

1           IN THE SUPREME COURT OF THE UNITED STATES

2   - - - - -X

3   ERICK CORNELL CLAY,                               :

4                    Petitioner                               :

5           v.                               :   No. 01-1500

6   UNITED STATES.                               :

7   - - - - -X

8   Washington, D.C.

9   Monday, January 13, 2003

10           The above-entitled matter came on for oral

11   argument before the Supreme Court of the United States at

12   11:05 a.m.

13   APPEARANCES:

14   THOMAS C. GOLDSTEIN, ESQ., Washington, D.C.; on behalf of

15                    the Petitioner.

16   MATTHEW D. ROBERTS, ESQ., Assistant to the Solicitor

17                    General, Department of Justice, Washington,

18                    D.C.; on behalf of the Respondent.

19   DAVID W. DE BRUIN, ESQ., Washington, D.C.; as amicus

20                    curiae; invited to brief and argue as amicus

21                    curiae in support of the judgment below.

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25

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	THOMAS C. GOLDSTEIN, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	MATTHEW D. ROBERTS, ESQ.	
7	On behalf of the Respondent	14
8	ORAL ARGUMENT OF	
9	DAVID W. DE BRUIN, ESQ.	
10	As amicus curiae; invited to brief and argue as	
11	amicus curiae in support of the judgment below	23
12	REBUTTAL ARGUMENT OF	
13	THOMAS C. GOLDSTEIN, ESQ.	
14	On behalf of the Petitioner	44
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in Number 01-1500, Eric Cornell Clay versus The  
5 United States.

6 Mr. Goldstein.

7 ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

8 ON BEHALF OF THE PETITIONER

9 MR. GOLDSTEIN: Thank you, Mr. Chief Justice,  
10 and may it please the Court:

11 Paragraph 6 of section 2255 provides that,  
12 quote, a 1-year period of limitation shall apply to a  
13 motion under this section. The limitation period shall  
14 run from the latest of -- and it identifies four events,  
15 the first of which is, quote, the date on which the  
16 judgment of conviction became final.

17 Congress did not define or otherwise explicate  
18 when the judgment becomes final in that provision, and the  
19 question presented by this case is that, given that final  
20 can mean many different things in different contexts, when  
21 does it -- judgment become final here?

22 Petitioner agrees with the clear majority of  
23 circuits and the United States that the judgment becomes  
24 final upon the conclusion of direct review or the  
25 expiration of time for seeking such review. As applied to

1 this case, petitioner's time to seek 2255 relief began to  
2 run when his time to seek certiorari in this Court  
3 expired.

4 Congress most likely intended that  
5 interpretation for two reasons. First, it is the one that  
6 this Court has consistently used in the most analogous  
7 context, and that is the dividing line between direct and  
8 collateral review; and, second --

9 QUESTION: Are you talking about now our  
10 retroactivity cases?

11 MR. GOLDSTEIN: Not merely retro --

12 QUESTION: The --

13 MR. GOLDSTEIN: Those included, Mr. Chief  
14 Justice, but also cases like Barefoot versus Estelle,  
15 dealing with the presumption of correctness, and also Bell  
16 versus Maryland, which addresses the question of when a  
17 statute is repealed, when does that repeal affect --  
18 what -- what convictions does it affect?

19 QUESTION: Well, those come from quite diverse  
20 contexts.

21 MR. GOLDSTEIN: Yes, Mr. Chief Justice, and that  
22 is, in effect, our point. Those -- most of those  
23 contexts, however, do deal with the dividing line between  
24 direct and collateral review.

25 The amicus quite rightly points out that there

1 are other meanings of final. We do believe, however, that  
2 they don't -- they aren't as close as this one, and they  
3 aren't the one that Congress most naturally looked to, and  
4 since Congress didn't tell this Court what it meant, you  
5 would look to the dividing line between direct and  
6 collateral review, because that's the point of this  
7 provision in section 2255.

8 I mentioned there was a second reason that I'll  
9 come to, and that is that the -- the minority rule doesn't  
10 work textually and would produce anomalous results.

11 The -- as I mentioned, the Court has picked up  
12 the notion of final -- the judgment of conviction becoming  
13 final, and that language appears almost verbatim in  
14 Linkletter, in contexts like Teague, Barefoot, and Bell.

15 QUESTION: Well, Link -- Linkletter was really a  
16 bygone era by the time Congress passed AEDPA.

17 MR. GOLDSTEIN: Mr. Chief Justice, but I think  
18 the point still would favor us. You're absolutely right,  
19 because although the Court has changed the line for  
20 retroactivity and changed the test, it has never changed  
21 the definition of what is final, and so for 40 years plus  
22 the Court has consistently included the time to seek  
23 certiorari, and that's a perfectly sensible result, as it  
24 would be applied in this case.

25 The -- the minority rule, by contrast, would

1 produce anomalous results. It would mean, for example,  
2 that in the couple of months after the mandate issues in  
3 the court of appeals, a judgment of conviction would be  
4 both final and non-final at the same time, because you  
5 wouldn't -- although the statute refers to the judgment of  
6 conviction becoming final, you wouldn't actually know at  
7 that point.

8 QUESTION: I thought that their -- amicus wrote,  
9 you know, a pretty good argument on that side, and I  
10 thought one of his better points, which is that if we're  
11 looking at the -- the 1-year limitation from a person in  
12 State proceedings, what it says is, it runs from the  
13 latest of the date on which judgment became final by the  
14 conclusion of direct review, or the expiration of time for  
15 seeking such review; and then when you look to the  
16 parallel for somebody in Federal proceedings, it says it  
17 becomes final from the date on which the judgment of  
18 conviction becomes final.

19 In other words, they use the first half of the  
20 sentence, doesn't use the sentence -- the second; and in -  
21 - in the State proceeding it has two, and here it has one,  
22 and he says you have to give some meaning to that  
23 difference.

24 MR. GOLDSTEIN: I understand. Justice Breyer,  
25 that is exactly what has caused the Fourth and Seventh

1 Circuits to scratch their head. It's a conceivable  
2 inference. We don't dispute that.

3 Of course, the majority of courts have applied  
4 another canon of construction here, and that is that when  
5 Congress uses the same phrase in a statute, it's  
6 interpreted generally, absent some strong contrary  
7 indication, to have the same meaning.

8 QUESTION: Oh, no, it doesn't, see, because you  
9 have become final by the conclusion of direct review, and  
10 then we have the date on which judgment of conviction  
11 became final, and he's saying that he would interpret it  
12 so they mean the same thing.

13 MR. GOLDSTEIN: Ah, but he wouldn't, and here's  
14 the reason, and let -- let me just take you very carefully  
15 through this, and for anyone who wants to look it up, it's  
16 the blue brief on page 1 would be the different statutory  
17 provisions.

18 2255 says, the limitation period shall run from  
19 the latest of the date on which the judgment of conviction  
20 became final. According to the amicus, that means the  
21 date on which the mandate issues.

