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 OF *AMICI CURIAE* FORMER FEDERAL JUDGES SUPPORTING PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are 17 former Article III judges[2] who have devoted much of their professional lives to the criminal justice system and who maintain a continuing interest in restoring a system of justice that is fair both in practice and procedure. Collectively, they served decades in the federal judiciary. Based on their experience as former Article III judges, *amici* submit this brief to urge the Court to reverse the judgment of the Court of Appeals.

Amici are:

Judge Mark. W. Bennett (Ret.)—District Judge (1994-2015), Chief Judge (2000-2007), Senior Judge (2015-2019) for the U.S. District Court for the Northern District of Iowa; Magistrate Judge (1991-1994) for the U.S. District Court for the Southern District of Iowa.

Judge B. Michael Burrage (Ret.)—District Judge (1994-2001), Chief Judge (1996-2001) for the U.S. District Court for the Eastern District of Oklahoma; District Judge (1994-2001) for the U.S. District Court for the Northern District of Oklahoma; District Judge (1994-2001) for the U.S. District Court for the Western District of Oklahoma.

Judge Robert J. Cindrich (Ret.)—District Judge (1994-2004) for the U.S. District Court for the Western District of Pennsylvania.

Judge Christopher F. Droney (Ret.)—Circuit Judge (2011-2019), Senior Judge (2019-2020) for the U.S. Court of Appeals for the Second Circuit; District Judge (1997-

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[1] No counsel for a party authored this brief in whole or in part. No person other than *Amici* or its counsel made a monetary contribution to its preparation or submission.

[2] The views in this brief are those of the *Amici Curiae* only and not necessarily of any institutions with which they are or have been affiliated.

2011) for the U.S. District Court for the District of Connecticut.

Judge Jeremy D. Fogel (Ret.)—District Judge (1998-2014), Senior Judge (2014-2018) for the U.S. District Court for the Northern District of California.

Judge W. Royal Furgeson, Jr. (Ret.)—District Judge (1994-2008), Senior Judge (2008-2013) for the U.S. District Court for the Western District of Texas.

Judge Nancy M. Gertner (Ret.)—District Judge (1994-2011), Senior Judge (2011) for the U.S. District Court for the District of Massachusetts.

Judge Richard J. Holwell (Ret.)—District Judge (2003-2012) for the U.S. District Court for the Southern District of New York.

Judge Alex Kozinski (Ret.)—Circuit Judge (1982-2017), Chief Judge (2007-2014) for the U.S. Court of Appeals for the Ninth Circuit.

Judge Timothy K. Lewis (Ret.)—Circuit Judge (1992-1999) for the U.S. Court of Appeals for the Third Circuit; District Judge (1991-1992) for the U.S. District Court for the Western District of Pennsylvania.

Judge Beverly B. Martin (Ret.)—Circuit Judge (2010-2021) for the U.S. Court of Appeals for the Eleventh Circuit; District Judge (2000-2010) for the U.S. District Court for the Northern District of Georgia.

Judge John S. Martin Jr. (Ret.)—District Judge (1990-2003), Senior Judge (2003) for the U.S. District Court for the Southern District of New York.

Judge Stephen M. Orlofsky (Ret.)—District Judge (1996-2003), Magistrate Judge (1976-1980) for the U.S. District Court for the District of New Jersey.

Judge Shira A. Scheindlin (Ret.)—District Judge (1994-2011), Senior Judge (2011-2016) for the U.S. District Court for the Southern District of New York;

Magistrate Judge (1982-1986) for the U.S. District Court for the Eastern District of New York.

Judge John D. Tinder (Ret.)—Circuit Judge (2007-2015), Senior Judge (2015) for the U.S. Court of Appeals for the Seventh Circuit; District Judge (1987-2007) for the U.S. District Court for the Southern District of Indiana.

