No. 21-857

IN THE
Supreme Court of the United States

MARCUS DEANGELO JONES,

Petitioner,

v.

DEWAYNE HENDRIX,

Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE AMERICAN CIVIL LIBERTIES UNION, AND THE ARKANSAS CIVIL LIBERTIES FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

DAVID D. COLE
AMERICAN CIVIL LIBERTIES UNION
915 15th St. NW
Washington, DC 20005

JENNESA CALVO-FRIEDMAN
AMERICAN CIVIL LIBERTIES UNION
125 Broad St., 18th Floor
New York, NY 10004

GARY SULLIVAN
ARKANSAS CIVIL LIBERTIES FOUNDATION
904 West 2nd Street
Little Rock, AR 72201

JEFFREY L. FISHER
O'MELVENY & MYERS LLP
2765 Sand Hill Road
Menlo Park, CA 94025

KENDALL TURNER
Counsel of Record
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006
(202) 383-5204
kendallturner@omm.com

Attorneys for Amici Curiae

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INTERESTS OF *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, NACDL has a nationwide membership of more than 11,500 attorneys, and another 28,000 affiliate members from all 50 states. NACDL's members include private criminal defense attorneys, public defenders, military defense counsel, law professors, and judges. Every year, NACDL files numerous amicus briefs with this Court and other courts to provide assistance in cases that present issues of broad importance to criminal defendants, defense attorneys, and the criminal legal system as a whole. NACDL has a particular interest in protecting the constitutionally guaranteed writ of habeas corpus, and it has filed amicus briefs in several cases relating to the scope of that writ, including *Banister v. Davis*, 140 S. Ct. 1698 (2020), *Ayestas v. Davis*, 138 S. Ct. 1080 (2018), and *Harrington v. Richter*, 562 U.S. 86 (2011).

The American Civil Liberties Union ("ACLU") is a national nonprofit, nonpartisan organization with approximately 2 million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution. In support of those principles, the ACLU has appeared before this Court on numer-

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici curiae and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

ous occasions, both as direct counsel and as an *amicus*. The ACLU has filed amicus briefs in several cases relating to the scope of habeas corpus relief, including *Williams v. Taylor*, 529 U.S. 362 (2000), *Bousley v. United States*, 523 U.S. 614 (1998), and *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998). Because this case involves the continued imprisonment of someone based on an acknowledged misinterpretation of law, it raises issues of fundamental importance to the ACLU and its members. The ACLU of Arkansas is a state affiliate of the national ACLU.

INTRODUCTION AND SUMMARY OF ARGUMENT

The most elementary rule of our criminal justice system is that the government may not imprison a person for conduct that is not a crime. When this Court construes a federal criminal statute more narrowly than previously construed in lower courts, therefore, federal prisoners on direct appeal or eligible to file a motion under 28 U.S.C. § 2255(a) may challenge their imprisonment on the ground that the statute does not reach their conduct. But if a federal prisoner has completed his direct appeal and filed a motion under Section 2255(a) before this Court definitively construed the statute at issue, he cannot file another motion under Section 2255(a). That statute permits successive motions for relief only when an individual brings a different type of innocence claim or a claim based on retroactively applicable, constitutional decisions from this Court. *See* 28 U.S.C. § 2255(h)(1), (2).

At the same time, Section 2255(e) allows an incarcerated individual to seek relief under another federal

statute—28 U.S.C. § 2241—when a motion under Section 2255 "is inadequate or ineffective to test the legality of his detention," 28 U.S.C. § 2255(e). The question in this case is whether federal prisoners may seek habeas relief under Section 2241 on the ground that a recent construction of the federal statute under which they were convicted makes clear that the conduct for which they are incarcerated is not criminal.[2]

Amici write to explain why the text of Section 2255(e)—buttressed by the constitutional underpinnings of habeas corpus itself—dictates that the answer to that question is yes. Section 2255(e) allows a prisoner to seek habeas relief under Section 2241 when a motion under Section 2255 "is" inadequate or ineffective to challenge the legality of his detention. Under this present-tense inquiry, it does not matter whether the prisoner might have been able to challenge the legality of his detention in the past. All that matters is whether the prisoner *currently* is able to raise such a challenge under Section 2255. If not, Section 2241 is available as a safety valve to ensure that the government cannot continue to imprison someone for conduct that was not a crime. Any other interpretation of Section 2255(e) would thwart the basic function of habeas corpus and raise grave questions under the Suspension Clause, the Due Process Clause, separation of powers, and the Eighth Amendment.

