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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

When a prisoner discovers exculpatory evidence mid-appeal, 28 U.S.C. §2244(b) does not tie the district court's hands. Habeas courts historically entertained mid-appeal efforts to amend, without a word about successive litigation. Just before Congress enacted §2244(b), Texas itself told this Court why. When "there has been no appellate review of the judgment of the district court, there is no finality to that court's review on the merits, and thus [an] amended petition would not be subject to dismissal for abuse." Pet'r. Br., *McCotter* v. *Petty*, No. 85-1656, 1986 WL 728550, at *23. "Congress passed AEDPA against this legal backdrop, and did nothing to change it." *Banister* v. *Davis*, 590 U.S. 504, 515 (2020). That should resolve this case. Rivers's motion was not a second or successive application, and the Fifth Circuit was wrong to hold otherwise.

Texas scarcely disputes the meaning of §2244(b). Instead, it spends most of its brief arguing that the rules of civil procedure do not permit mid-appeal efforts to amend. Every step of its logic is wrong—but Rivers can prevail whether or not this Court settles the procedural debate. The courts below made a threshold error about the meaning of §2244(b), and the Court can reverse on that basis alone.

When Texas does get around to §2244(b), the theory it offers is wrong and unworkable. The State understandably abandons the decision below, which didn't even cite *Banister*. It then cobbles together a new theory, consisting of one line from *Banister* and one line from *Gonzalez* v. *Crosby*, 545 U.S. 524 (2005), Br. 20, plus an ad hoc time-of-appeal rule borrowed from the Sixth Circuit, Br. 28. That approach has no basis in text or history, and no other court has found it persuasive. It also guarantees that this issue will be

back again soon, once the lower courts trip on the cracks already evident in Texas's theory. To save itself time, the Court should reject that theory now.

Finally, a word to clear the air. "Too much public discourse today is sullied by *ad hominem* rhetoric," and Texas "regrettably succumbs to this trend." *Ramos* v. *Louisiana*, 590 U.S. 83, 141 (2020) (Alito, J., dissenting). Presenting "as historical fact the testimony of the prosecution's witnesses," *Glossip* v. *Oklahoma*, 145 S. Ct. 612, 620 n.1 (2025), its brief brands Rivers as an "admitted" child abuser who has spent "the last thirteen years" seeking to "escape justice." Br. 1. Even if true, that would shed no light on the meaning of §2244(b). But Rivers denies such admissions, ROA.1584, and he has presented new evidence calling his convictions into question. If the Court reverses, those merits issues will be ripe for review. But *this* case is about §2244(b)—"[s]o all the talk" of escaping justice "is entirely out of place." *Ramos*, 590 U.S. at 143.

ARGUMENT

I. There is no obstacle to reaching the question presented.

A. This Court has jurisdiction.

Rivers has appellate standing. The district court refused to consider Rivers's proposed amendment, mistakenly holding that §2244(b) stripped it of jurisdiction. Pet. App. 19a. The Fifth Circuit affirmed. Pet. App. 11a. That judgment injures Rivers because it makes his path to habeas relief "rockier." *Banister*, 590 U.S. at 509. "And a favorable ruling from this Court would redress [his] injury by reversing that judgment." *Food Mktg. Inst.* v. *Argus Leader Media*, 588 U.S. 427, 432–33 (2019).

Nor is the case moot. Texas never explains (at 17) what "jurisdictional consequences" flow from the clerk's decision to docket Rivers's proposed amendment as a new case, but that error is easily fixed. On remand, Rivers could move to consolidate this case with his original habeas case, where his amendment belonged from the start. Cf. *Sherrod* v. *Am. Airlines, Inc.*, 132 F.3d 1112, 1117 (5th Cir. 1998) (after consolidation, "all motions filed in the second lawsuit were deemed filed in the consolidated suit"). He could then move under Rule 60(b)(6) for relief from the judgment denying his original habeas application. The grounds for that motion would be integrity-based: that the district court's threshold jurisdictional error, Pet. App. 18a–19a, "precluded" it from considering Rivers's proposed amendment while the original case was still pending. *Gonzalez*, 545 U.S. at 532 n.4. If the district court granted that motion, Rivers's original petition would again be pending, and the court could grant leave to amend. See *Chafin* v. *Chafin*, 568 U.S. 165, 174 (2013) ("[P]rospects of success are … not pertinent to the mootness inquiry.").

