No. 23-1345

IN THE

Supreme Court of the United States

DANNY RICHARD RIVERS,

Petitioner,

v.

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AMICUS BRIEF OF LEGAL SCHOLARS LEE KOVARSKY ET AL. IN SUPPORT OF PETITIONER

STEPHEN B. KINNAIRD
COUNSEL OF RECORD
VLADIMIR J. SEMENDYAI
MOLLY S. TEAGUE
PAUL HASTINGS LLP
2050 M Street, N.W.
Washington, DC 20036
(202) 551-1700
stephenkinnaird@paulhastings.com

QUESTION PRESENTED

Whether a second-in-time habeas claim filed while an appeal from the judgment on an initial habeas claim is still pending counts as a second or successive habeas petition under 28 U.S.C. § 2244(b).

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

Statutes

TABLE OF AUTHORITIES
(continued)

Other Authorities

INTEREST OF AMICI CURIAE[1]

Amici curiae are law professors and legal scholars who study federal post-conviction law and civil procedure. Amici curiae have no personal interest in the outcome of this case. They all share an interest in seeing habeas law applied in a way that ensures the just and timely adjudication of claims while preserving the traditional and intended operation of the Federal Rules of Civil Procedure. The amici are[2]:

- Lee Kovarsky is the Bryant Smith Chair in Law and the Co-Director of the Capital Punishment Center at University of Texas School of Law.
- Valena E. Beety is the Robert H. McKinney Professor of Law at Indiana University Mauer School of Law.
- David R. Dow is the Cullen Professor of Law at University of Houston Law Center.
- Eric M. Freedman is the Siggi B. Wilzig Distinguished Professor of Constitutional Rights at Maurice A. Deane School of Law at Hofstra University.

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[1] Pursuant to this Court's Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution to this brief's preparation or submission. Pursuant to this Court's Rule 37.2, counsel of record for all parties received timely notice of *amicis'* intention to file this brief.

[2] Institutions are listed for affiliation purposes only. All signatories are participating in their individual capacity, not as representatives of their institutions.

- Randy Hertz is the Fiorello LaGuardia Professor of Clinical Law and Vice Dean of New York University School of Law.
- Sheri Lynn Johnson is the James and Mark Flanagan Professor of Law and Assistant Director of Death Penalty Project at Cornell Law School.
- Justin Marceau is Professor of Law at University of Denver Sturm College of Law.
- Ira P. Robbins is the Barnard T. Welsh Scholar and Professor of Law and Co-Director of the Criminal Justice Practice & Policy Institute at American University Washington College of Law.
- Larry W. Yackle is Professor of Law Emeritus and Basil Yanakakis Faculty Research Scholar at Boston University School of Law.

SUMMARY OF ARGUMENT

I. Second-in-time habeas filings that raise new claims are not "second or successive" within the meaning of 28 U.S.C. § 2244(b) while an initial habeas application remains pending on appeal. This statutory meaning follows from the established meaning of the terms that the provision itself uses, and from other text in the broader habeas statute. Section 2244(b) does not expressly state that new claims are not successive while an initial appeal is pending, but the provision incorporates common law terminology under which that rule prevailed. Other provisions of the habeas statute, moreover, specify that habeas judgments are not final until appellate review concludes. Thus, a second-in-time habeas filing does not require second-

or-successive treatment until appellate review of the initial filing fully concludes.

II. Tying the successiveness determination to the conclusion of appellate review also comports with the gatekeeping purposes of Section 2244(b). The pendency of an appeal is a narrow window that offers little opportunity to abuse the writ by filing serial petitions. Accordingly, permitting second-in-time filings while initial-application appellate review is pending does not offend the purposes of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") generally or Section 2244(b) specifically—to conserve judicial resources, avoid piecemeal litigation, and promote finality within a reasonable time.

III. Permitting second-in-time filings until appellate review on an initial application concludes is fully consistent with this Court's decisions in *Gonzalez* v. *Crosby*, 545 U.S. 524 (2005), and *Banister* v. *Davis*, 590 U.S. 504 (2020). The second-in-time filing in *Gonzalez* (a Rule 60(b) motion) was filed more than a year after the prisoner's initial habeas application was resolved on appeal. Accordingly, *Gonzalez* does not require second-or-successive treatment for claims raised during the pendency of initial-application appeals. Instead, such claims are closer in kind to those at issue in *Banister* (which were raised in a Rule 59(e) motion), because they are properly understood to be part of the initial application proceeding that is pending on appeal.

