No. 23-

In the Supreme Court of the United States

DANNY RICHARD RIVERS, PETITIONER

v.

BOBBY LUMPKIN, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the federal habeas statute, a prisoner "always gets one chance to bring a federal habeas challenge to his conviction," *Banister* v. *Davis*, 590 U.S. 504, 509 (2020). After that, the stringent gatekeeping requirements of 28 U.S.C. § 2244(b)(2) bar nearly all attempts to file a "second or successive habeas corpus application." Here, petitioner sought to amend his initial habeas application while it was pending on appeal. The Fifth Circuit applied § 2244(b)(2) and rejected the amended filing.

The circuits are intractably split on whether § 2244(b)(2) applies to such filings. The Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits hold that § 2244(b)(2) categorically applies to all second-in-time habeas filings made after the district court enters final judgment. The Second Circuit disagrees, applying § 2244(b)(2) only after a petitioner exhausts appellate review of his initial petition. And the Third and Tenth Circuits exempt *some* second-in-time filings from § 2244(b)(2), depending on whether a prisoner prevails on his initial appeal (Third Circuit) or satisfies a seven-factor test (Tenth Circuit).

The question presented is:

Whether § 2244(b)(2) applies (i) only to habeas filings made after a prisoner has exhausted appellate review of his first petition, (ii) to all second-in-time habeas filings after final judgment, or (iii) to some second-in-time filings, depending on a prisoner's success on appeal or ability to satisfy a seven-factor test.

RELATED PROCEEDINGS

Ex parte Rivers, WR-84,550-01 & 84,550-02 (Tex. Ct. Crim. App. Oct. 5, 2016) (remanding for additional findings of fact and conclusions of law)

Rivers v. *State*, No. 08-12-00145-CR (Tex. Ct. App. Jan. 4, 2017) (findings of fact and conclusions of law following Oct. 5, 2016 remand)

Ex parte Rivers, WR-84,550-01 & 84,550-02 (Tex. Ct. Crim. App. July 7, 2017) (affirming Jan. 4., 2017 Texas Court of Appeals judgment)

Rivers v. *Davis*, No. 7:17-cv-00124 (N.D. Tex. Sept. 17, 2018) (denying habeas relief)

Rivers v. *Lumpkin*, No. 7:21-cv-00012 (N.D. Tex. Aug. 11, 2021) (deeming Feb. 2021 filing "second or successive and recommending transfer)

Rivers v. *Lumpkin*, No. 7:21-cv-00012 (N.D. Tex. Sept. 23, 2021) (adopting recommendation)

Rivers v. *Lumpkin*, No. 18-11490 (5th Cir. May 13, 2022) (affirming district court's Sept. 17, 2018 order denying initial habeas petition)

Rivers v. *Lumpkin*, No. 22-6688 (U.S. Apr. 3, 2023) (denying petition for a writ of certiorari)

Rivers v. *Lumpkin*, No. 21-11031 (5th Cir. Apr. 15, 2024) (affirming district court's Sept. 23, 2021, order; decision below here)

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INTRODUCTION

This case presents an acknowledged circuit split over an important procedural question: whether 28 U.S.C. § 2244(b)(2)'s rules for "second or successive" habeas petitions apply to a habeas filing made *after* the district court has denied an initial petition but *before* an appellate court has weighed in. Nine circuits have split four ways over that question, and only this Court can resolve the conflict.

1. This case is about the hurdles that a prisoner must clear before a court will hear him out. Petitioner Danny Rivers sought habeas relief, arguing that his counsel had failed to investigate his case and had shown up to trial drunk. The district court denied the petition, finding that Rivers couldn't explain what his lawyer should have done differently or why that would have changed things. But the answer soon emerged. After fighting for years to obtain his counsel's records, Rivers finally received them while his initial petition was up on appeal. Among the files, Rivers found an exculpatory report suggesting that he was wrongly convicted—evidence that his lawyers never once mentioned at trial.

New evidence in hand, Rivers raced to court—only to find the doors barred. Applying § 2244(b)(2), the district court reasoned that it was "without jurisdiction to entertain" the new evidence because Rivers's filing counted as a "second or successive" petition. Pet. App. 19a. (Never mind that his first petition was still pending on appeal and would be for nearly a year.) The Fifth Circuit affirmed, explaining that "filings introduced after a final judgment that raise habeas claims" are "deemed successive." Pet. App. 10a.

2. The Fifth Circuit's decision deepens a circuit conflict over when § 2244(b)(2) kicks in. In the Second Circuit, § 2244(b)(2) doesn't apply until a prisoner has exhausted appellate review of his initial habeas petition—leaving district courts free to consider a filing like Rivers's. As then-Judge Sotomayor put it, that approach guarantees "one full opportunity to seek collateral review." *Ching* v. *United States*, 298 F.3d 174, 177 (2d Cir. 2002). But the Fifth Circuit expressly "decline[d] … to embrace" that rule. Pet. App. 10a. Instead, it joined the Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits in applying § 2244(b)(2) after the district court enters final judgment. That approach effectively grants "one full opportunity to seek collateral review *in the district court*." *United States* v. *Santarelli*, 929 F.3d 95, 104 (3d Cir. 2019) (cleaned up). Meanwhile, the Third and Tenth Circuits follow their own unique approaches, holding that § 2244(b)(2) sometimes applies between final judgment and exhaustion and sometimes doesn't. Three circuits have already denied rehearing en banc, and the rest show no sign of rethinking their views.

In short: the circuits are intractably split, the conflict won't disappear on its own, and this Court's guidance is badly needed. See *Balbuena* v. *Sullivan*, 970 F.3d 1176, 1197, 1200 (9th Cir. 2020) (Fletcher, J., concurring in the result) ("urg[ing] the Supreme Court to recognize" and "resolve the conflict").

3. The decision below is also wrong. In *Banister* v. *Davis*, 590 U.S. 504 (2020), this Court explained that the phrase "second or successive" is a term of art that doesn't simply refer to every second-in-time habeas filing. Instead, the Court has looked to historical practice and statutory aims when determining whether § 2244(b)(2) applies. But the Fifth Circuit

didn't even cite *Banister*, let alone follow its guidance. Had it done so, the court would have realized that its rule doesn't square with history. Early courts analyzing abuses of the writ treated appellate review—not final judgment—as the relevant inflection point.