The Court also has habeas jurisdiction. While Rivers has served his child-pornography sentences, he remains "in custody" for sexual assault and indecency. 28 U.S.C. §2254(a). The proposed amendment pleads facts that could warrant relief from those convictions. J.A.68–69, 75. Prosecutors used the alleged child pornography to show "motive," ROA.733, and "confir[m] what the girls were saying," ROA.1045, and Rivers can argue on remand that the new evidence would have undermined the State's case. The alleged confession, which jurors never heard, would be immaterial under *Strickland* and *Napue*.

B. Rivers's arguments are properly before the Court.

1. Rivers's arguments are fairly included within the question presented. The paragraph introducing that question stated that Rivers "sought to amend his initial habeas application while it was pending on appeal" and explained that the circuits are split on "whether §2244(b)(2) applies to such filings." Pet. i. The question then asked whether §2244(b)(2) applies to all, some, or no filings submitted between final judgment and the end of appellate review.

Our opening brief offered the Court two ways to answer that question. Texas concedes that the broader, timing-focused theory—that §2244(b)(2) does not apply to *any* mid-appeal habeas filings—is properly before the Court and fits squarely within the question presented. If that's true, then so must our amendment theory: that §2244(b)(2) does not apply to *some* mid-appeal filings. The greater (mid-appeal filings) includes the lesser (mid-appeal Rule 15 motions). And deciding the case on that ground would all but resolve the circuit conflict, since most cases in the split involved amendments.

2. Rivers also preserved his amendment theory. Rivers told the district court that §2244(b)(2) did not apply because he had filed "an amendment to [his] initial petition under Fed. R. Civ. P. 15." Pet'r. Objections, No. 7:21-cv-00012 (N.D. Tex. Sept. 2, 2021), Dkt. 27, at 8; see also *id.* at 7–8 (applying Rule 15 would not "frustrate AEDPA's goals"). He pressed the same argument on appeal, reasoning that "a supplement/amendment should be acceptable under Fed. R. Civ. P. 15 and thus the new claims should not be subject to §2244." C.A. Br. 8. That's more than enough to preserve the argument that §2244(b) does not apply

to amendments, especially under the relaxed standards for pro se litigants.

The amendment argument is properly before this Court too. The petition stated that Rivers "urg[ed] the court to construe [his] filing as an amendment ... instead of a second or successive petition." Pet. 12. Following *Banister*'s logic, it then argued that the lower courts were wrong to apply §2244(b). *Compare* Pet. 25–26 *with* Br. 25–27 (history), *and* Pet. 27–30 *with* Br. 31–35 (purposes). Texas is right that Rivers first cited §2242 at the merits stage. But our §2242 argument is just that: an *argument* in support of the same *claim* that Rivers has made all along—that §2244(b) does not apply. See *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992). Texas does not suggest otherwise. In all events, this Court "retains the independent power to identify and apply the proper construction of governing law." *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991).

3. The procedural issues were also on full display when the Court granted cert. Anticipating Texas's objections, our petition explained that Rule 62.1 allows district courts to consider mid-appeal filings. See Pet. 3, 29 (citing case law). Texas responded that "the *only* way Rivers could have reopened the judgment to amend" was "Rule 60(b)." BIO 12. Our reply showed why that was wrong—previewing the procedural pathway set forth in our opening merits brief. See Reply 9 (citing Rules 62.1 and 12.1, §2106, and case law). The Court may address these "antecedent" matters, *Arcadia* v. *Ohio Power Co.*, 498 U.S. 73, 77 (1990), as "subsidiary issues fairly comprised by the question presented," *City of Sherrill* v. *Oneida Indian Nation*, 544 U.S. 197, 214 n.8 (2005).

II. A motion to amend or supplement an initial habeas petition that is pending on appeal is not a "second or successive" application.

A. A mid-appeal Rule 15 motion is not a "second or successive" application.

Text. Whatever the phrase "second or successive habeas corpus application" means, it cannot cover motions to amend. Congress treated "second or successive application[s]" and "amendment[s] to an application" as distinct legal concepts. §2266(b)(2)(B), (b)(3)(B). It subjected them to different legal rules. See §2242; §2244(b). And when Congress wanted to subject amendments to the rules governing second or successive applications, it said so. See §2266(b)(3)(B). As the United States concedes, all other amendments "follow the Federal Rules," U.S. Br. 17, so applying §2244(b) instead would flout Congress's drafting choices. Plenty of challenges might await a mid-appeal Rule 15 motion, but §2244(b) isn't one of them.