ARGUMENT

Section 2244(b) bars a claimant from filing "claim[s] presented in a second or successive habeas corpus application" without first obtaining "an order authorizing" such a filing from "the appropriate court of appeals." 28 U.S.C. § 2244(b)(2), (3); *accord Gonzalez*, 545 U.S. at 530. This rule applies to claims raised in new habeas petitions and through certain post-judgment motions, and imposes severe restrictions on second or successive habeas applications. *Gonzalez*, 545 U.S. 529–30. If a claim subject to Section 2244(b) "was also presented in a prior application," it "must be dismissed; if not, the analysis proceeds to whether the claim satisfies one of two narrow exceptions" set out in Section 2244(b)(2)(A)–(B). *Gonzalez*, 545 U.S. at 530. Thus, if a post-judgment motion "constitutes a second or successive petition, then all of § 2244(b)'s restrictions kick in," and limit claims that can be raised in that posture. *Banister*, 590 U.S. at 511. Conversely, if the motion "is instead part of resolving a prisoner's first habeas application—then § 2244(b)'s requirements never come into the picture." *Id.*

This case requires the Court to determine whether Section 2244(b) mandates successive petition treatment for new claims raised while a district court's habeas judgment is pending on appeal. The United States Court of Appeals for the Fifth Circuit held that it does, but such treatment is incompatible with the statutory text and context. *See Magwood* v. *Patterson*, 561 U.S. 320, 331–32 (2010). It is also "inconsistent with" "historical habeas doctrine and practice" and Section 2244(b)'s "own purposes"—the "two main places" where "this Court has looked for guidance"

when deciding whether a second-in-time filing is successive. *Banister*, 590 U.S. at 511–12.

The proper rule here is that declared by the United States Court of Appeals for the Second Circuit: new claims are not part of "second or successive" applications if the initial judgment is pending on appeal. *See Whab* v. *United States*, 408 F.3d 116, 118–120 (2d Cir. 2005); *Ching* v. *United States*, 298 F.3d 174, 177–79 (2d Cir. 2002) (Sotomayor, J.)). This rule is consistent with the statutory text and context, as well as the principles articulated in *Banister*, which held that Section 2244(b) did not apply to a subset of time-limited post-judgment motions that did not indefinitely extend the window for raising claims. 590 U.S. at 511, 514. The Court should grant certiorari, reject the Fifth Circuit's approach, and clarify that *Banister*'s logic applies here.

I. THE TEXT OF THE HABEAS STATUTE MEANS THAT SECTION 2244(B) DOES NOT APPLY TO A HABEAS CLAIM RAISED WHILE AN APPEAL FROM AN INITIAL APPLICATION IS PENDING.

As with all questions of statutory interpretation, this Court "begin[s] with the text." *Magwood*, 561 U.S. at 331. Indeed, *Banister* instructs that the answer to whether a habeas application is second or successive lies in part in Section 2244(b)'s "own purposes," 590 U.S. at 512, and "[t]he best evidence of th[ose] purpose[s] is the statutory text adopted by both Houses of Congress and submitted to the President," *W. Va. Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 98 (1991).

The phrase "second or successive application," as used in Section 2244(b), "is a 'term of art,' which 'is not self-defining.'" *Banister*, 590 U.S. at 511 (quoting

Slack v. *McDaniel*, 529 U.S. 473, 486 (2000), and *Panetti* v. *Quarterman*, 551 U.S. 930, 943 (2007)); *accord Magwood*, 561 U.S. at 332. "Although Congress did not define the phrase 'second or successive,' * * * it is well settled that the phrase does not simply 'refer to all § 2254 applications filed second or successively in time.'" *Magwood*, 561 U.S. at 331–32 (cleaned up); *Banister*, 590 U.S. at 511. A second or successive filing is one that "attacks the federal court's *previous resolution* of a claim on the merits" or raises new claims thereafter. *Gonzalez*, 545 U.S. at 532 (emphasis added; second emphasis removed).

