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 THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether petitioner's updated application for a writ of habeas corpus, filed after final judgment on his original application and during the pendency of an appeal from that judgment, should be treated as a second or successive habeas application.

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INTEREST OF THE UNITED STATES

This case concerns whether a state prisoner's filing of an updated application for a writ of habeas corpus under 28 U.S.C. 2254, while appeal from final judgment of his original application is pending, should be treated as a second or successive application under 28 U.S.C. 2244(b). The limitations on second or successive collateral attacks in the context of postconviction review of federal judgments under 28 U.S.C. 2255 are similar to, and cross-reference, the limitations on habeas applications by state prisoners. See 28 U.S.C. 2255(h). Because this Court's resolution of the question presented may therefore affect postconviction proceedings for federal prisoners, the United States has a substantial interest in this case.

INTRODUCTION

"Second or successive" habeas applications face stringent gatekeeping requirements under 28 U.S.C. 2244(b). Such applications may only be filed if first authorized by a court of appeals, which cannot issue such authorization if the application relitigates issues raised in an earlier habeas application. Absent specified exceptions, second or successive applications cannot raise new issues, either. Petitioner, a state prisoner, claims (Br. 1) that an updated application for a federal writ of habeas corpus, submitted while the denial of his original application was pending on appeal, was an "amendment" of that first application, not a restricted second or successive application. But even ordinary civil litigants do not have a right to "amend" their original filings following a district court's final judgment.

Like other habeas applicants, petitioner was entitled to "one fair opportunity" to litigate the merits of his claims in the district court. *Banister* v. *Davis*, 590 U.S. 504, 507 (2020). But after that court entered its judgment, petitioner was not free to continue to amend his application, years later, to add new claims or replead old ones. Instead, in the habeas context and elsewhere, amendment following a district court's final judgment requires relief from that judgment. And in petitioner's case, such relief would fall squarely within this Court's definition of a second or successive habeas application.

The Court has made clear that a motion for relief from the judgment constitutes a second or successive application when the motion seeks to raise one or more "claims" —*i.e.*, one or more asserted federal bases for relief from a state-court conviction—including by asserting new evidence in support of a previously litigated claim. *Gonzalez* v. *Crosby*, 545 U.S. 524, 530 (2005). That is pre-

cisely what petitioner sought to do here by postjudgment amendment—add new claims, or relitigate claims already raised in his original application. The lower courts correctly recognized that petitioner's postjudgment request to amend his initial application constituted a second or successive application. The judgment should be affirmed.

STATEMENT

1. In 2009, petitioner's daughter and stepdaughter told their mother, who was separated from petitioner and in the process of divorcing him, that petitioner had sexually abused them on multiple occasions. 8 Reporter's Record (RR) 57, 60-71. The victims' mother reported the abuse to the police, who obtained a warrant to search petitioner's home and recovered a laptop containing child pornography. 8 RR 66-67, 109-111; 10 RR 29-64.

The State of Texas charged petitioner with one count of continuous sexual abuse of a child, two counts of indecency with a child by sexual contact, one count of indecency with a child by exposure, and two counts of possessing child pornography. 2022 WL 1517027, at *1. The case proceeded to trial, and the jury found petitioner guilty on all counts. 2018 WL 4443153, at * 1. He was sentenced to 38 years of imprisonment, and his convictions were affirmed on direct appeal. *Ibid.*; see Pet. App. 13a.

Petitioner subsequently sought postconviction relief in state court based on, among other things, a claim that his trial counsel had been ineffective. 2017 WL 3380491, at *1. Each of petitioner's three attorneys filed affidavits stating that their trial strategy had been informed by petitioner's admissions to them that he had sexually abused his children. 2022 WL 1517027, at *1. The state

courts denied postconviction relief. 2017 WL 3380491, at *1.

2. Under 28 U.S.C. 2254, a state prisoner who has exhausted available state postconviction remedies may file an application for a writ of habeas corpus in federal district court. See 28 U.S.C. 2254(b)(1)(A) and (c). In August 2017, petitioner filed a pro se Section 2254 application. J.A. 20-35. Petitioner's federal habeas application renewed his claim, *inter alia*, that his trial counsel had been ineffective. J.A. 28.

The district court referred petitioner's Section 2254 application to a magistrate judge, who recommended that it be denied. 2018 WL 4443153, at *1. The magistrate judge observed that Section 2254(d) precludes a federal court from granting a Section 2254 application "with respect to any claim that was adjudicated on the merits in State court proceedings" unless the state-court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.* at *1-*2 (quoting 28 U.S.C. 2254(d)). The magistrate judge determined that none of petitioner's claims satisfied that standard. See *id.* at *3-*9.

The district court largely agreed with the magistrate judge's analysis and denied the Section 2254 application. 2018 WL 4409830. The court also declined to grant a certificate of appealability, as necessary for petitioner to appeal the court's judgment. 17-cv-124 Order 1 (Sept. 17, 2018); see 28 U.S.C. 2253(c). The court of appeals, however, granted a certificate of appealability limited to petitioner's claim that his trial counsel had been

ineffective for "failure to conduct a reasonable investigation and interview witnesses." J.A. 10.

In 2022, the court of appeals affirmed the denial of petitioner's habeas application. 2022 WL 1517027, at *1. This Court denied a petition for a writ of certiorari. 143 S. Ct. 1090 (No. 22-6688).