22 2244(d)(1) says -- has the -- has that, and it  
23 has some more, and that's your point. The limitation  
24 period shall run from the latest of the date on which the  
25 judgment became final, and then he gives that -- that same

1 phrase, judgment became final, a different meaning in the  
2 same statute. He reads that to mean either review in this  
3 Court, or the expiration of time to seek cert, so it  
4 does -- it would have actually a -- that phrase, judgment  
5 became final, would have a different meaning in 22 --

6 QUESTION: Well, but the -- the -- that  
7 doesn't -- the sentence doesn't end with judgment became  
8 final. It goes on to say, by the conclusion of direct  
9 review, or the expiration of the time for seeking such  
10 review.

11 MR. GOLDSTEIN: That's right, so what we have,  
12 Mr. Chief Justice, is 2244, Congress explicates a phrase.  
13 2255, it doesn't explicate it at all, and our --

14 QUESTION: So you are saying that in the --  
15 within 2244(d)(1), those words are surplusage, they don't  
16 do anything, that -- the -- that 2244 would mean the same  
17 thing if there were a period after "became final."

18 MR. GOLDSTEIN: Justice Ginsburg, it is correct  
19 that we think it would mean the same thing even if it  
20 weren't there, but it's not surplusage. It does have a  
21 role, and so I have several reasons to articulate to the  
22 Court why there's no negative pregnant -- our view is, and  
23 this Court has said, not every silence is pregnant. What  
24 we have in 2255 is silent.

25 My point, Justice Ginsburg, is that the



1 inference that the minority of courts draw, that Congress  
2 was doing something special in 2244, and therefore  
3 impliedly didn't intend to do the same thing in 2255, is  
4 not correct, and I have several points.

5           The first one goes to yours, Justice Ginsburg,  
6 and that is, it's reasonable for this Court to ask, okay,  
7 why did it put it in 2244 and it didn't put it in 2255?  
8 It would have been easier, obviously, if it had put it in  
9 2255.

10           The reason we think they put it in 2244 is not  
11 to specify which among the Federal interpretations of  
12 "judgment becomes final" applies, but to say that it's the  
13 Federal one, not the State one.

14           That's the real difference of force between 2244  
15 instead of 2255. 2244 cases come out of the State courts,  
16 and State courts define finality differently, and so what  
17 Congress did there in 44 was make quite clear that they  
18 were applying the Federal rule.

19           That was very important in particular, because  
20 State proceedings have the added complication of not just  
21 State direct review, but State post-conviction review, and  
22 so Federal habeas courts could be terribly confused on  
23 when the judgment and --

24           QUESTION: But -- but you're going to get State  
25 post-conviction review in connection with Federal habeas

1 cases because of the exhaustion requirement.

2 MR. GOLDSTEIN: Yes, Mr. Chief Justice, and that  
3 is our point, and that is that Congress really needed to  
4 do a better -- a very good job, as -- as good as they did  
5 in AEDPA in any context, but they needed to do a good job  
6 in telling Federal habeas cases in the 20 -- courts in the  
7 2244 context when the judgment of conviction became final,  
8 because if 20 --

9 QUESTION: Well, but you can also say that they  
10 had to give a special meaning of finality so that we could  
11 respect the processes of the States and make it clear that  
12 the -- all of the State procedures had to be exhausted, as  
13 the Chief Justice indicated, because of the intrusive  
14 nature of -- of habeas jurisprudence, of habeas orders  
15 from the Federal courts, and so you can read this as -- as  
16 being an exception to this general Federal rule when, in  
17 fact -- that brings me to another point -- you can address  
18 both.

19 I -- I had -- I had thought, as the amicus brief  
20 does indicate, that finality usually does mean from the  
21 date of the issuance of the mandate, and then you go back  
22 and you toll if there's -- if there's discretionary  
23 review.

24 MR. GOLDSTEIN: Justice Kennedy, this is the  
25 second point on the question of do -- does this Court have

1 some reason to believe that the presence in 24 -- excuse  
2 me, 44 but not 55 creates a negative inference, the sort  
3 of Russello presumption, and I agree with you that it  
4 would rest on a view that this interpretation in 44(d)(1)  
5 is unusual, and our point is that it's not unusual.

6           You are correct that the -- the -- as they said  
7 in Melconian, for example, that the term of art, final  
8 judgment, does generally mean the judgment of the district  
9 court, but everyone agrees that that's not the  
10 interpretation here. In fact, it's very clear that the --  
11 the phrase here, if I could again take you back to -- take  
12 you back to it in 2255, is judgment of conviction becomes  
13 final. That phrase, judgment of conviction, picks up  
14 Federal Rule of Criminal Procedure 32.

15           Judgment of conviction includes the conviction,  
16 the judgment of conviction and the sentence, and it is by  
17 necessity already final and appealable. If this Court  
18 were to say that the baseline rule is final judgment in  
19 the sense of a district court, that would mean in the 2255  
20 context that, although your -- your direct appeal could be  
21 sitting here in the Seventh Circuit for 2 years, after the  
22 first year, you need to be back in the district court on  
23 2255, because the judgment of conviction would have become  
24 final when it was entered by the district court, and no  
25 one thinks that's sensible.

1           In fact, the -- the notes to rule 5 of the -- of  
2   the 2255 rules make quite clear you're not supposed to be  
3   in on your 2255 until the direct review process is over,  
4   so that -- my point was that the -- what you're describing  
5   as the normal background rule of when a judgment of  
6   conviction becomes final actually describes the term  
7   "final judgment," which couldn't apply here.

8           QUESTION:   When you're -- when you're appealing  
9   from the district court to the court of appeals, when does  
10   the term, final -- what does the term of final mean there,  
11   as to the district court judgment?

12          MR. GOLDSTEIN:   In this -- in -- in our view,  
13   under 2255, Mr. Chief Justice, or --

14          QUESTION:   Yes.

15          MR. GOLDSTEIN:   It -- it does not become final,  
16   in our view.   What happens is, if you did not appeal, it  
17   would -- the judgment of conviction would become final  
18   after the 10 days --

19          QUESTION:   Well, characterize for -- for us,  
20   then, your understanding of the amicus view.   I thought  
21   their view is that it just becomes tolled.   The minute  
22   you -- the minute you file the appeal it becomes tolled,  
23   so there's no problem.

24          MR. GOLDSTEIN:   Well, Mr. -- Justice Kennedy,  
25   I do agree with you that that's the amicus's view.   Our

1 point is that it doesn't pick up what you're describing as  
2 the normal rule of final judgment. That wouldn't be the  
3 normal process. Our point is that the most --

4 QUESTION: Oh, I should think the normal rule  
5 does include the tolling exception that I -- that I --  
6 we've just explained.

