

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

DANNY RICHARD RIVERS,)
)
 Petitioner,)
)
 v.) No. 23-1345
ERIC GUERRERO, DIRECTOR,)
)
 TEXAS DEPARTMENT OF CRIMINAL)
)
 JUSTICE, CORRECTIONAL)
)
 INSTITUTIONS DIVISION,)
)
 Respondents.)

Pages: 1 through 58
Place: Washington, D.C.
Date: March 31, 2025

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6 ERIC GUERRERO, DIRECTOR,)
7 TEXAS DEPARTMENT OF CRIMINAL)
8 JUSTICE, CORRECTIONAL)
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10 Respondents.)

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12
13 Washington, D.C.
14 Monday, March 31, 2025

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16 The above-entitled matter came on for
17 oral argument before the Supreme Court of the
18 United States at 11:46 a.m.

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1 APPEARANCES:
2 PETER A. BRULAND, Washington, D.C.; on behalf of the
3 Petitioner.
4 AARON L. NIELSON, Solicitor General, Austin, Texas; on
5 behalf of the Respondent.
6 MATTHEW GUARNIERI, Assistant to the Solicitor General,
7 Department of Justice, Washington, D.C.; for the
8 United States, as amicus curiae, supporting the
9 Respondent.
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P R O C E E D I N G S

(11:46 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 23-1345, Rivers versus Guerrero.

Mr. Bruland.

ORAL ARGUMENT OF PETER A. BRULAND

ON BEHALF OF THE PETITIONER

MR. BRULAND: Mr. Chief Justice, and may it please the Court:

Congress did not slam the door on exculpatory evidence that emerges while a prisoner's first habeas case is on appeal. Outside of habeas, there's always been a pathway to bring late-breaking claims to an appellate court's attention.

And, historically, habeas was no different. The near-uniform practice in the decades before AEDPA was to consider such claims on the merits, as part and parcel of a prisoner's first habeas case, without a word about successive litigation. Congress enacted AEDPA against that backdrop, and as Banister tells us, it did not redefine what counts as successive.

1 The other side's rule is unmoored from
2 text and history, and also comes at a cost.
3 Viable constitutional claims that would have
4 warranted habeas relief will fall through the
5 cracks under their rule. That means every claim
6 of sentencing error, every claim of structural
7 error, and every Brady or Napue claim that
8 doesn't show innocence by clear and convincing
9 evidence.

10 The reason those claims don't fly
11 under 2244 is that Congress decided the state's
12 interest in repose outweighs the interest in
13 getting those claims right. But the other side
14 has never explained why they're entitled to
15 repose while they're still defending the
16 conviction on appeal. And you're not going to
17 hear an explanation this morning.

18 The small universe of cases where our
19 rule makes a difference is the universe of cases
20 where both the district court and the court of
21 appeals agree that a new claim deserves its day
22 in court. Those cases will be rare, but when
23 they arise, AEDPA does not strip district courts
24 of the power to consider new evidence that would
25 warrant habeas relief.

1 The lower courts here made a threshold
2 jurisdictional error and so never reached the
3 merits or any procedural issues. This Court
4 should reverse and remand.

5 I welcome your questions.

6 JUSTICE THOMAS: How would you defined
7 "second and successive"?

8 MR. BRULAND: I would define it,
9 Justice Thomas, based on the history, because
10 Banister says you look at the history --

11 JUSTICE THOMAS: Well, you --
12 post-AEDPA, how would you define it?

13 MR. BRULAND: Post-AEDPA, I would say
14 the second or successive petition is something
15 that, in 1996, when Congress used that phrase,
16 ordinary members of the bar would have
17 recognized as settled is second or successive.
18 And AEDPA says we look at the purpose behind --
19 I'm sorry, Banister says we look at the purposes
20 behind the statute, judicial economy, piecemeal
21 litigation, hastening finality. And Banister
22 tells us that that's how you look at it.

23 And this case, I think, is easier than
24 Banister or Gonzalez because the statute itself
25 answers that. Here we have Congress

1 specifically considering how amendments should
2 work in habeas, and Congress says amendments in
3 habeas work just like amendments in ordinary
4 civil litigation. And Congress said that
5 there's a small sliver of amendments that are
6 subject to the second or successive rules and
7 only those.

8 JUSTICE THOMAS: And don't we
9 normally -- in the mine-run cases consider
10 second-in-time to be "second and successive"?

11 MR. BRULAND: So, Justice Thomas, if I
12 were just looking at the phrase, I would say
13 yes, that's how I would look at "second or
14 successive." But this Court has said "second or
15 successive" is a term of art. And so all I'm
16 saying today is what this Court said in
17 *Banister*, which is that we look at the history
18 and the purposes.

19 And, again, I think this case is
20 easier than *Banister* because we have a statutory
21 hook. And going to that statutory hook, 2242
22 gives us the general rule. And then
23 2266(b)(3)(B) gives us the only exception.
24 Congress specifically thought about which
25 amendments should be subject to the rules

1 governing second or successive petitions, and it
2 said in 2266(b)(3)(B), it's only this tiny
3 sliver, filed by prisoners on death row in
4 opt-in states after the state files its answer.

5 And I think it would disregard
6 Congress's drafting choices to apply the rules
7 governing second or successive petitions outside
8 that tiny sliver. And I think my friend, Mr.
9 Guarnieri is with me on that. Page 17 of their
10 brief, they say 2266(b)(3)(B), that's the
11 exception and then other amendments follow the
12 federal rules.

13 And if there's any question about
14 that, I would turn to history, as I said,
15 Justice Thomas, and here you had the
16 near-uniform practice leading up to AEDPA was
17 that mid-appeal efforts to amend were not
18 treated as successive.

19 And I think my favorite case on that
20 is the Harisiades case because Texas needs the
21 Court to say that the district court and the
22 court of appeals with Learned Hand on the panel
23 and all nine members of this Court plus, I
24 guess, the Solicitor General and the line
25 prosecutor, all saw the effort to amend after

1 the appeal was filed and didn't say a word about
2 it, like, I guess forgot that it was second or
3 successive.

4 And this is not a case where that
5 issue was just lurking in the record. If you
6 look at the prisoner's blue brief, he says on
7 page 10 to 11, I filed my notice of appeal, and
8 then I moved to amend. And then he argues the
9 core of the amendment issue in his merits brief.

10 JUSTICE JACKSON: And he had a
11 judgment. I guess what I'm trying to understand
12 -- so, first of all, is your primary argument
13 that after judgment against him on the habeas
14 claim that existed, he appeals it, and during
15 the pendency of an appeal, if he seeks to amend
16 the existing habeas claim, you say what?
17 Because the appeal is still pending, he can do
18 it?

19 MR. BRULAND: Not necessarily, Justice
20 Jackson. Because the appeal is still pending,
21 it's not second or successive. It might be a
22 bad amendment. It might die for Rule 15
23 reasons. It might be --

24 JUSTICE JACKSON: How do you square
25 that with Gonzalez and the idea that the

1 judgment is doing some work here?