But, the statute does not expressly declare the level of finality that must attach to an initial application before a second-in-time filing is deemed to be second or successive. *See* 28 U.S.C. § 2244(b). The statute, however, incorporates "historical habeas doctrine and practice" that "is 'given substance in [the Court's] prior habeas corpus cases,'" *Banister*, 590 U.S. at 512 (quoting *Slack*, 529 U.S. at 486, and *Panetti*, 551 U.S. at 944), and "the statutory context" surrounding this phrase, *Magwood*, 561 U.S. at 332. That historical practice and statutory context confirm that the text of Section 2244(b) means that a second-in-time filing is not "second or successive" while an initial habeas application remained pending on appeal.

A. Historical Decisional Law Confirms that the Term "Second or Successive" in the Text of Section 2244(b) Excludes Claims Raised While Initial-Application Appeals Are Pending.

"Congress is understood to legislate against a background of common-law adjudicatory principles." *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 108 (1991); *accord Isbrandtsen Co.* v. *Johnson*, 343

U.S. 779, 783 (1952) ("Statutes which invade the common law * * * are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident."); Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 318 (2012) ("Statutes will not be interpreted as changing the common law unless they effect the change with clarity."). "'Where Congress uses terms that have accumulated settled meaning under * * * the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.'" *Kungys* v. *United States*, 485 U.S. 759, 770 (1988) (citing *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 329 (1981)).

Here, the common law abuse-of-the-writ doctrine provides the necessary historical context to interpret Section's 2244(b)'s second-or-successive provision. Accordingly, to determine whether a filing equates to a second or successive habeas petition within the meaning of Section 2244(b), this Court considers whether that "type of later-in-time filing would have 'constituted an abuse of the writ, as that concept is explained in our * * * cases'" predating AEDPA. *Banister*, 590 U.S. at 512–13 (quoting *Panetti*, 551 U.S. at 947). This Court's "historical precedents," *id.* at 513, demonstrate that courts traditionally did not consider second-in-time filings made while a first habeas application remained pending on appeal to be abuses of the writ—or, by extension, second or successive applications.

Historically, the abuse-of-the-writ doctrine arose to serve a similar purpose to the one animating Section 2244(b). Because "[a]t common law, res judicata did

not attach to a court's denial of habeas relief" and, accordingly, such a denial "could not be reviewed," "[s]uccessive petitions served as a substitute for appeal." *McCleskey* v. *Zant*, 499 U.S. 467, 479 (1991) (citations omitted). After Congress first provided for appellate review in habeas cases in 1867, *Felker* v. *Turpin*, 518 U.S. 651, 660 (1996), "courts began to question the continuing validity of the common-law rule allowing endless successive petitions," *McCleskey*, 499 U.S. at 479 (citation omitted).

The canonical successive-application precedents demonstrate that habeas claimants could raise new claims while other habeas claims remained pending on appeal without being found to abuse the writ. In other words, for the purposes of the successive-petition inquiry, courts did not consider a like application to be resolved until appellate review concluded. *See* Pet. 25.

For example, in *Salinger* v. *Loisel*, the Court observed that "a refusal to discharge on one application is [not] without bearing or weight when a later application is being considered." 265 U.S. 224, 230 (1924). The Court held that habeas applications should be disposed of "in the exercise of a sound judicial discretion guided and controlled by a consideration of whatever has a rational bearing on the propriety of the discharge sought." *Id.* at 231. The Court explained that such considerations may include "(a) the existence of another remedy, such as a right in ordinary course to an appellate review in the criminal case, and (b) a prior refusal to discharge on a like application." *Id.* Significantly, turning to the facts before it, the Court observed that "the prior refusal to discharge * * * was affirmed in a considered opinion by a Circuit Court of Appeals," and "[h]ad the District Court disposed of the

later applications on that ground, its discretion would have been well exercised" and "sustain[ed]" by this Court. *Id.* at 232.

In other words, in *Salinger*, as this Court explained years later, the habeas applicant's "successive applications were properly denied because he sought to retry a claim previously *fully considered and decided against him*." *Sanders* v. *United States*, 373 U.S. 1, 9 (1963) (emphasis added). Thus, when evaluating what constituted "a prior refusal to discharge on a like application," *Salinger*, 265 U.S. at 231, courts historically looked to the *entire proceeding* on that application—including review by the appellate court.

