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 OF THE STATES OF THE THIRD CIRCUIT, PENNSYLVANIA, NEW JERSEY, AND DELAWARE AMICI CURIAE IN SUPPORT OF RESPONDENT

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Interest of Amici Curiae

Almost every court of appeals that has addressed the question presented here has held that a habeas petitioner cannot add new claims to a petition while on appeal from denial of that petition; new claims at that stage are subject to AEDPA's second petition provisions. Only the Third Circuit and one other have held to the contrary.

That erroneous, minority circuit precedent erodes finality in the most serious Pennsylvania, New Jersey, and Delaware criminal cases. This contradicts Congress' intent in AEDPA. Habeas proceedings already undermine finality in state criminal cases, and allowing new claims to be raised after a final order on the merits has been appealed undermines finality with a vengeance. The issue in this case is therefore of great importance to the states of the Third Circuit, which, through their Attorneys General, urges this Court to affirm the Fifth Circuit's decision.

Summary of Argument

In AEDPA Congress overturned historically liberal habeas practice. It enacted instead a circumscribed regime making habeas an extraordinary remedy limited to extreme malfunctions of state criminal justice systems. Modern principles of habeas jurisprudence recognize the profound societal costs that attend the exercise of federal habeas, and that these costs justify significant limits on its availability.

In asserting that habeas petitions already denied on the merits may be amended while on appeal, petitioner cites procedural rules that he believes allow an end-run around Congress' intent. But these rules apply only if they are not inconsistent with AEDPA, which severely restricts successive applications.

Congress did not define "successive," but that does not mean it failed to convey its intent. That term in AEDPA presumably means the same as the synonym "subsequent" used in the previous version of § 2244(b), referring to applications filed after a court denied habeas relief.

While this Court has found exceptions to Congress' general rule that a habeas claim raised after a habeas petition was denied on the merits is successive, none apply here. To the contrary, this Court's decision in *Banister v. Davis* contradicts petitioner's position, since it holds that claims filed under Rule 59(e) are not successive precisely because they must be filed before

an appeal is taken. *Banister* agrees with *Gonzalez v. Crosby* that habeas claims raised after a final order on the merits was entered are successive under § 2244(b).

The order of the Court of Appeals should be affirmed.

Argument

Because AEDPA prioritizes finality, the correct demarcation between first and successive habeas petitions is a final order on the merits. An attempt to amend a denied petition on appeal is a successive petition.

By enacting AEDPA Congress intended to reverse judicial expansion of federal habeas corpus and enhance the finality of state criminal convictions. It pursued these goals by heavily restricting or eliminating prior practices such as unlimited successive petitions.

The guiding star should be the policies Congress emplaced in AEDPA. From that perspective, the proper resolution of this case is plain. Aside from certain exceptions inapplicable here, a federal habeas claim raised after a petition has been denied on the merits amounts to a successive petition. Civil procedure rules that could arguably be construed to allow a denied petition to be amended while on appeal are contrary to Congress' intent and the principles of

comity and federalism that inform all habeas proceedings.

1. AEDPA reversed historical practices such as unlimited successive petitions.

In the beginning, a sentence after conviction "by a court of competent jurisdiction was in *itself* sufficient cause for a prisoner's continued detention." *Jones v. Hendrix*, 599 U.S. 465, 483 (2023) (emphasis original, citation and internal quotation marks omitted). Federal habeas was restricted to federal prisoners, who could use the writ only "to challenge confinement imposed by a court that lacked jurisdiction … or detention by the Executive without proper legal process." *McCleskey v. Zant*, 499 U.S. 467, 478 (1991).

Then Congress extended the writ to state prisoners. Although habeas is governed by statute, this in turn led to broad judicial expansion of the writ. *Id*. at 478. *See Brown v. Allen*, 344 U.S. 443, 537 (1953) (Jackson, J., concurring) (extension by Congress to state prisoners "was construed as authority for federal judges to entertain collateral attacks on state court criminal judgments") (footnote omitted). Indeed, this Court expanded the scope of federal habeas with a "generosity" that led to "endless successive petitions." *McCleskey*, 499 U.S. at 478, 479 (citations omitted).

