No. 18-6943

IN THE

Supreme Court of the United States

GREGORY DEAN BANISTER,

Petitioner,

v.

LORIE DAVIS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

On Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

The question presented, as stated by the Court in its order granting review, is:

Whether and under what circumstances a timely Rule 59(e) motion should be recharacterized as a second or successive habeas petition under *Gonzalez v. Crosby*, 545 U.S. 524 (2005).

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

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INTRODUCTION

This Court has long recognized that Rule 59 motions are "thoroughly consistent with the spirit of the habeas corpus statutes." *Browder v. Director, Dep't of Corrs. of Ill.*, 434 U.S. 257, 271 (1978). As a matter of historical practice, Rule 59(e) motions peacefully coexisted with restrictions on successive habeas petitions. Indeed, there is no evidence that courts *ever* treated timely Rule 59(e) motions that seek to identify errors in a just-issued trial court decision as equivalent to new habeas applications.

Congress did not abrogate *Browder* or otherwise displace Rule 59(e) motions from habeas litigation when it enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. AEDPA tightened common law restrictions on repeat habeas applications in certain ways, *see* 28 U.S.C. § 2244(b), but it also preserved the basic principle that state prisoners should have one full and fair opportunity to pursue habeas relief in federal court. A timely Rule 59(e) motion is, and has always been, part of that one full and fair opportunity.

The Fifth Circuit disagreed, holding that petitioner's Rule 59(e) motion should be recharacterized as a second habeas application. Based on that determination, the court of appeals concluded not only that petitioner's Rule 59(e) motion should be rejected, but also that, by filing it, he lost the ability to pursue an appeal from the denial of his first habeas application. The Fifth Circuit recognized that a timely Rule 59(e) motion extends the time to appeal. *See* J.A. 305 (citing Fed. Rule App. Proc. 4(a)(4)(A)(iv)). And the court acknowledged that pe-

titioner's Rule 59(e) motion was "timely." *Id.* Yet the Fifth Circuit nonetheless held that petitioner could not rely on Rule 4(a)(4)(A)(iv)'s timing rule, which led the court to convert his timely appeal into an untimely one. J.A. 306. Petitioner's mistake? He had used Rule 59(e) to "attack[] the merits of the district court's reasoning in denying the § 2254 petition." *Id.* In other words, because petitioner used Rule 59(e) for *exactly* its intended purpose, *see White v. New Hampshire Dep't of Emp't Sec.*, 455 U.S. 445, 451 (1982), he forfeited the ability to seek appellate review in his first habeas case.

The Fifth Circuit erred three times over in reaching that extraordinary result. This Court should reverse for any or all of the following reasons.

First, the Fifth Circuit's premise that Rule 59(e) motions are potentially subject to AEDPA's restrictions on "second or successive habeas corpus application[s]," 28 U.S.C. § 2244(b), is wrong. A timely Rule 59(e) motion is not a "second or successive" habeas application. Such motion, which must be filed within 28 days of judgment, does not provide any opportunity to circumvent section 2244(b) or otherwise frustrate AEDPA's objectives. To the contrary, Rule 59(e) promotes efficiency and helps to prevent piecemeal litigation by letting the district court promptly correct any errors identified by the habeas applicant, potentially avoiding unnecessary appeals. By contrast, the Fifth Circuit's rule makes it effectively impossible for habeas applicants to ask a district court to fix mistakes made in decisions on the merits.

Second, even if this Court concludes that *some* Rule 59(e) motions implicate section 2244(b)—on the

theory that such filings could sweep beyond the ordinary scope of Rule 59, despite being "*labeled* as 59(e) motions"—that reasoning would not extend to this case. *Howard v. United States*, 533 F.3d 472, 476 (6th Cir. 2008) (Boggs, C.J., dissenting). Petitioner's Rule 59(e) motion did not include any "wholly new claims," but rather used Rule 59(e) for its core purpose: identifying errors in the "judge's decision on the case as it was put before him." *Id.* There is absolutely nothing in AEDPA that suggests Congress wanted to "functionally . . . repeal[]" this paradigmatic use of Rule 59(e) in all habeas cases decided on the merits. *Id.*

Third, the Fifth Circuit erred in recharacterizing petitioner's Rule 59(e) motion as a second habeas application for purposes of Federal Rule of Appellate Procedure 4(a). Recharacterizing a Rule 59(e) motion in that specific context is not necessary to avoid a conflict with section 2244(b), and it does not otherwise advance AEDPA's objectives. The Fifth Circuit's rule generates uncertainty on a jurisdictional issue that demands a bright line. And it creates a serious risk that habeas applicants who carefully follow all of the applicable Rules of Civil and Appellate Procedure (like petitioner did here) may still forfeit their appellate rights.

OPINIONS BELOW

The opinion of the court of appeals is unreported; it is reproduced at J.A. 303–309. The opinion of the district court is also unreported; it is reproduced at J.A. 158–218.

JURISDICTION

The court of appeals entered judgment on May 8, 2018, and denied a timely petition for rehearing on June 18, 2018. The petition for a writ of certiorari was filed on September 17, 2018, and granted on June 24, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent text of 28 U.S.C. § 2244, Rule 59 of the Federal Rules of Civil Procedure, Rule 4 of the Federal Rules of Appellate Procedure, and Rules 11 and 12 of the Rules Governing Section 2254 Cases in the United States District Courts is set forth in an appendix to this brief.

STATEMENT

A. The Underlying State Court Judgment

In May 2002, petitioner struck and killed a bicyclist while driving a car. J.A. 159. The circumstances of that fatal accident were sharply contested. According to petitioner, he and the bicyclist were driving in the road and windy conditions caused the bicyclist to enter his path while in a highway acceleration lane. J.A. 77, 112, 168. By contrast, the State of Texas alleged that petitioner lost control of his vehicle, which caused him to strike the bicyclist. J.A. 55. The State further alleged that petitioner had been driving recklessly as a result of insufficient sleep caused by recent cocaine use. J.A. 159. The State pursued this theory even though petitioner was not arrested at the scene of the accident "[b]ecause there was no indication he was intoxicated." J.A. 10–11.

Moreover, according to the responding officer, petitioner did not appear fatigued. J.A. 198.

After initially charging petitioner with intoxicated manslaughter, J.A. 11, 116, the State changed course and indicted him on one count of aggravated assault with a deadly weapon, with the indictment alleging that petitioner caused the accident as the result of the introduction of cocaine into his body, J.A. 158–159. To support that charge, the State relied in part on evidence from a post-accident blood draw, which, according to petitioner, state officials had described as mandatory—a claim that was inconsistent with the State's implied consent law, which is triggered by an arrest. J.A. 11, 93–94. Testing indicated that petitioner's blood contained 0.36 mg/L of benzoylecgonine, a chemical byproduct of the body's metabolization of cocaine. J.A. 20–21, 59. Benzoylecgonine itself has no effect on the body; it merely indicates that cocaine had been present at some earlier time. J.A. 21. The State also relied on a statement made by petitioner while in custody (which had not been preceded by *Miranda* warnings), purportedly admitting that he had taken cocaine "the day before" the accident. J.A. 12.

Petitioner's trial counsel waited until after the deadline for pretrial filings to file a motion to suppress the evidence obtained from the blood draw, which forfeited any opportunity for a suppression hearing. J.A. 103–104, 200. At trial, the State argued that petitioner had consented to the blood draw, and the trial court denied petitioner's motion to suppress. J.A. 91. The State then tried to capitalize on that evidence, including by presenting an expert toxicologist who testified about the presence of

benzoylecgonine in petitioner's blood sample, as well as about the phenomenon of a "cocaine crash"—*i.e.*, severe fatigue after the stimulant effect of cocaine wears off. J.A. 20–21. Notably, although the trial court conditioned admission of this testimony on the expert laying a foundation for concluding that petitioner had been "suffering from the crash effect," the expert never did so. J.A. 21, 64, 192. Trial counsel failed to object to the expert's testimony on this basis. J.A. 192, 276.

On the defense side, petitioner tried to introduce a weather report indicating that there were winds of approximately 25 miles per hour at the time and location of the accident. J.A. 202. The trial court excluded the report for lack of reliability, and petitioner's counsel had no way to further substantiate the report because she had not investigated the relevant weather conditions. *Id.*

The case was put to a jury. Inexplicably, the trial court's jury instructions referred to petitioner's prior "conviction," even though no evidence of such a conviction had been introduced at trial. J.A. 83–84, 285–286. In fact, although the instruction indicated that petitioner's prior conviction could only be considered for impeachment, petitioner did not testify, precluding the introduction of prior-conviction evidence for this purpose. J.A. 83–84. Petitioner's counsel did not object to the instruction. J.A. 83, 286.

2. Petitioner was found guilty of the aggravated assault charge. J.A. 159. The trial court sentenced petitioner to 30 years of imprisonment, which was enhanced on the basis of a prior conviction for cocaine trafficking. *Id.*

On direct appeal, petitioner's counsel primarily challenged the introduction of petitioner's custodial statement alluding to cocaine use. J.A. 13–18. Counsel also appealed the admission of the State's expert testimony, but he did not raise the expert's failure to connect the testimony about a "cocaine crash" effect with the toxicology evidence in the case. J.A. 20. Counsel also did not challenge the sufficiency of the State's evidence to sustain a conviction. The Court of Appeals for the Seventh District affirmed in an unpublished decision. J.A. 24. This Court denied a petition for a writ of certiorari. *Bannister v. Texas,* 552 U.S. 825 (2007).

B. State Habeas Proceedings

Petitioner filed a timely application for a writ of habeas corpus in Texas state court. J.A. 160. The petition raised numerous claims, including several directed to the ineffective assistance provided by both his trial and appellate counsel. The state trial court denied the petition, but the Texas Court of Criminal Appeals remanded for further factual findings. J.A. 160–161.

