No. 23-1345

IN THE

Supreme Court of the United States

DANNY RICHARD RIVERS,

Petitioner,

vs.

ERIC GUERRERO, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondents.

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

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Can a habeas corpus petitioner evade the rule of *Gonzalez* v. *Crosby* by seeking relief from an adverse judgment in the district court via a proffered amendment to his petition without first obtaining relief via FRCP 60(b)?

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In this case, petitioner seeks to evade the statutory successive petition rule for habeas corpus by amending his initial petition years after the case was decided in the District Court and had moved to the Court of Appeals. This attack on finality of decisions is contrary to the interests CJLF was formed to protect.

SUMMARY OF ARGUMENT

Under the existing precedents on post-judgment amendments in effect in all circuits, this Court's precedents in *Gonzalez* v. *Crosby* and *Banister* v. *Davis* already answer the question. There is no need to establish yet another standard. A post-judgment amendment of a civil complaint requires that the plaintiff qualify under Rules 59(e) or 60(b). Therefore, in any case where the Rule 59 deadline has passed, *Gonzalez* sets the standard.

The pre-AEDPA record for post-judgment amendments of habeas corpus petitions does not establish a contrary rule. All but two of the cases cited by peti-

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1. No counsel for a party authored this brief in whole or in part. No counsel, party, or any person or entity other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

tioner are explainable as cases where the successive petition rule did not provide a faster or easier basis for decision. In one, that rule was, in fact, invoked as a basis for decision. In the last one, the issue was raised and argued in this Court, though not resolved. Other cases in the years leading up to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) show that successiveness was invoked as a ground for rejecting such amendments.

The primary purpose of AEDPA—to reduce delay—would be impaired by the rule that petitioner proposes. Congress was not concerned with denying relief as much as it was concerned with the numerous proceedings and extended delays of prisoners whose judgments were ultimately upheld. Allowing a reopening of a case already final in the district court would defeat the core purpose of the successive petition reform.

Actual innocence is an important factor in deciding what cases warrant reopening, but the rule that petitioner seeks in this case is not limited to cases with plausible claims of innocence. It would apply equally to cases of certainly guilty murderers who seek to drag out their proceedings, exactly the cases that Congress sought to expedite. Any dissatisfaction with AEDPA's standard for innocence claims must be addressed to Congress.

Finally, the Court should not be deceived by efforts to inflate the numbers of wrongful convictions. This exoneration inflation was called out by Justice Scalia nearly 20 years ago, and the inflators have not cleaned up their act since.

ARGUMENT

I. Under the Rule 15 precedents of all circuits, *Gonzalez* and *Banister* already answer the question in this case.

Rule 15 of the Federal Rules of Civil Procedure[2] does not expressly distinguish between motions made before and after judgment. Even so, all the circuits agree that the standards for granting motions under Rule 15(a) shift dramatically at that point, and in a way directly relevant to the issues in this case.[3]

Even though Rule 15(a)(2) provides that "[t]he court should freely give leave [to amend] when justice so requires," that is not the standard after judgment is entered in the district court. The rule was stated by the Seventh Circuit recently in *Ewing* v. *1645 W. Farragut LLC*, 90 F. 4th 876 (2024).

"It is well settled that after a final judgment, a plaintiff may amend a complaint under Rule 15(a) only with leave of court after a motion under Rule 59(e) or Rule 60(b) has been made *and the judgment has been set aside or vacated*." *Id*., at 893 (citations and internal quotation marks omitted, emphasis in original). *Ewing* involved a motion made after the judgment was entered in the district court but before both parties filed appeals. See *id.*, at 884.

The same rule is followed in all but two of the other circuits. See *Palmer* v. *Champion Mortgage*, 465 F. 3d 24, 30 (CA1 2006); *Janese* v. *Fay*, 692 F. 3d 221, 225 (CA2 2012); *Ahmed* v. *Dragovich*, 297 F. 3d 201,

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2. All subsequent citations to "Rules" are to the Federal Rules of Civil Procedure unless otherwise indicated.

3. Rule 15(b) deals with amendments to conform to evidence or to issues tried by consent, and it is not relevant to this case.

207–208 (CA3 2002); *Calvary Christian Ctr.* v. *City of Fredericksburg*, 710 F. 3d 536, 539 (CA4 2013); *Vielma* v. *Eureka Co.*, 218 F. 3d 458, 468 (CA5 2000); *Auletta* v. *Ortino* (*In re Ferro Corp. Derivative Litig.*), 511 F. 3d 611, 624 (CA6 2008); *Lindauer* v. *Rogers*, 91 F. 3d 1355, 1357 (CA9 1996); *Tool Box, Inc.* v. *Ogden City Corp.*, 419 F. 3d 1084, 1087 (CA10 2005); *Boyd* v. *Sec'y, Dep't of Corr.*, 114 F. 4th 1232, 1237 (CA11 2024).

The variation in the other two circuits is a nonsubstantive one. "When a party moves to amend a complaint after dismissal, a more restrictive standard reflecting interests of finality applies.... Leave to amend will be granted if it is consistent with the stringent standards governing the grant of Rule 59(e) and Rule 60(b) relief." *UMB Bank, N.A.* v. *Guerin*, 89 F. 4th 1047, 1057 (CA8 2024) (citations and internal quotation marks omitted); accord, *Trudel* v. *Suntrust Bank*, 924 F. 3d 1281, 1287 (CADC 2019). This approach collapses the two motions into one, but the standards for decision are the same.