In 1966 Congress sought "a greater degree of finality" by modifying 28 U.S.C. § 2244(b) to allow dismissal of "a subsequent application." *Schlup v. Delo*, 513 U.S. 298, 317-318 (1995) (because multiple

petitions are "a threat to the finality of state court judgments," Congress sought "rules disfavoring … second and subsequent petitions") (citations omitted). *McCleskey*, 499 U.S. at 485-486.

Under § 2244(b) (1966) a "subsequent" application meant one filed "after" "release from custody or other remedy" was "denied by a court[.]"[1] The provision made allowance for a new claim "not adjudicated" in "the earlier application for the writ," provided the petitioner had not withheld it "or otherwise abuse[d] the writ." While such a claim was not subject to dismissal, it was not treated as part of the previous petition. A "subsequent application" remained one filed after "the earlier application" was "denied by a court[.]"

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[1] 28 U.S.C. § 2244(b)(1966) stated:

> When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus on behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

In 1996 Congress went further in AEDPA, imposing "demanding standards" reflecting an "essential" need to further promote "the finality of state convictions." *Shinn v. Ramirez*, 596 U.S. 366, 390 (2022) (citations omitted). Its intent was to impose "restrictions on the power of federal courts to grant writs of habeas corpus to state prisoners," *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003), "to further the principles of comity, finality, and federalism." *Duncan v. Walker*, 533 U.S. 167, 178 (2001).

In *Calderon v. Thompson*, 523 U.S. 538 (1998), this Court reversed the Ninth Circuit's decision to recall its mandate and reconsider the denial of Thompson's habeas petition. AEDPA technically did not control, yet this Court found that the recall was an abuse of discretion because it clashed with AEDPA's concerns grounded in finality. *Id.* at 554-559. These concerns include "the profound societal costs that attend the exercise of habeas jurisdiction" and "the State's interest in the finality of convictions[.]" "Finality," this Court explained, "is essential to both the retributive and the deterrent functions of criminal law. Neither innocence nor just punishment can be vindicated until the final judgment is known. Without finality, the criminal law is deprived of much of its deterrent effect." *Id.* at 554 (citations and internal quotation marks omitted). "[T]he State is entitled to the assurance of finality ... Only with an assurance of real finality can the State execute its moral judgment in a case. Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out." *Id.* at 556 (citation omitted). The Court found that "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." *Id*. at 553.

In *Shinn* this Court distinguished its equitable authority over habeas review from the legislative restraints imposed by Congress in AEDPA. Exercising "equitable judgment" and "discretion" to modify the Court's own "judge-made rules" is one thing, but AEDPA is something a court has "no authority to amend." "Where Congress has erected a constitutionally valid barrier to habeas relief, a court cannot decline to give it effect." *Shinn*, 596 U.S. at 384-385. If Congressional intent in enacting AEDPA conflicts with equitable or historical practices, the latter must give way.

Shinn summarizes the now-familiar concerns AEDPA addressed. "First, a federal order to retry or release a state prisoner overrides the State's sovereign power to enforce societal norms through criminal law," because habeas "frequently costs society the right to punish admitted offenders." Previously convicted offenders may go free "because the evidence needed to conduct a retrial has become stale or is no longer available," such that "the public suffers, as do the victims." Upsetting victims' expectation of finality "inflict[s] a profound injury to the powerful and legitimate interest in punishing the guilty, an interest shared by the State and the victims of crime alike." Second, federal habeas "imposes significant costs on state criminal justice systems" by disturbing "the State's significant interest in repose for concluded litigation" and undermining "the States'

investment in their criminal trials." It "detracts from the perception of the trial of a criminal case in state court as a decisive and portentous event." AEDPA imposes limits by, *inter alia*, preventing federal habeas review from serving as "a substitute for ordinary error correction," making it instead an "extraordinary remedy" that guards "only" against "extreme malfunctions in the state criminal justice systems." AEDPA also requires state prisoners to "exhaust the remedies available in the courts of the State," and even then federal habeas review is still "highly circumscribed. In particular, the federal court may review the claim based solely on the state-court record … and the prisoner must demonstrate that, under this Court's precedents, no fairminded jurist" could have reached the same judgment as the state court. *Shinn*, 596 U.S. at 376-378 (citations, brackets and internal quotation marks omitted).

