No. 23-1345

In the Supreme Court of the United States

DANNY RICHARD RIVERS, PETITIONER

v.

ERIC GUERRERO, 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 RESPONDENT

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QUESTION PRESENTED

The Antiterrorism and Effective Death Penalty Act (AEDPA) provides that "[a] claim presented in a second or successive habeas corpus application … that was presented in a prior application shall be dismissed" and "[a] claim presented in a second or successive habeas corpus application … that was not presented in a prior application shall be dismissed" unless one or more enumerated conditions are met. 28 U.S.C. §2244(b)(1)-(2). AEDPA further provides that "[b]efore 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." *Id.* §2244(b)(3).

Here, the district court denied Petitioner Danny Rivers's habeas application in a final judgment. Rather than asking the U.S. Court of Appeals for the Fifth Circuit to authorize a second application, however, Rivers simply filed a new application in the district court. Almost seven months later he argued that his new application should be deemed an amendment to his original application because the appeal of that original application was still pending. The district court and the Fifth Circuit rejected this gambit, reasoning that Rivers's new application clearly was an unauthorized second application under AEDPA. The question presented is thus:

Whether AEDPA requires a district court to entertain a second-or-successive application after it has issued its final judgment regarding a prisoner's original application merely because a prisoner belatedly describes his new application as an amendment to his original application and the appeal of the district court's denial of his original application remains pending.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Cases (ctd.):

Cases (ctd.):

Cases (ctd.):

Cases (ctd.):

Cases (ctd.):

Constitutional Provisions, Statutes, and Rules:

***Constitutional Provisions, Statutes and Rules (ctd.)*:**

Other Authorities:

INTRODUCTION

Danny Rivers admitted to sexually abusing his own daughters. Yet for the last thirteen years he has sought to escape justice. State and federal courts have uniformly rejected his efforts. After all, even seasoned lawyers can only do so much when someone has admitted to abusing two little girls.

This appeal arises out of Rivers's second habeas application attacking the same judgment of conviction, which he filed years after his first one was dismissed. Because he seeks "to revisit the federal court's denial on the merits" of the relief sought in his first application, *Gonzalez v. Crosby*, 545 U.S. 524, 534 (2005), and to "threaten[] an already final judgment," *Banister v. Davis*, 590 U.S. 504, 519 (2020), Rivers cannot file his second application without leave from the court of appeals, *see* 28 U.S.C. §2244(b).

Nor can Rivers evade that conclusion by belatedly mischaracterizing his second application as a "mid-appeal" motion to amend his first application. Not only did he never file such a motion, but it is hornbook law that those wishing to amend after entry of final judgment must first obtain relief from that judgment under Federal Rule of Civil Procedure 59(e) or 60(b). *See, e.g.*, 6 Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. §1489 (3d ed. 2024). Given AEDPA, that rule applies with special force for habeas applicants.

The Court, however, should not address the merits at all. Rivers spends the lion's share of his brief developing an argument under 28 U.S.C. §2242, but he has forfeited that argument at least three times. The application that he wishes to "amend" is also part of a different case that has been closed for years. And his alleged new "evidence"—which does not exist—concerns his *child-*

pornography convictions, not his *sexual-abuse* convictions. But Rivers hasn't been in custody for possessing child pornography since 2014. Accordingly, although his arguments all widely miss the mark, the Court should dismiss the petition as improvidently granted.

STATEMENT

I. Rivers's Convictions

Seeking the Court's sympathy, Rivers claims (at 1) he was "wrongly convicted" and (at 6) wishes to "clear his name." Not so. Texas here omits many graphic details from the trial testimony, but the record is plain that Rivers committed heinous sexual abuse—a fact confirmed by his own lawyers, who attested during postconviction proceedings that he admitted to abusing his daughters. *See* ROA.1776-1810; ROA.1731-47; ROA.1748-74.[1]

A. Rivers's sexual abuse of his daughters

Before their divorce in 2008, Rivers lived in Wichita Falls, Texas, with his then wife, Christina, and their two young daughters, B.R. (Rivers's stepdaughter) and N.R. (Rivers's biological daughter). 7.RR.66-67, 170-71. Between 2005 and 2009, Rivers groomed and repeatedly sexually abused those children.

1. Rivers had a "close relationship" with his stepdaughter, B.R. 7.RR.67. They "told each other everything," 7.RR.67, and she trusted him completely, 7.RR.71-72.

But in 2005, when she was nine years old, B.R. found out her fourth-grade class would learn about basic human sexuality. 7.RR.72-73; 8.RR.64, 66. She was worried and sought comfort from her parents. 7.RR.72-73;

[1] "RR" refers to the trial court reporter's record of Rivers's trial and "ROA" to the record on appeal in the Fifth Circuit.

8.RR.64. After Rivers and Christina reassured her, B.R. went to her bedroom to sleep. 7.RR.73-74. Later that evening, B.R. woke up to get a drink and Rivers, alone, called her into the living room where he was watching TV. 7.RR.74-75. B.R.—wearing only shorts and a t-shirt—sat down next to him. 7.RR.75, 78. Christina had already gone to bed. 7.RR.74.

Rivers changed the TV to adult pornography and directed B.R. to "get on top of him" while reassuring her that everything would be "okay." 7.RR.75-76. Rivers lowered his pajama bottoms to mid-thigh and positioned B.R. so she straddled his body—and particularly his "private parts." 7.RR.76, 78-80. Rivers eventually began to "moan[]" and then he ejaculated—after which he left to clean up. 7.RR.80. Upon returning, Rivers again reassured B.R. that what they had done was "okay," but asked that she not tell her mom. 7.RR.81. Over the years, Rivers proceeded to force B.R. to perform that sex act "[o]ver a hundred times." 7.RR.82.

When she was in the sixth grade, Rivers began digitally penetrating B.R. 7.RR.83-91. Rivers again started by showing her pornography. 7.RR.84. This time, however, he used a laptop to show men having sex with small girls, and a video of a man having sex with his daughter. 7.RR.84-86. Rivers rubbed B.R.'s vaginal area under her clothing and penetrated her with his fingers. 7.RR.87-91. Finally, he directed B.R. to "rub" his unclothed penis, causing him to ejaculate. 7.RR.89-91.

After Christina moved out in 2008, B.R. began sleeping with Rivers in his bedroom when she slept over. 7.RR.93-94. One night, she and N.R. were sleeping with Rivers, with B.R. between the two. 7.RR.98. B.R. woke to feel her dad touching her "private parts," with his hands, which resulted in him repeatedly penetrating her

vagina. 7.RR.98-100. Rivers again directed B.R. to manipulate his penis until he ejaculated. 7.RR.100-01. This happened many times. 7.RR.107.

2. Rivers's efforts to groom N.R. were similar—although the sexual abuse was worse. N.R. also had a warm and trusting relationship with her father, who made her "feel like a princess." 7.RR.171. N.R.'s bond of trust was so strong that when Rivers and Christina separated in 2008, N.R. wanted to live with her dad. 7.RR.171; 8.RR.56.

Things changed when N.R. was nine years old and living alone with Rivers. 7.RR.174. Rivers capitalized on her isolation by showing her pornography depicting adults and children. 7.RR.176-78. N.R. testified the videos showed "[g]uys and girls and sometimes children" "having sex." 7.RR.176. N.R. was also forced to watch a video of a father having sex with his daughter. 7.RR.178. And she was forced to play a game Rivers called "copy that," in which Rivers made N.R. perform the sexual acts she saw on the videos. 7.RR.179-80. Rivers would remove N.R.'s underwear and coerce her into highly explicit sexual acts, sometimes involving penetration by Rivers's penis and cunnilingus. 7.RR.181-89. N.R. estimated such conduct occurred "[a]t least twenty-five [times]. … Probably more." 7.RR.184.

B. Discovery of Rivers's sexual abuse

Michael Saenz was one of Rivers's close friends for many years. 8.RR.27-28, 30. But in October 2009, Saenz observed unusual contact between B.R. and Rivers, as well as odd, sexually tinged comments from Rivers about B.R. 8.RR.31-37. Those incidents stirred in Saenz "a feeling that something wasn't right," which led him to call Christina. 8.RR.37-39, 60-62.

Christina asked B.R. whether Rivers had ever made her feel uncomfortable, and B.R. said he had. 8.RR.63. B.R. then described what Rivers did to her. 8.RR.63-65. The next day, Christina called the police, who told her to bring B.R. and N.R. to the station. 8.RR.66-67. Christina immediately picked up B.R. and N.R. from school. 8.RR.67. While driving, Christina asked N.R. if Rivers ever made her feel uncomfortable, and N.R. responded that he made her watch pornography, but initially offered nothing else. 8.RR.68-69.

Both B.R. and N.R. met with therapists, a forensic interviewer, a sexual assault nurse examiner, and law enforcement, where they detailed the years of extreme sexual abuse. 8.RR.11-17, 128-29, 252-64, 267-76; 9.RR.41-64. Law enforcement obtained a warrant to search Rivers's home, where they found a large stash of pornography—consistent with B.R.'s and N.R.'s accounts. 8.RR.108-20, 129-38, 149-50. They also found pornography on Rivers's personal computer, some of which involved child participants, according to a trial witness for the State. 8.RR.108-12, 132-38.

C. Rivers's criminal judgment

The State prosecuted Rivers. At trial, he was represented by three experienced, privately retained lawyers with backgrounds in criminal defense: Rick Mahler, Mark Barber, and Frank Trotter.

