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,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF ARKANSAS, GEORGIA, ALABAMA, FLORIDA, IDAHO, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, NEBRASKA, NEVADA, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VIRGINIA, AND WEST VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICI CURIAE*

This case asks whether an incarcerated habeas petitioner may file an "amended petition" during the pendency of an appeal without its being a "second or successive application" subject to 28 U.S.C. § 2244(b). The States have obvious sovereign interests in the proper application of § 2244(b) because it applies to persons in State custody and the States defend against these petitions.

Since the Antiterrorism and Effective Death Penalty Act of 1996 was enacted, federal courts have often stretched or ignored its text to allow more federal habeas litigation than necessary, at great cost to States and courts. Here, AEDPA's text is not so malleable as to permit the result Rivers suggests—that an "amended" habeas petition is not "second or successive" so long as the first petition is still being reviewed on appeal, even if the attempt to amend comes years later.

Section 2244(b) applies to prisoners in State custody who seek habeas relief in federal court *after* being unsuccessful in state habeas proceedings. The resources spent defending a "second or successive" application in federal court are *on top of* what the State already devoted to proving guilt, defending that verdict on direct appeal, defending (at trial and on appeal) the prisoner's state habeas challenge, and defending that result via a petitioner's original federal petition and subsequent appeal.

The *amici* States have a strong interest in this Court's applying AEDPA as it is written and not opening up a loophole for further burdensome, unnecessary procedural battles.

SUMMARY OF THE ARGUMENT

I. Though AEDPA sharply limited prisoners' ability to file successive habeas petitions, this Court has often looked to pre-AEDPA law for guidance on the threshold question of what a successive petition is. If that history is followed here, Rivers must lose. Pre-AEDPA courts drew no distinction between new claims raised during appeal and those raised afterwards, treating both as successive alike. Indeed, at least six Circuits between 1993 and 1996 alone held that Rule 60(b) motions filed during an appeal were the equivalent of successive petitions, and no court of which Amici States are aware or that Rivers or his amici have cited held the contrary. For pre-AEDPA courts, the line dividing a first petition from successive petitions was (allowing for Rule 59(e) motions) simply the entry of final judgment.

Though Rivers sought cert on whether any and all mid-appeal "habeas filings" evade the bar on successive applications, Pet. i, he now largely seeks a bespoke carveout for so-called mid-appeal Rule 15 motions accompanied by a Rule 62.1 motion for an indicative ruling. There is, confessedly, much less pre-AEDPA law holding that kind of motion successive—though contrary to Rivers's claims that there's none, at least two Circuits held pre-AEDPA that mid-appeal motions to amend were successive filings. But the reason there is relatively little pre-AEDPA precedent rejecting that kind of motion is that Rivers has conjured a kind of motion that under the Rules of Civil Procedure doesn't exist, and never has. As Rule 15 has always been understood, a judgment loser must move to reopen the judgment before he can amend his pleading, as after final judgment there is no pending pleading to amend

(setting aside amendments to conform pleadings to the proof). And there prisoners would run into the well-settled rule that Rule 60(b) motions to raise new claims were successive. Rivers claims that a Rule 62.1 remand order to allow a district court to entertain a Rule 15 motion would reopen the judgment by itself, but his only authority for that proposition is a 1940s Second Circuit dictum that predates Rule 62.1 by over half a century and is irreconcilable with that rule's text. Rivers, then, must file a Rule 60(b) motion to get where he wants to go, and those motions are successive whether filed mid-appeal or post.

II. The Fifth Circuit was correct that Rivers's second-in-time habeas petition was a second or successive application, and therefore subject to § 2244(b). Of course it was, as it challenged the same judgment three years after the district court denied his first petition. The surprising thing is that some federal courts would have allowed Rivers to bypass § 2244(b) solely because his denied first petition was still pending on appeal. Any interpretation of AEDPA that would make § 2244(b) inapplicable here is critically flawed, and this Court should make that clear.

AEDPA, properly interpreted, conserves judicial resources, reduces piecemeal litigation, and lends finality to state court judgments. Yet Rivers walks down a well-worn path in seeking an exception to § 2244(b)'s purposefully rigorous requirements. Federal courts have often indulged atextual exceptions, special cases, and ad hoc analyses that circumvent AEDPA's clear text, but the Court should not do so here. Rivers's petition makes clear the need for close adherence to AEDPA's plain language. He attempted to raise new claims, three years after the district court denied his

petition, at a point when any other civil litigant would have no ability to amend due to the time limits in Rules 15, 59, 60, and 62.1. And of course this was after his criminal trial, direct appeal, state habeas proceedings and appeal, and his initial federal habeas petition. Yet because his appeal was still pending, some federal courts would permit him to freely amend without satisfying § 2244(b). That is plainly improper.

