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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

A timely Rule 59(e) motion is part of the first opportunity to pursue habeas relief—not a second habeas application. Therefore, timely Rule 59(e) motions do not implicate the restrictions on "second or successive" habeas applications established by AEDPA, 28 U.S.C. § 2244(b).

Respondent and her amici argue otherwise, but they do not identify *a single instance* pre-AEDPA in which a court suggested that a timely Rule 59(e) motion seeking to correct a merits decision was a new, successive habeas application. Nor can they point to anything in AEDPA that departed from this historical understanding. Instead, respondent and her amici rely primarily on *Gonzalez v. Crosby*, 545 U.S. 524 (2005), in which this Court held that certain Rule 60(b) motions are "similar enough" to second habeas applications that they must satisfy section 2244(b), *id.* at 531. But timely Rule 59(e) motions are fundamentally different from the Rule 60(b) motion at issue in *Gonzalez*—they *must* be filed pre-appeal, leaving no way for prisoners to use Rule 59(e) "to circumvent" AEDPA's restrictions on reopening closed cases, *id.*

In any event, this Court should reverse the Fifth Circuit *regardless* of whether petitioner's timely Rule 59(e) motion implicates section 2244(b) because his appeal would still have been timely. Under Federal Rule of Appellate Procedure 4(a)(4)(A)(iv), the time to appeal did not start until after the district court

denied petitioner's Rule 59(e) motion.[1] The contrary position urged by respondent and the United States contradicts Rule 4(a)(4)(A)'s plain text, as they ask this Court to impose a new condition—"proper" filing—that the Rule conspicuously lacks.

ARGUMENT

I. A Timely Rule 59(e) Motion Is Not Subject To Section 2244(b)'s Restrictions.

History, statutory structure, and habeas practice all show that timely Rule 59(e) motions are not "second or successive" habeas applications.

A. The History Of Rule 59(e) And Section 2244(b) Shows There Is No Inconsistency Between Those Provisions.

Respondent concedes (at 50) that AEDPA preserves a habeas applicant's one full opportunity to seek collateral review of a state-court conviction. And although respondent asserts (at 15–16) that entry of "final judgment" is the "dividing line" that marks the end of that opportunity, she quickly qualifies her assertion. As respondent recognizes (at 17), countless papers raising habeas "claims" within the meaning of *Gonzalez*—including applications for a certificate of appealability (COA), petitions for rehearing, and petitions for certiorari—may be filed after the district court enters judgment without implicating section 2244(b). The key question is thus

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[1] Respondent asserts (at 5–6) that petitioner's federal petition contained unexhausted claims. That is wrong. Petitioner raised all claims asserted in his federal petition—including the ineffective assistance claim that respondent identifies—in an amended state petition. N.D. Tex. Dkt. No. 10-3, at 91.

whether a timely Rule 59(e) motion is one of those filings that is part of the first full opportunity for habeas review.

The best place to look for the answer is history. As this Court has explained, "[t]he phrase 'second or successive' is not self-defining," so it "takes its full meaning from [this Court's] case law, including decisions predating [AEDPA]." *Panetti v. Quarterman*, 551 U.S. 930, 943–944 (2007). Here, the history is clear: Rule 59(e) motions have always been part of the *initial* civil proceeding.

1. Rule 59(e) traces back to the common-law "term rule," under which a court retained "plenary power" to modify an ostensibly final judgment during the term. *Zimmern v. United States*, 298 U.S. 167, 169–170 (1936); *see* Professors Br. 14–21. Significantly, motions to alter a judgment during the term were *not* considered new actions or collateral attacks, unlike remedies invoked to attack a judgment *after* the term—remedies that were the precursor to Rule 60(b). Professors Br. 21–24. The term rule "was applied in habeas cases," and its principles carried forward in Rule 59(e) (with mandatory time limits replacing the term). *Browder v. Director, Dep't of Corrs. of Ill.*, 434 U.S. 257, 270–271 (1978). This Court recognized in *Browder* that Rule 59's procedures are "thoroughly consistent with the spirit of the habeas corpus statutes." *Id.* at 271.

