No. 23-1345

IN THE
Supreme Court of the United States

DANNY RICHARD RIVERS,
Petitioner,

v.

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

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

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

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QUESTION PRESENTED

Whether an amendment to an initial application for habeas relief while an appeal from the judgment on that initial habeas application is still pending counts as a second or successive habeas petition under 28 U.S.C. § 2244(b).

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INTEREST OF *AMICI CURIAE*[1]

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

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SUMMARY OF ARGUMENT

I. Amendments to an initial habeas application that raise new claims or newly discovered evidence are not "second or successive application[s]" within the meaning of 28 U.S.C. § 2244(b) if they are made while the initial habeas application remains pending on appeal. This Court has held that, to fall within Section 2244(b), a filing must be in substance, or functionally similar to, an "application," as that term is used in the habeas statutes. An "application" for habeas relief institutes a new habeas action and presents claims for relief from conviction; a post-complaint filing gets Section 2244(b) treatment only if it functionally commences a second habeas action. A mid-appeal amendment that seeks to add a claim to a first application, or that adduces new evidence in support of existing claims, does not functionally commence a second habeas action and is not a "second or successive application" within the meaning of the statute. That understanding is consistent with other provisions of the habeas statute, which specify that habeas judgments are not final until appellate review concludes. Historical

habeas practice, from which the term "second or successive application" in Section 2244(b) draws its meaning, confirms this rule; questions about whether litigation was abusive arose when claimants undertook litigation after appellate proceedings finished. Thus, an amendment to an initial habeas application does not require Section 2244(b) treatment when it is filed before appellate review of the initial application is complete.

II. Tying the successiveness determination to the conclusion of appellate review also comports with the gatekeeping purposes of Section 2244(b). The pendency of an appeal is a narrow window that offers little opportunity to abusively file serial petitions. Moreover, the Federal Rules of Civil and Appellate Procedure already include adequate limitations to efficiently address any mid-appeal amendments to an initial habeas application made while that application remains pending on review. Their presence (and invocation pursuant to Section 2242) ensures that petitioner's Section 2244(b) interpretation does not open the floodgates to abusive litigation. Petitioner's interpretation thereby conserves judicial resources, avoids piecemeal litigation, and promotes finality within a reasonable time. In other words, it does not offend but instead serves the purposes of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") generally or Section 2244(b) specifically.

ARGUMENT

Section 2244(b) bars a claimant from filing "claim[s] presented in a second or successive habeas corpus application" without first obtaining "an order authorizing" such a filing from "the appropriate court of appeals." 28 U.S.C. § 2244(b)(2), (3); *accord Gonzalez* v. *Crosby*, 545 U.S. 524, 530 (2005). This rule applies to claims raised in new habeas petitions and through certain post-judgment motions, and it imposes severe restrictions on second or successive habeas applications. *Id.* at 529–530. If a claim subject to Section 2244(b) "was also presented in a prior application," then it "must be dismissed; if not, the analysis proceeds to whether the claim satisfies one of two narrow exceptions" set out in Section 2244(b)(2)(A)–(B). *Id.* at 530. Thus, if a post-judgment motion "constitutes a second or successive petition, then all of § 2244(b)'s restrictions kick in," and they limit review of claims raised in that posture. *Banister* v. *Davis*, 590 U.S. 504, 511 (2020). Conversely, if the motion "is instead part of resolving a prisoner's first habeas application—then § 2244(b)'s requirements never come into the picture." *Ibid.*

This case requires the Court to determine whether Section 2244(b) mandates successive petition treatment for new claims raised in an amendment to an initial habeas application that is still pending on appeal. The United States Court of Appeals for the Fifth Circuit held that it does, but such treatment is incompatible with the statutory text and its semantic context. *See Magwood* v. *Patterson*, 561 U.S. 320, 331–332 (2010). It is also "inconsistent with" "historical habeas doctrine and practice" and Section 2244(b)'s "own purposes"—the "two main places" where "this Court has

looked for guidance" when deciding whether a second-in-time filing is successive. *Banister*, 590 U.S. at 511–512. The proper rule here is that declared by the United States Court of Appeals for the Second Circuit: mid-appeal amendments are not part of "second or successive" applications if the initial judgment is pending on appeal. *See Whab* v. *United States*, 408 F.3d 116, 118–120 (2d Cir. 2005); *Ching* v. *United States*, 298 F.3d 174, 177–179 (2d Cir. 2002) (Sotomayor, J.).

I. THE MEANING OF "SECOND OR SUCCESSIVE" DEMONSTRATES THAT SECTION 2244(B) DOES NOT APPLY TO A HABEAS CLAIM RAISED WHILE AN APPEAL FROM AN INITIAL APPLICATION IS PENDING.