We will assume, for the sake of argument, that the *pro se* petitioner's second petition may be deemed an amended petition accompanied by the required motions. But see Brief for Respondent 12. That would necessarily include a motion under Rule 59(e) or 60(b) to set aside the judgment as a prerequisite to a motion under Rule 15 to amend the petition. In the alternative formulation, the Rule 15 motion would be judged by the applicable standards for Rule 59(e) or 60(b).

Whether the prerequisite motions are actually made, deemed to have been made, or have their standards imported, this Court's decisions in *Banister* v. *Davis*, 590 U. S. 504 (2020), and *Gonzalez* v. *Crosby*, 545 U. S. 524 (2005), control when they will be considered a successive petition subject to the limitations of 28 U. S. C. § 2244(b). Rule 59(e) motions are not, but they

must be made within "a fixed 28-day window" from the date of the district court's judgment on the petition. See *Banister*, at 517, 519. In the present case, the second petition was filed four years after the District Court judgment denying the first, see Brief for Respondent 8–9, far outside the window.

That leaves Rule 60(b). Rule 60(b)(2) is on point for this case—"newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)"—and Rule 60(b)(6) is limited on its face to "*other* reason[s]." See *Gonzalez* v. *Crosby*, 545 U. S., at 528–529; *Liljeberg* v. *Health Servs. Acquisition Corp.*, 486 U. S. 847, 863, n. 11 (1988). A Rule 60(b)(2) motion must be made within one year at most, see Rule 60(c)(1), so petitioner's deemed motion would be untimely, but that was not the reason given by the District Court or Court of Appeals. The question is whether the successive petition statute applies, and that base is covered by *Gonzalez*.

Petitioner objects that "Rule 15 and Rule 60(b) have little in common." Brief for Petitioner 41. But when the motion is made after judgment and after the Rule 59(e) window has closed, they have a great deal in common. In civil cases in every circuit, such a Rule 15 motion may not be granted without meeting the standards for Rule 60(b).[4] Petitioner further objects that *Gonzalez* "did not ... analyze when § 2244(b) first kicks in," Brief

4. Petitioner cites no post-*Gonzalez* Second Circuit case resolving the tension between the pre-*Gonzalez Whab* v. *United States*, 408 F. 3d 116 (CA2 2005), case and the combination of *Gonzalez* with the circuit precedent requiring Rule 60 relief before a post-judgment amendment, *Janese* v. *Fay*, *supra*. Nor do any of the *amici* supporting reversal. *Amicus* CJLF has not found any. *Ochoa* v. *Sirmons*, 485 F. 3d 538, 540–541 (CA10 2007), criticized *Whab* on this basis.

for Petitioner 42, but *Gonzalez*, 545 U. S., at 530–531, did set forth a standard to be applied in all Rule 60(b) motions in habeas cases, a standard which applies whether the motion is made before, during, or after the appeal. It noted, as correctly decided, cases which held that Rule 60(b) motions raising new claims are barred as successive without distinguishing completed from uncompleted appellate review. See *id*., at 531 (citing *Dunlap* v. *Litscher*, 301 F. 3d 873, 876 (CA7 2002) (motion filed during pending of certificate of appealability proceedings)). *Banister*'s discussion of *Gonzalez* and its comparison of Rule 59(e) and Rule 60(b) motions notes that the latter "attacks an already completed judgment." *Banister*, 590 U. S., at 520–521. That unqualified statement necessarily means "completed" in the district court, not the court of appeals, as Rule 60(b) is not limited to cases of completed appellate review.

In short, "the rules of procedure applicable to civil actions," 28 U. S. C. § 2242, tie Rules 15 and 60(b) together in any case where the amendment is made after judgment in the district court and after expiration of the Rule 59(e) deadline. The petitioner cannot amend without meeting the standards for a Rule 60(b) motion, and for habeas corpus cases such a motion requires meeting the standard for successive petitions if it states a "claim." *Gonzalez*, 545 U. S., at 530–531.

There is no need to forge a new standard for Rule 15. Simply applying existing civil procedure law for post-judgment amendments, *Banister* and *Gonzalez* cover the territory.[5] The Court of Appeals' application

5. In an appropriate case, the Court should reconsider the holding of *Gonzalez* regarding non-merit grounds, especially procedural default, see 545 U. S., at 532, n. 4, in light of *Banister*'s discussion of the importance of finality. See 590 U. S., at

of *Gonzalez* to this case is correct. See *Rivers* v. *Lumpkin*, 99 F. 4th 216, 222 (CA5 2024).

II. The pre-AEDPA record does not support petitioner's argument that reopening a decided case to amend was not considered successive.

A. Stages of Pre-AEDPA Evolution.

Petitioner cites a number of cases across a range of many years in which the successive petition issue was not raised. Brief for Petitioner 28–31. Petitioner claims these cases as evidence that reopening a decided habeas corpus case to amend the petition was not regarded as a successive petition, citing *Banister* v. *Davis*, 590 U. S. 504, 514, 519, n. 8 (2020). See Brief for Petitioner 27–29. The claim is that successive petition law before the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) had enough "bite" that disposition of these efforts on that basis would have been easier than the grounds on which they were actually decided.

The real history is more complicated. The limits on repeated petitions traveled a bumpy and winding road. *None* of the cases cited by petitioner presents a clear case where the law of successive petitions in effect at the time would have presented a clearer and easier path to decision than the one the court actually followed. Before getting to the cases, a survey of the history is necessary.