Respondent dismisses *Browder* because the Court applied Rule 59(e)'s timing requirements to a warden's motion. Resp. Br. 35–36; *see also* U.S. Br. 7–8. But respondent misses the point. *Browder*'s recognition that Rule 59(e) emerges from the term rule, and

that this rule was part of habeas practice, 434 U.S. at 270–271, confirms that timely Rule 59(e) motions have always been part of the *first* habeas case.

If that were wrong—if historically Rule 59(e) motions filed by prisoners were akin to second habeas applications—one would expect to find at least *some* decisions so holding. But respondent and her amici have come up empty. The parties and amici have identified *just one* case between 1946 (when Rule 59(e) was adopted) and 1996 (when AEDPA was enacted) that applied abuse-of-the-writ principles to a Rule 59(e) motion. *See* Pet. Br. 45; Professors Br. 27–28. And the reasoning of that isolated decision is inapplicable here, because petitioner did not use Rule 59(e) to raise new claims "that could have been raised before judgment was entered." *Bannister v. Armontrout*, 4 F.3d 1434, 1445 (8th Cir. 1993). In short, there is *no* evidence that, pre-AEDPA, courts or litigants *ever* thought that timely Rule 59(e) motions seeking "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), were equivalent to second habeas applications. Pet. Br. 25–26; Professors Br. 27–28.

Nor is there any basis to conclude that Congress meant to "vitiate the proper office that Rule 59(e) fills" in habeas litigation when it enacted AEDPA. *Howard v. United States*, 533 F.3d 472, 476 (6th Cir. 2008) (Boggs, C.J., dissenting). Respondent discusses (at 51) how AEDPA tightened restrictions on second or successive habeas applications. But what is at issue is not whether those restrictions are met, but whether they *apply*. *Cf. Magwood v. Patterson*, 561 U.S. 320, 336–337 (2010) (faulting state for fail-

ing to distinguish between those two issues).[2] On *that* question, the Court looks to pre-AEDPA practice. *Panetti*, 551 U.S. at 943–944. And although "the current text" supplants pre-AEDPA precedent when there is a conflict, *Magwood*, 561 U.S. at 338, respondent and her amici have not identified anything in AEDPA's text that justifies treating Rule 59(e) motions as successive petitions.

2. Respondent never denies that the common-law and statutory antecedents of Rule 59(e), Rule 60(b), and section 2244(b) support petitioner. Instead, she changes the subject. Resp. Br. 32–34. Respondent's position appears to be that because petitioner could not have brought *any* collateral challenge to a criminal conviction in 17th century England, the Court should ignore historical evidence showing that timely Rule 59(e) motions do not trigger restrictions on successive or abusive habeas petitions. That argument is an obvious non-sequitur, and respondent's charge of "halfway originalism" (at 32) is misplaced. This is not a constitutional case that might turn on whether, at the founding, petitioner would have had a common-law right to pursue habeas relief. The question

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[2] The United States makes this mistake (at 17–18) when it discounts pre-AEDPA practice because AEDPA's gatekeeping requirements are different from the earlier "ends of justice" standard for successive petitions. The point is that pre-AEDPA courts ruled on Rule 59(e) motions *without* requiring applicants to satisfy that exceptionally demanding standard. Pet. Br. 26. That is unsurprising: it would have made no sense to require habeas applicants to make a showing of *factual innocence* within ten days of judgment merely to seek reconsideration before an appeal. *See* U.S. Br. 17 (acknowledging several circuits applied this version of the "ends of justice" test).

presented asks what Congress intended *in 1996* when it "codifie[d]" and built upon certain "pre-existing limits on successive petitions." *Felker v. Turpin*, 518 U.S. 651, 664 (1996). The history described by petitioner and the Law Professor amici has clear relevance to that question. Respondent's digression does not.