On remand, petitioner's trial and appellate counsel submitted affidavits regarding their litigation performance and strategy. Petitioner's appellate counsel later submitted an amended affidavit, in which he conceded that he "should have raised" challenges to the legal and factual sufficiency of the State's evidence. J.A. 40. And while counsel did not express a view on whether such challenges would have succeeded, he admitted that "there was no tactical downside" to presenting them. J.A. 40.

The trial court denied the application for habeas relief on remand, and the Texas Court of Criminal Appeals affirmed without opinion. J.A. 42, 161.

C. Federal Habeas Proceedings

1. Petitioner, proceeding *pro se*, filed an application for habeas relief under 28 U.S.C. § 2254. J.A. 43, 157. Although the application raised many grounds, the majority centered on his claims that his counsel were constitutionally ineffective. J.A. 162, 186, 212. Among other things, petitioner asserted that his trial counsel had been ineffective for failing to file a timely motion to suppress the blood-draw evidence, failing to challenge the State's toxicology expert on a key ground, failing to investigate the weather conditions at the time of the accident, and failing to object to the jury instruction that gratuitously referenced his prior conviction. J.A. 103, 63, 110, 81. As to appellate counsel, petitioner's claims included an objection to counsel's failure to present a sufficiency challenge, which even counsel later admitted he "should have raised." J.A. 41, 55.

The district court denied the habeas application on the merits and denied a certificate of appealability. J.A. 158–218. The court concluded that petitioner could not establish that the performance of his counsel was both deficient and prejudicial with respect to any of the grounds raised. J.A. 211, 214.

2. Petitioner then filed a timely "Motion to Alter or Amend Judgment" under Rule 59(e), asking the district court "to correct manifest errors of law and fact." J.A. 219. The motion "address[ed] some, but not all, of the grounds in his [section] 2254 petition." *Id*. It is undisputed that petitioner's Rule 59(e) mo-

tion did not present any new claims for habeas relief, but instead "attacked the merits of the district court's reasoning in denying the § 2254 petition." J.A. 306; *accord* Br. in Opp. at 1.

"After consideration of the motion, and review of the underlying materials," the district court denied the motion. J.A. 254. Nothing in the district court's short order questioned whether petitioner's motion was properly presented under Rule 59(e). *Id.*

Within 30 days of the denial of petitioner's Rule 59(e) motion, petitioner requested a certificate of appealability and simultaneously filed a notice of appeal. J.A. 6–7, 255, 256. Petitioner made clear that he was challenging the district court's denial of his underlying application for habeas relief, rather than only the ruling on his Rule 59(e) motion. J.A. 255, 306.

3. Nearly a year later, the Fifth Circuit denied petitioner's request for a certificate of appealability. J.A. 306. But rather than address the merits of petitioner's habeas claims, the court denied the certificate on the sole ground that it lacked jurisdiction because, it concluded, the appeal was untimely. J.A. 305–306.

In reaching that conclusion, the Fifth Circuit recognized that petitioner had "timely filed a Rule 59(e) motion, which could extend the time for filing a notice of appeal until the entry of an order disposing of the motion." J.A. 305; *see* Fed. Rule App. Proc. 4(a)(4)(A)(iv) (providing that, if a party files a timely Rule 59(e) motion, "the time to file an appeal runs for all parties from the entry of the order disposing of [that] motion"). But the court determined that peti-

tioner could not rely on this timing rule because his Rule 59(e) motion was "properly characterized" as a second or successive application for a writ of habeas corpus. J.A. 306.

The Fifth Circuit based that conclusion on circuit precedent, which specifies that "a Rule 59(e) motion that 'add[s] a new ground for relief,' *or* 'attacks the federal court's previous resolution of the claim on the merits' is construed as a successive habeas petition." J.A. 305 (quoting *Williams v. Thaler*, 602 F.3d 291, 302 (5th Cir. 2010) (emphasis added)). According to the court of appeals, petitioner's Rule 59(e) motion was a second habeas application under that test because it "attacked the merits of the district court's reasoning in denying the § 2254 petition." J.A. 306. The Fifth Circuit further concluded that its own after-the-fact recharacterization of petitioner's motion precluded him from relying on Rule 4(a)(4)(A)(iv), because "[a] successive habeas petition filed in the district court is not among the motions that extends the time to file a notice of appeal." J.A. 305–306 (citing *Uranga v. Davis*, 879 F.3d 646, 648 (5th Cir. 2018)).[1]

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[1] In July 2019, petitioner was conditionally approved for parole, but he remains incarcerated and must clear several hurdles before his potential release, which would not occur before March 2020. His habeas challenge to his conviction will remain live regardless of whether he is incarcerated or subject to the lesser restrictions of parole. *See, e.g.*, *Spencer v. Kemna*, 523 U.S. 1, 7 (1998) ("[A] parolee's . . . challenge to the validity of his conviction always satisfies the case-or-controversy requirement."); *Jones v. Cunningham*, 371 U.S. 236, 241–243 (1963).

SUMMARY OF ARGUMENT

The Fifth Circuit incorrectly held that petitioner's timely Rule 59(e) motion was a "second or successive habeas corpus application" and that, as a result, he could not rely on the timing rule set by Federal Rule of Appellate Procedure 4(a)(4)(A)(iv), which made the appeal of the underlying habeas judgment untimely.

I. AEDPA is structured to provide a habeas applicant with one full and fair opportunity to pursue federal habeas relief. Section 2244(b)'s restrictions on second or successive habeas applications do not apply to timely Rule 59(e) motions, which are part of that one full opportunity.

A. As a matter of text, structure, and purpose, section 2244(b)'s gatekeeping rules for "second or successive" habeas applications do not apply to motions filed during adjudication of a prisoner's first habeas application. The phrase "second or successive" is a term of art rooted in historical habeas practice—whether an "application" is "second or successive" is informed by whether it would be abusive or successive pre-AEDPA. Motions pursing habeas relief as part of the first habeas proceeding are not abusive, and they do not trigger section 2244(b).

B. Timely Rule 59(e) motions are part of a prisoner's one "full and fair opportunity" to pursue federal habeas relief; such a motion is thus not in any way "inconsistent" with AEDPA's restrictions on second or successive habeas applications. *See* 28 U.S.C. § 2254 Rule 12. The same common law rule recognizing a district court's authority to alter or amend its just-issued judgments "was applied in habeas corpus cases." *Browder v. Director, Dep't of Corrs. of*

Ill., 434 U.S. 257, 270 (1978). And this Court held, in a pre-AEDPA case, that Rule 59's procedures are "thoroughly consistent with the spirit of the habeas corpus statutes." *Id.* at 271 (citation omitted). There is nothing in AEDPA that suggests Congress disagreed with that judgment and decided to dramatically limit the use of Rule 59(e) in habeas cases.

Rule 59(e) motions also have distinct features that prevent conflicts with section 2244(b). A Rule 59(e) motion must be filed within 28 days of judgment, with no possibility of an extension. *See* Fed. Rules Civ. Proc. 6(b)(2) and 59(e). The motion does not open up a second front of litigation. Rather, a timely motion *suspends* the finality of the underlying judgment in order to provide the district court with an opportunity to fix mistakes, and thus to avoid an unnecessary appeal. And if the district court denies the motion, its order merges into the final judgment, allowing for a single appeal.

C. This Court's decision in *Gonzalez v. Crosby*, 545 U.S. 524 (2005), provides no basis for recharacterizing timely Rule 59(e) motions as "second or successive" habeas applications. In *Gonzalez*, the Court held that, under certain circumstances, a Rule 60(b) motion can be "similar enough" to a habeas "application" that "failing to subject it" to section 2244(b)'s requirements "would be 'inconsistent with' the statute." *Id.* at 531. That holding depended on the unique characteristics of Rule 60(b). Rule 60(b) motions can be filed well after a case is final (including after any appeal), which was the fact-pattern in *Gonzalez*. As a result, Rule 60(b) can be used to "circumvent" section 2244(b)'s requirements in a way that Rule 59(e) motions—which must be filed *before* a po-

tential appeal—cannot. *Id.* Moreover, Rule 60(b) motions generally do *not* suspend a judgment's finality, and they give rise to separate appealable orders. *See Stone v. INS*, 514 U.S. 386, 401 (1995). They thus create a risk of fragmented litigation where Rule 59(e) motions do not.

The distinction between Rule 60(b) and Rule 59(e) motions is consistent with the treatment of analogous motions in the courts of appeals. This Court has suggested that motions to recall the appellate mandate should be treated like second or successive habeas applications. *See Calderon v. Thompson*, 523 U.S. 538, 553 (1998). By contrast, petitions for panel rehearing or rehearing en banc do not trigger section 2244(b). Rule 59(e) motions are much like rehearing petitions, whereas Rule 60(b) motions are the district court version of motions to recall the mandate.

D. The rule advocated by petitioner is also strongly supported by its "implications for habeas practice." *Panetti v. Quarterman*, 551 U.S. 930, 943–944 (2007) (citation omitted). Subjecting Rule 59(e) motions to section 2244(b) would not advance AEDPA's goals of "comity, finality, and federalism." *Id.* at 945 (quotation marks omitted). Rule 59(e) *promotes* efficiency by giving district courts "the opportunity to correct their own alleged errors," which, in turn, "prevents unnecessary burdens being placed on the courts of appeals." *United States v. Ibarra*, 502 U.S. 1, 5 (1991) (*per curiam*). Treating Rule 59(e) motions like second habeas applications would eviscerate those important benefits, by making it impossible—or at least unworkable—for a prisoner to seek reconsideration of an adverse merits decision in a habeas case. And it would also create an unlevel playing

field for habeas litigation, by making reconsideration of merits decisions a viable option only when the prisoner wins.