At common law, res judicata did not attach to a denial of habeas relief, and a petitioner could ask one judge after another for an opinion on the legality of his

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519–521. Finality is threatened as much by endless relitigation of claims dismissed as defaulted as it is by such relitigation of claims on the merits. But this is not the case.

custody. *McCleskey* v. *Zant*, 499 U. S. 467, 479 (1991). If the custody was authorized by a judgment of a court of general jurisdiction, however, the prisoner would get the same answer from every judge. The criminal judgment *was* res judicata. *Ex parte Watkins*, 3 Pet. (28 U. S.) 193, 202–203 (1830); *Jones* v. *Hendrix*, 599 U. S. 465, 483 (2023). In time, both of these rules relaxed. Habeas corpus became increasingly available to collaterally attack final judgments, see *Brown* v. *Davenport*, 596 U. S. 118, 130–131 (2022), and prior denials took on greater significance in subsequent applications. See *McCleskey*, at 479–480.

In the early and middle twentieth century, the treatment of successive petitions had not hardened into a rule. *Salinger* v. *Loisel*, 265 U. S. 224, 231 (1924), and *Wong Doo* v. *United States*, 265 U. S. 239, 241 (1924), upheld discretionary dismissals of habeas corpus petitions, but dicta in *Price* v. *Johnston*, 334 U. S. 266, 289 (1948), seemed to backtrack on what those decisions had held. See *McCleskey*, 499 U. S., at 483. Congress then enacted the initial version of 28 U. S. C. § 2244, providing discretion regarding successive petitions presenting no new ground and directing consideration of "the ends of justice." *McCleskey*, at 483. The Reviser's Note indicated that "Congress did not intend the new section to disrupt the judicial evolution of habeas principles." *Id*., at 484. As of 1950, it appeared that the rule was discretionary, and the limits of discretion were uncertain.

As the law in this area evolved, different terms came to refer to repeated claims versus new claims. A petition repeating the same claims came to be known as a "successive petition," while one presenting new claims that could have been raised earlier was called "abuse of the writ" or an "abusive petition." See *Kuhlmann* v. *Wilson*, 477 U. S. 436, 444, n. 6 (1986) (plurality opin-

ion). Of course, use of these different terms on the petition level rather than the claim level was a problem, as a single petition may contain both kinds of claims.

Then came the 1963 earthquake: the trilogy of *Fay* v. *Noia*, 372 U. S. 391 (1963), *Townsend* v. *Sain*, 372 U. S. 293 (1963), and *Sanders* v. *United States*, 373 U. S. 1 (1963). *Noia*, at 438, limited the procedural default rule to only the rare cases in which the defendant had "deliberately by-passed" his state remedies, effectively negating *Daniels* v. *Allen*, a companion case to *Brown* v. *Allen*, 344 U. S. 443 (1953). See *Noia*, at 448 (Clark, J., dissenting). *Sanders*, at 15, limited the successive petition bar to cases where the same claim was previously denied on the merits and the ends of justice would not be served by reaching the merits again. *Sanders* also adopted the *Noia* deliberate bypass standard for new claims, i.e., abuse of the writ. *Id*., at 18. Further, both rules only authorized, never required, the judge to deny a habeas corpus application on the grounds of successiveness or abuse. *Id*., at 18–19.

As of the end of the October 1962 Term, then, it was *not* true that "the rule against repetitive litigation ... had plenty of bite." Cf. *Banister* v. *Davis*, 590 U. S., at 514 (citing *McCleskey* and *Kuhlmann*). *Sanders* had defanged the rule and limited it to soft foods. It was also not true *at that time* that dismissing repetitive claims "would usually have been required." Cf. *id*., at 519, n. 8. *Sanders* was clear that proceeding to the merits of a successive petition was never reversible error, while *Price*, *supra*, had reversed the dismissal of a *fourth* petition. These statements would become true before the enactment of AEDPA, as *Banister* said, but not much before.

Fay v. *Noia*'s deliberate bypass rule for procedural default was largely abandoned 14 years later. See *Wainwright* v. *Sykes*, 433 U. S. 72, 89–91 (1977).

Sanders survived considerably longer. A plurality of this Court endorsed Judge Henry Friendly's "colorable showing of factual innocence" as a replacement for successive petition cases in *Kuhlmann* v. *Wilson*, 477 U. S., at 454, but that standard was never endorsed by a majority. It was not until 1991 that a mandatory standard of cause-and-prejudice or actual innocence was adopted for "abuse of the writ" cases in *McCleskey* v. *Zant*. 499 U. S., at 493–495. Thus, the statement in *Banister*, *supra*, about pre-AEDPA law's "bite" is true only for the five years immediately before AEDPA, i.e., April 1991 to April 1996.

B. Petitioner's Cases.

With this background in mind, we can examine the cases that petitioner claims support his position. The claim does not withstand examination.

Petitioner cites the *Harisiades* case at all three levels of its history, but this case does not support the argument on any of them. The petitioner was an immigrant fighting deportation. See *Harisiades* v. *Shaughnessy*, 90 F. Supp. 431, 432 (SDNY 1950). The same day that he filed his notice of appeal of the denial of his petition, this Court decided that the Administrative Procedure Act applies to deportation proceedings in *Wong Yang Sun* v. *McGrath*, 339 U. S. 33 (1950), overruling Second Circuit precedent. See *Harisiades*, 90 F. Supp., at 432 , and n. 1. *Wong Doo*, 265 U. S., at 241, had endorsed discretionary dismissal of a second petition in an immigration matter when it made a new claim that had been withheld from the first without explanation, but in 1950 it was not clear by any means that this applied to a case where the controlling precedent had changed in the interim. Indeed, the circumstances in which a change in the law justifies a succes-

sive petition continues to raise issues to this day. See, e.g., *Jones* v. *Hendrix*, 599 U. S. 465 (2023).