For its part, the United States contends (at 19) that history is ambiguous, even though it cannot identify any instance pre-AEDPA in which a court ever held—or a party even argued—that a prisoner's Rule 59(e) motion seeking reconsideration of a merits-based habeas denial was successive or abusive. But there are examples of district courts granting Rule 59(e) relief to habeas applicants after reconsidering the merits,[3] as well as numerous cases in which courts denied such Rule 59(e) motions without suggesting the motion was abusive or successive.[4]

The United States insists (at 19) that the latter cases "do not support the negative inference that the abuse-of-the-writ doctrine was wholly unavailable" as a defense. But at a certain point, the dog that didn't bark becomes a powerful clue. That silence is especially instructive here given the contrast with Rule 60(b), as pre-AEDPA "cases holding a Rule 60(b) motion to be an abuse of the writ were common." Professors Br. 28 (collecting decisions).

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[3] *See Correll v. Thompson*, 63 F.3d 1279, 1285 & n. 3 (4th Cir. 1995) (finding no procedural error in district court's use of Rule 59(e) to vacate its prior decision, but reversing on the merits); *York v. Tate*, 858 F.2d 322, 325 (6th Cir. 1988) (same).

[4] *See* Pet. Br. 26 n. 7 (collecting decisions).

B. Timely Rule 59(e) Motions Provide No Opportunity To Circumvent AEDPA.

The Rules of Civil Procedure apply in habeas cases "to the extent they are not inconsistent with any statutory provisions or [habeas-specific] rules." 28 U.S.C. § 2254 Rule 12; Fed. Rule Civ. Proc. 81(a)(4). Respondent's observation (at 47–50) that there are significant differences between habeas proceedings and ordinary civil litigation is thus both true and unhelpful. Respondent merely notes instances in which AEDPA and the habeas rules displace the default civil rules. But no statutory provision or rule displaces Rule 59; to the contrary, Rule 59 motions are "thoroughly consistent" with habeas procedure. *Browder*, 434 U.S. at 271.

The only question then is whether it is "inconsistent" with AEDPA for a prisoner to file a timely Rule 59(e) motion seeking reconsideration of a merits-based decision. Respondent and her amici identify no inconsistency.

1. AEDPA is structured to "further the principles of comity, finality, and federalism," as well as to "reduc[e] piecemeal litigation" of state-court judgments. *Panetti*, 551 U.S. at 945–946 (quotation marks omitted). Rule 59(e) motions are consistent with those principles. The motion *must* be filed within 28 days of judgment—extensions are not allowed. Fed. Rules Civ. Proc. 6(b)(2), 59(e). And because filing a Rule 59(e) motion "suspends the finality of the original judgment," *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 373 n. 10 (1984) (quotation marks and brackets omitted), there can be no piecemeal litigation: a decision denying a Rule 59(e) motion merges

into the final judgment, resulting in one appeal, *see* Pet. Br. 24.

These features of Rule 59(e) motions show why sweeping arguments premised on a state's general "interest in preserving . . . finality" are misplaced. Indiana Br. 2. A Rule 59(e) motion does not deprive a state of repose. By definition, such a motion must be filed *before* the time to appeal has run, and thus *before* "the State is entitled to the assurance of finality" because "federal proceedings have run their course." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998).

The United States implicitly concedes the significance of a post-judgment motion's timing—whether it "come[s] before or after appellate review"—but suggests this distinction "has much less salience in the habeas context" because there is no "automatic right to appellate review." U.S. Br. 14. That argument fails to take sufficient account of an applicant's ability to seek a COA, which comes with an *easier* standard than Rule 59(e) relief. Pet. Br. 32–33. There is thus no way for a petitioner to use a timely Rule 59(e) motion to circumvent either the COA requirement or section 2244(b) in order to revive an action that would otherwise be closed.

Respondent and the United States downplay the significance of Rule 59(e)'s effect on a judgment's finality for appeal because, they note, judgments subject to Rule 59(e) motions remain final for other purposes—they may be executed and have preclusive effect. Resp. Br. 24–25; U.S. Br. 23–24. But that observation fails to answer the obvious follow-up question: what type of finality *matters* here? As dis-

cussed above, looking to whether the district court retains authority to modify the judgment promotes AEDPA's objectives—it ensures there will be one appeal rather than piecemeal litigation, and reflects the fact that repose comes after the opportunity for first-habeas review has ended.