Ex parte Cuddy, decided by Justice Field and cited approvingly in *Salinger*, likewise shows that courts have looked to the finality of a prior application following appellate review before determining abuse of the writ. 40 F. 62 (C.C.S.D. Cal. 1889) (quoted in 265 U.S. at 231–32). In *Cuddy*, the applicant's first habeas application was denied and that denial was affirmed by this Court. 40 F. at 63. Thereafter, the applicant filed a second habeas application, "suppl[ying] what was omitted in his [first application] record." *Id.* at 64. In denying the second application, Justice Field looked to the entirety of the proceeding on the first application, including this Court's decision on appeal, which featured heavily in Justice Field's analysis.

Justice Field stressed the importance of "the fullness of the consideration given to" the first application and explained that "an ordinary justice would [hardly] feel like disregarding and setting aside the judgment of a magistrate like Chief Justice Marshall, or Chief Justice Taney, who had refused an application for a writ *after full consideration*." *Id.* at 66 (emphasis

added). Justice Field also suggested that the outcome in *Cuddy* might have been different had the applicant "not * * * appealed from the refusal of the district court" to grant the first application and received a final judgment after appellate review. *Id.* And while acknowledging "that the writ may often become an instrument of oppression" should an applicant be permitted to "renew" his application "indefinitely," Justice Field recognized that such concerns would be present only after an applicant "fails on appeal." *Id.* at 65. Thus, abuse of the writ was measured against the entirety of the first proceeding, including any appeal.

Historical precedents also demonstrate that in certain circumstances, judge-made abuse-of-the-writ rules permitted habeas applicants to add new claims while proceedings were on appeal. *See, e.g.*, *Sanders*, 373 U.S. at 15, 17 (setting down "basic rules" based on the "judicial and statutory evolution of the principles governing successive applications for federal habeas corpus" and stressing that "[n]o matter how many prior applications for federal collateral relief a prisoner has made," "[c]ontrolling weight may [not] be given to denial of a prior application for federal habeas corpus" "if a different ground is presented by the new application").

By contrast, where this Court found an abuse of the writ stemming from the filing of a second habeas application, it recognized that an applicant's first petition was "appealed to the Circuit Court of Appeals," which "affirmed the decision" of the district court denying the first petition. *Wong Doo* v. *United States*, 265 U.S. 239, 240 (1924). AEDPA might have displaced this judge-made law as the *source* of rules about second-in-time claims, but it largely incorporated their

content—specifically, it did not bar district courts from considering new claims while older claims are pending on appeal.

Other historical precedent establishes that Congress legislated a rule under which new claims are given successive-petition treatment only after appellate review of the initial claims concludes. For example, this Court in *Banister* cited to *Williamson* v. *Rison* and *Brewer* v. *Ward* to demonstrate that "decisions abound dismissing Rule 60(b) motions for" raising repetitive claims. *Banister*, 590 U.S. at 519 (citing 1993 WL 262632, at *1 (9th Cir. July 9, 1993), and 1996 WL 194830, at *1 (10th Cir. Apr. 22, 1996)). The Court also noted that *Brewer* "collect[ed] cases from multiple Circuits" that provided additional support for its conclusion about Rule 60(b) motions. *Id.* (citing *Brewer*, 1996 WL 194830, at *1). But *Williamson*, *Brewer*, and nearly every one of the cases cited in *Brewer* affirmed a denial of a Rule 60(b) motion after the previous habeas appeal had concluded. *See Williamson*, 1993 WL 262632, at *1; *Brewer*, 1996 WL 194830, at *1; *see also Guinan* v. *Delo*, 5 F.3d 313, 315 (8th Cir. 1993) (affirming denial of a Rule 60(b) motion after previous habeas appeal concluded); *Williams* v. *Whitley*, 994 F.2d 226, 229 (5th Cir. 1993) (same); *Clark* v. *Lewis*, 1 F.3d 814, 819 (9th Cir. 1993) (same); *May* v. *Collins*, 961 F.2d 74, 75 (5th Cir. 1992) (same); *Robison* v. *Maynard*, 958 F.2d 1013, 1015 (10th Cir. 1992) (same); *Blair* v. *Armontrout*, 976 F.2d 1130, 1133 (8th Cir. 1992) (same); *Bolder* v. *Armontrout*, 983 F.2d 98, 99 (8th Cir. 1992) (same); *Landano* v. *Rafferty*, 897 F.2d 661, 665–66 (3d Cir. 1990) (same); *Lindsey* v. *Thigpen*, 875 F.2d 1509, 1510 (11th Cir. 1989) (same); *but see Hunt* v. *Nuth*, 57 F.3d 1327, 1331, 1338–39 (4th Cir. 1995) (affirming de-

nial of a Rule 60(b) motion as successive after consolidating appeal of that denial with the prisoner's initial-application appeal); *Resnover* v. *Pearson*, 1993 WL 430159, at *1–2 (7th Cir. Oct. 22, 1993) (denying as successive new habeas claims raised after the court of appeals affirmed the denial of initial habeas claims but before this Court denied prisoner's petition for certiorari). Indeed, the denial of the prisoner's Rule 60(b) motion in *May* was on the merits, not because the court held the motion to be successive or abusive. *See*, 961 F.2d at 76–77.