2. Congress' intent was to treat habeas claims filed after a habeas petition was denied on the merits as successive petitions.

The above informs the current question of statutory construction, which asks what Congress meant by "second or successive habeas corpus application" in 28 U.S.C. § 2244(b) (1996). Legislative intent is key because "AEDPA's second-or-successive restrictions … embody Congress' judgment regarding the central policy question of postconviction remedies—the appropriate balance between finality and error correction." *Jones v. Hendrix*, 599 U.S. 465,

490-491 (2023) (citation and internal quotation marks omitted).

While Congress did not formally define "successive," that does not mean it failed to convey its intent. To the contrary, when using the term "successive" in AEDPA Congress presumably meant the same as it did when it used the synonym "subsequent" in 1966: an application filed after an "earlier" or "prior" habeas application in which a court denied release. Under AEDPA, dismissal of a successive application is now the norm. As in 1966, an exception from this now- mandatory dismissal rule is granted for previously-unraised claims, although now the exception is harder to meet. As before, though, in providing an exception for new claims AEDPA does not treat them as if they were part of the old petition. It treats new claims as successive.

The correct line of demarcation, then (subject, as discussed below, to certain narrow exceptions), is a final order deciding a habeas petition on the merits. This is borne out not only by Congress' use of "subsequent application" in § 2244(b) of 1966, but by this Court's adoption of that same understanding in *Gonzalez v. Crosby*, 545 U.S. 524 (2005).

There, Gonzalez filed a motion under Fed. R. Civ. P. 60(b) in which he raised habeas claims after his habeas petition was denied on the merits. This Court affirmed the Eleventh Circuit's *en banc* determination that this motion "was in substance a second or successive habeas corpus petition" under AEDPA's § 2254(b). 545 U.S. at 528.

As *Gonzalez* explains, the analysis is "relatively simple." An application that "seeks to add a new ground for relief" or "attacks the federal court's previous resolution of a [habeas] claim on the merits" amounts to a successive petition. *Id*. at 532 (footnote omitted). It makes no difference that "AEDPA did not expressly circumscribe the operation of Rule 60(b)," since it, "like the rest of the Rules of Civil Procedure, applies … only to the extent that it is not inconsistent with applicable federal statutory provisions and rules." *Id*. at 529 (citations, brackets, and internal quotation marks omitted). Today, for example, federal habeas rule 12 states that the Federal Rules of Civil Procedure apply only "to the extent that they are not inconsistent with any statutory provisions or these rules." Fed. R. Civ. P. 81(a)(4) likewise states that the Federal Rules of Civil Procedure apply "to proceedings for habeas corpus … to the extent that the practice in those proceedings … is not specified in a federal statute" or in the habeas rules, "and … has previously conformed to the practice in civil actions." *See Mayle v. Felix*, 545 U.S. 644, 654 (2005) (significant that advisory committee note to former habeas rule 11 [now rule 12] "permits application of the civil rules only when it would be appropriate to do so," and would not be "inconsistent or inequitable in the overall framework of habeas corpus").

Gonzalez rightly recognized that treating Rule 60(b) motions as amendments would undermine Congress' intent. That is particularly true because under Rule 60(b)(6) ("any other reason that justifies relief") there is no time limit. Petitioner is therefore in

the same position as Gonzalez. He seeks to attain through other rules what *Gonzalez* precluded under Rule 60(b): an ability to amend a petition already denied on the merits years, or even decades, later.

That is no exaggeration. In the Third Circuit there are sixteen pending habeas appeals in capital cases in which the petitions were filed before 2016; five were filed before the year 2000, and one dates back to 1994.[2] In petitioner's view these cases remain eligible for amendment. To paraphrase what this Court said in *Shinn*, "[g]iven our frequent recognition that AEDPA limited rather than expanded the availability of habeas relief … it is implausible that, without saying so" Congress intended to permit such belated amendment of habeas petitions. 596 U.S. at 386 (citation and internal quotation marks omitted).

In short, civil procedure rules are trumped by AEDPA and "the overall framework of habeas corpus." *Id*. Habeas petitions are not ordinary civil pleadings. They may not be amended after they have been denied and appealed.

