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

BRIEF FOR PETITIONER

Peter A. Bruland
Counsel of Record
Virginia A. Seitz
Benjamin M. Mundel
Cody M. Akins
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
pbruland@sidley.com

Counsel for Petitioner

January 21, 2025

(Additional counsel listed on inside cover)

Jacob Steinberg-Otter
Kimberly R. Quick*
David H. Kinnaird
Sasha S. Bryski*
Lily F. Holmes
Scott Lowder
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005

Jorge R. Pereira
SIDLEY AUSTIN LLP
1001 Brickell Bay Dr.
Suite 900
Miami, FL 33131
(305) 391-5100

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

Counsel for Petitioner

QUESTION PRESENTED

Under federal habeas law, a prisoner "always gets one chance to bring a federal habeas challenge to his conviction," *Banister* v. *Davis*, 590 U.S. 504, 509 (2020). After that, prisoners who file a "second or successive habeas corpus application" must satisfy the stringent gatekeeping requirements of 28 U.S.C. §2244(b)(2). Here, petitioner sought to amend his initial habeas application under Federal Rule of Civil Procedure 15 while it was pending on appeal. The Fifth Circuit deemed that filing a second or successive application, subject to §2244(b).

The question presented is whether §2244(b)(2) applies (i) only to habeas filings made after a prisoner has exhausted appellate review of his first petition, (ii) to all habeas filings submitted after a district court enters judgment, or (iii) only to some post-final-judgment habeas filings.

RELATED PROCEEDINGS

Ex parte Rivers, WR-84,550-01 & 84,550-02 (Tex. Ct. Crim. App. Oct. 5, 2016) (remanding for additional findings of fact and conclusions of law)

Rivers v. *State*, No. 08-12-00145-CR (Tex. Ct. App. Jan. 4, 2017) (findings of fact and conclusions of law following Oct. 5, 2016 remand)

Ex parte Rivers, WR-84,550-01 & 84,550-02 (Tex. Ct. Crim. App. July 7, 2017) (affirming Jan. 4., 2017 Texas Court of Appeals judgment)

Rivers v. *Davis*, No. 7:17-cv-00124 (N.D. Tex. Sept. 17, 2018) (denying habeas relief)

Rivers v. *Lumpkin*, No. 7:21-cv-00012 (N.D. Tex. Aug. 11, 2021) (deeming Feb. 2021 filing "second or successive and recommending transfer)

Rivers v. *Lumpkin*, No. 7:21-cv-00012 (N.D. Tex. Sept. 23, 2021) (adopting recommendation)

Rivers v. *Lumpkin*, No. 18-11490 (5th Cir. May 13, 2022) (affirming district court's Sept. 17, 2018 order denying initial habeas petition)

Rivers v. *Lumpkin*, No. 22-6688 (U.S. Apr. 3, 2023) (denying petition for a writ of certiorari)

Rivers v. *Lumpkin*, No. 21-11031 (5th Cir. Apr. 15, 2024) (affirming district court's Sept. 23, 2021, order; decision below here)

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INTRODUCTION

This case is about the hurdles a prisoner must clear to amend his initial habeas application. Petitioner Danny Rivers asked a federal court to review his state conviction, arguing that his counsel had failed to investigate his case and had shown up to trial drunk. The district court denied relief, holding that Rivers had not explained how he was prejudiced. But the answer soon emerged. After fighting for years to obtain his lawyers' records, Rivers finally received them while his case was on appeal. Among the files, Rivers found evidence suggesting he was wrongly convicted: an exculpatory report that his counsel apparently overlooked. New evidence in hand, Rivers raced to court and sought to amend his petition—only to find the doors barred. The courts below reasoned that Rivers's amendment was actually a "second or successive habeas corpus application" under 28 U.S.C. §2244(b), divesting the district court of jurisdiction to consider it.

That was wrong. Congress has already decided what standard applies when a prisoner seeks to amend a habeas application mid-appeal—and it's not §2244(b)(2). Under 28 U.S.C. §2242, an application "may be amended or supplemented as provided in the rules of procedure applicable to civil actions." Those rules, in turn, provide for just this situation. District courts may not *grant* a motion to amend while an appeal is pending. But Federal Rule of Civil Procedure 62.1(a)(3) authorizes them to *consider* a such motion and state that it "raises a substantial issue." If the court of appeals agrees, it may vacate and remand, clearing the way for amendment. Fed. R. App. P. 12.1(b); 28 U.S.C. §2106.

None of that happened here because the district court mistakenly thought that §2244(b) barred Rivers's filing. But §2244(b) cannot be read to implicitly prohibit what §2242 expressly permits. Nor can the decision below be squared with *Banister* v. *Davis*, 590 U.S. 504 (2020), which looked to historical habeas and statutory aims when deciding whether a filing is second or successive. Both point the same way here. As to history, habeas courts traditionally allowed prisoners to raise newly discovered evidence, and courts routinely addressed filings like Rivers's on the merits—instead of deeming them successive. (This Court was no exception.) And as to purposes, forcing motions like Rivers's to run the §2244(b)(2) gauntlet would have baleful implications for habeas practice, making it unlikely that Congress "would have viewed [them] as successive." 590 U.S. at 513.

The Fifth Circuit was also wrong to hold that §2244(b) kicks in as soon as a district court enters final judgment, making all post-judgment habeas filings second or successive. Section 2244(b) functions as a statute of repose, ensuring that state prosecutors don't have to defend the same conviction twice. But Congress did not recognize an interest in repose while a prisoner's initial petition remains pending. Instead, statutory context and historical practice show that the dividing line between first and successive petitions is the end of appellate review. Only then does §2244(b) apply.

This Court should reverse and remand so the district court can consider Rivers's amendment under the proper Rule 15 standard.

OPINIONS BELOW

The Fifth Circuit's opinion is reported at 99 F.4th 216 and is reproduced at Pet. App. 1a–11a. The district court's unpublished opinion is available at 2021 WL 4319670 and is reproduced at Pet. App. 12a–17a.

JURISDICTION

The Fifth Circuit issued judgment on April 15, 2024. Pet. App. 1a. The petition was filed June 24, 2024 and granted December 6, 2024. This Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISIONS

Sections 2106, 2242, and 2244(b) of Title 28 are reproduced in the Appendix to this brief.

STATEMENT OF THE CASE

A. Legal background

1. This case concerns when a habeas filing should be deemed a "second or successive habeas corpus application." 28 U.S.C. §2244(b).

a. The Antiterrorism and Effective Death Penalty Act of 1996 creates a dual-track system for federal habeas relief. One path is for first-time petitioners. "Under AEDPA, a state prisoner always gets one chance to bring a federal habeas challenge to his conviction." *Banister*, 590 U.S. at 509. This path begins in the district court. If that court denies relief, the prisoner may request a "certificate of appealability"—initially from the district court, and then from the court of appeals. See *Gonzalez* v. *Thaler*, 565 U.S. 134, 143–44 & n.5 (2012). The path ends only when the prisoner has exhausted the chance for review.

The second path is "rockier." *Banister*, 590 U.S. at 509. To file a "second or successive habeas corpus application," 28 U.S.C. §2244(b), a prisoner must first ask the court of appeals for "an order authorizing the district court to consider the application," *id.* §2244(b)(3)(A). The appellate court may oblige only if the petition "relies on a new and retroactive rule of constitutional law" or "alleges previously undiscoverable facts that would establish … innocence," *Banister*, 590 U.S. at 509 (citing 28 U.S.C. §2244(b)(2)). If so, the petition goes to the district court, which must decide for itself whether the petition "satisfies the requirements" of §2244. 28 U.S.C. §2244(b)(4). Only then may the district court reach the merits.

The upshot is that much rides on whether a given filing is deemed "part of resolving a prisoner's first habeas application," *Banister*, 590 U.S. at 507, or instead a "second or successive habeas corpus application." 28 U.S.C. §2244(b).

b. "[S]econd or successive" is a "term of art" that does not refer simply to "all habeas filings … following an initial application." *Banister*, 590 U.S. at 511 (citations omitted). To determine when §2244(b) applies, "this Court has looked for guidance in two main places." *Id.* at 512. First, history: "whether a type of later-in-time filing would have constituted an abuse of the writ" under the Court's "pre-AEDPA cases." *Id.* (cleaned up) (citation omitted). Second, "statutory aims": conserving judicial resources, reducing piecemeal litigation, and achieving finality "within a reasonable time." *Id.* at 512–13 (citation omitted).

2. Two recent cases have required this Court to consider whether a motion filed under a Federal Rule of Civil Procedure was actually a second or successive application. The Federal Rules "generally govern ha-

beas proceedings." *Banister*, 590 U.S. at 511; see Fed. R. Civ. P. 81(a)(4); 28 U.S.C. §2254 Rule 12 (Federal Rules apply "to the extent they are not inconsistent with" a federal statute or Habeas Rule). When motions authorized by a given Federal Rule constitute second or successive applications, however, AEDPA "displaces" the Federal Rule, and "all of §2244(b)'s restrictions kick in." *Banister*, 590 U.S. at 511.

Gonzalez v. *Crosby*, 545 U.S. 524 (2005), involved a Rule 60(b) motion for relief from judgment. The prisoner there "abandoned any attempt to seek review" of the order denying his habeas petition, waited a year, and then moved to reopen the case under Rule 60(b). *Id.* at 527, 537. Because his motion challenged "a nonmerits aspect of the first federal habeas proceeding," the Court found "no basis for contending that [it] should be treated like a habeas corpus application" in the first place. *Id.* at 533–34. Had the prisoner's motion gone to the merits, however, the Court suggested that it would have counted as a second or successive application (or its functional equivalent). See *id.* at 531–32.