These cases show that, historically, courts have nearly uniformly treated a habeas application as final for purposes of successive-claim treatment only after appellate proceedings had concluded. Courts considering subsequent applications by the same applicant could therefore review the "fullness of the consideration given to" the first application and determine the appropriate weight to that first judgment. *Cuddy*, 40 F. at 66.

This interpretation of finality accords with the general principle that there is "a distinction between judgments from which all appeals have been forgone or completed, and judgments that remain on appeal." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995). As this Court explained, "[w]ithin th[e] hierarchy [created by Article III], the decision of an inferior court is not (unless the time for appeal has expired) the final word of the [judicial] department as a whole." *Id.* That is why this Court in *Banister* emphasized that "*appeals from the habeas court's judgment* (or still later petitions to this Court) are not second or successive; rather, they are further iterations of the first habeas application." 590 U.S. at 512 (emphasis added).

And, if there is no final determination on an initial application while an appeal is pending, then a claim raised before appellate review concludes cannot be given successive-claim treatment. *See* 28 U.S.C. § 2244(b).

This approach to finality also makes sense in our judicial hierarchy because if a district court's judgment on the first habeas application is reversed or vacated on appeal, the district court may resolve that application in favor of petitioner. By contrast, tying successiveness to a district court's judgment on a first habeas application leads to perverse results: that judgment, which, if reversed or vacated on appeal, may "become a mere nullity," *Clerke* v. *Harwood*, 3 U.S. 342, 343 (1797), but may have already operated to bar potentially meritorious habeas claims under Section 2244(b). The Second Circuit's approach, which does not give successive-petition treatment to claims raised while appeals are pending, avoids this result. *Whab*, 408 F.3d at 118.

In short, traditional habeas practice and precedents show that second-in-time claims are not necessarily second-or-successive within the meaning of Section 2244(b), and that the requisite finality of the first decision for second-or-successive-petition purposes is the conclusion of appellate review. A pending appeal merely extends full consideration of the original application. *See Banister*, 590 U.S. at 512 ("[A]ppeals * * * are further iterations of the first habeas application."). A claim added while the first appeal is still pending, therefore, remains "a part of a prisoner's first habeas proceeding;" while that proceeding is still pending on appeal, it "[i]n timing and substance * * * hews closely to the initial application." *Id.* at 517.

B. Other Parts of the Habeas Statute Confirm the Meaning of "Second or Successive" in Section 2244(b).

Multiple provisions of AEDPA, including Section 2244, associate finality with the conclusion of appellate review. For example, Section 2244 provides limitations for "an application for a writ of habeas corpus by a person in custody pursuant to *the judgment* of a State court." 28 U.S.C. § 2244(d)(1) (emphasis added). That "reference to a state-court judgment * * * is significant," *Magwood*, 561 U.S. at 332, because Section 2244 further provides that "the date on which the judgment [of a state court] bec[omes] final" is "*the conclusion of direct review* or the expiration of the time for seeking such review," 28 U.S.C. § 2244(d)(1)(A) (emphasis added). Accordingly, the text of Section 2244, read as a whole, must be interpreted to require the same level of finality—conclusion of appellate review—before triggering the second-or-successive bar.

Section 2244(d)(2) also references the same level of finality by providing that "[t]he time during which a properly filed *application* for State post-conviction or other collateral review with respect to the pertinent judgment or claim *is pending* shall not be counted toward any period of limitation under this subsection." *Id.* § 2244(d)(2) (emphasis added). And this Court has held that a state court "application" for post-conviction review "is pending as long as the ordinary state collateral review process is 'in continuance,'" meaning that "until the application has achieved final resolution through the State's postconviction procedures, by definition it remains 'pending.'" *Carey* v. *Saffold*, 536 U.S. 214, 219–20 (2002). Because "the term 'application' cannot be defined in a vacuum," *Magwood*, 561

U.S. at 332, this Court should construe the term "second or successive application" in Section 2244(b) in the same manner. The initial habeas application is still pending if it is still on appeal; thus, all appellate proceedings concerning an initial habeas application must conclude before another application can be deemed second or successive.