2 MR. BRULAND: So, Justice Jackson,
3 Gonzalez did not face the question presented
4 here, because there was no pending appeal in
5 Gonzalez. The -- really, Gonzalez comes in a
6 year after abandoning his appeal, when all of us
7 up here agree that a habeas claim in that
8 posture would be second or successive.

9 And so, in Gonzalez, anything that
10 comes in would be second or successive. And
11 that's why the Court is saying, well, you can't
12 come in and circumvent the statute. And --

13 JUSTICE JACKSON: Well, why wouldn't
14 you be circumventing the statute here by just,
15 you know, interpreting anything that comes in
16 during an appeal as not being second or
17 successive?

18 MR. BRULAND: Well --

19 JUSTICE JACKSON: I mean, we have a
20 statute in which Congress was very clear about
21 limiting the number of filings or at least
22 applying pretty restrictive rules to the ability
23 to file another application.

24 And so I guess what I -- it -- it
25 boils down to for me at least is trying to

1 understand the work of the judgment in providing
2 the dividing line as to whether things filed
3 after that -- assuming the judgment remains in
4 effect, why aren't they second or successive and
5 wouldn't you be undermining AEDPA to say
6 otherwise?

7 MR. BRULAND: So two responses,
8 Justice Jackson. First, if you assume that what
9 Rivers filed was second or successive and were
10 just trying to circumvent the statute, then I
11 lose. But that's not how Banister looked at it.
12 Banister said we have a statutory phrase,
13 "second or successive" habeas corpus
14 application, that event meant something in 1996
15 when Congress enacted the statute. And the way
16 we figure out what it meant is we look at
17 pre-AEDPA history and practice and doctrine and
18 AEDPA's purposes.

19 So going squarely to your question, my
20 point is that, leading up to AEDPA, a filing
21 that came in during the appeal might have lost
22 on the merits. Banister says, well, that
23 doesn't count for the analysis.

24 JUSTICE JACKSON: I understand. But
25 aren't you reading a lot into Banister? I mean,

1 wasn't that in a 59(e) scenario?

2 MR. BRULAND: It was in a 59(e)
3 scenario, Justice --

4 JUSTICE JACKSON: And didn't that have
5 something to do with the analysis? I mean, the
6 point there was that the judgment was suspended,
7 such that -- you know, it's very -- a limited
8 amount of time, and it wasn't really the appeal
9 or lack of an appeal or whatnot that seemed to
10 be doing the work.

11 It was about the nature of the
12 judgment under a 59(e) scenario.

13 MR. BRULAND: So, Justice Jackson, I
14 agree that Banister was focused on that
15 question, and Banister wasn't focused on the
16 question before you today, the question of well,
17 what do we do when new evidence arises on the
18 appeal?

19 My point is that Banister gives us the
20 logic that we're supposed to use in analyzing,
21 well, how do we treat a claim or a filing that's
22 not a 59(e). And what I would say is Banister
23 says look to the history, look to the purposes.
24 And here I think we have history in droves.

25 We give you the Harisiades case, the

1 Strand case out of the Tenth Circuit, all of
2 these other cases where prisoners leading up to
3 AEDPA lob in motions to the court and then --

4 JUSTICE KAVANAUGH: Well, the SG says
5 that the considered trend in the years shortly
6 before the enactment of AEDPA in 1996 was to
7 treat efforts to amend a habeas application
8 mid-appeal as second or successive applications.

9 So they say by the time we got to
10 1996, what you're talking about really wasn't
11 the case. Do you want to address that?

12 MR. BRULAND: Two points, Justice
13 Kavanaugh. First, I disagree with them on the
14 history. I don't think that was the considered
15 trend.

16 But just to take a step back, you
17 could say the same thing about Banister. If you
18 look at Banister, the opinion cites one case
19 from 1965, one case from 1988, where 59(e)
20 motions were not deemed successive. And then
21 Texas comes in on the other side with a case
22 from 1993.

23 But that didn't turn the tied in
24 Banister because for purposes of the historical
25 analysis, I think the best place to look is page

1 325 of the Scalia-Garner treatise. And what
2 they say is when you're trying to figure out
3 what sort of history Congress would have picked
4 up, you look at, well, would a member of the bar
5 view this as settled?

6 And they say if it's just a couple of
7 opinions going one way or the other way, well,
8 that's not the kind of history that Congress
9 would have picked up. And going back to
10 Banister, I think the history here is even
11 stronger, at least as strong as it was in
12 Banister.

13 Petitioners there come in with cases
14 out of five circuits where courts didn't treat
15 59(e) motions as second or successive. We give
16 you cases out of six circuits. Then on the
17 other side of the ledger it's déjà vu, Justice
18 Kavanaugh.

19 Texas and its amici come in in
20 Banister. They have one case out of the Eighth
21 Circuit, where the court says, 59(e), second or
22 successive. And here they found one case out of
23 the Eighth Circuit applying the very same logic
24 that this Court wrote off as a historical
25 outlier in Banister.

1 So I think the history is at least as
2 clear here as it was in Banister.

3 JUSTICE GORSUCH: If we're going to
4 look at history, and habeas being civil
5 litigation, you know, the default rule is that
6 when the district court relieves itself of a
7 case, after 59, and it goes to the court of
8 appeals, you don't just get to Rule 15 file an
9 amendment willy-nilly. The case is in the court
10 of appeals. I mean, that's -- you know, a
11 baseline historical practice is -- is -- is
12 relevant.

13 What about that? I mean, you're
14 asking for us to treat habeas differently than
15 any other form of civil litigation.

16 MR. BRULAND: So I sure hope not,
17 Justice Gorsuch. The point that I'm trying to
18 make is that --

19 JUSTICE GORSUCH: Well, explain to me
20 why not. Because I've never heard of being able
21 to amend my complaint when I'm on appeal in a
22 12(b)(6) -- after a 12(b)(6) dismissal. Boy, I
23 would have liked to have done that a couple of
24 times.

25 (Laughter.)

1 MR. BRULAND: Justice Gorsuch, I think
2 you're absolutely right. And I want to take a
3 step back because I think it's important to be
4 precise about the doctrine.

5 So I'm not saying that you get to
6 amend your 12(b)(6) complaint after -- while
7 you're up on appeal.

8 My appeal is historically appellate
9 courts were open to new evidence or new claims
10 that come in. I think the best case there is
11 the Shotwell case. That's a case where the
12 Solicitor General comes into this Court at the
13 cert stage. They lost in the court of appeals.
14 And the Solicitor General says, look, I've got
15 two new affidavits that I think show that the
16 Respondent pulled a past -- pulled a fast one on
17 the lower courts. So please, Supreme Court,
18 would you kick it back down?

19 And the Court says, look, we are a
20 court of review, not first view, so we're not
21 going to take a crack at the merits, but they
22 say two things. They say, first, we believe the
23 solicitor general. This is new.