The Court should affirm the decision below.

ARGUMENT

I. Under Pre-AEDPA Abuse-of-the Writ Doctrine, New Claims Raised Mid-Appeal Were Deemed Successive.

In *Banister v. Davis*, this Court said that AEDPA's restrictions on second and successive petitions must be read against "the legal backdrop" that preceded them. 590 U.S. 504, 515 (2020). Holding that Rule 59 motions weren't second or successive petitions whereas merits-based Rule 60 motions were, it largely reasoned that in the years immediately leading up to AEDPA "decisions abound[ed]" holding that Rule 60 motions were second or successive, while just one decision in the pre-AEDPA era held Rule 59 motions were. *Id.* at 519.

Rivers claims the same history shows that any postjudgment motion to bring new claims wasn't deemed second or successive until the first petition was final on appeal—or alternatively, that at least "mid-appeal Rule 15 motions" weren't. But the pre-AEDPA history actually cuts decisively against Rivers. Just as decisions abounded holding Rule 60(b) motions were second or successive pre-AEDPA, so too decisions abounded holding Rule 60(b) motions on appeal were.

Indeed, no court of which Amici States are aware suggested that whether a Rule 60(b) motion was filed during an appeal or after could even potentially make a difference. There are fewer examples of courts deeming mid-appeal Rule 15 motions second or successive pre-AEDPA. But that is for good reason: by the time AEDPA was enacted, virtually every court to consider the question had held a plaintiff or habeas petitioner couldn't seek leave to amend his pleadings postjudgment without first moving to reopen the judgment. So absent an accompanying Rule 60 motion, which would be deemed second or successive, there were virtually no "mid-appeal" Rule 15 motions to consider.

A. This Court has often looked to history in defining second or successive petitions under AEDPA. But not just any history matters. Rivers, for example, relies heavily on Justice Field's 1889 opinion riding circuit in *Ex parte Cuddy*, Pet. Br. 26, 38, an opinion written early in the development of abuse-of-the-writ doctrine.[1] But Justice Field not only thought a habeas petition wasn't abusive until a prior petition's denial had been affirmed; he suggested successive petitions could be filed seriatim so long as a prisoner didn't appeal,[2] or if

[1] Abuse-of-the-writ doctrine didn't begin to emerge until after 1867, when Congress first provided for appellate review in habeas, *see Felker v. Turpin*, 518 U.S. 651, 660 (1996); prior to then, the common law "allow[ed] endless successive petitions," *McCleskey v. Zant*, 499 U.S. 467, 479 (1991), which "served as a substitute for appeal." *Id.*

[2] 40 F. 62, 66 (C.C.S.D. Cal. 1889) (reasoning Cuddy "need not have appealed from the refusal of the district court; he could have applied to the circuit judge, and also, afterwards, to the circuit justice"). In Justice Field's view, seemingly, habeas petitioners had a choice; they could appeal and forego their right at common

new evidence was discovered even after an appeal.[3] That early history can't inform how we understand "second or successive" today; Rivers concedes AEDPA sharply restricted successive petitions based on new evidence, Pet. Br. 27, 36, and no one thinks today that prisoners can file endless successive petitions so long as they don't appeal their first.

The history this Court has looked to, then, isn't the doctrine's early and tentative roots in the late 19th and early 20th centuries, but the mature doctrine in the years preceding AEDPA's enactment. *See Banister*, 590 U.S. at 519 (citing pre-AEDPA cases from 1993 and 1996 for the proposition that Rule 60(b) motions had been deemed successive before AEDPA); *cf. McCleskey*, 499 U.S. at 488 ("attempt[ing] to define the doctrine . . . with more precision" in 1991). That was the "legal backdrop" against which AEDPA was enacted, *Banister*, 590 U.S. at 515, and crucially, those were the years in which courts were actually interpreting the phrase "second or successive," which was used in a codification of the doctrine added to the Rules Governing Habeas Corpus Proceedings in 1976, *see McCleskey*, 499 U.S. at 487.

B. Though Rivers now primarily seeks a narrow ruling that so-called "mid-appeal Rule 15 motions" aren't second or successive, the question on which this Court originally granted certiorari was whether § 2244(b)(2) applied to "all second-in-time habeas

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law to successively petition, or successively petition and forego their right to appeal.