II. At a minimum, a Rule 59(e) motion that merely challenges the district court's rejection of claims raised in the prisoner's initial application is not equivalent to a second or successive habeas application. And, it is undisputed that petitioner's Rule 59(e) motion did not raise any new claims. As a historical matter, that traditional use of Rule 59(e) was never thought to implicate concerns about successive habeas applications or abuse of the writ. Nowhere in AEDPA did Congress express its intent to displace that understanding.

III. The Fifth Circuit also erred by concluding that petitioner's Rule 59(e) motion should be treated as a second or successive habeas application for purposes of Federal Rule of Appellate Procedure 4(a)(4)(A)(iv). The Fifth Circuit's approach deprives habeas applicants of a clear rule for when to notice an appeal. Prisoners who carefully follow the Rules may still lose the ability to pursue an appeal in their initial habeas case if a circuit court later decides that the prisoner's facially proper Rule 59(e) motion was not a "real" Rule 59(e) motion because it was "similar enough" to a habeas application. *Gonzalez*, 545 U.S. at 531. The Fifth Circuit's retroactive recharacterization rule is as unnecessary as it is unfair. At most, section 2244(b) might limit when a district court may grant relief under Rule 59(e); the statute does not require circuit courts to treat Rule 59(e) motions filed by habeas applicants as though they *do not even exist* for purposes of the appellate timing rules.

ARGUMENT

I. A Timely Rule 59(e) Motion Is Not Subject To AEDPA's Restrictions On "Second Or Successive" Habeas Applications Because It Is Part Of A Habeas Petitioner's Initial Habeas Application.

Like other civil actions, habeas corpus proceedings under 28 U.S.C. § 2254 are generally governed by the Federal Rules of Civil Procedure. *See* 28 U.S.C. § 2254 Rule 12; Fed. Rule Civ. Proc. 81(a)(4). An exception exists for instances in which applying the Civil Rules would be "inconsistent with any statutory provisions or [habeas-specific] rules." 28 U.S.C. § 2254 Rule 12. The question here is whether a habeas applicant's use of Rule 59(e) to seek reconsideration of a district court's just-issued decision denying his habeas application on the merits is "inconsistent" with either AEDPA or any other rule applicable to habeas litigation. The answer is no.

This Court has long held that "Rule 59 [is] applicable in habeas corpus proceedings," and it has recognized that the general process for seeking post-trial reconsideration in habeas litigation "conformed to the practice in other civil proceedings." *Browder v. Director, Dep't of Corrs. of Ill.*, 434 U.S. 257, 270 (1978). Contrary to the decision below, nothing in AEDPA's restrictions on "second or successive" habeas applications strips habeas petitioners of the procedural right to file timely post-judgment motions under Rule 59(e) before pursing appellate relief. As a matter of statutory text, structure, and history, AEDPA's gatekeeping provisions for "second or successive" habeas applications do not apply to timely

Rule 59(e) motions because such motions are "part and parcel of the petitioner's one full opportunity to seek collateral review." *Blystone v. Horn*, 664 F.3d 397, 414 (3d Cir. 2011) (quotation marks omitted).

A. AEDPA Is Structured To Provide Habeas Applicants With At Least One Full And Fair Opportunity For Federal Collateral Review.

Under federal habeas law, "[a] prisoner is entitled to one free-standing collateral attack per judgment." *Magwood v. Patterson*, 561 U.S. 320, 332–333 (2010) (citation omitted). AEDPA's restrictions on second or successive habeas applications, which build on common law rules prohibiting abuse of the writ, limit a prisoner's ability to launch a *new* collateral attack after his first habeas application has been fully litigated and decided again him. But those restrictions do not apply to motions authorized by the Rules of Civil Procedure that form part of the petitioner's *first* habeas proceeding.

1. "At common law, res judicata did not attach to a court's denial of habeas relief." *McCleskey v. Zant*, 499 U.S. 467, 490 (1991); *see Salinger v. Loisel*, 265 U.S. 224, 230 (1924). As a result, prisoners were able to bring "endless successive petitions" that renewed challenges to detention in the face of "previous decisions refusing discharge." *McCleskey*, 499 U.S. at 479 (quotation marks omitted). Over time, and particularly following the advent of appellate review of habeas denials, courts developed restrictions on repetitive applications. *Id.* at 480–483. Congress

adopted those principles by enacting 28 U.S.C. § 2244 in 1948. *Id.* at 483.[2]

This Court's pre-AEDPA decisions identified two types of repetitive petitions that were potentially subject to dismissal for misuse of the writ: same-claim successive petitions, which "raise[d] grounds identical to those raised and rejected on the merits on a prior petition," and "abusive petition[s]," which "rais[ed] grounds that were available but not relied upon in a prior petition." *Schlup v. Delo*, 513 U.S. 298, 318 n. 34 (1995); *see generally* 2 R. Hertz & J. S. Liebman, Federal Habeas Corpus Practice & Procedure § 28.1, pp. 1658–1659 (7th ed. 2018) (Hertz & Liebman) (reviewing the history of those doctrines). In either event, the government had the burden of pleading abuse of the writ as an affirmative defense. *See McCleskey*, 499 U.S. at 477.

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[2] As originally enacted, section 2244 provided that a federal court was not "required to entertain" a second or successive habeas petition from a state prisoner if the application "present[ed] no new ground" and if "the judge or court [was] satisfied that the ends of justice [would] not be served by" considering the petition. *McCleskey, v. Zant*, 499 U.S. 467, 483 (1991). Congress amended the statute in 1966 to provide that a second or successive petition "need not be entertained" by a federal court, "unless the application allege[d] and [was] predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge [was] satisfied that the applicant [had] not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ." *Id.* at 486. In enacting section 2244, Congress "made clear that as a general matter [it] did not intend the new section to disrupt the judicial evolution of habeas principles." *Id.* at 484.

As habeas doctrine developed before AEDPA's enactment in 1996, courts were instructed that they could only entertain same-claim successive petitions in the "rare instances" in which a second look was consistent with "the ends of justice"—a circumstance that required the petitioner to "supplement[] his constitutional claim with a colorable showing of factual innocence." *Kuhlmann v. Wilson*, 477 U.S. 436, 451–454 (1986); *see also Sanders v. United States*, 373 U.S. 1, 15–17 (1963). The abuse of the writ doctrine applicable to applications raising new habeas claims was, in turn, refined to require the petitioner to establish both "cause" and "prejudice" in order to excuse his failure to raise a claim in an earlier application. *See McCleskey*, 499 U.S. at 489–497. The recognized purpose of these doctrines was to limit a prisoner's ability to file a new application after he had already had one "full and fair opportunity" to pursue habeas relief. *Magwood*, 561 U.S. at 345 (Kennedy, J., dissenting); *see also Wong Doo v. United States*, 265 U.S. 239, 241 (1924).

Congress built on these doctrines in AEDPA to create "new statutory rules under § 2244(b)." *Magwood*, 561 U.S. at 337 (majority opinion). As amended by AEDPA, section 2244(b) now provides in relevant part:

> (1) "A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed."
>
> (2) "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" the application meets certain demanding conditions.

28 U.S.C. § 2244(b). The statute thus now bars same-claim successive applications entirely, *id.* § 2244(b)(1), while mandating dismissal of applications that raise new claims unless they clear the hurdles established for claims premised on newly discovered evidence or a new rule of constitutional law, *id.* § 2244(b)(2). In addition, an applicant must obtain leave from the court of appeals before filing a second habeas petition in the district court. *Id.* § 2244(b)(3).

2. "As a textual matter," section 2244(b)'s gatekeeping rules only apply to filings that present "[a] claim [ ] in a . . . habeas corpus application" that is "second or successive." *Calderon v. Thompson*, 523 U.S. 538, 553–554 (1998) (quotation marks omitted). Those conditions limit section 2244(b)'s scope, and make clear that its rules are not intended to prevent habeas petitioners from filing motions authorized by the Rules of Civil Procedure that are part of the "one full opportunity to seek collateral review." *Ching v. United States*, 298 F.3d 174, 177 (2d Cir. 2002) (Sotomayor, J.) (quotation marks omitted).

The phrase "second or successive" is a "term of art given substance" by this Court's "habeas corpus cases," including cases pre-dating AEDPA. *Slack v. McDaniel*, 529 U.S. 473, 486 (2000); *see also Panetti v. Quarterman*, 551 U.S. 930, 943–944 (2007). This Court has held "that the phrase does not simply 'refe[r] to all § 2254 applications filed second or successively in time.'" *Magwood*, 561 U.S. at 332 (quoting *Panetti*, 551 U.S. at 944). Rather, in determining

whether a filing should be treated as a second or successive application, this Court has looked to the "implications for habeas practice," *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644 (1998), as well as to "AEDPA's purposes of . . . 'further[ing] the principles of comity, finality, and federalism," *Panetti*, 551 U.S. at 945 (quotation marks omitted).

Thus, in considering whether a motion by a habeas petitioner that contains habeas claims is subject to section 2244(b), courts do not ask merely whether a prisoner has previously filed an application for habeas relief. Instead, courts look to whether the motion or application is of a type that would have been considered abusive or successive as a matter of historical practice.