A. The Text of Section 2244(b) Establishes that There Is a "Second or Successive *Application*" Only if a Filing Effectively Commences a New Action for Relief.

As with all questions of statutory interpretation, this Court "begin[s] with the text." *Magwood*, 561 U.S. at 331. Indeed, *Banister* instructs that the answer to whether a habeas application is second or successive lies in part in Section 2244(b)'s "own purposes," 590 U.S. at 512, and "[t]he best evidence of th[ose] purpose[s] is the statutory text adopted by both Houses of Congress and submitted to the President," *W. Va. Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 98 (1991). The text of Section 2244(b) and that of its statutory neighbors confirms that there is no "second or successive *application*" unless a filing effectively commences a new action for habeas relief. By contrast, those same textual indicators demonstrate what any ordinary reader

would intuit: that filings amending an initial application submitted while a habeas judgment is pending on appeal are not "second or successive application[s]."

The restrictions of Section 2244(b) apply only to "[a] claim presented in a second or successive habeas corpus *application*." 28 U.S.C. § 2244(b)(1), (2) (emphasis added). The phrase "second or successive application," as used in the statute, "is a 'term of art,' which 'is not self-defining.'" *Banister*, 590 U.S. at 511 (quoting *Slack* v. *McDaniel*, 529 U.S. 473, 486 (2000), and *Panetti* v. *Quarterman*, 551 U.S. 930, 943 (2007)); *accord Magwood*, 561 U.S. at 332. And this Court has repeatedly admonished that Section 2244(b) "does not simply refer to all habeas filings made second or successively in time, following an initial application." *Banister*, 590 U.S. at 511 (internal quotation marks and citations omitted); *accord Magwood*, 561 U.S. at 331–332.

Because, "as a textual matter, § 2244(b) applies only where the court acts pursuant to a prisoner's application for a writ of habeas corpus," "the first inquiry is whether the subsequent filing is a 'habeas corpus application' as the statute uses that term." *Gonzalez*, 545 U.S. at 530 (citation omitted). This Court's precedents identify two characteristics of habeas corpus applications. First, an "application must contain one or more 'claims'"—i.e., one or more "federal bas[e]s for relief from a state court's judgment of conviction." *Ibid.* Second, "an application for habeas corpus relief" is "the equivalent of a complaint in an ordinary civil case" that commences a suit. *Woodford* v. *Garceau*, 538 U.S. 202, 208 (2003); *McFarland* v. *Scott*, 512 U.S. 849, 862 (1994) (O'Connor, J., concurring in part and dissenting in part) ("an application for habeas corpus * * * is the

mechanism for *instituting a proceeding* under the statute") (emphasis added). Indeed, from the Judiciary Act of 1793, "an application for habeas corpus" has been the means of instituting a proceeding to review the decision to imprison an individual. *See Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807).

The habeas statutes are uniform in this usage. This Court presumes "that a given term is used to mean the same thing throughout a statute." *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994). The habeas statutes repeatedly describe an "application" as the means for instituting a proceeding for relief from conviction. Section 1914(a) explains that an "application for a writ of habeas corpus" is a mechanism for "instituting [such a] civil action, suit or proceeding in [federal district] court." 28 U.S.C. § 1914(a). Section 2254 speaks of "a proceeding instituted by an application for a writ of habeas corpus." *Id.* § 2254(e)(1). Section 2251 provides that "a habeas corpus proceeding [in federal court] is not pending until the application is filed." *Id.* § 2251(a)(2); *see also id.* § 2242 (prescribing the content of the application that initiates the action). Section 2244 defines the limitations period in which an application must be filed to commence a habeas action. *Id.* § 2244(d). And, in capital cases, Section 2263 prescribes the time period in which "[a]ny application under this chapter for habeas corpus relief under section 2254 must be filed in the appropriate district court." *Id.* § 2263(a). The consistent usage of the term "application" in these statutes suggests that the term "application" in Section 2244(b) likewise refers to a filing that commences a new habeas action.

Even if a filing is not *in form* an "application" that institutes a new habeas action, the restrictions of Section 2244(b) apply if a pleading is "*in substance* a successive habeas petition and should be treated accordingly." *Gonzalez*, 545 U.S. at 531 (emphasis added). But, as *Gonzalez* demonstrates, to be a habeas application, a filing must effectively initiate a new habeas action to trigger the limitations of Section 2244(b). For example, in the context *Gonzalez* considered—where the initial application was finally resolved and appellate remedies exhausted—a motion under Federal Rule of Civil Procedure 60(b) that asserts claims for relief from a state court conviction would effectively constitute a second or successive petition. *See* 545 U.S. at 531 ("A habeas petitioner's filing that seeks vindication [under Rule 60(b)] is, if not in substance a 'habeas corpus application,' at least similar enough that failing to subject it to the same requirements would be 'inconsistent with' the statute."); *see also Calderon* v. *Thompson*, 523 U.S. 538, 553 (1998) ("In a § 2254 case, a prisoner's motion to recall the mandate on the basis of the merits of the underlying decision can be regarded as a second or successive application for purposes of § 2244(b).").