7 MR. GOLDSTEIN: Justice Kennedy, as a matter  
8 of -- for example, Melconian, if we go back to what this  
9 Court has described as the normal background  
10 understanding, the normal background understanding is that  
11 just when it's entered by the district court; but if,  
12 again if I could come back to my basic point, and that is,  
13 we all agree final can mean a lot of things, and the  
14 closest one, it seems perfectly clear, is the one that  
15 divides direct and collateral review, because that's what  
16 this provision does.

17 I won't deny to you, Justice Kennedy, that it  
18 could mean different things. But no one -- and my third  
19 point I wanted to make, Justice Ginsburg, about why you  
20 shouldn't draw negative inferences, nobody's got a good  
21 reason. Nobody's got a reason to think that Congress  
22 would have wanted this time to be available to State  
23 prisoners, but not to Federal prisoners.

24 If I could reserve the balance of my time.

25 QUESTION: Very well, Mr. Goldstein.

1                   Mr. Roberts, we'll hear from you.

2                   ORAL ARGUMENT OF MATTHEW D. ROBERTS

3                   ON BEHALF OF THE RESPONDENT

4                   MR. ROBERTS: Mr. Chief Justice, and may it  
5 please the Court:

6                   When a defendant does not petition this Court  
7 for certiorari on direct appeal, his judgment of  
8 conviction becomes final within the meaning of section  
9 2255 when the time for filing a petition expires. That  
10 interpretation accords with the well-settled meaning of  
11 final and the law of collateral review, and it sensibly  
12 provides Federal prisoners the same time to prepare  
13 collateral attacks as similarly situated State prisoners.

14                  QUESTION: What about an appeal from the  
15 district court to the court of appeals?

16                  MR. ROBERTS: The judgment would become final if  
17 there -- if no appeal was filed at the time -- when the  
18 time to file an appeal expired after the 10-day period.

19                  QUESTION: And yet that's contrary to a lot of  
20 other things, is it not? I mean, you can't go into the  
21 district court 60 days after your time -- after the  
22 district final judgment was entered and still maybe have  
23 30 more days to appeal, and the district court isn't going  
24 to do anything.

25                  MR. ROBERTS: Well, we're talking about finality

1 for -- for a different purpose here. It's not a question  
2 of finality for the purpose of seeking appeal, or when a  
3 judgment -- in the term like final judgment, which is --  
4 which would be the sense of finality when, for the  
5 purposes of deciding --

6 QUESTION: Why -- why should those be different?

7 MR. ROBERTS: Well, in -- in terms of -- of  
8 collateral review, first of all the Congress used the  
9 particular phrase, when the judgment becomes final, that  
10 has an established meaning in that context. Second of  
11 all, it's logical that the time to commence collateral  
12 review should start to run at the conclusion of direct  
13 review, which this Court has made clear includes the  
14 period when -- within which to seek certiorari even if a  
15 petition isn't filed, and that's, in fact, what Congress  
16 concluded in section 2244, the parallel provision for  
17 State prisoners, and there's no persuasive reason why  
18 Congress would have started the -- the time limitation at  
19 a different time for Federal prisoners.

20 QUESTION: Except that -- except that they wrote  
21 the two sections differently. That -- that certainly is  
22 something of a reason.

23 MR. ROBERTS: Well, that -- that -- well, I'm  
24 talking about a -- a reason why they would have intended  
25 that result as opposed to a -- a canon or a textual

1     indication that there might be a difference, but even as  
2     to the textual indication --

3             QUESTION:   Well, I -- I thought they would  
4     intend it in order to show special respect for the  
5     processes of the State, so that a State has completely  
6     exhausted all of its procedures for determining what the  
7     law ought to be --

8             MR. ROBERTS:   But --

9             QUESTION:   -- before they're disrupted by a  
10    Federal judgment.

11            MR. ROBERTS:   But this doesn't concern the  
12    processes of the State, Your Honor, it concerns review  
13    in -- in this Court, and this Court's made clear the --  
14    the distinction of the time is between whether the -- the  
15    time to seek review in this Court is included or is not  
16    included, and that's not a -- a State -- a remedy, this  
17    Court's made clear that exhaustion of State remedies  
18    doesn't require a petitioner to seek review in this Court,  
19    that State remedies are exhausted as long as all avenues  
20    of review are pursued in -- in the State court system. So  
21    concerns about -- concerns about requiring them to go  
22    through the full State court system wouldn't justify the  
23    difference in the rule, nor would generalized concerns  
24    about comity, which would suggest that State prisoners  
25    ought to have less time to seek review from their



1 convictions, if -- if anything, to upset their State court  
2 convictions, rather than -- than more time.

3           And really, collateral review rules are driven  
4 more by finality concerns, which are equally strong in the  
5 Federal context and the State context. That's why the  
6 Teague retroactivity rules and rules of procedural default  
7 apply equally to both, and because finality concerns are  
8 the same, there -- there isn't any persuasive reason why  
9 Congress would have started the time limit at a different  
10 time.

11           The negative -- the negative inference points,  
12 to address the negative inference point, there are three  
13 reasons why it would be inappropriate to draw a negative  
14 inference from the omission of the clarifying language  
15 here. First, it contradicts the presumption that Congress  
16 used final in accordance with its settled meaning in the  
17 collateral review context, which petitioner discussed  
18 earlier.

19           QUESTION: But I -- I think, Mr. Roberts, that  
20 as I pointed out in the question to petitioner's counsel,  
21 2250 -- 44(d)(1) doesn't just stop with the word, final,  
22 it goes on to kind of explicate the possible -- possible  
23 meanings.

24           MR. ROBERTS: Yes, it explicates the meanings,  
25 but it explicates the meanings by providing the definition

1 that is the -- is -- by providing an explication that's  
2 consistent with the background definition that you would  
3 expect final to have, and there's a -- there are good  
4 reasons why Congress would have -- might have wanted to  
5 explicate the -- to explicate it more carefully in 2244.

6           Petitioner discussed one, which is that 2244  
7 concerned State prisoners, and Congress might have been  
8 concerned that, absent clarification, courts might import  
9 the definition of finality used by the State of  
10 conviction, and there are varying definitions there.  
11 There's not the uniform definition that would include  
12 review in this Court.

13           Second, it's possible that Congress might have  
14 been concerned that the courts would assume that the time  
15 limit in section 2244 starts to run the same time as the  
16 time limit in section 2263, which also concerns State  
17 prisoners, State capital defendants and States subject to  
18 expedited collateral review proceedings, and so  
19 Congress --

20           QUESTION: Do you --

21           MR. ROBERTS: -- may have spelled it out here.

22           QUESTION: Do you think it makes any difference  
23 that in 2255 Congress used the phrase, judgment of  
24 conviction, and in 2244(d)(1) it simply used the word,  
25 judgment?

1                   MR. ROBERTS: No, I -- I don't think that it  
2 makes a difference. There are variations in -- in  
3 language like that.