For example, in applying these principles, the courts of appeals have uniformly held that "a motion to amend a petition to add new claims does not constitute a 'successive' petition." 2 Hertz & Liebman § 28.1, at 1656–1657 n. 4.[3] The reason is simple: a petition is not "second or successive" if the proceeding initiated by the first habeas application is not "*final*." *Ching*, 298 F.3d at 177; *see also Johnson v. United States*, 196 F.3d 802, 805 (7th Cir. 1999) ("[A] motion is caught by § 2244(b) . . . only if it is second

[3] *See, e.g.*, *United States v. Santarelli*, 929 F.3d 95, 104–105 (3d Cir. 2019); *United States v. Trent*, 884 F.3d 985, 993–994 (10th Cir. 2018); *United States v. Sellner*, 773 F.3d 927, 931–932 (8th Cir. 2014); *Clark v. United States*, 764 F.3d 653, 658–660 (6th Cir. 2014); *Ching v. United States*, 298 F.3d 174, 177 (2d Cir. 2002); *Littlejohn v. Artuz*, 271 F.3d 360, 362 (2d Cir. 2001); *Anthony v. Cambra*, 236 F.3d 568, 572 (9th Cir. 2000); *Johnson v. United States*, 196 F.3d 802, 804–805 (7th Cir. 1999).

or successive to a proceeding that 'counts' as the first. A petition that has reached final decision counts for this purpose.").[4] As Judge Easterbrook explained in an opinion for the Seventh Circuit, "AEDPA allows every prisoner one full opportunity to seek collateral review," and "[p]art of that opportunity" is to exercise the procedural rights available in "every civil case." *Johnson*, 196 F.3d at 805.

The same logic applies to other motions authorized by the Rules of Civil Procedure that are filed in the first habeas proceeding. As discussed in detail below, timely Rule 59(e) motions fit this description. By definition, a Rule 59(e) motion does not initiate a new case, and it cannot be filed after the first habeas proceeding has ended; to the contrary, "a timely Rule 59(e) motion *suspends* the finality of the judgment," *Blystone*, 664 F.3d at 414, and an order denying such a motion merges into the final judgment for purposes of appeal, *see* p. 24, *infra*. The ability to ask the district court to correct its errors under Rule 59(e) is "part of every civil case." *Johnson*, 196 F.3d at 805. Habeas litigation is no exception.

B. A Timely Rule 59(e) Motion Is Part Of The First Habeas Proceeding.

1. Added to the Federal Rules of Civil Procedure in 1946, Rule 59(e) codifies the traditional authority

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[4] Many circuits have recognized that even filings formally labeled as habeas applications should be treated as motions to amend if the first habeas application is still pending. *See, e.g.*, *Santarelli*, 929 F.3d, at 104; *Sellner*, 773 F.3d, at 931–932; *Woods v. Carey*, 525 F.3d 886, 888–890 (9th Cir. 2008); *Ching*, 298 F.3d, at 177–182.

of a district court to correct just-issued judgments before they are subject to appellate review. "At common law, a court had the power to alter or amend its own judgments during, but not after, the term of court in which the original judgment was rendered." *Browder*, 434 U.S. at 270. Thus, "while the term was in existence," the judge had "plenary power" to "modify his judgment for error of fact or law or even revoke it altogether." *Zimmerman v. United States*, 298 U.S. 167, 169–170 (1936). Litigants could invoke this authority by filing a petition for rehearing under Equity Rule 69 or by filing a motion for a new trial.[5] Rule 59 of Civil Procedure "represents an amalgamation" of those two types of motions. Advisory Committee's 1937 Note on Fed. Rule Civ. Proc. 59, 28 U.S.C. App., p. 273.

By adopting Rule 59, the Rules Committee replaced the "term" rule with strict and uniform time limits. *Browder*, 434 U.S. at 271. Originally, Rule 59 motions were due 10 days after judgment; in 2009, that deadline was extended to 28 days, in part, to better integrate the timing for post-trial motions with the deadline for noticing an appeal. Advisory Committee's 2009 Note on Fed. Rule. Civ. Proc. 59, 28 U.S.C. App., p. 274. The district court may *not* ex-

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[5] Equity Rule 69 stated, in pertinent part: "No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Circuit Court of Appeals or the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court." Fed. Rule Equity 69, *reprinted in* James L. Hopkins, *The New Federal Equity Rules* 247 (2d ed. 1918).

tend the 28-day deadline. *See* Fed. Rule Civ. Proc. 6(b)(2).

Rule 59(e) may be invoked only to "support reconsideration of matters properly encompassed in a decision on the merits." *White v. New Hampshire Dep't of Emp't Sec.*, 455 U.S. 445, 451 (1982).[6] The Rule promotes judicial efficiency by letting a district court "rectify its own mistakes in the period immediately following entry of judgment," *id.* at 450, thus avoiding needless appeals to correct obvious errors. It also ensures that the "appellate court will have the benefit of the district court's plenary findings," *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 177 (1989), to the extent a Rule 59(e) motion prompts the district court to clarify its earlier decision.

To achieve those important objectives and to "avoid[] piecemeal appellate review," the Federal Rules of Appellate Procedure provide that "the filing of a petition for rehearing or a motion to amend or alter the judgment suspends the finality of the original judgment, thereby extending the time for filing a notice of appeal" until after the district court resolves the motion. *FCC v. League of Women Voters of Cal.*,

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[6] Rule 59(e) does not enumerate the bases for seeking relief, but courts have traditionally granted relief on one of four grounds: (1) "manifest errors of law or fact upon which the judgment is based"; (2) "newly discovered or previously unavailable evidence"; (3) "manifest injustice"; and (4) "an intervening change in controlling law." 11 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2810.1, pp. 158–162 (3d ed. 2003) (Wright & Miller).

468 U.S. 364, 373 n. 10 (1984) (quotation marks omitted).

Specifically, under Federal Rule of Appellate Procedure 4(a)(4)(A)(iv), if a Rule 59(e) motion is filed, the 30-day clock for noticing an appeal does not start until after entry of the order disposing of the motion. Any notice of appeal that is filed early does not become effective until after the district court resolves the Rule 59(e) motion. *See* Fed. Rule App. Proc. 4(a)(4)(B). Moreover, an order denying a Rule 59(e) motion is not separately appealable; the appeal runs from the underlying judgment, and any challenge to the district court's grounds for rejecting the Rule 59(e) motion can be taken up as part of the single appeal. 11 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2818, p. 246 (3d. ed. 2008) (Wright & Miller); *see also Foman v. Davis*, 371 U.S. 178, 181 (1962) (holding that the court of appeals should have treated a notice appealing the denial of a Rule 59(e) motion as seeking review of the underlying judgment). As a result, a Rule 59(e) decision functions much like any other interlocutory order in a civil proceeding: the order "merge[s]" into the final judgment, thus "combin[ing] . . . all stages of the proceeding" in "one review" by the court of appeals. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

The way these interlocking Rules operate leaves no doubt that a motion to alter and amend the judgment under Rule 59(e) is part of a single civil action that culminates in a single appealable judgment. A timely Rule 59(e) motion is thus not like a collateral attack on a final judgment and is not in any way analogous to initiating a second civil action.

2. a. A district court's authority "to rectify its own mistakes in the period immediately following entry of judgment," *White*, 455 U.S. at 450, extends fully to habeas litigation. Indeed, this Court has already recognized as much. As the Court explained in *Browder*, the common law rule allowing a court "to alter or amend its own judgments" during the term they were issued "was applied in habeas corpus cases." 434 U.S. at 270.

Nothing changed when the Rules Committee adopted Rule 59(e) to codify this authority, while substituting a strict time limit for the term rule. In fact, this Court squarely held in *Browder* that Rule 59 is "applicable in habeas corpus proceedings." 434 U.S. at 271. The Court reasoned that the procedures for Rule 59 are "thoroughly consistent with the spirit of the habeas corpus statutes." *Id.* As the Court explained, Rule 59 "is based on an interest in speedy disposition and finality," and its "requirement of a prompt motion for reconsideration is well suited to the special problems and character of [habeas] proceedings." *Id.* (quotation marks omitted).

In light of *Browder*, there could have been no serious argument pre-AEDPA that a timely Rule 59(e) motion by a habeas petitioner asking the district court to reconsider the denial of his application was "inconsistent with applicable federal statutory provisions." *Gonzalez*, 545 U.S. at 529 (quotation marks omitted). Before AEDPA's enactment, section 2244 provided that a judge would not entertain a successive application that "presents no new ground not theretofore presented and determined" unless doing so would serve "the ends of justice." 28 U.S.C. § 2244 (1952). As discussed, the "ends of justice" standard

was demanding, with this Court ultimately holding that it required a "colorable showing of factual innocence." *Kuhlmann*, 477 U.S. at 454. But there is not a hint in the case law that any court (or even any litigant) thought that a typical Rule 59(e) motion filed by a habeas petitioner had to clear this exceptionally high bar. Courts adjudicating habeas corpus applications regularly entertained Rule 59(e) motions under the ordinary standards for civil cases, and it was well established that filing such a motion would suspend the judgment's finality.[7]

b. In enacting AEDPA, Congress was presumptively aware of this Court's holding in *Browder* that use of Rule 59 by habeas applicants is "thoroughly consistent with the spirit of the habeas corpus statutes." 434 U.S. at 271; *see Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 169 (2014) ("[W]e presume that Congress is aware of existing law when it passes legislation." (citation omitted)). And when Congress "intends to effect a change" in law that departs from this Court's authoritative interpretation of a legal text, "it ordinarily provides a relatively clear indication of its intent." *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1520 (2017); *see also Midatlantic Nat'l Bank v. New Jersey Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986) ("The normal rule of statutory construction is that if Con-

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[7] *See, e.g.*, *Parkus v. Delo*, 985 F.3d 425, 426 (8th Cir. 1993); *Lomax v. Armontrout*, 923 F.2d 574, 575 (8th Cir. 1991); *Archer v. Lynaugh*, 821 F.2d 1094, 1096–1097 (5th Cir. 1987); *Inglese v. Warden, U.S. Penitentiary*, 687 F.2d 362, 363 (11th Cir. 1982).

gress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." (citation omitted)).