Accordingly, the inquiry under Section 2244 is whether a subsequent filing is tantamount to "a second or successive application" distinct from "a prior application." 28 U.S.C. § 2244(b)(1), (2). That requires that the pleading asserting claims for relief would effectively (if not formally) institute a "second or successive" habeas corpus action.

The textual requirement of "a second or successive application" is not met when a claimant adds a claim

to an initial habeas application while it remains pending on appeal. An appeal is merely a continuation of the original action. *See Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 175 (1803) ("It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause."); *Mackenzie* v. *A. Engelhard & Sons Co.*, 266 U.S. 131, 142–143 (1924) ("An appeal is a proceeding in the original cause and the suit is pending until the appeal is disposed of."). A mid-appeal amendment of the original action is not in substance, or functionally similar to, the commencement of a new habeas action.

Therefore, amendments attempted during the pendency of appellate proceedings are not second or successive applications within the meaning of Section 2244(b).

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

In addition to the text of Section 2244(b) itself, "the statutory context" illuminates the meaning of Section 2244(b) and the concepts of finality it protects. *Magwood*, 561 U.S. at 332. The semantic context of Section 2244(b) confirms that a mid-appeal amendment to an initial habeas application while an appeal of the judgment on the initial application is pending is not analyzed under the successive petition rules.

There is a background principle that successive petition treatment is pegged to a precise moment of finality, and that precise moment of finality is presumptively the conclusion of the appellate proceeding. And when Congress wanted to deviate from that presump-

tive timing, it said so expressly. That is why Section 2266—which applies to states that "opt in" to stronger procedural defenses in exchange for more generous right-to-counsel protection—expressly adjusts the moment Section 2244(b) kicks in. Specifically, Section 2266(b)(3)(B) says that "no amendment to an application for a writ of habeas corpus under this chapter shall be permitted after the filing of the answer to the application, except on the grounds specified in Section 2244(b)." Otherwise, Section 2244(b) would be effectively inoperative in these circumstances until the appeal concludes because that is when, for the purposes of habeas analysis, finality formally attaches.

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

Section 2244(d)(2) also references the same level of finality by providing that "[t]he time during which a

properly filed *application* for State post-conviction or other collateral review with respect to the pertinent judgment or claim *is pending* shall not be counted toward any period of limitation under this subsection." *Id.* § 2244(d)(2) (emphasis added). And this Court has held that a state court "application" for post-conviction review "is pending as long as the ordinary state collateral review process is 'in continuance,'" meaning that "until the application has achieved final resolution through the State's post-conviction procedures, by definition it remains 'pending.'" *Carey* v. *Saffold*, 536 U.S. 214, 219–220 (2002). Because "the term 'application' cannot be defined in a vacuum," *Magwood*, 561 U.S. at 332, this Court should construe the term "second or successive application" in Section 2244(b) in the same manner. The initial habeas application is still pending if it is still on appeal; thus, all appellate proceedings concerning an initial habeas application must conclude before another application can be deemed second or successive.

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

Similarly, the post-conviction provisions dealing with federal sentences indicate that finality attaches at the conclusion of appellate review. For example, mirroring Section 2244, Section 2255 provides for "[a]

1-year period of limitation" that is triggered by "the date on which the judgment of conviction becomes final." 28 U.S.C. § 2255(f)(1). This Court has held that in this "postconviction * * * context[,] * * * finality has a long-recognized, clear meaning: Finality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires." *Clay* v. *United States*, 537 U.S. 522, 527 (2003). And Section 2255 refers to Section 2244's requirements for filing "second or successive motions," 28 U.S.C. § 2255(h), demonstrating Congress's intent to treat finality the same under both sections of the habeas statute.

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

In light of the foregoing statutory context, in which finality refers to the conclusion of appellate review, the proper interpretation of a "second or successive habeas corpus application" is a second-in-time filing that effectively initiates a new habeas proceeding. In other

words, it is a second (or later) filing seeking habeas relief submitted *after* a district court's judgment on the initial habeas application is no longer pending on appeal. 28 U.S.C. § 2244(b)(1) (emphasis added).

C. The Term "Second or Successive" Takes Its Meaning from Prior Decisional Law that Treats Mid-Appeal Amendments as Part of the Same Application.

