. The saving clause is an exception to Section 2255(e)'s more general bar against "entertain[ing]" an "application for a writ of habeas corpus" filed by a federal prisoner. 28 U.S.C. 2255(e). And although that bar served to shift most federal postconviction litigation from habeas to Section 2255, the whole point of the saving clause was to guarantee that the

change would not leave federal prisoners with a substantively worse remedy. See Gov't Br. 16-17.

This Court has accordingly long understood the saving clause as a mechanism for ensuring that federal prisoners do not lose collateral-attack rights that they had under habeas simply because Section 2255 has shifted their principal forum for collateral review to the sentencing court. In *Sanders* v. *United States*, 373 U.S. 1 (1963), for example, the Court explained that if Section 2255 imposed a res judicata rule that would prevent a prisoner from bringing a successive postconviction claim, the Section 2255 remedy would be inadequate or ineffective under the saving clause precisely because no such res judicata rule would have barred such a successive claim in habeas. *Id.* at 14-15. Likewise, in *United States* v. *Hayman*, 342 U.S. 205 (1952), the Court emphasized that if Section 2255 precluded a court from providing an evidentiary hearing, its remedy would be inadequate or ineffective under the saving clause precisely because such a hearing would have been available in habeas. *Id.* at 223.

Sanders and *Hayman* thus make clear that the remedy by Section 2255 motion "is inadequate or ineffective" if it would preclude a "test" of a prisoner's claim in circumstances when habeas would permit it. 28 U.S.C. 2255(e). Those precedents, as well as others, see Gov't Br. 18, refute amicus's suggestion (Br. 21) that the court of appeals' habeas-blind approach was the law "for nearly 50 years" following Section 2255(e)'s enactment. Amicus offers no response to this Court's use of the habeas benchmark in *Hayman*. And amicus's only response (Br. 44) to the Court's use of the habeas benchmark in *Sanders* is to urge that *Sanders* be given "no weight." Amicus errs, however, in asserting (*ibid.*) that

"both the holding and reasoning of [*Sanders*] have been repudiated." Whatever modifications Congress made to the habeas remedy after *Sanders*, see *McCleskey* v. *Zant*, 499 U.S. 467, 484-486 (1991), this Court has continued to cite *Sanders* with approval without ever suggesting that its holding, reasoning, or observations about the saving clause were wrong. See, *e.g.*, *Schlup* v. *Delo*, 513 U.S. 298, 319-320 (1995); *McCleskey*, 499 U.S. at 484-485; *Kuhlmann* v. *Wilson*, 477 U.S. 436, 448-452 (1986) (opinion of Powell, J.).

Amicus is similarly mistaken in asserting (Br. 21) that a habeas benchmark would "expand[]" the saving clause or "counteract" the amendments made a half-century later in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. Neither AEDPA nor any other federal statute has amended the operative text of the saving clause, which Congress has left unaltered since Section 2255 was enacted "nearly 75 years ago," Amicus Br. 41. The clause's original meaning—the one recognized in *Sanders* and *Hayman*—thus continues to govern today. See *New Prime Inc.* v. *Oliveira*, 139 S. Ct. 532, 539 (2019). It is the court of appeals' view that would change the law by discarding the original meaning of the saving clause.

2. Habeas permits second or subsequent claims by prisoners who can show actual innocence in light of an intervening statutory-interpretation decision of this Court

Amicus acknowledges (Br. 28) that *Davis* v. *United States*, 417 U.S. 333 (1974), permits a federal prisoner to seek postconviction relief based on an intervening statutory-interpretation decision of this Court establishing that his conduct was not criminal. See Gov't Br.

20-21. Amicus does not dispute that *Davis*'s holding reflects the scope of relief available under habeas principles. See *id.* at 21-22; see also *Sunal* v. *Large*, 332 U.S. 174 (1947). Nor does amicus dispute that such relief would be available in a second or subsequent habeas application by a prisoner who could show his actual innocence under the demanding standard articulated in this Court's precedents. See Gov't Br. 22-25.

Amicus nevertheless criticizes the government's use of such habeas principles to inform the content of a habeas benchmark under the saving clause. In her view, the government is "internally inconsistent" in relying on both the "*post*-AEDPA federal habeas process available to *state* prisoners" and the "'*pre*-AEDPA habeas principles' governing *federal* prisoners," such as *Davis*, in defining the relevant habeas "benchmark." Amicus Br. 42-43 (citation omitted). That criticism lacks merit.