Ten days after the notice of appeal and the *Wong Yang Sun* decision, Harisiades moved to amend his petition and to reargue it, followed by a second motion to withdraw the appeal. *Harisiades* v. *Shaughnessy*, 90 F. Supp., at 432–433. The Government opposed the motions as beyond the jurisdiction of the court and argued "that the whole issue should be brought on by a petition for a new writ of habeas corpus." *Id*., at 433.

Contrary to petitioner's assertion, the dog *did* bark in *Harisiades*.[6] Cf. Brief for Petitioner 29. The Government affirmatively argued that a successive petition would be proper in these circumstances, not barred. As the parties agreed that the claim would be addressed one way or the other, and nothing in the embryonic law of successive habeas petitions pointed squarely to the contrary, the issue was simply one of which path to the merits was preferable.

The District Court noted the general rule against district court proceedings after the filing of the notice of appeal, but it also noted an exception in the then-existing Federal Rule of Civil Procedure 73[7] distinguishing cases in which the appeal had been docketed from those in which it had not. The District Court thus had jurisdiction despite the very recent appeal, and practical considerations favored a single decision presenting a single appeal to the Court of Appeals. *Harisiades* v. *Shaughnessy*, 90 F. Supp., at 433–434. The court then proceeded to the merits of whether the deportation

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6. See A. Doyle, The Adventure of Silver Blaze (1892), https://sherlock-holm.es/stories/html/silv.html.

7. Former Rule 73 was abrogated in 1968, and an unrelated rule of the same number was adopted.

proceeding was initiated before the non-retroactive Administrative Procedure Act was adopted, the only difficulty being which step in the process constituted initiation. *Id*., at 436–439. As the proceeding was initiated before enactment, the motion for leave to amend was denied.

Given that the Government's argument in the District Court eliminated any question of a successive petition bar, there is nothing remarkable in the fact that the Court of Appeals proceeded to the merits after summarizing the history. *United States ex rel. Harisiades* v. *Shaughnessy*, 187 F. 2d 137, 139 (CA2 1951). Nor is there anything remarkable that this Court, having taken up three cases to address a common constitutional question, *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 583–584 (1952), brushed off a procedural question in a footnote noting that the statute was expressly non-retroactive, *id*., at 583, n. 4, rather than burrowing into the record and finding a successive petition issue that the Government had renounced. To say that this omission is "striking" is absurd. Cf. Brief for Petitioner 29. It would be striking if this Court *had* gone far out of its way to dig up an issue unrelated to the question on which it had granted certiorari.

Most of the rest of the cases cited by petitioner fall into the successive petition dead zone between *Sanders* and *McCleskey*, when a petition could be dismissed as an abuse of the writ only if the petitioner's default cleared the very high hurdle of deliberate bypass. See *supra*, at 9. These cases have no probative value in establishing his thesis.

Strand v. *United States*, 780 F. 2d 1497 (CA10 1985), involved a petition that was successive by any definition, with an obvious reason why the successive petition bar was not invoked. Strand was convicted of tax and securities violations. His conviction was af-

firmed on appeal. His first petition under 28 U. S. C. § 2255 was denied, and the denial was affirmed in August 1982. *Id*., at 1497–1498. Strand filed a second petition in November 1982, and he made another filing over a year later. *Id*., at 1498. The majority calls this latter filing a "supplemental addendum," *id*., at 1500, and the dissent calls it an "amended petition." *Id*., at 1502–1503. Regardless of the nomenclature, the entire proceeding before the District Court at that point was a successive petition, the first petition being final on appeal.

So why is there no discussion of the successive petition bar? The obvious answer has nothing to do with the addendum/amendment. Strand claimed a *Brady* violation,[8] 780 F. 2d, at 1498, failure to disclose exculpatory evidence. The same nondisclosure that was the basis of the *Brady* claim was easily sufficient to meet the lax requirement of *Sanders* in effect at the time.[9] Bringing up the *Sanders* rule would not have avoided the need to decide the merits, and that is an entirely plausible reason for not bringing it up. Cf. Brief for Petitioner 30–31.

The premise of petitioner's *Banister*-based argument is that a court's decision to take the difficult course of deciding a motion on the merits when denying it as successive would be easier implies that the latter course was not available under the law as understood at the time. See *Banister*, 590 U. S., at 519, n. 8; Brief for Petitioner 30–31. Whatever validity that argument may

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8. *Brady* v. *Maryland*, 373 U. S. 83 (1963).

9. Indeed, a meritorious *Brady* claim would likely have been sufficient to meet even the stricter cause-and-prejudice test later adopted for abuse of the writ in *McCleskey*. See *Strickler* v. *Greene*, 527 U. S. 263, 282 (1999) (parallel between the elements of *Brady* and the cause-and-prejudice test).

have, it obviously does not apply when a court disposes of a motion on another simple and easy basis. Petitioner cites *Bennett* v. *Robbins*, 329 F. 2d 146 (CA1 1964), as disposing of a habeas corpus petitioner's motion to amend his petition *in the appellate court* "without suggesting that the motion was abusive." Brief for Petitioner 30. Of course not. The Court of Appeals simply and correctly noted that such a motion is "not properly made in this court." *Bennett*, at 147. That is easier still. The premise of the *Banister* footnote argument is not present.