AEDPA generally, and § 2244(b) specifically, incorporates "historical habeas doctrine and practice" that "is 'given substance in [the Court's] prior habeas corpus cases.'" *Banister*, 590 U.S. at 512 (quoting *Slack*, 529 U.S. at 486, and *Panetti*, 551 U.S. at 944). In this case, the term "second or successive" takes its meaning from a developed body of decisional law confirming that mid-appeal amendments are part of the same application as pending in the appellate courts.

The relationship between antecedent decisional law and the meaning of statutes that incorporate its terms is not unique to AEDPA or the habeas context. "Congress is understood to legislate against a background of common-law adjudicatory principles." *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 108 (1991); *accord Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952) ("Statutes which invade the common law * * * are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident."); Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts*, 318 (2012) ("Statutes will not be interpreted as changing the common law unless they effect the change with clarity."). "'Where Congress uses terms that have accumulated settled meaning under * * * the common law, a court

must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.'" *Kungys* v. *United States*, 485 U.S. 759, 770 (1988) (citing *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 329 (1981)).

Here, pre-statutory abuse-of-the-writ decisions inform Section 2244(b)'s reference to the second-or-successive provision. Accordingly, to determine whether a filing equates to a second or successive habeas "application" within the meaning of Section 2244(b), this Court considers whether that "type of later-in-time filing would have 'constituted an abuse of the writ, as that concept is explained in our * * * cases'" predating AEDPA. *Banister*, 590 U.S. at 512–513 (quoting *Panetti*, 551 U.S. at 947). Under those informative "historical precedents," *id.* at 513, amendments made while a habeas application remained pending on appeal were not considered to abuse the writ—and consequently should not be viewed as "second or successive applications" within the meaning of Section 2244(b).

Historically, the abuse-of-the-writ doctrine performed the function that Section 2244(b) now serves. Because "[a]t common law, res judicata did not attach to a court's denial of habeas relief" and, accordingly, such a denial "could not be reviewed," "[s]uccessive petitions served as a substitute for appeal." *McCleskey* v. *Zant*, 499 U.S. 467, 479 (1991) (citations omitted). After Congress first provided for appellate review in habeas cases in 1867, *Felker* v. *Turpin*, 518 U.S. 651, 660 (1996), "courts began to question the continuing validity of the common-law rule allowing endless successive petitions," *McCleskey*, 499 U.S. at 479.

The canonical successive-application precedents, which predicate the meaning of "second or successive"

in Section 2244(b), demonstrate that habeas claimants who added claims while the initial petition was pending on appeal did not abuse the writ. *See* Pet. Br. 27–31.

The salient moment of finality for successive petition treatment was at the conclusion of the appeal. Accordingly, early pre-statutory decisions consistently measured abuse of the writ against the entirety of the first proceeding, including any appeal. For example, in *Salinger* v. *Loisel*, the Court observed that "a refusal to discharge on one application is [not] without bearing or weight when a later application is being considered." 265 U.S. 224, 230 (1924). Turning to the facts before it, the Court observed that "the prior refusal to discharge * * * was affirmed in a considered opinion by a Circuit Court of Appeals," and "[h]ad the District Court disposed of the later applications on that ground, its discretion would have been well exercised" and "sustain[ed]" by this Court. *Id.* at 232.

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

Ex parte Cuddy, decided by Justice Field and cited approvingly in *Salinger*, likewise shows that courts have looked to the finality of a prior application following appellate review before determining abuse of the

writ. 40 F. 62 (C.C.S.D. Cal. 1889), *quoted in* 265 U.S. at 231–232. In *Cuddy*, the applicant's first habeas application was denied and this Court affirmed that denial. 40 F. at 63. Thereafter, the applicant filed a second habeas application, "suppl[ying] what was omitted in his [first application] record." *Id.* at 64. In denying the second application, Justice Field looked to the entirety of the proceeding on the first application, including this Court's decision on appeal, which featured heavily in Justice Field's analysis.

Justice Field stressed the importance of "the fullness of the consideration given to" the first application and explained that "an ordinary justice would [hardly] feel like disregarding and setting aside the judgment of a magistrate like Chief Justice Marshall, or Chief Justice Taney, who had refused an application for a writ *after full consideration*." *Id.* at 66 (emphasis added). Justice Field also suggested that the outcome in *Cuddy* might have been different had the applicant "not * * * appealed from the refusal of the district court" to grant the first application and received a final judgment after appellate review. *Ibid.* And while acknowledging "that the writ may often become an instrument of oppression" should an applicant be permitted to "renew" his application "indefinitely," Justice Field recognized that such concerns would be present only after an applicant "fails on appeal." *Id.* at 65. Thus, in these early cases, abuse of the writ was measured against the entirety of the first proceeding and finality did not attach until the conclusion of appellate proceedings.

More recent abuse-of-the-writ-era decisions remained unconcerned about activity during the pendency of appeal. For example, in *Harisiades* v.