Other limitations on the writ ensure that construing Section 2255(e) to allow individuals like petitioner

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[2] The remainder of this brief focuses on convictions for conduct that is not deemed criminal. But similar arguments apply to detentions in excess of applicable statutory maximums and capital sentences where the sentenced individual is substantively ineligible for the death penalty.

to seek habeas relief will not open the federal courts to a flood of meritless petitions. First, Section 2255(e) allows an incarcerated individual to seek habeas relief under Section 2241 only if he challenges the "legality of his detention." This language is limited to testing the legality of imprisonment for the conduct at issue; it excludes challenges to the *procedures* used at trial or other conduct that led to the conviction. Second, doctrines that have long constrained access to habeas relief—including exhaustion, procedural default, nonretroactivity, laches, and abuse of the writ—continue to circumscribe access to relief under Section 2241. But where, as here, an individual is detained for conduct that this Court has declared does not violate the criminal law, relief must be available as a constitutional matter, and is available as a statutory matter under Sections 2255(e) and 2241.

ARGUMENT

I. FEDERAL PRISONERS WHO CANNOT CHALLENGE THE SUBSTANTIVE LEGALITY OF THEIR DETENTIONS UNDER SECTION 2255 ARE NOT CATEGORICALLY PRECLUDED FROM DOING SO UNDER SECTION 2241.

A. The text of Section 2255(e)—particularly its use of the present tense—makes clear that federal prisoners may seek habeas relief under these circumstances.

1. Courts of appeals that have rejected petitioner's view of Section 2255(e) have held that relief under Section 2241 is available only if an incarcerated indi-

vidual shows that Section 2255's remedy "*was*" inadequate or ineffective at the time of the individual's "first § 2255 motion." Pet. App. 7a (emphasis added); *see also McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1081 (11th Cir. 2017) ("The petitioner bears the burden of establishing that the remedy by motion *was* 'inadequate or ineffective to test the legality of his detention.'") (emphasis added) (internal citation omitted); *Prost v. Anderson*, 636 F.3d 578, 594 (10th Cir. 2011) (similar). In other words, these courts have focused on the adequacy or efficacy of the remedy under Section 2255 *in the past*.

This reasoning departs from the plain text of that statute. The relevant text of Section 2255(e) focuses on the present. It allows federal prisoners to seek habeas relief under Section 2241 when the remedy provided by Section 2255 "*is* inadequate or ineffective to test the legality of [their] detention." 28 U.S.C. § 2255(e) (emphasis added). Put another way, this saving clause asks whether Section 2255's remedy *is currently* inadequate or ineffective, not whether it *was* inadequate or ineffective.

This Court routinely relies on Congress's choice of verb tense when construing statutes. *See, e.g.*, *Gundy v. United States*, 139 S. Ct. 2116, 2127 (2019); *Nichols v. United States*, 578 U.S. 104, 110 (2016); *Carr v. United States*, 560 U.S. 438, 448 (2010). For example, in *Nichols*, the Court considered a provision of the Sex Offender Registration and Notification Act that requires offenders to register "in each jurisdiction where the offender resides[.]" 578 U.S. at 107 (quoting 42 U.S.C. § 16913(a)). As the Court explained, the statute "uses only the present tense," so a person who

"once *resided* in Kansas, after his move" need not register in Kansas because he does not currently reside there. *Id.* at 109.

This close attention to verb tense is consistent with Congress's own view of present-tense verbs in statutes. As the Dictionary Act explains: "In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . words used in the present tense include the future as well as the present." 1 U.S.C. § 1. "By implication, then, the Dictionary Act instructs that the present tense generally does *not* include the past." *Carr*, 560 U.S. at 448 (emphasis added).

Where Congress uses both the present and the past tenses in a single statute, that confirms that the present-tense verbs are intended to direct the court's attention to current circumstances, not some state of affairs in the past. *See, e.g.*, *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 631-32 (2012); *United States v. Wilson*, 503 U.S. 329, 333 (1992). In that situation "[t]he fact that Congress consciously chose the past tense to describe" certain elements of the statute "suggests that Congress knows how to target" the past "when it wants to do so." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 63 n.4 (1987).