In *Clarke* v. *Henderson*, 403 F. 2d 687, 688 (CA6 1968), the District Court erred in deciding the case without an evidentiary hearing. The District Court relied on the state trial court record, which the Court of Appeals deemed inadequate. In addition, there was an intervening decision of this Court on the standard to be applied. *Ibid*. With the case going back anyway, the Court of Appeals indicated that the petitioner should be allowed to amend his petition. *Id*., at 689. This case stands only for the proposition that an amendment to a petition presently before the District Court, whether on the first round or after remand, is not a successive petition. That is true, but not relevant to the present case.

In *Thomas* v. *Virginia*, 357 F. 2d 87, 90 (CA4 1966), the Court of Appeals remanded to consider a new claim under *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), decided one year before the case was argued. The timing of the *Escobedo* decision in relation to the District Court proceedings is not stated in the decision. This could be a case where new law would have justified a successive petition under *Sanders* in any event, as in *Harisiades*, *supra*.

In *Bishop* v. *Lane*, 478 F. Supp. 865, 866 (ED Tenn. 1978), a petitioner represented by counsel sought to

amend his petition after judgment under Rule 15 without first moving for relief from the judgment under any of the rules for such relief, which at the time included Rule 52 as well as Rules 59 and 60. That was improper, as discussed *supra*, Part I. The District Court did not deem a Rule 60 motion to have been made, as might have been proper for an unrepresented petitioner, but just denied the obviously improper motion on that simple ground. *Id*., at 867. Nothing remarkable there, and there was no reason to go into the more difficult and fact-based question of whether the petitioner could qualify under *Sanders*.

Petitioner cites *Briddle* v. *Scott*, 63 F. 3d 364 (CA5 1995), with no point page to indicate what portion of the opinion he claims supports his thesis. See Brief for Petitioner 30. This is the only post-*McCleskey* case in this portion of the petitioner's brief. Briddle filed a timely motion to reconsider 12 days after the District Court's decision. *Id*., at 370. Nearly a year later, after a change of counsel, he filed another motion claiming to be a supplement to the first motion, raising new issues. *Ibid*. The Court of Appeals affirmed, noting circuit precedent that *McCleskey* applied retroactively, that Rule 60(b) may not be used to circumvent it, and that Briddle had made no showing of cause to meet the *McCleskey* test. *Id*., at 376, and n. 25. How petitioner can include this case under a discussion claiming that "not a single judge suggested that any of the prisoners had abused the writ" is not explained. The Fifth Circuit judges more than suggested it; they made *McCleskey* a part of their ruling.

Petitioner's reliance on *Petty* v. *McCotter*, 779 F. 2d 299 (CA5 1986), is similarly curious. In this case, a panel of the Court of Appeals decided to reverse and remand a case after the petitioner raised new claims on appeal. See *id*., at 302. The court indicated that the

petition should be amended on remand, not because petitioner needed to do so to make his case but because this was necessary for the State to invoke the defense of nonexhaustion. See *ibid*. This action was sufficiently irregular that this Court granted the State's petition for certiorari. See *McCotter* v. *Petty*, 478 U. S. 1003 (1986).

At oral argument in this Court, abuse of the writ was not only "suggested," it was front and center:

> "QUESTION: General Palmer, what it really boils down to, isn't it, that you want to be able to argue effectively that there is an abuse of the writ because even if they had just not taken this disposition, he could still have filed a second habeas petition, but you would have claimed it would be an abuse of the writ if he had?
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> "MR. PALMER: That is correct, Your Honor." Tr. of Oral Arg. in *Lynaugh* v. *Petty*, O.T. 1986, No. 85-1656, p. 6, https://www.supremecourt.gov/pdfs/transcripts/1986/85-1656_03-03-1987.pdf.
>
> "QUESTION: Mr. Breihan, why isn't it the case that when a matter rises to significantly enough injustice that it would be a proper exercise of the Court of Appeals' discretion to allow the matter to be raised anew it would not also be significant enough to avoid the contention of abuse of the writ if the matter were raised in the normal fashion?
>
> "I mean, this has to be an unusual situation. You can't have the Court of Appeals doing this all the time because it will, as your opponent suggests, string out these habeas proceedings until doomsday, but if the situation is extraordinary enough for the Court of Appeals to act in this fashion, why wouldn't it automatically be extraordinary enough that when an additional habeas petition were brought you

could not be dismissed on the basis of abuse of the writ?" *Id*., at 21–22.

At the end, counsel for the State deemed the connection between the remand order and the successive petition rule to be the crux of the case. *Id*., at 34. But there was another wrinkle. Counsel for the State was also asked what would have happened if the issue had been raised in the District Court, to which he replied, "Dismiss for failure to exhaust." *Id*., at 34–35. A Justice observed that this was likely to be the result under the Court of Appeals' disposition as well. *Id*., at 35.[10]

At this point in habeas history, *Wainwright* v. *Sykes* had already disposed of the *Fay* v. *Noia* "deliberate bypass" test for defaulted claims, see *supra*, at 9, but the successive petition rule was still in flux. *Kuhlmann* v. *Wilson*, 477 U. S. 436 (1986), had come to an inclusive end the term before. Remand, dismissal as unexhausted, and a state-court ruling on procedural default would not have seemed like an unacceptable outcome, however unorthodox the Court of Appeals' remand order had been. See Tr. of Oral Arg. in *Lynaugh* v. *Petty*, *supra*, at 15 ("not quite clear on how much difference it all makes"). This Court dismissed the writ of certiorari as improvidently granted without explanation. *Lynaugh* v. *Petty*, 480 U. S. 699 (1987).