Following trial, at which B.R. and N.R. took the stand to detail the horrific abuse recounted above, the jury found Rivers guilty of six offenses: one count of continuous sexual abuse of a young child; two counts of indecency with a child by contact; one count of indecency with a child by exposure; and two counts of possession of child pornography. ROA.625-42. The jury sentenced him to consecutive sentences of thirty years' imprisonment for

the continuous-sexual-abuse count, three years for the indecency-by-contact counts, and two years for the indecency-by-exposure count and child-pornography counts. ROA.625-36. His child-pornography sentences were served concurrently with his other sentences. ROA.1872-77. He began serving those sentences in 2012 and completed them in 2014. ROA.1872-73, 1875-76.

Rivers appealed his conviction, but the appellate court affirmed. *Rivers v. State*, No. 08-12-00145-CR, 2014 WL 3662569 (Tex. App.—El Paso, July 23, 2014, pet. ref'd). The Texas Court of Criminal Appeals (CCA) denied his petition for discretionary review in 2015. *Rivers v. State*, No. PD-1104-14 (Tex. Crim. App. Jan. 14, 2015).

II. Rivers's Postconviction Proceedings

A. State habeas proceedings

Following direct appeal, Rivers initiated state postconviction proceedings in 2015. ROA.1825-44. He alleged that his trial counsel had been ineffective because, *inter alia*, they failed to interview or present certain character witnesses. ROA.1830-31.[2] The CCA decided that "additional facts [were] needed," and so remanded to require "trial counsel to respond and discuss their investigation of [Rivers's] case, their defense strategy at trial, and the State's evidence." *Ex parte Rivers*, Nos. WR-84,550-01, 84,550-02, 2016 WL 5800277, at *1 (Tex. Crim. App. Oct. 5, 2016) (per curiam); *see* Tex. Code Crim. Proc. art. 11.07, §3(d).

Rivers's lawyers submitted affidavits swearing that Rivers admitted to committing the sexual abuse he was

[2] In 2016, Rivers filed another state application raising "the same" claims "as in the original application" but with case-law citations. ROA.2565. The CCA resolved both together.

charged with. Rivers told Mahler "how he had sexually assaulted the two girls over the years in great detail," ROA.1778, justifying himself by saying his daughters "'wanted it,'" ROA.1779. His admissions largely "matched the allegations the girls had made to the police," including that he "would sleep in the same bed with the two girls" and abuse them. ROA.1778-79. Rivers made similar admissions to Barber and Trotter. *See, e.g.*, ROA.1733 ("[H]e confirmed those admissions to me."); ROA.1751 ("[He] told us that he had committed crimes against the children."). Rivers further "admitted that he had purchased the pornography in the house at a local pornography shop," ROA.1780, and "admitted to downloading the images on to his computer through the Limewire program mentioned at his trial," ROA.1733. Rivers's lawyers explained how these admissions significantly limited available defenses, including with respect to interviewing or calling certain witnesses. ROA.1736-38, 1755-58, 1779-80, 1782.

Rivers denied admitting his guilt to his lawyers. ROA.1583-84. But after considering the evidence, the trial court found that Rivers did admit to it, ROA.4922-23—a finding entitled to considerable deference, *e.g.*, 28 U.S. §2254(e)(1), especially given the underlying sworn testimony. The court also considered and rejected other allegations, such as Rivers's claim that Barber had been inebriated in court. ROA.1659, 1883-84, 4926. Because counsel rendered effective assistance, the court recommended that the CCA deny Rivers's application. ROA.4637, 4928-29. The CCA did so. *Ex parte Rivers*, Nos. WR-84,550-01, WR-84,550-02, 2017 WL 3380491, at *1 (Tex. Crim. App. June 7, 2017). More than three years later, he filed another state application,

ROA.5055-60, which the CCA dismissed as procedurally barred, ROA.173.

B. Federal habeas proceedings

1. In August 2017, Rivers filed his first federal habeas application, raising six claims, including ineffective assistance of counsel. JA.20-35. In September 2018, the district court adopted the magistrate judge's recommendation that Rivers could not overcome AEDPA's relitigation bar, ROA.165-67, and entered final judgment, JA.2. Rivers sought a certificate of appealability with respect to his "claim of ineffective assistance of trial counsel based on the failure to investigate and interview witnesses." Order at 1-2, *Rivers v. Davis*, No. 18-11490 (5th Cir. July 9, 2020) (Graves, J., in chambers). Judge Graves granted a COA on that claim. *Id.* at 3.

2. In February 2021, while the parties were briefing Rivers's appeal of the denial of his first application, Rivers filed another application in the district court attacking the same convictions. ROA.10-23. That second-in-time application was entitled "petition for a writ of habeas corpus: 28 U.S.C. §2254," ROA.10, and it was docketed as a new case with a different case number, *compare* JA.2, *with* JA.5.

Rivers raised fourteen grounds for relief, JA.66-75, many of which he had previously asserted, JA.76. But Rivers also attempted to modify his ineffective-assistance-of-trial-counsel claims by arguing that he had discovered new evidence withheld by his lawyers: that a forensic report allegedly suggests that investigators did not believe that actual children were depicted in the pornography. JA.68-69. Rivers argued he did not learn about this report until resolution of a bar complaint. JA.68-69.

On August 11, 2021, the magistrate judge issued a report recommending that the district court reject Rivers's new application as "successive because it challenge[d] the same conviction Rivers challenged" in his first application. Pet.App.13a. Because prisoners who wish to file additional applications need authorization from a court of appeals, the judge recommended transferring Rivers's new application to the Fifth Circuit. Pet.App.15a-16a.

Rivers objected, arguing—almost seven months after filing his second application—that his petition "should be construed as an amendment to [his] initial petition currently pending on appeal." ROA.271, 274-75.

On September 23, 2021, the district court accepted the magistrate judge's recommendation, deemed Rivers's second application to be successive, and transferred it to the Fifth Circuit. Pet.App.19a. The Fifth Circuit docketed a new proceeding for Rivers to move for authorization to file a second application, but it dismissed that proceeding after Rivers refused to seek authorization. *See In re Rivers*, No. 21-10967 (5th Cir. Nov. 15, 2021); JA.13-14. Instead, on October 12, 2021, Rivers noticed an appeal of the district court's transfer order. ROA.285.

3. On May 13, 2022, while Rivers's second appeal was pending, the Fifth Circuit affirmed the district court's dismissal of Rivers's first application. *See Rivers v. Lumpkin*, No. 18-11490, 2022 WL 1517027 (5th Cir. May 13, 2022). The court explained that Rivers "must present evidence" to support his allegations, but all he offered were procedurally barred affidavits that "were not presented to the state habeas trial court," and which the CCA accordingly did not consider. *Id.* at *4-5. This

Court subsequently denied Rivers's certiorari petition. *See Rivers v. Lumpkin*, 143 S.Ct. 1090 (2023).

4. As for Rivers's second appeal, the Fifth Circuit affirmed the district court's transfer order, concluding that Rivers's second application was, indeed, successive. Pet.App.4a-11a. The court reasoned that his "second-in-time petition attacks the same conviction that he challenged in his first-in-time §2254 petition" and "adds several new claims that stem from the proceedings already at issue in his first §2254 petition." Pet.App.6a. The court joined the overwhelming majority of its sister circuits in applying *Gonzalez* to hold that "filings introduced after a final judgment that raise habeas claims, no matter how titled, are deemed successive." Pet.App.10a.

Nonetheless, before he petitioned for certiorari, the Fifth Circuit gave Rivers another chance to seek authorization to file a second application by *sua sponte* opening an additional original proceeding. *See In re Rivers*, No. 24-10330 (5th Cir. Apr. 15, 2024); JA.17-19. Rivers received two 30-day extensions to move for authorization to file a second application, yet he never did. Rather, he waited until after the extended deadline passed to file another extension request. JA.17-18. The Fifth Circuit denied that third extension request and dismissed his second original proceeding on July 26, 2024. JA.19.

Almost five months later, the Court granted certiorari with respect to the Fifth Circuit's holding that Rivers's second-in-time application was successive.

SUMMARY OF ARGUMENT

"Congress enacted AEDPA to advance the finality of criminal convictions." *Mayle v. Felix*, 545 U.S. 644, 662 (2005). Yet despite admitting to his lawyers that he sexually abused his daughters, Rivers has been attacking his convictions for more than a decade. None of this is

consistent with AEDPA. Not content to undermine just AEDPA, however, Rivers now advances a new theory that would make a hash out of civil litigation more generally. The Court should not reward such tactics.

I. The Court should dismiss Rivers's petition as improvidently granted for at least three reasons.

First, the Court granted certiorari to answer whether §2244(b)(2) applies before "appellate review of the first habeas application is exhausted." Cert.Pet.24. But Rivers spends barely five pages on that issue. Instead, he devotes the bulk of his brief to a new theory—that the Fifth Circuit erred in deeming his new application as successive because of 28 U.S.C. §2242. This new theory appears nowhere in Rivers's cert-stage briefing, Fifth Circuit briefing, or district court briefing. Nor does he cite a single case, treatise, or law review article adopting it.

Second, there are a pair of unbriefed jurisdictional questions. Rivers wishes to "amend" an application filed in a case that has been closed since 2023. Because Article III does not allow the Court to order the reopening of a *different* case, it is hard to see how any injury he allegedly suffers from being unable to "amend" his application is redressable. This appeal also appears to be moot for similar reasons. The Court did not grant certiorari to resolve these threshold questions but cannot address Rivers's merits argument without doing so.

Third, Rivers's alleged new evidence bears only on his child-pornography convictions. But Rivers finished serving his sentence for those convictions more than a decade ago. His arguments about child pornography are irrelevant because they do not affect the sexual-abuse offenses for which he remains "in custody." 28 U.S.C. §2254(a). The Court thus lacks "habeas jurisdiction,"

Lackawanna Cnty. Dist. Att'y v. Coss, 532 U.S. 394, 403-04 (2001), to consider this appeal.