Texas fails to answer most of these points. It chiefly argues (at 29) that §2242 applies only before final judgment, whereas §2244(b) applies after. But the statutes don't say that, and the §2242 Codifier's Note suggests otherwise. Congress added the amendment provision to "conform to existing practice," Codifier's Note, 28 U.S.C. §2242 (1952), and fresh on its mind would have been *Price* v. *Johnston*, 334 U.S. 266 (1948). After the prisoner there made new factual allegations in his appellate brief, this Court remanded for "amendment or elaboration of [the] pleadings." *Id.* at 277, 290–91. Pre-AEDPA courts continued to entertain such efforts, and Texas cites no language in §2244(b) purporting to "affec[t]" this practice. Contra Resp. Br. 29. Finally, because amendments and second or successive applications are mutually exclusive categories, "there is no conflict" between §2242(b) and

§2244. *Nat'l Cable & Telecomms. Ass'n* v. *Gulf Power Co.*, 534 U.S. 327, 336 (2002).

History. The history here is even stronger than in *Banister*. Our opening brief cited cases from six circuits that addressed mid-appeal efforts to amend "on the merits." *Banister*, 590 U.S. at 515. Texas's amici cite only one case going the other way—the same losing score as in *Banister*.

1. Texas can't get around the historical cases that entertained mid-appeal motions to amend.

a. Nearly everything Texas says about *Harisiades* v. *Shaughnessy* is wrong. Had Harisiades just wanted to "buttress" his claims with "intervening authority," Br. 35, he could have done so in an appellate brief. Instead, he sought to "amend" his "petition" with new factual allegations supporting a claim under the APA, which this Court had just held applicable to deportation proceedings like his. 90 F. Supp. 431, 432 n.2 (S.D.N.Y. 1950). Only later, when the government argued that "the notice of appeal barred the District Court from considering the motion," did Harisiades move to withdraw his appeal. *Id.* at 433. Faced with the two motions, the court "first consider[ed] the merits of the original application for leave to amend." *Id.* at 434. It then spent six pages analyzing "whether the deportation proceeding was 'initiated' prior to the [APA's] effective date." *Id.* at 436. (If so, amendment would be futile.) Finding that it had been, the court denied leave to amend. It then summarily denied the motion to withdraw—which Texas calls the main issue—in a single sentence.

Nor was the amendment issue simply lurking in the record when *Harisiades* reached this Court. Among the questions this Court granted was whether the APA "was applicable to the proceeding against"

Harisiades—a question that entered the case only through the motion to amend. Pet. for Writ of Cert. at 5, *Harisiades* v. *Shaughnessy*, No. 50-43 (U.S. May 3, 1951). Harisiades's opening brief then made clear that he had "moved to amend" his habeas application to allege facts supporting an APA claim *after* "fil[ing] a notice of appeal." Pet'r. Br. at *10–11, *Harisiades* v. *Shaughnessy*, 1951 WL 81967 (U.S. Dec. 4, 1951). And he argued the effective-date issue at length. *Id.* at *23–27.

If mid-appeal efforts to amend were abusive, this Court had every reason and opportunity to say so. Instead, it reached the "effective date" question—the basis for denying leave to amend—and affirmed on the merits. *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 583 n.4 (1952). (Texas's references to "standing" and "consent" are misleading. Those statements related to another argument, "aside" from the APA. *Id.*)

b. Texas fares no better with the remaining cases.

It first claims (at 36) that *Strand* v. *United States*, 780 F.2d 1497 (10th Cir. 1985), involved mid-appeal efforts to supplement the record, not a motion to amend. Even if that were right, Texas doesn't explain why (under its theory) that would not have been abusive. But Texas is wrong. The prisoner in *Strand* filed two mid-appeal motions asking the district court to consider additional factual bases for habeas relief, and the Tenth Circuit called those motions "§2255 *pleadings*." 780 F.2d at 1500 (emphasis added). Yet neither the United States nor any of the four judges who heard the case hinted that they were abusive.

Texas has even less to say about our other cases. It chiefly observes (at 36) that prisoners who introduced new grounds for relief directly in the court of appeals did not file "Rule 15 motions." Perhaps not. But the

relief those prisoners sought (and sometimes received) was the chance to raise new habeas claims mid-appeal: precisely what Texas says was off-limits. Nor does it matter that reaching the merits might sometimes have been "easier" than applying early abuse-of-the-writ doctrine. Contra CJLF Br. 13–14. That objection applies equally to the cases this Court relied on in *Banister*. *E.g.*, *Gajewski* v. *Stevens*, 346 F.2d 1000 (8th Cir. 1965). Here, as in *Banister*, what matters is that court after court addressed mid-appeal efforts to amend "without any comment about repetitive litigation," 590 U.S. at 515—not even as an alternative ground, mentioned in passing.