3. Exceptions to Congress' bar to successive petitions do not apply here.

Some of this Court's decisions construing the term "successive" in § 2244(b) create narrow exceptions to Congress' baseline rule that the first petition ends

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[2] This was established by a PACER search in the Third Circuit under search terms: NOS: 3535, Filed: 01/31/2025 and earlier, Status: open.

when denied on the merits. But these exceptions do not apply in this case.

In *Stewart v. Martinez–Villareal*, 523 U.S. 637 (1998), this Court held that an unripe *Ford* claim[3] raised in a former petition did not render the later one successive when the claim ripened. The majority did not disagree with the dissent's objection that this was contrary to the plain statutory language. Rather, it found that adherence to the statute in this situation could produce results "far reaching and seemingly perverse." *Id.* at 644. By its nature a *Ford* claim may arise at any time and cannot be accommodated by the standard habeas framework.

In *Slack v. McDaniel*, 529 U.S. 473 (2000), though AEDPA did not apply, the majority made clear that a habeas petition is not successive where the former one was not dismissed on the merits but for failure to exhaust. Thus, *Slack* does not actually conflict with Congress' baseline rule, which requires the earlier petition to be denied on the merits for the next petition to be successive.

In *Panetti v. Quarterman*, 551 U.S. 930, 945, 947 (2007), the Court found that "Congress did not intend the provisions of AEDPA addressing 'second or successive' petitions to govern" a previously unraised *Ford* claim that would have been unripe if raised earlier. "In the usual case," the Court explained, "a petition filed second in time and not otherwise

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[3] *Ford v. Wainwright*, 477 U.S. 399 (1986) (holding that the Eighth Amendment prohibits execution of an insane offender).

permitted by the terms of § 2244 will not survive AEDPA's 'second or successive' bar. There are, however, exceptions." As the dissent pointed out, though, *id*. at 967 (Thomas, J., with Roberts, C.J., Scalia, J., and Alito, J., dissenting), this exception must apply only to *Ford* claims: the argument that a new claim is not successive merely because it was previously unripe was rejected by this Court in *Burton v. Stewart*, 549 U.S. 147, 153-154 (2007) (*per curiam*).

Magwood v. Patterson, 561 U.S. 320 (2010), held that the petition there was not successive because it addressed a new judgment. The new petition could not be successive because it effectively addressed a new case.

Lastly, in *Banister v. Davis*, 590 U.S. 504 (2020), this Court distinguished *Gonzalez* on the ground that a motion filed under Fed. R. Civ. P. 59(e) differs significantly from one under Rule 60(b). A Rule 59(e) motion must be filed within 28 days, and it "suspends the finality of the habeas judgment," unlike Rule 60(b) which "attacks an already completed judgment." Rule 59(e) 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." 590 U.S. at 519-521 (emphasis added). Because Rule 59(e) prevents an order on the merits from becoming final, *Banister* is akin to *Slack*. It does not apply to a case in which, as here, a final order on the merits has been appealed.

None of the above cases supports the petitioner's position.[4] Further, aside from *Stewart* and *Panetti*, which concern newly-ripe *Ford* claims, none conflict with Congress' view that a successive application is ordinarily understood as one that raises a habeas claim after the habeas petition was denied on the merits. *Magwood* concerns a new judgment. *Slack* and *Banister* apply where there is no final order on the merits.

Indeed, *Banister* contradicts petitioner's argument that Fed. R. Civ. P. 62.1 allows a denied-on-the-merits habeas petition to be amended while on appeal. *Banister* is premised on the differences between Rule 59(e) and Rule 60(b) motions. Significantly, the advisory committee notes present Rule 62.1 as a way to pursue, in effect, a Rule 60(b) motion after an appeal was taken ("This new rule adopts for any motion that the district court cannot grant because of a pending appeal the practice that most courts follow when a party makes a Rule 60(b) motion to vacate a judgment that is pending on appeal"). In contrast, and as *Banister* explains, a claim raised in a Rule 59(e)