4                   QUESTION: Well, usually variations in language  
5 mean variations in meaning.

6                   MR. ROBERTS: Yes, Your Honor, but it's  
7 referring back to the judgment of the State court under  
8 which the person is in custody. The -- the provision  
9 2244(d)(1) is reproduced in the gray brief on page 2 to 3.

10                  So where it says the date on which the judgment  
11 became final, it's -- it's referring back to a -- a person  
12 who's in custody pursuant to the judgment of a State  
13 court, and that would be the judgment of the district  
14 court -- I mean, of the trial court in -- in that  
15 situation, but fundamentally, our points are two.

16                  One, there's a background rule, and the  
17 presumption is generally of -- of what -- when a judgment  
18 becomes final in the collateral review context, and it's  
19 generally presumed, with good reason, that Congress  
20 legislates against that background rule and uses the terms  
21 with their settled meaning in that context; and second, we  
22 know Congress did that with respect to State prisoners in  
23 section 2244 because they clarified it there; and it makes  
24 sense that the time limitation should run at the same  
25 time, because there's no persuasive reason for them to run

1 at a different time.

2 QUESTION: Mr. Roberts, refresh my recollection.  
3 Was 2255 and 22 -- and 2240(d)(1) enacted as part of the  
4 same statute?

5 MR. ROBERTS: They were enacted as part of  
6 the -- the same statute, Your Honor, but the -- the  
7 proposition that the same word has the same meaning, the  
8 same word becomes final, has the same meaning throughout  
9 the statute -- same statute would apply by virtue of that.  
10 So the -- so that we would expect that when Congress said,  
11 becomes final in section 22 -- 2255, and when it said,  
12 became final in 2244, both referring to a judgment of the  
13 trial court convicting the defendant, that it -- it  
14 intended those phrases to have the same meaning.

15 QUESTION: I wouldn't think that. I would -- I  
16 would think that where you say, on the one hand, where it  
17 becomes final by (a) or (b), and elsewhere you simply say,  
18 where it becomes final --

19 MR. ROBERTS: Right.

20 QUESTION: -- I would think that the latter  
21 means, even if it becomes final in some other fashion.

22 Now, that happens not -- that happens not to  
23 help the respondent here.

24 MR. ROBERTS: Yes.

25 QUESTION: But I -- but I do think that that's

1 the more natural --

2 MR. ROBERTS: Well, that -- that would be one

3 possibility, that here it was restricted --

4 QUESTION: Don't you think that's the more

5 natural --

6 MR. ROBERTS: -- but it was broader.

7 QUESTION: That's right, broader.

8 MR. ROBERTS: Yes, but it's hard for me to

9 conceive, frankly, what the broader --

10 QUESTION: What the broader would be.

11 MR. ROBERTS: -- understanding of finality is,

12 Your Honor. I do think that -- that not every time

13 that -- that Congress uses the different language to --

14 that's more amplified and clarifying, does that -- that

15 mean that --

16 QUESTION: Not necessarily.

17 MR. ROBERTS: -- that the words -- and the Court

18 does not generally -- does not generally apply the

19 negative inference, the Russello presumption to draw the

20 conclusion that the -- that identical phrases have -- have

21 different meaning.

22 QUESTION: Oh, if -- if you applied the Russello

23 presumption here, you -- you would be applying the

24 presumption that I just described, namely in -- in one

25 section, it limited it, in -- in the other section, it

1     didn't limit it at all.  You'd think the latter section  
2     would be broader, not narrower.

3             MR. ROBERTS:  That -- that would be --

4             QUESTION:  That's -- that's what Russello said.

5             MR. ROBERTS:  That would be parallel to Russello  
6     and parallel to some other cases where there's been  
7     additional limiting language, and the Court has said  
8     therefore, the -- we won't read that limit into the  
9     earlier language, but in those cases also what bears note  
10    is that the word that was limited later on, here the word  
11    becomes -- the phrase becomes final, was by the Court, in  
12    those cases, given its ordinary meaning, what you would  
13    expect, apart from the Russello presumption.

14            QUESTION:  Yes, but what I --

15            MR. ROBERTS:  And here --

16            QUESTION:  That gets you into the argument of  
17    whether there is an ordinary meaning of final.

18            MR. ROBERTS:  Yes.  Yes, Your Honor, and there  
19    isn't -- there isn't an ordinary meaning across the board  
20    in every context, but here we have a -- a narrow context  
21    in which Congress has acted in the collateral review  
22    context, in particular in the commencement of collateral  
23    review, and in this Court's cases, in the collateral  
24    review context, particularly delineating when direct  
25    review ends and collateral review begins, the Court has

1 used repeatedly, over 30 years before enactment of AEDPA,  
2 the -- this established definition of finality, and  
3 there's -- there's no reason why Congress would have  
4 departed from that here.

5 If there are no further questions, we would  
6 submit.

7 QUESTION: Very well, Mr. Roberts.

8 Mr. de Bruin, we'll hear from you.

9 ORAL ARGUMENT OF DAVID W. DE BRUIN,  
10 AMICUS CURIAE IN SUPPORT OF THE JUDGMENT BELOW

11 MR. DE BRUIN: Mr. Chief Justice, and may it  
12 please the Court:

13 There are four points that are dispositive of  
14 this case. First, the most natural and logical inference  
15 is that the textual language in section 2255 cannot mean  
16 exactly the same thing as the very different textual  
17 language enacted at the same time in the same statute in  
18 section 2244. Second, the text of each provision has an  
19 ordinary and accepted meaning that is not, in fact, the  
20 same. Third, there are at least three reasons why  
21 Congress logically used a different trigger for the  
22 limitation periods in section 2244 and 2255, and fourth,  
23 no harmful or absurd consequences flow from a  
24 determination that Congress did not intend these very  
25 different provisions with their very different texts to

1 mean precisely the same thing, as the parties here  
2 contend, and for these reasons, I submit the judgment of  
3 the court of appeals in this case is correct, and it  
4 should be affirmed.

5           The Russello presumption in this case is  
6 particularly strong. Congress, in fact, used three  
7 different formulations in AEDPA in identifying triggers  
8 for time limitations under the statute, 2244, 2255, as  
9 we've talked about, and also 2263. In each of those  
10 formulations, enacted in the same statute at the same  
11 time, Congress explicitly chose different words to  
12 describe what the triggering event was and what the  
13 consequences of subsequent events were.

14           QUESTION: Let's -- let's review the Russello  
15 presumption. Russello had an earlier section where the  
16 more general word was limited. What -- what was the --  
17 what was the -- the -- what was the general word involved  
18 in that case?

19           MR. DE BRUIN: I believe -- I have the exact  
20 language, that in Russello, the -- the general was any  
21 interest acquired.

22           QUESTION: Any -- any interest acquired. That's  
23 what the later provision said, and the earlier provision  
24 said, any interest in the enterprise acquired.

25           MR. DE BRUIN: Correct, any interest in any



1 enterprise which the defendant has established.