Section 2263, which is one of several provisions potentially applicable to state capital sentences, likewise ties finality to the conclusion of appellate review. *See* 28 U.S.C. § 2263(a) (providing that the statutory time requirements for filing a habeas application are triggered by "*final* State court affirmance of the conviction" (emphasis added)); *id.* § 2263(b)(2) (tolling the time requirements "until the *final* State court disposition of" a "first petition for post-conviction review or other collateral relief" (emphasis added)).

Similarly, the post-conviction provisions dealing with federal sentences indicate that finality attaches at the conclusion of appellate review. For example, mirroring Section 2244, Section 2255 provides for "[a] 1-year period of limitation" that is triggered by "the date on which the judgment of conviction becomes final." 28 U.S.C. § 2255(f)(1). This Court has held that in this "postconviction * * * context[,] * * * finality has a long-recognized, clear meaning: Finality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires." *Clay* v. *United States*, 537 U.S. 522, 527 (2003). And Section 2255 refers to Section 2244's requirements for filing "second or successive motions," 28 U.S.C. § 2255(h), demonstrating Congress's intent

to treat finality the same under both sections of the habeas statute.

The statutory exhaustion rule likewise confirms that, under AEDPA, finality attaches only when appellate review concludes. Section 2254(b) provides that a habeas application "shall not be granted unless * * * the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). A habeas claimant doesn't exhaust until they go through "one complete round of the State's established appellate review process." *Carey*, 536 U.S. at 220 (citation omitted). In the same vein, an application for habeas relief cannot be second or successive within the meaning of Section 2244(b) until an initial habeas application "achieve[s] final resolution through" the appellate process. *Id.*

In light of the foregoing statutory context, in which finality refers to the conclusion of appellate review, the proper interpretation of a "second or successive habeas corpus application" is a second-in-time filing submitted after a district court's judgment on the initial habeas application is no longer pending on appeal. 28 U.S.C. § 2244(b)(1) (emphasis added).

II. PEGGING SUCCESSIVENESS TO THE TIME AT WHICH APPELLATE REVIEW OF THE INITIAL HABEAS APPLICATION BECOMES FINAL IS CONSISTENT WITH SECTION 2244(b)'S PURPOSES.

The problems that Section 2244(b) (and the abuse-of-the-writ doctrine) aimed to solve do not require the Fifth Circuit's heavy-handed approach. The animating concern behind the successive petition rules is to deter *abuses* of the writ that risked creating uncer-

tainty in final judgments and wasting judicial resources in the form of meritless, serial applications. As this Court explained, "[t]he point of § 2244(b)'s restrictions * * * is to conserve judicial resources, reduce piecemeal litigation, and lend finality to state court judgments within a reasonable time." *Banister*, 590 U.S. at 512 (cleaned up); *see also McCleskey*, 499 U.S. at 481 (explaining that the abuse-of-the-writ doctrine developed to curb "endless applications" once appellate review of habeas petitions was available).

The Second Circuit's rule, which gives initial-petition treatment only to claims raised while an appeal is pending, fits squarely with Section 2244(b)'s purposes. Indeed, just as "[n]othing in Rule 59(e) * * *conflicts with [AEDPA's] goals" in part because Rule 59(e) is time-limited and triggers 2244(b) only after appellate review has concluded, nothing in the Second Circuit's approach risks opening the floodgates to meritless litigation Section 2244(b) or AEDPA is intended to curb. *Banister*, 590 U.S. at 515–16.

A. There Is No Risk of Open-Ended Litigation Because All Claims Become Successive After Appellate Review of the Initial Application Concludes.

In determining whether a motion is equivalent to a second or successive petition, this Court "ha[s] considered AEDPA's own purposes": "to conserve judicial resources, reduce piecemeal litigation, and lend finality to state court judgments within a reasonable time." *Banister*, 590 U.S. at 512 (cleaned up). Treating a petition for relief from judgment filed while a first habeas application remains pending on appeal as not second or successive does not undermine those purposes; it advances them.