II. Even if the Court were to reach the merits, Rivers's second application is subject to AEDPA's second-or-successive bar. It bears all the hallmarks of a second application: It aims "to revisit the federal court's denial on the merits," *Gonzalez*, 545 U.S. at 534, and "threaten[s] an already final [habeas] judgment with successive litigation," *Banister*, 590 U.S. at 519.

Rivers cannot escape AEDPA by belatedly mischaracterizing his second application as a "mid-appeal" Rule 15(a) motion. Setting aside that Rivers never filed such a motion, "historical habeas doctrine and practice," *id.* at 512, would have treated his second application as a Rule 60(b) motion, which courts routinely dismiss as an abuse of the writ, *id.* at 519; *Gonzalez*, 545 U.S. at 534. And "AEDPA's purposes"—"reducing delay, conserving judicial resources, and promoting finality," *Banister*, 590 U.S. at 515—would be thwarted if prisoners could circumvent AEDPA through the artifice of "mid-appeal" Rule 15 motions. Indeed, no civil litigant, let alone a habeas applicant, could do what Rivers asks this Court to allow.

III. Rivers's contrary arguments are meritless. *First*, his (forfeited) §2242 theory fails out of the gate. Once a party appeals a final judgment, a district court cannot allow amendment without vacating the judgment under Rule 60(b). *See, e.g.*, Wright & Miller, *supra*, §1489. Yet §2244(b) bars such Rule 60(b) motions. Rivers cannot point to a single case supporting the notion that habeas courts historically entertained, much less endorsed, "mid-appeal" Rule 15 motions.

Second, Rivers's cursory discussion of the question this Court granted certiorari to consider highlights why

the Court should affirm. Rivers's argument is foreclosed by *Gonzalez* and *Banister*—which no doubt explains why Rivers called an audible after the Court granted certiorari. By any measure, the minority view, fashioned before *Banister*, is untenable.

Third, Rivers improperly leans on policy arguments while ignoring or criticizing key provisions of AEDPA. Had Rivers followed AEDPA, however, the Fifth Circuit would have denied his motion for leave to file a second application because his arguments about child pornography are irrelevant and, in all events, foreclosed by his admitted guilt to years of sexual abuse.

ARGUMENT

I. The Court Should Dismiss the Petition.

A. Rivers's lead theory is triply forfeited.

Rivers spends much of his brief on a theory found nowhere in his certiorari petition and not passed on below. He also devotes just five pages to the question the Court chose to decide. As the Court is one of "final review and not first view," *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) (citation omitted), it should dismiss the petition as improvidently granted.

1. Because "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court," Sup. Ct. R. 14.1(a), petitioners cannot "smuggl[e] additional questions into" a case, *Irvine v. California*, 347 U.S. 128, 129 (1954). This remains true even if a new theory is "complementary" or "related" to the question the Court granted certiorari to consider. *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 31-32 (1993) (citation omitted). Enforcing this rule protects against "ill-considered decisions of questions not presented in the petition." *Id.* at 34.

Here, Rivers advanced one theory in his certiorari petition—that §2244(b)(2) "does not apply until appellate review of the first habeas application is exhausted." Cert.Pet.24. That is the theory he now offers as an "alternative[]" and "independent" theory in his merits brief. Rivers.Br.37; *see also id.* (arguing that "§2244(b) applies only after the initial petition is final on appeal").

Presumably recognizing that *Gonzalez* and *Banister* preclude that theory, Rivers now offers a different one: AEDPA is irrelevant because §2242—the most cited statute in Rivers's merits brief—governs "what standard applies when a prisoner seeks to amend a habeas application mid-appeal." Rivers.Br.1; *see also, e.g.*, *id.* at 13, 16-17. This new theory, spanning much of his brief, proceeds as follows: (i) "Under 28 U.S.C. §2242, an application 'may be amended or supplemented as provided in the rules of procedure applicable to civil actions,'" *id.* at 1; (ii) Rule 15(a)(2) allows a party to move to amend its complaint even after filing a notice of appeal, *id.* at 16-20; (iii) while an appeal is pending, a district court may issue an indicative ruling under Rule 62.1 that it would allow the movant to amend its complaint, *id.* at 19-20; (iv) if a court of appeals agrees, it can vacate the district court's judgment under 28 U.S.C. §2106, without Rule 60(b), *id.* at 21-22; and (v) nothing in the more-specific and later-in-time AEDPA precludes any of this, *id.* at 22-25.

Rivers's certiorari petition included nothing remotely like this new theory. It did not mention §2242 or §2106 at all, much less discuss "mid-appeal Rule 15 motions," Rivers.Br.27—an eye-popping phrase to anyone familiar with civil litigation. In fact, his petition never cited Rule 15. It mentioned Rule 62.1 just twice, and only to explain why his case would be more efficient if §2244(b)(2) did not apply. Cert.Pet.3, 29. No cert-stage

amicus advanced this new theory, either. Only one mentioned §2242—as a *typo*. *See* NACDL.Cert.Br.3. Nor do the cases that Rivers identified as comprising the circuit split ground their relevant analysis in §2242, §2106, or Rule 62.1. *See* Cert.Pet.13-22. In fact, almost none of the cases in his certiorari petition mentions even one of those provisions, and no case from any court mentions all of them.

2. Rivers's briefing below also omitted this new theory. In the district court, he never mentioned §2242 or §2106, let alone Rule 62.1. He didn't even file a motion to amend; instead—years after the district court's final judgment—he filed a new application. *See, e.g.*, ROA.10. It was not until nearly seven months later that he asked the district court to construe it as an amendment to his first application, advancing an argument consistent with the theory he raised in his certiorari petition, ROA.271, 274-75—not his new theory.

Nor did Rivers present his new theory to the Fifth Circuit. Even Rivers's motion to stay the mandate pending his certiorari petition said nothing about §2242, §2106, Rule 15, or Rule 62.1. *See* Opposed Motion to Stay the Mandate, *Rivers v. Lumpkin*, No. 21-11031 (5th Cir. 2024) (No. 98). The Court is not in the business of passing on arguments forfeited below. *See, e.g.*, *Jones v. Hildebrant*, 432 U.S. 183, 188-89 (1977).

3. Finally, addressing Rivers's new theory would be imprudent. "Because certiorari jurisdiction exists to clarify the law, its exercise 'is not a matter of right, but of judicial discretion.'" *City & County of San Francisco v. Sheehan*, 575 U.S. 600, 610 (2015) (quoting Sup. Ct. R. 10). Rivers asks the Court to answer in the first instance at least five questions of broad applicability, none of which are presented in his certiorari petition:

1. Can a party move to amend under Rule 15(a)(2) in the district court while an appeal is pending without also filing a Rule 60(b) motion?
2. Can a party file such an exotic Rule 15(a)(2) motion after Rule 60(b)'s deadlines have passed—thus nullifying those deadlines?
3. Does Rule 62.1 apply to Rule 15 motions?
4. Does Rule 62.1 apply to Rule 15 motions even after Rule 60(b)'s deadlines have passed?
5. Even if the answers to the first four questions are "yes," do AEDPA's more-specific and later-in-time provisions govern habeas cases?

To prevail, Rivers must run the table for all five questions, yet he does not cite a single case adopting his view of any of them. The closest he comes is a district court decision suggesting—in *dicta*—that courts may offer indicative rulings regarding Rule 15(a)(2). *See* Rivers.Br.19 (citing *Ret. Bd. of Policemen's Annuity & Benefit Fund v. Bank of N.Y. Mellon*, 297 F.R.D. 218 (S.D.N.Y. 2013)). But *Policemen's Annuity* involved an *interlocutory* appeal, so there was no final judgment, and so no question about Rule 60(b). 297 F.R.D. at 219.

The Court did not grant review to consider fundamental questions of civil procedure. Nor should it address the relationship between §2242, Rule 15(a)(2), Rule 60(b), Rule 62.1, and §2106 without the benefit of any court of appeals decision adopting Rivers's theory. In fact, as far as Texas is aware, no judge—anywhere—has adopted it. Nor has any treatise or law review article. The Court should not decide such issues in the first instance.

B. Rivers overlooks Article III requirements.

Rivers also has not briefed a pair of Article III questions. As the Fifth Circuit explained, Rivers's first

application—the one he wishes to amend—is closed. Pet.App.3a n.2. The Fifth Circuit affirmed final judgment almost three years ago, and this Court denied certiorari nearly two years ago. *Supra* pp. 9-10. That case is over. This is a different case. The only way to reopen the final judgment from that first case would be for Rivers to file a Rule 60(b) motion in that case, which he did not do and cannot do now given Rule 60(b)'s deadlines.

Rivers's brief says little about the jurisdictional consequences of these facts. He claims (at 46) that "[i]f this Court reverses, the district court can grant Rivers effective relief by reopening the judgment denying his initial habeas petition." But the Court can only decide the "case[]" before it. U.S. Const. art. III, §2. Accordingly, it is doubtful (at best) that the Court even has power to reopen judgments from *different* cases, especially as an exercise of appellate jurisdiction. Nor should it matter that the district court might erroneously grant a Rule 60(b) motion if (i) Rivers later were to file such a motion in that closed case and (ii) this Court were to issue an opinion in this case. "It is a federal court's judgment, not its opinion, that remedies an injury; thus it is the judgment, not the opinion, that demonstrates redressability." *Haaland v. Brackeen*, 599 U.S. 255, 294 (2023). For similar reasons, mootness cannot be overlooked. These are threshold jurisdictional questions that Rivers has not briefed and that the Court did not grant certiorari to decide.