24 JUSTICE GORSUCH: Yeah, I accept that
25 we have that power, especially when this -- the

1 government is admitting an error, right, or --
2 or some other important new considerations.

3 But as a general rule in civil
4 practice, if I come in and say, boy, I got a
5 great amendment and I'm in front of a panel of
6 -- they roll their eyes and they say, nice,
7 that's a nice thing you have there. You
8 probably should have done that earlier, friend,
9 you know, go file a 60(b). That's what they
10 say.

11 MR. BRULAND: Well, Justice Gorsuch, I
12 think you're right. If you come in to the court
13 of appeals or even the district court, you're
14 probably going to get laughed out of court most
15 of the time but my point is a different one.

16 My point is about the power that
17 courts have. And what I would say is for a long
18 time appellate courts have been open to claims
19 and denied most of them, but been open to
20 claims. And so I hope I'm not asking for
21 anything in habeas that we wouldn't have in
22 ordinary civil litigation.

23 My point is when you file that in
24 habeas, it's not second or successive. It's
25 probably dead for other reasons but it's not

1 second or successive.

2 JUSTICE SOTOMAYOR: Sorry. I'm -- I'm
3 not sure I follow your argument. If it's normal
4 civil litigation and not habeas, if you file a
5 motion to amend between a final judgment in the
6 district court and an appeal, the district court
7 has no inherent power to open -- to grant that
8 motion, correct?

9 MR. BRULAND: Correct.

10 JUSTICE SOTOMAYOR: All it could do is
11 a 62.1, make a suggestion to the court of
12 appeals, correct?

13 MR. BRULAND: Yes.

14 JUSTICE SOTOMAYOR: Here you didn't
15 ask them to make a suggestion. So not having
16 asked them to do it, why do you think the motion
17 is still alive after the court of appeals
18 affirmed the judgment below?

19 MR. BRULAND: Well, two responses,
20 Justice Sotomayor.

21 JUSTICE SOTOMAYOR: How could the
22 court -- the district court reopen absent 60(b)?
23 That's my point. You could reopen under -- you
24 could reopen under 60(b) to consider your
25 motion, correct?

1 MR. BRULAND: Correct.

2 JUSTICE SOTOMAYOR: All right. But
3 none of that happened. You didn't ask them to
4 indicate under 62.1 and the court of appeals
5 didn't vacate or remand the matter to the
6 district court to make the motion to amend still
7 live, right?

8 MR. BRULAND: So I -- I agree with you
9 on the second half, Justice Sotomayor. I
10 disagree about what the record shows on the
11 first half.

12 If you look at Joint Appendix 107,
13 Rivers is asking, he says, look, please,
14 district court, would you consider an
15 interlocutory review.

16 Now, in --

17 JUSTICE SOTOMAYOR: He can't do a --
18 that's the point. It may have been a product of
19 him being pro se. And if he had hired you then,
20 you probably would have made a motion --

21 MR. BRULAND: So, Justice Sotomayor --

22 JUSTICE SOTOMAYOR: -- the proper
23 motion, but he didn't.

24 MR. BRULAND: Well, my point is -- is
25 twofold. First, I think he did ask for an

1 interlocutory review. I will grant he --

2 JUSTICE SOTOMAYOR: There is no
3 interlocutory relief, meaning you admitted that
4 the district court does not have the power to
5 adjudicate the motion to amend. The most it
6 could do is what 62.1 permits, which is an
7 indication to the court of appeals.

8 MR. BRULAND: Yes. And my --

9 JUSTICE SOTOMAYOR: And that's not an
10 interlocutory appeal.

11 MR. BRULAND: So I take what he was
12 asking for. The only plausible way to construe
13 what he was asking for is as an indicative
14 ruling.

15 Now, the district court took up his
16 motion to amend and didn't reach the merits. It
17 said: Look, I don't have the jurisdiction to
18 open the front cover because this is a second or
19 successive petition.

20 JUSTICE SOTOMAYOR: That's correct.

21 MR. BRULAND: So we're asking you to
22 hold that that was a mistake under AEDPA. And
23 you asked about the relief on --

24 JUSTICE SOTOMAYOR: But he presented
25 the same thing to the court of appeals,

1 basically the same motion, and the court of
2 appeals did not grant a vacate and remand.

3 MR. BRULAND: Well, that --

4 JUSTICE SOTOMAYOR: It wasn't
5 convinced by whatever he presented. It may have
6 made an error, but that wasn't appealed either.

7 MR. BRULAND: So, Justice Sotomayor, I
8 don't think the court of appeals saying we're
9 not going to enlarge the record shows us what it
10 would do in response to an interlocutory -- or
11 I'm sorry --

12 JUSTICE SOTOMAYOR: It could have done
13 -- it could have done what we did in the case
14 you cite.

15 MR. BRULAND: Well, that's --

16 JUSTICE SOTOMAYOR: If there had been
17 a confession of error or if it was convinced
18 that something truly untoward had happened, it
19 could have vacated and remanded.

20 MR. BRULAND: Well, Justice Sotomayor,
21 I think there's a meaningful difference between
22 a prisoner mailing in some typewritten pages and
23 one of the court of appeals' colleagues picking
24 up the phone and saying, look --

25 JUSTICE SOTOMAYOR: In civil

1 litigation, absent a vacate and remand by the
2 court of appeals, would the motion have to be
3 considered under 60(b)?

4 MR. BRULAND: If there's no indicative
5 ruling and if there's no vacatur and remand,
6 then the only way to reopen the judgment would
7 be 60(b), unless the court of appeals reverses
8 or vacates otherwise.

9 JUSTICE SOTOMAYOR: Correct. Thank
10 you.

11 JUSTICE JACKSON: Counsel, can I have
12 you address the threshold arguments that are
13 being made about standing and the relief?

14 MR. BRULAND: Yes. So, first, as to
15 standing, this Court has -- or, I'm sorry, as to
16 standing, we have appellate standing because an
17 order from this Court reversing the Fifth
18 Circuit would lead to the potential for redress.

19 And what we would say there is we
20 would go back to the district court and we would
21 file a 60(b)(6) motion to bring back the order
22 -- I'm sorry -- bring back the initial habeas
23 petition. And for purposes of standing and
24 mootness, the probability of success is -- is
25 not on the table, so it's just a question about

1 the district court's power.

2 And there the argument would be --
3 it's an integrity-based argument under footnote
4 4 of Gonzalez. We would be saying in this
5 position, the Supreme Court has just decided
6 that we were right about the AEDPA question.
7 So, District Court, respectfully, would you
8 please reopen the judgment denying the initial
9 appeal -- or initial petition. Then the motion
10 to amend would still be pending and the --

11 JUSTICE JACKSON: You're saying we
12 don't have to care about whether or not that is
13 going to be successful?

14 MR. BRULAND: Yes, that's right.

15 JUSTICE JACKSON: Just have the
16 opportunity to do it?

17 MR. BRULAND: That's right. It's a
18 question about the district court's power.
19 Texas is coming in and saying, well, look,
20 there's nothing that you could on remand. And
21 we've identified a procedure that would let the
22 district court grant Rivers redress.