This Court's primary concern with post-judgment motions that raise new claims is that such motions are "often distant in time and scope" and "threate[n] serial habeas litigation." *Id.* at 520–21; *cf. Williams* v. *United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring) ("This drain on society's resources is compounded by the fact that issuance of the habeas writ compels a State * * * to relitigate facts buried in the remote past through presentation of witnesses whose memories of the relevant events often have dimmed."). "[W]ithout rules suppressing abuse, a prisoner could bring such a motion endlessly." *Banister*, 590 U.S. at 521.

But permitting a prisoner to bring such a motion *while the appeal is still pending*, as the Second Circuit does, presents none of these concerns. Indeed, doing so could "avoi[d] 'piecemeal appellate review,'" *Banister*, 590 U.S. at 516 (citation omitted),[3] thereby conserving judicial resources. And the "point" of AEDPA's gatekeeping mechanism with respect to finality is only to "len[d] finality to state court judgments *within a reasonable time*." *Id.* at 512 (emphasis added). Triggering the requirements of Section 2244(b) only upon the conclusion of appellate review of the first habeas application ensures finality within a "reasonable time" and leaves little opportunity for abuse, thus fitting firmly within Section 2244(b)'s purposes.

Indeed, the limited window available to petitioners in this context under the Second Circuit's rule draws a sharp contrast to the "extended timespan" of other

[3] A court of appeals may, for example, stay the appeal of a prisoner's initial habeas application until a second-in-time filing is resolved by the district court.

Rule 60(b) motions with which this Court was concerned in *Banister*, 590 U.S. at 519–20 (expressing concern that because it can be invoked during an "open-ended 'reasonable time,'" "Rule 60(b) inevitably elicits motions that go beyond Rule 59(e)'s mission of pointing out the alleged errors in the habeas court's decision" and pointing to cases bringing claims years after the final judgment). A later application brought pursuant to the Second Circuit's rule is much more akin to a Rule 59(e) motion, which "gives a prisoner only a narrow window to ask for relief." *Id.* at 516.

B. There Is Little Lost in Routing Claims Alleged During the Pendency of a Case on Appeal to District Courts.

The proper rule adopted by the Second Circuit is fully consistent with expeditious determination of habeas petitions.

It bears emphasizing that the gatekeeping provisions codified in Section 2244 barring "second or successive" petitions except in rare circumstances are not the only gates through which habeas claims must pass. "[P]rocedural-default rules continue to constrain review of claims in all applications, whether the applications are 'second or successive' or not." *Magwood*, 561 U.S. at 340. And, to the extent an applicant invokes Rule 60(b) for relief from judgment while an appeal is still pending, the application must satisfy Rule 60(b)'s stringent requirements. *See Gonzalez*, 545 U.S. at 535.[4] These built-in restrictions help ensure that fed-

[4] While a post-conviction motion under Rule 60(b) raising new claims may constitute a second or successive application if the first application has been finally determined with no further recourse to appeal, *see id.* at 527, 531–32; *accord Whab*, 408 F.3d at

eral courts are not exposed to an "avalanche of frivolous postjudgment motions." *Id.* at 534–35; *cf. Lafler* v. *Cooper*, 566 U.S. 156, 172 (2012) (explaining that concerns that allowing successful ineffective assistance of counsel claims in habeas petitions to reopen rejected plea offers would "open the floodgates" are "misplaced," given that the prosecution and trial courts have measures to weed out meritless claims).

The Second Circuit's approach does not prop wide open the courthouse door to claims that otherwise lack merit or bear fatal procedural flaws—it merely ensures that prisoners may avail themselves of the "one full opportunity" for collateral review to which they are entitled. *Whab*, 408 F.3d at 118 (citing *Ching*, 298 F.3d at 177–79). No one has alleged any marked increase of meritless habeas claims filed in the Second Circuit since the adoption of its rule.

Indeed, denying movants the ability to amend petitions when new evidence comes to light not only may deny a habeas petitioner justice, but may also incentivize the filing of kitchen-sink and ill-supported habeas petitions, thus burdening the district courts. *Cf. Price* v. *Johnston*, 334 U.S. 266, 293 (1948) (criticizing "denials of petitions without leave to amend" because "[t]hat only encourages the filing of more futile petitions").