By contrast, the aspects of finality referenced by respondent and the United States have less significance here. Whether a judgment "is immediately subject to execution" (Resp. Br. 24) is irrelevant when that judgment is the denial of a habeas application: the prisoner is already in custody (that is why he is bringing a habeas petition) and he will remain in custody pending any appellate review. Preclusion is similarly inapposite. Claim and issue preclusion relieve parties and courts from the "vexation of *multiple* lawsuits." *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 466 n. 6 (1982) (emphasis added). They do not prevent a district court from correcting its own judgment during the brief period before jurisdiction passes to the appellate court.

2. Neither respondent nor her amici deny that the features discussed above distinguish Rule 59(e) motions from the Rule 60(b) motion at issue in *Gonzalez*. Nor could they: Gonzalez filed his post-judgment motion almost three years after the district court issued its judgment, and more than a year after the Eleventh Circuit denied a COA. *See Gonzalez v. Secretary for Dep't of Corr.*, 317 F.3d 1308, 1310 (11th Cir. 2003). In that circumstance, allowing a petitioner to proceed with a post-trial motion asserting a habeas claim would offer an obvious path to "circumvent[ing]" section 2244(b). *Gonzalez*, 545 U.S. at 531. Here, by contrast, petitioner's Rule

59(e) motion did not let him circumvent anything because his first habeas action remained live—he could still "alleg[e] that the [district] court erred in denying habeas relief on the merits," *id.* at 532, notwithstanding section 2244(b)(1), by seeking a COA and pursuing an appeal.

Without disputing those premises, respondent and the United States argue that they do not distinguish *all* Rule 60(b) motions. In particular, respondent and the United States observe that Rule 60(b) motions filed within the Rule 59(e) time window function like Rule 59(e) motions. Resp. Br. 25–29; U.S. Br. 12–13. Respondent and the United States assume that such a Rule 60(b) motion is a successive habeas application under *Gonzalez* (if it includes a habeas "claim"), and they reason from there that Rule 59(e) motions should be too. But their premise is wrong, so their conclusion does not follow.

As discussed, pp. 3–6, *supra*, Rule 59 and Rule 60 motions have distinct historical pedigrees, which are reflected in their modern characteristics. *See* Professors Br. 14–28. The fact that Federal Rule of Appellate Procedure 4(a)(4)(A) now treats Rule 60(b) motions filed within 28 days of judgment as equivalent to Rule 59 motions does not erase the distinctions between these Rules. To the contrary, the history behind the 1993 amendments to Rule 4(a)(4) shows that the *time* of filing is the key dividing line.

a. Rule 4(a) was amended in 1979 to address problems associated with "district courts and courts of appeals . . . both hav[ing] the power to modify the same judgment." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 59–60 (1982). The amend-

ment rendered void any notice of appeal filed before the disposition of a qualifying post-judgment motion—which included Rule 59(e) motions, but not Rule 60(b) motions. The characterization of a motion therefore became critical. Parties were forced to guess whether their motion was a true motion to "alter or amend the judgment" under Rule 59(e) or a motion for "relief from judgment" under Rule 60(b). They often guessed wrong, and courts of appeals also struggled to draw the line.[5]

As a solution, most courts of appeals established a rule—fully applicable in habeas cases—under which *all* motions questioning "the correctness of a judgment" made within the time to file a Rule 59(e) motion were treated as Rule 59(e) motions for purposes of Rule 4(a)(4).[6] In 1993, the Rules Committee codified this approach, explaining that its amendment to Rule 4(a)(4) "comports with the practice in several circuits of treating all motions to alter or amend judgments that are made within 10 [now 28] days after entry of judgment *as Rule 59(e) motions* for purposes of Rule 4(a)(4)." Advisory Committee's 1993 Note on Fed. Rule App. Proc. 4, 28 U.S.C. App., pp. 665–666 (emphasis added).

b. Invoking Rule 4(a)(4)(A)(vi) to shoehorn Rule 59(e) motions into *Gonzalez*'s holding, as respondent urges, would invert history. Rule 60(b) motions filed

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[5] *E.g.*, *Charles v. Daley*, 799 F.2d 343, 347 (7th Cir. 1986); *Gibbs v. Maxwell House*, 701 F.2d 145, 147 (11th Cir. 1983).

