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

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

REPLY BRIEF FOR PETITIONER

Peter A. Bruland
Counsel of Record
Benjamin M. Mundel
Cody M. Akins
Kimberly R. Quick*
David H. Kinnaird
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
pbruland@sidley.com

* Supervised by principals of the firm who are members of the District of Columbia bar

Counsel for Petitioner

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INTRODUCTION

Lumpkin concedes "there is a mature circuit split" that is important enough to "justify certiorari." Opp. 16. He doesn't deny that this case is the ideal vehicle for resolving it. And he admits that the conflict has deepened even while this case has been pending. Ten circuits have now splintered four ways over when 28 U.S.C. § 2244(b)(2)'s gatekeeping requirements for "second or successive" habeas petitions kick in, and the question is ripe for review.

Lumpkin's only response is that the circuits are not "intractably" split because the Second, Third, and Tenth might still "self-correct" in light of *Banister* v. *Davis*, 590 U.S. 504 (2020). Opp. 16. But those courts have already had—and rejected—multiple opportunities to do so. Only this Court can resolve the conflict, and there is no reason to stay on the sidelines.

With nowhere else to turn, Lumpkin spends most of his brief on the merits—but none of his arguments makes this case any less certworthy. *Gonzalez* v. *Crosby*, 545 U.S. 524 (2005), doesn't "mandat[e]" the outcome because that case did not implicate the timing question posed here. Contra Opp. 7. Nor can the decision below be squared with *Banister*. Like the Fifth Circuit, Lumpkin sidesteps historical habeas practice, and he offers no serious answer on AEDPA's purposes. Finally, Lumpkin is also wrong that Rule 60(b) was Rivers's only path to relief. Even while an appeal is pending, a district court retains jurisdiction to issue an indicative ruling about new exculpatory evidence. Section 2244(b)(2) doesn't supplant Rule 62.1 any more than it does Rule 59(e).

This case is the perfect opportunity to resolve an important question. The Court should grant review.

I. Respondent concedes that the 7-1-1-1 circuit split is certworthy.

A. Lumpkin admits "there is a mature circuit split" on the question presented, which "could be a sufficient basis to justify certiorari." Opp. 16. He's right. In the Second Circuit, § 2244(b)(2) does not apply until a prisoner exhausts appellate review of his first habeas petition. In seven other circuits, § 2244(b)(2) kicks in once the district court enters final judgment or shortly thereafter. (Even those courts can't agree on *when*.) In the Tenth Circuit, § 2244(b)(2) applies even sooner—unless the prisoner satisfies a seven-factor test. And in the Third Circuit, § 2244(b)(2) toggles on and off depending on who wins the appeal. See Pet. 13–20. In short: the circuits are in shambles, and this Court's intervention is badly needed.

The split is now even deeper than it was when this case started. As Lumpkin concedes (at 14), "[t]he Fourth and Eleventh Circuits [have] recently issued clear decisions" deepening the conflict. Opp. 14. In *Bixby* v. *Stirling*, 90 F.4th 140, 143, 145 (4th Cir. 2024), the petitioner sought further habeas relief while the "appeal from the denial of his [first] petition was pending." The Fourth Circuit rejected that filing as a "second or successive" petition, deepening the conflict. And the Eleventh Circuit, which had previously addressed the issue only in unpublished orders, just solidified the split in a published opinion. Citing the decision below, it "join[ed] the majority of … circuits" and expressly "disagree[d]" with the Second Circuit's approach. *Boyd* v. *Sec'y, Dep't of Corr.*, 114 F.4th 1232, 1238 & n.3 (11th Cir. 2024).