3. In February 2021, while petitioner's appeal from the denial of his original federal habeas application was pending before the court of appeals, he filed another Section 2254 application in the district court. J.A. 5, 58-80. He again alleged that his trial counsel had been ineffective, and also asserted various other claims. J.A. 66-75. For his ineffective-assistance claims, he maintained that the factual basis for the claims had become available to him only "recently," when he had obtained records from one of his trial lawyers after filing a grievance with the state bar. J.A. 68; see J.A. 68-69, 87-89.

a. Title I of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, Tit. I, 110 Stat. 1217, imposes strict constraints on the filing of "second or successive" federal habeas applications. 28 U.S.C. 2244(b). In order to file such an application, a state prisoner must secure preapproval from a panel of the court of appeals under 28 U.S.C. 2244. See 28 U.S.C. 2244(b)(3)(A) and (B). The panel "may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of" Section 2244(b). 28 U.S.C. 2244(b)(3)(C). Section 2244(b)(1) requires the dismissal of any claim that was already "presented in a prior application." And Section 2244(b)(2) requires the dismissal of any claim "that was not presented in a prior application * * * unless" it satisfies one of two criteria.

The first criterion is where "the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. 2244(b)(2)(A). The second is where the facts underlying the claim could not previously have been discovered through due diligence and "would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. 2244(b)(2)(B)(ii).

b. Here, the district court referred petitioner's new habeas application to a magistrate judge, who recommended that it be treated as a second or successive application and that it be transferred to the court of appeals for the gatekeeping required under Section 2244(b). Pet. App. 12a-17a. The magistrate judge observed that petitioner was seeking to "challenge[] the same conviction[s]" that he had challenged in his original application, *id.* at 13a, and that he was again "asserting that his trial and appellate counsel were ineffective," *id.* at 14a.

Petitioner objected to the magistrate judge's recommendation on the theory, *inter alia*, that his new application "should be construed as an amendment to [his] initial petition currently pending on appeal." D. Ct. Doc. 27, at 5 (Sept. 2, 2021). He pointed to Federal Rule of Civil Procedure 15, the rule covering amending and supplementing pleadings, as a basis for construing the filing that way. D. Ct. Doc. 27, at 8.

The district court overruled petitioner's objections, agreed with the magistrate judge that the application should be treated as second and successive, and transferred petitioner's filing to the court of appeals. Pet. App. 18a-19a.

c. The court of appeals "docketed a new proceeding for [petitioner] to file a motion for authorization to file a successive" application. Pet. App. 3a. But rather than file such a motion, petitioner filed a notice of appeal from the transfer order itself. *Ibid.* When he did so, the court had not yet decided his earlier appeal from the denial of his original Section 2254 application. *Id.* at 3a n.2. But by the time the court issued its decision in the appeal of the transfer order, it had already affirmed the denial of his original application, and this Court had denied certiorari. *Ibid.*; see 143 S. Ct. 1090.

The court of appeals affirmed the district court's transfer order. Pet. App. 1a-11a. Petitioner reprised his contention that his updated habeas application should not have been treated as a second or successive application but instead as a motion to amend his original application, which was "still pending on appeal" when he filed the updated application. *Id.* at 1a. The court of appeals noted at the outset that, because petitioner's earlier appeal had been unsuccessful, "the current relief that [he] seeks is unclear since there is nothing to amend." *Id.* at 3a n.2. But the court stated that it "need not reach" the question of appropriate relief because it agreed with the district court that "the second-in-time petition was successive." *Ibid.*

The court of appeals explained that petitioner's updated application fell "squarely within the contours for successive" applications. Pet. App. 6a. The court acknowledged petitioner's assertion that his renewed ineffective-assistance claims relied on information that was unavailable at the time of his original application, but noted that such an assertion "does not excuse him from meeting the standards for seeking authorization under § 2244." *Id.* at 6a-7a. The court observed that

automatically allowing updated habeas applications like petitioner's, after judgment has been entered on the original application, would "circumvent the requirements for filing successive petitions under § 2244." *Id.* at 7a. And it quoted the Seventh Circuit's similar observation that such filings, if permitted, would "'drain most force from the time-and-number limits in § 2244' by allowing prisoners to file an unlimited number of new applications until the appeal is over." *Id.* at 8a (quoting *Phillips* v. *United States*, 668 F.3d 433, 435 (7th Cir. 2012)).

The court of appeals also drew guidance from this Court's decision in *Gonzalez* v. *Crosby*, 545 U.S. 524 (2005). See Pet. App. 9a-10a. *Gonzalez* had instructed that when a habeas applicant files a motion under Federal Rule of Civil Procedure 60(b) seeking relief from the judgment in order to "present 'newly discovered evidence' in support of a claim previously denied," the motion is "in substance a successive habeas petition and should be treated accordingly." 545 U.S. at 531 (citation omitted). The court of appeals recognized that petitioner's postjudgment filing here had not been formally labeled as a motion under Rule 60(b). Pet. App. 9a. But it observed that any alternative labeling was a "distinction without a difference," because the "nature of the relief sought" was effectively the same no matter how it was styled. *Id.* at 9a-10a.

SUMMARY OF ARGUMENT

Petitioner's updated habeas application, filed nearly two and a half years after the district court had already entered judgment on his original application, is a second or successive application subject to AEDPA's gatekeeping requirements. This Court should therefore affirm

the lower courts' transfer of it to the court of appeals for gatekeeping under 28 U.S.C. 2244(b).

A. Federal habeas proceedings are governed by the Federal Rules of Civil Procedure, except to the extent that those rules are inconsistent with a federal statute or the more specific rules applicable in habeas proceedings. Federal Rule of Civil Procedure 15 addresses amending and supplementing the pleadings. But Rule 15 does not permit a litigant to do what petitioner attempted here: to amend a pleading after the district court has already entered final judgment, in an effort to obtain a better judgment. Instead, as every court of appeals to have considered the question in ordinary civil litigation has recognized, a postjudgment amendment is not permitted unless the judgment itself is first set aside or vacated.