Such is the case here. Section 2255(e) twice uses the past tense in the first part the very same sentence at issue here. That passage provides as a default rule that "[a]n 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." 28 U.S.C. § 2255(e) (emphasis added). Yet the statute's final clause uses the present tense word "is" right before the words "inadequate or ineffective." Because Congress used a present-tense verb, the question whether a federal prisoner may seek habeas relief under Section 2241 pursuant to Section 2255(e)'s saving clause turns solely on whether a Section 2255 motion "is" presently "inadequate or ineffective." In other words, "[w]hen the linking verb is read (as Congress wrote it) in the present tense, the prisoner cannot access § 2241 unless § 2255 is—at the moment her § 2241 petition is filed in federal court—inadequate [or] ineffective to test the detention's legality." Jennifer Case, *Text Me: A Text-Based Interpretation of 28 U.S.C. § 2255(e)*, 103 Ky. L. J. 169, 194 (2014-15).

In fact, this Court has already interpreted a prior version of Section 2255(e) to allow federal prisoners to seek habeas relief under Section 2241 where the remedy in Section 2255 is presently inadequate or ineffective. In *Sanders v. United States*, 373 U.S. 1 (1963), the Court held that "a prisoner barred by res judicata would seem as a consequence to have an 'inadequate or ineffective' remedy under § 2255." *Id*. at 14-15. This view of the law makes sense only if the adequacy or efficacy of the Section 2255 remedy is assessed at the time the prisoner files the petition under Section 2241, rather than the time he filed his initial Section 2255 motion. If the Court had construed the statute from the vantage point of the time of the initial Section 2255 motion, res judicata would be inapplicable and the Section 2255 remedy would be adequate.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), of course, subsequently placed various restrictions on federal prisoners' ability to seek and obtain post-conviction relief. But Congress legislates against the backdrop of this Court's decisions. *See, e.g.*, *Herman & MacLean v. Huddleston*, 459 U.S. 375, 385-86 (1983) (noting "[i]n light of [a] well-established judicial interpretation [of a statutory provision], Congress' decision to leave [the provision] intact suggests that Congress ratified" the interpretation). And Congress did not disturb the path highlighted in *Sanders* for seeking habeas relief under Section 2241 when the remedy afforded by Section 2255 "is inadequate or ineffective to test the legality of the detention." *Compare* 28 U.S.C. § 2255(e) (1996); *with* 28 U.S.C. § 2255 (1948). Congress thus presumptively legislated in 1996 with *Sanders* in mind. And Congress presumptively intended to accept the Court's prior interpretation of Section 2255(e).

2. This interpretation of Section 2255(e) is not only grammatically compelled, but also structurally and historically sound.

First, surrounding statutory language confirms that Section 2255's word "is" refers to the present tense. When Congress enacted Section 2255, it also adopted similar language in Section 2254: Section 2254 empowered federal courts to grant habeas relief to state prisoners regardless of exhaustion when "there *is* either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner." *See Darr v. Burford*, 339 U.S. 200, 210 n.3 (1950) (quoting 28 U.S.C. § 2254) (emphasis added).

Section 2254's similar phrasing regarding the ineffectiveness of state remedial process underscores that Section 2255's "is" means "is." In Section 2254, the statutory exception to the exhaustion rule—i.e., where there "is" no available or effective state process—makes no sense unless it is understood in the present tense. The exhaustion doctrine is about the state "remedies still available at the time of the federal petition." *Engle v. Isaac*, 456 U.S. 107, 125 n.28 (1982). If such a remedy is available, the petitioner must use it before proceeding to federal court. *See id.* If, however, *in the present* there is no mechanism for presenting the claim in state court, the petitioner can stay in federal court. *See* 28 U.S.C. § 2254(b)(1). (If *in the past* there was a mechanism but the state prisoner neglected to use it, the prisoner "meets the technical requirements for exhaustion" because "there are no state remedies 'available' to him," although that circumstance would present a procedural default. *Coleman v. Thompson*, 501 U.S. 722, 732 (1991).)

Second, when Congress amended Section 2255 in AEDPA, courts understood Section 2255 to allow federal prisoners to seek habeas relief under Section 2241 when "a motion under § 2255 'is inadequate or ineffective to test the legality of his detention.'" *Birchfield v. United States*, 296 F.2d 120, 122 (5th Cir. 1961). To determine whether a particular prisoner could proceed under Section 2241, "at least some federal courts analyzed whether, at the time of the filing of the § 2241 petition, a § 2255 motion was 'inadequate or ineffective.'" *McCarthan*, 851 F.3d at 1104 (Jordan, J., concurring in part and dissenting in part). As the Fifth Circuit explained: a petitioner who "is free to assert" a claim in a Section 2255 motion cannot

file a Section 2241 petition because a motion under Section 2255 is not "inadequate or ineffective" at the time of the filing. *Birchfield*, 296 F.2d at 122. And this Court held that, "where the Section 2255 procedure is shown to be 'inadequate or ineffective', the Section provides that the habeas corpus remedy shall remain open to afford the necessary hearing." *United States v. Hayman*, 342 U.S. 205, 223 (1952).