[6] *Skagerberg v. Oklahoma*, 797 F.2d 881, 883 (10th Cir. 1986) (habeas case); *accord Moy v. Howard Univ.*, 843 F.2d 1504, 1506 (D.C. Cir. 1988).

within 28 days of judgment have "the same effect on finality as a Rule 59(e) motion" (Resp. Br. 25) precisely because they are treated as though they *are* Rule 59(e) motions. The fit between AEDPA and motions that function this way should be evaluated on their own terms—not by reference to whether Rule 60(b) motions filed much later could be used to avoid section 2244(b)'s restrictions.

Nothing in *Gonzalez* suggests otherwise. As respondent acknowledges, "*Gonzalez* said little . . . about the meaning of 'second or successive'" (Br. 12) because it did not have to: an application with a habeas claim filed fifteen months after the court of appeals denied a COA is unquestionably second or successive. The Court thus had no occasion to address whether a pre-appeal, post-judgment motion is "similar enough" to a second habeas application to implicate section 2244(b). 545 U.S. at 531. Not only was the motion in *Gonzalez* filed *years* after judgment, but *every* Rule 60(b) decision cited in the opinion involved a motion filed after the window for Rule 59(e) relief had closed.

Moreover, respondent is clearly wrong when she asserts (at 46) that petitioner's argument "implies" that the Court "recharacterized [Gonzalez's] motion to [his] detriment" by recognizing that he sought relief under Rule 60(b)(6) despite using a title that referenced Rule 59(e). *See Gonzalez*, 545 U.S. at 527 n. 1. Petitioner's rule applies only to "timely" Rule 59 motions—indeed, the question presented is limited to whether a "*timely* Rule 59(e) motion should be recharacterized as a second or successive habeas petition." 139 S. Ct. 2742 (emphasis added). The long-delayed motion in *Gonzalez* could not possibly have

satisfied petitioner's test, regardless of its "title." *Gonzalez*, 545 U.S. at 527 n. 1.

C. Respondent's Test For Identifying "Second Or Successive" Applications Sweeps In Motions That She Concedes Do Not Implicate Section 2244(b).

According to respondent, a filing that advances a habeas claim is "second or successive" rather than "part and parcel" of the first habeas proceeding if it is addressed to a tribunal that has rendered a final judgment—regardless of whether further review is available, either on a timely motion for reconsideration or on appeal. Br. 15–18; *accord* U.S. Br. 7. Not only does this test lack historical footing, *see* Part I.A, *supra*, but it would sweep in filings that no one thinks should be subjected to section 2244(b). Respondent's efforts to qualify her test and explain away the inconsistencies are unconvincing.

1. A petition for rehearing in the Court of Appeals, Fed. Rules App. Proc. 35, 40, or in this Court, Sup. Ct. Rule 44, functions much like a Rule 59(e) motion in the district court—all are subject to strict time limits, and their filing temporarily suspends the judgment's finality to allow reconsideration before the court relinquishes jurisdiction. And like the prototypical Rule 59(e) motion, petitions for rehearing often include habeas "claims" as defined by *Gonzalez*: they "attack[] the federal court's resolution of a claim *on the merits*." 545 U.S. at 532. It would be anomalous to hold that these appellate-level requests for merits reconsideration are allowed, but earlier-filed, pre-appeal Rule 59(e) motions are barred by section 2244(b)(1).