The strictures that AEDPA imposes on federal habeas proceedings support applying that understanding of the Federal Rules to habeas applications. Congress has provided that a habeas application "may be amended or supplemented as provided in the rules of procedure applicable to civil actions," 28 U.S.C. 2242, and prejudgment amendments in accord with those rules are not considered second or successive habeas applications. But those rules do not allow for postjudgment motions seeking a better judgment without first obtaining relief from the judgment that has already been entered. And this Court's precedents demonstrate that in the habeas context, relief from the judgment on substantive grounds—for example, to plead new claims or to replead old claims with new evidence, as petitioner here seeks to do—are subject to stringent gatekeeping requirements as second or successive habeas applications. See *Gonzalez* v. *Crosby*, 545 U.S. 524 (2005).

Petitioner was not entitled to circumvent the second or successive nature of his filing through the simple expedient of declining to invoke Rule 60(b), the rule under which he could seek relief from final judgment. His motion to replace the judgment previously entered with one more favorable to him was functionally identical to a Rule 60(b) motion. The courts below thus correctly treated that motion as a second or successive application.

B. State prisoners cannot point to the mere fact that their appeal is pending to avoid otherwise applicable AEDPA gatekeeping for postjudgment motions to amend. In *Banister* v. *Davis*, 590 U.S. 504 (2020), this Court viewed the finality of judgment in the district court, not the conclusion of appellate proceedings, as the trigger on AEDPA's limitations on second or successive applications. Under AEDPA, a habeas applicant is entitled to "one fair opportunity" to have his claims adjudicated on the merits in the district court, *id.* at 507, including the opportunity to invoke Rule 15 before judgment. That opportunity ends once the district court renders a final appealable judgment.

To conclude otherwise would be inconsistent with the structure and design of AEDPA, under which the habeas applicant does not even have a right to appeal, but must instead obtain a certificate of appealability. AEDPA's limitations are designed to streamline the proceedings and protect the finality of state criminal convictions. They cannot be squared with a renewed request for collateral relief, styled as an "amendment" to the already denied original, that does not qualify as a valid second or successive habeas application.

Nor does AEDPA's historical backdrop support amendment during appeal without relief from the judg-

ment. While the case law was not uniform, the prevailing trend in the years before AEDPA was enacted was to treat efforts to amend a habeas application during an appeal as second or successive applications, subject to abuse-of-the-writ principles.

C. Petitioner's position is flawed for the further reason that his proposed amendment procedure—which contemplates an indicative ruling from the district court on a Rule 15 motion and appellate vacatur to allow amendment—is itself unsound. An indicative midappeal ruling on a postjudgment Rule 15 motion can do no more than indicate what the district court would have done had judgment not already been entered. It does not provide a basis for relief from the judgment—which would require a motion under a different rule—and nothing authorizes a court of appeals to simply vacate the judgment to allow for a prejudgment amendment.

Petitioner points to an appellate court's general authority to vacate and remand under 28 U.S.C. 2106. But this Court's precedents make clear that such authority must be exercised consistently with the rules of civil procedure and AEDPA's limits on second or successive applications. The rules do not allow what petitioner proposes, AEDPA considers a filing like his to be a second or successive habeas application, and the lower courts appropriately treated it as such.

ARGUMENT

PETITIONER'S POSTJUDGMENT HABEAS APPLICATION WAS SUBJECT TO AEDPA'S GATEKEEPING REQUIREMENTS FOR SECOND OR SUCCESSIVE APPLICATIONS

Federal habeas proceedings by state prisoners are governed by the Federal Rules of Civil Procedure to the extent that those rules are "not inconsistent with" any applicable federal statute or with the smaller set of

rules specific to habeas proceedings. *Gonzalez* v. *Crosby*, 545 U.S. 524, 529 (2005) (citation omitted). But Federal Rule of Civil Procedure 15's procedures for amending a pleading do not generally apply after judgment has been entered. Instead, plaintiffs in that posture must generally seek relief from the judgment under either Rule 59(e) or Rule 60(b). And construing those rules in light of AEDPA, this Court has made clear that efforts to bring postjudgment claims like petitioner's are subject to the limits that 28 U.S.C. 2244 places on second or successive habeas applications.

Petitioner's attempt to circumvent those limitations, simply because he sought postjudgment amendment while his appeal of the judgment was pending, are unsound. The pendency of an appeal does not alter the bedrock requirement that a postjudgment amendment requires relief from the judgment. Under the Federal Rules of Civil Procedure, the entry of judgment by a district court is the relevant terminative event. It is even more clearly so under AEDPA, which does not even confer a right to an automatic appeal when postconviction relief is denied. Nor can petitioner avoid the effect of a final judgment through his newly minted proposal that a court of appeals could vacate a judgment when the district court indicates that it might grant *pre*judgment amendment, when it lacks a basis to grant *post*judgment relief.

A. In Habeas, As In Ordinary Litigation, Postjudgment Amendment Requires Relief From The Judgment, Which Petitioner Cannot Obtain Without Authorization To File A Second Or Successive Habeas Application

Federal habeas proceedings for state prisoners are "civil in nature." *Banister* v. *Davis*, 590 U.S. 504, 507 (2020). As such, the parties are generally subject to the

rules applicable to all civil litigants. See Rule 12 of the Rules Governing Section 2254 Cases; Fed. R. Civ. P. 81(a)(4); see also 28 U.S.C. 2242. And in civil litigation, "the time to amend * * * expires once the district court makes its decision" because the final judgment itself "marks a terminal point" in the litigation. *Phillips* v. *United States*, 668 F.3d 433, 435 (7th Cir. 2012). Seeking postjudgment amendment of a habeas application without an independent basis for relief from final judgment, as petitioner is trying to do here, is therefore inconsistent with the applicable Federal Rules. It is also at odds with both AEDPA and this Court's precedents.