Five Terms ago, in *Banister* v. *Davis*, the Court faced a similar question involving a Rule 59(e) motion to alter or amend a judgment. Under Rule 59(e), a party may seek reconsideration up to 28 days after the district court enters judgment, including on the basis of "new arguments" and "newly discovered or previously unavailable evidence." *Banister*, 590 U.S. at 508 n.2 (quoting 11 Wright & Miller, *Federal Practice & Procedure* §2810.1, at 161–62 (3d ed. 2012)). Distinguishing *Gonzalez*, the Court held that a Rule 59(e) motion "does not count as a second or successive habeas application." *Id.* at 521.

3. While federal habeas law does not expressly address the motions at issue in *Gonzalez* and *Banister*, Congress specifically authorized prisoners to amend or supplement their habeas applications. Under 28 U.S.C. §2242, which predates AEDPA and the Habeas Rules, an "[a]pplication for a writ of habeas corpus … may be amended or supplemented as provided in the rules of procedure applicable to civil actions."

B. Factual background

Danny Rivers has spent the last thirteen years fighting to prove his innocence. While his initial habeas petition was pending on appeal, he discovered that exculpatory evidence had been sitting in his trial counsel's files all the while—evidence that his lawyers could have used to clear his name. If Rivers is right, he not only received ineffective assistance but was also wrongly convicted. This case is about whether §2244(b)(2) bars Rivers from amending his petition and bringing the new evidence to light.

1. Rivers is tried and convicted.

In 2012, a Texas jury convicted Rivers of sexually abusing his children and possessing child pornography. He is currently serving a 38-year sentence.

a. This case began amidst a bitter divorce. In 2008, a Texas judge awarded Rivers temporary custody of his 9-year-old daughter. *Rivers* v. *Lumpkin*, No. 7:21-cv-00012 (N.D. Tex.), Dkt. 11-14 ("R-1"), at 156, 164. The court also granted Rivers sole use of the family home and denied his ex-wife's request for alimony. *Id.* Dkt. 11-15 ("R-2"), at 15. In response, Rivers's ex-wife "punish[ed]" him by "not letting him see" his 12-year-old stepdaughter, whom he had raised as his own. R-2, at 16.

The following year, with custody arrangements unchanged, Rivers's ex-wife drove the children to the police station. Both girls met with officers and accused Rivers of sexually abusing them. R-2, at 18, 129. Police then searched Rivers's home, seized the family laptop, and launched a forensic examination, eventually identifying "two files of interest"—a single image and a single video—that "appeared to be" child pornography. *Id.* at 26–28; *id.* Dkt. 11-10 ("R-3"), at 13, 31, 73; *id.* Dkt. 11-16, at 15, 66–67.

b. A grand jury indicted Rivers for indecency with a child, continuous sexual abuse, and two counts of possessing child pornography. R-3, at 8–15. Rivers, who had no criminal history, R-2, at 161, pleaded not guilty.

Trial looming, Rivers moved to sever the child-pornography counts, arguing they would poison the jury's views on the other charges. R-1, at 15. The State opposed severance. Because Texas had "no DNA or physical evidence," it argued that the alleged child pornography was "necessary" to establish Rivers's "motive" and "attraction to young girls." *Id.* at 14–15. The court refused to sever. *Id.* at 23.

c. At trial, Rivers's daughter and stepdaughter alleged a staggering pattern of sexual abuse. R-1, at 142, 145–46, 167–68. They further claimed that Rivers had shown them child pornography at least seventy times, testifying that he had "downloaded multiple videos" and played different films on different occasions. *Id.* at 153, 172. (Texas charged Rivers with possessing only one such video.) Rivers's daughter also accused her father of secretly recording images in the shower, R-1, at 170, although no hidden cameras were ever found. All told, the girls alleged over 200 instances of shocking abuse, many of which reported-

ly took place in common areas of the home while their mother, uncle, or cousin were present in the house. R-1, at 139, 147, 152–53, 156, 158, 166; R-2, at 12, 90. No other witnesses testified that they had seen the alleged abuse, and no physical evidence corroborated the story. R-2, at 34, 64.

This lack of supporting evidence made the alleged child pornography a key issue at trial. The prosecution called multiple witnesses to testify about the video file and image that Rivers was charged with possessing. R-2, at 19, 28, 44, 74, 84, 100. While the trial judge had granted a continuance so the defense could obtain its own experts, R-3, at 31, 40, counsel did not do so. R-2, at 112. Instead, the defense called only one witness, who testified that he and Rivers were traveling for work when the two files were allegedly downloaded. R-2, at 113–14, 131. That witness later swore that Rivers's lawyers never "contacted [him] until the day they wanted [him] to testify" or asked for evidence that would have corroborated Rivers's alibi. *Rivers* v. *Lumpkin*, No. 7:17-cv-00124 (N.D. Tex.), Dkt. 27-3, at 9.

d. The jury convicted Rivers on all charges, Pet. App. 2a. It rejected the prosecution's call for a 169-year sentence, however, and recommended that the court sentence Rivers to 42 years. R-3, at 213–14, 221–29. The court further decreased the sentence: 38 years behind bars, all counts considered—three years above the minimum. Pet. App. 13a. The Texas Court of Appeals affirmed.

2. Rivers seeks postconviction relief.

a. In 2013, while his direct appeal was still pending, Rivers began asking his lawyers to send him his client file. He explained: "I don't know what all it con-

tains, but it looks like I'm going to have to do this thing pro se, so I need everything I can get." No. 7:21-cv-00012 (N.D. Tex.) Dkt. 15-11, at 67. Counsel "never responded," and two years later, hindered by his imprisonment, Rivers was still trying. *Id.* at 68–69. He eventually resorted to filing a formal grievance with the Texas state bar.

Meanwhile, Rivers pressed forward with what records he had. In 2016, he sought state postconviction relief based on ineffective assistance, among other grounds. Relevant here, he argued that his trial counsel had failed to "perform an objectively reasonable investigation" or "verify the ages of the persons" in the alleged child pornography. No. 7:21-cv-00012 (N.D. Tex.), Dkt. 12-21, at 9. He added that his lead counsel was "inebriated" at the trial. *Id.* at 11.

The Texas Court of Criminal Appeals found that Rivers had "alleged facts that, if true, might entitle him to relief." *Ex parte Rivers*, 2016 WL 5800277, at *1 (Tex. Crim. App. Oct. 5, 2016). It remanded for further factfinding, ordering the court to appoint counsel if it "elect[ed] to hold a hearing." *Id.* Judge Alcala wrote separately to urge the appointment of counsel "regardless of whether the trial court holds a hearing." *Id.* (Alcala, J., concurring).

On remand, the court neither held a hearing nor appointed counsel. Instead, it chiefly relied on affidavits in which trial counsel defended their performance, denied drunkenness, and claimed that Rivers had "admitted to [them] that he engaged in sexual acts with the victims." *Rivers* v. *Davis*, 2018 WL 4443153, at *3 (N.D. Tex. July 27, 2018); see also No. 7:17-cv-00124 (N.D. Tex.), Dkt. 24-1, at 24. Rivers responded with his own affidavit, categorically "deny[ing] making such admissions." Dkt. 24-1 at 4. He

also submitted a text message from one of the lawyers' spouses, confirming that counsel "showed up intoxicated for court," *id.* at 25, and a news report showing that his lead counsel was arrested six months before the trial "after showing up at a woman[']s house naked and drunk," *id.* at 33 (cleaned up) (quoting Texoma, *Local Attorney Sentenced to Two Years Probation* (Mar. 18, 2015), bit.ly/Barber-Arrest). The trial court nonetheless "concluded that counsel were not ineffective," and the Court of Criminal Appeals affirmed. *Ex parte Rivers*, 2017 WL 3380491, at *1 (Tex. Crim. App. June 7, 2017).

b. Rivers filed a federal habeas petition in 2017, raising the same ineffective-assistance claims, among other grounds. No. 7:17-cv-00124 (N.D. Tex.), Dkt. 1, at 6. When the district court denied relief, Rivers "timely filed a notice of appeal," *Rivers* v. *Lumpkin*, 2022 WL 1517027, at *4 (5th Cir. May 13, 2022), and sought a certificate of appealability.

3. While his habeas appeal is pending, Rivers discovers new, exculpatory evidence.

While his case was pending on appeal, Rivers finally received the client file that he first requested in 2013. Pet. App. 2a. In it, he found a state investigator's report analyzing the two files underlying his child-pornography conviction. The report called the video merely "of interest," without further comment. Meanwhile, the image was labeled "**NOT CHILD PORN**." J.A. 91–92. The report also listed a number of other files found on the family laptop. Next to one—entitled "reallyunderagekiddieporn"—the state investigator had written: "although the title indicated it to be child porn," it "is not." *Id.* at 91. Another, whose title included phrases like "pre-teen tiny chil-

dren" and "incest sex porn underage," was likewise marked "**NOT CHILD PORN**." *Id.* at 92. The report also showed that these files were *not* saved under Rivers's name; they were instead recovered from a download folder bearing the name of Rivers's ex-wife.

After discovering the report, Rivers moved to supplement the appellate record. See *id.* at 41. He also filed an affidavit stating that he had never seen the report and noting that his lawyers had "failed to raise this exculpatory evidence" that had been "in [their] possession" all along. *Id.* at 54–55. The affidavit added that Rivers's "estranged wife had access to the house and did in fact enter the house … while [Rivers] was out of town during the time frame the alleged child porn was downloaded," *id.* at 49. The Fifth Circuit denied Rivers's motion but granted a certificate of appealability. *Id.* Dkt. 34, at 2.

C. Procedural history

In February 2021—more than a year before the last filings were submitted in his pending appeal—Rivers returned to the district court and tried to amend his initial petition. Using the standard §2254 template provided to pro se litigants, Rivers alleged that his counsel had "fail[ed] to present exculpatory evidence in their possession" that would have shown "factual innocence." J.A. 68. He added that prosecutors had violated due process by "falsely pursu[ing]" charges based on evidence that "their own investigators" deemed "NOT CHILD PORN." *Id.* at 75.