The Fifth Circuit's approach will also frustrate § 2244(b)(2)'s aims. At bottom, the question is not *whether* prisoners like Rivers will try to bring new evidence to the courts' attention. (They will—no matter what rule this Court adopts.) The question instead is *which court* will consider that evidence first. Under the Second Circuit's approach, a filing like Rivers's would have gone to the district court that just denied the initial petition: the single member of Article III most familiar with the case. That judge could then have weighed the new evidence and decided whether to issue an indicative ruling under Federal Rule of Civil Procedure 62.1. By contrast, the Fifth Circuit's rule requires Rivers to ask a brand-new three-judge panel for permission to ask the district court to consider whether or not to reach the merits. It's hard to squeeze that rule from the statutory text—and harder still to attribute it to a Congress focused on judicial economy, efficiency, and finality.

4. The question presented is important, and this case is an ideal vehicle. Until this Court weighs in, at least some states and prisoners will be living under the wrong rule, and those in the outstanding circuits will have to guess which rule applies. The interests on both sides are too critical to leave up to geographical chance. The split is also outcome-determinative here: if Rivers were incarcerated in New York instead of Texas, courts would have considered the new evidence, giving him a meaningful path to relief.

The Court should grant review.

OPINIONS BELOW

The court of appeals' opinion is reported at 99 F.4th 216 and is reproduced in the appendix to this petition at Pet. App. 1a–11a. The district court's opinion is unpublished but is available at 2021 WL 4319670 and is reproduced at Pet. App. 12a–17a.

JURISDICTION

The Fifth Circuit issued its judgment on April 15, 2024. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 2244(b)(2) of Title 28, U.S. Code, provides:

> A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

STATEMENT

A. Legal background

1. The Antiterrorism and Effective Death Penalty Act of 1996 creates a dual-track system for federal habeas relief. One path is for first-time petitioners. "Under AEDPA, a state prisoner always gets one chance to bring a federal habeas challenge to his conviction." *Banister* v. *Davis*, 590 U.S. 504, 509 (2020). This path begins in the district court. If that court denies relief, the prisoner may request a "certificate of appealability"—initially from the district court, and then from the court of appeals. See *Gonzalez* v. *Thaler*, 565 U.S. 134, 140 & n.5 (2012). The path ends only when the prisoner has exhausted the chance to appeal and seek certiorari.

The second path is "rockier." *Banister*, 590 U.S. at 509. A prisoner who wants to file a "second or successive habeas corpus application," 28 U.S.C. § 2244(b)(2), must first ask the court of appeals for "an order authorizing the district court to consider the application," *id.* § 2244(b)(3)(A). The appellate court may oblige only if the prisoner makes a "prima facie showing," *id.* § 2244(b)(3)(C), that the petition "relies on a new and retroactive rule of constitutional law" or "alleges previously undiscoverable facts that would establish … innocence," *Banister*, 590 U.S. at 509 (citing 28 U.S.C. § 2244(b)(2)). If so, the petition goes to the district court, which must decide for itself whether the petition "satisfies the requirements" of § 2244. 28 U.S.C. § 2244(b)(4). At the same time, because any claim "presented in a prior application" must be dismissed, § 2244(b)(1), both courts must carefully compare the new petition to all prior petitions to determine precisely what "claims" the prison-

er has brought. Only then—after all that is done—may the district court reach the merits.

The upshot is that much rides on whether § 2244(b)(2) applies—that is: on whether a filing is deemed "part and parcel of the first habeas proceeding," *Banister*, 590 U.S. at 507, or instead a "second or successive habeas corpus application," 28 U.S.C. § 2244(b)(2).

2. The phrase "second or successive" is a "term of art" that does not refer simply to "all habeas filings … following an initial application." *Banister*, 590 U.S. at 511 (first quoting *Slack* v. *McDaniel*, 529 U.S. 473, 486 (2000), then quoting *Magwood*, 561 U.S. at 332 (2010)). To determine when § 2244(b)(2) applies, "this Court has looked for guidance in two main places." *Id.* at 512. First, the Court has considered history: "whether a type of later-in-time filing would have constituted an abuse of the writ" under the Court's "pre-AEDPA cases." *Id.* (cleaned up) (quoting *Panetti v. Quarterman*, 551 U.S. 930, 947 (2007)). Second, the Court has looked to "AEDPA's own purposes": conserving judicial resources, reducing piecemeal litigation, and achieving finality "within a reasonable time." *Id.* (citing *Panetti*, 551 U.S. at 945–46).

B. Factual and procedural background

Danny Rivers has spent the last twelve years fighting to prove his innocence. Along the way, he discovered that exculpatory evidence had been sitting in his trial counsel's files all the while—evidence that his lawyers could have used to clear his name. If Rivers is right, then he not only received ineffective assistance but was also wrongly convicted. This case is about the procedural hurdles that Rivers must clear before a court will hear him out.

1. Rivers is tried and convicted

In 2012, a Texas jury convicted Rivers of sexually abusing his children and possessing child pornography. He is currently serving a 38-year sentence.

a. This case began amidst a bitter divorce. In 2008, a Texas judge awarded Rivers temporary custody of his 9-year-old daughter. *Rivers* v. *Lumpkin*, No. 7:21-cv-00012 (N.D. Tex.), Dkt. 11-14 ("R-1"), at 156, 164. The court also granted Rivers sole use of the family home, ordered his ex-wife to pay child support, and denied her request for alimony. *Id.* Dkt. 11-15 ("R-2"), at 15. In response, Rivers's ex-wife "punish[ed]" him by "not letting him see" his 12-year-old stepdaughter, whom he had raised as his own. R-2, at 16.

The following year, with custody arrangements unchanged, Rivers's ex-wife drove the children to the police station while Rivers was away for work. Both girls met with officers and accused Rivers of sexually abusing them. R-2, at 18, 129. Police then searched Rivers's home, seized the family laptop, and launched a monthslong forensic examination, eventually identifying "two files of interest" that "appeared to be child pornography." *Id.* at 26, 28; *id.* Dkt. 11-10 ("R-3"), at 13, 31, 73; *id.* Dkt. 11-16, at 15, 66–67.

b. A Wichita County, Texas grand jury indicted Rivers for continuous sexual abuse, indecency with a child, and two counts of possessing child pornography. R-3, at 8–15. Rivers, who had no prior criminal history, R-2, at 161, pleaded not guilty.