3. Once Section 2255(e) is properly understood in the present tense, the precise meaning of the word "test" in Section 2255(e) is irrelevant.

The decision below held that petitioner had an opportunity before *Rehaif* "to test" the legality of his detention because he could have pressed that claim in his initial Section 2255 motion. *See* Petr. Br. 36-42. In the court's view, Section 2255(e) "is interested in [the] opportunity [to raise the issue], not [the] outcome." Pet. App. 6a; *see also McCarthan*, 851 F.3d at 1086-87 ("The opportunity to test or try a claim, however, neither guarantees any relief nor requires any particular probability of success; it guarantees access to a procedure."); *Prost*, 636 F.3d at 584 (same). In contrast, the majority of the courts of appeals have understood that Section 2255 is ineffective to test the legality of detention if the incarcerated individual previously filed a Section 2255 motion and its resolution is contrary to the Court's construction of a federal, criminal statute. *See, e.g.*, *United States v. Wheeler*, 886 F.3d 415, 427-28 (4th Cir. 2018).

But this entire debate is immaterial once the word "is" is properly interpreted to refer to the present tense. An incarcerated individual is jurisdictionally

barred from bringing most second or successive Section 2255 motions. *See* 28 U.S.C. § 2255(f). Given this jurisdictional bar, Section 2255 is inadequate or ineffective to test the legality of the individual's detention under *any* definition of "test." After all, he cannot *presently* use Section 2255 to test his detention in any way.

In sum, because Section 2255 *is* "inadequate or ineffective to test the legality" of petitioner's detention, the statute permits him to proceed under Section 2241. Other constraints on habeas might often limit the relief available under Section 2241—even to prisoners in situations very similar to petitioner. *See infra* Part II. But where, as here, those constraints do not apply, relief is not categorically foreclosed under Section 2241.

B. The doctrine of constitutional avoidance supports reading the statute to preserve habeas where the statute petitioner was convicted of violating does not criminalize his conduct.

The doctrine of constitutional avoidance, *see. e.g.*, *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005), also requires interpreting Section 2255 to preserve petitioner's ability to pursue his claim that he is incarcerated without legal authority. At this threshold stage, the Court must assume that petitioner is illegally incarcerated. That is, the Court must assume that petitioner's conduct did not violate 18 U.S.C. § 922(g)(5)(A) as construed in *Rehaif v. United States*, 139 S. Ct. 2191, 2194 (2019). Under these circumstances, precluding petitioner from obtaining judicial relief for

such ongoing illegal detention would raise grave constitutional concerns under the Suspension Clause, the Due Process Clause, separation of powers, and the Eighth Amendment. All of these constitutional principles support the proposition that it is unconstitutional to deny a detained person any meaningful opportunity to challenge his imprisonment for conduct the statute of conviction does not make criminal.

1. *Suspension Clause*. Years ago, this Court declined to decide whether Section 2255 violated the Suspension Clause, emphasizing that, "[i]n a case where the Section 2255 procedure is shown to be 'inadequate or ineffective', the Section provides that the habeas corpus remedy shall remain open to afford the necessary hearing." *United States v. Hayman*, 342 U.S. 205, 223 (1952). But if petitioner—incarcerated under a statute that does not authorize his incarceration—were barred from seeking habeas relief, then a serious concern would arise that Section 2255(e) indeed violates the Suspension Clause.

The essence of habeas corpus is the opportunity to have a court review a detained person's claim that the government lacks legal authority to detain him. It is thus "uncontroversial . . . that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." *Boumediene v. Bush*, 553 U.S. 723, 779 (2008) (quoting *INS v. St. Cyr*, 533 U.S. 289, 302 (2001)). Under the Eighth Circuit's decision below, no such opportunity exists, raising a serious question under the Suspension Clause.

This is so even if the Suspension Clause is understood to apply only to habeas relief afforded at the time of the Framing. At that time, and until the middle of the twentieth century, habeas relief was limited to claims that the court lacked "jurisdiction." *See, e.g.*, *McCleskey v. Zant*, 499 U.S. 467, 478 (1991). But as petitioner's brief makes clear, the understanding of "jurisdiction" both at the time of the enactment of the relevant statutory provisions here and at the time of the Founding encompassed claims that an individual was detained for conduct that was not criminal under the applicable law. *See* Petr. Br. 16-19.