[3] *Id.* (deeming Cuddy's petition abusive because "there [we]re no new facts," and stating "[t]he question is entirely different when subsequent occurring events have changed the situation").

filings after final judgment" or only those "made after a prisoner has exhausted appellate review of his first petition." Pet. i. Besides filings that are successive petitions on their face, by far the most common type of filing to which that question applies is the Rule 60(b) motion. And in the years before AEDPA's enactment, lower courts uniformly held that Rule 60(b) motions filed before a prisoner exhausted appellate review were second or successive.

In *Banister* this Court, distinguishing pre-AEDPA Rule 60 practice from that under Rule 59, noted that pre-AEDPA "decisions abound" rejecting Rule 60(b) motions as second or successive. 590 U.S. at 519 (citing *Brewer v. Ward*, 1996 WL 194830, at *1 (10th Cir. Apr. 22, 1996) (collecting cases from six Circuits)). Rivers says that if pre-AEDPA courts thought mid-appeal filings were successive, "there should be lots of decisions" saying that too. Pet. Br. 39 (quoting *Banister*, 590 U.S. at 514). There are. Between 1993 and 1996, six Circuits—the Fourth, Fifth, Sixth, Seventh, Eighth and Ninth—all held that Rule 60(b) motions filed on appeal or while a cert petition was pending were second or successive.[4] Courts of appeals

[4] *See Hunt v. Nuth*, 57 F.3d 1327, 1331, 1339 (4th Cir. 1995) (holding Rule 60(b) motion filed two months after judgment by counsel the Fourth Circuit appointed on appeal was "properly treat[ed] . . . as a successive habeas petition"); *Behringer v. Johnson*, 75 F.3d 189, 190 (5th Cir. 1995) (per curiam) (holding Rule 60(b) motion filed while application for leave to appeal was pending was "properly viewed as a second . . . petition"); *Kyles v. Whitley*, 5 F.3d 806, 808 (5th Cir. 1993) (holding, where appeal was held in abeyance pending a Rule 60(b) motion, that "a petitioner may not use a Rule 60(b) motion to raise constitutional claims that were not included in the original habeas petition"); *McQueen v. Scroggy*, 99 F.3d 1302, 1309, 1335 (6th Cir. 1996) (holding, after denying motion to remand to amend the petition

held that Rule 60(b) motions filed before prisoners were even granted leave to appeal were successive, *Behringer*, 75 F.3d at 190; that Rule 60(b) motions appeals were held in abeyance for were successive, *Kyles*, 5 F.3d at 808; that Rule 60(b) motions the court of appeals invited prisoners to file in lieu of untimely Rule 15 motions were successive, *McQueen*, 99 F.3d at 1309, 1335; and even that Rule 60(b) motions filed before an appeal was taken were successive, *Bonin*, 999 F.2d at 427–28.

These courts did not so much as suggest that whether a Rule 60(b) motion was filed on appeal or after could even potentially make a difference. Indeed in many of the cases, when the Rule 60(b) motion was filed is only discernible from the opinion's procedural history or the underlying docket. Instead, they simply reasoned without any discussion of mid- or post-appeal timing "that a Rule 60(b) motion is the practical equivalent of a successive habeas petition." *McQueen*, 99 F.3d at 1335. The only temporal distinction these courts thought mattered is that the motions were filed

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and "call[ing] McQueen's attention to [Rule] 60(b)," that subsequent Rule 60(b) motion filed over two years before the Sixth Circuit entered judgment was "the practical equivalent of a successive habeas petition"); *Resnover v. Pearson*, 1993 WL 430159, at *1–2 (7th Cir. Oct. 22, 1993) (holding Rule 60(b) motion filed after first petition's denial was affirmed but before this Court denied cert was successive); *Guinan v. Delo*, 5 F.3d 313, 316–17 (8th Cir. 1993) (holding Rule 60(b) motion filed after decision on appeal but before this Court denied cert was "correctly treated . . . as a second habeas petition" and "still would have been" were it filed before appeal was decided); *Bonin v. Vasquez*, 999 F.2d 425, 427–28 (9th Cir. 1993) (holding that a self-styled motion to amend filed one month after judgment and before appeal was properly construed as a Rule 60(b) motion and "was subject to the same cause and prejudice standard" as "a second petition").

"after a decision on the merits," *id.*, and "follow[ed] the entry of final judgment," *Bonin*, 999 F.2d at 428.