With his trial looming, Rivers moved to sever the child-pornography counts, arguing that they might color the jury's views on the other charges. R-1, at 15. The state opposed severance. Because its case had "no DNA or physical evidence," Texas argued that the

alleged child pornography was "necessary" to establish Rivers's "motive" and "attraction to young girls." *Id.* at 14–15. The court refused to sever. *Id.* at 23.

c. At trial, Rivers's daughter and stepdaughter alleged a staggering pattern of sexual abuse. R-1, at 142, 145–146, 167–168. They further claimed that Rivers had shown them child pornography at least seventy times, testifying that he had "downloaded multiple videos" and played different films on different occasions. *Id.* at 153, 172. Rivers's daughter also accused her father of secretly recording images in the shower. R-1, at 170. (No hidden cameras were ever found.) All told, the girls alleged over 200 instances of shocking abuse, many of which reportedly took place in common areas of the home while their mother, uncle, or cousin were also present in the house. R-1, at 139, 147, 152–53, 156, 158, 166; R-2, at 12, 90. No other witnesses saw the alleged abuse, and no physical evidence corroborated the story. R-2, at 34, 64.

Given the lack of supporting evidence, the alleged child pornography was a key issue at trial. The prosecution called multiple witnesses to testify about the two files—a single image and a single video—that Rivers was charged with possessing. R-2, at 19, 28, 44, 74, 84, 100. While the trial judge had granted a continuance so the defense could obtain its own forensic experts, R-3, at 31, 40, counsel did not do so. R-2, at 112. Instead, the defense called only a single witness, who testified that Rivers was out of town when the files were allegedly downloaded. R-2, at 113–114, 131.

d. The jury convicted Rivers on all charges, Pet. App. 2a. It rejected the prosecution's call for a 169-year sentence, however, and recommended that the court sentence Rivers to 42 years instead. R-3, at

213–14, 221–29. The court went lower still: 38 years behind bars, all counts considered—just three years above the minimum. Pet. App. 13a. The Texas Court of Appeals affirmed.

2. Rivers seeks postconviction relief

a. In 2013, Rivers began asking his lawyers to send him his client file. He explained: "I don't know what all it contains, but it looks like I'm going to have to do this thing pro se, so I need everything I can get." No. 7:21-cv-00012 (N.D. Tex.) Dkt. 15-11, at 67. Counsel "never responded to [his] request," and two years later, Rivers was still trying. *Id.* at 68–69. He eventually resorted to filing a formal grievance with the Texas state bar.

Meanwhile, Rivers pressed forward with what records he had. In 2016, he sought state postconviction relief based on ineffective assistance, among other grounds. Relevant here, he argued that his trial counsel had failed to "perform an objectively reasonable investigation" or "verify the ages of the persons" in the alleged child pornography. No. 7:21-cv-00012 (N.D. Tex.), Dkt. 12-21, at 9. He added that his lead counsel was "inebriated" at the trial. *Id.* at 11.

The Texas Court of Criminal Appeals found that Rivers had "alleged facts that, if true, might entitle him to relief." *Ex parte Rivers*, 2016 WL 5800277, at *1 (Tex. Crim. App. Oct. 5, 2016). It remanded for further factfinding, ordering the court to appoint counsel if it "elect[ed] to hold a hearing." *Id.* Judge Alcala wrote separately to urge the appointment of counsel "regardless of whether the trial court holds a hearing." *Id.* (Alcala, J., concurring).

On remand, the trial court neither held a hearing nor appointed counsel. Instead, it chiefly relied on af-

fidavits in which trial counsel defended their performance, denied any drunkenness, and claimed that Rivers had "admitted to [them] that he engaged in sexual acts with the victims." *Rivers* v. *Davis*, 2018 WL 4443153, at *3 (N.D. Tex. July 27, 2018); see also No. 7:17-cv-00124 (N.D. Tex.), Dkt. 24-1, at 24. Rivers responded with his own affidavit, categorically "deny[ing] making such admissions." *Id.* at 2. He also submitted a text message from one of the lawyers' spouses, confirming that counsel "showed up intoxicated for court," *id.* at 25, and a news report showing that his lead counsel was arrested six months before the trial "after showing up at a woman[']s house naked and drunk," *id.* at 33 (cleaned up) (quoting Texoma, *Local Attorney Sentenced to Two Years Probation* (Mar. 18, 2015), bit.ly/Barber-Arrest). The trial court nonetheless "concluded that counsel were not ineffective," and the Court of Criminal Appeals affirmed. *Ex parte Rivers*, 2017 WL 3380491, at *1 (Tex. Crim. App. June 7, 2017).

b. Rivers sought federal habeas relief in August 2017, raising the same ineffective-assistance claims, among other grounds. No. 7:17-cv-00124 (N.D. Tex.), Dkt. 1, at 6. The district court denied Rivers's habeas petition and declined to grant a certificate of appealability. Pet. App. 2a. Rivers then sought a certificate of appealability from the Fifth Circuit.

3. While his habeas appeal is pending, Rivers obtains exculpatory evidence

a. While his case was pending on appeal, Rivers finally received the client file that he first requested in 2013. Pet. App. 2a. In it, he found a state investigator's report analyzing the two files underlying his child-pornography conviction. The report called the video merely "of interest," without further comment.

Meanwhile, the image was labeled "**NOT CHILD PORN**." No. 7:21-cv-00012 (N.D. Tex.), Dkt. 15-11, at 75–77. The report also listed a number of other files found on the family laptop. Next to one—entitled "reallyunderagekiddieporn"—the state investigator had written: "although the title indicated it to be child porn," it "is not." *Id.* at 75. Another, whose title included phrases like "pre-teen tiny children" and "incest sex porn underage," was also marked "**NOT CHILD PORN**." *Id.* Most telling of all, these files and the video "of interest" were *not* saved under Rivers's name; they were instead recovered from a download folder bearing the name of Rivers's ex-wife.

After discovering the investigator's report, Rivers moved to supplement the appellate record. See No. 18-11490 (5th Cir.), Dkt. 27. He also filed an affidavit stating that he had never seen the report and noting that his lawyers had "failed to raise this exculpatory evidence" that had been "in [their] possession" all along. *Id.* at 5, 10–11. The affidavit added that Rivers's "estranged wife had access to the house and did in fact enter the house, against court orders, while [Rivers] was out of town during the time frame the alleged child porn was downloaded," *id.* at 7—one explanation for why the "child pornography" appeared under her username, not his.

The Fifth Circuit denied Rivers's motion to supplement the record but granted a certificate of appealability for the ineffective-assistance claim. *Id.* Dkt. 34, at 2. Rivers later asked the court either to stay his appeal or to remand so he could seek relief in the district court without creating "piecemeal litigation." *Id.* Dkt. 61, at 5–6. The Fifth Circuit refused, *id.* Dkt. 78, and ultimately affirmed, see *Rivers* v. *Lumpkin*, 2022

WL 1517027 (5th Cir. May 13, 2022), *cert. denied*, 143 S. Ct. 1090 (2023).

b. In February 2021, while his appeal was still pending, Rivers used the standard § 2254 petition template provided to pro se litigants to bring the new evidence to the district court's attention. No. 7:21-cv-00012 (N.D. Tex.), Dkt. 2, at 7. While the filing also raised several new claims, Rivers chiefly argued that trial counsel's "fail[ure] to present exculpatory evidence" violated his right to effective assistance. *Id.* Dkt. 10, at 24.