Shaughnessy, the petitioner sought to amend his habeas application while its denial was pending on appeal. 90 F. Supp. 431, 432 & n.2 (S.D.N.Y. 1950); *see also* Pet. Br. 28–29. The district court denied the amendment on the merits, *Harisiades*, 90 F. Supp. at 432–433, and the Second Circuit, after consolidating the appeal with the previously pending appeal from the initial habeas application, affirmed, *United States ex rel. Harisiades* v. *Shaughnessy*, 187 F.2d 137, 139–140, 142 (2d Cir. 1951). This Court also affirmed on the merits. *See Harisiades* v. *Shaughnessy*, 342 U.S. 580, 583 n.4 (1952). Neither this Court nor the lower courts (and none of the parties) in *Harisiades* even suggested that the mid-appeal amendment was abusing the writ. *Id.*; 187 F.2d at 139–140, 142; 90 F. Supp. at 439.

Strand v. *United States*, 780 F.2d 1497 (10th Cir. 1985), provides another example. *See also* Pet. Br. 29–30. There too, the petitioner filed a motion to amend the initial habeas application while the district court's judgment on that application was on appeal. *Strand*, 780 F.2d at 1498–1499. The district court denied the motion on the merits, and the Tenth Circuit, after consolidating the appeal of that decision with the initial-application appeal, affirmed on the merits. *Id.* at 1499–1500. Neither court characterized the mid-appeal motion as an abuse of the writ. *Id.* at 1500. This practice of addressing attempted mid-appeal amendments on the merits without treating them as abusing the writ continued for decades. *See* Pet. Br. at 29–31 (providing other examples).

These pre-statutory abuse-of-the-writ decisions inform the meaning of "second or successive application" in Section 2244(b) because they embody the general

principle that there is "a distinction between judgments from which all appeals have been forgone or completed, and judgments that remain on appeal." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995). As this Court explained, "[w]ithin th[e] hierarchy [created by Article III], the decision of an inferior court is not (unless the time for appeal has expired) the final word of the [judicial] department as a whole." *Ibid.* That is why this Court in *Banister* emphasized that "*appeals from the habeas court's judgment* (or still later petitions to this Court) are not second or successive; rather, they are further iterations of the first habeas application." 590 U.S. at 512 (emphasis added). And, if there is no final determination on an initial application while an appeal is pending, then a claim raised before appellate review concludes cannot be given successive-claim treatment. *See* 28 U.S.C. § 2244(b).

Other historical precedent establishes that Congress legislated a rule under which new claims are given successive-petition treatment only after appellate review of the initial claims concludes. For example, this Court in *Banister* cited *Williamson* v. *Rison* and *Brewer* v. *Ward* to demonstrate that "decisions abound dismissing Rule 60(b) motions for" raising repetitive claims. *Banister*, 590 U.S. at 519 (citing 1993 WL 262632, at *1 (9th Cir. July 9, 1993), and 1996 WL 194830, at *1 (10th Cir. Apr. 22, 1996)). The Court also noted that *Brewer* "collect[ed] cases from multiple Circuits" that provided additional support for its conclusion about Rule 60(b) motions. *Ibid.* (citing *Brewer*, 1996 WL 194830, at *1). But *Williamson*, *Brewer*, and nearly every one of the pre-AEDPA cases cited in *Brewer* affirmed a denial of a Rule 60(b) motion after

the previous habeas appeal had concluded. *See Williamson*, 1993 WL 262632, at *1; *Brewer*, 1996 WL 194830, at *1; *see also Guinan* v. *Delo*, 5 F.3d 313, 315 (8th Cir. 1993) (affirming denial of a Rule 60(b) motion after previous habeas appeal concluded); *Williams* v. *Whitley*, 994 F.2d 226, 229 (5th Cir. 1993) (same); *Clark* v. *Lewis*, 1 F.3d 814, 819 (9th Cir. 1993) (same); *May* v. *Collins*, 961 F.2d 74, 75 (5th Cir. 1992) (same); *Robison* v. *Maynard*, 958 F.2d 1013, 1015 (10th Cir. 1992) (same); *Blair* v. *Armontrout*, 976 F.2d 1130, 1133 (8th Cir. 1992) (same); *Bolder* v. *Armontrout*, 983 F.2d 98, 99 (8th Cir. 1992) (same); *Landano* v. *Rafferty*, 897 F.2d 661, 665–666 (3d Cir. 1990) (same); *Lindsey* v. *Thigpen*, 875 F.2d 1509, 1510 (11th Cir. 1989) (same); *but see Hunt* v. *Nuth*, 57 F.3d 1327, 1331, 1338–1339 (4th Cir. 1995) (affirming denial of a Rule 60(b) motion as successive after consolidating appeal of that denial with the prisoner's initial-application appeal); *Resnover* v. *Pearson*, 1993 WL 430159, at *1–2 (7th Cir. Oct. 22, 1993) (affirming successive treatment for new habeas claims raised after the court of appeals affirmed the denial of initial habeas claims but before this Court denied prisoner's petition for certiorari). Indeed, in one of the cases cited by *Brewer*, the denial of the prisoner's Rule 60(b) motion was on the merits, not because the court held the motion to be successive or abusive. *See May*, 961 F.2d at 76–77.