2 QUESTION: Okay, and -- and what Russello said  
3 is, where you have a limitation in the earlier one, an  
4 interest in any enterprise, and then the later one just  
5 says, any interest, we assume that any interest is  
6 broader. It's not limited by, in any enterprise.

7 Now, if you apply -- and I think that's entirely  
8 reasonable, but if you apply that same principle here,  
9 what it comes to is that where in the early one it says  
10 final by reason of (a) and (b), and in the later one, it  
11 just says, becomes final, you would think the later one  
12 would -- would include (a), (b), and maybe (c), (d), (e),  
13 but it certainly wouldn't be narrower than the earlier  
14 one, which is what you're insisting it is.

15 In other words, it seems to me Russello cuts  
16 exactly against your position, rather than for it.

17 MR. DE BRUIN: Well, I think the -- the meaning  
18 of becomes final in 2255 is, in a sense, broader, in that  
19 there are different conditions that can trigger when a  
20 judgment becomes final. The -- the normal rule is that  
21 judgments of courts become final when the court acts, not  
22 upon the expiration of review. That finality, however,  
23 may be disrupted, or arrested by subsequent filings.

24 QUESTION: But aren't you picking one of the two  
25 means of finality that's set forth in the earlier

1 provision? You're saying in the later provision it only  
2 means one of those two. That's not Russello at all.  
3 That's the opposite of Russello.

4 MR. DE BRUIN: No --

5 QUESTION: I -- I think what you'd have to say  
6 is, it means those two perhaps plus some others.

7 MR. DE BRUIN: No, for two reasons. One,  
8 Congress logically can include the first phrase, the  
9 conclusion of direct review, as a means of clarifying and  
10 contrasting its inclusion of the second or the expiration  
11 of the time for seeking such review.

12 That is the unusual clause. Typically,  
13 judgments become final when the court acts. They're not  
14 dependent upon the expiration of the time for review for  
15 finality to attach.

16 QUESTION: Or on the issuance of a mandate.

17 MR. DE BRUIN: But that is an action of the  
18 court, Justice Ginsburg. In other words, the point is,  
19 and the parties agree that the word final does have  
20 different meanings in different contexts.

21 QUESTION: It surely does.

22 MR. DE BRUIN: And -- and I don't dispute that,  
23 but in this case, I think you have to look at final, and  
24 it is guided by two things. The meaning of final in 2255  
25 is informed by the language in 2244, where Congress

1 provided a very specific definition there that it did not  
2 employ in 2255.

3 QUESTION: You seem to take only one part of the  
4 definition, because 2244 says, on direct review, or the  
5 expiration, but you seem to accept that 2255 does  
6 encompass direct review. That is, if someone actually  
7 files a petition for cert, then the finality rule would  
8 not kick in.

9 MR. DE BRUIN: Justice Ginsburg, that is not  
10 actually clear. It is not clear that Congress in 2255  
11 intended either formulation to be the defining point in  
12 all cases. Under Rule 33, there was very similar language  
13 that triggered a time bar to -- to when the judgment  
14 became final and, as interpreted by the courts there,  
15 finality was not always coextensive with the conclusion of  
16 direct review.

17 The rule there, universally established, was  
18 that if a court of appeals issued its mandate and a stay  
19 of the mandate was not obtained, the 2-year clock under  
20 Rule 33 began to run from the date of the mandate whether  
21 or not the defendant, not having obtained a stay,  
22 petitioned this Court for certiorari. So although the  
23 question is not presented in this case, it is not  
24 automatically clear that Congress in 2255 meant either of  
25 the triggers that appear in 2244, but, as this Court

1 recognized in Russello, these provisions do not need to be  
2 mutually coextensive. One can be a subset of the other.

3 In this instance, Congress could include the  
4 words, the conclusion of direct review, simply to provide  
5 clarity that it also wanted to include the unusual event,  
6 which was the expiration of the time for seeking such  
7 review.

8 QUESTION: You would also -- what -- they --  
9 they also -- the Government gave meaning to the -- gave  
10 meaning to the difference by saying, even if you're right  
11 about that, becomes final, becomes final includes  
12 expiration of time. That's their argument.

13 And as to the first thing, by direct review,  
14 that includes expiration of time, too. They just put it  
15 in to make sure it was not the habeas route in the States,  
16 and then they put the second clause in really to save  
17 Federal judges from being confused about what happens in  
18 the California Court of Appeals, what happens in the lower  
19 inter -- intermediate State courts to make sure that --  
20 that this ordinary Federal situation was seen as applying  
21 to cases as they wend their way up through the State court  
22 system, too.

23 MR. DE BRUIN: What is --

24 QUESTION: I think that's -- that was -- I heard  
25 that being given, in any case. Are you following? Was I

1 clear enough?

2 MR. DE BRUIN: Yes, I believe.

3 QUESTION: Yes.

4 MR. DE BRUIN: But what is significant, Justice  
5 Breyer, is that that argument essentially undercuts their  
6 argument that Congress, in enacting 2255, was using an  
7 established meaning of final, coming from this Court's  
8 precedents in their retroactivity cases.

9 If Congress believed that the word final, as  
10 used in 2255, standing alone, without clarification,  
11 automatically conveyed the definition this Court has used  
12 in the retroactivity cases, that definition, as this Court  
13 knows, applies equally to State convictions as well as to  
14 Federal convictions. In fact, that rule in Linkletter was  
15 originally developed in the context of review of a State  
16 conviction. In Griffith, the Court applied that same  
17 concept of finality both to a State conviction and to a  
18 Federal conviction, so if Congress thought by using just  
19 the word final, we mean, in essence, the retroactivity  
20 definition --

21 QUESTION: If you -- if you --

22 MR. DE BRUIN: -- that would have applied to  
23 both.

24 But conversely, if Congress was aware that that  
25 word, final, might mean something different, then the

1 obvious differences in wording here make a meaningful  
2 difference. 2244 means what Congress specified.

3 The point is, there is no greater reason to  
4 believe that the Court's definition in the retroactivity  
5 cases applies in 2255 but not 2244.

6 QUESTION: Right. If -- if, in fact, you could  
7 read it, as Justice Scalia suggested, which I think maybe  
8 you could, or as the way the SG suggested for the sake of  
9 argument, is there any argument that you shouldn't?  
10 I mean, it sounds simple, clear, uniform; everybody'd  
11 understand it. Is there any reason not to read it that  
12 way if the language permits it?

13 MR. DE BRUIN: I think what you have done is,  
14 you've rendered the words of section 2244, as Justice  
15 Ginsburg pointed out, wholly superfluous.

16 QUESTION: All right, but then you're answering  
17 my question, no. You're saying, there is no reason not to  
18 read it that way if you could, with the language, but the  
19 language doesn't permit it.