By contrast, Rivers doesn't cite a single pre-AEDPA case holding that Rule 60(b) motions on appeal weren't successive. That is because, as far as Amici States can tell, such cases don't exist;[5] indeed, the narrow split over whether mid-appeal Rule 60(b) motions were successive only developed after AEDPA's enactment. The only evidence Rivers cites that pre-AEDPA courts thought only post-appeal filings were successive are three opinions, two by district courts, that emphasized a successive claim had previously been rejected on appeal. Pet. Br. 39. But none of those cases say that exhausting appellate review was a necessary condition for a filing's being successive, nor does Rivers even claim they do. And it is hardly surprising that district courts viewed successive filings that "put th[e] Court in the position of reviewing a decision of its Court of Appeals" as particularly egregious. *Id.* (quoting *Walker v. Lockhart*, 514 F. Supp. 1347, 1352 (E.D. Ark. 1981)). After all, such filings were not only successive but offended the "principle of stare decisis," as those courts actually reasoned. *Walker*, 514 F. Supp. at 1352

[5] Rivers's legal scholar amici, who make more of an attempt to find favorable pre-AEDPA authority, don't identify any such cases either. All they say on this score is that most—though they admit not all—of the pre-AEDPA cases in the *Brewer* string-cite this Court cited in *Banister* involved post-appeal Rule 60(b) motions, and that one entertained a post-appeal Rule 60(b) motion on the merits. Legal Scholars Amici Br. 20. That doesn't show that pre-AEDPA courts distinguished between mid- and post-appeal filings.

(quoting *United States ex rel. Schnitzler v. Follette*, 406 F.2d 319, 321 (2d Cir. 1969)).[6]

C. Pre-AEDPA courts uniformly treated mid-appeal motions to reopen habeas judgments as successive, and Rivers doesn't even attempt to marshal any evidence to the contrary. But he claims matters were different for post-judgment, mid-appeal Rule 15 motions. As to these, he says, his "research did not find a single pre-AEDPA case where a court treated mid-appeal efforts to amend or supplement as an abuse of the writ." Pet. Br. 29. In fact there are several, but Rivers struggled to find them for good reason: the Rules of Civil Procedure don't allow a freestanding motion to amend postjudgment. Rather, a judgment loser seeking to amend his pleadings or habeas petition has to reopen the judgment first.

Rivers claims pre-AEDPA courts never treated postjudgment motions to amend on appeal as successive. In fact there are several cases of courts' doing just that shortly before AEDPA's enactment. In *Smith v. Armontrout*, Judge Richard Arnold held that the precise procedure Rivers pursued here, a motion to remand "to allow the petitioner . . . to amend his petition," was "the functional equivalent of a second or successive petition." 888 F.2d 530, 540 (8th Cir. 1989).

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[6] Moreover, even if statements like *Walker*'s were read to imply a necessary condition for a filing's being successive, that still wouldn't support Rivers's rule. Instead, it would suggest that a filing is only successive if a prior denial of habeas relief was appealed and affirmed, a position that even Rivers doesn't defend. If the prisoner in *Walker* had never appealed the first denial and still filed a new petition twelve years later, Pet. Br. 39, Rivers would still say the later petition was successive because the first denial was final.

In *Bonin*, the Ninth Circuit held that "[b]ecause final judgment had already been entered," a postjudgment motion to amend was "properly construed . . . as a request for relief from the judgment [under] Rule 60(b)," 999 F.2d at 427, and should be held to "the same cause and prejudice standard" as a "second petition," *id.* at 428; *see also Bonin v. Calderon*, 59 F.3d 815, 847 (9th Cir. 1995). And in *McQueen*, the Sixth Circuit denied a motion to remand to amend the petition, directed the petitioner to first move to reopen the judgment under Rule 60(b), 99 F.3d at 1309, and then held that the Rule 60(b) motion he filed was "the practical equivalent of a successive habeas petition" because it "advance[ed] new claims . . . after a decision on the merits ha[d] been rendered," *id.* at 1335.

But if there aren't more pre-AEDPA cases holding that mid-appeal motions to amend were successive, that's for good reason; the Rules of Civil Procedure don't allow postjudgment motions to amend until a judgment's been reopened. It is blackletter law that "once a judgment is entered the filing of an amendment cannot be allowed until the judgment is set aside or vacated under Rule 59 or Rule 60." 6 Charles Alan Wright et al., Federal Practice and Procedure § 1489 & n.1 (3d ed. updated June 2024) (collecting cases from every regional circuit). That proposition was well-settled long before AEDPA's enactment; Wright and Miller said that most courts had adopted it as early as 1971. 6 Charles Alan Wright et al., Federal Practice and Procedure § 1489 (1st ed. 1971).