Judge Thomas I. Vanaskie (Ret.)—Circuit Judge (2010-2018), Senior Judge (2018-2019) for the U.S. Court of Appeals for the Third Circuit; District Judge (1994-2010), Chief Judge (1999-2006) for the U.S. District Court for the Middle District of Pennsylvania.

Judge T. John Ward (Ret.)—District Judge (1999-2011) for the U.S. District Court for the Eastern District of Texas.

SUMMARY OF ARGUMENT

This case presents a question of critical importance to federal judges nationwide. *Amici* urge the Court to hold that the "second or successive" bar in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") does not apply to requests to supplement or amend a habeas application that is still pending on direct appeal.

This Court's precedents do not squarely answer the question presented. If anything, they suggest that the entry of a "final" judgment is not necessarily the trigger point for the second-or-successive bar. The bar does not apply, for example, to motions for reconsideration filed shortly after final judgment is entered. *Banister v. Davis*, 590 U.S. 504, 507 (2020). It does not apply to all Rule 60(b) motions to reopen a judgment either. *Buck v. Davis*, 580 U.S. 100, 128 (2017); *Gonzalez v. Crosby*, 545 U.S. 524, 535 & n.5 (2005). And no one would dispute that habeas petitions may be freely amended if the habeas applicant wins the appeal and the case is remanded for further proceedings in the district court. *Cf. United States v. Santarelli*, 929 F.3d 95, 106 (3d Cir. 2019).

Nor does AEDPA define "second or successive." As this Court has explained, the phrase "second or successive" is a "term of art" without an established ordinary meaning. *See Banister*, 590 U.S. at 511. The Court, therefore, must decide how the phrase applies in this situation by looking to AEDPA's "statutory aims." *Id.* at 513.

One of Congress's overriding purposes in enacting AEDPA was to reduce the burdens on courts and judges. *Id.* at 515. This Court should avoid construing AEDPA in a manner that would impose additional burdens on courts. Here, as in *Banister*, applying the-second-or-successive bar, which adds a step—directing habeas applicants to seek permission to file from the court of appeals—would be the more burdensome interpretation. Requiring the second-or-successive certification step for every run of the mill request to supplement or amend a habeas petition burdens circuit courts that are unfamiliar with the case or its background, and which often must invest additional resources to construe filings in favor of a *pro se* litigant. Because district courts are best positioned to address and dispose of these types of post-appeal filings, and can readily handle them using tools already at their disposal without resort to the "second or successive" bar, the best place to direct these filings is to the district courts.

ARGUMENT

THE COURT SHOULD CONSTRUE AEDPA TO MINIMIZE THE BURDEN ON THE JUDGES WHO MUST REVIEW HABEAS FILINGS

As former judges who have dealt with numerous filings by habeas petitioners in both district and appellate courts, *amici* believe that where AEDPA's text does not furnish a clear definition, it should be construed to minimize the burden on courts. That burden is virtually always minimized where requests for action on habeas applications are channeled, in the first instance, to district

courts. Congress recognized that fact in AEDPA by enacting the certificate of appealability ("COA") requirement. *See Miller–El v. Cockrell*, 537 U.S. 322, 337-38 (2003). That requirement reflects Congress's view that district courts should, where possible, protect the courts of appeals from frivolous filings by habeas petitioners.

Moreover, for a variety of reasons, channeling these filings to district courts will lessen the burden on the judicial system as a whole. The district court that has just denied a habeas petition that is now on appeal will have the benefit of having already seen the applicant's petition and will therefore be more familiar with the facts of the case and the context of any follow-on filing. Additionally, district judges can act without needing to obtain consensus from a three-judge panel that must get up-to-speed about a case before it can determine whether to authorize a second-or-successive habeas application. District courts also have significant power to control their dockets and ensure the orderly and expeditious resolution of the matters before them. District courts are highly capable of determining whether a habeas petition is frivolous. Indeed, they do so all the time—with, for instance, *pro se* filings and original habeas petitions.