Respondent and the United States purport to justify this inconsistency by noting that AEDPA "expressly contemplates" "appellate rehearing petitions." U.S. Br. 8, 23–25 (citing 28 U.S.C. §§ 2244(b)(3)(E), 2266(c)(1)); Resp. Br. 31 (same). But that is the point: respondent and the United States articulate a test for identifying "second or successive" applications that they cannot reconcile with AEDPA's treatment of appellate rehearing petitions. Their attempt to turn this flaw back on petitioner by arguing that AEDPA's reference to appellate rehearing petitions implicitly excludes timely Rule 59(e) motions is unsound. This is not a case in which it would be appropriate to draw an *expressio unius* inference—the scattered references to appellate rehearing petitions do not appear in a list of authorized motions that might plausibly exclude other motions by implication. *Cf. Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003). After all, AEDPA does not expressly reference petitions for rehearing in this Court, but surely Congress did not mean to distinguish between those petitions and rehearing petitions in the circuits.[7]

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[7] The United States' related argument based on 28 U.S.C. § 2266 is similarly flawed. The United States observes (at 25) that the provision's "reticulated set of deadlines" does not account for Rule 59(e) motions. But that argument proves too much, since both respondent and the United States *concede* that some Rule 59(e) motions are permissible. Resp. Br. 19; U.S. Br. 11–12. To the extent a Rule 59(e) motion could be used to undermine section 2266's deadlines in a particular case, the motion might be disallowed on the ground that it is "inconsistent with" *section 2266*. 28 U.S.C. § 2254. But that possibil-

Respondent also attacks (at 29–30) the analogy between Rule 59(e) motions and appellate rehearing petitions on the ground that an appellate court judgment does not become final until the mandate issues. But just as with district court judgments, an appellate-court order has certain immediate effects, even though its finality for other purposes is suspended. For example, courts of appeals have recognized that a published decision becomes binding circuit precedent as soon as it issues, and that "a stay of the mandate does *not* destroy the finality of an appellate court's judgment." *In re Zermeno-Gomez*, 868 F.3d 1048, 1052 (9th Cir. 2017) (emphasis added) (quotation marks omitted); *see also Martin v. Singletary*, 965 F.2d 944, 945 n. 1 (11th Cir. 1992) (a stay of the mandate "in no way affects" the precedential authority of a decision).[8]

In the end, the only distinction that respondent manages to draw (at 30–31) is this: in district court, a Rule 59 motion suspends the finality of a judgment that previously was considered final, *see* Fed. Rule App. Proc. 4(a)(4); in the court of appeals, filing a rehearing petition prevents a judgment from becoming final before the mandate issues, *see id.* 41(b). Respondent does not explain how this minor, technical difference has *any* relevance to whether the motion aligns with AEDPA's objectives—because it has none.

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ity provides no justification for restricting Rule 59(e) motions *generally*.

[8] Respondent's reference (at 30) to a single district court decision does not establish a contrary rule.

2. Respondent's attempt to explain away (at 16–17) the implications of her interpretation for pleading amendments likewise falls short. Respondent acknowledges that motions to amend filed pre-judgment are not second or successive habeas applications, but she contends that courts have treated the initial entry of judgment as the dividing line. *See id.* (citing *Johnson v. United States*, 196 F.3d 802, 805 (7th Cir. 1999)). The case law does not support this position.[9]

In *Johnson*, for example, the court concluded that additional filings in a first habeas proceeding may be akin to successive habeas applications after that first action "has reached a final decision"—but, critically, the court defined "final decision" in terms of whether "a final judgment has been entered, *and the time for appeal has expired*." *Id.* at 805 (emphasis added). Any doubt is eliminated by *Phillips v. United States*, 668 F.3d 433 (7th Cir. 2012), which, like *Johnson*, was authored by Judge Easterbrook. There, the court, citing *Johnson*, recognized that "[a] motion to amend that is filed within the time to appeal might be treated as a continuation of the original application"—rather than a second petition—because "a district court retains jurisdiction to fix problems during this post-judgment period." *Id.* at 435 (citing *United States v. Ibarra*, 502 U.S. 1 (1991)). The Seventh Circuit is no outlier in holding the district court's ini-