As this Court has long recognized, habeas is an evolving remedy that is subject both to this Court's "equitable discretion" and to statutory changes, within constitutional limits. *Brown* v. *Davenport*, 142 S. Ct. 1510, 1523 (2022); see *Felker* v. *Turpin*, 518 U.S. 651, 663-664 (1996). Given the saving clause's use of the present tense ("*is* inadequate or ineffective"), that evolving remedy must be evaluated as it exists at the time the prisoner invokes the saving clause by filing a habeas petition. And AEDPA changed the scope of the habeas remedy in some ways but not in others.

Claims based on new factual and constitutional developments can be brought by state and federal prisoners alike, so AEDPA's parallel limits on those claims in 28 U.S.C. 2244(b)(2) (for state prisoners) and Section 2255(h) (for federal prisoners) reflect Congress's decision to change the governing habeas principles. Gov't

Br. 25-29. In contrast, federal claims based on a new decision narrowing the scope of the statute of conviction can only be brought by federal prisoners, and AEDPA—which addressed a landscape of habeas litigation largely consisting of claims by state prisoners—did not specifically address such claims at all. Congress thus did not disturb the traditional habeas principles governing such claims.

The traditional principles reflected in cases like *Davis* thus continue to supply the relevant habeas benchmark for pure statutory claims like the one at issue here. And amicus does not dispute that under those principles, a federal prisoner who relies on an intervening statutory-interpretation decision of this Court to show his actual innocence of the crime of conviction can file a second or subsequent application for relief. The unavailability of a corresponding "remedy by motion" therefore renders that remedy "inadequate or ineffective to test the legality of his detention," 28 U.S.C. 2255(e), as compared to habeas—triggering the saving clause.

3. Amicus's practical concerns do not justify a crabbed interpretation of the saving clause

Amicus asserts (*e.g.*, Br. 31-37) that allowing prisoners to invoke the saving clause would raise various practical difficulties. But her objections are largely directed at petitioner's expansive understanding of the clause, not the government's more limited interpretation. The practical concerns that amicus seeks to raise about the government's approach are overstated and would not in any event justify a departure from the most natural interpretation of the statutory text.

a. Amicus expresses concern (Br. 32-33) that application of the saving clause will cause certain federal

courts to become overloaded with habeas applications. But even on her own view of the clause's scope, districts with federal prisons see a disproportionate amount of habeas litigation, "including the computation of good-time credits, location of imprisonment, administration of parole, or imposition of detention conditions." Amicus Br. 18. Particularly given that most circuits have for the past 25 years permitted some statutory claims under the saving clause, see Gov't Br. 10-11, amicus provides no reason to conclude that courts would be overwhelmed by adjudicating habeas claims consistent with the limited approach described in the government's brief. See *id.* at 30-32 (highlighting those limits).

Amicus questions (Br. 33) a habeas court's authority and competence to resentence a prisoner if it grants relief. But statutory authority for that practice is found in 28 U.S.C. 2243, which authorizes a habeas court to "dispose of the [habeas] matter as law and justice require." See *Hilton* v. *Braunskill*, 481 U.S. 770, 775 (1987); see also *Peyton* v. *Rowe*, 391 U.S. 54, 66-67 (1968) (explaining that "[s]ince 1874, the habeas corpus statute has directed the courts to determine the facts and dispose of the case summarily, 'as law and justice require'") (citation omitted). And to the extent that the original sentencing court would be better positioned to assess a prisoner's claims or conduct a resentencing, the case may be transferred back. See, *e.g.*, *Guenther* v. *Marske*, 997 F.3d 735, 743 (7th Cir. 2021).