C. The Court lacks habeas jurisdiction.

Rivers's alleged new evidence centers on his child-pornography convictions. *See, e.g.*, Rivers.Br.10-11. But he omits a key point: His child-pornography sentences were served *concurrently* with both his sexual-abuse sentences and each other. ROA.1872-77. He started serving the child-pornography sentences in 2012 and

completed them in 2014—seven years before he sought federal habeas relief. ROA.1872-73, 1875-76. The Court thus has no "habeas jurisdiction" to consider those convictions. *Coss*, 532 U.S. at 403-04. Instead, new evidence could only be relevant if it undermined his sexual-abuse convictions. Yet not only did Rivers not offer such evidence, *infra* pp. 44-45, but he admitted to sexually abusing his daughters. Rivers thus cannot meet his burden to identify "previously undiscoverable facts that would establish … innocence." *Banister*, 590 U.S. at 509 (citing 28 U.S.C. §2244(b)(2)).

II. AEDPA Bars Rivers's Second Application.

If the Court reaches the merits, it should affirm because the Fifth Circuit correctly applied AEDPA.

A. Rivers's second application is successive.

1. "A state prisoner may request that a federal court order his release by petitioning for a writ of habeas corpus" on the ground that the prisoner "is in custody in violation of the Constitution or laws or treaties of the United States." *Shinn v. Ramirez*, 596 U.S. 366, 375 (2022) (quoting 28 U.S.C. §2254(a)). But such review "imposes special costs on our federal system." *Id.* at 376. For one, it "overrides the State's sovereign power to enforce" its criminal laws. *Id.* (citing *Calderon v. Thompson*, 523 U.S. 538, 556 (1998)). For another, "[i]t 'disturbs the State's significant interest in repose for concluded litigation.'" *Id.* at 377 (quoting *Harington v. Richter*, 562 U.S. 86, 103 (2011)).

Accordingly, "[t]o respect our system of dual sovereignty," Congress has imposed "several limits" to promote "federal-state comity" and to ensure that federal review does "not serve as 'a substitute for ordinary error correction through appeal.'" *Id.* at 375, 377-78. One such

limit is AEDPA's "'gatekeeping' mechanism for the consideration of second or successive applications in district court," codified in §2244. *Felker v. Turpin*, 518 U.S. 651, 657 (1996).

This provision "impose[s] three requirements on second or successive habeas petitions." *Gonzalez*, 545 U.S. at 529. "First, any claim that has already been adjudicated in a previous petition must be dismissed." *Id.* at 529-30 (citing 28 U.S.C. §2244(b)(1)). "Second, any claim that has *not* already been adjudicated must be dismissed unless it relies on either a new and retroactive rule of constitutional law or new facts showing a high probability of actual innocence." *Id.* at 530 (citing 28 U.S.C. §2244(b)(2)). "Third, before the district court may accept a successive petition for filing, the court of appeals must determine that it presents a claim not previously raised that is sufficient to meet §2244(b)(2)'s new-rule or actual-innocence provisions." *Id.* (citing 28 U.S.C. §2244(b)(3)).

"[T]he phrase 'second or successive'" application in §2244 is a "term of art," *Magwood v. Patterson*, 561 U.S. 320, 332 (2010) (quoting *Slack v. McDaniel*, 529 U.S. 473, 486 (2000)), whose meaning is elucidated by "statutory context," *id.* The Court thus has held that the phrase second or successive "does not 'simply refer' to all habeas filings made 'second or successively in time,' following an initial application." *Banister*, 590 U.S. at 511 (quoting *Magwood*, 561 U.S. at 332).

Instead, some later-in-time filings are "a part of a prisoner's first habeas proceeding." *Id.* at 517. For example, "an amended petition, filed after the initial one *but before judgment*, is not second or successive." *Id.* at 512 (emphasis added). Likewise, Rule 59(e) motions—which "briefly *suspend[]* finality to enable a district court to fix any mistakes and thereby perfect its

judgment *before a possible appeal*"—are not treated as second or successive. *Id.* at 516 (emphases added). Rule 60(b) motions that are aimed at "some defect in the integrity of the federal habeas proceedings," rather than at "setting aside the movant's state conviction," also are not covered. *Gonzalez*, 545 U.S. at 532-33. Lastly, "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." *Banister*, 590 U.S. at 512.

By contrast, filings that "threaten[] an *already final judgment* with successive litigation" run afoul of the second-or-successive bar. *Id.* at 519 (emphasis added). So too do filings that seek to "revisit the federal court's denial *on the merits* of a claim for relief," such as "a prisoner's motion to recall the mandate *on the basis of the merits* of the underlying decision." *Gonzalez*, 545 U.S. at 534. Thus, a Rule 60(b) motion qualifies if it "substantively addresses federal grounds for setting aside the movant's state conviction," *id.* at 533, by, for example, "present[ing] new claims for relief" or "presenting new evidence in support of a claim already litigated," *id.* at 531.

2. Rivers's second-in-time application bears all the hallmarks of a second-or-successive application attacking the same convictions. Start with the fact that the document he filed—under a new case number and more than two years after final judgment in his first case—was denominated "petition for writ of habeas corpus: 28 U.S.C. §2254." ROA.10. Consider also its substance: It sets out many grounds for challenging his state-court conviction, ROA.15-20, that plainly duplicate his first application, *compare* JA.28-31 (first application), *with* JA.66-75 (second).

Rivers's second application thus is barred by AEDPA: "A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." 28 U.S.C. §2244(b)(1). Nor does his alleged new evidence help him. "Even assuming that reliance on a new factual predicate causes that motion to escape §2244(b)(1)'s prohibition of claims 'presented in a prior application,'" *Gonzalez*, 545 U.S. at 531 (quoting 28 U.S.C. §2244(b)(1)), AEDPA still required Rivers to obtain leave from the Fifth Circuit to proceed with that successive application, *id.*; *see also* 28 U.S.C. §2244(b)(3).[3]

Rivers, however, failed to seek such authorization even after the Fifth Circuit invited him to do so—*twice*. *Supra* pp. 9-10. The district court thus correctly deemed Rivers's application second or successive, and the Fifth Circuit correctly affirmed.

B. AEDPA bars "mid-appeal" amendments.

Rivers resists this straightforward analysis by arguing (at, *e.g.*, 16-18, 45-46) that despite what he called it, the second-in-time application he filed in the district court should be construed as a "mid-appeal" motion to amend under Rule 15. He is incorrect.

1. As an initial matter, it is hard to fault the district court for not construing Rivers's second application that way. That second application did not mention Rule 15, let alone argue that the court should permit him to amend

[3] AEDPA also required him to seek authorization to pursue his claims, JA.71-72, that *Ramos v. Louisiana*, 590 U.S. 83 (2020), established a "new rule of constitutional law, made retroactive to cases on collateral review," 28 U.S.C. §2244(b)(2)(A). Rivers does not advance an argument regarding this issue, which is foreclosed in any event. *See Edwards v. Vannoy*, 593 U.S. 255, 258 (2021).

an application filed in a different case that had already proceeded to final judgment and was pending on appeal. *See* ROA.10-23. It was nearly seven months later, after the magistrate judge's decision, that Rivers told the district court that his second application should be construed as a motion to amend. ROA.265-66, 274-75. But it is the "substance" of the pleading that controls, *Gonzalez*, 545 U.S. at 531—not Rivers's post-hoc mischaracterization of it. And here, his second application sought "to revisit the federal court's denial *on the merits*" of habeas relief, *id.* at 534—i.e., its "determination that there … do not exist grounds entitling [Rivers] to habeas corpus relief," *id.* at 532 n.4. Because Rivers's second application was "in substance a successive habeas petition" it "should be treated accordingly." *Id.* at 531.

2. Even assuming Rivers's second application could be construed as a motion to amend, it would still be foreclosed. "In addressing what qualifies as second or successive, this Court has looked for guidance in two main places": "historical habeas doctrine and practice" and "AEDPA's own purposes." *Banister*, 590 U.S. at 512. Neither supports Rivers.

This Court's first line of inquiry turns on "whether 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.'" *Id.* (quoting *Panetti v. Quarterman*, 551 U.S. 930, 947 (2007)). Here, historical habeas doctrine and practice would have treated Rivers's purported "mid-appeal" Rule 15 motion as a Rule 60(b) motion. And as this Court has twice explained, such a Rule 60(b) motion historically would have been treated as a successive application. *See id.* at 519; *Gonzalez*, 545 U.S. at 531.

A prisoner may amend or supplement an application "as provided in the rules of procedure applicable to civil actions." 28 U.S.C. §2242. In turn, under Rule 15, a plaintiff may "amend[] once as a 'matter of course,' *i.e.*, without seeking court leave," before a responsive pleading has been served. *Mayle*, 545 U.S. at 655 (quoting Fed. R. Civ. P. 15(a)(1)). "In all other cases," the plaintiff may amend only with the consent of the opposing party or with leave of court. Fed. R. Civ. P. 15(a)(2).