23 JUSTICE JACKSON: What about the
24 habeas jurisdiction and the fact that he's in
25 custody on one charge versus the other?

1 MR. BRULAND: Yes. We're challenging
2 the convictions for which he's still in custody.
3 I don't take the other side to be arguing that
4 the new exculpatory evidence doesn't undermine
5 those convictions. They certainly didn't argue
6 that in the brief in opposition or below.

7 I take them to be challenging us on
8 the merits, but I don't take them to be saying,
9 as a matter of habeas jurisdiction, that there's
10 -- that the -- the evidence wouldn't go as a
11 jurisdictional matter.

12 JUSTICE JACKSON: Thank you.

13 MR. BRULAND: Now, my -- my friends on
14 the other side, I think, are going to stand up
15 and say a word about the floodgates. And so I
16 do want to address that. And the reason that
17 our approach doesn't open the floodgates is that
18 it comes with a structural barrier and an
19 absolute jurisdictional backstop. And that's
20 borne out by what we've seen in the Second
21 Circuit over the last two decades.

22 So I'll start with the structural
23 piece. For any of this to get off the ground,
24 the habeas petitioner has to go to the district
25 court, convince the district court to issue an

1 interlocutory -- or an indicative ruling on a
2 habeas petition that it's just denied. And then
3 the absolute jurisdictional backstop is the
4 court of appeals has to agree to remand the case
5 for further proceedings.

6 And at both steps of those analysis,
7 the prisoner has the burden of showing that
8 amendment here would not be futile, that it's
9 timely. That kicks out a lot of cases because
10 AEDPA has a one-year statute of limitations.
11 The prisoner is also going to have to show that
12 it's not going to be a dead case on the merits.

13 Then you go up to the court of
14 appeals. And we've cited cases. The Louisiana
15 against Becerra case, where the Western District
16 of Louisiana sent up a flare to the Fifth
17 Circuit, and the Fifth Circuit said, no, we --
18 we don't think this amendment should go forward.
19 It's not timely. You should have brought it
20 earlier.

21 So the court of appeals is doing
22 another review. And all of this is borne out by
23 what we've seen in the Second Circuit over the
24 last 20 years because the Second Circuit has
25 read AEDPA our way. They've said 2244 doesn't

1 kick in until the end of the appeal.

2 And I will tell you I've read more of
3 these cases than I care to remember. There's
4 about one or two per year over the last 20
5 years. And what you see, time and time again,
6 is prisoners come in and they say, look, I just
7 got some new evidence, or something changed and
8 I want to fight it out. And in one- or two- or
9 three-page opinions, a magistrate judge or the
10 district court judge has no trouble addressing
11 those claims.

12 And just to take a step back, at
13 bottom, I think this case is really a venue
14 case, like the EPA cases you had last week
15 because, these claims are coming in one way or
16 the other. The question is just who's the
17 frontline decisionmaker going to be.

18 I can tell you when a prisoner gets
19 new evidence or thinks the prisoner has a new
20 claim while the appeal is pending, he's going to
21 send something in to some court. And then some
22 decisionmaker is going to have to decide, well,
23 what do I do with it? And what --

24 JUSTICE ALITO: Mr. Bruland, is the
25 argument that you're making today and the

1 primary argument that you make in your brief the
2 same argument that you made in your petition?

3 MR. BRULAND: Justice Alito, it's the
4 same claim. We say at the --

5 JUSTICE ALITO: Is it the same
6 argument?

7 MR. BRULAND: The 2242 argument is new
8 at the merits stage, yes. And this Court has
9 been very clear that I can come in and make
10 arguments at the merits stage in support of the
11 same claim raised in a petition. I don't take
12 my friends --

13 JUSTICE ALITO: Is there a conflicts
14 on the circuits in this new argument that you're
15 making today?

16 MR. BRULAND: Well, there's a conflict
17 in the circuits because a bunch of circuits
18 reject the idea that an amendment is not a
19 second or successive petition. That's what the
20 Fifth Circuit said below. Rivers said all along
21 I filed an amendment. That means it's okay
22 under Rule 15 and, therefore, it's not second or
23 successive.

24 The Fifth Circuit said not so fast.
25 We think 2244 applies right after final

1 judgment. They didn't cite Banister. And so
2 that is the same argument that Rivers has been
3 making. And the Fifth Circuit rejected the
4 argument that it's an amendment; therefore, it
5 should be okay.

6 Now, I do want to go to the point that
7 --

8 JUSTICE ALITO: Well, we've had a
9 mini-epidemic of cert petitions that have
10 convinced us to take a case because there's
11 supposedly a conflict on a certain issue, and
12 then once cert is granted, the argument that is
13 advanced by the petitioners, quite a bit
14 different from what we were sold at the petition
15 stage.

16 Is this another outbreak of the same
17 disease?

18 MR. BRULAND: I don't think so,
19 Justice Alito, and I think the best evidence
20 there is the United States is never shy about
21 pointing out when a petitioner strays from the
22 QP or the petition. And I don't hear my friends
23 from the United States to be making that
24 argument.

25 But even if you're worried about the

1 amendment theory, I would say the timing
2 argument, even Texas agrees, that that is
3 squarely within the question presented. And
4 that is an issue over which the lower courts
5 have certainly disagreed.

6 JUSTICE ALITO: Thank you.

7 MR. BRULAND: And what I would say
8 there on the timing question, we also have
9 context and history on our side there.

10 And, again, to go back to your
11 question, Justice Gorsuch, this is not a case
12 where I'm coming in and asking for special
13 favors for habeas petitioners. All I'm saying
14 is it might be a bad amendment. The lower
15 courts might take five minutes to take a look at
16 it and say this is going nowhere. All I'm
17 asking you to say is whatever it is, it's not
18 second or successive.

19 And one reason to think that it's not
20 second or successive is, as your opinion, your
21 separate opinion, in Edwards against Vannoy
22 pointed out, we have this long-standing
23 principle in habeas that finality means this
24 court says go away or affirms on the merits or
25 the opportunity to seek cert runs out.

1 So, again, I'm not saying let's create
2 a special loophole or porthole or anything for
3 habeas prisoners to come in. All I'm saying is,
4 whatever the words "second or successive" habeas
5 application meant in 1996, they don't refer to
6 this sort of filing because, historically, those
7 kinds of filings were not deemed abuses of the
8 writ.

9 And so if you agree with us on the
10 AEDPA question, I will grant Texas will have a
11 lot of civil procedure arguments below. I'm
12 sure they'll have a lot of merits arguments
13 below. All we're asking to you decide is this
14 narrow question of -- may I finish, Mr. Chief?

15 CHIEF JUSTICE ROBERTS: Sure.

16 MR. BRULAND: All I'm asking you to
17 decide is this narrow question of what counted
18 as a second or successive habeas corpus
19 application in 1996, and it wasn't this.