Soon thereafter, Rivers asked the Fifth Circuit to stay or remand. *Id.* at 95. Rivers explained that his amended petition contained "substantial [ineffective-assistance] claims that [it] should be aware of before determining if counsel was or was not ineffective." *Id.*

at 99. Since his "original habeas action [remained] pending," Rivers reasoned that "judicial economy would best be served by [the Fifth Circuit's] one time review," covering "all grounds"—both "those on appeal" and "those currently raised in the district court." *Id.* (cleaned up). To avoid "piecemeal litigation," Rivers asked the court to either stay appellate proceedings so he could "exhaust the new claims and then join the causes" or to "remand this case back to the district court for consideration of the new grounds." *Id.* at 100. The court denied the motion in a one-line order. No. 18-11490 (5th Cir.) Dkt. 78.

Meanwhile, in the district court, the same magistrate judge who reviewed Rivers's initial habeas petition recommended that the February 2021 filing be deemed a "second or successive" petition and transferred to the Fifth Circuit for lack of jurisdiction. See Pet. App. 3a–4a. Rivers objected, maintaining that the filing was "an amendment to [his] initial petition currently pending on appeal." 7:21-cv-00012 (N.D. Tex.), Dkt. 27, at 5. He then moved the court to stay or "consider an interlocutory review" to "preserve judicial resources." J.A. 107. The court adopted the magistrate's recommendation and denied Rivers's stay motion. See Pet. App. 18a–19a. Rivers appealed in October 2021, again arguing that his filing was "an amendment/supplement under Fed. R. Civ. P. 15 to [his] initial petition." 5th Cir. No. 21-11031, Dkt. 20, Feb. 17, 2022.

The Fifth Circuit docketed Rivers's jurisdictional appeal as a separate case. (Now there were two appeals pending before separate panels.) Seven months later, in May 2022, Panel 1 affirmed the initial habeas denial without addressing Rivers's amended petition or the newly discovered evidence. See *Rivers*,

2022 WL 1517027, *cert. denied*, 143 S. Ct. 1090 (2023). Then, in April 2024, Panel 2 affirmed the transfer order—the decision below. Pet. App. 1a–2a. It reasoned that §2244(b) applies to "filings introduced after a final judgment that raise habeas claims, no matter how titled." *Id.* at 10a.

SUMMARY OF ARGUMENT

For two independent reasons, Rivers's motion to amend was not a second or successive habeas corpus application. The Court should reverse and remand.

I. First, a mid-appeal Rule 15 motion is not a second or successive habeas corpus application.

A. Section 2242 of Title 28 expressly states that an "[a]pplication for a writ of habeas corpus … may be amended or supplemented as provided in the rules of procedure applicable to civil actions." The civil rules, in turn, permit motions to amend or supplement a pleading while a case is pending on appeal. Although a district court lacks jurisdiction to *grant* such a motion, Federal Rule of Civil Procedure 62.1(a)(3) permits it to issue an indicative ruling "stat[ing] either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue." The court of appeals may then vacate the judgment and "remand for further proceedings." Fed. R. App. P. 12.1; 28 U.S.C. §2106.

Because §2242 authorizes mid-appeal motions to amend a habeas application, such motions cannot be deemed "second or successive habeas corpus application[s]" under §2244(b). Requiring such motions to satisfy §2244(b)(2) would nullify Congress's instruction that habeas applications "may be amended" if they satisfy "the rules of procedure applicable to civil actions." 28 U.S.C. §2242. It would wrongly treat an

amendment as a new, independent "application," rather than part and parcel of the initial application. And it would override Congress's decision that only a limited subset of amendments not at issue here must satisfy §2244(b)(2). See *id.* §2266(b)(3)(B).

B. Historical practice confirms that mid-appeal motions to amend are not second or successive habeas applications. Courts historically did not treat habeas petitions presenting newly discovered evidence as successive. Nor did they regard mid-appeal Rule 15 motions as abuses of the writ. Presented with such motions, courts addressed them on the merits, without suggesting they were abusive.

C. Treating mid-appeal Rule 15 motions as part of and parcel of the initial habeas application would also advance AEDPA's aims. Channeling such filings to the same judge who has just ruled on the initial petition maximizes judicial economy, avoids piecemeal litigation, and hastens the finality of state convictions. By contrast, diverting them to the court of appeals under §2244(b) would burden appellate judges, lead to simultaneous appeals, and leave states and prisoners in limbo. It's hard to attribute those results to a Congress focused on efficiency and finality.

D. Applying §2244(b)(2) to mid-appeal motions to amend also leads to anomalous results that Congress is unlikely to have intended. On the Fifth Circuit's view, Rule 15 applies to nearly every motion to amend in a habeas case. Only a tiny sliver—those filed by a prisoner while the case is pending appeal—must run the §2244(b)(2) gauntlet. That approach also creates senseless distinctions between similarly situated prisoners, slamming the door on newly discovered evidence while the case is still pending.

II. Alternatively, §2244(b) does not apply while a prisoner's initial petition is pending on appeal. In the postconviction context, this Court has always understood finality by reference to the end of appellate review, not final judgment. Pre-AEDPA courts applied abuse-of-the-writ principles in that manner, treating the appellate court's decision as the dividing line between first and successive petitions. Far from rejecting that view, Congress embraced it throughout AEDPA by pegging finality to the end of appellate review. And treating appellate review as the relevant inflection point here makes sense too. Section 2244(b) functions as a statute of repose, sparing states the burden of defending the same conviction twice. But Congress did not recognize a state's interest in repose while the initial petition is still pending: that interest vests only once the appeal is over.

III. The Fifth Circuit's contrary arguments fail.

A. *Gonzalez* v. *Crosby* doesn't control this case. *Gonzalez* neither involved nor addressed mid-appeal amendments under Rule 15. Nor did it analyze or decide whether the dividing line between initial petitions and "second or successive" petitions is the district court's entry of judgment or the end of appellate review. And *Gonzalez*'s logic doesn't apply here either because §2242 expressly permits amendments as provided in the civil rules, which already contain ample safeguards against abuse.

B. The Fifth Circuit was also wrong to fear a flood of amendments. Given the jurisdictional, procedural, and substantive barriers to amending mid-appeal, prisoners have every incentive to file all of their claims in their initial petition. The Second Circuit, where mid-appeal Rule 15 motions have been allowed for the last 20 years, offers an informative case study.

District courts there have not been flooded with abusive amendments, and the motions they have received have not proven burdensome.

IV. This Court should reverse and remand. The courts below made a threshold jurisdictional error that kept them from reaching the merits of Rivers's motion to amend. On remand, the district court will have the chance to consider whether Rivers's newly discovered evidence warrants relief under the proper Rule 15 standard.

ARGUMENT

I. A motion to amend or supplement an initial habeas petition that is pending on appeal is not a "second or successive" application.

A. Section 2242 permits prisoners to seek leave to amend or supplement their applications while an appeal is pending.

Section 2242 tells courts which rules to apply when a prisoner moves to amend or supplement an initial habeas petition: "the rules of procedure applicable to civil actions." Those rules, in turn, include mechanisms for updating a pleading mid-appeal. Applying §2244(b)(2)'s gatekeeping requirements instead of the civil rules would nullify §2242 and disregard Congress's drafting choices.

1. Under §2242, a habeas application may be amended or supplemented as provided in the rules of civil procedure.

Congress has told courts that a habeas application "may be amended or supplemented as provided in the rules of procedure applicable to civil actions." 28 U.S.C. §2242. Beyond Congress's "general prescrip-

tio[n]" that the Federal Rules apply in habeas cases, §2242 "specifically" requires courts to allow amendment and supplementation per the rules of civil procedure. *Mayle* v. *Felix*, 545 U.S. 644, 654–55 (2005).

Section 2242 reflects longstanding practice that predates both the Habeas Rules and AEDPA. By its terms, the Habeas Corpus Act of 1867 contemplated amendments only to the jailer's "return" and "suggestions made against it," 14 Stat. 385, 386. But by 1948, when Congress added the amendment provision to §2242, courts had long permitted prisoners to amend their petitions "in the interest of justice." *E.g.*, *Holiday* v. *Johnston*, 313 U.S. 342, 350 (1941); see also *Price* v. *Johnston*, 334 U.S. 266, 291–92 (1948) (remanding for amendment). As the Codifier's Note explains, the provision aimed "to conform to [this] existing practice." Codifier's Note, 28 U.S.C. §2242 (1952).

Under §2242, amending a habeas petition works just like amending a pleading "in ordinary civil litigation." *Mayle*, 545 U.S. at 663. Section 2242 imposes no restrictions beyond those "provided in the rules of procedure." 28 U.S.C. §2242. Nor did Congress tether §2242 to a specific rule. Instead, it broadly instructed courts to allow amendments in accordance with the "rules" governing "civil actions." *Id.*

2. The rules of civil procedure provide for motions to amend or supplement a pleading while an appeal is pending.

a. Federal Rule of Civil Procedure 15 lets parties amend and supplement their pleadings. Under Rule 15(a)(2), "a party may amend its pleading" with "the court's leave," which should be "freely give[n] when justice so requires." Fed. R. Civ. P. 15(a)(2); see *Fo-*

man v. *Davis*, 371 U.S. 178, 182 (1962). And under Rule 15(d), a court "may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after" the initial pleading.