The same magistrate judge who reviewed Rivers's initial habeas petition recommended that the new filing be deemed a "second or successive" petition and transferred to the Fifth Circuit for lack of jurisdiction. See Pet. App. 3a–4a. Rivers objected to the recommendation, No. 7:21-cv-00012 (N.D. Tex.), Dkt. 27, and "move[d] the court to consider an interlocutory review," *id.* Dkt. 26, at 5. The district court adopted the recommendation and denied Rivers's motion as moot. See Pet. App. 18a–19a

Rivers appealed the transfer order, urging the court to construe the February 2021 filing as an amendment to his initial petition, instead of a second or successive petition. Pet. App. 3a–4a. The Fifth Circuit affirmed. *Id.* at 1a–2a. It reasoned that § 2244(b)(2) applies to "filings introduced after a final judgment that raise habeas claims, no matter how titled." *Id.* at 10a. Here, the February 2021 filing was "second-in-time" and "attack[ed] the same conviction that [Rivers had] challenged" in his initial habeas proceeding, so it counted as "second or successive." *Id.* at 6a. The court's opinion acknowledged that eight other circuits had splintered on the question. *Id.* at 8a.

REASONS FOR GRANTING THE PETITION

The courts of appeals are intractably split over whether § 2244(b)(2) applies to a habeas filing made *after* the district court has denied an initial petition but *before* an appellate court has weighed in. That question is critically important to states and prisoners alike, and it arises too often to leave up to geographical happenstance. The decision below is also wrong. It ignores this Court's guidance in *Banister*, flies in the face of historical practice, and frustrates—rather than furthers—AEDPA's aims. Finally, this case is an ideal vehicle for the Court to offer much-needed guidance. The issue is cleanly presented and outcome-determinative: only the Fifth Circuit's mistaken reading of § 2244(b)(2) stands between Rivers and a meaningful path to relief. The Court should grant the petition.

I. The courts of appeals are split four ways over what triggers § 2244(b)(2), and only this Court can resolve the conflict.

Nine circuits have split four ways over the question presented. In the Second Circuit, § 2244(b)(2) does not apply until the petitioner exhausts appellate review of his first habeas petition. The Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits disagree, holding that § 2244(b)(2) applies as soon as, or shortly after, the district court enters final judgment. (Even they can't agree on the precise trigger.) Meanwhile, the Tenth Circuit applies § 2244(b)(2) even earlier—except when the petitioner satisfies a seven-factor test. And in the Third Circuit, § 2244(b)(2) toggles on and off depending on whether the petitioner wins or loses on appeal. Respondent acknowledged the split below, see No. 21-11031 (5th Cir.), Dkt. 52, at 15–24, and only this Court can resolve it.

A. In the Second Circuit, § 2244(b)(2) does not apply until appellate review of the first habeas petition is exhausted.

In *Whab* v. *United States*, the Second Circuit held that § 2244(b)(2) does not apply while "appellate proceedings following the district court's dismissal of the initial petition remain pending." 408 F.3d 116, 118 (2d Cir. 2005).

Usama Whab filed a pro se habeas petition. *Id.* at 117. The district court denied the petition and declined to issue a certificate of appealability. *Id.* at 118. Whab then sought a certificate of appealability from the Second Circuit, which the court ultimately denied. *Id.* While that motion was still pending, however, Whab asked the Second Circuit for permission to file a "second or successive" petition. *Id.* at 119.

The court held that Whab's "subsequent petition was not 'second or successive' within the meaning of" AEDPA. *Id.* at 118. Citing then-Judge Sotomayor's rationale in *Ching* v. *United States*, it explained that a petition can't be "second or successive" unless it is filed after "the conclusion of a proceeding that counts as the first." 298 F.3d at 177. And the first proceeding isn't over until the "opportunity to seek review in the Supreme Court has expired." *Whab*, 408 F.3d at 120. Because Whab's first proceeding was still pending when he filed his subsequent petition, § 2244(b)(2) did not apply. *Id.* at 119.

Of course, that doesn't mean that anything goes. "Traditional doctrines, such as abuse of the writ, continue to apply." *Id.* at 119 n.2. So even if a filing is not "second or successive" under § 2244(b)(2), prisoners do not get a "free pass" to "file numerous petitions before an initially filed petition is finally adjudicated

on the merits." *Id.*; see also *Ching*, 298 F.3d at 179–80 ("Courts are not obliged to entertain needless or piecemeal litigation; nor should they adjudicate a motion or petition whose purpose is to vex, harass, or delay.") Neither can prisoners "prevent the adjudication of an initial habeas petition from ever becoming final by extending the first habeas proceedings through an infinite number of new petitions." *Fuller* v. *United States*, 815 F.3d 112, 113 (2d Cir. 2016). Section 2244(b)(2) kicks in "when the time to file a petition for *certiorari* … expire[s]"—whether or not a follow-up petition is still pending. *Id.*

Since *Whab*, the Second Circuit has repeatedly reaffirmed this workable approach. *E.g.*, *Garcia* v. *Superintendent of Great Meadow Corr. Facility*, 841 F.3d 581, 582 (2d Cir. 2016); *Fuller*, 815 F.3d at 113.

B. In the Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits, § 2244(b)(2) applies when the district court enters final judgment or shortly after.

Six circuits have expressly rejected the Second Circuit's approach, holding that § 2244(b)(2) is triggered at (or around) the time that the district court enters final judgment. Yet even these courts can't agree on exactly what triggers the statute.

1. In the Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits, § 2244(b)(2) applies as soon as the district court enters final judgment.

a. The Fifth Circuit below recognized the split and "decline[d] … to embrace" the Second Circuit's rule, holding instead that § 2244(b)(2) applies after the entry of final judgment. Pet. App. 10a–12a.

The district court denied Danny Rivers's pro se habeas petition and entered final judgment. Pet. App. 2a. The Fifth Circuit then granted a certificate of appealability as to Rivers's ineffective-assistance claim. *Id.* While that appeal was pending, Rivers sought further relief in the district court. Applying § 2244(b)(2), the district court deemed Rivers's filing a "second or successive" petition, and the Fifth Circuit affirmed.