While Rule 15 applies straightforwardly before a district court enters final judgment, a "problem" arises when a plaintiff seeks leave to amend "once a judgment has been entered or an appeal has been taken." Wright & Miller, *supra*, §1489. In such cases, "the filing of an amendment cannot be allowed until the judgment is set aside or vacated under Rule 59 or Rule 60." *Id.* & n.1 (collecting cases). "To hold otherwise would enable the liberal amendment policy of Rule 15(a) to be employed in a way that is contrary to the philosophy favoring finality of judgments and the expeditious termination of litigation." *Id.* Worse yet, it "would render … meaningless" Rules 59(e) and 60(b), which "specifically … provide a mechanism for those situations in which relief must be obtained after judgment." *Id.*

That is why *every* regional circuit holds that a plaintiff may not use Rule 15 to amend a complaint after final judgment absent relief under Rule 59(e) or Rule 60(b). *See, e.g.*, *Fisher v. Kadant, Inc.*, 589 F.3d 505, 508-09 (1st Cir. 2009); *Ruotolo v. City of New York*, 514 F.3d 184, 191 (2d Cir. 2008); *Ahmed v. Dragovich*, 297 F.3d 201, 207-08 (3d Cir. 2002); *Laber v. Harvey*, 438 F.3d 404, 427-28 (4th Cir. 2006); *Benson v. St. Joseph Reg'l Health Ctr.*, 575 F.3d 542, 550 (5th Cir. 2009); *Leisure Caviar, LLC v. U.S. Fish & Wildlife Serv.*, 616 F.3d 612, 615-16 (6th Cir.

2010); *Runnion ex rel. Runnion v. Girl Scouts of Greater Chi. & Nw. Ind.*, 786 F.3d 510, 521 (7th Cir. 2015); *United States v. Harrison*, 469 F.3d 1216, 1217 (8th Cir. 2006); *Balbuena v. Sullivan*, 980 F.3d 619, 638 (9th Cir. 2020); *Tool Box, Inc. v. Ogden City Corp.*, 419 F.3d 1084, 1087 (10th Cir. 2005); *United States ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1361 n.22 (11th Cir. 2006); *Ciralsky v. CIA*, 355 F.3d 661, 673 (D.C. Cir. 2004). This is "black-letter law." *Fisher*, 589 F.3d at 509. Indeed, the question presented in *BLOM Bank SAL v. Honickman*, No. 23-1259, 145 S.Ct. 117 (2024) (granting certiorari), presupposes that litigants *cannot* file Rule 15(a) motions until a judgment has been vacated under Rule 60(b), a proposition with which both the petitioner and respondent there agree.

Accordingly, even if Rivers's second application were a motion to amend, *but see supra* pp. 21-22, it still would have to be "construed as [a] Rule 60(b) motion[]." 12 Moore's Federal Practice, §60.64, at 60-219 (3d ed. 2024).[4] Yet "a Rule 60(b) motion that seeks to revisit the federal court's denial *on the merits* of a claim for relief should be treated as a successive habeas petition." *Gonzalez*, 545 U.S. at 534. That includes both a Rule 60(b) motion "present[ing] new claims for relief from a state court's judgment of conviction," as well as one "presenting new evidence in support of a claim already litigated." *Id.* at 531. "[D]ecisions" from "pre-AEDPA habeas courts … abound dismissing Rule 60(b) motions for that reason." *Banister*, 590 U.S. at 519.

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[4] Because Rivers's second application was filed more than two years after final judgment was entered denying his first one, *compare* JA.2, *with* JA.5, it could not be construed as a Rule 59(e) motion, which must be filed "[n]o later than 28 days after the entry of the judgment," Fed. R. Civ. P. 59(e).

Even a glance at Rivers's second application confirms that none of its claims seeks to challenge "some defect in the integrity of the [first] federal habeas proceedings." *Gonzalez*, 545 U.S. at 532. Instead, it "present[s] a revisitation *of the merits*" of Rivers's first application, *id.* at 534, thereby "serv[ing] to collaterally attack [that] already completed judgment" and "threatening" that "already final judgment with successive litigation," *Banister*, 590 U.S. at 518-19. That is, "in substance[,] a successive habeas petition and should be treated accordingly." *Gonzalez*, 545 U.S. at 531.

3. "AEDPA's purposes" confirm the point. *Banister*, 590 U.S. at 515. AEDPA aims "to prevent serial challenges to a judgment of conviction, in the interest of reducing delay, conserving judicial resources, and promoting finality." *Id.* Rivers's "mid-appeal" Rule 15 gambit would dash each of those goals.

Start with reducing delay and promoting finality. Permitting "mid-appeal" amendments does nothing to "maintain[] a prisoner's incentives to consolidate all of his claims in his initial application." *Id.* at 516. Indeed, a prisoner who is denied habeas relief can start over with new or modified claims by waiting until his appeal is docketed and then filing a "mid-appeal" motion to amend. That prisoner would not need to bother with Rule 60(b) or §2244(b); instead, he could circumvent a final judgment by taking advantage of the much lower standard for amending a complaint under Rule 15.

True, most "mid-appeal" motions to amend, like most Rule 60(b) motions and attempts to bring second-or-successive applications, will be unsuccessful. But "[t]he win-loss rate is for this point irrelevant." *Id.* at 515. Under Rivers's theory, it would be foolish for many habeas applicants *not* to hold back at least some claims as an

insurance policy should things go south in the first application. Delay itself would be especially valuable for "capital petitioners" looking to "deliberately engage in dilatory tactics to prolong their incarceration." *Rhines v. Weber*, 544 U.S. 269, 277-78 (2005). Rivers's approach hardly "consolidates appellate proceedings" but instead "allow[s] repeated attacks on" the first final judgment. *Banister*, 590 U.S. at 516.

Such motions also would waste judicial resources. Before the merits of a prisoner's "amended" application could be adjudicated, the question whether the prisoner may amend would have to ping-pong back and forth between the district court and court of appeals:

1. After appealing the first judgment, the prisoner would have to file a motion to amend under Rule 15(a) and a motion for an indicative ruling under Rule 62.1. The district judge would then have to issue an indicative ruling stating "it would grant the motion" to amend or that the motion "raises a substantial issue" Fed. R. Civ. P 62.1(a)(3).
2. The court of appeals would have to be notified of that indicative ruling, *id.* 62.1(b), and then determine whether it should exercise its "discretion" to remand to the district court to adjudicate that motion to amend, Fed. R. App. P. 12.1(b) & advisory committee's notes to the 2009 adoption.
3. The district court then would have to decide whether to grant the Rule 15 motion but would not be "bound" to do so by its indicative ruling because "further proceedings on remand may show that the motion ought not be granted." Fed. R. Civ. P. 62.1 & advisory committee's notes to the 2009 adoption.

By contrast, under the Fifth Circuit's holding here, if a prisoner wishes to present new claims or evidence after an unsuccessful application, he must seek permission from a court of appeals. 28 U.S.C. §2244(b)(3)(A). If the court of appeals grants permission, he may file a new application in the district court. *Id.* §2244(b)(4). But if the court of appeals denies permission, the matter is closed because that denial "shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." *Id.* §2244(b)(3)(E). That is a much simpler, more efficient process. Text, precedent, history, and policy thus all point the same way—Rivers's second-in-time application is a second-or-successive application.

III. Rivers's Contrary Arguments Are Meritless.

Rather than rebutting the Fifth Circuit's analysis, Rivers offers a new theory based on §2242. Then, as an "independent" theory, Rivers.Br.37, Rivers also briefly addresses the question the Court granted certiorari to answer. Neither theory is correct.

A. Rivers's new §2242 theory is wrong.

Rivers devotes the bulk of his brief to his new theory that he can avoid AEDPA by reconceptualizing his second application as a "mid-appeal" motion to amend. To support his novel hypothesis, Rivers offers many pages of analysis about §2242, the Rules of Civil Procedure, and historical habeas practice. None of it supports him.

1. Rivers starts (at 16-17) with the uncontroversial proposition that a prisoner may amend his application without triggering §2244(b). But he then leaps (at 22-25) to the conclusion that unless a prisoner can amend his petition at *any time*—including while his earlier case is on appeal—§2244 would conflict with, or impliedly repeal, §2242. That is plainly wrong.

"[A]n amended petition, filed after the initial one *but before judgment*, is not second or successive." *Banister*, 590 U.S. at 512 (emphasis added). The dividing line therefore is the filing of a notice of appeal after entry of final judgment. A Rule 59(e) motion is not second or successive because it "helps produce a single *final judgment* for appeal" and allows a "district court to fix any mistakes and thereby *perfect its judgment before a possible appeal*." *Id.* at 516 (emphases added). Before final judgment, a prisoner may be able to amend under Rule 15(a)(2). So too after final judgment and before appeal, so long as he satisfies Rule 59(e)'s stringent requirements. But after judgment is entered and a notice of appeal is filed, §2244 bars further applications no matter how styled, absent leave from the court of appeals.

The Eleventh Circuit recently addressed this question. As Judge Grant explained, "a prisoner cannot amend a habeas petition and relitigate the case after the district court has entered its final judgment and he has appealed." *Boyd v. Sec'y, Dep't of Corr.*, 114 F.4th 1232, 1236 (11th Cir. 2024). In fact, it is "obvious" that "a district court has no jurisdiction to grant a motion to amend a pleading that is no longer pending before it." *Id.* at 1237. And "[t]he notion that a petitioner could pursue his claims in the district court and in the court of appeals at the same time offends not just common sense, but firmly established rules of procedure," including rules governing the finality of judgments and appellate jurisdiction. *Id.* "All that to say, by the time a federal habeas petition is on appeal, it is too late to amend it—no different than in any other civil case." *Id.* at 1236.

Similarly, in *Castro v. United States*, Judge Ramirez also rejected an effort to evade AEDPA's provisions governing second-or-successive applications. No. 3:04-CR-

00018, 2020 WL 6121220 (N.D. Tex. Aug. 24, 2020). She explained, correctly, that a prisoner cannot amend an already dismissed application unless "the judgment was first vacated under Rules 59 or 60." *Id.* at *3.