Unlike other Federal Rules, *e.g.*, Fed. R. Civ. P. 12(b), (h), these provisions contain no time limit. To the contrary, Rule 15(d) permits supplementation after a court has found "the original pleading … defective in stating a claim or defense." Likewise, leave to amend "has been granted under Rule 15(a) at various stages of the litigation," including "after a judgment has been entered" and "on remand following appeal." 6 Wright & Miller, *Federal Practice & Procedure* §1488 & n.11 (3d ed. June 2024); see also Fed. R. Civ. P. 15(b)(2) (expressly permitting amendment "after judgment").

b. Rule 15 motions may be filed while a case is on appeal. Two structural barriers ordinarily prevent district courts from granting such motions: the pending appeal and the final judgment. But those barriers are not insurmountable. Federal courts have long experience with the complexities of litigation—including the problem of newly discovered evidence. The "rules of procedure applicable to civil actions" reflect that experience, 28 U.S.C. §2242, providing ways to update the pleadings even after an appeal has been filed. Relevant here, Federal Rule of Civil Procedure 62.1(a) permits a district court to issue an indicative ruling inviting remand, and Federal Rule of Appellate Procedure 12.1(b) and 28 U.S.C. §2106 allow the court of appeals to vacate and remand in response.

i. An appeal "divests the district court of its control over those aspects of the case involved in the appeal." *Griggs* v. *Provident Consumer Disc. Co.*, 459 U.S. 56,

58 (1982). That principle precludes a district court from *granting* a motion to amend a pleading that is pending on appeal. The principle does not, however, preclude the district court from *considering* the motion. Even if a district court lacks jurisdiction to grant a motion, it still "ha[s] jurisdiction to entertain the motion and either deny the motion on its merits, or certify its intention to grant the motion to the Court of Appeals, which could then entertain a motion to remand." *United States* v. *Cronic*, 466 U.S. 648, 667 n.42 (1984) (citing *United States* v. *Johnson*, 327 U.S. 106, 108–09 (1946)).

Federal Rule of Civil Procedure 62.1(a) is the modern mechanism for this longstanding practice. It gives a district court three options when faced with a "timely motion … for relief that the court lacks authority to grant because of an appeal." First, the court may "defer considering the motion." *Id.* §(a)(1). Second, it may entertain the motion and "deny" it. *Id.* §(a)(2). Finally, the court may issue an "[i]ndicative [r]uling" "stat[ing] either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue." *Id.* §(a)(3). When the court of appeals receives such a ruling, Federal Rule of Appellate Procedure 12.1(b) allows it to "remand for further proceedings."

Although Rule 62.1(a) is often used in conjunction with Rule 60(b) motions, "nothing in [the rule's] language limits its application" to that context. *Ret. Bd. of Policemen's Annuity & Benefit Fund* v. *Bank of N.Y. Mellon*, 297 F.R.D. 218, 221 (S.D.N.Y. 2013). Instead, Rule 62.1(a) covers "all circumstances in which a pending appeal ousts district-court authority to grant relief." Report of the Civil Rules Advisory Committee, Dec. 12, 2006 at 14. That includes mid-

appeal Rule 15 motions. See, *e.g.*, *Ret. Bd.*, 297 F.R.D. at 220, 223.

Rule 62.1(a) does not require a party to move for an indicative ruling. The rule speaks of just one motion—the "timely motion … for relief that the court lacks authority to grant because of an appeal." Fed. R. Civ. P. 62.1(a). A distinct "motion" for a "targeted 'indicative ruling'" is thus unnecessary: the district court may issue an indicative ruling based solely on the underlying motion for relief. *Mendia* v. *Garcia*, 874 F.3d 1118, 1120–21 (9th Cir. 2017) (collecting cases); see also, *e.g.*, *Scarborough* v. *U.S. Sec. Assocs., Inc.*, 836 F. App'x 60, 61 & n.1 (2d Cir. 2020).

ii. When a district court issues an indicative ruling under Rule 62.1(a), "the court of appeals may remand for further proceedings." Fed. R. App. P. 12.1(b). The court of appeals may also "vacate" or "set aside" any "judgment" or "order" below and "require such further proceedings … as may be just under the circumstances." 28 U.S.C. §2106. Remand on those terms makes a separate motion to reopen the judgment unnecessary.

Appellate courts' authority to grant such relief has a deep pedigree. For as long as there have been federal appellate courts, those courts have had to contend with unforeseen developments on appeal. Sometimes the appellate court was "informed" of new evidence. *E.g.*, *Estho* v. *Lear*, 32 U.S. (7 Pet.) 130, 131 (1833) (Marshall, C.J.); *United States* v. *Shotwell Mfg. Co.*, 355 U.S. 233, 234–38 (1957); *Levinson* v. *United States*, 32 F.2d 449, 450 (6th Cir. 1929). Sometimes an intervening event meant that "great injustice" would be done by ruling on "the present … record." *E.g.*, *Ballard* v. *Searls*, 130 U.S. 50, 52 (1889); *Ransom* v. *City of Pierre*, 101 F. 665, 670–71 (8th Cir. 1900). And sometimes situations "changed

radically" enough to "preclud[e]" further action. See *Watts, Watts & Co.* v. *Unione Austriaca Di Navigazione*, 248 U.S. 9, 21–22 (1918) (collecting cases). When such things happen, courts are not limited to "correcting error" but may also "dispos[e] of the case as justice may at th[e] time require." *Id.* at 21.

D.W. Bosley Co. v. *Wirfs*, 20 F.2d 629 (8th Cir. 1927), is illustrative. The plaintiff in *Bosley* sued the defendant for patent infringement. After losing in the district court, the defendant appealed and "the case was argued and submitted" before the Eighth Circuit. *Id.* at 630. Then, while the appeal was still pending, the defendant discovered that another firm had been selling products "like those patented to the [plaintiff]" years before the plaintiff applied for his patent. *Id.* The Eighth Circuit knew what that meant: if the defendant was right, the evidence "would be likely to lead the court below to a different result from its earlier conclusion." *Id.* At the defendant's request, the Eighth Circuit remanded to the district court, where the defendant sought to "amend its answer and present [the] newly discovered" evidence. *Id*; see also, *e.g.*, *Estho*, 32 U.S. at 131 (granting leave to amend); *Dietz* v. *Horton Mfg. Co.*, 170 F. 865, 873 (6th Cir. 1909) (same).

A remand order that vacates the judgment "reopen[s] litigation." *Mendoza* v. *Lumpkin*, 81 F.4th 461, 470 (5th Cir. 2023). This makes it unnecessary to ask the district court for relief from judgment under Rule 60(b). The remand order "suppl[ies] all that is needed by way of authority below and amount[s] 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). Rule 62.1(c) reflects this principle, providing that "[t]he district court may de-

cide the motion if the court of appeals remands for that purpose." See also Wright & Miller §1489 (calling such an order "comparable to a vacation of the lower court's judgment").

* * *

All of that boils down to this: While Rule 15 motions are most common before final judgment, a party may also seek leave to amend or supplement while an appeal is pending. A district court that receives such a motion may consider it and issue an indicative ruling. Then, if the court of appeals vacates and remands, the district court is free to grant the motion.

3. Section 2244(b) does not override §2242.

a. "[I]t is this Court's duty to interpret Congress's statutes as a harmonious whole rather than at war with one another." *Epic Sys. Corp.* v. *Lewis*, 584 U.S. 497, 502 (2018). It follows that §2244(b)(2) cannot be read to implicitly prohibit what §2242 expressly permits. Section 2242 expressly allows a prisoner to "amen[d] or supplemen[t]" his "[a]pplication" "as provided in the rules of procedure applicable to civil actions." Section 2242 thus identifies what conditions must be satisfied to amend a habeas petition: the conditions specified in the civil rules. Those conditions don't include §2244(b)(2)'s stringent gatekeeping requirements for second or successive petitions. Construing a motion to amend as a second or successive petition, and thereby subjecting it to §2244(b)(2), would thus nullify Congress's instruction that a habeas petition "may be amended" as provided in the civil rules. 28 U.S.C. §2242.

Treating an *amendment* to an application as a "second or successive" application would also "elid[e] the

difference" Congress recognized between the two. *Artuz* v. *Bennett*, 531 U.S. 4, 9 (2000). Section 2244(b) refers to a "second or successive" application as a new, distinct "application." Section 2242, meanwhile, makes clear that an "amendment" is not a new and independent application, but rather something that happens to an existing application. See 28 U.S.C. §2242 (providing that "[i]t"—the "[a]pplication"—may be amended); see also Tr. of Oral Arg., *Banister*, No. 18-6943 (Assistant to the Solicitor General: "Section 2242 … makes clear that that amendment still goes to the same application."). And Congress elsewhere in the statute expressly distinguished between "an application," an "amendment to an application," and a "second or successive application." 28 U.S.C. §2266(b)(2), (b)(3)(B).

Congress also showed that it knows how to subject an amendment to §2244(b)(2)'s gatekeeping requirements when it wants to. It did so in §2266, part of AEDPA's "opt-in" chapter: a set of fast-track procedures for capital habeas cases that apply when a state meets certain conditions. See 28 U.S.C. §§2261–2266; *Calderon* v. *Ashmus*, 523 U.S. 740 (1998). Under §2266(b)(3)(B), "[n]o amendment … shall be permitted after the filing of the answer to the application, except on the grounds specified in section 2244(b)." Congress thus considered requiring that amendments satisfy the §2244(b)(2) standards—but it did so for only a tiny sliver of amendments: those filed by state prisoners, on death row, whose states have opted in. When "Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest," this Court should "not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply." *Jama* v. *ICE*, 543 U.S. 335, 341 (2005).

b. Viewed another way, treating a motion to amend as a second or successive petition would effectively read §2244(b) as impliedly repealing §2242. But "[t]he cardinal rule is that repeals by implication are not favored." *Posadas* v. *Nat'l City Bank of N.Y.*, 296 U.S. 497, 503 (1936). "[P]resented with two statutes, the Court will regard each as effective—unless Congress' intention to repeal is clear and manifest, or the two laws are irreconcilable." *Me. Cmty. Health Options* v. *United States*, 590 U.S. 296, 315 (2020) (cleaned up). Not so here.