According to the Fifth Circuit, § 2244(b)(2) covers "filings introduced after a final judgment that raise habeas claims." Pet. App. 10a. The court derived that rule from this Court's decision in *Gonzalez* v. *Crosby*, 545 U.S. 524 (2005). The prisoner in *Gonzalez* "did not file for rehearing or review" in his first habeas proceeding and then sought Rule 60(b) relief a year later. *Id.* at 527. This Court held that § 2244(b)(2) did not apply because the prisoner's Rule 60(b) motion did not raise habeas claims. The Fifth Circuit read *Gonzalez* to stand for the "underlying principle" that § 2244(b)(2) applies after final judgment, lest prisoners use "post-judgment motions" to evade AEDPA. But see *Balbuena*, 970 F.3d at 1200 (Fletcher, J., concurring in the result) ("*Gonzalez* does not answer the question whether [a petition] is a 'second or successive' habeas application under § 2244(b).").

b. The Ninth Circuit also applies § 2244(b)(2) as soon as the district court has "adjudicated [a] habeas petition on the merits." *Balbuena* v. *Sullivan,* 980 F.3d 619, 642 (9th Cir. 2020).

While the denial of Alexander Balbuena's habeas petition was still pending on appeal, Balbuena sought additional relief in the district court. *Id.* at 628, 639. The district court deemed Balbuena's subsequent filing "an unauthorized second or successive petition,"

and the Ninth Circuit affirmed. *Id.* at 628. Citing circuit precedent, it held that § 2244(b)(2) applied because Balbuena "sought to add a new claim after the district court denied his petition." *Id.* at 636–37. Along the way, the Ninth Circuit expressly acknowledged—and "decline[d] to follow"—the Second Circuit's contrary approach. *Id.* at 637.

Judge Fletcher wrote separately to "urge the Supreme Court to recognize the circuit split and adopt" the Second Circuit's rule. *Id.* at 642 (Fletcher, J., concurring in the result). In his view, the Ninth Circuit "made a mistake" both "as a matter of ordinary language" and "as a practical matter." *Id.* at 644. As to text, he reasoned that § 2244(b)(2) applies "only once an appeal has been finally adjudicated." *Id.* And as to consequences, he explained that the Second Circuit's rule "will not result in a flood of late and procedurally abusive claims." *Id.* He closed by "encourag[ing]" this Court to "resolve the conflict in the circuits" and expressing "optimis[m]" that it would "agree with" the Second Circuit "rather than" the Ninth. *Id.* at 645.

c. The Seventh Circuit also holds that final judgment triggers § 2244(b)(2). See *Phillips* v. *United States*, 668 F.3d 433, 435–36 (7th Cir. 2012). While the Seventh Circuit was reviewing his habeas denial, David Phillips asked the district court to consider newly discovered evidence. *Id.* at 434. The district court denied that motion on the merits, but the Seventh Circuit approached things differently. It held that the new filing was not "properly before the district court" in the first place because it was a second-or-successive petition. *Id.* That was so (reasoned the court) because "[f]inal judgment marks a terminal point," and "[t]reating motions filed during appeal as

part of the original application" would undermine AEDPA's "time-and-number limits." *Id.* at 435.

d. The Eighth Circuit follows a similar approach. See *Williams* v. *Norris*, 461 F.3d 999 (8th Cir. 2006). After the district court denied Frank Williams's habeas petition, it failed to enter a separate final judgment. *Id.* at 1000–01. In the brief period before the order became final, see Fed. R. Civ. P. 58, Williams moved to amend the judgment and sought relief from it. 461 F.3d at 1000–01. The district court denied both motions as second-or-successive habeas petitions. *Id.* The Eighth Circuit affirmed, reasoning that the district court had intended to "dispose of Williams's petition on the merits," so his later filings were "postjudgment"—and thus subject to § 2244(b)(2). *Id.* at 1002.

e. The Eleventh Circuit also applies § 2244(b)(2) after final judgment. See *United States* v. *Terrell*, 141 F. App'x 849, 851–52 (11th Cir. 2005). Shortly after George Terrell asked the Eleventh Circuit to review the denial of his initial habeas petition, he sought additional habeas relief in the district court. *Id.* at 850–51. The district court applied § 2244(b)(2), deeming his motion an unauthorized second-or-successive application. *Id.* at 851. The Eleventh Circuit agreed, emphasizing that "the district court had already denied" Terrell's initial habeas petition. *Id.* at 852.

2. The Sixth Circuit follows a slightly different rule, tying § 2244(b)(2) to the opportunity for appeal—not the entry of final judgment.

Samuel Moreland's initial habeas petition was still pending on appeal when Moreland sought further habeas relief in the district court. *Moreland* v. *Robinson*, 813 F.3d 315, 322 (6th Cir. 2016). The Sixth Cir-

cuit deemed Moreland's filings "second or successive habeas petitions." *Id.* at 319. But instead of pegging § 2244(b)(2) to the entry of final judgment, like the Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits, the Sixth Circuit focused on the window for appeal. In its view, a motion that "seeks to raise habeas claims" is a "second or successive habeas petition" when filed "after the petitioner has appealed the district court's denial of his original habeas petition or after the time for the petitioner to do so has expired." *Id.* at 325. In other words, courts in the Sixth Circuit ask whether "the district court has … lost jurisdiction of the original habeas petition." *Jones* v. *Bradshaw*, 46 F.4th 459, 479–81 (6th Cir. 2022). This means that a petitioner who would be out of luck in the other circuits could get relief in the Sixth Circuit while the window to appeal is still open.

C. In the Tenth Circuit, § 2244(b)(2) applies after a first-in-time petition is filed, unless the petitioner satisfies a seven-factor test.

The Tenth Circuit applies § 2244(b)(2) whenever a second-in-time petition raises "separate and distinct" claims—even if the first-in-time petition is still pending before the district court. *United States* v. *Espinoza-Saenz*, 235 F.3d 501, 503, 505 (10th Cir. 2000). That rule puts the Tenth Circuit at odds with not only the Second Circuit, see *Ochoa* v. *Sirmons*, 485 F.3d 538, 540–41 (10th Cir. 2007) ("declin[ing]" to follow the Second Circuit's rule), but also with other circuits that allow amendments before final judgment, e.g., *Phillips*, 668 F.3d at 435.

But petitioners in the Tenth Circuit can avoid this otherwise strict rule when "justice" demands. *Douglas* v. *Workman*, 560 F.3d 1156, 1190 (10th Cir. 2009).