20 CHIEF JUSTICE ROBERTS: Thank you
21 counsel.

22 Justice Thomas?

23 Justice Alito?

24 Justice Sotomayor?

25 JUSTICE SOTOMAYOR: You did point out

1 to us in the -- your cert petition a circuit
2 split. I'm not sure the Third Circuit rule is
3 consistent with what you claim it is. It's more
4 consistent with what we were speaking about
5 earlier.

6 The Third Circuit rule says, when a
7 district court gets a motion to amend, it should
8 exercise its discretion to hold the appeal
9 pending the court of appeals' decision. And it
10 can only consider it or grant it if the court of
11 appeals vacates and remand.

12 So that's always the case, correct?

13 MR. BRULAND: That's right, Justice
14 Sotomayor.

15 JUSTICE SOTOMAYOR: So the Third
16 Circuit, I don't think, is inconsistent with
17 anything.

18 The Second Circuit does have some very
19 charitably loose language that -- that a motion
20 to amend is never second or successive. But I,
21 like you, had my law clerk look at what the
22 Second Circuit was doing, and I got a bunch of
23 cases where the district court didn't wait for
24 the court of appeals to rule but instead said it
25 was an abuse of -- the motion to amend was an

1 abuse of the writ. So I don't know -- and they
2 dismissed and the circuit didn't do anything.

3 So I'm not sure the rule is as
4 absolute as you say. They're basically
5 following and saying hold it until the circuit
6 acts. And if we vacate and remand, then you can
7 consider it.

8 MR. BRULAND: I think that's right,
9 Justice Sotomayor. Here's how I understand it
10 under Federal Rule of Civil Procedure 62.1: It
11 says the district court can always consider
12 something that comes in. And the district court
13 has three options. It can deny it outright. I
14 think that's most of the cases that you and I
15 were discussing. It can also defer ruling. I
16 think that's one of the things that the Third
17 Circuit was focused on. I think your opinion in
18 the Ching case has the footnote that says the
19 same thing. Or -- and this is the other
20 alternative we were talking about -- it can send
21 up a flare to the court of appeals and say this
22 raises a substantial issue.

23 So my -- what I'm suggesting here is
24 the Second Circuit --

25 JUSTICE SOTOMAYOR: So you're

1 suggesting sort of a, what should I call it,
2 procedural thing? Don't call it second or
3 successive and refer it to the court of appeals,
4 but instead deny it now?

5 MR. BRULAND: Justice Sotomayor, I
6 want to be very clear about the doctrine because
7 there are two separate questions. There's the
8 question of is it second or successive as
9 Congress used that phrase in 1996? And then
10 there is an analytically distinct question of
11 what should you do with it procedurally.

12 My -- the only question I'm asking you
13 to answer is what is the meaning of "second or
14 successive" habeas corpus application in 1996?
15 And then we've also tried to give you some
16 comfort about the procedural pathway. And so,
17 yes, that is one of the things that a district
18 court can do.

19 And, in fact, that's what most of the
20 courts in the Second Circuit that we've seen
21 have done, is just take one look, deny them
22 outright.

23 And the last thing I would add is the
24 other side comes in and says: Well, how does
25 that square with your efficiency argument, if

1 the prisoner can just file something in the
2 middle of the appeal and then file a second or
3 successive petition?

4 I didn't find a single case in the
5 Second Circuit where that happened. Prisoners
6 are taking no for an answer. And if they
7 didn't, boy, if I were a court of appeals judge,
8 I would be glad to have a short opinion
9 explaining why this amendment goes nowhere.

10 JUSTICE SOTOMAYOR: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice Kagan?

12 Justice Gorsuch?

13 Justice Kavanaugh?

14 Justice Jackson?

15 Thank you, counsel.

16 Mr. Nielson.

17 ORAL ARGUMENT OF AARON L. NIELSON

18 ON BEHALF OF THE RESPONDENT

19 MR. NIELSON: Mr. Chief Justice and

20 may it please the Court:

21 Rivers' new petition filed years after
22 an appeal of the final judgment is second or
23 successive under AEDPA for multiple reasons.
24 I'm going to start with precedent.

25 Under Gonzalez and Banister, Rule

1 59(e) motions aren't successive, while Rule
2 60(b) motions generally are, because, quoting
3 from Banister, a Rule 59(e) motion is a one-time
4 effort to bring alleged errors in a just issue
5 decision to a habeas court's attention before
6 taking a single appeal.

7 Rivers' theory, however, would allow
8 him to repeatedly allege new claims having
9 nothing to do with the final judgment issued
10 years ago, after he appealed.

11 I think Banister's logic is all but
12 dispositive here.

13 I would also like to respond to some
14 of the things I heard from my friend during his
15 argument. He says that the time before AEDPA in
16 1996 there were six circuits on his side. I
17 don't agree with that at all. I urge the Court
18 to look at the brief from Arkansas. Arkansas
19 goes through the cases right before AEDPA's
20 enactment.

21 I would also urge the Court to look at
22 page 16 and 17 of the reply brief. I think
23 that's where he's getting that. You will notice
24 he cites cases on his side, Fourth, Fifth, and
25 Eighth, and then he says Fourth, Fifth, and

1 Eighth agree with us. The cases that agree with
2 us were later in time. They were closer to
3 1996.

4 He also says -- you know, we talked
5 about this was a pro se, which I understand and
6 I am sympathetic to, but Sidley was brought in
7 not, you know, just for the cert stage. They
8 filed the motion to stay the Fifth Circuit's
9 judgment pending certiorari.

10 None of their new argument is in that
11 either. This isn't an example of a pro se
12 person not knowing what to do. This was Sidley
13 Austin not raising the argument.

14 As to standing, the Court has
15 jurisdiction to address the split that it
16 thought it was hearing. That is a question
17 about res judicata from the first judgment, does
18 it bar the second case.

19 What the Court doesn't have
20 jurisdiction to do is to open a case that is not
21 in front of it. That case was closed. The
22 first petition was dismissed in a final judgment
23 in 2018. The Fifth Circuit affirmed in 2022.
24 This Court denied cert in 2023. That case is
25 done. I don't know how the Court could reopen

1 that case.

2 As the habeas jurisdiction, again,
3 he's not in custody for what he's talking about.
4 I don't know how he can have -- how this Court
5 can have habeas jurisdiction there.

6 As to the Second Circuit rule, look,
7 you definitely have the opportunity to have
8 multiple appeals under that rule. Because you
9 could have the first one, and then you amend,
10 and you get another final judgment, and you have
11 a second one.

12 This Court said in *Banister* you can't
13 do that.

14 And as to the new argument, there is
15 no split, Justice Alito. In fact, on our side
16 *United States v. Arrington*, 2014, from the D.C.
17 Circuit, Judge Srinivasan, joined by Judges
18 Garland and Millett, said you can't use 2106 to
19 get around AEDPA in that way.