There is no evidence—let alone "clear and manifest" evidence—that Congress intended §2244(b) to repeal §2242. *Id.* Courts "strongly presum[e]" that "Congress will specifically address language on the statute books that it wishes to change." *United States* v. *Fausto*, 484 U.S. 439, 453 (1988). Congress did just that in AEDPA. Title I of the Act, labeled "Habeas Corpus Reform," expressly amended §§2243, 2244, 2245, and 2255 of Title 28. Pub. L. No. 104-132, tit. I, §§101–106 (1996). But neither that title nor any other provision of AEDPA mentions §2242. See *id.*

Nor are §§2242 and 2244(b) "irreconcilable." *Me. Cmty.*, 590 U.S. at 315. Irreconcilability is a high bar. See *J.E.M. Ag Supply, Inc.* v. *Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 141–42 (2001). It is "not enough to show" that two statutes "produce differing results when applied to the same factual situation, for that no more than states the problem." *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 155 (1976). And a "policy preference" for applying one provision over another won't do either. *FCC* v. *NextWave Personal Commc'ns Inc.*, 537 U.S. 293, 304 (2003). Instead, two statutes are "irreconcilable" only when they "cannot mutually coexist" or there is "a positive repugnancy"

between them. *Radzanower*, 426 U.S. at 155. Here, §§2242 and 2244(b) can easily coexist, without "repugnancy," by confining them each to their own respective spheres. Section 2242 addresses amendments but not second or successive applications. Section 2244(b), for its part, says much about second or successive applications but not a word about amendments. If both provisions stuck to their own jobs, neither would be out of work. *Id.*

B. Historical practice confirms that mid-appeal Rule 15 motions are not second or successive habeas applications.

Even apart from §2242, *Banister*'s logic yields the same result. To decide "what qualifies as second or successive," this Court looks first to "historical habeas doctrine and practice." *Banister*, 590 U.S. at 512. If "a type of later-in-time filing would have constituted an abuse of the writ, as that concept is explained" in the Court's "pre-AEDPA cases," it is "successive." *Id.* (citation omitted). "[I]f not, likely not." *Id.* As shown below, history favors Rivers twice over. For one thing, habeas courts did not historically deem the mere act of raising newly discovered evidence abusive. More telling still, pre-AEDPA courts routinely decided mid-appeal Rule 15 motions on the merits—rather than dismissing them as abusive.

1. The abuse-of-the-writ doctrine did not foreclose petitions presenting newly discovered evidence.

The abuse-of-the-writ doctrine was a nineteenth-century innovation. "[B]y the common law of England, as it stood at the adoption of the constitution," the denial of habeas relief was "no bar to the issuing of a second or third or more writs." *Ex parte Kaine*, 14

F. Cas. 78, 80 (C.C.S.D.N.Y. 1853). Courts were instead "accustomed to exercise an independent judgment on each successive application, regardless of the number." *Salinger* v. *Loisel*, 265 U.S. 224, 230–31 (1924). "Th[is] rule made sense because at common law an order denying habeas relief could not be reviewed. Successive petitions served as a substitute for appeal." *McCleskey* v. *Zant*, 499 U.S. 467, 479 (1991) (internal citation omitted).

Only later, once "a right to an appellate review was given," did U.S. courts restrict this practice. *Salinger*, 265 U.S. at 231. Abuse-of-the-writ doctrine developed to ban successive petitions that presented claims that were "deliberately with[e]l[d]," *Sanders* v. *United States*, 373 U.S. 1, 18 (1963), or that the applicant "had [a] full opportunity" to present in his first petition, *Wong Doo* v. *United States*, 265 U.S. 239, 241 (1924). Courts carefully emphasized, however, that presenting newly discovered evidence was not itself abusive. *E.g.*, *Price*, 334 U.S. at 290–91.

Ex parte Cuddy, one of the earliest abuse-of-the-writ cases, illustrates the point. 40 F. 62, 66 (C.C.S.D. Cal. 1889) (Field, J.). A district court denied Thomas Cuddy's initial habeas petition, and this Court affirmed. *Id.* at 63. Cuddy then sought habeas relief from Justice Field, riding circuit. Justice Field ordered the writ dismissed, reasoning that "a second application upon the same facts … should not be heard," absent "leave to make a new application." *Id.* at 66. At the same time, he cabined that principle to "cases where a second application is made upon the same facts presented, or which might have been presented" in the first application. *Id.* In his view, things would be "entirely different" if "subsequent occurring events" offered "new" grounds for relief. *Id.*

Other courts agreed. In line with Justice Field's remarks, habeas courts did not treat the presentation of newly discovered evidence as itself abusive. This Court said as much in *Waley* v. *Johnston*, 316 U.S. 101, 105 (1942), where the subsequent petition did not raise "the same issue" as the prior one. Early twentieth-century district courts applied the same principle, reasoning that a "substantial change in the circumstances" could warrant a further petition. *E.g.*, *Ex parte Moebus*, 148 F. 39, 40 (D.N.H. 1906). So did state courts, which "routinely allowed prisoners to introduce exculpatory evidence that was either unknown or previously unavailable to the prisoner." *Boumediene* v. *Bush*, 553 U.S. 723, 780–81 (2008) (collecting cases).

To be sure, Congress later restricted prisoners' ability to raise newly discovered evidence in "second or successive" applications. But this "historical habeas doctrine and practice" counsels against construing that phrase more broadly than the statutory text compels. See *Banister*, 590 U.S. at 512 (If a "type of later-in-time filing" would not have "constituted an abuse of the writ," it is "likely not" successive.).

2. Habeas courts did not historically treat mid-appeal Rule 15 motions as successive.

The same rules applied when new grounds for relief emerged while an initial petition was pending on appeal. Had courts viewed mid-appeal Rule 15 motions as successive, "there should be lots of decisions dismissing them on that basis." *Banister*, 590 U.S. at 514. Instead, courts time and again "resolved [such] motions on the merits—and without comment about repetitive litigation." *Id.* at 515.

a. *Harisiades* v. *Shaughnessy* is a good example. After a district court denied his initial habeas petition, Peter Harisiades appealed to the Second Circuit. See *United States ex rel. Harisiades* v. *Shaughnessy*, 187 F.2d 137, 138 (2d Cir. 1951). Then, while his appeal was pending, he returned to the district court and "moved for permission to amend." *Harisiades* v. *Shaughnessy*, 90 F. Supp. 431, 432 & n.2 (S.D.N.Y. 1950). The United States "opposed the motion" on multiple grounds, see *id.* at 432–33, but it didn't claim that Harisiades had abused the writ by moving to amend mid-appeal.

The district court in *Harisiades* followed precisely the path that Rivers advocates here. While it recognized that an appeal "deprive[s] the District Court of authority," the court still deemed it "proper" to "consider the merits of the … application to amend." *Id.* at 433–34. In short: exactly what Rule 62.1(a) would later prescribe. See *Munoz* v. *United States*, 451 F. App'x 818, 819 n.1 (11th Cir. 2011) (Rule 62.1 "codif[ied]" existing practice). After doing so, the court denied the motion "on the merits"—without a hint that moving to amend was itself an abuse of the writ. *Id.* at 820.

The Second Circuit affirmed. When Harisiades challenged the denial of his motion to amend, the court consolidated that appeal with his pending habeas appeal, see 187 F.2d at 139, and decided both cases in the same four-page opinion. As to the amendment issue, Judge Swan (joined by Chief Judge Learned Hand and Judge Augustus Hand) proceeded straight to the merits and deemed the district court's order "correct." *Id.* at 139–40, 142. That is telling. After all, dismissing Harisiades's motion as successive "would have been easier" than ruling on the merits.

Banister, 590 U.S. at 519 n.8. "And even more to the point, that course would usually have been required" if mid-appeal Rule 15 motions "counted as successive." *Id.* The Second Circuit clearly did not view them that way.

But the story doesn't end there. After the Second Circuit denied relief, this Court granted certiorari and affirmed. See *Harisiades* v. *Shaughnessy*, 342 U.S. 580 (1952). Although the Court's opinion focuses chiefly on the habeas denial, the Court also addressed the amendment issue. Like the lower courts, this Court went straight to the merits. Compare *id.* at 583 n.4, with 90 F. Supp. 437, *and* 187 F.2d at 139–40. And like the lower courts, this Court said not a word about abuse of the writ—an omission all the more striking for the fact that it came only two months after the Court had unanimously decried the "problems raised by … applications for habeas corpus that are repetitious." *United States* v. *Hayman*, 342 U.S. 205, 212 & n.14 (1952).

b. Nor was *Harisiades* the only dog that didn't bark. Over the next four decades, prisoners regularly tried to amend their petitions after final judgment. But instead of dismissing these motions as successive, courts routinely addressed them on the merits. In fact, our research did not find a single pre-AEDPA case where a court treated mid-appeal efforts to amend or supplement as an abuse of the writ.

Some of these cases resemble *Harisiades*. Take *Strand* v. *United States*, 780 F.2d 1497 (10th Cir. 1985). The prisoner there filed an "amended petition" while his case was still pending before the district court. *Id.* at 1505 (McKay, J., dissenting). The court later denied relief—apparently without considering the amended petition—and the prisoner appealed. *Id.*

at 1498–99. While the appeal was pending, he filed a "renewed motion to supplement" in the district court. *Id.* After that too was denied, the prisoner appealed, and the Tenth Circuit consolidated the cases. *Id.* at 1499. The court affirmed without a hint that the prisoner had abused the writ. See *id.* at 1500.