The reason for that rule is simple. As the Eleventh Circuit recently explained in a habeas case where Rivers's proposed maneuver was tried, "a district court has no jurisdiction to grant a motion to amend a

pleading that is no longer pending before it." *Boyd v. Sec'y, Dep't of Corr.*, 114 F.4th 1232, 1237 (11th Cir. 2024); *see also Calvary Christian Ctr. v. City of Fredericksburg*, 710 F.3d 536, 540 (4th Cir. 2013) (Niemeyer, J.) ("[W]hen the action has been dismissed, there is no pending complaint to amend."); *Mitsubishi Aircraft Int'l, Inc. v. Brady*, 780 F.2d 1199, 1203 (5th Cir. 1986) (holding postjudgment amendment could not be granted because "there was no longer existent a claim to be amended"). So until the judgment is vacated, "it would be contradictory to entertain a motion to amend the complaint." *Nat'l Petrochemical Co. of Iran v. M/T Stolt Sheaf*, 930 F.2d 240, 245 (2d Cir. 1991).

Rivers doesn't really dispute any of this. As he acknowledges with some understatement, final judgments are "structural barriers" that "ordinarily prevent district courts from granting" postjudgment Rule 15 motions, Pet. Br. 18, and some of the pre-AEDPA cases he approvingly cites as denying them on the merits denied them on the ground that they couldn't be granted until the judgment was vacated. Pet. Br. 30 (citing *Briddle v. Scott*, 63 F.3d 364 (5th Cir. 1995); *Bishop v. Lane*, 478 F. Supp. 865 (E.D. Tenn. 1978)). Instead, Rivers claims only that *mid-appeal* postjudgment Rule 15 motions don't require an underlying Rule 60(b) motion. If, he asserts, a prisoner in his shoes persuades a court of appeals to remand under Rule 62.1 to allow the district court to entertain a motion to amend, the remand order itself "amounts" to a vacatur of the judgment, "mak[ing] it unnecessary" to set it aside under Rule 60(b). Pet. Br. 21. But that end-run around the bar on postjudgment amendments doesn't work.

To begin with, the claim that Rule 62.1 remands automatically vacate the judgment is contradicted by the rule itself. Rule 62.1 "adopt[ed] . . . the practice that most courts follow[ed] when a party ma[de] a Rule 60(b) motion to vacate a judgment that is pending on appeal," Fed. R. Civ. P. 62.1 advisory committee note, and is still most often used to entertain Rule 60(b) motions. If a Rule 62.1 remand itself vacated the judgment, the district court wouldn't have to rule on a Rule 60(b) motion on remand; the judgment would be vacated already. But the rule actually says that "[t]he district court may decide the motion if the court of appeals remands for that purpose." Fed. R. Civ. P. 62.1(c); *see also* Fed. R. Civ. P. 62.1 advisory committee note (district courts may deny the motion even after a favorable indicative ruling in light of "further proceedings on remand"). Otherwise, the district court's indicative ruling "that it would grant the motion if the court of appeals remands for that purpose," Fed. R. Civ. P. 62.1(b), would really function as advice to the court of appeals on whether *it* should grant the motion, not as guidance on whether a remand to entertain the motion would be worthwhile. Thus, the only way to make sense of the indicative-ruling procedure is that Rule 62.1 remands reinvest jurisdiction in the district court to grant whatever postjudgment relief the Rules of Civil Procedure otherwise allow, not that the remands vacate judgments themselves.

Unsurprisingly then, courts of appeals reject the notion that they can reopen judgments merely by way of Rule 62.1 remand. Just last year, for example, after the Fourth Circuit remanded under Rule 62.1 to let a district court entertain a motion to amend, it held on appeal from the subsequent denial that the district

court couldn't grant the amendment on remand unless it first vacated the judgment under Rule 60(b). *Daulatzai v. Maryland*, 97 F.4th 166, 173, 178–79 (4th Cir. 2024) (Niemeyer, J.). If Rivers were right, the judgment would have already been vacated. In *Balbuena v. Sullivan*, a habeas case, the Ninth Circuit granted the prisoner a remand to seek leave to amend, but explained that "the district court could not apply Rule 15; instead, it could only consider Balbuena's new claim if it set aside its earlier judgment under Rule 60(b)." 980 F.3d 619, 638 (9th Cir. 2020).[7] And in *Quinones v. Frequency Therapeutics*, where a judgment loser sought a Rule 62.1 remand to amend his dismissed complaint, the First Circuit explained that even on remand he would "need[] a Rule 60 motion to reopen the record to allow [him] to file a Rule 15 motion to amend." 347 F.R.D. 560, 564 n.4 (D. Mass. 2024) (quoting oral argument).