While the denial of his first habeas petition was pending on appeal, Yancy Douglas asked the Tenth Circuit for permission to file a second application asserting that prosecutors had concealed information about a key witness. *Id.* at 1160, 1167–68. The Tenth Circuit acknowledged that, under *Ochoa*, it "would not ordinarily permit a habeas petitioner to supplement his habeas petition in this way." *Id.* at 1189. But this was no ordinary case. Rather, based on "seven factors"—including that Douglas's initial habeas petition remained pending, that the new claim related closely to his pending claims, the prosecutor's conduct, that Douglas faced the death penalty, and disparity between Douglas and his codefendant—the court decided to "deem" the later petition "a supplement to the previously asserted" petition, rather than a second-or-successive petition. *Id.* at 1189–96. The upshot is that courts in the Tenth Circuit don't apply § 2244(b)(2) under circumstances when courts in the Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits would have to. See also *United States* v. *Pickard*, 396 F. App'x 568, 572 (10th Cir. 2010).

D. In the Third Circuit, § 2244(b)(2) toggles on and off depending on who wins the initial appeal.

Finally, the Third Circuit follows its own unique rule. It agrees with the Second Circuit that § 2244(b)(2) does not automatically apply to a "subsequent habeas petition" filed before "exhaustion of appellate remedies with respect to the denial of [the] initial habeas petition." *Santarelli*, 929 F.3d at 104–05. But prisoners in Delaware, New Jersey, and Pennsylvania face a twist that those in Connecticut, New York, and Vermont don't. When a prisoner in the Third Circuit seeks further habeas relief while

his initial petition is pending on appeal, the applicability of § 2244(b)(2) depends on the outcome of that appeal. See *id.* at 104 n.5 (Even if a "subsequent habeas petition" is "not 'second or successive' at the time of filing," it "could *later* be construed as a 'second or successive' habeas petition.").

Here's the Third Circuit's logic. While the first petition is up on appeal, the petitioner has not had "one full opportunity to seek collateral review." *Id.* at 105 (citation omitted). So a subsequent petition filed during that period should be "construed as a motion to amend" the first petition. *Id.* at 105–06. That motion belongs "in the district court in the first instance." *Id.* at 106. Yet the district court lacks jurisdiction while the appeal is pending, so the motion to amend must stay on ice. *Id.* Now for the twist. If the Third Circuit "vacates or reverses … and remands the matter," the district court "would again be vested with jurisdiction to consider" the motion. *Id.* When that happens, § 2244(b)(2) doesn't apply. On the other hand, if the prisoner "exhausts her appellate remedies to no avail," she has "expended the 'one full opportunity to seek collateral review' that AEDPA ensures." *Id.* (citation omitted). In that case, § 2244(b)(2) *does* apply and—presto!—the "motion to amend" becomes a "second or successive" habeas petition. *Id.*

* * *

Only this Court can "resolve the conflict in the circuits," *Balbuena*, 980 F.3d at 642 (Fletcher, J., concurring in the result), and there is no reason to wait. Three circuits have already denied rehearing en banc—and one of them has done so twice. See Order, *Phillips* v. *United States*, Nos. 10-2154 & 11-1498 (7th Cir. Feb. 21, 2012); Order, *Williams* v. *Norris*, No. 04-3485 (8th Cir. Jan. 11, 2007); Order, *Balbuena*

v. *Sullivan*, Nos. 12-16414, 18-15432 (9th Cir. Nov. 17, 2020); Order, *Jacobs* v. *Thornell*, No. 22-16822 (9th Cir. Apr. 9, 2024). The others show no sign of rethinking their positions. Nor is there any need for more percolation. The nine circuits that have already weighed in cover roughly 88% of all federal and state prisoners. See Fed. Bureau of Prisons, *Statistics*, bit.ly/Federal-Prisons; Prison Pol'y Initiative, *Appendix: State and Federal Prison Populations 2019-2023*, bit.ly/State-Prisons. All positions are staked out, and this Court now has the benefit of numerous opinions on the issue. The Court should grant review.

II. The question presented is critically important and recurring.

A. The question presented is too important to punt. Since 1996, AEDPA cases have become a fixture of this Court's docket. In fact, the Court has repeatedly granted cert to resolve conflicts over this very provision. See, *e.g.*, *Banister*, 590 U.S. at 511 (5-3 split); *Gonzalez*, 545 U.S. 524 (2005); *Slack* v. *McDaniel*, 529 U.S. 473 (2000) (3-4 split); *Stewart* v. *Martinez-Villareal*, 523 U.S. 637, 641 (1998) (1-1 split). That alone suggests certworthiness—even apart from the fact that this split is deeper than those.

The issue is also critically important to parties on both sides. Until this Court weighs in, at least some states and prisoners will be living under the wrong rule, and those in the outstanding circuits will have to guess which rule applies. For states, that uncertainty turns AEDPA's promise of "finality" on its head. *Banister*, 590 U.S. at 512. But the stakes are even higher for prisoners. Cf. *Boumediene* v. *Bush*, 553 U.S. 723, 739 (2008) (calling habeas "one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights"). "Federal

postconviction law is complex, and few prisoners understand it well." *Curry* v. *United States*, 507 F.3d 603, 604 (7th Cir. 2007). So the last thing they need when seeking to navigate AEDPA's procedural thicket is uncertainty over *which* thicket they are in.

B. The need for review is all the more pressing because this issue arises so often. Two circuits have confronted the question presented in the last four months. See Pet. App. 1a; *Jacobs* v. *Thornell*, 2024 WL 810443 (9th Cir. Feb. 27, 2024). But that's nothing compared to the district courts. See, *e.g.*, *Daly* v. *Oliver*, 2024 WL 2092997, at *3 (E.D. Pa. May 9, 2024), *appeal docketed*, No. 24-2070 (3d Cir. June 18, 2024); *Herrera* v. *United States*, 2024 WL 218964, at *1 (N.D. Tex. Jan. 19, 2024); *Hernandez* v. *Macomber*, 2023 WL 2992172, at *3 (C.D. Cal. Apr. 17, 2023); *Thomas* v. *Sec'y, Fla. Dep't of Corr.*, 2023 WL 2837521, at *9–11 (M.D. Fla. Apr. 7, 2023); *Bollinger* v. *Gittere*, 2023 WL 2242444, at *1–3 (D. Nev. Feb. 24, 2023), *appeal docketed*, No. 23-99002 (9th Cir. March. 28, 2023); *Perpall* v. *United States*, 2023 WL 2016836, at *1–2 (S.D. Fla. Feb. 15, 2023) (acknowledging the split); *Atkins* v. *United States*, 2023 WL 1765536, at *3 (S.D. Fla. Feb. 3, 2023) (same).