In other cases, the prisoner tried to amend in the appellate court itself. *Bennett* v. *Robbins*, 329 F.2d 146, 147 (1st Cir. 1964), is typical. After the district court denied habeas relief, the prisoner appealed and asked the First Circuit to let him "amend his application." *Id.* The court declined, without suggesting that the motion was abusive. *Id.* *Petty* v. *McCotter*, 779 F.2d 299 (5th Cir. 1986), is much the same. The prisoner there introduced a new claim for the first time on appeal. *Id.* at 301. In an opinion joined by Judge Jones, the Fifth Circuit remanded, holding that he "should be given an opportunity to amend." *Id.* at 302. No member of the panel suggested that the prisoner was abusing the writ. See also *Clarke* v. *Henderson*, 403 F.2d 687, 688 (6th Cir. 1968); *Thomas* v. *Virginia*, 357 F.2d 87, 90 (4th Cir. 1966).

In still other cases, prisoners sought leave to amend after final judgment but before appeal. That's what happened in *Bishop* v. *Lane*, 478 F. Supp. 865, 866 (E.D. Tenn. 1978). Instead of deeming the motion successive, the court simply walked the prisoner through the rules of civil procedure and then denied leave to amend. *Id.* at 467. See also *Briddle* v. *Scott*, 63 F.3d 364 (5th Cir. 1995).

What is striking about all these cases is that not a single judge suggested that any of the prisoners had abused the writ. It's hard to see why "a half century's worth of habeas courts would have resolved [Rule 15] motions on the merits" if they viewed them as succes-

sive. *Banister*, 590 U.S. at 519 n.8. "The only plausible account of their actions is that they did not." *Id.*

C. AEDPA's aims favor treating mid-appeal Rule 15 motions as part and parcel of the initial application.

"Congress passed AEDPA against this legal backdrop, and did nothing to change it." *Id.* at 515. As *Banister* explained, AEDPA made it harder for second or successive petitions to get past the gate—but it did not "redefine what qualifies as a successive petition" in the first place. *Id.* "Nor do AEDPA's purposes demand a change" in the practice just described. *Id.* Far from it: forcing mid-appeal Rule 15 motions to run the §2244(b)(2) gauntlet would frustrate—not further—efficiency and finality," making it unlikely that "Congress would have viewed [them] as successive." *Id.* at 512–13.

1. Conserving judicial resources. The question is not *whether* prisoners will race to court when exculpatory evidence emerges mid-appeal. They will—no matter what rule the Court adopts. The question instead is *how* the lower courts should review those inevitable filings.

a. Rivers's rule lets only the most promising claims proceed, efficiently filtering out the rest. Under our approach, a mid-appeal Rule 15 motion would go to the district court judge who just decided the initial petition: the single decisionmaker most familiar with the case. If the motion raised a "substantial issue," Rule 62.1(a)(3), the court could say so. *E.g., Parry* v. *Kerestes*, 2013 WL 6002358, at *2 (W.D. Pa. Nov. 12, 2013). If not, the court could deny it. Rule 62.1(a)(2). Either way, a judge "familiar with a habeas appli-

cant's claims" would likely make "quick work" of such a filing. *Banister*, 590 U.S. at 517.

b. The Fifth Circuit's contrary rule displaces district courts and burdens the courts of appeals. Because the Fifth Circuit's approach turns on whether a mid-appeal filing "raise[s] habeas claims," Pet. App. 10a, the district court must first decide whether the prisoner has asserted "merits-based" or "integrity-based" grounds for relief—a "not-always-easy threshold determination." *Banister*, 590 U.S. at 518 n.7. If the filing raises merits-based claims, the district court lacks jurisdiction and must either dismiss or transfer it as a second or successive petition. Three appellate judges must then decide—from square zero, without a district-court opinion, and likely without adversarial briefing, see *In re Williams*, 898 F.3d 1098, 1101 (11th Cir. 2018) (Wilson, J., specially concurring)—whether "the factual predicate for the claim" could have been "discovered previously through the exercise of due diligence." 28 U.S.C. §2244(b)(2)(B)(i). Next they must examine "the evidence as a whole" and determine whether "the facts underlying the claim, if proven," would be "sufficient to establish by clear and convincing evidence" that "no reasonable factfinder" would have convicted but for constitutional error. *Id.* §2244(b)(2)(B)(ii). That, in turn, means considering the state's "theory of the case," the evidence "support[ing]" that theory, and the counterfactual effect of the "newly-discovered evidence," including how it would have undermined the state's evidence and influenced the theories—and even "alternative theories"—that both sides could have "offered the jury." *Munchinski* v. *Wilson*, 694 F.3d 308, 335–37 (3d Cir. 2012). One recent authorization case features a two-column, sixteen-row chart that spans three pages of the Federal Reporter. See

In re Will, 970 F.3d 536, 544–46 (5th Cir. 2020). And that's just the first step. If the appellate court authorizes a "second or successive" petition, the case goes back to the district court, which must "conduct its own thorough review" to ensure "the requirements of §2244(b)(2) have been satisfied." *Id.* at 543 (cleaned up). Still more: because any claim "presented in a prior application" must be dismissed, §2244(b)(1), both courts must compare the "second or successive" petition to every prior petition and determine precisely what "claim[s]" were already brought, *id.* at 541—a task that usually means slogging through "less-than-limpid" pro se filings. *Banister*, 590 U.S. at 516.

All agree that "a three-judge panel of the court of appeals" is the first port of call for petitions filed after a prisoner exhausts appellate review of his initial application. 28 U.S.C. §2244(b)(3)(B). But a Congress concerned about efficiency had little reason to channel filings like Rivers's down that path—and good reason to treat them as "part and parcel of the first habeas proceeding." *Banister*, 590 U.S. at 507.

2. Reducing piecemeal litigation. AEDPA's second aim likewise favors Rivers's rule. Under our approach, an indicative ruling followed by remand could make further appellate proceedings "altogether unnecessary." *Banister*, 590 U.S. at 516. Conversely, if a district court denies leave to amend, there is little risk of "piecemeal appellate review." *Id.* For one thing, prisoners "may not" appeal a "final order in a habeas corpus proceeding" without a "certificate of appealability." See 28 U.S.C. §2253(c)(1). And even if such an appeal *did* get off the ground, it would be consolidated with the already-pending habeas appeal, see *Harisiades*, 187 F.2d at 139; *Strand*, 780 F.2d 1499, and reviewed for "abuse of discretion." *E.g.*,

Brown v. *United States*, 384 F. App'x 815, 817 (10th Cir. 2010) (Gorsuch, J.).

The Fifth Circuit's contrary rule calls for two simultaneous appellate proceedings, demanding the attention of up to six judges. Without an indicative ruling, Panel 1 (the original merits panel) would have to press forward and decide the initial appeal—even if the new evidence was outcome-determinative. Meanwhile, their colleagues on Panel 2 (the authorization panel) would have to learn the case from scratch and evaluate the new evidence without "the benefit of the district court's plenary findings." *Banister*, 590 U.S. at 517. That is the epitome of piecemeal litigation.

3. Hastening finality. Finality cuts the same way. If the new evidence here isn't the bombshell that Rivers reckons, the best way to "lend[] finality" to his conviction "within a reasonable time" would have been for the district court to say so back in 2021. *Banister*, 590 U.S. at 512. District courts are well suited to that task, with tools and experience that appellate courts lack. Instead, the lower courts sent Rivers and Texas down a path that could keep the "cloud of federal review" over Rivers's conviction for years to come. *Id.* at 523 (Alito, J., dissenting); see, *e.g.*, *In re Will*, 970 F.3d at 536 (authorization proceeding filed September 26, 2017 and closed August 5, 2020).

* * *

Had Congress wanted mid-appeal Rule 15 motions to count as second or successive petitions, "it easily could have written" such a law. *Ali* v. *Fed. Bureau of Prisons*, 552 U.S. 214, 227 (2008). But it's hard to squeeze that rule from the text of §2244(b) and its historical backdrop. And it's even harder to attribute the consequences it would entail to a Congress fo-

cused on judicial resources, efficiency, and finality. For more than two centuries, this Court has declined to "adopt an interpretation that will defeat [a statute's] own purpose, if it will admit of any other reasonable construction." *The Emily*, 22 U.S. (9 Wheat.) 381, 388 (1824). It should do the same here.

D. Treating mid-appeal Rule 15 motions as second or successive would produce perverse results.

All agree that §2244(b) kicks in after a prisoner has exhausted the opportunity for review of his initial habeas petition. But applying §2244(b)(2) to mid-appeal Rule 15 motions creates a procedural patchwork and slams the door on viable constitutional claims long before AEDPA demands.

1. Treating mid-appeal Rule 15 motions as second or successive applications creates "procedural anomalies." *Castro* v. *United States*, 540 U.S. 375, 380–81 (2003). "[T]he courts of appeals agree … that an amended petition, filed after the initial one but before judgment, is not second or successive." *Banister*, 590 U.S. at 512. And if the prisoner won on appeal, Rule 15 would also govern any post-remand motion to amend. See *Boyd* v. *Sec'y, Dep't of Corr.*, 114 F.4th 1232, 1240 (11th Cir. 2024) (Pryor, J., concurring); *Mendoza*, 81 F.4th at 468–71. Under the Fifth Circuit's approach, the very same document would be a successive application if a prisoner filed it in the district court after final judgment, but not if the prisoner filed it before final judgment or waited until after the court of appeals vacated and remanded.