Thus, the Framers understood that courts lacked jurisdiction to convict an individual for conduct that is not, by statute, a crime. *See Ex parte Yarbrough*, 110 U.S. 651, 654 (1884) ("If the law which defines the offence and prescribes its punishment is void, the court was without jurisdiction, and the prisoners must be discharged."); *Ex parte Siebold*, 100 U.S. 371, 375 (1879) (holding a "party imprisoned under a sentence of a United States court, upon conviction of a crime created by and indictable under an unconstitutional act of Congress, may be discharged from imprisonment by this court on habeas corpus" because there was no authority to indict and try defendant for a crime that is "illegal and void, and cannot be a legal cause of imprisonment"); *cf. Ex parte Page*, 49 Mo. 291, 294 (1872) (granting habeas to person sentenced to ten years under statute that allowed maximum sentence of seven years because the "judgment of the court in passing sentence was illegal" and "absolutely void" and thus "exceed[ed] the jurisdiction of the court and [was not] the exercise of an authority prescribed by law").

Bousley v. United States, 523 U.S. 614 (1998), reinforces petitioner's constitutional entitlement to habeas review. There, Bousley pleaded guilty to "using" a firearm in violation of 18 U.S.C. § 924(c)(1), on the ground that guns in his "bedroom were in close proximity to drugs and were readily accessible." 523 U.S. at 617. Five years later, this Court interpreted Section 924(c)(1)'s "use" prong more restrictively, requiring a showing of "active employment of the firearm," not merely "storing a weapon near drugs." *Id*. Bousley sought collateral relief under 28 U.S.C. § 2255, alleging that his plea was unintelligent because he was misinformed about the elements of a Section 924(c)(1) offense. This Court agreed. And while it held that Bousley had procedurally defaulted that claim by failing to raise it on direct review, that default did not bar relief insofar as petitioner could "establish actual innocence." 523 U.S. at 623. The Court explained:

> [D]ecisions of this Court holding that a substantive federal criminal statute does not reach certain conduct, like decisions placing conduct beyond the power of the criminal law-making authority to proscribe, necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal . . . Accordingly, it would be inconsistent with the doctrinal underpinnings of habeas review to preclude petitioner from relying on [an intervening decision] in support of his claim that his guilty plea was constitutionally invalid.

Id. at 620-21 (internal citations and quotation marks omitted).

In short, the Court relied on constitutional concerns to allow Bousley to advance his claim where this Court's interpretation of a criminal statute created "a significant risk that a defendant stands convicted of an act that the law does not make criminal." *Id.* at 620 (internal quotation marks omitted). Similar constitutional concerns favor reading the statute here to preserve petitioner's ability to pursue his claim that he is innocent because his conduct did not violate the law as this Court has construed it.

2. *Due Process and Separation of Powers*. The Eighth Circuit's interpretation of Section 2255 also presents significant and intertwined Due Process Clause and separation of powers concerns, as it mandates continued imprisonment for conduct that a "criminal statute, as properly interpreted, does not prohibit." *Fiore v. White*, 531 U.S. 225, 228 (2001) (per curiam). Like petitioner here, the defendant in *Fiore* was convicted of violating a statute that was later interpreted to clarify that an element of the crime has a narrower meaning than the meaning understood at the time the defendant was convicted. The Court deemed it "clear" that due process forbade Fiore's conviction and continued incarceration" for conduct that a criminal statute, "as properly interpreted, does not prohibit." *Id.*; *see also Bunkley v. Florida*, 538 U.S. 835, 840 (2003) ("It has long been established by this Court that 'the Due Process Clause . . . forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt.'" (quoting *Fiore*, 531 U.S. at 228-29)). As the Court previously explained, "[t]here can be no room for doubt" that sustaining "conviction and punishment . . . for an act that the law does not make criminal "inherently

result[] in a complete miscarriage of justice." *Davis v. United States*, 417 U.S. 333, 346-47 (1974).