The Second Circuit's rule also imposes few costs on district courts already familiar with the facts that would underlie post-conviction motions in habeas proceedings. This Court has previously observed that "[a]

118, it does not offend Section 2244(b) to allow such a motion to proceed when appellate review of the first application is still pending.

judge familiar with a habeas applicant's claims can usually make quick work of a meritless motion." *Banister*, 590 U.S. at 517; *cf. Abdur'Rahman* v. *Bell*, 537 U.S. 88, 97–98 (2002) (Stevens, J., dissenting) (explaining that because "[t]he District Court ha[d] already heard the extensive evidence" it was "in the best position to evaluate the equitable considerations that may be taken into account in ruling on a Rule 60(b) motion"). Thus, district courts will almost never have resource-intensive hearings on claims even if they are routed to them in the first instance.

Moreover, the costs are especially "slight" when the district court upholds its prior decision. *Banister*, 590 U.S. at 517. Indeed, in *Banister*, the district court disposed of petitioner's 59(e) motion in a mere five days. *Id.* "Nothing in such a process conflicts with AEDPA's goal of streamlining habeas cases." *Id.*

By contrast, the Fifth Circuit's alternative imposes far greater costs. Requiring post-conviction filings raising new claims to go to the courts of appeals as second or successive habeas applications would force an appellate court to decide the merits of such later-in-time filings "from square zero, and often without adversarial briefing." Pet. 27–28. And if the court of appeals authorizes the later-in-time application, the district court would still have to conduct its *own* review of the merits and Section 2244(b)(2)'s requirements. *Id.* These harms that flow from the Fifth Circuit's approach—dragging out proceedings unnecessarily, wasting judicial resources, and promoting piecemeal litigation, in direct contravention of Section 2244(b)'s purposes—are not present in the Second Circuit's rule, which better reflects Section 2244(b)'s purposes.

III. THE SECOND CIRCUIT'S RULE IS CONSISTENT WITH *GONZALEZ* AND *BANISTER*.

The Second Circuit's rule—tied to the pendency of appellate review of initial habeas claims—entirely comports with this Court's decisions in *Gonzalez* and *Banister*. In *Gonzalez*, the applicant tried to add claims in a Rule 60(b) motion over a year *after* an initial petition had been rejected by the district and appeals courts, and the applicant "did not file for rehearing or review of that decision." 545 U.S. at 527. At that time, that initial determination became final and unappealable. The Court held that, in such circumstances, Section 2244 bars a Rule 60(b)(6) motion that challenges "the substance of the federal court's resolution of a claim on the merits." *Id.* at 531–32.

But, not every claim raised in a post-judgment posture is the same, and *Gonzalez* does not require that a claim raised during the pendency of appeal be treated as a second or successive habeas petition. In other words, it is the pendency of appellate proceedings that distinguishes the posture here from that in *Gonzalez*. Instead, cases like this one are much closer to *Banister*, because a claim raised during the pendency of appellate review is not "distant in time and scope," does not "always giv[e] rise to a separate appeal," and does not "attac[k] an already completed judgment." 590 U.S. at 520–21.[5]

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[5] Indeed, cases like this are not inconsistent with either *Gonzalez* or *Banister*, because both of those cases relied on precedent where appeals of initial habeas applications were final. *See Banister*, 590 U.S. at 519 (citing *Williamson*, 1993 WL 262632, at *1, and *Brewer*, 1996 WL 194830, at *1); *Gonzalez*, 545 U.S. at 531 (citing *Rodwell* v. *Pepe*, 324 F.3d 66, 69 (1st Cir. 2003)).

* * *

In sum, Section 2244(b)'s text and context, interpreted in view of the historical decisional law the statute incorporates, show that second-or-successive treatment should not apply to a second-in-time habeas application until appellate review of the initial application concludes. This statutory meaning is further bolstered by Section 2244(b)'s (and AEDPA's) purposes and the principles this Court articulated only four years ago in *Banister*.

CONCLUSION

The Court should grant the petition and hold that second-in-time claims filed while an appeal from an initial habeas application is still pending do not run afoul of Section 2244(b)'s bar against second or successive habeas applications.

Respectfully submitted,

STEPHEN B. KINNAIRD
Counsel of Record
VLADIMIR J. SEMENDYAI
MOLLY S. TEAGUE
PAUL HASTINGS LLP
2050 M Street, N.W.
Washington, DC 20036
(202) 551-1700
stephenkinnaird@paulhastings.com

Counsel for Amici

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