There is absolutely nothing in AEDPA that suggests Congress intended to abrogate *Browder* and foreclose certain Rule 59(e) motions as being "inconsistent" with the statute. 28 U.S.C. § 2254 Rule 12. This Court's post-AEDPA precedent, which recognizes that the phrase "second or successive" is informed by this Court's pre-AEDPA case law, further counsels against such a disruptive reading of the statute. *Slack*, 529 U.S. at 486. After AEDPA, just as before it, a timely Rule 59(e) motion is part of the first habeas proceeding—not a second collateral attack. There is accordingly no inconsistency between a habeas petitioner's use of Rule 59(e) to challenge the district court's decision and section 2244(b)'s gatekeeping provisions.

C. *Gonzalez*'s Holding That Some Rule 60(b) Motions Are Subject To Section 2244(b) Has No Bearing On The Treatment Of Timely Rule 59(e) Motions.

Circuits that have subjected Rule 59(e) motions to section 2244(b) have relied on this Court's *Gonzalez* decision, which addressed whether and under what circumstances Rule 60(b) motions should be treated like second or successive habeas applications. 545 U.S. at 530–35; *see, e.g.*, *Williams v. Thaler*, 602 F.3d 291, 303–305 (5th Cir. 2010); *Ward v. Norris*, 577 F.3d 925, 932–935 (8th Cir. 2009); *see also United States v. Pedraza*, 466 F.3d 932, 933 (10th Cir. 2006) (extending precedent concerning Rule 60(b) to Rule

59(e) motions, but without specifically referencing *Gonzalez*). The reasoning of these circuits' opinions is thin, with courts suggesting that because "Rules 59(e) and 60(b) permit the same relief—a change in judgment," they must also present the same potential for conflict with section 2244(b). *Williams*, 602 F.3d at 303–304.[8] But decisions like *Williams* disregard a basic distinction between timely Rule 59(e) motions like the one here and the Rule 60(b) motion at issue in *Gonzalez*: there, *after* fully litigating his habeas proceeding all the way through appeal, Gonzalez filed a Rule 60(b) motion in an effort to reopen the adverse judgment from that concluded proceeding. *Gonzalez*, 545 U.S. at 527. A Rule 59(e) motion, which must be filed *before* the first appeal, provides no such opportunity to revive a fully adjudicated first habeas application.

1. In *Gonzalez*, this Court held that a Rule 60(b) motion is subject to section 2244(b)'s restrictions on second or successive habeas applications to the extent—and only to the extent—that the motion "contains one or more 'claims'" for habeas relief. 545 U.S. at 530. The Court recognized that even though such a motion may "not [be] in substance a 'habeas corpus application,'" it is "at least similar enough" to one

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[8] Moreover, several of the circuit decisions that have been placed on the Fifth Circuit's side of the split actually addressed the materially different situation in which a habeas petitioner filed a Rule 59(e) motion to seek reconsideration of the denial of his Rule 60(b) motion—not his initial habeas application. *See Blystone v. Horn*, 664 F.3d 397, 415 n. 12 (3d Cir. 2011) (distinguishing the decisions of the Eighth and Tenth Circuits in *Ward* and *Pedraza*, respectively, on that basis).

"that failing to subject [the Rule 60(b) motion] to the same requirements would be 'inconsistent with'" AEDPA's restrictions. *Id.* at 531. As the Court explained, "[u]sing Rule 60(b) to present new claims for relief from a state court's judgment of conviction—even claims couched in the language of a true Rule 60(b) motion—circumvents AEDPA's requirement that a new claim be dismissed unless it relies on either a new rule of constitutional law or newly discovered facts." *Id.*

The procedural posture in *Gonzalez* underscores the potential conflict between Rule 60(b) and section 2244(b). When the prisoner in *Gonzalez* filed his Rule 60(b) motion, his first habeas case had been closed for more than a year: the Eleventh Circuit denied a certificate of appealability in April 2000, and he filed a motion under Rule 60(b)(6) fifteen months later in July 2001 based on an intervening Supreme Court decision. *See Gonzalez v. Secretary for Dep't of Corr.*, 317 F.3d 1308, 1310 (11th Cir. 2003). Given that posture, the only issue the Court faced in deciding whether section 2244(b)'s restrictions applied was whether the Rule 60(b) motion presented a claim for habeas relief (the Court held that it did not, *see* 545 U.S. at 535–536). There was no question that if the motion were equivalent to a habeas application, then it would be a *second* application because the petitioner had already "expended the one full opportunity to seek collateral review that AEDPA ensures." *Blystone*, 664 F.3d at 413 (quotation marks omitted). By contrast, the issue here is not whether petitioner's Rule 59(e) motion contained a habeas claim because, for example, it "attacks the federal court's previous resolution of a claim on the merits."

Gonzalez, 545 U.S. at 532 (emphasis omitted). Even assuming that petitioner's Rule 59(e) motion could be so characterized, it *still* is not a second habeas application because petitioner filed the motion in an *ongoing* habeas proceeding.

2. The Court's implicit assumption in *Gonzalez* that the motion at issue should be treated like a second or successive habeas application if it presented any habeas "claims" also follows directly from the nature of Rule 60(b) motions.

The "whole purpose" of Rule 60(b) "is to make an exception to finality." *Gonzalez*, 545 U.S. at 529. Unlike the 28-day deadline for Rule 59(e) motions, Rule 60(b) motions may be filed long after a judgment is final. Motions based on the grounds set forth in Rule 60(b)(1), (2), and (3) may be filed up to one year after entry of judgment; for the Rule's remaining three grounds—including the broad catch-all recognized by Rule 60(b)(6)—the only requirement is that the motion "be made within a reasonable time." Fed. Rule Civ. Proc. 60(c)(1). The Rule thus presents an obvious path for trying to relitigate a first habeas application that was denied on the merits—and for circumventing the barriers Congress imposed in section 2244(b) to block most such attempts.

There are also several features of Rule 60(b) motions that show they are not part of the same proceeding initiated by the first habeas application. Unlike Rule 59(e) motions, a Rule 60(b) motion ordinarily does not "affect the finality of[] the original judgment" or otherwise extend the time for appeal.

Browder, 434 U.S. at 263 n. 7; *see also Stone v. INS*, 514 U.S. 386, 401 (1995).[9] Similarly, unless a Rule 60(b) motion is filed within 28 days of judgment, "the pendency of the motion before the district court does not affect the continuity of a prior-taken appeal." *Stone*, 514 U.S. at 401. And "an appeal from denial of [a] Rule 60(b)" motion filed outside of the 28-day window "does not bring up the underlying judgment for review." *Browder*, 434 U.S. at 263 n. 7 (citation omitted). Rather, "[t]he denial of the motion is appealable as a separate final order." *Stone*, 514 U.S. at 401.

Given these distinct features of Rule 60(b) motions, it "would be 'inconsistent with'" AEDPA to let a habeas petitioner use the Rule to challenge the denial of his habeas application on the merits. *Gonzalez*, 545 U.S. at 531. At a minimum, resort to a Rule 60(b) motion after a district court judgment is final may promote the sort of "piecemeal" litigation that section 2244(b) is intended to discourage, *see Panetti*, 551 U.S. at 946, by letting a petitioner pursue habeas relief on two different fronts—potentially leading to two different appeals from two different final judgments.

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[9] The exception that proves the rule is that a motion styled under Rule 60(b) will suspend entry of final judgment and thus extend the time to notice an appeal if it is filed within 28 days of the initial judgment. *See* Fed. Rule App. Proc. 4(a)(4)(A)(vi). In that situation, courts treat the Rule 60(b) motion as substantively equivalent to a Rule 59(e) motion. *See* Advisory Committee's 1993 Note on Fed. Rule App. Proc 4, 28 U.S.C., App., p. 665; 16 Wright & Miller, § 3950.4, at 342.

The conflict is even starker if a petitioner does what Gonzalez did: files a Rule 60(b) motion after the conclusion of any appeals, when denial of the first habeas application is final by any definition. It is thus unsurprising that, by the time this Court addressed the issue in *Gonzalez*, "[v]irtually every Court of Appeals to consider the question" had already held that a Rule 60(b) motion containing one or more habeas claims was "in substance a successive habeas petition and should be treated accordingly." 545 U.S. at 531.

Rule 59(e) does not present these concerns. As discussed, the motion is part of the single habeas proceeding: filing a timely Rule 59(e) motion suspends the final judgment; an order denying the motion merges into the final judgment; and any challenge to that denial is taken up as part of a single appeal. *See* p. 24, *supra*. And perhaps most significantly, a Rule 59(e) motion does not provide habeas petitioners seeking to resuscitate a previously rejected habeas challenge with a path to avoid section 2244(b).

In the *Gonzalez* fact-pattern, treating a Rule 60(b) motion that presents a habeas claim as "similar enough" to a second or successive application, 545 U.S. at 531, promotes finality: the case is over unless the court of appeals determines that the prisoner's motion meets one of the narrow conditions for authorized second or successive applications. Characterizing a prisoner's Rule 59(e) motion in this same way, by contrast, will not force him to go through section 2244(b) to continue his challenge; he may still seek review of the district court's judgment by bypassing Rule 59(e) and instead obtaining a certificate

of appealability. *See* 28 U.S.C. § 2253(c). And the standard for receiving a certificate of appealability is *much* less demanding than section 2244(b)—the petitioner need only show that "reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (quotation marks omitted). Indeed, the standard for a certificate of appealability is lower even than the standard for relief under Rule 59(e), which, at a minimum, requires showing that there *was* an error, not merely that reasonable jurists *could think* there was one.

It thus makes little sense to view a Rule 59(e) motion as an attempt to "circumvent" AEDPA. *Gonzalez*, 545 U.S. at 531. The motion simply lets a habeas applicant invite the district court to correct its own errors before the applicant asks an appellate court to correct them instead.