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[4] The Second Circuit in *Ching v. United States*, 298 F.3d 174, 178 (2d Cir. 2002), reasoned that cases such as *Stewart* and *Slack* "instruct that a prior district court judgment dismissing a habeas petition does not conclusively establish that there has been a final adjudication of that claim," which supposedly meant that the district court's order dismissing Ching's habeas petition *on the merits* was not "final" even though the case was on appeal. The Third Circuit largely adopted the *Ching* analysis in *United States v. Santarelli*, 929 F.3d 95, 104-105 (3d Cir. 2019). But both of these cases misread *Stewart* and *Slack*. The former applies only to *Ford* claims, while the latter turns on the absence of a district court decision on the merits.

motion is not successive because it must be filed before an appeal is taken, and it prevents the district court's order from becoming final. Both *Banister* and *Gonzalez* agree that habeas claims raised under Rule 60(b), which has no such limitations, are successive applications.

That same reasoning applies here. No decision of this Court has ever suggested that a habeas petition that was denied by a final order on the merits may be amended while on appeal. Such an application is a successive petition under § 2244(b).

4. Equitable or historical arguments do not support treating successive petitions as while- on-appeal amendments.

AEDPA is the polestar of habeas navigation. Yet not only AEDPA, but also "the general principles" of habeas jurisprudence, compel recognition of "the profound societal costs that attend the exercise of habeas jurisdiction"—costs that justify "significant limits on the discretion of federal courts to grant habeas relief." *Calderon v. Thompson*, 523 U.S. at 554-555 (citations omitted). These principles require limiting "opportunities for delay and piecemeal litigation," *Duncan v. Walker*, 533 U.S. 167, 180 (2001), and instead promoting "enduring respect for the State's interest in the finality of convictions that have survived direct review within the state court system." *Calderon*, 523 U.S. at 555 (citations and internal quotation marks omitted). Like other aspects of habeas litigation, the extent to which proceedings may be prolonged by belated amendments raising new

claims "must be informed by principles of comity and finality that govern every federal habeas case." *Shinn*, 596 U.S. at 382.

Given this historical context, appellant's arguments are unpersuasive. He contends that the abuse of the writ doctrine, which concerned claims deliberately withheld, "did not foreclose petitions presenting newly discovered evidence" (appellant's brief, 25). But deciding whether a claim is an abuse of the writ is not the same thing as deciding if it's successive. AEDPA likewise does not foreclose new evidence claims, but it treats them as successive and imposes limits, such as requiring proof of due diligence, that may bar them entirely. If these limits are more stringent than the abuse of the writ doctrine, it proves only that Congress intended to replace the historical practice. *See Burris v. Parke*, 95 F.3d 465, 469 (7th Cir. 1996) (*en banc*) ("The doctrine of abuse of the writ is defunct. The term derives from [former] section 2244(b), now wholly superseded by the new law, which nowhere uses the term. There is no longer any statutory handle for the doctrine, and in any event its role seems wholly preempted by the detailed provisions of the new statute concerning successive petitions").

Nor do equitable considerations assist petitioner. He argues that rejecting his argument will bring "perverse results" (petitioner's brief, 35). Yet the results are not perverse at all. Petitioner believes that the kind of "new" evidence that warrants amendment after appeal includes evidence that was overlooked because "trial counsel sat on" it (*id.*, 36). Yet in the

federal habeas context it is well settled that counsel "is the petitioner's agent … and the petitioner must bear the risk of attorney error." *Shinn*, 596 U.S. at 380 (citation omitted). It is routine to subject claims of all kinds to increasingly difficult procedural obstacles as a case advances through various stages of review. The obstacles should be at their greatest height in a federal habeas challenge to a state conviction, because Congress has reserved such a proceeding as an "extraordinary remedy" that guards "only" against "extreme malfunctions in the state criminal justice systems." *Shinn*, 596 U.S. at 377. Congress' rejection of the historical practice of endless successive petitions in favor of the principle of finality is in no sense perverse; it merely recognizes that there must "at some point be the certainty that comes with an end to litigation." *Teague v. Lane*, 489 U.S. 288, 322 n.3 (1989) (plurality).

The order of the Court of Appeals should be affirmed.

Conclusion

For these reasons, the Commonwealth respectfully submits that this Court should affirm the Court of Appeals.

Respectfully submitted,

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