2. The Fifth Circuit's rule also draws senseless distinctions between similarly situated prisoners.

Many meritorious petitions depend on new evidence. *E.g.*, *Andrus* v. *Texas*, 590 U.S. 806, 807 (2020); *Kyles* v. *Whitley*, 514 U.S. 419, 421–22 (1995). In such cases, a prisoner must usually show a "reasonable probability" that, had the new evidence emerged sooner, "the result of the [challenged] proceeding would have been different." *United States* v. *Bagley*, 473 U.S. 667, 681–82 (1985). That's a burden—but much lighter than the one imposed by AEDPA. Under §2244(b)(2)(B)(ii), a second or successive application must present facts that would "establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty." That raises the bar. No longer is it enough to "undermin[e] confidence in the outcome of the trial." *Bagley*, 473 U.S. at 678. Instead, the evidence must "establish … innocence." *Banister*, 590 U.S. at 509. And AEDPA also ratchets up the burden of proof. A "reasonable probability" is less than a preponderance. See *Kyles*, 514 U.S. at 434. But §2244(b)(2)(B)(ii) demands "clear and convincing evidence": *more* than a preponderance. *Ca. ex rel. Cooper* v. *Mitchell Bros.' Santa Ana Theater*, 454 U.S. 90, 93 n.6 (1981).

The difference between these two standards means that identically situated prisoners will face different outcomes through no fault of their own. Imagine two prisoners whose trial counsel sat on mitigating evidence that would have yielded a lighter sentence. Prisoner 1 requests his counsel's files, receives them promptly, and discovers the evidence while preparing his initial habeas petition. Prisoner 2 also requests his counsel's files, but the lawyer stonewalls for years—turning them over only on pain of disbarment, while the prisoner's initial petition is pending on appeal. Under the Fifth Circuit's rule, Prisoner 1 faces

the *Strickland* standard and may well get a lesser sentence. But Prisoner 2 is out of luck. While the evidence shows ineffective assistance, it doesn't show innocence, so he fails under §2244(b)(2)(B)(ii).

II. Alternatively, §2244(b) applies only after the initial petition is final on appeal.

The Court may also reverse for the independent reason that §2244(b) does not apply while a prisoner's initial petition is still pending on appeal. *United States* v. *Santarelli*, 929 F.3d 95, 104–05 (3d Cir. 2019); *Whab* v. *United States*, 408 F.3d 116, 118 (2d Cir. 2005). The Fifth Circuit held otherwise, declaring that that "filings introduced after a final judgment that raise habeas claims … are deemed successive." Pet. App. 10a. Contra *Banister*, 590 U.S. at 510–11. If that rule sounds familiar, it should. In *Banister*, Texas urged this Court to hold that "[e]ntry of final judgment is the dividing line between a first and second application." Brief for Respondent, *Banister* v. *Davis*, No. 18-6943 at 18. The Court declined that invitation there, and it should do the same here. In the postconviction context, this Court has long treated the end of appellate review—not the entry of final judgment—as the relevant inflection point. Far from rejecting that view, Congress embraced it throughout AEDPA, under which a state's interest in repose vests only after a prisoner has exhausted the opportunity for review.

A. Before AEDPA, courts treated the end of appellate review as the dividing line between first and successive petitions.

Article III creates "not a batch of unconnected courts, but a judicial *department* composed of 'inferior courts' and 'one supreme Court.'" *Plaut* v. *Spendthrift*

Farm, Inc., 514 U.S. 211, 227 (1995). From that structure follows "a distinction between judgments from which all appeals have been foregone or completed, and judgments that remain on appeal (or subject to being appealed)." *Id.* Only the former is "the final word of the department." *Id.* That is why this Court's "unvarying understanding of finality for collateral review purposes" has always looked to the end of appellate review. *Clay* v. *United States*, 537 U.S. 522, 527 (2003). In this context, finality attaches only "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." *Id*. at 528.

No surprise, then, that the earliest abuse-of-the-writ cases recognized that "action … on [a] second application" should turn on the "character of the court or officer to whom the first application was made, and the fullness of the consideration given to it." *Cuddy*, 40 F. at 66. What mattered to this Court in *Salinger*, for example, was that the "prior refusal" of habeas relief had been "affirmed in a considered opinion by a *Circuit Court of Appeals*"—not that a district court had entered final judgment. 265 U.S. at 226–27, 232 (emphasis added). Likewise, Justice Field explained in *Cuddy* that habeas relief was unavailable to a prisoner who had already "invok[ed] the judgment of the *appellate* court upon the record presented" and "fail[ed] therein." 40 F. at 64 (emphasis added). That implies that consequences for later abuses of the writ attached only after a case was final on appeal.

Courts continued applying abuse-of-the-writ principles by reference to appellate review right up until Congress enacted AEDPA. Take *Walker* v. *Lockhart*,

514 F. Supp. 1347 (E.D. Ark. 1981). The prisoner there sought habeas relief in 1967, lost in the district court (Henley, C.J.), and then lost again on appeal. See *id.* at 1350. When he filed "identical" claims twelve years later, the district court (Woods, J.) declined to "reac[h] the merits" of the successive petition. *Id.* If the dividing line between first and successive petitions was final judgment, one would expect Judge Woods to focus on Chief Judge Henley's 1967 opinion—not the Eighth Circuit's affirmance. Instead, Judge Woods reasoned that reconsidering the claims "would put this Court in the position of reviewing a decision *of its Court of Appeals*." *Id.* at 1352 (emphasis added). Here again, this suggests that appellate review was the dividing line for abuse-of-the-writ purposes. See also, *e.g.*, *Whitney* v. *United States*, 424 F. Supp. 1236, 1237 (E.D. Mo. 1976); *Andrews* v. *Deland*, 943 F.2d 1162, 1173 (10th Cir. 1991).

If pre-AEDPA courts thought that final judgment was what mattered for abuse-of-the-writ purposes, "there should be lots of decisions" saying so. *Banister*, 590 U.S. at 514. Instead, courts consistently spoke as though the end of appellate review marked the dividing line between first and successive petitions. Against that backdrop, a rule focused on final judgment is "bad wine of recent vintage." *Rotkiske* v. *Klemm*, 589 U.S. 8, 14 (2019) (citation omitted).

B. AEDPA itself pegs finality to the end of appellate review, not final judgment.

Numerous provisions of AEDPA treat the end of appellate review as the relevant inflection point. It would be strange if §2244(b) broke ranks and focused on the district court's entry of judgment.

AEDPA ties exhaustion to the end of state appellate review. To seek federal habeas relief, a state prisoner must first "exhaust[t] the remedies available in the courts of the State." 28 U.S.C. §2254(b)(1)(A). That means receiving not just a final judgment from the trial court, but also "invoking one complete round of the State's established appellate review process." *O'Sullivan* v. *Boerckel*, 526 U.S. 838, 845 (1999).

Section 2244 itself focuses on the end of appellate review for statute-of-limitations and tolling purposes. Under §2244(d)(1)(A), the one-year deadline for seeking federal habeas relief runs from the date "on which the [state] judgment became final by 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); see also *id.* §2263(a). And tolling works the same way. AEDPA's statute of limitations is tolled while an application for state postconviction relief is "pending." *Id.* §2244(d)(2). An application does not cease to be pending upon "a lower court's entry of judgment." *Carey* v. *Saffold*, 536 U.S. 214, 219 (2002). Rather, it remains "pending" until it "has achieved final resolution." *Id.* at 220–21; see also 28 U.S.C. §2263(b)(2).

Postconviction review of federal judgments follows the same pattern. Under §2255(f)(1), a prisoner must seek relief within one year after a federal "judgment of conviction becomes final." In that context, finality does not attach until this Court has spoken or the chance for review has run. *Clay*, 537 U.S. at 527–28.

C. A state's interest in repose does not vest until the end of appellate review.

AEDPA functions as a statute of repose. Federal habeas law gives prisoners one chance to drag state

prosecutors into federal court. After that, §2244(b)(2) tells them not to come back unless they have "a new and retroactive rule of constitutional law" or "previously undiscoverable facts" showing "innocence." *Banister*, 590 U.S. at 509. Beyond those narrow exceptions, AEDPA "effect[s] a legislative judgment" that states "should be free" from the burden of defending the same conviction twice. *CTS Corp.* v. *Waldburger*, 573 U.S. 1, 9 (2014) (cleaned up).

But Congress did not recognize a state's interest in repose while a prisoner's first petition remains pending. If that interest vested after a district court enters final judgment, the case should end there. Instead, Congress authorized "appeals from the habeas court's judgment" and "still later petitions to this Court"—treating them both as "further iterations of the first habeas application." *Banister*, 590 U.S. at 512. Since the case is "pending until the appeal is disposed of," *Mackenzie* v. *A. Engelhard & Sons Co.*, 266 U.S. 131, 142–43 (1924), the state's interest in repose vests only when the case is final on appeal.

III. The Fifth Circuit's contrary arguments fail.

A. *Gonzalez* does not control this case.

The Fifth Circuit thought that "principles" from *Gonzalez* v. *Crosby* required it to deem Rivers's motion successive. See Pet. App. 10a. Not at all. The court squeezed those principles from "a handful of sentences extracted from [a] decisio[n] that had no reason to pass on" the question presented here. *Brown* v. *Davenport*, 142 S. Ct. 1510, 1528 (2022). Nor does this case raise the circumvention concerns that motivated *Gonzalez*. Rule 15 and Rule 60(b) have little in common, and allowing mid-appeal Rule 15

motions poses even less circumvention risk than allowing the Rule 59(e) motions approved in *Banister*.

1. *Gonzalez* did not address §2242 or analyze when §2244(b) first kicks in, so it "cannot make [the Court] stop in its tracks." *Royal Canin U.S.A., Inc.* v. *Wullschleger*, — S. Ct. — (2025) (slip op. at 17).