The takeaway from *Petty* is that allowing new claims to be raised after judgment in the District Court was recognized as raising questions of successive petitions and abuse of the writ years before AEDPA, even as the law was in flux and the questions were not answered. This case stands for the opposite of petitioner's thesis, not in support of it.

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10. This Court's transcripts at that time did not identify which Justice asked the question.

Petitioner has scoured the case reports going back three-quarters of a century and found none that support his thesis and some that refute it. There are other cases that refute it as well.

C. Contrary Cases.

Petitioner seeks (1) to amend his petition in the District Court after that court's decision and (2) to obtain a remand from the Court of Appeals of his pending appeal for that purpose. See Brief for Petitioner 18–22. There are, in fact, pre-AEPDA precedents against both components of this gambit, contrary to petitioner's claim. Cf. Brief for Petitioner 29.

In *Smith* v. *Armontrout*, 888 F. 2d 530, 540 (CA8 1989), appellate counsel made a motion to remand in the Court of Appeals, "the purpose of which is to allow petitioner, after the case gets back to the District Court, to amend his petition extensively and obtain an evidentiary hearing on a number of new issues." Although lacking the indicative ruling in the district court that petitioner proposes here, see Brief for Petitioner 18, Smith's attempt was substantially the same. The court's rejection is clear: "The motion to remand is the functional equivalent of a second or successive petition for habeas corpus. If a second petition making the new allegations asserted in the motion would be dismissed as an abuse of the writ, then the motion to remand should be denied." *Smith*, at 540. The court anticipated *McCleskey* for the standard, see *id*., at 541 (citing *Wainwright* v. *Sykes*, 433 U. S. 72 (1977)), and found the standard not met. *Id*., at 541–546.

A post-judgment, pre-appeal amendment was rejected on similar grounds in *Bonin* v. *Vasquez*, 999 F. 2d 425 (CA9 1993). Bonin was a serial killer convicted of ten murders in Los Angeles County and four murders in a separate judgment in Orange County. *Id*.,

at 426. He filed two federal habeas corpus petitions which were assigned to the same judge but not consolidated. *Ibid*. The District Court denied the Orange County petition on July 20, 1992, and 29 days later "Bonin filed a 'Motion to Amend [Both] Petitions And For Relief From Judgment' setting forth six new claims that had never before been presented either on direct appeal, in state collateral proceedings, or to the district court." *Id*., at 427. "[T]he district court properly construed Bonin's [Orange County] motion as a request for relief from the judgment pursuant to Rule 60(b) ...." *Ibid*. The State Public Defender's Office asked to be excused so that new counsel could argue that its ineffective assistance was "cause" under *McCleskey*. The court held that *McCleskey* did apply, *id*., at 428, but denied a change of counsel on the ground that ineffective assistance on collateral review was not cause. *Id*., at 428–430.

The same panel returned to the issue in its decision of the appeal on the merits in *Bonin* v. *Calderon*, 59 F. 3d 815 (CA9 1995). The court reiterated that the July 20 ruling was a final judgment, and that the motion to amend was correctly construed as a Rule 60(b) motion. *Id*., at 847. This was in accordance with precedent in many circuits and the principal treatises, endorsed shortly afterwards by the Ninth Circuit. See *Lindauer* v. *Rogers*, 91 F. 3d 1355, 1357 (CA9 1996); see also Part I, *supra*. The motion to amend was therefore "subject to the cause and prejudice standard of *McCleskey*." *Bonin* v. *Calderon*, at 847.

The claim that post-judgment efforts to amend habeas corpus petitions were not recognized as raising abuse-of-the-writ concerns before AEDPA does not hold water. At the time Congress acted, there were multiple cases raising the issue. Further, the general understanding that a Rule 60(b) motion is a prerequisite to an

amendment, if the time for a Rule 59(e) motion has lapsed, makes the numerous Rule 60(b) precedents applicable. See *Banister*, 590 U. S., at 519. History supports forbidding the use of post-judgment amendments to circumvent the successive petition limitation.

III. The purpose of AEDPA would be defeated by poking yet another hole in finality.

"Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases, and 'to further the principles of comity, finality, and federalism.' " *Woodford* v. *Garceau*, 538 U. S. 202, 206 (2003) (quoting *Williams* v. *Taylor*, 529 U. S. 420, 436 (2000)). One of the most important reforms was to clamp down hard on repeated attacks on the same judgment. Congress decided, in essence, that *Kuhlmann* and *McCleskey* had not gone far enough in tightening the limits on successive petitions, and Congress would restrict them much further.

Although this is not a capital case, nothing in petitioner's proposed rule would limit it to non-capital cases. Despite petitioner's reference to prisoners who obtain new exculpatory evidence, nothing in the proposal limits it to that situation. Petitioner's proposed rule would apply equally to stone cold guilty murderers who seek to drag out their proceedings, exactly the abuse targeted by AEDPA. The goal was not to limit the number of prisoners who obtain relief. The goal was to reach the end faster in cases of criminals correctly tried and sentenced. It is obvious from the debates that the excessive number of proceedings before a case was truly final was a principal target.