2. Texas's amici cite just one pre-AEDPA case going the other way. In *Smith* v. *Armontrout*, the Eighth Circuit called the prisoner's "motion to remand" the "functional equivalent of a second or successive petition." 888 F.2d 530, 540 (1989). That court used the same rationale to find Rule 59(e) motions successive in a case *Banister* deemed an outlier. See 590 U.S. at 515 (citing *Bannister* v. *Armontrout*, 4 F.3d 1434, 1445 (8th Cir. 1993)). *Smith* is an outlier too.

Finally, there was no historical habeas practice of construing mid-appeal Rule 15 motions as Rule 60(b) motions. Contra U.S. Br. 26. The United States misreads the procedural history of *Bonin* v. *Vasquez*, 999 F.2d 425 (9th Cir. 1993), which did not involve a mid-appeal filing of any sort. (It also double-counts *Bonin* v. *Calderon*, 59 F.3d 815 (9th Cir. 1995), a later opinion in the same case.) The only takeaway from *Bonin* is that a motion seeking "Relief From Judgment," filed "pursuant to Rule 60(b)," was "properly construed" as a Rule 60(b) motion. 999 F.2d at 427–28.

B. Mid-appeal Rule 15 motions offer a viable path to relief.

1. This Court may reverse without reaching the procedural issues. The district court ruled on threshold jurisdictional grounds, holding that Rivers's proposed amendment was a second or successive application. The narrowest way to resolve this case would be to correct that error, reserving all other questions. Anticipating Texas's objections, we have explained why motions like Rivers's are viable. But questions about the meaning of §2244(b) are analytically distinct from questions about the procedural path to relief, and the Court can answer the former without tackling the latter. *E.g.*, *Morgan* v. *Sundance, Inc.*, 596 U.S. 411, 417 (2022) ("assum[ing] without deciding" several antecedent issues and "consider[ing] only the next step"). That would be appropriate here, since two circuits allow mid-appeal Rule 15 motions, and there are strong arguments for their viability. See *United States* v. *Santarelli*, 929 F.3d 95, 105–06 (3d Cir. 2019); *Ching* v. *United States*, 298 F.3d 174, 177 (2d Cir. 2002).

2. If the Court reaches the procedural issues, it should apply §2106 and the Federal Rules as written.

a. The procedural debate comes down to vacatur. No one denies that clerks may docket mid-appeal Rule 15 motions. All agree that such motions cannot be granted absent vacatur. And all agree that Rule 60(b) is one path to vacatur. Texas, however, needs the Court to go further and deem Rule 60(b) the *only* path. But that ignores §2106, the same statute that permits this Court to GVR. *E.g.*, *Lawrence* v. *Chater*, 516 U.S. 163, 166–67 (1996) ("We have GVR'd" under §2106 "in light of … changed factual circumstances").

i. According to Texas, "*every* regional circuit holds" that postjudgment amendment requires "relief under Rule 59(e) or Rule 60(b)." Br. 23. That is not what the cases say. Most of the thirty-odd cases cited by Texas and its amici involved efforts to amend after judgment and before appeal, when a movant *would* need to seek vacatur under Rules 59(e) or 60(b). None cites—let alone purports to limit—§2106. None holds that a party who secures a reversal must still seek Rule 60(b) relief before amending. And none suggests that Rule 60(b) is necessary when the court of appeals vacates without reaching the merits.

The treatises don't help Texas either. The Wright & Miller section "explaining why Rivers cannot do what he proposes," Resp. Br. 34, actually *states* Rivers's rule. "[T]he district court may request the court of appeals to remand the case for consideration of the motion for leave to amend and the remand order will be viewed as comparable to a vacation of the lower court's judgment." 6 Wright & Miller, *Federal Practice & Procedure* §1489 (3d ed. June 2024); see 13A Cyc. of Fed. Proc. §63:11 (3d ed. Jan. 2025) (similar).

ii. The United States insists (at 29) that §2106 may not be used to "avoi[d] the limitations of the federal procedural rules." But Rule 60(b) does not purport to limit the exercise of appellate vacatur. Nor does it purport to be the only path to *district-court* vacatur. Rule 60(d)(1) disclaims such exclusivity by preserving the "independent action," one of the "old forms of obtaining relief from a judgment." *United States* v. *Beggerly*, 524 U.S. 38, 45 (1998). And this Court has treated §2106 and Rule 60(b) as alternative paths to vacatur. See *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 29 (1994) (appellate court "*may* remand" for consideration of Rule 60(b) vacatur "even

in the absence of, or before considering the existence of" grounds for §2106 vacatur (emphasis added)).