1. The Federal Rules of Civil Procedure do not permit postjudgment amendment of the pleadings without relief from the judgment

Once judgment is entered, a civil litigant has 28 days to file a motion to "alter or amend" the judgment under Rule 59(e). Fed. R. Civ. P. 59(e). The litigant may also, "within a reasonable time," seek relief from the judgment under Rule 60(b). Fed. R. Civ. P. 60(c)(1). The more general procedures for amendment under Rule 15, in contrast, do not provide a basis for updating a party's pleadings after judgment in an effort to seek a more favorable judgment.

Rule 15(a) provides that, before trial, civil litigants may amend pleadings "once as a matter of course" in a set timeframe and otherwise "only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(1) and (2). Rule 15(b) addresses amendments of the pleadings during and after trial, typically to conform the pleadings to the presentation of evidence. And Rule 15(c) governs when an amended pleading will relate back to an earlier pleading for purposes of any period of limitations or repose. See, *e.g.*, *Mayle*

v. *Felix*, 545 U.S. 644, 657-665 (2005) (applying Rule 15(c) in the context of a Section 2254 proceeding).

The only provision of Rule 15 that allows for postjudgment amendment is correction of the pleadings to *conform to* the judgment where an issue has been tried by consent—not to *alter* an already final judgment. See Fed. R. Civ. P. 15(b)(2). Postjudgment relief—including amendments to pleadings submitted in the hope of obtaining relief that was previously denied—is instead the province of Rules 59(e) and 60(b). See 6 Charles Alan Wright et al., *Federal Practice and Procedure* § 1489, at 816 (3d ed. 2010) (Wright & Miller) (observing that "the broad amendment policy of Rule 15(a) should not be construed in a manner that would render" the more specific limitations in Rules 59(e) and 60(b) "meaningless"); see also, *e.g.*, *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645 (2012) ("It is a commonplace of statutory construction that the specific governs the general.") (brackets and citation omitted).

Every court of appeals that has considered the issue in ordinary civil litigation has recognized that straightforward interpretation of the rules. As all of them have observed, a postjudgment amendment is not permitted unless the judgment itself is first set aside or vacated under Rules 59(e) or 60(b). See, *e.g.*, *Tool Box, Inc.* v. *Ogden City Corp.*, 419 F.3d 1084, 1087 (10th Cir. 2005) ("This court has repeatedly and unequivocally held that, '[o]nce judgment is entered, the filing of an amended complaint is not permissible until judgment is set aside or vacated pursuant to [Rules] 59(e) or 60(b).'") (citation omitted; first set of brackets in original); see also, *e.g.*, *Palmer* v. *Champion Mortg.*, 465 F.3d 24, 30 (1st Cir. 2006); *Williams* v. *Citigroup Inc.*, 659 F.3d 208, 213 (2d Cir. 2011) (per curiam); *Ahmed* v. *Dragovich*, 297 F.3d

201, 207-208 (3d Cir. 2002); *Laber* v. *Harvey*, 438 F.3d 404, 427 (4th Cir. 2006) (en banc); *Vielma* v. *Eureka Co.*, 218 F.3d 458, 468 (5th Cir. 2000); *Morse* v. *McWhorter*, 290 F.3d 795, 799 (6th Cir. 2002); *Vesely* v. *Armslist LLC*, 762 F.3d 661, 666-667 (7th Cir. 2014); *United States* v. *Harrison*, 469 F.3d 1216, 1217 (8th Cir. 2006); *Lindauer* v. *Rogers*, 91 F.3d 1355, 1357 (9th Cir. 1996); *Cooper* v. *Shumway*, 780 F.2d 27, 29 (10th Cir. 1985) (per curiam); *MacPhee* v. *MiMedx Grp., Inc.*, 73 F.4th 1220, 1249-1250 (11th Cir. 2023); *Building Indus. Ass'n* v. *Norton*, 247 F.3d 1241, 1245 (D.C. Cir. 2001), cert. denied, 534 U.S. 1108 (2002); cf. 6 Wright & Miller § 1489, at 814 n.1 (collecting additional cases).[1]

2. The strictures of AEDPA reinforce the limitations of the Federal Rules

That application of the Federal Rules is especially appropriate in the context of an application for postconviction relief under AEDPA. When he files his original (timely) federal habeas application, "[a] prisoner receives one complete round of litigation, which as in other civil suits includes the opportunity to amend a pleading *before* judgment" under Rule 15. *Johnson* v. *United States*, 196 F.3d 802, 805 (7th Cir. 1999) (emphasis added). But as explained above (see pp. 5-6), AEDPA generally limits state prisoners to a single federal collateral attack on their final state convictions, strictly limiting "second or successive" collateral attacks to cases in

[1] In *BLOM Bank SAL* v. *Honickman*, No. 23-1259 (oral argument scheduled for Mar. 3, 2025), this Court is considering the standard to be applied under Rule 60(b)(6) when a civil litigant seeks relief under that provision in order to file an amended complaint. But even the Second Circuit, whose judgment is under review in *BLOM Bank*, agrees that a postjudgment amendment may not be granted unless the court first grants relief from the judgment.

which a court of appeals finds that the prisoner has made a prima facie showing of a new claim that satisfies one of two narrow criteria. See 28 U.S.C. 2244(b). And efforts to renew claims after judgment on substantive grounds—like petitioner's effort here—are subject to those limits.