B. Split conceded, Lumpkin offers just one reason to punt: that "the minority circuits" might still "self-correct" in light of *Banister*. Opp. 16. In his view,

"[t]his Court should grant certiorari only if they fail to do so at the next opportunity." *Id.* What Lumpkin doesn't mention, however, is that those courts have already *had* the chance to "self-correct"—and they've passed. Just a few weeks ago, the Third Circuit doubled down on its approach in an opinion citing *Banister*. See *Ross* v. *Adm'r E. Jersey State Prison*, No. 23-1240, 2024 WL 4341335, at *6 (3d Cir. Sept. 30, 2024). And the Second Circuit has also stuck to its guns. See *Waiters* v. *United States*, No. 20-2712, 2021 WL 11096770, at *1 (2d Cir. May 19, 2021) (continuing to apply *Whab* v. *United States*, 408 F.3d 116 (2d Cir. 2005)).

* * *

Ten circuits have now split four ways over the question presented. The conflict is entrenched and won't fix itself. And with roughly 99% of prisoners now covered by the split, there is no reason for this Court to wait any longer. See Fed. Bureau of Prisons, *Statistics*, bit.ly/Federal-Prisons; Prison Pol'y Initiative, *Appendix: State and Federal Prison Populations 2019-2023*, bit.ly/State-Prisons. It's high time to resolve this question once and for all.

II. Respondent doesn't deny that this case is the ideal vehicle to resolve a critically important habeas question.

A. Lumpkin admits that the question presented is important. See Opp. 16 (conceding the "importance of clear jurisdictional rules"). Rivers's amici agree. The Nation's leading habeas scholars have explained how the Fifth Circuit's rule "leads to perverse results" and could "bar potentially meritorious habeas claims." Scholars Br. 13. The National Association of Criminal Defense Lawyers, the Innocence Project, and the

Federal Public Defenders have warned that "an entire subset of *Brady* and ineffective assistance claims" may fall through the cracks. NACDL Br. 14. And nearly a dozen of this Court's former Article III colleagues have urged it to grant review because "the majority rule unduly burdens courts." Judges Br. 6.

B. Lumpkin also doesn't deny that "this case is an ideal vehicle." Pet. 3. The question presented is outcome-determinative. No factual disputes will hinder review. See Opp. 3–4. And—unlike most habeas petitioners—Rivers meticulously preserved all of his arguments below. No wonder Lumpkin doesn't dispute that "Rivers will have a meaningful path to relief" if this Court reverses. Pet. 31. It's hard to imagine a better vehicle for addressing the question presented.

III. The decision below is wrong.

A. Section 2244(b)(2) does not strip district courts of jurisdiction to consider all habeas filings submitted while an initial petition is on appeal. In holding otherwise, the Fifth Circuit failed to cite *Banister*—much less follow the roadmap that it lays out. Had it done so, the court would have realized that its ruling doesn't square with either "historical precedents" or "statutory aims." *Banister*, 590 U.S. at 513. As to history, early cases suggest that filings submitted while an initial habeas application is on appeal are not "second or successive." See Pet. 25–27; Scholars Br. 6–13. And as to purposes, treating filings like Rivers's as "second or successive" would frustrate—not further—judicial economy, efficiency, and finality. See Pet. 27–30; Judges Br. 7–8. The Fifth Circuit considered none of this, and its categorical rule can't be squared with this Court's cases.

B. Lumpkin's responses don't wash.

1. Lumpkin chiefly argues (at 7–8) that cert isn't warranted because *Gonzalez* "mandated" the outcome below and offers "sufficient guidance as to what constitutes a successive petition." That's doubly wrong.

For one thing, even if Lumpkin were right and *Gonzalez* controlled, the lower courts are still in disarray over how to apply its "guidance." Contra Opp. 7. The Fifth Circuit gleaned from *Gonzalez* the "underlying principle" that habeas filings "introduced after a final judgment … are deemed successive." Pet. App. 10a. Other courts beg to differ. See, e.g., *Douglas* v. *Workman*, 560 F.3d 1156, 1190, 1193 (10th Cir. 2009) (citing *Gonzalez* and adopting seven-factor test); *Moreland* v. *Robinson*, 813 F.3d 315, 322–24 (6th Cir. 2016) (citing *Gonzalez* and pegging § 2244(b)(2) to the window for appeal); *United States* v. *Santarelli*, 929 F.3d 95, 105 (3d Cir. 2019) (pegging § 2244(b)(2) to exhaustion and stating that *Gonzalez* "does not compel a different result"). That alone warrants review.