For parallel reasons, detaining petitioner for conduct that Congress did not make criminal also violates the separation of powers. "[U]nder our federal system it is only Congress, and not the courts, which can make conduct criminal." *Bousley*, 523 U.S. at 620-21; *see also United States v. Lanier*, 520 U.S. 259, 267-68, n.6 (1997); *United States v. Hudson*, 11 U.S. 32 (7 Cranch) (1812). Therefore, where the Court construes a federal criminal statute, detaining individuals under contrary readings of the statute exceeds the courts' constitutionally granted authority. Such is the case under the facts this Court must assume here. Petitioner is currently detained not because *Congress* authorized his detention, but because *federal courts* erroneously construed the statute to criminalize conduct Congress did not in fact make a crime.

This Court's direction that substantive interpretations narrowing criminal statutes apply retroactively on collateral review further supports the notion that the Constitution precludes detaining individuals under statutes that do not in fact criminalize their conduct—regardless of when it is determined that that is so. In *Mackey v. United States*, 401 U.S. 667, 675 (1971), Justice Harlan articulated a view of retroactivity for cases on collateral review, later adopted in *Teague v. Lane*, 489 U.S. 288 (1989), that finality interests should yield when a conviction is attacked on the ground that the "conduct [is] beyond the power of the criminal law-making authority to proscribe." *Id.* at 310; *see Mackey*, 401 U.S. at 692-93 (Harlan, J., opinion concurring in judgments in part and dissent-

ing in part). Because "[a] conviction or sentence imposed in violation of a substantive rule is not just erroneous but contrary to law and, as a result, void. . . . a court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced." *Montgomery v. Louisiana*, 577 U.S. 190, 203 (2016). "There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." 401 U.S. at 693 (Harlan, J., opinion concurring in judgments in part and dissenting in part).

Accordingly, both Due Process and the separation of powers supports the common-sense proposition that the Constitution does not permit the continued detention of an individual whose conduct was not a crime.

3. *Eighth Amendment*. Punishing someone for conduct that is not a crime would also violate the Eighth Amendment. Punishment is "cruel and unusual," U.S. Const. amend. VIII, when it is "grossly disproportionate and excessive punishment for the crime." *Solem v. Helm*, 463 U.S. 277, 288 (1983). That beings so, it must also violate the Eighth Amendment to inflict punishment for no crime at all. Serving "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of" something that the law does not punish." *See Robinson v. California*, 370 U.S. 660, 667 (1962).

This Court can and should avoid the multitude of constitutional problems raised by the court of appeals' artificially cramped interpretation of Section 2255 by

adopting the statutory construction that is both more faithful to the text and ensures its constitutionality.

II. OTHER LIMITATIONS ON THE WRIT DISPEL ANY CONCERNS ABOUT CONSTRUING SECTION 2255 TO ALLOW UNLAWFULLY DETAINED INDIVIDUALS TO SEEK HABEAS RELIEF UNDER SECTION 2241.

As set forth above, the plain meaning of Section 2255(e) dictates that a federal prisoner may seek habeas relief under Section 2241 if the remedy under Section 2255 is *currently* inadequate or ineffective. This interpretation will not open the federal courts to a flood of unmeritorious habeas petitions from federal prisoners, because federal law imposes several other constraints on habeas relief in this setting.

A. *"Legality of Detention."* Under Section 2255(e), a federal prisoner may file a petition under Section 2241 only to test the "legality of his detention." 28 U.S.C. § 2255(e). This language excludes a large swath of claims ordinarily brought in habeas petitions, including many that are properly the subjects of motions filed under Section 2255(a).

A federal prisoner may file a motion under Section 2255(a) to seek release "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." 28 U.S.C. § 2255(a). A petition to "test the legality of [] detention," *id.* § 2255(e), is substantially narrower. It is limited to claims of error that rise to the level of a

"fundamental defect which inherently results in a complete miscarriage of justice and . . . present(s) exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." *Davis*, 417 U.S. at 346 (internal quotation marks omitted).

When "Congress includes particular language in one section of a statute but omits it in another . . . [courts presume] that Congress act[ed] intentionally." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (citation omitted). Congress has preserved the textual distinction between subsections 2255(a) and (e) throughout the statute's existence. The statute should accordingly be read with the presumption that Congress was creating two different standards in subsection (a) and subsection (e), and that subsection (e) allows a much narrower set of claims.

Interpreting Section 2255(e) to allow habeas challenges on the ground that conduct for which the defendant was convicted is not a crime is consistent with not only Section 2255's text, but also with "the original sphere for collateral attack on a conviction." Henry Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 151 (1970). As detailed above, the original understanding of habeas ensured challenges were allowed "where the tribunal lacked jurisdiction either in the usual sense or because the statute under which the defendant had been prosecuted was unconstitutional." *Id.*; *see supra* Part I.B.1. By the same token, an intervening decision interpretating a statute more narrowly than previous courts did can make clear that an individual is imprisoned for conduct that is not a crime.