No case holds otherwise. Contra U.S. Br. 29–30. *Unitherm Food Systems, Inc.* v. *Swift-Eckrich, Inc.*, 546 U.S. 394, 402 n.4 (2006), reasoned that §2106 cannot be used to do what this Court had long interpreted Rule 50 to "forbi[d]." But (again) this Court has never held that Rule 60(b) forbids appellate vacatur. As for *Calderon* v. *Thompson*, 523 U.S. 538, 546 (1998), that case says nothing about §2106, and the Ninth Circuit recalled its mandate after this Court denied cert, when all agree that §2244(b) applies.

If the United States is worried that appellate courts will use §2106 to circumvent Rule 60(b), this Court can always clarify the §2106 standards. But this debate is about vacatur *authority*—not vacatur *standards*—and Rivers has never argued that §2106 is less exacting than Rule 60(b). Cf. *Bancorp*, 513 U.S. at 26 (§2106 vacatur is "extraordinary remedy").

b. Texas (but not the United States) floats various other objections. None is sound.

i. Rule 62.1 applies to Rule 15 motions, and Texas cites no case suggesting otherwise. The phrase "motion … for relief," Rule 62.1(a), covers "any motion that the district court cannot grant because of a pending appeal," Report of the Civil Rules Advisory Committee, Dec. 12, 2006 at 14. A motion to amend "falls within th[at] scope." *Scriber* v. *Ford Motor Co.*, 2024 WL 2830499, at *3 (S.D. Cal. June 4, 2024); see Rule 7(b)(1)(C) (motions must "state the relief sought"); *Carbiener* v. *Lender Processing Servs., Inc.*, 2014 WL 12616966, at *2 n.6 (M.D. Fla. Sept. 29, 2014) ("leave to amend" is "relief"). Plenty of courts have considered Rule 15 motions under Rule 62.1. *E.g.*, *Scriber*, 2024 WL 2830499, at *3; *Louisiana* v. *Becerra*, No.

21-cv-03970, ECF No. 59, at 5 (W.D. La. Feb. 9, 2022); *Beverley* v. *N.Y.C. Health & Hosp. Corp.*, 2020 WL 5750828, at *8 (S.D.N.Y. Sept. 25, 2020).

Nor does Texas cite (at 32) any case requiring a standalone "Rule 62.1 motion." Rule 62.1 mentions only one motion: the underlying "motion … for relief that the court lacks jurisdiction to grant." Meanwhile, the "split" that Texas cites is about what to do when there is no underlying motion—not about whether a Rule 62.1 motion is necessary. Anyhow, Rivers *did* seek an indicative ruling. He didn't use the magic words "indicative ruling under Rule 62.1(a)(3)," but that is the only plausible way to construe his request for "interlocutory review." J.A.107; see also C.A. Opening Br. 8; *Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976) (pro se filings are "liberally construed").

Texas is also wrong (at 33) that Rule 62.1 imports "Rule 60(b)'s deadlines." A "timely motion," Rule 62.1(a), is a motion that is timely under whatever standards govern that motion. That follows from the drafters' choice to "g[o] beyond Rule 60(b) motions" and "include all circumstances in which a pending appeal" bars relief. Committee Report at 14. Nor would reading Rule 62.1 faithfully render Rule 60(b)'s deadlines "meaningless." Resp. Br. 33. When no appeal is pending, an amendment *must* go through Rule 60(b), and would thus be subject to its deadlines. And Rule 60(b) is also necessary for relief unavailable under Rule 15. In all events, Texas's deadline argument assumes (at 33 n.5) that the Rule 60(b)(6) door is shut for newly discovered evidence. But this Court has never held that, and some courts disagree. *E.g.*, *PETA* v. *HHS*, 901 F.3d 343, 355 (D.C. Cir. 2018).

ii. The State's Rule 15 objections are nonstarters too. The heading "Amendments Before Trial" was "intended to be stylistic only." Committee Notes on 2007