3. This Court's treatment of analogous motions at the appellate level further confirms that section 2244(b) applies differently to motions under Rule 59(e) and Rule 60(b). A Rule 60(b) motion is the district court equivalent of a motion to recall the mandate—a type of motion that this Court has suggested should be treated like a second or successive habeas application. *See Calderon*, 523 U.S. at 553. In either case, "a post-finality motion" that includes a claim for habeas relief "produces a second countable" application. *Johnson*, 196 F.3d at 805. A Rule 59(e) motion, by contrast, is comparable to the filing of a petition for rehearing *before* the appellate mandate is-

sues, which plainly is *not* a second or successive application.

a. In *Calderon*, this Court confronted the question whether the court of appeals, acting en banc, had violated section 2244(b) or otherwise abused its discretion by recalling its mandate and reversing its decision to deny habeas relief. 523 U.S. at 541–542. As relevant here, the Court held that "the terms of AEDPA" did "not govern," because the court of appeals had decided *sua sponte* to recall the mandate that had been issued to close out petitioner's first habeas application. *Id.* at 554. But the Court also suggested in dicta that "a prisoner's motion to recall the mandate on the basis of the merits of the underlying decision can be regarded as a second or successive application for purposes of § 2244(b)" because "otherwise[] petitioners could evade" those statutory limits. *Id.* at 553.

The Court in *Gonzalez* thought that this statement from *Calderon* was "entirely consonant" with its holding as to Rule 60(b) motions. 545 U.S. at 534. That is not surprising, given the obvious similarities between motions to recall the mandate and Rule 60(b) motions, which both seek to set aside fully and finally adjudicated judgments, but merely do so at different levels of the judicial system.

b. A Rule 59(e) motion is not like a motion to recall the mandate. As noted, the motion does not seek vacatur of a final judgment; its filing "suspends the finality of the original judgment." *League of Women Voters*, 468 U.S. at 373 n. 10 (quotation marks and brackets omitted).

Instead, a Rule 59(e) motion is quite similar to a petition for rehearing. Like a Rule 59(e) motion, petitions for rehearing must be filed within a short amount of time following entry of the court's decision. *See* Fed. Rule App. Proc. 40(a)(1). And similar to the effect of a Rule 59(e) motion, filing a petition for rehearing automatically stays issuance of the appellate court's mandate—the event that *actually* signals finality. *See* Fed. Rule App. Proc. 41(b); *see also Calderon*, 523 U.S. at 556–557 (describing the assurance of "real finality" provided by the "mandate denying relief"); *Wilson v. Ozmint*, 357 F.3d 461, 464 (4th Cir. 2004) (noting that, because the mandate had not issued in a habeas appeal, the court could, "at [its] discretion, amend what [it] previously decided" (quotation marks omitted)).

There is no serious argument that a petition for panel rehearing or rehearing en banc filed by a prisoner in his first habeas proceeding is a second habeas application. AEDPA clearly presupposes that rehearing petitions are part of appellate review in habeas; when Congress wanted to limit the right to file a rehearing petition, it said so expressly. *See* 28 U.S.C. § 2244(b)(3)(E) ("The grant or denial of an authorization by a court of appeals to file a second or successive application . . . shall not be the subject of a petition for rehearing."); *see also id.* § 2266(c)(1)(B) (recognizing petitions for rehearing form part of the process for first habeas review even under the expedited procedures applicable to certified opt-in states). And courts do not appear to have ever thought that rehearing petitions are equivalent to second habeas applications anytime they "attack" the panel's "previous resolution of a claim on the merits." *Gonzalez*,

545 U.S. at 532. Indeed, even as the Court in *Calderon* explored whether recalling the appellate mandate conflicts with AEDPA, it recited the fact that the habeas applicant had "filed a petition for rehearing" without ever suggesting that such a petition might conflict with section 2244(b). 523 U.S. at 546. That is because it clearly does not. And neither does Rule 59(e)—the rehearing petition's district court counterpart.

D. Subjecting Rule 59(e) Motions To Section 2244(b) Fails To Advance AEDPA's Goals And Produces Anomalous Results.

In cases applying section 2244(b), this Court has recognized that its interpretation of the statute should be informed by the "implications for habeas practice." *Pannetti*, 551 U.S. at 943. Here, functional considerations overwhelmingly favor treating a timely Rule 59(e) motion as part of the first federal habeas proceeding rather than as a second habeas application. The contrary approach adopted by the Fifth Circuit, meanwhile, produces "distortions and inefficiencies"—compromising, rather than promoting, AEDPA's objectives. *Id.*

1. There is a clear mismatch between Rule 59(e) motions and AEDPA's gatekeeping provisions for second or successive habeas applications. Rule 59(e) recognizes the traditional authority of a district court to correct errors in a just-issued judgment, which may avoid wasting resources through an unnecessary appeal. Putting that square peg through the round hole of section 2244(b) would erode the usefulness of Rule 59(e) in habeas litigation.

Most notably, such an approach would completely foreclose habeas petitioners from using Rule 59(e) for its most common purpose: to seek "reconsideration of matters properly encompassed in a decision on the merits." *White*, 455 U.S. at 451. Under section 2244(b)(1), successive applications that seek review of a claim that "was presented in a prior application" are barred—full stop. As a result, applying section 2244(b) to any prisoner-filed Rule 59(e) motions that "alleg[e] that the court erred in denying habeas relief on the merits," *Gonzalez*, 545 U.S. at 532, would "vitiate the proper office that Rule 59(e) fills" in habeas litigation, *Howard v. United States*, 533 F.3d 472, 476 (6th Cir. 2008) (Boggs, C.J., dissenting). That implication of the Fifth Circuit's approach is problematic, because there is nothing in AEDPA's text, history, or purpose that suggests Congress intended to "so impede Rule 59(e)'s operation" in habeas cases. *Blystone*, 664 F.3d at 414; *see also Rishor v. Ferguson*, 822 F.3d 482, 492 (9th Cir. 2016) ("We see no sign that Congress intended AEDPA to vitiate the district court's power to 'rectify its own mistakes in the period immediately following the entry of judgment,' obviating the time and expense of unnecessary appellate proceedings." (quoting *White*, 455 U.S. at 450)).

Even for the much smaller set of Rule 59(e) motions that could be subject to section 2244(b)(2)'s restrictions under the Fifth Circuit's approach—rather than to section 2244(b)(1)'s absolute bar—AEDPA's rules for second or successive habeas applications are a poor fit in obvious ways. Consider, for example, a Rule 59(e) motion asserting that an intervening change in substantive law calls for the court to

amend the judgment in petitioner's favor. *See* 11 Wright & Miller § 2810.1, at 162 ("[A] Rule 59(e) motion may be justified by an intervening change in controlling law.").[10] Assuming that such a motion could be characterized as presenting a new "claim," *see Gonzalez*, 545 U.S. at 532, the habeas petitioner would have to go first to the court of appeals merely to secure permission to file a Rule 59(e) motion raising the new authority, *see* 28 U.S.C. § 2244(b)(3). Requiring that time-consuming detour frustrates the purpose of filing a Rule 59(e) motion in the first place: *i.e.*, providing the district court with a chance to correct a just-issued judgment *before* a litigant asks the appellate court for relief. *See* pp. 23–24, *supra*. Why would a habeas applicant bother with such a convoluted path to reconsideration when he could instead just move ahead to pursue an appeal?

The upshot is that if the Fifth Circuit's approach were adopted, then Rule 59(e) would cease to be a viable procedural option for prisoners to seek prompt

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[10] As a practical matter, it will be rare for a decision to issue in the 28 days following entry of judgment that could form the basis of a habeas applicant's claim for relief on the merits. Because substantive review under section 2254(d) is "backward-looking," a habeas petitioner often will not be able to invoke decisions issued during federal habeas litigation to support the merits of his application. *Greene v. Fisher*, 565 U.S. 34, 38 (2011); *see also Teague v. Lane*, 489 U.S. 288, 310–311 (1989). For similar reasons, Rule 59(e) will only very rarely present a viable path for introducing newly discovered evidence in habeas litigation. *Cf. Cullen v. Pinholster*, 563 U.S. 170, 181–182 (2011) (recognizing that review under section 2254(d) is limited to the record before the state court).

reconsideration of just-entered judgments denying habeas applications on the merits. And that would place "unnecessary burdens" on the courts of appeal, by taking away an "opportunity" for district courts "to correct their own alleged errors." *United States v. Ibarra*, 502 U.S. 1, 5–6 (1991) (*per curiam*). It could also lead to an undesirable uptick in "piecemeal appellate review of judgments," *Osterneck*, 489 U.S. at 177, as appellate courts may be compelled to issue remands in cases involving obvious, and easily correctable, district court errors.

In short, the Fifth Circuit's approach to Rule 59(e) motions would *frustrate*—rather than promote—AEDPA's goals of "conserv[ing] judicial resources, reduc[ing] piecemeal litigation, [and] streamlin[ing] federal habeas proceedings." *Panetti*, 551 U.S. at 946 (quotation marks omitted). And it would have those ill effects without furthering "principles of comity, finality, and federalism," *id.* at 945 (quotation marks omitted), because denying access to Rule 59(e) would not end a prisoner's first challenge to his state conviction—it would merely redirect him to seek a certificate of appealability without giving the district court a chance to correct obvious errors or to otherwise clarify its reasoning, *see* pp. 32–33, *supra*.