20 I welcome the Court's questions.

21 JUSTICE THOMAS: How would you define
22 "second or successive"? I think there are --
23 some think that it -- the appeal has to be
24 final. And I think most would just simply say
25 the judgment of the district court. What --

1 what's your view?

2 MR. NIELSON: I think the Court
3 answered it in Banister. I think if you have
4 the first application, and then you have another
5 application after the final judgment, sometimes
6 suspended by Rule 59(e), if you're doing it
7 again the second time, that is second and
8 successive.

9 I think that's how we take the Court's
10 decision in Banister. I think that answers the
11 question, respectfully, Your Honor.

12 JUSTICE JACKSON: What if the judgment
13 is vacated? I'm trying to understand the
14 scenario. Even if we agree with you that, you
15 know, the judgment is the line and the person
16 appeals, goes up to the Fifth Circuit or
17 whatever circuit, and they agree and vacate the
18 judgment and send it back.

19 Any filings that had been submitted by
20 the prisoner in that interim, could they be
21 considered by the district court on remand?

22 MR. NIELSON: No, we don't think so,
23 Your Honor, but I want to make sure that we
24 understand. If that is this Court's rule, Texas
25 still prevails because there wasn't a remand

1 after the --

2 JUSTICE JACKSON: No, I understand.
3 That's not this case. But I -- I guess I'm a
4 little worried about a world in which if we are
5 pegging this to the judgment, the judgment is
6 subsequently vacated and there's new evidence
7 now in the record and the district court is
8 being called upon by the vacatur and the remand
9 to review it, I don't understand why -- totally
10 not this case -- but I don't understand why at
11 that point now the new evidence doesn't get
12 considered as an amendment of the initial habeas
13 filing.

14 MR. NIELSON: So -- so the way this
15 works in ordinary civil litigation -- and then I
16 will do an AEDPA gloss on it. In ordinary
17 litigation, if there is a remand from the court
18 of appeals --

19 JUSTICE JACKSON: Accompanying a
20 vacatur of the judgment.

21 MR. NIELSON: With a vacatur of the
22 judgment, you still are going to be limited by
23 the scope of the remand. It's not like if
24 there's a remand, now everything is up for
25 grabs.

1 It's still you're limited -- and,
2 again, if the Court needs to look at cases on
3 this, Wright and Miller Section 1488, I think
4 it's footnote 811 is the one that discusses this
5 line of cases, the -- the scope of the mandate
6 rule.

7 So, you know, for instance, you have a
8 case about a contract claim and --

9 JUSTICE JACKSON: So could the court
10 of appeals indicate, having, you know, been
11 alerted to the fact that there's this new
12 evidence out there -- I mean, I guess I -- I
13 don't understand a world in which new evidence
14 surfaces that everyone agrees could not have
15 been found before, and here it is, and it's
16 relevant to the issue of habeas.

17 I appreciate your argument that after
18 we have a judgment, you -- you know, as long as
19 the judgment stands, consideration of that would
20 be a second or successive kind of scenario under
21 AEDPA.

22 But if there is no judgment, because
23 it goes up to the court of appeals and the
24 judgment is vacated, it's unclear to me why the
25 new evidence that is relevant to the initial

1 habeas petition couldn't be looked at by a
2 district court reviewing that habeas petition.

3 If -- if the court of appeals says you
4 can, then you can?

5 MR. NIELSON: Again, it would be -- as
6 long as it is within the scope of the mandate.

7 JUSTICE JACKSON: Of -- of the
8 mandate. Yeah.

9 MR. NIELSON: Which often would be --
10 again, it would depend on the facts of the case.

11 But the AEDPA gloss on all of this is
12 under AEDPA, you have the COA requirement.

13 JUSTICE JACKSON: Yes.

14 MR. NIELSON: So the scope of the
15 appeals are inherently going to be limited. So
16 the scope of the mandate is going to be narrower
17 than in an ordinary case.

18 So imagine you have a case where
19 somebody says: I have a Brady claim and a
20 Strickland claim. And the district court says:
21 You lose on both. The Fifth -- the court of
22 appeals -- I said the Fifth Circuit. The court
23 of appeals grants a COA as to the Brady issue
24 and then reverses.

25 Back in front of the district court,

1 you can't say, well, I'm going to bring a
2 different Strickland claim and an AEDPA claim.
3 Because that's not within the scope of --

4 JUSTICE JACKSON: I see.

5 JUSTICE KAVANAUGH: On the Second
6 Circuit experience, I think your initial
7 response is precedent in text, but taken on its
8 own, it's workability.

9 Do you have a concern about how
10 workable it's been in the Second Circuit? It
11 seems like it's worked fine.

12 MR. NIELSON: Well, I -- we -- we
13 don't think it's worked fine. The case that we
14 cite was the Anderson case out of Connecticut,
15 where, you know, it seemed like a pretty
16 straightforward issue. The poor judge has to go
17 through three separate lines of analysis to try
18 to figure out what to do with this thing. And
19 that's, I think, a pretty straightforward case.

20 But I would also, you know, recognize
21 that, by definition, you're going to have
22 multiple appeals possible out of -- out of a
23 single case. So you have the very first one
24 that is up on appeal. While that's happening,
25 all the way up to this Court, up in certiorari

1 petition, they file a second one. They can keep
2 litigating that.

3 Well, that means you're going to get
4 two appeals out of a single -- what they claim
5 is a single application. That doesn't make any
6 sense.

7 And I think it's important to
8 recognize that 2244(b) doesn't mean you lose.
9 2244(b) means you have to go to the court of
10 appeals. And we're talking about mid-appeal
11 cases.

12 So that means, you know, unless it's,
13 like, day 29, so we're not just past Rule
14 59(e) -- 59(b) -- 59(e), rather, we're talking
15 about a case where you already have a court of
16 appeals panel who is already looking at this
17 thing.

18 It seems to me a lot more efficient
19 for that panel to be able to have the
20 opportunity to look at the new material, rather
21 than sending it back to a district court or a
22 magistrate judge three years ago, you know, 1500
23 cases later. They're not going to possibly
24 remember what that case was about, whereas you
25 have a panel looking at it right now.

1 JUSTICE KAVANAUGH: If -- if we
2 conclude the pre-'96 case law is just a mixed
3 bag, doesn't -- doesn't cut either way?

4 MR. NIELSON: Well, I mean, I would
5 urge -- I think the Court already answered the
6 history, in both Gonzalez and Bannister.

7 JUSTICE KAVANAUGH: On -- on this
8 issue.

9 MR. NIELSON: Sure. But, again, I
10 think the Court has already answered the history
11 in Gonzalez and Banister.

12 Because in every Circuit Court, if you
13 file a motion to amend a case that has been
14 closed for years, it's either one of two things:
15 It's either a nullity, does not exist, or it
16 will be construed as a Rule 60(b) motion. That
17 is the rule in Moore's Federal Practice.