Amendment; see also Wright & Miller §1488 ("[C]ourts have not imposed any arbitrary timing restrictions on requests for leave to amend ...."). And Rule 15(b)(2)'s provision for amendment "even after judgment" simply means that vacatur is unnecessary when a party seeks to "conform the pleadings to the proof." *First Nat'l Bank of Louisville* v. *Cont'l Ill. Nat'l Bank & Tr. Co.*, 933 F.2d 466, 468 (7th Cir. 1991) (Posner, J.). That doesn't imply that Rule 15(a) becomes unavailable after the court enters judgment. It just means Rule 15(b)(2) motions—unlike Rule 15(a) motions—can be granted absent vacatur.

iii. Texas's response to §2106 is a non sequitur. Br. 32. No one is talking about "enlarg[ing] the record on appeal." *Stanton* v. *Liaw*, 2023 WL 3645525, at *3 (7th Cir. May 25, 2023). The point is that appellate courts are "bound to consider any change, either in fact or in law, which has supervened since the judgment was entered." *Patterson* v. *Alabama*, 294 U.S. 600, 607 (1935). If "such a change … may affect the result," courts "may recognize" this "by setting aside the judgment and remanding." *Id.*; see, *e.g.*, *Giles* v. *Maryland*, 386 U.S. 66, 74 (1967) (plurality) (postconviction vacatur in light of new evidence); *United States* v. *Shotwell Mfg. Co.*, 355 U.S. 233, 237 (1957).

III. Alternatively, §2244(b) applies only after the initial petition is final on appeal.

The Court could also reverse by holding that §2244(b) does not apply while an appeal is pending. (By clarifying that mid-appeal Rule 60(b) motions are not successive, the Court would also make the procedural debate a nonissue.) Texas's criticism (at 37) that Rivers gave "cursory treatment" to this theory is baffling. Historical and purposive arguments for mid-appeal amendments equally support the broader point that §2244(b) permits mid-appeal habeas

claims. Br. 25–35. In all events, history confirms that mid-appeal Rule 60(b) motions were not considered abusive, and only Rivers's rule responds to AEDPA's purposes. Contra Texas (at 13), *Banister* did not "foreclos[e]" these arguments, and "what the Court did say … hardly advances the [State's] cause here." *Perez* v. *Sturgis Pub. Schs.*, 598 U.S. 142, 149 (2023).

Context. Other provisions of AEDPA tie finality to a final, nonappealable order—not a judgment. This reflects the "long-recognized, clear meaning" of finality in the postconviction context. *Clay* v. *United States*, 537 U.S. 522, 527 (2003). After all, "[w]hen a sovereign furnishes an opportunity to appeal … none of the preceding decisions are final in an ultimate sense until any appeals are concluded." *Edwards* v. *Vannoy*, 593 U.S. 255, 287 n.2 (2021) (Gorsuch, J., concurring) (quoting 3 W. Blackstone, *Commentaries on the Laws of England* 411 (1768)) (cleaned up).

Texas retorts (at 38) that *Clay* is distinguishable because its rule "promote[s] federal-state comity." But *Clay* involved a "federal prisoner" and said nothing about comity. 537 U.S. at 524. Nor did *Clay* limit its logic to "the context of *initial* federal applications." Resp. Br. 38. Speaking broadly about the "postconviction" context, *Clay* said that finality attaches when this Court affirms, denies review, or when the chance to seek cert expires. 537 U.S. at 527.

History. In the decades before AEDPA, what was true of mid-appeal Rule 15 motions, Br. 27–31, was also true of mid-appeal habeas claims generally.

A. As of 1987, it was settled law that abuse-of-the-writ doctrine did not cover mid-appeal habeas filings. Texas would know. As the United States recognizes (at 26), the Fifth Circuit remanded to "allo[w] postjudgment amendment without considering abuse

of the writ" in *Petty* v. *McCotter*, 779 F.2d 299, 302 (5th Cir. 1986). Texas challenged that ruling, and this Court granted cert (later dismissed as improvidently granted). *Lynaugh* v. *Petty*, 480 U.S. 699 (1987) (Mem.). In its opening brief, Texas explained that "[b]ecause there ha[d] been no appellate review of the judgment of the district court, there [w]as no finality to that court's review on the merits." Pet'r. Br. at *23, 1986 WL 728550. In other words (Texas's own): "the abuse doctrine simply does not apply" when a prisoner "is sent back to the District Court" because "[i]t is all the same case. It is not a new case." Oral Arg. Recording at 10:05, *Lynaugh*, No. 86-1656 (Mar. 3, 1987), bit.ly/Petty_OA. The author of *Gonzalez* also weighed in. See *id.* at 8:29 (Justice Scalia: "I wouldn't have seen any basis for arguing an abuse of the writ.").