A prejudgment motion to amend under Rule 15 does not fall within the historical understanding of a "second or successive" application. See *Banister*, 590 U.S. at 512 (noting a consensus in the lower courts that "an amended petition, filed after the initial one but before judgment, is not second or successive" and citing, *inter alia*, 2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 28.1, at 1656-1657 n.4 (7th ed. 2017) (Hertz & Liebman)); see also 1 Hertz & Liebman § 17.2, at 998-1000 (7th ed. 2023). Instead, "[t]he Civil Rule governing pleading amendments, Federal Rule of Civil Procedure 15," has been "made applicable to habeas proceedings." *Mayle*, 545 U.S. at 655.

Rule 15's application is a product not only of the rules themselves, but also 28 U.S.C. 2242, a pre-AEDPA statute that continues to specify that a habeas application "may be amended or supplemented as provided in the rules of procedure applicable to civil actions." See *Mayle*, 545 U.S. at 655. But nothing in Section 2242 or elsewhere supports an exception to the limits on second or successive collateral attacks for postjudgment motions to amend, which are generally not allowed "in the rules of procedure applicable to civil actions." 28 U.S.C. 2242. Indeed, AEDPA even restricts a habeas applicant's ability to amend under Rule 15 itself in certain cases.

In particular, AEDPA provides expedited federal-habeas procedures in capital cases in States that satisfy specified criteria, see 28 U.S.C. 2261-2266, under which (*inter alia*) "[n]o amendment to an application for a writ of habeas corpus * * * shall be permitted after the filing of the answer to the application, except on the grounds specified in section 2244(b)." 28 U.S.C. 2266(b)(3)(B). While petitioner would draw (Br. 23) the negative inference that those are the only motions to amend that would be subject to Section 2244(b)'s limits on second or successive applications, the purpose and effect of Section 2266(b)(3)(B) is to limit even *pre*judgment amendments in covered cases. The appropriate negative inference is that other cases follow the Federal Rules—not that habeas applicants have special latitude to seek *post*judgment amendment.

Instead, as this Court's decisions illustrate, post-judgment motions by habeas applicants seeking relief on substantive grounds should generally be considered "second or successive" applications under Section 2244(b). In *Gonzalez* v. *Crosby*, this Court explained that whether a particular Rule 60(b) motion constitutes a second or successive "application" for AEDPA purposes depends on whether the motion asserts a "'claim'" as that term is used in Section 2244(b), which the Court defined as "an asserted federal basis for relief from a state court's judgment of conviction." 545 U.S. at 530. And the Court made clear that an assertion of "constitutional error" that was not raised before judgment, the identification of a "change in substantive law" in respect to a previously denied claim, or an effort "to present 'newly discovered evidence' in support of such a claim" would all be "if not in substance a 'habeas corpus application,' at least similar enough that failing to subject it

to the same requirements would be 'inconsistent with' the statute." *Id.* at 531 (citation omitted).

More recently, in *Banister* v. *Davis*, this Court held that a motion to alter or amend a judgment under Federal Civil Rule of Procedure 59(e) does not qualify as a second or successive habeas petition—precisely because it is "part of producing the final judgment granting or denying habeas relief," not a motion seeking relief thereafter. 590 U.S. at 521. The Court observed that, unlike a Rule 60(b) motion, a Rule 59(e) motion "suspends the finality" of a judgment, and the district court's disposition of the motion merges into the judgment for purposes of appellate review. *Id.* at 520. And it noted that "[s]uch a motion does not enable a prisoner to abuse the habeas process by stringing out his claims over the years," but "instead gives the court a brief chance to fix mistakes before its (single) judgment on a (single) habeas application becomes final and thereby triggers the time for appeal." *Id.* at 517.

Together, *Gonzalez* and *Banister* demonstrate the AEDPA gatekeeping inquiry for postjudgment motions to amend. When a state prisoner seeks to amend a habeas application after judgment, the prisoner must first seek and obtain relief from the judgment. To the extent that Rule 59(e) is available, the district court may consider whether relief from the judgment is appropriate under that provision—without treating the request as a second or successive application. After the 28-day period for invoking Rule 59(e) has closed, however, Rule 60(b) is the only available mechanism. And when a state prisoner seeks relief from the judgment under Rule 60(b) in order to amend the application, *Gonzalez* applies, and renewed litigation on substantive grounds is

barred unless the prisoner is able to navigate the strictures of Section 2244(b).

3. Petitioner's postjudgment effort to amend the pleadings to obtain a more favorable judgment was a second or successive habeas application

Petitioner here is subject to those strictures. He did not file a timely Rule 59(e) motion; instead, he had a final appealable judgment denying his habeas application, which he unsuccessfully appealed. See pp. 5-7, *supra*. While that appeal was pending, he sought to file an amended application based on purportedly new evidence gleaned from a case file that he obtained from one of his trial lawyers. J.A. 68. He made that request in February 2021, nearly two-and-a-half years after the district court had already entered judgment denying his original application. J.A. 2, 5.

Assuming that petitioner's filing could be construed as requesting relief from the judgment in order to amend his application, any such request under Rule 60(b) would have been properly treated as a second or successive application—and thus subject to AEDPA gatekeeping. Petitioner was seeking to present "one or more 'claims'" for federal relief from the same state-court convictions at issue in his original habeas application, on the basis of allegedly "'newly discovered evidence'" supporting the ineffective-assistance claims that the district court had already rejected. *Gonzalez*, 545 U.S. at 530-531 (citations omitted); cf. Pet. App. 9a-10a.