20 MR. DE BRUIN: I --

21 QUESTION: That's your argument.

22 MR. DE BRUIN: I believe that's correct. I  
23 believe --

24 QUESTION: And I take it as a no, that if it did  
25 permit it, there isn't any good reason.

1           MR. DE BRUIN: I think Congress certainly could  
2 have enacted a statute that had the same trigger. I think  
3 there also are significant reasons why it made sense for  
4 Congress not to use the same trigger. There are --

5           QUESTION: It wouldn't render that language  
6 superfluous if you interpreted it the way I suggested,  
7 which is that -- that finality in the second provision  
8 includes not just the two specifications in the first, but  
9 also some other unnamed aspects of finality, which we  
10 don't have to decide upon in this case, but which doesn't  
11 help your case.

12          QUESTION: Well, I mean --

13          MR. DE BRUIN: Justice Scalia, what --

14          QUESTION: Go ahead.

15          MR. DE BRUIN: What I think defeats that is that  
16 there isn't anything else. There isn't a broader universe  
17 that --

18          QUESTION: If -- if you're -- if you're going to  
19 say that 2255, by contrast with 2244(d)(1) must mean  
20 something broader, then -- though, the broader you define  
21 finality, the more difficult it is for a petitioner to  
22 make his case, it seems to me -- a habeas petitioner. If  
23 there are any number of different ways that a judgment can  
24 become final, that -- that is bad for the person seeking  
25 habeas relief.

1                   MR. DE BRUIN: I think that's right. As,  
2 Mr. Chief Justice, you recognized, the habeas -- there --  
3 there's an interest in setting the date and in a non-  
4 capital case, as these cases will be, where certiorari has  
5 not been sought, if claims are to be brought, have the  
6 statute begin, the claims be filed, if relief is  
7 appropriate, relief be granted; but what I think is  
8 significant, Justice Scalia, is that there is no broader  
9 meaning of final that anyone has ever articulated.

10                   The -- the broadest definition that has been  
11 identified is that which is set forth in 2244, the  
12 conclusion of direct review, or, what is not normally  
13 included for finality, the expiration of the time for  
14 seeking the conclusion of direct review, as opposed --

15                   QUESTION: But that makes sense --

16                   QUESTION: I suppose you could answer Justice  
17 Scalia by saying that these are exceptions to the ordinary  
18 rule of finality, although the statute doesn't quite read  
19 that way. They're -- they -- or they are special  
20 extensions --

21                   MR. DE BRUIN: They --

22                   QUESTION: -- of the ordinary rule of finality.

23                   MR. DE BRUIN: I -- I -- they're extensions, is  
24 exactly right, but I think it is clear that finality  
25 normally occurs when a court acts. Here, when the court



1 of appeals issued its mandate, nothing else happened in  
2 the case. Mr. Clay did not --

3 QUESTION: Mr. de Bruin, I'd like to take you  
4 back to that word, mandate, because finality means  
5 different things in different contexts. The most basic  
6 finality rule is when the district court disassociates  
7 itself from the case, and then the case is lodged on  
8 appeal. It's final for, say, preclusion purposes at that  
9 point.

10 This Court dates from, not from the mandate in  
11 the court of appeals, but take, for example, our rule on  
12 cert. Doesn't it run from the entry of judgment in the  
13 court of appeals, not from the later time when a mandate  
14 is issued?

15 MR. DE BRUIN: Yes.

16 QUESTION: So where do you make up the mandate  
17 rule as a general rule?

18 MR. DE BRUIN: Well, two points. One, I believe  
19 2244 makes clear that whatever 2255 means, it can't mean  
20 exactly the same thing as 2244, because Congress didn't  
21 use those words. That still leaves the question, well,  
22 what, then, does becomes final mean in 2255? Does it mean  
23 when the court of appeals issues its judgment? Does it  
24 mean when it issues its mandate? Those questions still  
25 need to be answered.

1                   QUESTION: Am I right that our rules don't refer  
2 to the mandate date at all, that it's always the entry of  
3 judgment?

4                   MR. DE BRUIN: That is correct. The 90-day  
5 clock runs from the -- from the entry of judgment, not the  
6 mandate, but in deciding that question, what did Congress  
7 mean by final, assuming it's not what it said in 2244.  
8 Because it didn't say that here, the Court has to decide,  
9 is it the judgment, is it the mandate, and there is, in  
10 fact, a developed body of law under, I submit, a very  
11 analogous situation. Under Rule 33, the defendant had  
12 2 years from final judgment to bring a claim, and the  
13 courts had interpreted finality in that context to mean  
14 when the court of appeals issued its mandate.

15                  QUESTION: I think your case would be persuasive  
16 if, indeed, there was a generally understood meaning of  
17 finality, and -- and that's the part of your brief I  
18 focused on, and I just don't think you carry the day.  
19 I just think, as Justice Ginsburg points out, it means a  
20 lot of different things. So once that's the case, all you  
21 have to rely upon is this principle that -- that where --  
22 where a thing is said two different ways in a statute,  
23 there must be a reason. You have to give them different  
24 meaning. That isn't an absolute principle, and it -- it  
25 has all sorts of exceptions. I mean, it -- it just

1 depends.

2           For example, if you say, from the day of entry  
3 of judgment in one section of the statute, and in another  
4 section of the statute it reads, from the day judgment was  
5 entered, do you really think you have to give different  
6 meaning to those two formulations? Of course not. It all  
7 depends on what -- what the other factors involved are,  
8 and here --

9           MR. DE BRUIN: I think --

10           QUESTION: -- I don't see any other factor,  
11 unless you show that finality has a normal meaning,  
12 which -- so that the earlier provision is giving it some  
13 peculiar meaning. That -- that would be persuasive --

14           MR. DE BRUIN: I agree with you --

15           QUESTION: -- but -- but I don't think you carry  
16 the day on that point.

17           MR. DE BRUIN: I agree with you that Russello  
18 sets a presumption, it's not an automatic rule, but what  
19 is significant in this case is not just that there's a  
20 formulation that appears essentially the same, but in  
21 different words. What you have is two provisions, 2244  
22 and 2255, that are markedly parallel. You cannot read  
23 them, going along almost word-for-word, and then you get  
24 to this difference -- which is not a minor difference, but  
25 there's an entire qualifying clause added -- and not be

1 struck: "Congress must have meant something different or  
2 they would not have diverged so significantly."

3 QUESTION: But you admit that for one part of  
4 that clause, Congress didn't mean any different. The --  
5 if there is a petition filed, if there is, in fact, a cert  
6 petition filed, then State and Federal prisoners got  
7 treated alike, so it's the -- the only place, as I  
8 understand it, where you're saying there's a difference is  
9 whether the time for filing a petition counts even when  
10 the -- there -- no petition is filed.

11 MR. DE BRUIN: Well, Justice Ginsburg, I don't  
12 concede that. I don't concede that it is true that if a  
13 petition is filed, that the clock is automatically  
14 arrested so that automatically the conclusion of direct  
15 review isn't counted. That's not really presented here  
16 because there was no petition, it may be Congress did not  
17 mean for either of those clauses to be in all cases the  
18 determinative fact under 2255.