In a particularly notorious case cited often in the debates, see 141 Cong. Rec. 4111–4112 (Feb. 8, 1995)

(Rep. Cox); *id*., at 14734, col. 1–2 (June 5, 1995) (Sen. Feinstein), the *McCleskey* rule had not been clear enough to prevent the issuance of a stay of execution to entertain a *fifth* federal challenge to a death sentence on an obviously defaulted claim. See *Gomez* v. *United States Dist. Court for the Northern Dist. of Cal.*, 503 U. S. 653, 653–654 (1992) (*per curiam*). Senator Hatch also cited the *Andrews* case, which took 18 years and 30 appeals. See 141 Cong. Rec. 15062, col. 2 (1995). That case took almost three years on the second round of federal habeas. See *Andrews* v. *Deland*, 943 F. 2d 1162, 1168 (CA10 1991) (petition filed July 19, 1989), cert. denied, 502 U. S. 1110 (1992), rehearing denied, 503 U. S. 967 (March 30, 1992). This was in a case involving "no question of Andrews' participation in the crimes," 943 F. 2d, at 1186, an almost unbelievably horrific case of sadistic torture and multiple murder. See *State* v. *Pierre*, 572 P. 2d 1338, 1343–1344 (Utah 1977).

To preclude more than one round of federal review in all but the rarest cases, Congress clamped down hard on "second or successive" habeas corpus applications in its revision of § 2244(b). See *Tyler* v. *Cain*, 533 U. S. 656, 661-662 (2001). Congress barred repeated claims completely and limited new claims to two narrow categories: (1) retroactive new rules; and (2) newly discovered facts *and* actual innocence.

Congress's intent to *preclude* the second round of litigation, not merely to enable the state to *prevail* in that round, is further implemented by the extraordinary procedural measures in subdivision (b)(3). Subdivision (b)(3)(A) requires leave of the Court of Appeals to even file the petition, and subdivision (b)(3)(B) requires that decision to be made by a three-judge panel. This is to preclude allowing a single judge to authorize filing and grant a stay. Subdivision (b)(3)(D) requires a

decision in 30 days, and (b)(3)(E) forbids rehearing or certiorari review of that decision.

Congress made the substantive standard for new claims so high that in the vast majority of cases it is obvious that the petitioner cannot meet it.[11] That very high hurdle discourages applications and makes the quick denial of most of those that are filed feasible. Very few cases involve new rules of constitutional law that this Court has made retroactive on collateral review, see 28 U. S. C. § 2244(b)(2)(A), as this Court makes very few such rules. New evidence that goes only to sentence and not "guilt of the underlying offense" does not qualify under subparagraph (b)(2)(B)(ii) and is easily screened out. Tangential facts that do not come remotely close to the "no reasonable factfinder" standard of the same subparagraph, as in the present case, are typically not hard to identify as such. See Brief for Respondent 44–46.

When the petitioner seeks to add new claims while the appeal of the first petition is pending, the application goes to the same court considering the appeal. Petitioner says that it is inefficient for the application to go to a different panel, Brief for Petitioner 34, but if that is a problem the court of appeals can deal with it via its internal assignment process.

Petitioner's proposal is that the district court reopen a case which was completed and closed as to that court, consider a motion, and state that it merely "raise[s] a substantial issue." Brief for Petitioner 1. He further contends that if the court of appeals agrees that there is merely a substantial issue, that is enough to bring the appeal to a screeching halt and send the no-longer-final case back to the district court, *ibid*., from which it

11. The argument that it is too high is addressed in Part IV, *infra*.

would then go back to the court of appeals again when one side or the other appeals the new decision. A similar game of court ping-pong between state and federal courts is exactly what the Congress sought to squelch when it beefed up the exhaustion rule. See *Duncan* v. *Walker*, 533 U. S. 167, 181 (2001). Fewer proceedings, not more, is what Congress sought to achieve. A single application to file a successive petition, in the court that is already considering the appeal, with a high standard for granting and no review of the decision, see 28 U. S. C. § 2244(b)(3)(E), achieves that.

Congress's goals of enhancing finality and minimizing the number of proceedings have already taken some major hits. *Rhines* v. *Weber*, 544 U. S. 269 (2005), reauthorized federal-state court ping-pong, and its admonitions of not "too frequently," "limited circumstances," and "time limits" have no teeth. See *id*., at 277–278. *Gonzalez*, 545 U. S., at 532, n. 4, has already authorized an end-run around the successive petition bar for claims denied as procedurally defaulted. No more loopholes are in order. The statute should be enforced to limit the number of proceedings, as it was intended. For the present case that means that any move to make new claims more than 28 days after final judgment in the district court, whatever label is attached to it, must meet the standard for a successive petition.

IV. Complaints that the actual innocence window is too narrow must be addressed to Congress, not the judiciary.

Petitioner in this case claims that he is actually innocent, see Brief for Petitioner 6, a claim refuted by the State. See Brief for Respondent 2–10. However, the rule he proposes contains nothing at all that would limit

it to innocence questions. He claims that Federal Rules of Civil Procedure 15(a)(2) and 62.1(a) are the governing rules. See Brief for Petitioner 17–20. He denies that Rule 60(b) relief from the judgment is a prerequisite, *id*., at 21, despite the voluminous authority to the contrary. See *supra*, Part I. He claims that the only restraints are case law limits similar to those that Congress implicitly found inadequate when it enacted AEDPA, plus the AEDPA statute of limitations. Brief for Petitioner 44–45. This proposal would leave the door wide open to claims based on procedural questions and issues regarding the sentencer's discretionary choice of sentence within the legal range, issues that may cast no doubt whatever on the petitioner's guilt of the offense.