In these cases that shape the statutory meaning of "second or successive," courts have been nearly uniform in reserving successive-application treatment for claims added after appellate proceedings conclude. Courts considering subsequent applications by the same applicant could therefore review the "fullness of

the consideration given to" the first application and determine the appropriate weight of that first judgment. *Cuddy*, 40 F. at 66.

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

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

A. Limiting Section 2244(b) to Applications Filed After the Prior Application Is Final and Unappealable Comports with AEDPA's Purposes.

In determining whether a motion is equivalent to a second or successive petition, this Court "ha[s] considered AEDPA's own purposes": "to conserve judicial resources, reduce piecemeal litigation, and lend finality to state court judgments within a reasonable time." *Banister*, 590 U.S. at 512 (internal quotation marks,

alterations, and citation omitted). Treating an amendment filed while a first habeas application remains pending on appeal as not second or successive does not undermine those purposes; it advances them.

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

But permitting a prisoner to bring such a motion *while the appeal is still pending*, as the Second Circuit does, presents none of these concerns. Indeed, doing so could "avoi[d] 'piecemeal appellate review,'" *Banister*, 590 U.S. at 516 (citation omitted), thereby conserving judicial resources. And the "point" of AEDPA's gatekeeping mechanism with respect to finality is only to "len[d] finality to state court judgments *within a reasonable time*." *Id.* at 512 (emphasis added). Triggering the requirements of Section 2244(b) only upon the conclusion of appellate review of the first habeas application ensures finality within a "reasonable time" and leaves little opportunity for abuse, thus fitting firmly within Section 2244(b)'s purposes. The problems that Section 2244(b) (and the abuse-of-the-writ doctrine) aimed to solve do not require the Fifth Circuit's heavy-handed approach.

B. Restrictions Built into Rule 60(b) Curb Any Potential Abuse.

Although petitioner relies on Federal Rule of Civil Procedure 15 and 28 U.S.C. § 2242, some habeas petitioners have relied on Federal Rule of Civil Procedure 60(b) to reopen judgments to add new claims or newly discovered evidence while an appeal of the original judgment is pending. *See, e.g.*, *Balbuena* v. *Sullivan*, 970 F.3d 1176, 1184 (9th Cir. 2020). In that context, if this Court were to find that Section 2244(b) did not operate until appellate review concludes, a district court would *still* need to find that stringent Rule 60(b) restrictions do not preclude the amendment. And if the case remains pending on appeal when the district court actually writes the decision, it would also need to provide a satisfactory indicative ruling under Rule 62.1. Under these circumstances, contorting Section 2244(b) into an additional tool to protect and promote finality and prevent litigation abuse is simply unnecessary.

1. *Gonzalez* Does Not Categorically Forbid Rule 60(b) Motions that Present Claims for Relief While an Appeal Is Pending.

In adopting its flawed rule, the Fifth Circuit looked to *Gonzalez* to "guid[e] [its] analysis." Pet. App. 9a. But it misread *Gonzalez*, which does not forbid resort to Rule 60(b) before or during an appeal. In that case, the applicant tried to add claims in a Rule 60(b) motion over a year *after* an initial petition had been rejected by the district and appeals courts, and the applicant "did not file for rehearing or review of that decision." 545 U.S. at 527. At that time, that initial determina-

tion had become final and unappealable. In that context, this Court declared that Section 2244(b) bars a Rule 60(b)(6) motion challenging "the substance of the federal court's resolution of a claim on the merits" because it is in substance (or functionally similar to) a second or successive application. *Id.* at 531–532.

But *Gonzalez* does not categorically require that a Rule 60(b) motion raised during the pendency of appeal be treated as a second or successive habeas petition; that circumstance was not at issue. A judicial decision "is not a binding precedent on [a] point" that is "not * * * raised in briefs or argument nor discussed in the opinion of the Court." *United States* v. *L.A. Tucker Truck Lines*, 344 U.S. 33, 38 (1952). In any event, the discussion in *Gonzalez* of when Rule 60(b) motions may be treated as second or successive applications was dicta; this Court held that the Rule 60(b) motion in question, which attacked the district court's application of the statute of limitations, did not present claims on the merits and thus could not be a second or successive application. *Gonzales*, 545 U.S. at 533–534.