18 We can cite other cases as well, we
19 have a whole string cite of these cases.

20 What we know from Gonzalez and
21 Banister, that if it's a Rule 60(b), well, then
22 it's already second and successive.

23 So I don't think the history works for
24 them. They do have a couple of cases where they
25 say, well, that looks like amendment, but they

1 didn't grant relief in any of those cases.
2 We're reading a lot into silence, especially
3 because we have cases like Judge Arnold's
4 decision from the Eighth Circuit. You know, he
5 knows a little bit about civil procedure, and he
6 says no, you can't -- you can't do this. I
7 think that would be the relevant history.

8 So you have all the cases that say
9 60(b) mid-appeal, that counts as second or
10 successive, and you have someone who tries to
11 get around that with Rule 15, and they say,
12 well, that's second and successive too. That's
13 the history in 19 -- leading up right to 1996.

14 If there are no further questions.

15 JUSTICE GORSUCH: Just one on habeas
16 jurisdiction. Why don't -- why -- why don't we
17 have it? I understand he may have completed one
18 sentence, but he's serving concurrent sentences
19 for other things. He claims his amendment will
20 help him with those.

21 MR. NIELSON: Yeah. A couple of
22 answers. One --

23 JUSTICE GORSUCH: One will do.

24 MR. NIELSON: Okay. Well, the easier
25 answer is hall --

1 JUSTICE GORSUCH: The better answer
2 hopefully.

3 (Laughter.)

4 MR. NIELSON: Well, then -- all right.

5 JUSTICE GORSUCH: Just answer it.

6 MR. NIELSON: I will give you -- the
7 easier answer to write an opinion is that was
8 the subject of the first habeas proceeding. The
9 state post-conviction court said there's three
10 lawyers that said you did this. You say they --
11 you didn't -- you didn't say that; they did.
12 That's a finding of fact.

13 Then he goes to the federal
14 post-conviction court about that, and that's
15 about the sexual abuse charges. And he has to
16 show that that is wrong. And he has no
17 evidence. And the district court says no
18 habeas, the Fifth Circuit affirms, and this
19 Court denies certiorari. That issue is closed.

20 CHIEF JUSTICE ROBERTS: Anything
21 further? No?

22 Thank you, counsel.

23 Mr. Guarnieri.

24

25

1 ORAL ARGUMENT OF MATTHEW GUARNIERI
2 FOR THE UNITED STATES, AS AMICUS CURIAE,
3 SUPPORTING THE RESPONDENT

4 MR. GUARNIERI: Mr. Chief Justice, and
5 may it please the Court:

6 Petitioner litigated his first Section
7 2254 application to a final judgment and was
8 granted a certificate of appealability. Two and
9 a half years later, while his appeal was still
10 pending, he went back to the district court and
11 filed what he came to characterize as a motion
12 to amend his first application.

13 Neither the Rules of Civil Procedure
14 nor the statutes applicable to habeas
15 proceedings grant -- permit granting such a
16 post-judgment request to amend. As a matter of
17 black-letter civil procedure law, a party may
18 not amend its pleadings after the entry of
19 judgment without first obtaining relief from the
20 judgment.

21 And in habeas proceedings, when a
22 prisoner requests relief from the judgment
23 mid-appeal to add new claims or to replead old
24 claims on the basis of allegedly new evidence,
25 Section 2244(b) applies.

1 Petitioner's request to inject new
2 claims or new evidence into these proceedings
3 cannot go forward unless he can satisfy AEDPA's
4 stringent gatekeeping requirements.

5 I welcome the Court's questions.

6 CHIEF JUSTICE ROBERTS: Is there any
7 way in which your argument for the United States
8 differs from that of Respondent?

9 MR. GUARNIERI: I -- I don't think so,
10 Mr. Chief Justice. Texas has taken a position
11 on a number of subsidiary issues with respect to
12 the operation of Federal Rule of Civil Procedure
13 62.1. The United States has not taken a
14 position on those issues.

15 But with respect to the main points at
16 issue in this case, I think the United States
17 and Texas are fully aligned. And I --

18 JUSTICE BARRETT: Counsel, I was just
19 going to say Petitioner points out that the
20 government doesn't complain about the new
21 argument injected in the brief. And you didn't
22 say anything in your brief. Do you want to say
23 anything now?

24 MR. GUARNIERI: I -- I -- I could
25 share the Court's frustration. I don't -- I

1 don't want to presuppose how the Court has
2 reacted to the merits arguments in this case,
3 but if there is a sense of frustration that
4 Petitioner's arguments have evolved
5 substantially from the certiorari stage to the
6 merits stage, I -- I could entirely understand
7 that frustration.

8 We have not urged the Court to dispose
9 of the case on those grounds, principally
10 because the United States does not have any
11 particular federal interest in whether
12 Petitioner preserved specific arguments in this
13 case. We are participating here so that the
14 Court -- because we think it's important to get
15 the underlying legal rules correct, and on those
16 points, again, I think we are in lockstep
17 agreement with Texas on all the points that
18 matter.

19 JUSTICE BARRETT: Well, speaking of
20 those rules, do you want to articulate exactly
21 what rule statement you would be looking for and
22 how you think it might affect 2255?

23 MR. GUARNIERI: Sure. I think the key
24 -- and this is -- comes directly from the
25 opinion of the Fifth Circuit in this case. The

1 key point is that the limitations in Section
2 2244(b) on the filing of second or successive
3 applications come into play when a district
4 court has entered a judgment on a first
5 application on the merits. It is the entry of
6 judgment that marks the terminal point in the
7 proceedings after which the gatekeeping
8 procedures in AEDPA apply.

9 And it doesn't -- I think, if you
10 agree with us on that, then it doesn't really
11 matter whether the Petitioner comes into court
12 and characterizes the relief that he is
13 requesting as a form of post-judgment amendment
14 or as a motion for relief from the judgment
15 under 60(b) or perhaps as a request to the court
16 of appeals itself to vacate and remand under 28
17 U.S.C. 2106 for the purpose of granting an
18 amendment.

19 All of those things, those are just
20 the procedural vehicles for requesting relief
21 from the judgment in order to add new claims or
22 to replead old claims with new evidence. Those
23 are two of the things that this Court identified
24 in Gonzalez as the kinds of arguments made after
25 judgment that are properly treated as second or

1 successive applications under Section 2244(b).

2 JUSTICE SOTOMAYOR: So where -- you're
3 not disagreeing with your colleague that -- or
4 are you -- that if the court of appeals vacates
5 and remands and vacates the judgment, is it then
6 second and successive?

7 MR. GUARNIERI: No, I think -- I think
8 the point that my colleague was making was that
9 the constraint there is going to be the scope of
10 the remand from the court of appeals. But if
11 you set that constraint aside, if the court of
12 appeals has vacated the judgment on a first
13 application for some reason other than just
14 clearing the way for amendment and the case goes
15 back to the district court, then we do think
16 that in that case the state prisoner is in the
17 same posture as pre-judgment before the case
18 went up on appeal, and they can seek to amend as
19 permitted under Rule 15.