And those are just (some of) the cases available on Westlaw. The federal courts received over 14,000 habeas petitions last year. See U.S. Courts, *Civil Statistical Tables For the Federal Judiciary* (Dec. 31, 2023), bit.ly/2023-Statistics. Since one in ten habeas cases involves an amended petition, see N. King, et al., *Final Technical Report: Habeas Litigation in U.S. District Courts* 34 (2007), bit.ly/Habeas-Report, the real numbers are likely far higher. Cf. Rachel Brown, et al., *Is Unpublished Unequal? An Empirical Examination of the 87% Nonpublication Rate in Federal Ap-*

peals, 107 Cornell L. Rev. 1, 62 (2021) (finding that pro se, non-capital habeas cases are "published at less than one-third of the overall rate").

III. The decision below is wrong.

The Fifth Circuit thought that § 2244(b)(2) required the district court to dismiss "for lack of jurisdiction" because Rivers's 2021 filing was "introduced after a final judgment" and "raise[d] habeas claims." Pet. App. 10a–11a. That is wrong. *Banister* showed how courts should determine "what qualifies as second or successive," 590 U.S. at 512, and its logic favors Rivers here. But the Fifth Circuit didn't even cite *Banister*—let alone engage in the proper analysis—and its rule doesn't square with this Court's holdings either.

A. Section 2244(b)(2) does not apply until appellate review of the first habeas application is exhausted.

The phrase "second or successive application" is a "term of art" that is "not self-defining." *Banister*, 590 U.S. at 511 (quoting *Slack*, 529 U.S. at 486). To determine when § 2244(b)(2) applies, "this Court has looked for guidance in two main places." *Id.* at 512. First, history: "whether a type of later-in-time filing would have constituted an abuse of the writ, as that concept is explained" in this Court's "pre-AEDPA cases." *Id.* (cleaned up) (quoting *Panetti*, 551 U.S. at 947). Second, "AEDPA's own purposes": conserving judicial resources, reducing piecemeal litigation, and achieving finality "within a reasonable time." *Id.* (citing *Panetti*, 551 U.S. at 945–46). Here, both factors align. Early courts applied abuse-of-the-writ rules in light of appellate review, not final judgment, and applying § 2244(b)(2) to filings like Rivers's would frustrate, not further, AEDPA's aims.

1. Courts historically analyzed abuses of the writ by reference to appellate review, not final judgment.

The abuse-of-the-writ doctrine was a nineteenth-century innovation. "[B]y the common law of England, as it stood at the adoption of the constitution," the denial of habeas relief was "no bar to the issuing of a second or third or more writs, by any other court or magistrate having jurisdiction of the case." *Ex parte Kaine*, 14 F. Cas. 78, 80 (C.C.S.D.N.Y. 1853). Instead, "courts and judges were accustomed to exercise an independent judgment on each successive application, regardless of the number." *Salinger* v. *Loisel*, 265 U.S. 224, 231 (1924). Only later, once "a right to an appellate review was given," did American courts pare back this practice. *Id.* When they did, they tied abuse-of-the-writ rules to the completion of appellate review—not the entry of final judgment.

Ex parte Cuddy, one of the earliest abuse-of-the-writ cases, is a good example. 40 F. 62, 66 (C.C.S.D. Cal. 1889) (Field, J.). A district court denied Thomas Cuddy's habeas petition, and this Court affirmed. *Id.* at 63 (citing *Ex parte Cuddy*, 131 U.S. 280 (1889)). Cuddy then sought habeas relief from Justice Field, riding circuit. Justice Field ordered the writ dismissed, reasoning that "a second application upon the same facts … should not be heard," absent "leave to make a new application." *Id.* at 66.

Along the way, Justice Field emphasized two things. *First*, "action … on the second application" should turn on the "character of the court or officer to whom the first application was made, and the fullness of the consideration given to it." *Id.* In *Cuddy*, for example, Justice Field rejected the petition because the prisoner sought further relief "after invok-

ing the judgment of the appellate court" and "failing therein." *Id.* at 64. In other words: the abuse-of-the-writ doctrine applied after this Court weighed in—not after the district court entered final judgment. In fact, had the prisoner not "appealed from the refusal of the district court," he could have "applied to the circuit judge" for the same relief. *Id.* at 66. *Second*, Justice Field "refer[red], of course," only to "cases where a second application is made upon the same facts presented, or which might have been presented" in the initial application. *Id.* In his view, things would be "entirely different" if "subsequent occurring events" offered "new" grounds for consideration. *Id.*

This Court's abuse-of-the-writ cases followed the same approach. Take *Salinger*, 265 U.S. at 230–32, which involved a serial habeas petitioner. Citing *Cuddy*, the Court explained that an appellate court's "prior refusal" to grant a "like application" carries weight "when a later application is being considered." *Id.* at 230–31. Since the "prior refusal" in *Salinger* was "affirmed in a considered opinion by a Circuit Court of Appeals," with "no attempt to obtain" further review, an abuse-of-the-writ dismissal "would have been well exercised." *Id.* at 226–27, 232. Here again, what mattered was that an appellate court had weighed in—not that a district court had denied the first petition and entered final judgment.

All of that boils down to this. When early courts applied abuse-of-the-writ rules, they asked whether an appellate decisionmaker had spoken—not whether a district court had entered final judgment. That makes sense, since this Court has long understood "proceedings in the appellate tribunal" to be part of the "process of law" by which prisoners test the legality of confinement. *Frank* v. *Mangum*, 237 U.S. 309,

327 (1915) (discussing appellate review of conviction). Against that backdrop, a rule that treats final judgment as the relevant inflection point is "bad wine of recent vintage." *Rotkiske* v. *Klemm*, 589 U.S. 8, 14 (2019) (citing *TRW Inc.* v. *Andrews*, 534 U.S. 19, 37 (2001) (Scalia, J., concurring in judgment)).