In resisting this consensus view of Rule 62.1, Rivers relies solely on a single dictum of the Second Circuit preceding the rule's adoption by 60 years.[8] Pet. Br. 21

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[7] *Balbuena* is part of the circuit split on the question this Court granted certiorari on, whether *all* postjudgment habeas filings during an appeal evade the second or successive bar. But none of the cases on the other side of the split blessed Rivers's proposed vacate-and-remand-to-amend procedure either; they simply held that facially successive petitions aren't second or successive under § 2244 so long as an appeal from the first petition's denial is pending. *See Whab v. United States*, 408 F.3d 116 (2d Cir. 2005).

[8] Rivers also cites *Mendoza v. Lumpkin* for the proposition that a "remand order that vacates the judgment 'reopen[s] litigation.'" Pet. Br. 21 (quoting 81 F.4th 461, 470 (5th Cir. 2023)). But the question is whether Rule 62.1 remands vacate the judgment. *Mendoza*, by way of distinguishing them from the broader remand the court had previously granted in that case, specifically says they do not. *See Mendoza*, 81 F.4th at 469 ("The type of

(citing *Markert v. Swift & Co.*, 173 F.2d 517, 520 (2d Cir. 1949)). In that case, which the Second Circuit had previously remanded to allow the district court to entertain a postjudgment motion to amend, the Second Circuit agreed with what was even then the consensus view that "[t]echnically the judgment of dismissal should be reopened before an amendment to the complaint is granted," and that once the time to make a Rule 59 motion expires, "the relief must be sought under [Rule] 60(b)." *Markert*, 173 F.2d at 519. And it even said that the plaintiffs "[i]n fact . . . did rely on this rule." *Id.* But it then gratuitously—and self-contradictorily—went on to say that a Rule 60 motion "seems hardly necessary," because its "remand would seem to . . . amount in itself to a vacation of the judgment." *Id.* at 520.

That tentative and unreasoned dictum about a remand's seeming effect has no persuasive value. It didn't interpret and predates Rule 62.1, which plainly states that it's the district court, not the court of appeals, that reopens or declines to reopen the judgment on remand. It has never been cited by the Second Circuit in the 76 years since, where today "[i]t is well established that '[a] party seeking to file an amended complaint postjudgment must first have the judgment vacated or set aside pursuant to [Rules] 59(e) or 60(b).'" *Metzler Inv. Gmbh. v. Chipotle Mexican Grill, Inc.*, 970 F.3d 133, 142 (2d Cir. 2020) (quoting *Ruotolo v. City of New York*, 514 F.3d 184, 191 (2d Cir. 2008)).[9]

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limited remand under Rule 12.1(b) [the Rules of Appellate Procedure's companion to Rule 62.1] . . . does not disturb finality in the district court.").

[9] The Second Circuit has also specifically said that its Rule 62.1 remands aren't vacaturs. *See Corporación Mexicana De*

And by allowing judgment losers to obtain vacatur on a mere showing that Rule 15 was satisfied, or even just might be, it "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"—as the Second Circuit has in fact reasoned. *Id.* (quoting *Williams v. Citigroup Inc.*, 659 F.3d 208, 213 (2d Cir. 2011)).

* * *

In sum then, a postjudgment motion to amend a habeas petition, even if a court of appeals grants a remand to entertain it, requires an accompanying Rule 60(b) motion. Pre-AEDPA history is clear that Rule 60(b) motions to raise new claims were deemed the equivalent of successive petitions whether they were filed mid-appeal or after. AEDPA was passed "against this legal backdrop, and did nothing to change it." *Banister*, 590 U.S. at 515. So mid-appeal motions to amend habeas petitions are second or successive.

II. Courts Should Stop Interpreting AEDPA Creatively and Instead Apply its Plain Language.

That a federal court could conceivably determine that Rivers's assertion of new claims *years* after the district court denied his habeas petition was anything other than a "second or successive application" makes

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Mantenimiento Integral, S. De R.L. De C.V. v. Pemex Exploración Y Producción, 832 F.3d 92, 102 n.6 (2d Cir. 2016) (describing "a remand following an indicative ruling" as "far afield from . . . a full vacatur and remand" and holding plaintiffs forfeited a request for the former by seeking only the latter); *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 118 (2d Cir. 2011) (noting prior Rule 62.1 "remand . . . to *permit the district court to rule* on the pending Rule 60(b) motion") (emphasis added).

clear that courts have lost the plot on AEDPA. And States are the primary casualties of this divergence.