2. Internal Restrictions upon Relief Limit the Potential for Abusive Rule 60(b) Motions.

A closer look at Rule 60(b) reveals no inconsistency with the goals of AEDPA if Rule 60(b) motions for relief on the merits are cabined to those filed during an appeal. Indeed, "several characteristics of a Rule 60(b) motion limit the friction between the Rule and the successive-petition prohibitions of AEDPA, ensuring that [the Court's] harmonization of the two will not expose federal courts to an avalanche of frivolous postjudgment motions." *Gonzales*, 545 U.S. at 534–535. Rule

60(b) strikes a balance between fairness and commitment to finality; its built-in limitations allow courts to correct certain errors while curbing any duplication and delay by imposing a high burden on movants for obtaining relief. *Ibid.*; *cf. Lafler* v. *Cooper*, 566 U.S. 156, 172 (2012) (explaining that allowing successful ineffective assistance of counsel claims in habeas petitions to reopen rejected plea offers would not "open the floodgates," given that the prosecution and trial courts have measures against meritless claims).

At the outset, Rule 60(b) requires "that the motion 'be made within a reasonable time'" and imposes "the more specific 1-year deadline for asserting three of the most open-ended grounds of relief (excusable neglect, newly discovered evidence, and fraud)." *Id.* at 535.

Each subparagraph of Rule 60(b) commonly invoked for habeas claims also has stringent requirements that protect the finality of state convictions and conserve judicial resources.

Rule 60(b)(2). Rule 60(b)(2) allows a party to seek relief "from a final judgment, order, or proceeding" based on "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." Fed. R. Civ. P. 60(b)(2). For newly discovered evidence to provide a basis for a new trial under Rule 60(b)(2), a movant must demonstrate that: (1) the evidence was newly discovered since the trial; (2) the movant was diligent in discovering the new evidence; (3) the newly discovered evidence is material, and not merely cumulative or impeaching; and (4) the newly discovered evidence would probably produce a different result. *AG Pro, Inc.* v. *Sakraida*, 512 F.2d 141, 143 (5th Cir. 1975), *rev'd on other grounds*, 425 U.S. 74 (1976). Each of

these requirements restricts the availability of relief and provides a barrier against a flood of litigation.

Rule 60(b)(2) is strictly limited to facts that existed (but were not yet discovered) at the time of trial, ensuring that relief is granted only for newly *discovered* evidence. *See Chilson* v. *Metro. Transit Auth.*, 796 F.2d 69, 70–72 (5th Cir. 1986); *accord Rivera* v. *M/T Fossarina*, 840 F.2d 152, 156 (1st Cir. 1988); *Brown* v. *Penn. R.R. Co.*, 282 F.2d 522, 526–527 (3d Cir. 1960). This limitation prevents parties from using post-trial developments or subsequently created evidence as a basis for reopening a judgment.

The movant must also prove that the evidence could not have been uncovered with reasonable diligence during the original proceedings. This diligence requirement is strictly enforced to prevent litigants from abusing Rule 60(b)(2). *See, e.g.*, *Bailey* v. *Cain*, 609 F.3d 763, 767 (5th Cir. 2010) (affirming denial of Rule 60(b) motion where habeas petitioner did not act with reasonable diligence to uncover evidence); *White* v. *Fair*, 289 F.3d 1, 11–12 (1st Cir. 2002) (same).

The newly discovered evidence must also be material, meaning facts that would have significant impact on judgment. *See, e.g.*, *Green* v. *Bank of Am. Corp.*, 530 F. App'x 426, 430 (6th Cir. 2013) (affirming denial of Rule 60(b)(2) motion where newly discovered evidence would still not "establish any liability"); *Graham by Graham* v. *Wyeth Labs.*, 906 F.2d 1399, 1417 (10th Cir. 1990) (noting that materiality requires that the newly found evidence focus on one of the most significant aspects of plaintiff's claim).

The newly discovered evidence, moreover, must also likely yield a different result. *See, e.g.*, *Graham*, 906 F.2d at 1417; *Baxter Int'l, Inc.* v. *Morris*, 11 F.3d

90, 93 (8th Cir. 1993) (affirming denial of Rule (60)(b) relief in part because the newly found evidence was not likely to produce a different result if presented at trial).

Thus, any petitioner desiring to amend their initial habeas petition mid-appeal for consideration of new evidence has a heavy burden to meet within the current framework of Rule 60(b)(2).