2. Treating filings like Rivers's as "second or successive" would frustrate AEDPA's aims.

Banister's other source of guidance—"AEDPA's own purposes"—points the same way. 590 U.S. at 512. Treating filings like Rivers's as "second or successive" would have baleful "implications for habeas practice," making it unlikely that "Congress would have viewed [them] as successive." *Id.* at 512–13.

a. Judicial resources. So far as the lower courts are concerned, the question is not *whether* prisoners like Rivers will seek further relief while their initial petitions are on appeal. The question instead is *which court* will review those filings first. Everyone agrees that "a three-judge panel of the court of appeals" is the first port of call for petitions filed after a prisoner exhausts appellate review of his initial application. 28 U.S.C. § 2244(b)(3)(B). But Congress had little reason to channel filings like Rivers's down that path—and good reason to treat them as part and parcel of the initial habeas application.

i. If section 2244(b)(2) is a "rock[y]" path for prisoners, that goes double for courts. *Banister*, 590 U.S. at 509. When the court of appeals receives a "second or successive" petition, three appellate judges have to decide—from square zero, and often without adversarial briefing—whether the new evidence could have been "discovered previously through the exercise of

due diligence." 28 U.S.C. § 2244(b)(2)(B)(i). Then they have to examine "the evidence as a whole" and determine whether "the facts underlying the claim, if proven," would be "sufficient to establish by clear and convincing evidence" that "no reasonable factfinder" would have convicted but for constitutional error. *Id.* § 2244(b)(2)(B)(ii). That, in turn, means considering the state's "theory of the case," the evidence "support[ing]" that theory, and the counterfactual effect of the "newly-discovered evidence," including how it would have undermined the state's evidence and influenced the theories—and even "alternative theories"—that both sides could have "offered the jury." *Munchinski* v. *Wilson*, 694 F.3d 308, 335–37 (3d Cir. 2012). One recent authorization case was pending before the Fifth Circuit for almost three years, and the opinion features a two-column, sixteen-row chart that spans three pages of the Federal Reporter. See *In re Will*, 970 F.3d 536, 544–46 (5th Cir. 2020). And that's just the first step. Even when the appellate court authorizes a "second or successive" petition, the district court must still "conduct its own thorough review" to ensure "the requirements of § 2244(b)(2) have been satisfied." *Id.* at 543 (citation and quotation marks omitted). Still more: because any claim "presented in a prior application" must be dismissed, § 2244(b)(1), both courts must carefully compare the "second or successive" petition to all prior petitions and determine precisely what "claim[s]" have been brought. *Id.* at 541. That can be especially challenging when the courts confront an "inartistically drawn [pro se] petition," *Price* v. *Johnston*, 334 U.S. 266, 292 (1948).

ii. Now consider the alternative. When Rivers sought further relief in February 2021, he went before the same magistrate judge and district court judge who denied his initial petition. Had those judg-

es reached the merits, they—better than anyone—would have known whether his new evidence was worth the candle. If not: game over. If so, the court could have issued an indicative ruling under Federal Rule of Civil Procedure 62.1. E.g., *Parry* v. *Kerestes*, 2013 WL 6002358 (W.D. Pa. Nov. 12, 2013). Either way, a judge "familiar with a habeas applicant's claims" would likely make "quick work" of a filing like this. *Banister*, 590 U.S. at 517. That's good reason to think that a Congress concerned about judicial resources "would have viewed" such filings as "part and parcel of the first habeas proceeding." *Id.* at 507, 513.

b. Reducing piecemeal litigation. The latter path would serve AEDPA's second aim too—and this case is Exhibit A. New evidence in hand, Rivers asked the Fifth Circuit to remand so that he could seek relief on "all [his] claims rather than revisiting this case in piecemeal litigation." No. 18-11490 (5th Cir.) Dkt. 61, at 5–6. When that failed, he asked the district court to "consider an interlocutory review" to "prevent unnecessary litigation and to preserve judicial resources." No. 7:21-cv-00012 (N.D. Tex.), Dkt. 26, at 5. Instead, the court transferred the matter to the Fifth Circuit, which opened a brand new proceeding, where Rivers must convince three judges to authorize a fourth judge to consider whether or not to consider the new evidence.

c. Finality. Finality cuts the same way. Suppose that the state investigator's report that Rivers discovered in his client file isn't the bombshell that Rivers reckons. In that case, the way to "lend[] finality" to Rivers's conviction "within a reasonable time" would have been for the district court to say so in September 2021. *Banister*, 590 U.S. at 512. Had it done that, this case would be over. Instead, the lower

courts sent Rivers and Texas down a path that could prolong this case—and leave the validity of Rivers's conviction up in the air—for years to come.

* * *

Had Congress wanted all post-judgment habeas filings to count as second or successive petitions, "it easily could have written" such a law. *Ali* v. *Fed. Bureau of Prisons*, 552 U.S. 214, 227 (2008). But it's hard to squeeze that rule from the text of § 2244(b)(2) and the history against which it was written. And it's even harder to attribute the consequences to a Congress focused on judicial resources, efficiency, and finality. See *N.Y. State Dep't of Soc. Servs.* v. *Dublino*, 413 U.S. 405, 419–20 (1973) ("We cannot interpret federal statute to negate their own stated purposes.").

B. The Fifth Circuit's decision cannot be squared with this Court's cases.

The Fifth Circuit addressed none of this. It did not ask whether Rivers's filing "would have constituted an abuse of the writ, as that concept is explained in [this Court's] pre-AEDPA cases." *Banister*, 590 U.S. at 512 (cleaned up) (quoting *Panetti*, 551 U.S. at 947). It did not explain how its approach would "conserv[e] judicial resources" or "streamlin[e] habeas cases." *Id.* at 515, 517. And while it offered vague generalities about evading AEDPA's limitations, it said not a word about finality, let alone whether its rule would hasten or hinder that objective here. In fact, the court didn't even cite *Banister*—even through both parties relied on that case in their briefs.

Nor does the Fifth Circuit's approach square with this Court's holdings. Gregory Banister's Rule 59(e) motion came "after a final judgment" and raised "habeas claims," Pet. App. 10a, but this Court still held

that it was "part and parcel of the first habeas proceeding," *Banister*, 590 U.S. at 507. Likewise, the prisoner in *Slack* filed a post-final-judgment habeas petition, and this Court allowed that to proceed too. *Slack*, 529 U.S. at 487. And the same was true in *Stewart*, where the prisoner's post-final-judgment habeas application "was not a 'second or successive' petition' under § 2244(b)." 523 U.S. at 643–45.

IV. This case is an excellent vehicle.

This case is an ideal vehicle to finish what *Banister* started. The question presented raises a pure legal issue that was fully briefed and squarely decided below. There are no preservation problems, alternative holdings, or factual disputes that would frustrate review. And the split is outcome-determinative. The Fifth Circuit declined to consider Rivers's new evidence because it thought § 2244(b)(2) required that result. Yet if Rivers were held in Buffalo, New York, instead of Beeville, Texas, § 2244(b)(2) would have been no barrier, and the lower courts could have reached the merits. In other words, if this Court reverses and adopts the Second Circuit's rule, Rivers will have a meaningful path to relief. The lower courts denied Rivers's initial petition largely because he could not pinpoint what his counsel should have done differently or how that might have changed things. See *Rivers*, 2018 WL 4443153, at *4. But the new evidence puts those questions to rest. Now all that stands between Rivers and a fighting chance is the Fifth Circuit's mistaken reading of § 2244(b)(2).

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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