But Lumpkin isn't right: "*Gonzalez* does not answer the question whether a [mid-appeal habeas filing] is a 'second or successive' habeas application under § 2244(b)." *Balbuena* v. *Sullivan*, 970 F.3d 1176, 1200 (9th Cir. 2020) (Fletcher, J., concurring in the result). How could it? The petitioner in *Gonzalez* sought relief more than a year *after* his appeal ended, and his filing did not present a habeas claim in the first place. See *Gonzalez*, 545 U.S. at 527, 533 & n.6; Scholars Br. 23. So the "general expressions" Lumpkin cites can hardly "control the judgment in a subsequent suit when the very point is presented for decision." *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821).

2. Turning to *Banister*, Lumpkin insists that the decision below is "consistent with" this Court's guid-

ance. Opp. 5. But he has no sound answer to the Fifth Circuit's failure to cite *Banister*, and his efforts to defend that court's reasoning fall flat.

a. Lumpkin concedes (at 10) that the Fifth Circuit "did not consider" whether Rivers's filing "would have 'constituted an abuse of the writ, as that concept is explained in [this Court's] pre-AEDPA cases.'" *Banister*, 590 U.S. at 512. Neither does Lumpkin.

Instead, he principally contends that the Fifth Circuit was right to ignore that question because "the text of § 2244, not abuse of the writ, [i]s the relevant inquiry." Opp. 10. That misses the point. No one doubts that "the text of AEDPA … controls," nor does anyone think historical practice "should supplant § 2244(b) as gatekeeper." Contra Opp. 9. This Court looked to "historical habeas doctrine and practice" in *Banister* because "[t]he phrase 'second or successive habeas corpus application' … is a 'term of art' that 'is not self-defining.'" *Banister*, 590 U.S. at 511 (quoting *Slack* v. *McDaniel*, 529 U.S. 473, 486 (2000)). In other words, historical practice matters precisely because § 2244(b)(2) "takes its full meaning from [the Court's] case law." *Panetti* v. *Quarterman*, 551 U.S. 930, 943 (2007). Ignoring that is a telltale sign that the Fifth Circuit (and Lumpkin) have taken a wrong turn.

After thumbing his nose at historical practice, Lumpkin pivots to a source that *Banister* did *not* consult: legislative history. Citing a handful of floor statements, Lumpkin declares that "Congress likely intended" to "curtail the problem of successive habeas petitions" by "overrid[ing] … pre-AEDPA legal standards." Opp. 9. "Well, yes, but so what?" *Pulsifer* v. *United States*, 601 U.S. 124, 135 n.3 (2024). *Banister* already confirmed that AEDPA "did not redefine" the

standard that matters here: "what qualifies as a successive petition." 590 U.S. at 515.

In all events, the legislative history doesn't favor Lumpkin. As then-Chairman of the Senate Judiciary Committee Orrin Hatch explained, AEDPA was intended to "guarantee prisoners one *complete* and fair course of collateral review in the Federal System." *Federal Habeas Corpus Reform: Eliminating Prisoners' Abuse of the Judicial Process: Hearing on S. 623 Before the S. Comm. on the Judiciary*, 104th Cong. 2, 3 (1995) (emphasis added). That meant "one full course of litigation up to the Supreme Court." *Judicial Conference of the United States, Ad Hoc Comm. on Fed. Habeas Corpus in Capital Cases, Comm. Report and Proposal* (Lewis F. Powell, Jr., Chairman, Aug. 23, 1989), reprinted in *Habeas Corpus Reform: Hearings Before the S. Comm. on the Judiciary*, 101st Cong. 7–30 (1991). It follows that "a subsequent filing" is not "'second or successive' … simply because the district court rendered a [final] judgment." *Ching* v. *United States*, 298 F.3d 174, 178 (2d Cir. 2002) (Sotomayor, J.).

b. Lumpkin fares no better when he turns to *Banister*'s other source of guidance, AEDPA's purposes.