19 QUESTION: So under your reading, it might be  
20 that the judgment becomes final, the court of appeals  
21 judgment becomes final when the mandate comes down, even  
22 though the petitioner has filed a cert petition. It could  
23 mean that.

24 MR. DE BRUIN: It could mean that, and that was,  
25 in fact, the established rule under Rule 33, which is a

1 very similar time mechanism, and I submit the most  
2 appropriate context is, look at other congressional  
3 enactments imposing time limits on the bringing of claims  
4 after judgment, and the rule under Rule 33 was cert was  
5 irrelevant unless a stay of the mandate was obtained under  
6 Federal Rule of Appellate Procedure 41; and, of course,  
7 under 41(c) you can obtain a stay of the mandate if a  
8 substantial question exists for the presentation of a  
9 petition for certiorari.

10 QUESTION: Am I wrong in thinking that the  
11 general understanding is that when you file a cert  
12 petition, that the finality is suspended until that  
13 petition is disposed of?

14 MR. DE BRUIN: I don't believe that is a general  
15 rule. The most analogous rule, as it existed both under  
16 the Speedy Trial Act and under Rule 33, was that simply  
17 petitioning this Court for certiorari did not  
18 automatically arrest the finality of a judgment for either  
19 of those two statutes: only if you got a stay of the  
20 mandate. That's the whole purpose under Rule 41(c) for  
21 providing for a stay of the mandate; and, of course, it's  
22 that rule that the simple filing of a petition, that's  
23 what may engender meritorious petitions, which the  
24 Government contends is a reason not to interpret 2255 the  
25 way the court of appeals did below.

1           It makes sense, I submit, not to have a rule  
2   that the automatic filing arrests the finality of the  
3   judgment, and that was, in fact, the rule under Rule 33,  
4   and that's the way the Speedy Trial Act has been  
5   interpreted, and other statutes of limitations, that the  
6   filing for cert does not automatically trigger the -- or  
7   disrupt the statute.

8           QUESTION: Mr. de Bruin, I think I understand  
9   your argument based on the different wording, but --  
10   I think this question was asked before, too: is there any  
11   reason why Congress might want to give Federal  
12   post-conviction petitioners less time than State  
13   post-conviction petitioners?

14          MR. DE BRUIN: Yes, but first I must correct  
15   you. Under this overall statutory scheme, I submit  
16   Federal prisoners have more time, not less, and the reason  
17   for that, it is wrong for the parties to argue, as they  
18   do, that this construction of 2255 is necessary to ensure  
19   parity. There is no parity.

20          As the Court knows from its decision in Duncan  
21   versus Walker, and just last term in Carey versus Saffold,  
22   the 1-year statute under 2244 applies to the preparation  
23   of two different things. It applies to the preparation of  
24   your State collateral petition, and then once that is  
25   filed, but only after it's filed, there is tolling, as was

1 at issue in Duncan versus Walker and Carey versus Saffold;  
2 and then after the State petition is resolved, but not  
3 including certiorari, that's very clear, then you've got  
4 to file your Federal 2254 petition. So a State inmate has  
5 one year to do both, prepare his State collateral claim,  
6 assuming total exhaustion under Rose versus Lundy, and  
7 then, after the State collateral petition is resolved, the  
8 Federal collateral petition.

9           The Federal inmate, by contrast, has a full year  
10 simply to bring his 2255 motion. So it is not true that  
11 only by forcing this different language in 2244 and 2255  
12 to mean the same thing, will you achieve parity. There  
13 isn't parity. Federal inmates have more time. But there  
14 are, in any event, reasons for that difference.

15           Again, claims coming from State court by  
16 definition must be exhausted, previously litigated claims.  
17 By definition, 2255 claims cannot be the same claims that  
18 were litigated on direct review. I submit it makes  
19 logical sense for Congress to allow the State claim,  
20 previously litigated in State court, to run its full  
21 course at least through cert on direct review before  
22 starting the statute.

23           If this -- and I submit Teague here really  
24 provides a reason. Since this Court has recognized that  
25 if it were to issue a new rule of constitutional procedure

1 before the time expired to file for cert, and if one of  
2 the petitioner's State claims was litigated on direct  
3 review, it is less an affront to the State system for this  
4 Court to simply grant, vacate, and remand than for a lower  
5 Federal court to take up that claim on habeas. So  
6 Congress logically could have said that the time to begin  
7 the statute will not run until the expiration of time for  
8 the conclusion of direct review. There are reasons such  
9 as that that could provide an explanation for why Congress  
10 did what it did, which is to provide very different  
11 triggers in these two statutes.

12 Fourth, it's important that there are no harmful  
13 consequences that follow from granting these two different  
14 provisions, with their very different text, different  
15 meanings. As I mentioned, Federal defendants will always  
16 have at least one full year from the issuance of the  
17 mandate to bring their claim. As this Court has  
18 recognized, in a non-capital case, the defendant has no  
19 interest in delaying the adjudication of any collateral  
20 claims that may exist. The construction of the court of  
21 appeals in this case is clear and easy to administer. The  
22 Federal inmate has one year from the issuance of the  
23 mandate if not --

24 QUESTION: Well, it isn't clear on the point  
25 that I asked you about, because I thought that the court



1 of appeals said yes, if you actually file your petition  
2 for cert, then the time doesn't run until the petition is  
3 disposed of. I thought -- you -- you said that's  
4 ambiguous, but I don't think that that's what the court  
5 of appeals said.

6 MR. DE BRUIN: You are correct, Justice  
7 Ginsburg. The courts of appeals have held universally  
8 that if you petition for cert, the 1-year period does not  
9 begin to run until the petition is resolved, and that rule  
10 is not presented here. There is, in fact -- authority  
11 goes both ways, that subsequent filings in a different  
12 court at times do arrest the finality of a prior judgment,  
13 and at times they do not.

14 My only point was, in looking at the language of  
15 2244 and asking whether the language there, the conclusion  
16 of direct review defeats the Russello presumption, my  
17 point simply is, it does not defeat it. One  
18 interpretation is that Congress didn't mean either to  
19 apply here, and instead embraced a rule much like the  
20 established practice under Rule 33, but even if -- the  
21 Court does not need to accept that to affirm the court of  
22 appeals here.

23 The rule logically could be that if the court of  
24 appeals issues its mandate, the case is over in the court  
25 of appeals. Nothing else happens, no motion to stay, no

1 petition for cert. The case is final. That's -- that's  
2 consistent with common understanding of the word.

3 QUESTION: But in terms of confusing things, if  
4 we were to take that view of it, it would, because  
5 everybody assumes, well, you file your cert petition, then  
6 it's on hold until --

7 MR. DE BRUIN: No, but -- I'm sorry, but  
8 continuing on my thought, if nothing happens, the case is  
9 final when the court of appeals rules. You have a year.