To illustrate the different burdens on district courts and appellate courts posed by these filings, consider a request to amend or supplement a petition analogous to the one at issue in this case: a request in which the petitioner asserts that he has discovered a "factual predicate" for a meritorious claim that "could not have been discovered previously." 28 U.S.C. § 2244(b)(2)(B). Some court is going to have to figure out whether this factual predicate is genuinely "new" and likely to mean the petition would be meritorious. If the second-or-successive bar applies, that will have to be three court-of-appeals judges who likely have never seen any facet of this habeas application before. To decide whether to permit

the filing, they will have to study the record, study the facts (all potentially presented in a difficult-to-parse *pro se* filing), and decide both whether this factual predicate is new and whether it will likely result in relief. In contrast, if the second-or-successive bar does *not* apply, the court that decides whether to permit the amendment or supplement will be a single district judge—the judge who already knows the case well and is therefore best situated to be the frontline decisionmaker. She will readily and in short order be able to determine whether the new material warrants serious consideration.

Indeed, district judges possess institutional competencies that make them better suited to hear these applications. For instance, district judges have vast experience in separating relevant and irrelevant facts. District judges also have more control over their docket and schedule. Finally, appellate courts are by default courts of review, not courts of first view. By sending filings to appellate courts for first view, "second or successive" certification displaces that default rule, making inefficiencies more likely and increasing the burden on appellate judges.

That the relevant filings might be *pro se* only further exacerbates the difference in the burdens. This Court has long held that "a *pro se* complaint, 'however inartfully pleaded,' must be held to 'less stringent standards than formal pleadings drafted by lawyers.'" *Estelle v. Gamble*, 429 U.S. 97, 107 (1976) (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972)). Some courts hold that "[*p*]*ro se* habeas petitioners are to be afforded 'the benefit of any doubt.'" *Brown v. Roe*, 279 F.3d 742, 746 (9th Cir. 2002) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir.1985)). A three judge panel trying to provide "the benefit of any doubt" to a *pro se* litigant who insists new facts have come to light that show his innocence confronts a significant investment of time and resources.

Members of this Court acknowledged the differences in burdens during oral argument in *Banister v. Davis*. In *Bannister*, the petitioner filed motions containing several hundred pages of a stylized play, including stage directions. At oral argument, Justice Gorsuch questioned, "I would think the second time around, the district court might be righteously indignant and have very little trouble denying that … this is more efficient than allowing the court of appeals—forcing the court of appeals … to decide whether it's a true Rule 59 or a fake one." Oral Arg. Tr. 31:5-8, 31:13-15, 31:21-22, *Banister v. Davis*, 590 U.S. 504 (2020) (No. 18-6943).

The burden imposed on the courts of appeals by requests to file second or successive habeas petitions is already significant. The courts of appeals decide roughly 40,000 appeals annually, and approximately 3,200 original proceedings. U.S. Courts, Federal Judicial Caseload Statistics (2024), https://bit.ly/4gWYY2Z. Of the original proceedings, about 1,900 of them (59%) are requests to file a second or successive habeas application. *Id.* As these numbers show, requests to file a second or successive habeas applications are already a material drag on the courts of appeals. A rule that increases the number of requests would only further burden these courts, thwarting one of Congress's key purposes in enacting AEDPA.

Finally, it bears emphasis that a habeas petitioner who seeks to supplement or amend a habeas application while it is on appeal is likely to be barred from doing so for non-AEDPA reasons. As the petitioner states, the best that such an applicant may be able to obtain is "an indicative ruling under Federal Rule of Civil Procedure

62.1." Pet. 3, 29.[3] The bottom line, however, is that AEDPA's "second or successive" bar should have no relevance to whether a habeas petitioner can obtain relief on a still-live habeas petition that is pending on appeal.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[3] As the rule itself states, it is a method of obtaining action from a district court "that the court lacks authority to grant because of an appeal that has been docketed and is pending." Fed. R. Civ. P. 62.1. And district courts are explicitly authorized to "defer" or "deny" such motions under that rule. *Id.*