Regardless of whether AEDPA supplemented then-existing abuse-of-the-writ doctrine or replaced it, *compare Magwood v. Patterson*, 561 U.S. 320, 338 (2010) (opinion of Thomas, J.) ("[W]e must rely upon the current text to determine when the phrase applies, rather than pre-AEDPA precedents or superseded statutory formulations."), *with Banister*, 590 U.S. at 512, AEDPA is designed to "conserve judicial resources, reduce piecemeal litigation, and lend finality to state and alterations omitted). court judgments within a reasonable time," *id.* (quotation

Rivers, like many duplicative habeas petitioners before him, seeks to evade the plain language of § 2244 and the obvious import of the civil rules to create yet *another* exception to AEDPA's clear rules. He argues that Rule 62.1 permits his motion for *mid-appeal* amendment *three years down the road*. Pet. Br. 19–20. He recognizes that "[a]n appeal . . . divests the district court of its control over those aspects of the case involved in the appeal," *Coinbase, Inc. v. Bielski*, 599 U.S. 736, 740 (2023); Pet. Br. 18–19 (quoting *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (per curiam)), but sees Rule 62.1 as a workaround. But how could Rule 62.1 apply here? First, it requires a "timely motion," and Rivers acted *years* after the district court denied his first application. Additionally, regardless of its label, *see Gonzalez v. Crosby*, 545 U.S. 524, 531 (2005), what Rivers filed *was a second habeas application that did not comply with § 2244(b)*. Rivers would complicate federal habeas cases with yet another layer of counterintuitive exceptions upon exceptions and special cases.

AEDPA tamps down on this sort of ad hoc decision-making. Properly understood, § 2244(b) has real and salutary effects on federal courts and State litigators. When prisoners assert new habeas claims throughout the pendency of an appeal, it "requir[es] the State repeatedly to appear and expend its resources, with no help in sight from supposed limitations on 'second or successive' petitions." *Slack v. McDaniel*, 529 U.S. 473, 492 (2000) (Scalia, J., concurring in part and dissenting in part). Each year federal courts confront tens of thousands of habeas corpus petitions, which typically make up between five to ten percent of federal cases. *See* Admin. Office of the U.S. Courts, *Federal Judicial Caseload Statistics, U.S. District Courts-Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit* (2024) (Table C-2), *available at* https://www.uscourts.gov/sites/default/files/2024-12/jb_c2_0930.2024.pdf.

By any measure, "[h]abeas petitions occupy an outsized place on federal dockets." *Banister*, 590 U.S. at 523 (Alito, J., dissenting). And this is not new; over 70 years ago Justice Jackson lamented that "this Court has sanctioned progressive trivialization of the writ [of habeas corpus] until floods of stale, frivolous and repetitious petitions inundate the docket of the lower courts and swell [its] own." *Brown v. Allen*, 344 U.S. 443, 536 (1953) (Jackson, J., concurring). More recently, in the twelve-month period ending on September 30, 2024, 13,378 new habeas cases were filed in federal court, constituting nearly five percent of 290,896 cases filed that year. *Federal Judicial Caseload Statistics, U.S. District Courts-Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit* (2024) (Table C-2). Put differently, roughly one in

every twenty federal cases is a habeas petition. *See also* Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. Rev. 791, 815 (2009) (In 2009, "one out of every fourteen civil cases filed in federal district court is a habeas challenge by a state prisoner."). And statistics show "that, in the main, district courts resolve habeas petitions correctly," being "reversed in only a miniscule percentage of appeals in cases involving state prisoners' habeas claims." *Banister*, 590 U.S. at 533 (Alito, J., dissenting); *see* Admin. Office of the U.S. Courts, *Federal Judicial Caseload Statistics, U.S. Courts of Appeals Judicial Business-Decisions in Cases Terminated on the Merits, by Circuit and Nature of Proceeding* (2024), *available at* https://www.uscourts.gov/sites/default/files/2024-12/jb_b5_0930.2024.pdf (4.3 percent of private prisoner petitions were reversed in year ending September 30, 2024).