Amicus's concern (Br. 34) about difficult choice-of-law issues has little bearing on the government's position, which requires an intervening statutory decision from *this* Court, see Gov't Br. 30-31. The same is true of amicus's concern (Br. 35-36) that allowing statutory claims under the saving clause will invite subsidiary

questions. As amicus acknowledges (Br. 37), the government's position, and the precedent on which it is based, largely answer such questions. For example, because habeas would require a prisoner raising a pure statutory claim in a second or subsequent collateral attack to establish actual innocence, see Gov't Br. 22-25, the saving clause is unavailable to address a claim of "an incorrect mandatory minimum," Amicus Br. 35. And even if difficult subsidiary questions did exist, that would provide no basis to deviate from a faithful interpretation of the saving clause in light of its text and this Court's precedents.

b. Amicus asserts that the Court should eschew the government's interpretation because it would leave prisoners raising statutory claims via the saving clause "better off" than prisoners raising constitutional claims in second or subsequent motions under Section 2255(h). Amicus Br. 29 (emphasis omitted). As the government has explained (Br. 39-40), that assertion is mistaken. A habeas petition brought under the saving clause is not subject to the procedural requirements applicable to Section 2255 motions, but the prisoner must make a stringent threshold showing of actual innocence based on an intervening decision of this Court.

In any event, any anomalies resulting from the assertedly preferential procedural treatment of claims raised under the saving clause in habeas over claims raised in a second or subsequent Section 2255 motion are the product of congressional design. Any habeas petition filed under the saving clause, whether under the court of appeals' approach or others, would be treated differently for procedural purposes from a Section 2255 motion. Congress expressly provided that federal prisoners could sometimes litigate successive

claims in habeas instead of under Section 2255 even after having been "denied * * * relief" in an earlier Section 2255 motion. 28 U.S.C. 2255(e). Yet Congress also enacted procedural requirements applicable to Section 2255 motions that it declined to make applicable to federal prisoners proceeding in habeas. See, *e.g.*, 28 U.S.C. 2244(b)(3), 2253(c)(1). Any policy consequences flowing from that congressional choice have no bearing on the antecedent question of the saving clause's scope—which is the question presented in this case—and would provide no justification for departing from the best interpretation of the statutory text in answering that antecedent question. *New Prime*, 139 S. Ct. at 543.

Amicus attempts to recast those policy concerns as an argument that the government's reading of the statute is "internally inconsistent." Amicus Br. 31 (citation omitted). But she does so only by presuming that her contrary interpretation is correct—that is, by presuming that Congress intended to foreclose the "additional error correction" available under traditional habeas principles when an intervening statutory decision of this Court makes clear that someone is in prison for conduct that is not a crime. *Ibid.*

c. Finally, amicus errs in relying (Br. 44) on the President's clemency power as a reason to foreclose the availability of saving-clause relief for the category of postconviction claims at issue here. The President could grant clemency to *any* federal prisoner. See U.S. Const. Art. II, § 2, Cl. 1. But Congress has nevertheless allowed federal prisoners to seek postconviction relief in the federal courts and secure a judicial determination of the legality of their detention—including through habeas claims under the saving clause. The President's constitutional authority to provide alternative relief

provides no more of a basis to disavow judicial review in this context than it does in other collateral-review contexts.

B. Amicus Cannot Justify The Court Of Appeals' Categorical Preclusion Of Saving-Clause Relief

Amicus fails to justify the court of appeals' holding that the saving clause is categorically unavailable to prisoners asserting statutory claims.

1. The saving clause asks whether "the remedy by motion *is* inadequate or ineffective to test the legality of [a prisoner's] detention." 28 U.S.C. 2255(e) (emphasis added). As the government has explained (Br. 36-37), that language requires an inquiry into a prisoner's current ability to seek relief under Section 2255. Amicus does not dispute the clause's unambiguous present-tense focus and, indeed, she faults petitioner for failing to respect it. See Amicus Br. 39. Amicus neglects, however, to address the implications of the present-tense focus for the position she defends, which rests on the fact that "petitioner *could have raised* his current statutory claim in his initial [Section] 2255 motion." *Id.* at 22 (emphasis added).

Amicus would elide the distinction between the past and the present by asking whether "the [Section] 2255 process is generally capable of adjudicating the claim that the prisoner seeks to raise," even if only in an initial postconviction motion that came and went long ago. Amicus Br. 24. But under the plain text of the saving clause, the habeas remedy may be available even when a prisoner has already brought a previous motion under Section 2255. The saving clause specifically identifies a prisoner who has previously "appl[ied] for relief, by motion, to the court which sentenced him," with the result that "such court has denied him relief," as one who

would be eligible to seek habeas relief if "the remedy by motion *is* inadequate or ineffective to test the legality of his detention." 28 U.S.C. 2255(e) (emphasis added). The question is thus the adequacy of the remedy by motion at the specific time when the prisoner is seeking relief, not its "general" adequacy at some other time (or for some other prisoner).