Rule 15 is not an end-run around Rule 60(b), or the limitations that AEDPA places on second or successive habeas applications. Petitioner's request to "amend" his habeas application is an effort to obtain a different judgment on his claim that he received ineffective assistance of counsel in the proceedings leading to his state

criminal convictions. The district court already denied that claim, and final judgment was entered years ago. What he seeks is therefore functionally indistinguishable from postjudgment relief under Rule 60(b), and his grounds for seeking it are grounds that *Gonzalez* expressly identifies as constituting a second or successive habeas application. Section 2244(b) addresses the circumstances under which new evidence or new law can support such a renewed effort at habeas relief. Unless petitioner can satisfy one of its criteria, his application cannot proceed.

B. A Pending Appeal Does Not Permit Habeas Applicants To Avoid Otherwise Applicable AEDPA Gatekeeping

Notwithstanding general civil practice under the Federal Rules, the strictures of AEDPA, and this Court's precedents interpreting both, petitioner insists that he is entitled to raise new substantive grounds for habeas relief long after final judgment on his initial application. Focusing on the pendency of his appeal of that judgment when he filed his updated habeas application, he contends that "a mid-appeal Rule 15 motion is not a second or successive habeas corpus application," and that Section 2244(b)'s limitations on such applications "do[] not apply while a prisoner's initial [application] is pending on appeal." Pet. Br. 13, 15. Those contentions are unsound.

1. As petitioner recognizes (Br. 44), a district court lacks the power even to grant a motion to amend once an appeal is pending. That is consistent with the "clear background principle prescribed by this Court's precedents," under which an 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) (quoting *Griggs* v. *Provident Consumer Discount*

Co., 459 U.S. 56, 58 (1982) (per curiam)). A trial court's traditional "common-law power," in habeas and non-habeas cases alike, was "'to alter or amend its own judgments * * * *prior to* any appeal.'" *Banister*, 590 U.S. at 513 (emphasis added; citation omitted).

This Court's decision in *Banister*—the principal authority on which petitioner relies—accordingly treats the finality of a judgment for purposes of appeal, not the conclusion of appellate proceedings, as the dividing line between an initial habeas application and subsequent ones. The Court identified the critical feature that exempts a Rule 59(e) motion from classification as a second or successive application to be that "a Rule 59(e) motion is a one-time effort to bring alleged errors in a just-issued decision to a habeas court's attention, *before* taking a single appeal." *Banister*, 590 U.S. at 521 (emphasis added). A Rule 59(e) motion, the Court explained, "is a limited continuation of the original proceeding—indeed, a part of producing the final judgment granting or denying habeas relief," *ibid.*, which "'*suspends* the finality of the original judgment' for purposes of an appeal," *id.* at 508 (emphasis added; citation omitted).

A Rule 60(b) motion—which, if substantive, *is* a second or successive habeas application, see *Gonzalez*, 545 U.S. at 530—"differs from a Rule 59(e) motion" precisely because a Rule 60(b) motion "attacks an already completed judgment," in a manner that produces "'a separate final order'" that could "giv[e] rise to a separate appeal," *Banister*, 590 U.S. at 520-521 (citation omitted). Styling a postjudgment motion as a motion to amend the pleadings, rather than to amend the prior judgment itself, does not change the equation. If granted, the putative motion to amend would likewise produce

"'a separate final order'" that would "giv[e] rise to a separate appeal." *Id.* at 520 (citation omitted).

2. Under AEDPA, a habeas applicant is generally entitled to "one fair opportunity" to have the claims in his initial habeas application adjudicated on the merits. *Banister*, 590 U.S. at 507; see *Slack* v. *McDaniel*, 529 U.S. 473, 485-486 (2000); *Stewart* v. *Martinez-Villareal*, 523 U.S. 637, 643-644 (1998). A final appealable judgment in the district court—not the conclusion of any appeal—marks the end of that "one fair opportunity."

A right to seek amendment in habeas proceedings so long as an appeal—or, presumably, a petition for a writ of certiorari—is pending would be antithetical to AEDPA's "goal of streamlining" such proceedings. *Rhines* v. *Weber*, 544 U.S. 269, 277 (2005). AEDPA's limitations are "grounded in respect for the finality of criminal judgments." *Calderon* v. *Thompson*, 523 U.S. 538, 558 (1998). And finality, in turn, "is essential to both the retributive and the deterrent functions of criminal law." *Id.* at 555; see *McCleskey* v. *Zant*, 499 U.S. 467, 492 (1991) ("Perpetual disrespect for the finality of convictions disparages the entire criminal justice system.").

Section 2244(b)'s limits on second or successive petitions, in particular, operate as a "modified res judicata rule," *Felker* v. *Turpin*, 518 U.S. 651, 664 (1996), and reflect what Congress determined to be "the appropriate balance between finality and error correction," *Jones* v. *Hendrix*, 599 U.S. 465, 491 (2023). As the Seventh Circuit has explained, "[t]reating motions filed during appeal as part of the original application * * * would drain most force from the time-and-number limits" that AEDPA places on postconviction filings. *Phillips*, 668 F.3d at 435. A prisoner who has filed a timely

initial application could "keep filing more until the first has been finally resolved, a process that can take years." *Ibid.* Nothing in AEDPA "suggests that the time-and-number limits are irrelevant as long as a prisoner keeps his initial request alive through motions, appeals, and petitions." *Ibid.*; see *Beaty* v. *Schriro*, 554 F.3d 780, 783 (9th Cir. 2009) (observing that "allow[ing] the filing of new claims this late in the process would essentially nullify the rules about second and successive petitions").