B. To show that AEDPA codified the opposite view, Texas would need to show that a sea change took place over the next nine years. Nothing of the sort happened. Between 1987 and 1996, at least six cases addressed mid-appeal Rule 60(b) motions without deeming them successive. See *United States* v. *Edmonson*, 928 F. Supp. 1052, 1053–55 (D. Kan. 1996); *May* v. *Collins*, 961 F.2d 74 (5th Cir. 1992); *Carriger* v. *Lewis*, 971 F.2d 329, 331–32 (9th Cir. 1992) (en banc); *Ford* v. *Armontrout*, 916 F.2d 457, 459, 461 (8th Cir. 1990); *Giarratano* v. *Procunier*, 891 F.2d 483, 486–87 (4th Cir. 1989); *Schewchun* v. *Edwards*, 815 F.2d 79 (Table) (6th Cir. 1987). Three went the other way. See *Guinan* v. *Delo*, 5 F.3d 313 (8th Cir. 1993); *Hunt* v. *Nuth*, 57 F.3d 1327 (4th Cir. 1995); *Behringer* v. *Johnson*, 75 F.3d 189 (5th Cir. 1996). And some cases sent mixed signals. See *Resnover* v. *Pearson*, 1993 WL 430159 (7th Cir. 1993); *McQueen* v. *Scroggy*, 99 F.3d 1302 (6th Cir. 1996). The final tal-

ly: lopsided for Rivers. But even if the post-*Petty* cases were a draw, that is "hardly the sort of uniform construction that Congress might have endorsed." *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 532 (1994); see Scalia & Garner, *Reading Law* 325 (2012).

Purposes. Both of Rivers's theories respond to AEDPA's aims. Texas's theory does not, and its objections miss the mark.

A. River's approach furthers all three of AEDPA's aims. First, judicial economy. Our rule benefits reviewing courts by flagging mid-appeal claims that could make it "altogether unnecessary" to decide the appeal. *Banister*, 590 U.S. at 516. And all with minimal burden on district courts whose "familiar[ity] with a habeas applicant's claims" will make for "quick work of a meritless motion." *Id.* at 517. Texas objects (at 41) that a prisoner whose mid-appeal motion is denied under Rule 62.1(a)(2) could later refile it as a successive application. That's conceivable—although any prisoner who sized up the odds would likely take no for an answer. Even if he didn't, however, the court of appeals would still have "the benefit of the district court's plenary findings," *id.,* and could deny authorization in a one-line order citing the prior denial. By contrast, Texas would channel *every* mid-appeal habeas filing to an appeals panel under §2244(b)(3)(B)—demanding "a significant investment of time and resources." Judges' Br. 6. It would also force the merits panel to decide the original appeal, even if *every* judge involved thought that the new evidence would change the outcome. That is why this Court's former colleagues with experience at every level of the federal judiciary say that River's rule "will lessen the burden on the judicial system as a whole." *Id.* 5.

Second, mid-appeal habeas claims will not create piecemeal litigation. Option A: indicative ruling, remand, and a decision that "merges with the prior determination." *Banister*, 590 U.S. at 509. Option B: the district court denies the motion because it doesn't even "rais[e] a substantial issue"—which also means no certificate of appealability. See 28 U.S.C. §2253(c) (requiring "substantial showing"). By contrast, Texas's rule will *always* create piecemeal litigation because the court of appeals will need to open a new original proceeding to review every mid-appeal habeas claim that comes through the door.

Finality cuts the same way—at least according to amici who have "opposed … hundreds of petitions for writs of habeas corpus." Prosecutors' Br. 1. "The only putative benefit" that Texas's rule offers states "is to make it harder" for prisoners like Rivers "to obtain habeas relief given AEDPA's escalating stringency." *Id.* at 6–7. "But procedurally hamstringing a prisoner's amended habeas filing, particularly where the new filing reflects newly discovered evidence, does not serve any legitimate state interest." *Id.* at 7. Instead, "the interests of prosecutors, victims, and the public alike" favor treating such filings as "part of the still-pending, first-in-time habeas petition." *Id.*

B. Our timing theory also accounts for repose. Br. 40–41. Texas doesn't explain why §2244(b) should grant a state repose before the case is final on appeal. Instead, it pivots—claiming (at 41) that Congress wanted to "provide States with certainty that the universe of claims would be closed once an appeal is filed." Wrong again. Congress granted prisoners the chance to appeal, which means that the "universe of claims" could always reopen. Subject only to the law-of-the-case doctrine and the appellate mandate, states are on notice that a district court "will permit

new issues to be presented by an amended pleading" if the appellate court reverses or vacates. Wright & Miller §1489. Besides, Congress knew how to close the "universe of claims," but it did so only under AEDPA's capital-habeas opt-in chapter. See Br. 23.