2. All of these implications of the Fifth Circuit's approach to Rule 59(e) motions are bad enough on their own to strongly disfavor that court's interpretation of section 2244(b). But the problems are compounded by the fact that these consequences operate to systematically disadvantage one side in habeas litigation, and thus create an imbalance between habeas petitioners and their wardens. Because section

2244(b) applies only to "second or successive habeas application[s]," the Fifth Circuit's approach would allow the State to make full use of Rule 59(e) when challenging a decision granting the writ, even as habeas applicants lack a corresponding ability to contest a decision that comes out the other way.[11]

This Court has rejected interpretations of section 2244(b) that create such "procedural anomalies"—*i.e.*, "allowing review where the lower court decision disfavors, but denying review where it favors, the Government." *Castro v. United States*, 540 U.S. 375, 380–381 (2003). Before the Court will accept such a result, there must be a "clear indication" that Congress intended the disparity. *Id.* at 381. Indeed, the Court in *Gonzalez*—in rejecting the State's argument that *all* prisoner-filed Rule 60(b) motions in habeas proceedings are like successive habeas applications—pointed to the fact that either the prisoner or the State may invoke the Rule, which the Court thought supported its view that "Rule 60(b) has an unquestionably valid role to play in habeas cases." 545 U.S. at 534. Thus, although there are some ways in which the procedural options for habeas applicants are more limited than those available to the State, those differences emerge from the clear language and structure of AEDPA—not from the sort of indirect rescission of procedural rights contemplated by the Fifth Circuit.

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[11] Government litigants regularly invoke Rule 59(e) to challenge adverse habeas decisions. *See, e.g.*, *Vitko v. United States*, No. 08-cr-171, 2016 WL 2930909, at *1 (D. Me. May 19, 2016); *United States v. Evans*, No. 2:92-cr-163-5, 2015 WL 2169503, at *1 (E.D. Va. May 8, 2015).

For example, although AEDPA curtails the appellate rights of habeas applicants by requiring them to obtain a certificate of appealability—a limitation that does not apply to the State—this one-sided restriction is a clear consequence of Congress's decision to limit appeals that a habeas "applicant" may pursue. *See* 28 U.S.C. § 2253(c). That asymmetry is also consistent with habeas practice; long before AEDPA, Congress "established the requirement that a prisoner obtain a certificate of probable cause to appeal." *Barefoot v. Estelle*, 463 U.S. 880, 892 (1983). Moreover, the certificate of appealability requirement merely imposes a heightened burden on habeas applicants seeking appellate review; it does not strip away a path to review of a merits decision *completely*, as would the Fifth Circuit's approach to Rule 59(e) motions, *see* p. 33, *supra*.

Given the absence of any comparable statutory text or historical precedent that supports the Fifth Circuit's approach, there is no reason for this Court to accept the "troublesome results" of its interpretation of section 2244(b), which would turn Rule 59(e) into a one-way ratchet in habeas cases. *Castro*, 540 U.S. at 380.

* * * * *

A timely Rule 59(e) motion is not subject to AEDPA's restrictions on second or successive habeas applications: such a motion is part of the petitioner's one full opportunity to seek federal collateral review.

On that basis alone, the Fifth Circuit's decision should be reversed.[12]

II. At A Minimum, A Timely Rule 59(e) Motion That Does Not Raise A New Claim Should Not Be Treated As A Second Or Successive Habeas Application.

The rule set forth in Part I is easy to apply: a court need only ask when a motion was filed to decide if section 2244(b)'s gatekeeping provisions are triggered. If a Rule 59(e) motion is timely, then it is not the functional equivalent of a second habeas application.

Both the Ninth Circuit and Chief Judge Boggs in *Howard* recognized the appeal of this "easy to apply" "bright-line approach." *Rishor*, 822 F.3d at 493; *accord Howard*, 533 F.3d at 476 (Boggs, C.J., dissenting). But they concluded that such a principle cannot "be sustained in every case," *Howard*, 533 F.3d at 476 (Boggs, C.J., dissenting), because habeas applicants could use Rule 59(e) "to raise entirely new claims," *Rishor*, 822 F.3d at 493. Thus, the Ninth Circuit held—and Chief Judge Boggs would have

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[12] Because this case involves a Rule 59(e) motion, which must be filed within 28 days of judgment, there is no need for the Court to decide whether certain other motions (*e.g.*, motions for leave to amend) filed later than 28 days after judgment, but before the completion of appellate review, are subject to section 2244(b). *Compare Santarelli*, 929 F.3d at 104–105 (first application is not final until opportunity for Supreme Court review has expired), and *Garcia v. Superintendent of Great Meadow Corr. Facility*, 841 F.3d 581, 582 (2d Cir. 2016) (*per curiam*) (same), *with Ochoa v. Sirmons*, 485 F.3d 538, 541 (10th Cir. 2007) (rejecting this approach).

held—that a timely Rule 59(e) motion is subject to section 2244(b)'s restrictions *only* if the motion "raises a new claim" for habeas relief. *Id.*; *accord Howard*, 533 F.3d at 476–477 (Boggs, C.J., dissenting). "Such a post-judgment motion," the theory goes, is merely '*labeled*' a Rule 59(e) motion," but "is in substance a second habeas petition.'" *Rishor*, 822 F.3d at 493 (quoting *Howard*, 533 F.3d at 476 (Boggs, C.J., dissenting)).

Concerns about the potential for habeas applicants to use Rule 59(e) to evade section 2244(b) are overstated. "[S]everal characteristics of a Rule [59(e)] motion limit" any possible "friction between the Rule and the successive-petition prohibitions of AEDPA." *Gonzalez*, 545 U.S. at 534. From a procedural standpoint, the 28-day deadline—which cannot be extended, *see* Fed. R. Civ. P. 6(b)(2)—ensures that a motion must be filed promptly, which prevents applicants from using the Rule to undermine AEDPA's goals of finality and repose. *See* pp. 29–31, *supra*. The substantive standards for Rule 59(e) relief are also stringent: reconsidering a judgment under the Rule "is an extraordinary remedy which should be used sparingly," and a Rule 59(e) motion "may not be used . . . to raise arguments or present evidence that could have been raised prior to the entry of judgment." 11 Wright & Miller § 2810.1, at 156–157, 163–164; *accord Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n. 5 (2008). Moreover, any attempt to use Rule 59(e) to assert new claims must contend with AEDPA's one-year limitations period. *See* 28 U.S.C. § 2244(d). And a claim that "asserts a new ground for relief supported by facts that differ in both time and type from those in the original plead-

ing" will not relate back to the filing date of the original application. *Mayle v. Felix*, 545 U.S. 644, 650 (2005).

But to the extent that any concern about circumvention remains, it does not apply to a Rule 59(e) motion that merely "address[es] itself to correcting the alleged errors made by the district court in its consideration of earlier claims." *Howard*, 533 F.3d at 477 (Boggs, C.J., dissenting). Petitioner's Rule 59(e) motion did just that. Thus, regardless of whether this Court concludes that some Rule 59(e) motions may implicate section 2244(b), the motion at issue here does not.

A. A Rule 59(e) Motion That Does Not Raise New Claims Is Not "Inconsistent" With Section 2244(b).

As discussed, p. 15, *supra*, the Rules of Civil Procedure apply in habeas litigation unless they are "inconsistent with" AEDPA or other habeas-specific rules. 28 U.S.C. § 2254 Rule 12; Fed. Rule Civ. Proc. 81(a)(4). Whatever might be said of Rule 59(e) motions that present new habeas claims, there clearly is no conflict between AEDPA's second-or-successive restrictions and a motion that merely seeks "to bring to the attention of a district judge errors . . . in the judge's decision on the case as it was before him." *Howard*, 533 F.3d at 476 (Boggs, C.J., dissenting).

A contrary decision would have to rest on the premise that a Rule 59(e) motion seeking reconsideration of a just-issued decision is "similar enough to" a second habeas application that failing to block it under section 2244(b)(1) "would be 'inconsistent with' the statute." *Gonzalez*, 545 U.S. at 531. But neither

history, the purposes of AEDPA, nor logic support stretching section 2244(b)(1) so far.

To begin with, and as discussed above, pp. 25–26, *supra*, there do not appear to be *any* examples pre-AEDPA in which courts subjected Rule 59(e) motions seeking reconsideration of an on-the-merits denial of a habeas claim to the restrictive "ends of justice" standard that applied to same-claim successive petitions. That is not surprising given this Court's recognition in *Browder* that it is "thoroughly consistent with the spirit of the habeas corpus statutes" to apply Rule 59 to "motion[s] to reconsider the grant or denial of habeas corpus relief." 434 U.S. at 270–271. Petitioner has been able to identify only a single pre-AEDPA case in which a court applied abuse-of-the-writ principles to a Rule 59(e) motion. And that case involved an attempt by the habeas applicant to use the motion to present a *new* habeas claim that could have been raised in his initial habeas petition. *See Bannister v. Armontrout*, 4 F.3d 1434, 1445 (8th Cir. 1993). Even assuming that this outlier decision reflected the law pre-AEDPA (which is doubtful), it provides no support for treating as abusive an ordinary Rule 59(e) motion seeking correction of a just-issued judgment.

There is no indication in AEDPA's text that Congress intended to depart from established law by taking ordinary Rule 59(e) motions off the table. *See* p. 27, *supra*. Nor is such a significant change from background law supported by AEDPA's general objectives. The contrary arguments presented by the Fifth Circuit are unpersuasive.

The Fifth Circuit justified its approach to Rule 59(e) motions by reference to "AEDPA's basic premises": *i.e.*, "avoiding piecemeal litigation and encouraging petitioners to bring all of their substantive claims in a single filing." *Williams*, 602 F.3d at 303. But those "premises" have no bearing on a Rule 59(e) motion that asks the district court to correct its errors. It makes no sense to suggest that a habeas applicant should anticipate a district court's error before it happens; by definition, a motion asking for reconsideration of a decision is not ripe until that decision issues. And, for the reasons discussed above, Rule 59(e) motions do not lead to piecemeal litigation—they *avoid* it. By suspending the finality of the judgment, a Rule 59(e) motion provides the district court with a chance to correct an error immediately, while also ensuring that, if the motion is denied, a single final judgment issues, leading to a single appeal. *See* p. 24, *supra*

Similarly, a Rule 59(e) motion asking the district court to correct an obvious error cannot plausibly be described as an effort to circumvent section 2244(b)(1)'s bar on same-claim successive petitions. Any such argument is irreconcilable with the fact that Congress allows habeas applicants to challenge the district court's resolution of a claim on the merits by pursuing appellate relief. *See* 28 U.S.C. § 2253(c); pp. 32–33, *supra*. Neither the appellate review process nor a Rule 59(e) motion conflict with section 2244(b)(1), and for the same reason: that provision is intended to prevent habeas applicants from reviving claims that were already fully litigated and rejected—not to cut-off their ability to challenge an ad-

verse decision in the ordinary course of the first habeas proceeding.