For example, in *McDonnell v. United States*, 579 U.S. 550 (2016), this Court held that setting up a meeting, talking to another official, or organizing an event does not qualify as an "official act" for purposes of the federal bribery statute. *Id.* at 574. Like any other decision interpreting a federal statute, that construction of the bribery statute declared what the statute "ha[s] always meant." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313 n.11 (1994). Accordingly, a person who was convicted of federal bribery before *McDonnell*, and whose conviction was premised on actions that *McDonnell* deemed non-criminal, cannot be legally detained because the Court has clarified that such acts do not violate the federal bribery statute. *See id.*

By contrast, many other statutory claims do not challenge "the legality of detention" per se, and therefore are not preserved by Section 2255(e). Where, for example, a court has "fail[ed] to comply with the formal requirements of a rule of criminal procedure," a prisoner's conviction or sentence is generally not subject to collateral attack. *Davis*, 417 U.S. at 346. That is because new rules of criminal procedure do not show the prisoner's sentence or conviction was fundamentally illegal, "but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004); *see also Hill v. United States*, 368 U.S. 424, 428-29 (1962). The saving clause requires more. A prisoner is entitled to file a petition under the saving clause only if he can show that his conviction is substantively illegal.

B. *Procedural Requirements.* The availability of habeas relief under Section 2241 is constrained not

only by the textual "legality of detention" limitation in Section 2255(e), but also by various common law habeas defenses. These defenses include the exhaustion requirement, the procedural default doctrine, laches, and abuse of the writ.

1. Absent exceptional circumstances, a federal court will not consider a habeas petition until the petitioner has exhausted his remedies. *See Clinton v. Goldsmith*, 526 U.S. 529, 537 n.11 (1999) (making clear that the exhaustion requirement applies to petitions brought under Section 2241); *Braden v. 30th Jud. Cir. Ct. of Ky.*, 410 U.S. 484, 489 (1973) (same). If they do not, the State may seek dismissal of the habeas petition on that basis, *see id.*, or the district court may *sua sponte* reject the petition, *see Granberry v. Greer*, 481 U.S. 129, 131 (1987).

2. A corollary to the exhaustion requirement is the doctrine of procedural default. That doctrine bars federal habeas relief for prisoners who failed in prior proceedings to satisfy a procedural requirement. *See Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991); *see also, e.g.*, *Bousley v. United States*, 523 U.S. 614, 622 (1998) (discussing procedural default in the Section 2255 context). Thus, federal prisoners typically cannot obtain habeas relief based on non-constitutional and non-jurisdictional claims where those claims could have been raised on direct appeal but were not. *See* Brian R. Means, Federal Habeas Manual §§ 9B:7, 9B:8 (May 2022 update).

3. The doctrine of laches may also preclude relief for someone who waited too long to seek relief under Section 2241. *See, e.g.*, *Craven v. United States*, 26 F. App'x 417, 419 (6th Cir. 2001) (applying laches to

deny writ of error coram nobis); *Bashford v. Smith*, 2008 WL 4952496, at *6 (E.D. Cal. Nov. 18, 2008) (petitioner's "seven year wait to file his § 2241 claim might invoke the equitable doctrine of laches").

Laches bars relief based on a "petitioner's lack of diligence . . . 'in the prosecution of rights.'" *Pace v. DiGuglielmo*, 544 U.S. 408, 419 (2005) (internal citation omitted). In the habeas context, this doctrine applies where the delay "affects the State's ability to defend against the claims raised." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993); *see* Rules Governing Section 2255 Proceedings for the United States District Courts, Rule 9, cmt. (similar). The government may move to dismiss a habeas petition based on such prejudice to its ability to respond to the petition. *Vasquez v. Hillary*, 474 U.S. 254, 265 (1986).