Indeed, AEDPA does not even grant applicants for postconviction relief an automatic right to appeal in the first place. Unlike ordinary civil litigants, who typically have an unfettered right to appeal the final decision of a district court, see 28 U.S.C. 1291, AEDPA's default rule is that "an appeal may *not* be taken," unless a court finds that the requirements for a certificate of appealability are met. 28 U.S.C. 2253(c) (emphasis added); see *Miller-El* v. *Cockrell*, 537 U.S. 322, 327 (2003). That limitation cannot readily be reconciled with an extended amendment period. And it would be particularly perverse if continued appellate proceedings (including a petition to this Court) challenging *the denial of a certificate of appealability* were themselves to keep the amendment window open. If AEDPA "left open an exception this broad, that point would have been made explicit in the statute." *Ochoa* v. *Sirmons*, 485 F.3d 538, 541 (10th Cir. 2007) (per curiam).

Petitioner contends (Br. 39-40) that various provisions of AEDPA treat the end of appellate review, rather than final judgment in the district court, as the marker of finality. But "[f]inality is a concept that has been 'variously defined; like many legal terms, its precise meaning depends on context.'" *Jimenez* v. *Quarterman*, 555 U.S. 113, 119 (2009) (quoting *Clay* v.

United States, 537 U.S. 522, 527 (2003)). The relevant concept of finality here is the one embodied in Rules 59(e) and 60(b) and recognized in *Banister*. Rule 60(b) uses the term "final judgment" to refer to a district court judgment that is "final for appellate review and claim preclusion purposes." *Clay*, 537 U.S. at 527; see 28 U.S.C. 1291. And *Banister* used the term in the same way when explaining why it is consistent with AEDPA to the treat a Rule 59(e) motion—which "suspends the finality of the habeas judgment"—as part of an initial habeas application. 590 U.S. at 520; see *id.* at 515-516.

Petitioner errs in asserting (Br. 31-33) that AEDPA's streamlining goals would be furthered by district-court motions to amend during the pendency of an appeal. Any modest benefit of the district court's familiarity with the case is, in practice, likely to be outweighed by the systemic costs of inviting additional postjudgment motions to amend. And if Congress had shared petitioner's view that district courts are best positioned to examine new filings by habeas applicants in the first instance, it would not have assigned the court of appeals the task of determining whether a second or successive application "makes a prima facie showing that the application satisfies the requirements" of Section 2244(b). 28 U.S.C. 2244(b)(3)(C). Thus, even if petitioner were correct in arguing (Br. 31) that his proposed rule "lets only the most promising claims proceed, efficiently filtering out the rest," that is an argument that should be addressed to the legislature—not this Court. See, *e.g.*, *Henson* v. *Santander Consumer USA Inc.*, 582 U.S. 79, 89-90 (2017).

3. Nor does historical practice support petitioner's approach; if anything, it points in the opposite direction. Petitioner claims (Br. 27-31) that, historically, mid-

appeal requests to amend a habeas petition were not regarded as abuses of the writ, pointing to a handful of examples in which an amendment seems to have been denied without any suggestion that it was abusive. But as this Court has explained, abuse of the writ "refers to a complex and evolving body of equitable principles." *McCleskey,* 499 U.S. at 481. Although the case law was not uniform, the considered trend in the years shortly before the enactment of AEDPA in 1996 was to treat efforts to amend a habeas application midappeal as second or successive applications.

The Eighth Circuit, for example, followed that approach in *Smith* v. *Armontrout*, 888 F.2d 530, 540 (1989), abrogated on other grounds by *Sawyer* v. *Whitley*, 505 U.S. 333 (1992). There, during the pendency of a state prisoner's appeal from the denial of his habeas application, the prisoner filed a motion to remand the case to the district court, seeking to raise new factual and legal arguments that had not been included in the original habeas application. *Id.* at 532, 539. The court of appeals explained that the motion to remand, "the purpose of which [was] to allow petitioner * * * to amend his petition," was the "functional equivalent of a second or successive petition for habeas corpus." *Id.* at 540. And, applying abuse-of-the-writ principles, the court denied the motion. *Id.* at 540-546; cf. *Bannister* v. *Armontrout*, 807 F. Supp. 516, 558 (W.D. Mo. 1991) (applying abuse of writ principles to postjudgment motion to amend), aff'd, 4 F.3d 1434 (8th Cir. 1993), cert. denied, 513 U.S. 960 (1994).

The Fourth Circuit took a similar approach in *Hunt* v. *Nuth*, 57 F.3d 1327 (1995), cert. denied, 516 U.S. 1054 (1996). While an appeal was pending there, the state prisoner filed a Rule 60(b) motion seeking to vacate the

judgment in order to amend his habeas application. See *id.* at 1331, 1338-1339. The Fourth Circuit observed that, because the postjudgment motion sought to raise "additional habeas claims," the motion "constituted a successive habeas petition." *Id.* at 1339. Had amendment instead been available through Rule 15, as petitioner here contends, the state prisoner in *Hunt* would presumably have taken that route. The state prisoner's filing of a Rule 60(b) motion instead reflects the recognition that he needed relief from the judgment in order to amend his application. And the Fourth Circuit's denial of the effort as an impermissible second or successive application correctly anticipated this Court's later decision in *Gonzalez*.

The pre-AEDPA Ninth Circuit, in fact, explicitly recognized that a state prisoner's postjudgment Rule 15 motion to amend a federal habeas application was properly construed as a motion for relief under Rule 60(b); that the motion was "tantamount to a second petition"; and that the motion was properly denied as "abusive." *Bonin* v. *Vazquez*, 999 F.2d 425, 427 (1993); see *id.* at 428; see also *Bonin* v. *Calderon*, 59 F.3d 815, 847 (9th Cir. 1995), cert. denied, 516 U.S. 1051 (1996).