C. Nothing cuts the other way. Texas chiefly warns (at 25–26) that our approach opens the floodgates to abusive habeas claims. If that is true, it's fair to ask why Texas still hasn't found a single case from the Second Circuit saying so. (The lone case it cites, *Anderson* v. *Connecticut*, 2022 WL 3082985 (D. Conn. Aug. 3, 2022), addresses a few civil-procedure questions and *doesn't* beg the Second Circuit to revisit §2244(b).) The Second Circuit may see fewer habeas cases than the Fifth, but surely its prisoners are no less ingenious. For that matter, if the Second Circuit's reading is so unworkable, why aren't Connecticut, New York, or Vermont here supporting Texas? In all events, Texas never engages with the daunting structural and doctrinal barriers to relief. Br. 44–45. Our approach is a safety valve—not a magnet—and the valve doesn't open unless a prisoner can persuade two courts that remand is warranted. Any "insurance policy" claims will fail outright, contra Resp. Br. 44–45, and prisoners who seek delay can be sanctioned or deemed vexatious filers.

IV. Texas's remaining arguments fail.

A. Texas's outlier rule is unworkable.

Texas wants this Court to adopt an outlier position that only the Sixth Circuit has embraced. The State doesn't even try to defend the Fifth Circuit's after-final-judgment rule. Pet. App. 10a. Instead, it borrows a few words from *Banister* and *Gonzalez* and declares that a filing is "second or successive" if it "threatens an already final judgment" or "seeks to re-

visit" a merits determination. Br. 20 (cleaned up). Texas then announces—out of nowhere—that the "dividing line" between first and successive petitions "is the filing of a notice of appeal." *Id.* 28. That is the Sixth Circuit's rule, which it adopted solely to "reconcile" circuit precedent. *Moreland* v. *Robinson*, 813 F.3d 315, 325 (6th Cir. 2016). No other court agrees.

Nor does Texas explain how district courts are supposed to administer its "rule." For example, after the Rule 59(e) window closes, do federal prisoners get another thirty-two days to file more habeas claims? See Fed. R. App. P. 4(a)(1)(B). In the Sixth Circuit, the answer is yes. See *Moreland*, 813 F.3d at 324. But such claims would threaten an already final judgment and revisit the merits—so a district court would have to choose between Texas's ad hoc "dividing line" and its "rule." Or consider a timely Rule 59(e) motion filed after the notice of appeal. Is such a filing kosher (under *Banister*) or successive (under Texas's theory)? A district court would have no idea. Meanwhile, our rules are clear: §2244(b) doesn't apply (i) to amendments or (ii) while appeals are pending.

B. Texas's vehicle arguments are waived and wrong.

For the first time, Texas now suggests that what Rivers filed should not be construed as a motion to amend. Even if Texas hadn't forfeited that argument below and waived it here, it would still be wrong. Texas concedes (at 8, 22) that Rivers's filing overlapped with his first application and sought to "modify" some claims by pleading new facts. By definition, that is a proposed amendment. If any doubt remained, Rivers clarified the relief he sought before the district court ruled—and just eleven days after receiving the magistrate's report. 7:21-cv-00012 (N.D. Tex. Sept. 2, 2021), Dkt. 27, at 10. Texas doesn't ex-

plain (at 20) why using the prison library's §2254 template changes matters or why Rivers is responsible for the clerk's issuing "a new case number."

Nor can Texas credibly deny (at 44) that the new evidence raises questions about Rivers's convictions. According to Rivers, the report shows that neither the image nor the video he was convicted of possessing were child pornography. See J.A.69; ROA.4113. While Texas may contest the evidence on remand, its claims about the image ring especially hollow. Trial exhibit 33 lists three files "of [i]nterest": the two files Rivers was convicted of possessing, plus a false positive. See ROA.1137–38. The report also lists three files "of interest." J.A.94. The first file in the report is the first file in the exhibit: the video. The second file in the report is the second file in the exhibit: the false positive. And the third file in the report—labeled "**NOT CHILD PORN**"—matches the exhibit's description of the image that Rivers was convicted for possessing. If Texas thought that its report was talking about a *different* image, it has had years to say so.

CONCLUSION

The Court should reverse and remand.

Respectfully submitted,

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