Nor would it make sense to disagree. Section 2242 and §2244(b) happily co-exist. Before final judgment, a prisoner may be able to amend; but after jurisdiction transfers to the court of appeals, a prisoner can only advance new claims or evidence after receiving leave from that court. And if there were conflict between §2242 and §2244(b), the latter would control because it was enacted later-in-time and is more specific. Put differently, "the specific governs the general," especially where "Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (citations omitted). And "the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citations omitted).

Nothing about §2266(b) is to the contrary. *Contra* Rivers.Br.23. Designed to expedite capital cases (which this case is not), that provision makes some amendments impermissible even *before* final judgment. *See* 28 U.S.C. §2266(b)(3)(B). But §2266 says nothing about the situation addressed in *Gonzalez* and *Banister*.

2. Rivers next turns to the Rules of Civil Procedure. Unfortunately for him, however, "the courts of appeals agree," *Banister*, 590 U.S. at 512, that *no one*—even in ordinary civil litigation—can file a Rule 15(a) motion after final judgment absent Rule 59(e) or Rule 60(b) relief. After all, "Rule 15(a), by its plain language, governs

amendment of pleadings *before* judgment is entered; it has no application *after* judgment is entered." *Jacobs v. Tempur Pedic Int'l, Inc.*, 626 F.3d 1327, 1344 (11th Cir. 2010); *see also supra* pp. 23-24 (string cite).

Faced with the problem that district courts lack jurisdiction to entertain Rule 15 motions after final judgments are appealed, Rivers seeks refuge (at 18-22) in Rule 62.1. On his telling, he can get around any jurisdictional problem if: (i) the district court issues an indicative ruling that it would grant his motion to amend; (ii) the court of appeals remands under Federal Rule of Appellate Procedure 12.1(b); and (iii) the court of appeals *also* vacates the final judgment because it determines under §2106 that such a disposition is "just under the circumstances." Rivers errs several times over.

First, Rivers's convoluted theory has nothing to do with this case. He did not ask the district court for an indicative ruling under Rule 62.1, and he did not ask the Fifth Circuit to construe his second application as requesting one.

Rivers tries to head off this objection by arguing (at 20) that he didn't need to make a "distinct" motion for an indicative ruling but instead could rely "solely on the underlying motion for relief." This is yet another universal question of civil procedure with consequences far beyond this case that was not addressed in the certiorari petition or briefed or passed on below. "Courts," moreover, "are split as to whether a party seeking a ruling under Rule 62.1 must *also* file an accompanying predicate motion that the district court lacks authority to grant." *Est. of Najera-Aguirre v. County of Riverside*, No. 5:18-CV-00762, 2020 WL 5370618, at *1 (C.D. Cal. Aug. 13, 2020) (emphasis added); *accord, e.g.*, *Camp v. Gregory*, 67 F.3d 1286, 1290 (7th Cir. 1995) ("[W]hen the plaintiff

files a motion for leave to amend alone, the court is not obligated to construe it as a simultaneous request for relief under Rules 59 or 60.").

Regardless, *Mendia v. Garcia*, 874 F.3d 1118 (9th Cir. 2017), does not support Rivers. The Ninth Circuit explained that some courts will "construe district court actions as indicative rulings even when no FRCP 62.1 motion … was filed." *Id.* at 1121. Even those courts, however, only do so when the district court "indicated it would *grant* a motion for the requested relief." *Id.* at 1122 (emphasis added). Here, nothing in the district court's order indicates that it would grant Rivers leave. Pet.App.12a-19a. Nor would there be any basis to do so because his new evidence concerns his child-pornography convictions, for which he is not in custody. As for his sexual-abuse convictions, Rivers confessed to his lawyers.

Second, even if Rivers could obtain Rule 62.1 relief without asking for it, Rule 62.1 does not apply to Rule 15(a) motions. Rule 62.1 applies when a party makes a "timely *motion … for relief*" in the 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(a) (emphasis added). This rule was added in 2009—years after AEDPA's enactment—to clear up "confusion [that] existed regarding how to handle Rule 60(b) motions once an appeal has been filed." Wright & Miller, *supra*, §2873. That's why the quintessential "motion for relief" referenced by Rule 62.1 is a Rule 60(b) motion. *Id.* §2911. A motion to amend a complaint under Rule 15, by contrast, is decidedly unlike a Rule 60(b) motion because it does not seek "relief," Fed. R. Civ. P. 62.1(a), from anything the district court has done.

The only civil authority Rivers cites (at 19) is a district court case that emphasized Rule 62.1's "drafting history" and declined to issue an indicative ruling anyway. *Policemen's Annuity*, 297 F.R.D. at 221. That drafting history also undercuts Rivers. While the Rules Committee said that the then-proposed Rule 62.1 "goes beyond Rule 60(b) motions," it clarified that "[t]he orders likely to be caught up in the broader rule will be interlocutory orders with respect to injunctions." Comm. on Rules of Prac. & Proc., Rep. of the Civil Rules Advisory Comm. (2006), at 14. Nowhere did the Committee suggest a motion to amend under Rule 15 would be a proper subject of a Rule 62.1 motion.

Third, even if Rule 62.1 does apply to a Rule 15 motion, Rivers does not cite a single case applying §2106 to vacate a final judgment to facilitate the district court's consideration of a "mid-appeal" Rule 15 motion. Indeed, a Westlaw search across all federal decisions for any case citing §2106, Rule 62.1, and Rule 15(a) comes up empty. Nor could such a case be correctly decided. Appellate courts "must decide the appeal based on the record as it existed when the district court rendered its decision." *Stanton v. Liaw*, No. 22-2199, 2023 WL 3645525, at *3 (7th Cir. May 25, 2023). If an appellant wishes to introduce new evidence after final judgment has been entered and a notice of appeal filed, "he must seek relief from the judgment in the district court." *Id.* (citing Fed. R. Civ. P. 60(b)).

Rivers instead cites (at 21) a century-old patent-infringement case predating §2106 by decades. *See D.W. Bosely Co. v. Wirfs*, 20 F.2d 629 (8th Cir. 1927). *Wirfs*, however, did not involve a motion to amend, an indicative ruling, or a vacatur of a final judgment to permit a plaintiff to amend a complaint. Instead, the Eighth Circuit

remanded so a party could move "for leave to reopen the case" after new evidence emerged on appeal. *Id.* at 630. That is the equivalent of a Rule 60(b)(2) motion, not a Rule 15(a) motion.

Fourth, in all events, a party cannot amend under Rule 15(a) after Rule 60(b)'s deadlines have run. Otherwise, those deadlines would be meaningless. *See* Wright & Miller, *supra*, §1489. Nor may a district court issue an indicative ruling with respect to Rule 60(b) if those deadlines have run. *See* Fed. R. Civ. P. 62.1(a) (requiring a "timely motion"). Again, otherwise, Rule 60(b)'s deadlines would be meaningless. A court thus cannot issue an indicative ruling with respect to Rule 15(a) after Rule 60(b)'s deadlines have run. The Court's "role [is] to make sense rather than nonsense out of the *corpus juris*." *Maslenjak v. United States*, 582 U.S. 335, 345 (2017) (citation omitted). There would be no reason for Rule 60(b)'s deadlines if a party could evade them simply by filing a Rule 62.1 motion respecting a Rule 15(a) motion.

Because Rivers seeks to introduce new evidence he claims was not previously available to him despite his alleged diligence, the Rule 60(b)(2) deadline was one year.[5] Yet Rivers did not file his second application until years after final judgment. The Federal Rules do not allow

[5] Rivers could not rely on Rule 60(b)(6) because each sub-part is "mutually exclusive" and Rule 60(b)(2) is directly applicable. *E.g.*, *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 n.11 (1988); *McKay v. Novartis Pharm. Corp.*, 751 F.3d 694, 701 n.5 (5th Cir. 2014). Regardless, Rivers received the reports he alleges are new evidence in October 2019, ROA.4174, but did not file his second application until February 2021, which is not remotely a "reasonable time," Fed. R. Civ. P. 60(c), to seek to "amend" an application that had been dismissed years earlier in a final judgment.

anyone to do what Rivers is (very) belatedly attempting to do, even apart from AEDPA.

Against all of this, Rivers notes (at 18) that Wright & Miller say that an amendment is allowed "after a judgment has been entered" and Rule 15(b)(2) allows conforming amendments "after judgment." Yet Wright & Miller have an entire section explaining why Rivers cannot do what he proposes. *See* Wright & Miller, *supra*, §1489. Their discussion of permissible amendments post-judgment largely concerns before an appeal or the scope of an appellate court's mandate, neither of which is relevant here. *Id.* §1488 & nn.10-11. And Rule 15(b)(2) would serve no purpose if any type of amendment were permissible. *Inclusio unius est exclusio alterius* governs.

3. Rivers next turns to history, but his two arguments again come up short.

First, Rivers argues (at 25) that "habeas courts did not historically deem the mere act of raising newly discovered evidence abusive." No one disagrees. AEDPA itself permits a prisoner to present new evidence in support of a claim previously asserted if that prisoner (unlike Rivers) satisfies AEDPA's requirements and obtains authorization from a court of appeals. *See* 28 U.S.C. §2244(b)(2)(B), (3)(A). The problem is not that Rivers wishes to present new evidence but that he refuses to follow AEDPA's procedures for doing so. AEDPA, however, "modified" historical "abuse-of-the-writ rules." *Magwood*, 561 U.S. at 336.

Second, Rivers argues (at 25) that "pre-AEDPA courts routinely decided mid-appeal Rule 15 motions on the merits—rather than dismissing them as abusive." But he does not cite a single case involving a "mid-appeal Rule 15 motion." And he cannot overcome the body of law holding that, absent Rule 60(b) relief, no litigant—

habeas or otherwise—can amend a complaint after an appealed final judgment.