Thus, even though not every court had come around to that approach by the time of AEDPA's enactment, see, *e.g.*, *Petty* v. *McCotter*, 779 F.2d 299, 302 (5th Cir. 1986) (allowing postjudgment amendment without considering abuse of the writ), cert. granted, 478 U.S. 1003 (1986), and cert. dismissed, 480 U.S. 699 (1987), the legal backdrop for AEDPA did not exempt midappeal efforts to amend from classification as "second or successive."

C. Petitioner's Indicative-Ruling Theory Is Flawed

Petitioner's approach also suffers from a second and independent flaw, in that it relies on a procedural mechanism that district and appellate courts are not authorized to implement. Although he did not suggest it in his petition for a writ of certiorari, petitioner now asserts (Br. 17-22) that a postjudgment motion to amend should be effectuated through a multistep process: (1) the applicant seeks an indicative ruling from the district court under Federal Rule of Civil Procedure 62.1(a) as to whether a Rule 15 motion to amend might be granted; (2) if the district court indicates that it might do so, the court of appeals would then have discretion to vacate and remand the judgment to permit consideration of the motion; (3) the district court could then potentially grant the motion; and (4) if it does, habeas proceedings on an amended pleading would then commence. It is unclear how petitioner himself could follow such a course at this point, having not previously requested such an indicative ruling; presumably, he anticipates some sort of order that recreates the pendency of the now-concluded appeal of the denial of his initial habeas application. But in any event, his proposal is faulty.

Rule 62.1(a) creates a mechanism for a district court to inform the court of appeals that the district court would entertain a motion for relief that the district court presently "lacks authority to grant" due to a pending appeal. Fed. R. Civ. P. 62.1(a)(2) and (3). If the district court indicates that it would grant such a motion—or that the motion "raises a substantial issue"—the movant must "promptly notify" the court of appeals. Fed. R. Civ. P. 62.1(a)(3) and (b). The court of appeals, in turn, "may remand for further proceedings but retains jurisdiction unless it expressly dismisses the appeal."

Fed. R. App. P. 12.1(b). If the court of appeals does order such a limited remand, the district court may then "decide the motion." Fed. R. Civ. P. 62.1(c).

By their terms, however, neither Civil Rule 62.1(a) nor Appellate Rule 12.1(b) authorizes the vacatur of the judgment that petitioner's proposal requires. Instead, the remand is simply to return limited jurisdiction to the district court so that it "may decide the motion," Fed. R. Civ. P. 62.1(c), with the court of appeals otherwise "retain[ing] jurisdiction" or "dismiss[ing] the appeal," Fed. R. App. P. 12.1(b)—neither of which would eliminate the district court's preexisting judgment. Rule 62.1 was adopted in 2009 to codify an existing practice in the courts of appeals regarding Rule 60(b) motions. See Fed. R. Civ. P. 62.1 advisory committee's note (2009) (explaining that the rule states a "practice that most courts" already follow "when a party makes a Rule 60(b) motion to vacate a judgment that is pending on appeal"). The purpose of such motions is for the district court *itself* to decide whether to "relieve a party or its legal representative from a final judgment." Fed. R. Civ. P. 60(b). The indicative-ruling provisions do not themselves authorize vacating a final judgment in order to allow for some prejudgment procedure, like amendment, whose time has already passed.

Petitioner's proposal therefore cannot be squared with the rules that he invokes. It is critical to petitioner's legal theory that a postjudgment motion to add or modify claims be deemed a motion under Rule 15, not a motion under Rule 60(b) (which, under *Gonzalez*, would be treated as second or successive). But the rules to which he points do not themselves authorize postjudgment relief, as Rule 60(b) does. Unlike a Rule 60(b) motion, which can be granted postjudgment, a Rule 15

motion requires more than just a return of jurisdiction to the district court. Instead, as petitioner implicitly recognizes by incorporating vacatur into his proposed procedure, the granting of a Rule 15 motion requires restoration of a prejudgment posture—something plainly outside the scope of Rule 62.1 itself.

Petitioner suggests (Br. 20) that Section 2106 might provide the authority he needs, but that provision cannot do the work that petitioner's indicative-ruling theory requires. Section 2106 states, in general terms, that this Court or "any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. 2106. This Court has made clear, however, that "[t]he authority described in § 2106 * * * 'must be exercised consistent with the requirements of the Federal Rules of Civil Procedure.'" *Greenlaw* v. *United States*, 554 U.S. 237, 249 (2008) (quoting *Unitherm Food Sys., Inc.* v. *Swift-Eckrich, Inc.*, 546 U.S. 394, 403 n.4 (2006)).

Section 2106 is thus itself subject to the principle that a postjudgment amendment of the pleadings "cannot be allowed until the judgment is set aside or vacated under Rule 59 or Rule 60." 6 Wright & Miller § 1489, at 814; cf. *Unitherm Food*, 546 U.S. at 402 n.4 (rejecting argument that Section 2106 authorizes relief based on a sufficiency argument that a litigant did not properly preserve). Section 2106 does not provide an independent mechanism for avoiding the limitations of the federal procedural rules. And it particularly should not do so in the context of a habeas application that has been

denied, as this Court's decision in *Calderon* v. *Thompson* illustrates.

Under the logic of *Calderon*, a request to the court of appeals to vacate under Section 2106 from a state prisoner in petitioner's position would itself be the functional equivalent of a second or successive habeas application. *Calderon* explained that, "[i]n a § 2254 case, a prisoner's motion to recall the mandate on the basis of the merits of the underlying decision can be regarded as a second or successive application for purposes of § 2254(b)," because otherwise state prisoners could use such motions to evade AEDPA's gatekeeping limitations. 523 U.S. at 553. The same is true here: if given the option, prisoners would undoubtedly choose the procedure that petitioner posits over the stricter gatekeeping procedure that Section 2244 demands. AEDPA, like the Federal Rules, does not permit such an end run.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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