20 Now, that's not this case. The Fifth
21 Circuit properly affirmed in the Petitioner's
22 initial appeal, and in the second appeal, I
23 think, the Fifth Circuit correctly recognized
24 that Section 2244(b) requires treating the --
25 the filing that Petitioner made in this case as

1 an application to file a second or successive
2 application and was properly transferred to the
3 Fifth Circuit for AEDPA gatekeeping.

4 JUSTICE BARRETT: Given that this is
5 not this case, do you think we need to ask -- or
6 answer Justice Sotomayor's question in the
7 opinion about the vacate and remand scenario?

8 MR. GUARNIERI: No, there's -- there
9 was no occasion to do that here, but I do think
10 that that is how, in general, the -- the
11 situation would properly be governed on the --
12 on a remand.

13 Now, again, I want to emphasize that
14 that presupposes that the court of appeals is
15 remanding for some reason other than just to
16 clear the way for amendment. I mean, that is
17 the kind of vacatur that my friend is requesting
18 here.

19 On his view of how this works, if you
20 discover -- claim to discover some new evidence
21 in the course of your appeal from a final
22 judgment on your first application, the -- the
23 state prisoner could go to the court of appeals
24 and request a vacatur and remand for no purpose
25 other than avoiding the limitations that would

1 otherwise apply to a Rule 60(b) motion filed in
2 the district court itself, which, again, under
3 Gonzalez, would have to be treated as a second
4 or successive application.

5 We don't think that kind of remand is
6 -- is permissible as a matter both under the
7 authority vested in the courts of appeals under
8 Section 2106 and just under AEDPA gatekeeping.

9 But if you were in a situation in
10 which the court of appeals vacates and remands
11 for some other reason, the district court made a
12 mistake in its entry of the first judgment and
13 the case goes back down, then, yes, I do think
14 there could be an opportunity for amendment in
15 those circumstances.

16 CHIEF JUSTICE ROBERTS: Anything
17 further? No?

18 Thank you, counsel.

19 MR. GUARNIERI: Thank you, Mr. Chief
20 Justice.

21 CHIEF JUSTICE ROBERTS: Mr. Bruland,
22 rebuttal?

23 REBUTTAL ARGUMENT OF PETER A. BRULAND
24 ON BEHALF OF THE PETITIONER

25 MR. BRULAND: Thank you. Justice

1 Sotomayor, Justice Barrett, I want to resist the
2 idea that that's not this case. Our whole
3 point, the only question we're asking you to
4 decide is, did the district court make a
5 threshold jurisdictional error about the meaning
6 of AEDPA?

7 I think it did for the textual
8 reasons, the historical reasons, the purposive
9 reasons. And if that's right, then I think the
10 correct remedy would be to reverse and to send
11 it back down. And what we would say then is we
12 could have the debate about, well, maybe they
13 would say harmless error because they don't like
14 the procedures or they have merits arguments,
15 but we would be asking you to correct the
16 threshold jurisdictional error that they made
17 about the meaning of 2244(b). That was what cut
18 everything off.

19 Now, I don't think there's any
20 daylight between what I'm asking you to do and
21 what the Third Circuit and even the Second
22 Circuit have said. It all goes to what
23 Mr. Guarnieri just said about, well, for some
24 other reason. And I don't understand where
25 that's coming from, because 2106 doesn't say

1 "for some other reason." And I don't see there
2 being any sort of penumbral emanations from Rule
3 60(b) that curtail the appellate court's power
4 to vacate.

5 So then the question becomes, well,
6 where are we getting this you can't ask the
7 district court to send up a flare so that the
8 court of appeals can vacate just because you
9 want to amend. It seems like what they're
10 asking to you do is put an atextual gloss on
11 2106 such that if you're asking for a certain
12 form of relief, then that doesn't fly.

13 I'm not sure where that comes from,
14 but it certainly doesn't come from AEDPA. And
15 this Court could reverse just saying the meaning
16 of 2244(b) is not what the lower court said.
17 And you could save all of this stuff about the
18 procedures and 2106 for another day.

19 We're just asking you to reverse on
20 the threshold AEDPA ground, which is
21 analytically distinct from the procedural
22 pathway.

23 Justice Alito, I want to take just one
24 more crack at addressing your concerns about the
25 QP. What I would say is the amendment argument

1 is a narrower ground that answers directly the
2 QP. We framed it broadly. We said does 2244
3 apply to all, some, or no mid-appeal habeas
4 filings? The amendment argument says, well, it
5 sure doesn't apply to all because textually,
6 historically, and looking at AEDPA's purposes,
7 an amendment is not a second or successive
8 petition.

9 I could understand the other side's
10 argument, if I were coming up here asking you to
11 accept something broader, but usually as an
12 advocate, it's a good thing to be standing up
13 here offering a narrow ground for relief with a
14 statutory hook.

15 Justice Kavanaugh, I want to say a few
16 words to you about workability because I think
17 that is the key or a key point in this case. It
18 really does come down to what is the proper
19 venue because a prisoner who gets new evidence
20 is going to race to court no matter what
21 decision this Court reaches today. And then
22 some district court or some court of appeals is
23 going to have to decide what to do.

24 But please don't take my word for it.
25 Don't take General Nielson's word for it. I

1 urge to you look at the judge's amicus brief,
2 because you have 17 of your former Article III
3 colleagues with nearly 300 years -- or 300 years
4 of experience collectively as appellate judges
5 and district court judges and magistrate judges
6 and what they're in here telling you is the
7 other side's rule is burdensome for the judicial
8 system as a whole. That's because the court of
9 appeals is going to happen -- have to open a
10 brand new original proceeding every time one of
11 these claims comes through the door.

12 And, remember, these claims are coming
13 whatever this Court says. So I think it's a
14 whole lot more efficient looking at AEDPA's
15 purposes to channel these things through the
16 district court, the single decisionmaker most
17 familiar with the case, which as Banister said
18 and Magwood said, the district court can take a
19 five-minute glance at this and say, no, it loses
20 on the merits, so no need to bother the court of
21 appeals.

22 These claims are coming. And the most
23 workable solution is to say they get channeled
24 through the district court while the appeal is
25 pending. I will be the first to grant Congress

1 inverted the normal presumption that appellate
2 courts are courts of review, not first view,
3 once the first case is over.

4 But while the first case is still
5 pending, 2244 does not apply. And it does not
6 flip that presumption. And I think the judges
7 well explain why there's no evidence that's what
8 Congress intended.

9 Again, the last thing I'll say and
10 then I'll sit down early, we are just asking you
11 to reverse the lower court's threshold error
12 about the meaning of 2244, and then we can fight
13 out whether Danny Rivers has merits issues or
14 procedural issues.

15 Bottom line, Danny Rivers might have
16 99 problems; it's just 2244 isn't one of them.
17 We would ask you to reverse. Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel. The case is submitted.

20 (Whereupon, at 12:38 p.m., the case
21 was submitted.)

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23

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