Take Rivers's primary authority, *Harisiades v. Shaughnessy*, 90 F.Supp. 431 (S.D.N.Y. 1950). There, the petitioner wanted to buttress his application with intervening authority from this Court announced "the same day" he noticed his appeal. *Id.* at 432. The petitioner raised that new authority to the district court, not by filing a motion to amend under Rule 15(a), but by filing a motion to dismiss the appeal under former Federal Rule of Civil Procedure 73(a) (now found in Rule of Appellate Procedure 42(a)). Under that rule, a district court could dismiss an appeal on the motion of a party "[i]f an appeal *has not been docketed*." *Id.* at 433 (emphasis added). The issue therefore was *not* whether to permit a "mid-appeal" amendment, but rather "whether the petitioner's motion to withdraw the appeal should be granted." *Id.* at 434. The court said that, in deciding the Rule 73(a) motion, it "would first consider the merits," but the motion for voluntary dismissal was what grounded the district court's jurisdiction. *Id.* at 433-34. Rivers cannot rely on that theory, however, because his appeal was docketed years before he filed his second application.

It is therefore neither "telling" nor "striking" that no judge on the district court, the Second Circuit, or this Court raised a question about second-or-successive applications. *Contra* Rivers.Br.28-29. Even assuming for argument's sake that a 75-year-old district court decision correctly states the law on motions for voluntary dismissal of undocketed appeals, nothing would change here. Unlike a "mid-appeal" motion to amend after an appeal has been pending for years, dismissing an appeal predocketing may well be "part of resolving a prisoner's first habeas application." *Banister*, 590 U.S. at 511. What

is clear is that this Court said nothing material to Rivers's situation. In fact, the Court's relevant "merits" analysis, Rivers.Br.29, is limited to a single footnote explaining why the petitioner could not rely on the Administrative Procedure Act and lacked "standing" to complain about matters to which he "consent[ed]." *Harisiades v. Shaughnessy*, 342 U.S. 580, 583 n.4 (1952).

Strand v. United States, 780 F.2d 1497 (10th Cir. 1985), is even further afield. *Contra* Rivers.Br.29-30. There the Tenth Circuit affirmed a district court's denial on the merits of a second application. *Strand*, 780 F.2d at 1499-1501. But *Strand* did not involve a "mid-appeal" motion to amend a complaint. Instead, it concerned a district court's *refusal* to "supplement the district court record" following that court's denial of that second application. *Id.* at 1499. Without oral argument, the Tenth Circuit affirmed. *Id.* at 1501. It makes no sense to read a decision from 1985 denying habeas relief—which doesn't mention Rivers's argument—as somehow supporting Rivers's argument.

None of the four remaining court-of-appeals cases Rivers cites (at 30) involved "mid-appeal" Rule 15 motions, either. In *Bennett v. Robbins*, the First Circuit *denied* a "hackneyed" motion to amend because it was "not properly made in th[at] court." 329 F.2d 146, 147 (1st Cir. 1964) (per curiam). The Fourth and Sixth Circuits themselves instructed district courts to permit *pro se* petitioners to amend to account for additional precedent. *See Clarke v. Henderson*, 403 F.2d 687, 688-89 (6th Cir. 1968) (per curiam); *Thomas v. Virginia*, 357 F.2d 87, 90 (4th Cir. 1966); *accord* 28 U.S.C. §2244(b)(2)(A). And in *Petty v. McCotter*, the Fifth Circuit allowed a prisoner to amend (rather than ordering a hearing) precisely to protect the *State*'s right to "assert[] the defense of

nonexhaustion of state remedies." 779 F.2d 299, 302 (5th Cir. 1986). None of these cases supports Rivers. More generally, a smattering of cases—plucked from hundreds of thousands of habeas applications—cannot create a tradition so strong as to overcome what AEDPA says as confirmed by *Gonzalez* and *Banister*.

B. The minority circuit view is also wrong.

Rivers devotes (at 37-41) just a handful of pages to the question the Court granted certiorari to answer. His cursory treatment confirms that any suggestion that "§2244(b) does not apply while a prisoner's initial petition is still pending on appeal," Rivers.Br.37, is wrong.

1. To begin, Rivers says essentially nothing about *Banister*'s key analysis. Yet the Court's logic—and the way the Court distinguished *Gonzalez*—was that a submission to a district court is not a second application so long as it is submitted *before* an appeal. *E.g.*, *Banister*, 590 U.S. at 519. That logic does not hold if a prisoner can amend his application after appealing. Nor would the Court have emphasized that Rule 59(e) motions "briefly suspend[] finality to enable a district court to fix any mistakes … before a possible appeal" if finality and appeals were irrelevant. *Id.* at 516.

2. Instead, Rivers's primary contention (at 37) is that "this Court has long treated the end of appellate review—not the entry of final judgment—as the relevant inflection point" for purposes of §2244(b). That is not what the cases say.

In *Clay v. United States*, the Court resolved a dispute about when AEDPA's one-year statute of limitations for filing an *initial* application begins to run, concluding that "[f]inality 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." 537 U.S. 522, 527 (2003). This holding does not help Rivers. In the context of *initial* federal applications by state prisoners, fixing the date the statute of limitations begins to run at the conclusion of the direct-review challenge to the prisoner's conviction makes sense. Such a rule "promote[s] federal-state comity," *Shinn*, 596 U.S. at 378, by "ensur[ing] that the state courts have the opportunity fully to consider federal-law challenges to a state custodial judgment before the lower federal courts may entertain a collateral attack upon that judgment," *Duncan v. Walker*, 533 U.S. 167, 178 (2001); *see also O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) (grounding the principle in "comity").

But §2244(b)'s restrictions on second-or-successive applications are animated by very different concerns. They "constitute a modified res judicata rule," *Felker*, 518 U.S. at 664, "and thus embody Congress' judgment regarding the central policy question of postconviction remedies—the appropriate balance between finality and error correction," *Jones v. Hendrix*, 599 U.S. 465, 491 (2023). Congress's preference for "finality" in the context of successive applications, *id.*, cuts decisively against tying §2244(b)'s applicability to the conclusion of appellate proceedings. And it would make even less sense given that, under AEDPA, prisoners have no right to appellate review of district courts' resolution of their federal applications but must obtain certificates of appealability from the courts of appeals. 28 U.S.C. §2253(c).

It is thus hardly "strange" that rules governing exhaustion and the statute of limitations for purposes of bringing an *initial* application differ from those governing a *successive* application. *Contra* Rivers.Br.39-40. That is simply a function of Congress's determination that different concerns motivate different phases of

postconviction litigation. That is why a lopsided majority of courts recognize that entry of final judgment—sometimes as "suspended" by Rule 59(e), *Banister*, 590 U.S. at 519—is the dividing line. *See* Pet.App.9a.

3. None of the cases Rivers cites (at 38-39) is to the contrary.

In *Salinger v. Losiel*, for example, the Court would have "sustain[ed the] action" if the district court there had denied an application as successive on the ground that an earlier application had been rejected "by a court of co-ordinate jurisdiction and was affirmed in a considered opinion by a Circuit Court of Appeals." 265 U.S. 224, 232 (1924). But because the district court's decision was not based on that ground, the Court affirmed for other reasons. *Id.* Nothing turned on the fact that a court of appeals, as opposed to a district court, had rejected the first application. Instead, the Court's aside concerned the quality of the other courts' analysis. *Id.*

Ex parte Cuddy, 40 F. 62 (S.D. Cal. 1889), is even more inapt. There, Justice Field, sitting as a district judge, *denied* a successive application by a prisoner after this Court had rejected the prisoner's original one. *Id.* at 66. He observed that the fact that another court had rejected the first application might alone "justify a refusal of the second." *Id.* He qualified that assertion, however, by noting that the "character of the court or officer" who decided the first application, as well as "the fullness of the consideration given to it," would "naturally … affect[]" the second judge's "action" on the successive application, especially "in the absence of statutory provisions." *Id.* at 65-66. But he did not suggest that a new application cannot be successive until an appellate court weighs in. Rivers reads far too much (at 38) into "impli[cation]" and silence.

Finally, cases like *Walker v. Lockhart*, 514 F.Supp. 1347 (E.D. Ark. 1981), are nonstarters—even apart from the fact that a five-page decision from a district court is an odd place to hunt for the history of habeas. The prisoner's argument was frivolous. Busy courts do not opine on the metes and bounds of the abuse-of-the-writ doctrine just to dismiss claims barred by "the common principle of stare decisis." *Id.* at 1352.

4. Rivers also briefly invokes (at 37) decisions from the two circuits on his side of the split, which hold that a second application does not trigger §2244(b)'s bar until appellate review on the first one is over. *See United States v. Santarelli*, 929 F.3d 95, 104-05 (3d Cir. 2019); *Whab v. United States*, 408 F.3d 116, 118-19 (2d Cir. 2005). But neither circuit had the benefit of *Banister*—a case that is all but dispositive. Instead, they acted on a misunderstanding of this Court's decisions in *Slack* and *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998). *See, e.g.*, *Santarelli*, 929 F.3d at 104-05; *Ching v. United States*, 298 F.3d 174, 178 (2d Cir. 2002).

In *Slack*, the Court held that a prisoner who returns to federal court after exhausting a previously unexhausted claim that was presented in a first habeas application does not violate the second-or-successive bar because "the initial mixed petition" is treated "as though it had not been filed." 529 U.S. at 487-88. And in *Stewart*, the Court held that that a "premature" claim regarding eligibility for execution would not count as an application until it ripened. 523 U.S. at 643.