Rule 60(b)(3). Rule 60(b)(3) likewise imposes strict limitations. That Rule permits a court to set aside a judgment that was obtained through "fraud, * * * misrepresentation, or misconduct by an opposing party." Fed. R. Civ. P. 60(b)(3). For relief under this Rule, the offending conduct must be proven "by clear and convincing evidence" and "must be such as prevented the losing party from fully and fairly presenting his case or defense." *Rozier* v. *Ford Motor Co.*, 573 F.2d 1332, 1339 (5th Cir. 1978) (citations omitted); *see Pray* v. *Dep't of Just.*, 290 F. App'x 501, 504 (3d Cir. 2008) (affirming denial of Rule 60(b)(3) motion because alleged fraud was based on "nothing more than speculation"). This is a "heavy" burden, *Wilson* v. *Thompson*, 638 F.2d 801, 804 (5th Cir. 1981); *accord Jones v. Ferguson Pontiac Buick GMC, Inc.*, 374 F. App'x 787, 789 n.1 (10th Cir. 2010), that naturally limits relief and guards against the flood of litigation.

Rule 60(b)(6). Rule 60(b)'s catch-all provision allows for relief for "any other reason." Fed. R. Civ. P. 60(b)(6). Courts interpret this subsection very narrowly, requiring "'extraordinary circumstances'" not covered by the other provisions, which "'will rarely occur in the habeas context.'" *Buck* v. *Davis*, 580 U.S. 100, 112-113 (2017) (quoting *Gonzalez*, 545 U.S. at 535); *see also Martinez* v. *Shinn*, 33 F.4th 1254, 1265

(9th Cir. 2022) (holding that habeas petitioner failed to show extraordinary circumstances under Rule 60(b)(6)); *Miller* v. *Mays*, 879 F.3d 691, 699 (6th Cir. 2018) (same). And while Rule 60(b)(6) has no time limit, relief is unavailable if a party failed to take timely action. *Pioneer Inv. Serv. Co.* v. *Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 393 (1993).

Moreover, "Rule 60(b) proceedings are subject to only limited and deferential appellate review." *Gonzalez*, 545 U.S. at 534–535. This prevents litigation over state convictions from stretching indefinitely.

A movant is also not entitled as of right to resolution of her Rule 60(b) motion if an appeal of the judgment on the prior application is still pending. 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). In such circumstances, where a habeas petitioner moves for "relief that the court lacks authority to grant," Rule 62.1 permits a trial court to "(1) defer considering the motion," "(2) deny the motion," or "(3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue." Fed. R. Civ. P. 62.1(a). If the trial court issues an indicative ruling under Rule 62.1(a)(3), the movant "must promptly notify" the appellate court, Fed. R. Civ. P. 62.1(b), which "may remand for further proceedings but retains jurisdiction unless it expressly dismisses the appeal," Fed. R. App. P. 12.1(b). The requirements that the movant both convince the district court of the substantiality or correctness of the motion and convince the court of appeals to exercise its remand discretion, ensures that only legitimate motions will be entertained. And this

process, which may moot the appeal altogether, saves the appellate court from unnecessarily expending its resources and allows the trial court to efficiently resolve substantial claims.

C. The Second Circuit's Approach Is Superior to the Fifth Circuit's in Promoting Efficient Resolution of Habeas Claims.

For all the foregoing reasons, the Second Circuit's approach does not open the courthouse door to unmeritorious claims—it merely ensures that prisoners may avail themselves of the "one full opportunity" for collateral review to which they are entitled. *Whab*, 408 F.3d at 118 (citing *Ching*, 298 F.3d at 177–179). No one has alleged any marked increase of meritless habeas claims filed in the Second Circuit since the adoption of its rule.

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

The Second Circuit's rule also imposes few costs on district courts already familiar with the facts that would underlie post-conviction motions. "A judge familiar with a habeas applicant's claims can usually make quick work of a meritless motion." *Banister*, 590 U.S. at 517; *cf. Abdur'Rahman* v. *Bell*, 537 U.S. 88, 97–98 (2002) (Stevens, J., dissenting) (explaining that because "[t]he District Court ha[d] already heard the ex-

tensive evidence," it was "in the best position to evaluate the equitable considerations that may be taken into account in ruling on a Rule 60(b) motion"). Thus, district courts will almost never have resource-intensive hearings on the merits of mid-appeal claims.

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

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

* * *

In sum, Section 2244(b)'s text and context, interpreted in view of the informing decisional law that the statute incorporates, show that second-or-successive treatment should not apply to a mid-appeal motion to amend until appellate review of the initial application

concludes. This statutory meaning is further bolstered by Section 2244(b)'s (and AEDPA's) purposes, the synergy between Section 2244(b) and existing limitations found in the Federal Rules, and the principles this Court articulated less than five years ago in *Banister*.

CONCLUSION

The Court should hold that mid-appeal amendments to an initial habeas application brought while an appeal from the initial habeas application is still pending do not run afoul of Section 2244(b)'s bar against second or successive habeas applications.

Respectfully submitted,

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