10 If, however, you petition for cert, then the  
11 judgment, the finality of the judgment is arrested, and  
12 the one year does not begin to run until the petition is  
13 resolved. That would be perfectly permissible. In other  
14 words -- and that is, in fact, the construction of the  
15 Seventh Circuit, that --

16 QUESTION: That's -- that's not quite tolling.  
17 If -- if you -- if you waited for, say, 40 days before you  
18 filed, does the 40 days count again? Do you tack, or do  
19 you get a whole new period?

20 MR. DE BRUIN: You would get a whole new period,  
21 and that is consistent with --

22 QUESTION: So -- so that's not quite like  
23 tolling, I think.

24 MR. DE BRUIN: It's not tolling. Now, Congress  
25 has provided tolling under 2263. It has provided tolling

1 under different aspects of the statute. But no, this is  
2 not tolling. There -- there are established rules that a  
3 judgment is final, but yet, if you file a motion for  
4 reconsideration, for instance, the finality of the  
5 judgment, even though it was final and the time bars were  
6 running, finality is arrested; and then once the petition  
7 for reconsideration is decided, you have a full period,  
8 again, and so Justice Ginsburg, that would be a perfectly  
9 permissible construction, and in fact, perhaps the most  
10 logical construction, that if you petition for cert, the  
11 finality of the judgment is arrested and you have a full  
12 year.

13           The point is, finality will always be affected  
14 by what the defendant does and does not do, and there will  
15 always be a series of different rules, depending on  
16 whether a petition for cert was filed, whether an appeal  
17 was filed, and there will be different rules from State as  
18 well as Federal.

19           There's a whole series of different rules; but  
20 the rule of the court of appeals in this case was, if  
21 nothing happens after the court of appeals issues its  
22 decision, the judgment is final within the meaning of  
23 2255. That's consistent with the fact that judgments  
24 routinely are final without being dependent upon the  
25 expiration of the time for review.

1           The formulation in 2244 is, in fact, unusual.  
2 Congress provided for that in 2244, but did not provide  
3 for that in 2255.

4           For all these reasons, I -- I urge the Court to  
5 find that the decision of the court of appeals is correct,  
6 the construction of the language affords the text its  
7 natural meaning, does not work any harmful results, and  
8 should be affirmed.

9           Thank you very much.

10           QUESTION: Thank you, Mr. de Bruin, and the  
11 Court thanks you for your help to the Court with your  
12 amicus brief in this case.

13           MR. DE BRUIN: Thank you.

14           QUESTION: Mr. Goldstein, you have 3 minutes  
15 remaining.

16           REBUTTAL ARGUMENT OF THOMAS C. GOLDSTEIN

17           ON BEHALF OF THE PETITIONER

18           MR. GOLDSTEIN: Thank you, Mr. Chief Justice.  
19 If I could address first the question of whether or not  
20 there is a background understanding of when a judgment of  
21 conviction becomes final, because conceivably that would  
22 give rise to the negative inference that Congress was  
23 doing something special in 2244 that it didn't intend in  
24 2255.

25           The amicus points the Court to the pre-amendment

1 Rule 33, and I think it's important to play out exactly  
2 what finality means there, because in the pre-amendment  
3 Rule 33, there wasn't agreement on whether or not finality  
4 attaches upon the issuance of a mandate.

5 QUESTION: Which set of Rule 33 are we talking  
6 about?

7 MR. GOLDSTEIN: Before the 1998 amendment,  
8 Mr. Chief Justice.

9 QUESTION: To what set, what --

10 MR. GOLDSTEIN: I apologize, to criminal  
11 procedure.

12 QUESTION: Criminal procedure.

13 MR. GOLDSTEIN: I do apologize.

14 Under -- before it was amended, some courts said  
15 it was the judgment. Some courts said it was the mandate.  
16 That's discussed in the advisory committee notes to the  
17 amendment.

18 In addition, most things under Rule 33, those  
19 other than newly discovered evidence, ran from the entry  
20 of the judgment in the district court, and perhaps most  
21 important of all, it's settled under Rule 33, and this is  
22 the Cook case from the Ninth Circuit that's cited in the  
23 amicus brief, that under Rule 33 if a cert petition was  
24 filed, that didn't stop the time.

25 QUESTION: Well, you say it's settled. It's

1 settled in the Ninth Circuit?

2 MR. GOLDSTEIN: Mr. Chief Justice, there were no  
3 contrary cases, you're quite right. This Court never  
4 passed on it, and there's no contrary authority.

5 And so my point is this. Even under Rule 33, it  
6 could mean a lot of different things, and I do think it's  
7 perfectly clear that among all the analogies, the closest  
8 one is this Court's collateral review precedents.

9 I do want to pick up on Justice Breyer's and --  
10 and the Chief Justice's question about, well, didn't they  
11 explicate something in 2244 that they didn't in 2255, and  
12 if I could give a contrary -- give a hypothetical where I  
13 think that reasoning would apply, if 2255 said, when the  
14 judgment of conviction becomes final by the expiration of  
15 direct -- by the conclusion of direct review, it would be  
16 very difficult for a 2255 petitioner to say, "and that  
17 includes the time for seeking cert," because then you  
18 would have a real contrast with 2244. You would have one  
19 of the phrases in 55, but both in 44, and there you could  
20 have a genuine inference.

21 Here we don't have anything, and my point is  
22 that this silence is not pregnant. You don't draw the  
23 inference that Congress meant nothing at all, or that  
24 Congress meant -- as Justice Scalia points out, an even  
25 narrower universe.

1           The final point I want to make is about --

2           QUESTION: I thought his point was it was an  
3 even broader universe.

4           MR. GOLDSTEIN: Mr. Chief Justice, no, his --  
5 the amicus's point would have to be that 2255 means some  
6 subset, or some smaller interpretation, or some shorter  
7 time.

8           QUESTION: Well, I -- I thought you were talking  
9 about Justice Scalia's --

10          MR. GOLDSTEIN: I apologize. You're quite  
11 right. Justice Scalia's point is that look, if you use  
12 the word by, it could either mean it's explicating things,  
13 or more naturally it means, we've picked a subset, and so  
14 you don't have the subset here. That's Russello.  
15 Interest versus interest in an enterprise. Interest in an  
16 enterprise is a -- a smaller part of the bigger ball.

17          The final point is about policy reasons.  
18 There really is no reason Congress would have intended  
19 this period of time, the time when you could have sought  
20 cert but didn't, to be available to a State prisoner  
21 versus a -- a Federal prisoner. There's no explanation  
22 given by amicus that makes any sense. For example, GVRs  
23 apply only when a cert petition is filed.

24          Thank you.

25          CHIEF JUSTICE REHNQUIST: Thank you,

1 Mr. Goldstein. The case is submitted.

2 (Whereupon, at 11:58 a.m., the case in the  
3 above-entitled matter was submitted.)

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