Actual innocence has long been recognized as a compelling factor regarding whether to make habeas corpus relief available. See *Kaufman* v. *United States*, 394 U. S. 217, 235–236 (1969) (Black, J., dissenting); Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 142 (1970); *Kuhlmann* v. *Wilson*, 477 U. S. 436, 452 (1986) (plurality opinion) (requirement for successive petition); *Schlup* v. *Delo*, 513 U. S. 298, 321–322 (1995) (supplement to cause-and-prejudice test for defaulted and successive claims). Of the various rules being considered in this case, only one expressly distinguishes innocence claims from other kinds of claims: AEPDA's statutory replacement for the *McCleskey* rule, 28 U. S. C. § 2244(b).

In formulating the case-law version of the actual innocence test, which is still the law for procedural default, the Court noted that successful claims of actual innocence in habeas corpus cases are rare. *Schlup*, 513 U. S., at 321, n. 36. The problem, of course, is that *claims* of innocence by guilty prisoners are not rare at all, and too-frequent retrials of actual innocence pose a

threat to limited judicial resources in proceedings that are supposed to be heard "summarily." 28 U. S. C. § 2243. The problem is particularly acute in capital cases, where claims are often presented on the eve of execution, see *Schlup*, at 341 (Rehnquist, C.J., dissenting), accompanied by a demand for yet another stay in a case already delayed far too long.

There has been an effort for quite some time now to convince courts and legislatures that genuine claims of innocence are much more common than previously recognized. Justice Scalia called out the dubious methods used in this effort in his concurrence in *Kansas* v. *Marsh*, 548 U. S. 163, 196 (2006), where he noted that the "inflation of the word 'exonerated' " was "endemic." This exoneration inflation was further exposed in a follow-up article. See Campbell, Exoneration Inflation, J. Inst. Adv. Crim. Just. 49 (Summer 2008), http://www.cjlf.org/files/CampbellExonerationInflation2008.pdf (as visited Feb. 14, 2025).

In the present case, *Amicus* Phillips Black raises the issue of people who are actually innocent but unable to meet the standard for relief in AEDPA. Regrettably, this brief attempts to make its case by designating as "exonerated" people identified as such by a notorious exoneration inflator, the misleadingly named National Registry of Exonerations (NRE). See Phillips Black Brief 10, n. 2. Listing in this registry is not any kind of official declaration of innocence, as the name leads people to believe, but simply an academic effort. It was co-founded by Samuel Gross, see National Registry of Exonerations, Staff, https://www.law.umich.edu/special/exoneration/Pages/Staff.aspx (as visited Feb. 14, 2025), the very inflator named by Justice Scalia. *Kansas* v. *Marsh*, 548 U. S., at 196.

Getting listed as "exonerated" does not require actual innocence or proof of innocence, by any standard.

It is sufficient that (1) on retrial a jury did not find the evidence still available and admissible amounted to proof beyond a reasonable doubt, i.e., the defendant was acquitted; or (2) the prosecution decided to drop the charges, regardless of why they were dropped. The action leading to the designation of "exonerated" need not have anything to do with evidence of innocence. National Registry of Exonerations, Glossary, https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx. The definition is largely the same as the Death Penalty Information Center's notoriously overinclusive "innocence list." See Campbell, *supra*, at 54–60. A person who is stone cold guilty might be "exonerated" under this definition because credible evidence of guilt was suppressed for a technical *Miranda* violation or as "fruit of the poisonous tree." *Id*., at 57.

Amicus CJLF realizes that this exoneration inflation debate is somewhat tangential to the issues in this case, but factually dubious or outright false assertions by advocates are sometimes incorporated uncritically into this Court's opinions, where the Court's prominence makes them a source of misinformation for a very long time, impervious to efforts at correction. For example, the statistical error on race and capital sentencing in *McCleskey* v. *Kemp*, 481 U. S. 279, 287 (1987), continues to be cited in debates to this day, decades after it was called out as a textbook example of how to mislead with statistics. See Scheidegger, Rebutting the Myths About Race and the Death Penalty, 10 Ohio St. J. Crim. L. 147, 156-157 (2012); Barnett, How Numbers Can Trick You, 97 MIT Tech. Rev. 38, 42–43 (Oct. 1994).

While true cases of innocence are rare, and more rare than the inflators would have us believe, they do occur. As a matter of policy, a good argument can be

made that Congress went too far in clamping down on innocence as a ground for a successive petition. For example, California's statute on successive petitions in capital habeas cases, enacted in an initiative by supporters of capital punishment, requires only proof of innocence by a preponderance of the evidence. See Cal. Pen. Code § 1509(d). But this case is not a policy debate.

The question in this case is whether a habeas corpus petitioner should be able to add new claims after a decision in the district court merely by complying with Rule 15(a) without meeting the standards of the statutory successive petition rule, even though a Rule 60(b) motion is considered a prerequisite in civil cases, and even though this Court has held that a Rule 60(b) motion adding a new claim must meet the successive petition standards. An affirmative answer to this question is nothing more than an evasion of the decision of Congress regarding the standards for taking a second bite at the apple.

Disagreement with Congress is no excuse for evasion. The legislative branch has spoken, and the judicial branch must follow the statute so enacted, absent a constitutional issue. There is no constitutional limit on Congress's authority to limit repeated collateral attacks on criminal judgments. *Jones* v. *Hendrix*, 599 U. S. 465, 487–488 (2023). Complaints about the narrowness of the actual innocence exception must be addressed to Congress.

CONCLUSION

The decision of the Court of Appeals for the Fifth Circuit should be affirmed.

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Respectfully submitted,

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