Lumpkin begins (at 10) by chiding Rivers for "tak[ing] issue with Congress' policy determinations" and for quibbling with "the procedural impediments of § 2244(b) … *in [and] of themselves*." Not at all. Everyone agrees that petitions filed after the prisoner exhausts appellate review of his initial application count as second or successive and are channeled through the court of appeals. See Pet. 27. The question here is whether § 2244(b)(2) also governs a filing like Rivers's—*i.e.*, one submitted while the initial application is pending on appeal. As the petition ex-

plained (at 27–30), "AEDPA's own purposes" suggest that the answer is no. *Banister*, 590 U.S. at 512. By invoking "Congress' policy determinations," however, Lumpkin merely begs the question. Opp. 10.

Turning to the merits, Lumpkin warns that Rivers's approach would waste "judicial resources" and permit "an infinite number of post-judgment amendments." Opp. 11, 13. But the Second Circuit has applied the rule that Rivers advocates for nearly two decades. So if Lumpkin is right, it's fair to ask why he doesn't cite a single example of the abuses he fears. His failure to do so suggests that district courts have all the tools they need to serve as effective gatekeepers. See *Whab*, 408 F.3d at 119 n.2 ("Traditional doctrines, such as abuse of the writ, continue to apply."); *Ching*, 298 F.3d at 180 ("[T]he decision to grant a motion to amend is committed to the sound discretion of the district court."); NACDL Br. 19–21. Nearly a dozen "former judges who have dealt with numerous filings by habeas petitioners in both district and appellate roles" agree. Judges Br. 7. In their experience, "district courts are best positioned to deal with and dispose of these types of post-appeal filings, and can readily handle them using tools already at their disposal without resort to" § 2244(b)(2). *Id.* at 4.

3. Finally, Lumpkin is also wrong that Rivers's only path to relief "would have been a Rule 60(b) motion." Opp. 12. True, the district court "had no jurisdiction to consider an 'amended' petition" while the case was "pending on appeal." Opp. 12. But even while "an appeal … is pending," a district court may issue an indicative ruling stating "that [a] motion raises a substantial issue." Fed. R. Civ. P. 62.1. The appellate court may then "remand for further proceedings." Fed. R. App. P. 12.1(b). Here, had the dis-

trict court not misread § 2244(b)(2), it could have considered Rivers's new evidence and (if warranted) stated that "it would grant the motion if the court of appeals remand[ed]." Fed. R. Civ. P. 62.1. In that case, an "order for remand would … amount in itself to a vacation of the judgment for further proceedings, including amendments." *Markert* v. *Swift & Co.*, 173 F.2d 517, 520 (2d Cir. 1949) (deeming "resort … to Rule 60" unnecessary); see also 28 U.S.C. § 2106 (authorizing appellate courts to "vacate … any judgment" and "require such further proceedings … as may be just under the circumstances").

Contra Lumpkin, § 2244(b)(2) doesn't "supplan[t]" Rule 62.1 any more than it does Rule 59(e). Opp. 11. Like a Rule 59(e) motion, a Rule 62.1 motion "gives a prisoner only a narrow window to ask for relief." *Banister*, 590 U.S. at 516. Should both courts oblige, a remand for amendment would be "a limited continuation of the original proceeding." *Id.* at 521. And if the district court again denied relief, the prisoner would "tak[e] a single appeal." *Id.* In short, Rule 59(e) and Rule 62.1 are alike "in just about every way that matters." *Id.* at 518. The courts below reached none of this because they thought § 2244(b)(2) strips district courts of jurisdiction to consider *any* "post-judgment" habeas filing. Opp. 5. Should this Court reverse, Rivers will be free to seek 62.1 relief on remand.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

Peter A. Bruland
Counsel of Record
Benjamin M. Mundel
Cody M. Akins
Kimberly R. Quick*
David H. Kinnaird
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
pbruland@sidley.com

* Supervised by principals of the firm who are members of the District of Columbia bar

October 29, 2024 *Counsel for Petitioner*