AEDPA greatly reduces the enormous costs that these tens of thousands of (often frivolous) petitions entail. But those benefits evaporate as exceptions and ad hoc special cases multiply. It isn't just the cost in litigating the rare second or successive petition that gets through: it is the cost of litigating *whether* something is second or successive in the first place, when that analysis should be exceedingly simple.

The danger of ignoring AEDPA extends well beyond the increased workload for State lawyers defending against them. The flood of meritless claims can sweep away meritorious claims to prisoners' own detriment. *See* Hoffmann & King, 84 N.Y.U. L. Rev. at 814 ("Given the more than 18,000 habeas petitions filed each year, and the growing number of claims per petition, the danger that at least some deserving constitutional

claims will be swept away by the overwhelming flood of meritless ones is substantial."). AEDPA's limit on "second or successive applications" was designed "to conserve judicial resources, reduce piecemeal litigation, and lend finality to state court judgments within a reasonable time." *Banister*, 590 U.S. at 512 (alterations accepted) (quotation omitted). That is, AEDPA confronted real harms with real consequences. And this Court has declined to "adopt[] a presumption against finality as a substantive value" because "how to balance [finality of sentences] against error correction is a judgment about the proper scope of the writ [of habeas corpus] that is normally for Congress to make." *Jones v. Hendrix*, 599 U.S. 465, 491 (2023) (quotation omitted) (alteration accepted).

On top of everything else, § 2244(b) applies to federal habeas petitions brought by *State* prisoners, who are required to have already exhausted available State remedies, *see* 28 U.S.C. § 2254(b). A collateral attack in federal court to "redetermine federal questions already adjudicated by state courts and subject to Supreme Court review" is "quite different" from a case that *originates* in federal court. Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 512 (1963). A different "calculus" applies "where the question is whether a suit which is and must be tried in state court should then be reopened to allow the redetermination of federal questions by a federal judge." *Id.* In this "situation," "the whole point" is that "we [as a society] have already made the fundamental decision that we do want the state courts to decide the case," creating "special problems of waste of resources, strain in federal-state relations and damage to the fabric

of criminal law" that weigh against "superimpos[ing] collateral review on the Supreme Court's direct supervisory function." *Id.* That § 2244(b) places stringent "gatekeeping requirements," *Banister*, 590 U.S. at 509, on second or successive *collateral attacks* makes perfect sense for a statute that was "design[ed] . . . to further the principles of comity, finality, and federalism," *Panetti v. Quarterman*, 551 U.S. 930, 945 (2007) (quotation omitted), as well as to "conserve judicial resources, reduce piecemeal litigation, and lend finality to state court judgments within a reasonable time," *Banister*, 590 U.S. at 512 (quotation omitted) (alterations accepted).

It is no surprise that Rivers tried to assert a new claim (years after the district court denied his first habeas corpus petition) without satisfying § 2244(b)'s high bar. Why wouldn't he? The incentives for most prisoners are to continue filing petitions without end. But it is concerning that some federal courts might turn a blind eye to § 2244(b) and permit amendment without prior approval, long after the Federal Rules would permit any other civil plaintiff to timely amend. While "[c]hronology . . . is by no means all" when determining whether a filing is second or successive, timing and timeliness absolutely matter, because timeliness matters throughout the Federal Rules of Civil Procedure, which "generally govern habeas proceedings." *Id.* at 511–12; *see also id.* at 521 (emphasizing that Banister's Rule 59(e) motion was timely). Rule 62.1, on which Rivers bases his argument, *see* Pet. Br. 1, only applies to "a timely motion," and Rivers does not identify a timely motion he could file three years after the district court's judgment. Rule 60(b) motions relying on newly discovered evidence

must occur "no more than a year after the entry the entry of the judgment or order" (and are second or successive anyway), Fed. R. Civ. P. 60(c)(1); Rule 59(e) motions are due "no later than 28 days after the entry of judgment"; and Rule 15(b), with the exception of amendments to "conform [the pleadings] to the evidence," Fed. R. Civ. P. 15(b)(2), only permits post-trial amendment if the judgment is reopened under Rule 59(e) or Rule 60(b), *supra* at 11-12. That is, Rivers's argument would put him in a better position than non-habeas civil litigants. AEDPA cannot possibly allow for that, so Rivers's motion must be second or successive.

It is past time for courts with "a taste for disregarding AEDPA" to be reined in. *Davis v. Smith*, 145 S. Ct. 93, 93 (2025) (Thomas, J., dissenting from denial of certiorari). This Court should make clear that AEDPA is not a statute to be circumvented.

CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted,

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