2. To the extent that amicus addresses the present-day adequacy of the "remedy by motion," 28 U.S.C. 2255(e), for a pure statutory claim by a prisoner who has previously sought postconviction relief, she appears to view the Section 2255 remedy as adequate on the theory that the claim "could * * * be adjudicated, even if it would ultimately 'be dismissed' for failure to comply with statutory limits on repeat filings." Amicus Br. 23 (quoting 28 U.S.C. 2244(b)(2)). That view reflects a misunderstanding of the provisions governing a second or subsequent Section 2255 motion.

A prisoner whose second or subsequent motion is not certified by the court of appeals as containing the kind of factual or constitutional claim permitted by Section 2255(h) would not have his claim dismissed on the merits; he would be jurisdictionally barred from seeking the "remedy by motion," 28 U.S.C. 2255(e), altogether. And even amicus appears to acknowledge that a completely unavailable remedy may be "inadequate or ineffective." See, *e.g.*, Amicus Br. 16-17 (allowing for application of the saving clause when the "sentencing court is not practically accessible" or when a claim is "not cognizable in the 2255 process") (emphasis omitted).

In construing the corresponding procedures for certifying second or subsequent postconviction claims by state prisoners, see 28 U.S.C. 2244(b)(3), this Court has held that the lack of certification will "deprive [a] Dis-

trict Court of jurisdiction to hear [a prisoner's] claims." *Burton* v. *Stewart*, 549 U.S. 147, 149 (2007) (per curiam). Those procedures are expressly incorporated into Section 2255(h). See 28 U.S.C. 2255(h) ("A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals.").

The jurisdictional nature of the certification requirement completely closes the courthouse doors to a "remedy by motion" under Section 2255 for a federal prisoner who has sought postconviction relief before, 28 U.S.C. 2255(e), but now can show actual innocence based on an intervening statutory-interpretation decision of this Court. All that prisoner would be able to do under Section 2255 is to request certification from the court of appeals, which would be compelled to deny that request. Such a request for certification is not itself the "remedy by motion," *ibid.*; it is a prerequisite to filing a "second or successive motion," 28 U.S.C. 2255(h). And it is difficult to see how the "remedy by motion" can be deemed adequate and effective "to test" the legality of detention for a prisoner who is actually innocent when the prisoner is jurisdictionally barred from even filing the motion. 28 U.S.C. 2255(e).

3. Amicus fails to explain why the Section 2255 remedy is "inadequate or ineffective" for a prisoner who finds it merely impracticable to file a Section 2255 motion, see Amicus Br. 16-17, yet adequate and effective for one who is jurisdictionally barred from filing such a motion. Indeed, interpreting the saving clause to be available only for practical impediments would give no weight to Congress's rejection of proposed saving-clause language that would have focused solely on "practicability" in favor of the broader "inadequate or ineffective" language. Gov't Br. 38 (brackets and cita-

tion omitted); see *id.* at 16-18. Amicus's focus on the sentencing court's availability or authority likewise is at odds with the text of the saving clause, which refers to the adequacy and efficacy of the "remedy"—not the "court." The sentencing court's inaccessibility obviously would render the remedy inadequate or ineffective, but the remedy may be inadequate or ineffective even when the sentencing court is accessible.

Like the court of appeals, amicus sometimes appears to assume that Section 2255 cannot be rendered inadequate or ineffective by a limitation contained in Section 2255 itself—here, Section 2255(h)'s jurisdictional restrictions on second or subsequent motions. But if the contours of the "remedy by motion" themselves define what is "adequate" and "effective," the saving clause would be illogically circular, provide no meaningful benchmark for adequacy or efficacy, and do little to no work. See Gov't Br. 37-38. Indeed, it is not clear why, on that self-referential construction, a prisoner could ever file a habeas petition at all. A habeas petition must be filed in the district of the prisoner's confinement; the Section 2255 remedy itself, in contrast, requires a prisoner to seek relief from "the court which imposed the sentence," 28 U.S.C. 2255(a).