B. Petitioner's Rule 59(e) Motion Was Timely And Did Not Raise New Claims.

If this Court holds that a Rule 59(e) motion is not subject to section 2244(b) when that motion merely asks the district court "to reconsider a previously adjudicated claim," *Rishor,* 822 F.3d at 493, then the Court must reverse the decision below. Petitioner's Rule 59(e) motion focused entirely on the reasoning of the district court's decision rejecting the claims presented in his initial habeas application. *See* J.A. 219–253. It does not present any new grounds for relief.

The Fifth Circuit acknowledged that petitioner's "Rule 59(e) motion merely attacked the merits of the district court's reasoning in denying the § 2254 petition." J.A. 306. Respondent agrees, and has never suggested that petitioner's Rule 59(e) motion raised new claims. *See* Br. in Opp. 1. The Fifth Circuit's decision to treat this prototypical use of Rule 59(e) as a second habeas application cannot be sustained under any plausible reading of AEDPA.

III. Nothing In AEDPA Or *Gonzalez* Supports The Fifth Circuit's Decision To Treat Petitioner's Notice Of Appeal As Untimely.

The Fifth Circuit's treatment of petitioner's Rule 59(e) motion was erroneous for yet another reason: the court assumed that giving effect to AEDPA's restrictions on second or successive habeas applications required it to retroactively recharacterize petitioner's Rule 59(e) motion, thus changing the time he

had to appeal well after it was too late to adjust. *See* J.A. 305–306. Nothing in section 2244(b) or this Court's precedent supports such a court-induced forfeiture of appellate rights.

In habeas litigation, "Federal Rule of Appellate Procedure 4(a) governs the time to appeal." 28 U.S.C. § 2254 Rule 11(b). Rule 4(a)(4)(A)(iv) instructs that if a party files a timely motion "to alter or amend the judgment under Rule 59," then the time to file an appeal does not run until "entry of the order" disposing of the motion.

Petitioner, who was then proceeding *pro se*, followed the applicable Rules to the letter. He filed a timely Rule 59(e) motion that fell squarely within that Rule's accepted scope—it sought "reconsideration of matters properly encompassed in a decision on the merits," *White*, 455 U.S. at 451. *See* J.A. 219. And after the district court denied the motion—in an order that did not so much as hint at any procedural irregularity—petitioner filed a notice of appeal within 30 days. J.A. 7–8, 254, 255, 256. Yet the Fifth Circuit decided, almost a year later, that petitioner's Rule 59(e) motion was not a *real* Rule 59(e) motion because it could be characterized as a second habeas application. J.A. 306. As a result, petitioner's reasonable assumption that Rules 59(e) and 4(a)(4)(A)(iv) mean what they say cost him the ability to pursue an appeal from the denial of his first habeas application.

The Fifth Circuit's conclusion that AEDPA requires federal courts to pull such a bait-and-switch on habeas applicants rests on a fundamental misreading of *Gonzalez*. As discussed, pp. 28–30, *supra*,

the question in *Gonzalez* was whether section 2244(b)'s gatekeeping provisions "limit the application of Rule 60(b)"—a question that arose because of "the fact that Rule 60(b), like the rest of the Rules of Civil Procedure, applies in habeas corpus proceedings under 28 U.S.C. § 2254 only to the extent that it is not inconsistent with applicable federal statutory provisions and rules." 545 U.S. at 529 (brackets, quotation marks, and footnote omitted). In holding that section 2244(b) restricts some uses of Rule 60(b), the Court did not suggest that motions presenting claims for habeas relief are not "true" Rule 60(b) motions. Rather, the Court reasoned that such motions were "at least similar enough" to second habeas applications that they should be subjected to section 2244(b)'s requirements. *Id.* at 531. In other words, under *Gonzalez*, a Rule 60(b) motion that presents a habeas claim is still a Rule 60(b) motion. But the motion must also satisfy the gatekeeping rules for second or successive habeas applications to avoid a conflict with AEDPA.

The Fifth Circuit's decision here thus rested on a mistaken premise. The court reasoned that if a Rule 59(e) motion is subject to section 2244(b), then it no longer qualifies as a Rule 59(e) motion for *any* purpose, including for determining the time to appeal. *See* J.A. 306. But that does not follow. The Rules for section 2254 proceedings make clear that Rule 4(a) governs the time to notice an appeal in habeas cases—without exception. *See* U.S.C. § 2254 Rule 11(b). And, even under the assumption (which petitioner disputes) that some Rule 59(e) motions are "similar enough" to second habeas applications that they should have to clear the same gatekeeping provi-

sions, *Gonzalez*, 545 U.S. at 531, that would not provide a reason to recharacterize a Rule 59(e) motion for purposes of Rule 4(a). Section 2244(b) is concerned with limiting a prisoner's ability to take a second bite at the apple through repeat habeas filings. It has *nothing* to say about the timing for noticing an appeal from judgment in a first habeas proceeding.

Even if AEDPA were a reason why some Rule 59(e) motions must be *denied*, that would not establish that those motions *do not exist* for purposes of the appellate timing rules. Rule 4(a) specifies only *one* basis on which a Rule 59 motion may fail to stop the appellate clock: if it is late. A Rule 59(e) motion may be deficient in any other way, but as long as it is timely "filed," it stops the time to appeal. *Cf. Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (distinguishing between "filed" and "*properly* filed" in another provision of AEDPA, and holding that a document can be "properly filed" even if the relief it seeks is barred).

Lacking any basis in AEDPA's text or purpose, the Fifth Circuit's after-the-fact recharacterization rule has nothing to recommend it. Indeed, this Court has cautioned lower courts against "carv[ing] out exceptions" to the general rule that filing a "motion for rehearing . . . renders an otherwise final decision of a district court not final until it decides the petition for rehearing." *Ibarra*, 502 U.S. at 6.[13] In *Ibarra*, the

[13] *Ibarra* was a criminal case, but the Court relied by analogy on the same "well-established rule in civil cases" concerning motions for reconsideration. *United States v. Ibarra*, 502 U.S. 1, 5 (1991) (*per curiam*).

Court summarily reversed a Tenth Circuit decision refusing to apply that general rule to a motion for reconsideration of a previously abandoned claim. *Id.* at 6–8. In doing so, the Court rejected the Tenth Circuit's effort to question whether the defendant's post-judgment motion served the purposes of "a 'true' motion for reconsideration which would extend the time for appeal." *Id.* at 7. The Court reasoned that it would be undesirable "to graft a merits inquiry onto what should be a bright-line jurisdictional inquiry." *Id.* at 6 (quotation marks and brackets omitted). As the Court explained, "[w]ithout a clear general rule litigants would be required to guess at their peril the date on which the time to appeal commences to run." *Id.* at 7.

A rule that requires (or even allows) appellate courts to retroactively recharacterize Rule 59(e) motions is especially undesirable in habeas litigation. Because there is no general right to counsel in federal habeas proceedings (outside of capital cases), the vast majority of habeas applications are litigated *pro se*.[14] *Pro se* applicants who diligently follow the applicable Rules and notice their appeal when Rule 4(a) tells them to do so should not lose their ability to appeal because an appellate court later decides that their Rule 59(e) motion was "similar enough" to a

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[14] *See* Uhrig, *The Sacrifice of Unarmed Prisoners to Gladiators: The Post-AEDPA Access-to-the-Courts Demand for a Constitutional Right to Counsel in Federal Habeas Corpus*, 14 U. Pa. J. Const. L. 1219, 1254 (2012) (referencing empirical work showing that "federal habeas petitioners lacked assistance of counsel in 92.3% of non-capital cases").

second habeas application, *Gonzalez*, 545 U.S. at 531, to reclassify after the fact.

"The injustice caused by letting [a] litigant's own mistake lie is regrettable, but incomparably less than the injustice of *producing* prejudice through the court's intervention." *Castro*, 540 U.S. at 386–387 (Scalia, J., concurring in part and concurring in the judgment). Because nothing in AEDPA supports an appellate court's intervention to reset the time for noticing an appeal by recharacterizing a timely and facially proper Rule 59(e) motion, the Fifth Circuit's judgment should be reversed on this basis as well.

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit should be reversed.

Respectfully submitted.

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STATUTORY APPENDIX

1. The current version of 28 U.S.C. § 2244 provides:

§ 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) 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.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a

State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

2. 28 U.S.C. § 2244, as published in the 1952 edition of the United States Code, provided:

§ 2244. Finality of determination.

No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States, or of any State, if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry.

3. The current version of Federal Rule of Civil Procedure 59(e) provides:

New Trial; Altering or Amending a Judgment

*** * ***

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.

4. The current version of Rules 11(b) and 12 of the Rules Governing Section 2254 Cases in the United States District Courts provides:

Rule 11. Certificate of Appealability; Time to Appeal

* * *

(b) Time to Appeal. Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.

Rule 12. Applicability of the Federal Rules of Civil Procedure

The Federal Rules of Civil Procedure, to the extent they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules.

5. The current version of Rule 4(a)(1)(a), and 4(a)(4) of the Federal Rules of Appellate Procedure provides:

Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

*** * ***

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party files in the district court any of the following motions under the Federal Rules of Civil Procedure--and does so within the time allowed by those rules--the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment--but before it disposes of any motion listed in Rule 4(a)(4)(A)--the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal--in compliance with Rule 3(c)--within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

*** * ***