4. Finally, relief by writ of habeas corpus has long been "governed by equitable principles," *Sanders v. United States*, 373 U.S. 1, 17 (1963), embodied in the "abuse of the writ" doctrine. Among these principles is "the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks." *Id.*

Thus, for example, before AEDPA generally barred second or successive petitions, 28 U.S.C. § 2244(b)(2),(3), this Court held that a prisoner may be deemed to have waived his right to a hearing on a second application if he "deliberately with[eld] one of two grounds for federal collateral relief at the time of filing his first application," *Sanders*, 373 U.S. at 18, or if he "failed to raise a claim through inexcusable neglect," *McCleskey*, 499 U.S. at 489. As the Court explained: "Nothing in the traditions of habeas corpus

requires the federal courts . . . to entertain collateral proceedings whose only purpose is to vex, harass, or delay." *Sanders*, 373 U.S. at 18.[3]

More generally, habeas petitions are subject to "a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions." *Lonchar v. Thomas*, 517 U.S. 314, 323 (1996) (emphasis omitted). That does not mean that a judge can deny a habeas petition based on his own "conscience as a measure of equity." *Id.* But "this Court has created careful rules for dismissal of petitions for abuse of the writ" that constrain access to habeas relief. *Id.* at 324. A district court may, for example, "dismiss summarily a first petition without waiting for the State's response if it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief." *Id.* at 325. It may also "order expansion of the record to facilitate a disposition on the merits without the need for an evidentiary hearing," or take other action that the district court deems appropriate. *Id.* at 325-27.

Lastly, if a court previously rejected the same claim a prisoner brings under Section 2241, a court—exercising "sound judicial discretion"—may dismiss the claim for that reason alone. *Wong Doo v. United*

[3] The fact that petitioner in theory could have presented his claim on his first Section 2255 motion does not preclude relief. As the court of appeals explained, "[w]hen Jones filed his first § 2255 motion, our precedent had already rejected a *Rehaif*-type argument." Pet. App. 5a. Now that this Court has definitively interpreted the statute, the fact that petitioner could in theory have pursued a losing claim before does not make it permissible to bar him from seeking relief today, when the illegality of his detention is conclusively established.

States, 265 U.S. 239, 241 (1924). In practice, this means that if a prisoner seeking relief under Section 2241 on grounds he previously raised under Section 2255 and is unable to point to an intervening decision—as petitioner has done here with *Rehaif*—the prior rejection of his claim will typically be given "controlling weight." *Wong Doo*, 265 U.S. at 241; *see Sanders*, 373 U.S. at 15 (same). The same principle generally holds—albeit technically as a matter of law of the case or res judicata instead of the "abuse of the writ" doctrine—where the prisoner's claim was previously rejected on direct review. *See Withrow v. Williams*, 507 U.S. 680, 720 (1993) (Scalia, J., concurring in part and dissenting in part) (citing *Kaufman v. United States*, 394 U.S. 217 (1969)) (suggesting res judicata applies in these circumstances); Means, *supra*, § 10:1 (suggesting that courts have discretion to apply the law of the case doctrine in these circumstances).

The upshot is that Section 2241's safety valve is generally reserved only for the rare situation where, as here, an intervening decision makes clear that the petitioner is incarcerated for conduct that is not a crime.

5. To be sure, many of the common law defenses to habeas relief are inapplicable where a prisoner can establish that, under the correct legal standard, he is innocent of the crime of conviction. *Bousley*, 523 U.S. at 622 (procedural default); *McCleskey*, 499 U.S. at 495 (abuse of the writ). Procedural default and abuse of the writ may also be excused where the habeas petitioner can show cause and actual prejudice. *Bousley*, 523 U.S. at 622; *McCleskey*, 499 U.S. at 493. But that is as it should be, and is critical to avoiding miscarriages of justice. These carve-outs allow habeas to

work in the equitable, flexible way that it was designed to work for many hundreds of years, so that it can serve as a meaningful remedy for those wrongfully detained. At the same time, the equitable defenses significantly constrain access to habeas relief, as described above. To the extent the Court is concerned about opening the floodgates to habeas claims by construing Section 2255(e) as the petitioner proposes, these affirmative defenses check that flood.

CONCLUSION

For all the reasons articulated above and in petitioner's brief, the judgment of the court of appeals should be reversed.

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Respectfully submitted,

DAVID D. COLE
AMERICAN CIVIL LIBERTIES UNION
915 15th St. NW
Washington, DC 20005

JENNESA CALVO-FRIEDMAN
AMERICAN CIVIL LIBERTIES UNION
125 Broad St., 18th Floor
New York, NY 10004

GARY SULLIVAN
ARKANSAS CIVIL LIBERTIES FOUNDATION
904 West 2nd Street
Little Rock, AR 72201

JEFFREY L. FISHER
O'MELVENY & MYERS LLP
2765 Sand Hill Road
Menlo Park, CA 94025

KENDALL TURNER
Counsel of Record
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006
(202) 383-5204
kendallturner@omm.com

Attorneys for Amici Curiae