Accordingly, rather than viewing the contours of Section 2255 as themselves determinative of the saving clause's scope, this Court has recognized that potential limitations inherent in the Section 2255 remedy, such as res judicata limits on subsequent filings, *Sanders*, 373 U.S. at 14-15, or a preclusion of evidentiary hearings, *Hayman*, 342 U.S. at 223, could render it inadequate or ineffective. And even amicus acknowledges the same point by suggesting that the saving clause allows prisoners to resort to habeas when "a prisoner's claim is not

legally cognizable in a sentencing court." Amicus Br. 16 (emphasis omitted). All of those results would make no sense if Section 2255 itself were the relevant benchmark—but they make perfect sense if, as this Court has long recognized, the benchmark is instead the habeas remedy for which Section 2255 substitutes.

4. At bottom, amicus's position, like the court of appeals', boils down to a negative inference drawn from Section 2255(h): By barring all second or subsequent motions except those containing claims based on certain new factual and constitutional developments, the argument goes, Congress must have meant to categorically preclude resort to the saving clause for claims based on new statutory decisions. That argument places too much weight on Congress's silence.

"Virtually all the authorities who discuss the negative-implication canon emphasize that it must be applied with great caution, since its application depends so much on context." Antonin Scalia & Bryan A. Garner, *Reading Law* 107 (2012). Here, amicus identifies nothing about Section 2255(h) (which does not itself apply to habeas petitions by federal prisoners) or the saving clause (which AEDPA did not amend) that would support a negative inference about statutory claims—a set of claims distinct from the claims Congress actually addressed in Section 2255(h).

The Court should not presume that Congress intended to foreclose saving-clause relief for statutory claims simply because it did not specifically address such claims when it adopted Section 2255(h)'s restrictions on second or subsequent Section 2255 motions. The omission of such claims "perhaps [is] because of a congressional oversight," *Chazen* v. *Marske*, 938 F.3d 851, 863 (7th Cir. 2019) (Barrett, J., concurring)—

exactly the sort of inadvertent remedial deficiency that the saving clause was designed to save. See *Sanders*, 373 U.S. at 14-15; *Hayman*, 342 U.S. at 223. Or it might be the product of Congress's deliberate decision to set forth rules governing claims based on new constitutional and factual developments (which are a frequent feature of postconviction litigation by both state and federal prisoners) while relying on background habeas principles to address federal claims based on new statutory decisions (which are far less common). Whatever Congress's reasoning may have been, the Court should demand a clearer statement before concluding that Congress displaced the traditional habeas principles providing a remedy for a class of demonstrably innocent prisoners. Cf. *McQuiggin* v. *Perkins*, 569 U.S. 383, 397 (2013) ("[W]e will not construe a statute to displace courts' traditional equitable authority absent the clearest command.") (citation omitted).

The textual and logical deficiencies in the negative-inference approach are highlighted by the contextual impropriety of deeming Congress to have silently foreclosed postconviction relief for prisoners raising compelling claims of innocence that would have allowed for a remedy under traditional habeas. "The importance of the Great Writ * * * along with congressional efforts to harmonize the new statute with prior law, counsels hesitancy before interpreting AEDPA's statutory silence as indicating a congressional intent to close courthouse doors that a strong equitable claim would ordinarily keep open." *Holland* v. *Florida*, 560 U.S. 631, 649 (2010) (citation omitted).

Had the 1996 Congress intended to depart from the traditional habeas-equating function of the saving clause—reflected not only in *Hayman* and *Sanders*, but

in other decisions of this Court, see Gov't Br. 15-18—it could have said that. And had Congress intended to abrogate the habeas remedy for prisoners who can show actual innocence based on an intervening statutory-interpretation decision of this Court, simply because they once sought relief before, it could have said that as well.

It did neither of those things. Instead, Congress left the law where it was before—with a path to relief for a limited class of claims by prisoners who demonstrate that they have been imprisoned in the absence of a crime. Petitioner cannot make that showing of actual innocence, see Gov't Br. 34-35, but Congress did not close the door to prisoners who can.

* * * * *

For the foregoing reasons and those in the government's opening brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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