Such holdings are irrelevant to a case like Rivers's involving no mixed petition or incomplete exhaustion. Nor does Rivers suggest that the special justifications underlying those cases apply where there is no comity-based reason to indulge the fiction that Rivers's first

application "had not been filed," *Slack*, 529 U.S. at 487-88 (following *Rose v. Lundy*, 455 U.S. 509 (1982)), and there is no question that Rivers's claims have been "ripe" since his trial concluded more than a decade ago, *Stewart*, 523 U.S. at 643. As *Gonzalez* and *Banister* confirm, Rivers's claims are the very sort that §2244(b) governs.

5. Rivers further says (*e.g.*, at 15, 40-41) that §2244(b) is a "statute of repose." But that characterization is not in *Banister* and was mentioned only by the dissent in *Gonzalez*. *See* 545 U.S. at 544 (Stevens, J., dissenting). Regardless, because Congress did not want to "enable a prisoner to abuse the habeas process by stringing out his claims," *Banister*, 590 U.S. at 517, it had good reason to provide States with certainty that the universe of claims would be closed once an appeal is filed absent leave from a court of appeals.

C. Rivers's policy arguments fail.

Finally, Rivers peppers his brief with policy arguments. Such arguments are neither relevant nor correct.

1. To begin, Rivers never confronts the elephant in the room: What happens if a district court *refuses* to issue an indicative ruling regarding alleged new evidence? Contrary to Rivers's suggestion (at 33), a denial of a Rule 62.1 motion is not appealable. *See Doucette v. Dep't of Interior*, 849 F.App'x 653, 656 (9th Cir. 2021) (following *Martinez v. Ryan*, 926 F.3d 1215, 1229 (9th Cir. 2019)). Are such prisoners barred from seeking leave to file a second application respecting that evidence, or can they still invoke §2244(b)(2)?

If §2244(b)(2) is still available, Rivers's efficiency arguments go out the window because all the ordinary litigation would still occur, plus more. And if §2244(b)(2) is unavailable, then his theory *harms* prisoners. Congress decided that "three-judge panel[s]" of appellate judges,

not single district judges, should decide whether to grant leave to file second applications. 28 U.S.C. §2244(b)(3)(B). Rivers—who has doubly forfeited his ability to seek leave to file a second application, *supra* pp. 9-10—may be willing deprive his fellow prisoners of their statutory rights, but he cannot blame Congress.

2. Rivers's efficiency arguments also fail for other reasons. He says (at 14, 31, 44), for example, that allowing "mid-appeal Rule 15 motions … maximizes judicial economy, avoids piecemeal litigation, and hastens the finality of state convictions" because it would allow "the same judge who has just ruled on the initial petition" to address the allegedly new evidence. But it is not true that new claims must go to the same judge. For Rule 59(e) motions, such an argument holds because the deadline is 28 days. But this very case shows that a habeas appeal can be pending for years. *See also, e.g.*, *Alvarez v. Guerrero*, No. 18-70001 (5th Cir. filed Jan. 18, 2018) (appeal pending more than seven years); *Montiel v. Chappell*, 43 F.4th 942 (9th Cir. 2022) (same). There is no guarantee the same judge will see the case again, let alone remember it.

Nor does Rivers's approach prevent different appellate panels from considering piecemeal appeals. He asserts (at 34) that the majority rule "calls for two simultaneous appellate proceedings." That happened here because Rivers instituted two cases years apart. If a court of appeals chooses to do so, however, it can channel a motion for leave to file a second application to the panel already considering a related appeal.

He also says (at 14, 36-37) that the majority rule creates "senseless distinctions," with some prisoners forced to use §2244(b) while others can use Rule 15. But the line between final judgment and not-final-judgment is

foundational. Rivers's theory, by contrast, does create senseless distinctions. Why should one prisoner be able to use Rule 15 while another must use §2244(b) merely because an appellate court happened to resolve one prisoner's appeal more quickly? The majority rule adopted by the Fifth Circuit treats all prisoners the same.

Rivers is wrong (at 35), moreover, that if a court of appeals reverses a district court's denial of an application, a prisoner can amend that application to include new claims or facts having nothing to do with the issue decided on appeal. Because of the mandate rule, that ploy would not work in ordinary litigation. *See, e.g.*, *Pipefitters Loc. 636 Ins. Fund v. Blue Cross & Blue Shield of Mich.*, 418 F.App'x 430, 435 (6th Cir. 2011) (following *Royal Bus. Grp., Inc. v. Realist, Inc.*, 933 F.2d 1056, 1066 (1st Cir. 1991)). It thus must fail given AEDPA's certificate-of-appealability requirement, which further limits a mandate's scope. *See, e.g.*, *Mendoza v. Lumpkin*, 81 F.4th 461, 470 (5th Cir. 2023) (per curiam) (allowing amendment post-remand if within mandate's "scope"); *Beaty v. Schriro*, 554 F.3d 780, 782-83 (9th Cir. 2009) (affirming refusal to allow amendment post-remand).

Rivers's reliance on the Second Circuit is also misplaced. He says district courts there are doing just fine; caselaw is to the contrary. *See Anderson v. Connecticut*, No. 3:21-CV-00825, 2022 WL 3082985, at *1-4 (D. Conn. Aug. 3, 2022) (navigating confusion caused by Second Circuit's rule). Regardless, the Second Circuit is a poor guide because the district courts in the Second Circuit decide nowhere near the number of habeas cases as the district courts in the Fifth, Ninth, and Eleventh Circuits. *See U.S. District Courts—Civil Cases Commenced, by Nature of Suit and District*, U.S. Cts. (Sept. 30, 2024), https://perma.cc/XQR7-GRKK.

Eventually, Rivers all but gives up the game by criticizing (at 32-33) the process required by §2244(b). Taken to their logical conclusion, his criticisms of §2244(b) would mean that *no* applications should be channeled through that provision—flatly contrary to AEDPA.

3. Finally, although suggesting his approach hastens finality (at 34), Rivers omits one of AEDPA's most important provisions: "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." 28 U.S.C. §2244(b)(3)(E). Here is what would have happened if Rivers had asked the Fifth Circuit for leave to file a second application, as AEDPA requires.

First, the Fifth Circuit would have rejected out of hand any direct consideration of Rivers's child-pornography convictions. Rivers has not been in custody for either since 2014. *See supra* pp. 17-18.

If the Fifth Circuit did consider Rivers's new "evidence," it would have even more reason to deny leave. Nothing in Rivers's own (excerpted) versions of the reports says that no files were child pornography. To the contrary, the file for Count 5—file "1)" on JA.94—does *not* say "NOT CHILD PORN." JA.94; *see, e.g.*, ROA.981-82, 1032, 1137 (identifying file for Count 5). And the file for Count 6 does not appear to be on JA.94 at all. *See* ROA.981, 1032, 1138 (identifying file for Count 6).[6] Instead, Rivers focuses on 14 files listed on JA.91-92. Yet none of those files corresponds to Counts 5 and 6. In

[6] Given the report's abstractness regarding file "3)," it is impossible to say for *certain* it is not the image connected to Count 6. Even if it were, Rivers served his sentences for Counts 5 and 6 concurrently and the report indicates—as the jury found—that the Count 5 file *is* child pornography.

fact, Detective Perry testified at trial that he found "fourteen files that [he] believe[d] were adult pornography." ROA.938. Regardless, Rivers's trial theory—designed to defend against both the child-pornography *and* the sexual-abuse counts—was that Christina downloaded child pornography to frame him. *E.g.*, ROA.56-61, 926, 1039. That defense would make little sense if the pornography was not, in fact, illegal.

The Fifth Circuit also would have immediately rejected any allegations regarding a "drunk" lawyer. *Contra* Rivers.Br.1. Not only is that sensational allegation irrelevant to Rivers's already-served child-pornography sentences, but it was advanced to the state postconviction court and found to be false. *See supra* p. 7. And even if it were true, Rivers had three lawyers.

Second, the Fifth Circuit also would have rejected any indirect consideration of Rivers's child-pornography convictions. As the trial testimony (and the four specific sexual-abuse counts he was convicted of) confirm, *see supra* pp. 2-6, Rivers is in prison today for sexually abusing his daughters. Five witnesses—his daughters and his lawyers—have sworn under penalty of perjury that he did it. This case is not one of actual innocence.

Nor do his child-pornography convictions undermine his other convictions. Even if Rivers were right that the pornography only featured adult women who looked like children, *but see, e.g.*, ROA.981-82, that would not diminish that evidence's value with respect to sexual abuse. In terms of grooming kids, there is no difference between Rivers showing his nine-year-old daughters pornography featuring actual children or pornography featuring adults who look like children. That is why his lawyers argued it was not his pornography at all—the only defense with a chance of success. *E.g.*, ROA.1035-39. The jury,

however, disagreed. It is impossible to say with a straight face that "no reasonable factfinder would have found [Rivers] guilty," 28 U.S.C. §2244(b)(2)(B)(ii), much less that he could make such an extraordinary showing "by clear and convincing evidence," *id.*

Third, the Fifth Circuit would have found that it could not authorize claims Rivers previously raised. *See Gonzalez*, 545 U.S. at 530 (citing 28 U.S.C. §2244(b)(1)). The court thus would have denied leave to file a second application, and this litigation would be over. That is the efficiency Congress enacted AEDPA to achieve. No wonder Rivers declined the Fifth Circuit's invitations to seek leave to file a second application.

CONCLUSION

If the Court does not dismiss the writ, it should affirm.

Respectfully submitted.

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