The question in *Gonzalez* was "whether a Rule 60(b) motion filed by a habeas petitioner is a 'habeas corpus application' as the statute uses that term." 545 U.S. at 530. To answer that question, the Court explained, the "first step of analysis" is to ask whether the motion contains a habeas "claim"—"an asserted federal basis for relief" from a state conviction. *Id.* at 530. When a Rule 60(b) motion seeks to "add a new ground for relief" or relitigate the "previous resolution of a claim *on the merits*," it raises a "claim." *Id.* at 532. But that is not the case when the motion attacks "some defect in the integrity of the federal habeas proceedings." *Id.* The Rule 60(b) motion in *Gonzalez* attacked a "nonmerits aspect" of the prior habeas proceeding, so there was "no basis" to treat it like a habeas application at all. *Id.* at 533–34.

Gonzalez also reasoned that a merits-based Rule 60(b) motion is a habeas application (or at least its functional equivalent) and "should be treated accordingly" when the filing is second or successive. *Id.* at 531–32. We have no quarrel with that proposition. This case involves a Rule 15 motion, not a Rule 60(b) motion. *Gonzalez* said nothing about Rule 15 or §2242, not a single brief cited those provisions, and they did not come up at argument. Nor did *Gonzalez* implicate or address whether the dividing line between an initial petition and a "second or successive" petition is final judgment or the end of the appeal. The Court had no occasion to consider that issue be-

cause Aurelio Gonzalez filed his Rule 60(b) motion more than a year after "abandon[ing] any attempt to seek review" of the order denying his habeas petition. *Gonzalez*, 545 U.S. at 537. So unlike this case, there was no pending appeal in *Gonzalez*.

2. Nor does *Gonzalez*'s logic control. *Gonzalez* worried about circumvention because the prisoner there was relying on a generally applicable Federal Rule of Civil Procedure—not the federal habeas statute itself. But those concerns are misplaced here. When a prisoner moves to amend or supplement his initial petition, habeas law "itself contains" the pathway he "seeks to exploit." *Banister*, 590 U.S. at 530 (Alito, J., dissenting). In other words, Congress has already weighed the risks of circumvention and determined that applications "may be amended or supplemented as provided in the rules of procedure applicable to civil actions." 28 U.S.C. §2242. If §2242 is "bad policy" or "working in unintended ways," states "can ask Congress to change the law." But "this Court is not the forum for such arguments." *Am. Hosp. Ass'n* v. *Becerra*, 596 U.S. 724, 738 (2022).

In all events, mid-appeal Rule 15 motions differ from the Rule 60(b) motions at issue in *Gonzalez* "in just about every way that matters." *Banister*, 590 U.S. at 518. They were not historically deemed abusive. See *supra* §1.B.2. They are not "open-ended": they're brought within the "fixed … window" while an appeal is pending—the next phase in the "original proceeding." 590 U.S. at 519–20; see *supra* §II.A. Any appeal would be consolidated into the pending appeal. See *supra* §I.C.2. And (as we discuss next) numerous "rules suppres[s] abuse." 590 U.S. at 520. In fact, mid-appeal Rule 15 motions pose far less circumvention risk than the Rule 59(e) motions this

Court approved in *Banister*. Rule 59(e) lets prisoners raise "new arguments" based on "newly discovered or previously unavailable evidence" with the say-so of a single judge. *Banister* 590 U.S. at 508 n.2 (citation omitted). By contrast, amending mid-appeal requires at least three judges to agree that the claim is worth the candle: the district court plus a panel majority—the same lineup needed for a second or successive petition. See 28 U.S.C. §2244(b)(3)–(4).

B. The ordinary civil rules provide ample safeguards against abusive motions.

The Fifth Circuit also worried about opening the floodgates to "an unlimited number of new applications until the appeal is over." Pet. App. 8a. Even without §2244(b)(2), however, numerous barriers still incentivize prisoners to bring all their claims at once, as 20 years of experience in the Second Circuit shows.

1. Rivers's rule "maintains a prisoner's incentives to consolidate all of his claims in his initial application." *Banister*, 590 U.S. at 516. To see why, just count the hurdles that a prisoner must clear before amending his petition mid-appeal. First he needs an indicative ruling from the same judge who just ruled against him. Next he faces an absolute jurisdictional barrier: without two votes to remand, his motion to amend is going nowhere. Of course, none of that will happen unless he can show that his proposed amendments are not prejudicial, dilatory, or futile. *Foman*, 371 U.S. at 182. Then there are abuse-of-the-writ rules, *e.g.*, *Santarelli*, 929 F.3d at 106, which turn away claims that "w[ere], or could have been, raised … earlier," *James* v. *Walsh*, 308 F.3d 162, 167 (2d Cir. 2002), or whose "whose purpose is to vex, harass or delay," *Ching* v. *United States*, 298 F.3d 174, 179 (2d Cir. 2002). And that still leaves AEDPA's one-year

statute of limitations and Rule 15's relation-back requirements, see *Mayle*, 545 U.S. at 648–50, which together will doom untimely amendments.

All but the most promising claims will falter in that obstacle course—and any self-interested prisoner has good reason to avoid it. (Of course, any prisoners who would be undeterred by all of that are likely the sort of prisoners who would try their luck on §2244(b)(2) as well. Channeling *their* mid-appeal filings through the district court is far more efficient than saddling the court of appeals with them. See *supra* §I.C.1.)

2. The Second Circuit is a perfect case study. For the last two decades, courts there have applied §2244(b) only after a prisoner exhausts appellate review of his initial petition. *Whab*, 408 F.3d at 118. They have not seen a flood of mid-appeal habeas motions. Nor are they struggling to handle the motions they do receive. Courts in the Second Circuit routinely deny such motions in concise orders, *e.g.*, *Cooper* v. *United States*, 2013 WL 57043 (S.D.N.Y. Jan. 4, 2013) (two pages), issued within a matter of days, *e.g.*, *Steele* v. *United States*, 2022 WL 4292271 (S.D.N.Y. Sept. 16, 2022) (seven business days). And they often do so on threshold grounds, without requesting a response. *E.g.*, *Lewis* v. *Brown*, 2013 WL 2181520, at *6 (W.D.N.Y. May 20, 2013) (abuse of the writ). Two decades in, the sky has not fallen in the Second Circuit—and it won't fall anywhere else either.

IV. The Court should reverse and remand.

A. Under the correct standard, this is an easy case. When Rivers moved to amend in February 2021, his pending appeal barred the district court from granting the motion. See *Griggs*, 459 U.S. at 58. But Rule 62.1(a)(3) still permitted the district court to consider

the motion and determine whether it "raise[d] a substantial issue" under the Rule 15 standards. A court that had "already analyzed" Rivers's initial petition would have no trouble answering that question. *Magwood* v. *Patterson*, 561 U.S. 320, 340 n.15 (2010).

Amendment is plainly warranted here. When the district court denied relief in Rivers's initial habeas action, it held that Rivers had not shown his counsel's performance was "so flawed that it prejudiced his case." *Davis*, 2018 WL 4443153, at *5, *recommendation adopted* 2018 WL 4409830, at *1 (N.D. Tex. Sept. 17, 2018). But the state investigator's report tips the balance. It shows that counsel had "exculpatory evidence in their possession" yet failed to use it, J.A. 68—a classic *Strickland* violation. *E.g.*, *Richards* v. *Quarterman*, 566 F.3d 553, 568 (5th Cir. 2009). And it also suggests that the state "falsely pursued child pornography charges" based on evidence its "own investigators" had deemed "NOT CHILD PORN." J.A. 74. That violates due process. See *Giles* v. *Maryland*, 386 U.S. 66, 74–80 (1967). All of that makes this a straightforward case under Rule 15.

B. The Fifth Circuit deemed it "unclear" what relief Rivers could obtain now that his initial habeas petition has been denied, Pet. App. 3a n.2. The answer is simple. If this Court reverses, the district court can grant Rivers effective relief by reopening the judgment denying his initial habeas petition. While Texas will be free to oppose such relief below, it has waived any objection here. See Sup. Ct. R. 15.2.

The district court's error skewed the proceedings that followed. Rather than considering Rivers's motion on the merits as part of his original habeas action, the court opened a new action and ultimately held that §2244(b) left it "without jurisdiction." Pet.

App. 19a. That was wrong—and the mistake had consequences. Rivers tried to amend his initial petition in February 2021, a full year before the last filings were submitted in his initial habeas appeal. Compare J.A. 5, *with* J.A. 9. But for that error, the district court could have issued an indicative ruling in the original habeas action, inviting the Fifth Circuit to remand well before the panel picked up a single brief. Instead, with no indicative ruling, the panel affirmed the denial of habeas relief without addressing the newly discovered evidence.

On remand, the district court can give Rivers effective relief by setting aside the judgment denying his habeas petition on the ground that its error undermined "the integrity of" his original habeas action. *Gonzalez*, 545 U.S. at 532 (addressing integrity-based Rule 60 motions). The court will then be free to consider Rivers's motion on the merits for the first time and to let Rivers amend in light of the newly discovered evidence.

CONCLUSION

The Court should reverse and remand.

Respectfully submitted,

Peter A. Bruland
Counsel of Record
Virginia A. Seitz
Benjamin M. Mundel
Cody M. Akins
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
pbruland@sidley.com

January 21, 2025

Jacob Steinberg-Otter
Kimberly R. Quick*
David H. Kinnaird
Sasha S. Bryski*
Lily F. Holmes
Scott Lowder
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005

Jorge R. Pereira
SIDLEY AUSTIN LLP
1001 Brickell Bay Dr.
Suite 900
Miami, FL 33131
(305) 391-5100

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

Counsel for Petitioner

APPENDIX

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APPENDIX

28 U.S.C. § 2106. Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. § 2242. Application

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

It may be amended or supplemented as provided in the rules of procedure applicable to civil actions.

If addressed to the Supreme Court, a justice thereof or a circuit judge it shall state the reasons for not making application to the district court of the district in which the applicant is held.

28 U.S.C. § 2244. Finality of determination

* * *

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

* * *