[9] Leave to amend post-judgment requires vacatur of the judgment, which may be granted if the litigant demonstrates entitlement to amend her pleadings. *See, e.g., Laber v. Harvey*, 438 F.3d 404, 427–428 (4th Cir. 2006) (en banc).

tial entry of judgment is *not* the end-point of the first habeas case. *See, e.g.*, *Ching v. United States*, 298 F.3d 174, 178–181 (2d Cir. 2002) (Sotomayor, J.); Pet. Br. 20–21 & n. 3 (collecting decisions).[10]

D. Preventing District Courts From Correcting Errors Under Rule 59(e) Does Not Further AEDPA's Objectives.

Respondent and the United States never deny that adopting their interpretation of "second or successive" would "preclude broadly the reconsideration of just-entered judgments." *Rishor v. Ferguson*, 822 F.3d 482, 492 (9th Cir. 2016) (quotation marks and citation omitted). Their attempts to minimize the resulting negative implications of their approach fall short.

First, respondent notes (at 37) that her interpretation of the "second or successive" bar does not preclude *all* Rule 59(e) motions, since motions that do not include a *Gonzalez* "claim" would still be allowed. That approach surely would *not* leave "ample room" for a district court to correct its own errors. *Id.* A motion limited to attacking "the integrity of the federal proceedings" (*id.*) is not a substitute for Rule 59(e)'s *primary* use: "rectify[ing] . . . mistakes" through "reconsideration of matters properly encompassed in a decision on the merits," *White*, 455 U.S. at 450–451.

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[10] *United States v. Nelson*, 465 F.3d 1145 (10th Cir. 2006), does not support respondent, because the relevant motion was filed after the prisoner's first collateral attack "[became] final when he failed to file a notice of appeal." 465 F.3d at 1146.

Second, the United States contends (at 26) that barring prototypical Rule 59(e) motions from habeas practice presents no cause for concern, because the errors they identify could "instead be[] vindicated on appeal." But Rule 59(e) is supposed to provide a path for *avoiding* unnecessary appeals, which "prevents unnecessary burdens being placed on" the circuit. *United States v. Ibarra*, 502 U.S. 1, 5 (1991) (*per curiam*); *accord United States v. Dieter*, 429 U.S. 6, 8 (1976). Moreover, although the United States is unimpressed by the number of habeas cases in which Rule 59(e) motions have led to outright reversals, it fails to account for the positive role Rule 59(e) motions play in allowing courts to clarify their orders, which promotes judicial economy. NACDL Br. 12–20.

2. By contrast, concerns that Rule 59(e) motions will cause undue burden and delay are overstated. Resp. Br. 52–53; U.S. Br. 26–27. A district court that is already familiar with the substance of a petitioner's claims can efficiently review a Rule 59(e) filing and quickly dispatch those that do not identify a significant error. Here, the district court issued a one-page order denying petitioner's Rule 59(e) motion five days after it was filed—without requiring respondent to answer. J.A. 6, 254; *contra* Resp. Br. 52 (asserting that accepting post-trial motions forces the state to respond on pain of "default"). Moreover, lamentations about the supposed burdens associated with timely merits reconsideration are hard to square with the United States' (correct) acknowledgment that a habeas petitioner *may* file a motion asking the district court to reconsider a COA denial. Br. 14–15, 28 (citing 28 U.S.C. § 2254 Rule 11(a)).

On this account, petitioner could have filed a post-judgment motion raising all of the same arguments if he had framed them as reasons for granting a COA rather than for amending the judgment. Any incremental burdens associated with letting prisoners also seek the latter form of relief are hardly "obvious and substantial." U.S. Br. 26.

II. There Is No Conflict Between Applying Rule 4(a)'s Plain Text And AEDPA.

Appellate Rule 4(a) "governs the time to appeal" in habeas litigation. 28 U.S.C. § 2254 Rule 11(b). That rule imposes just two prerequisites for Rule 59(e) motions to suspend the time to appeal: the appellant must (1) "file[]" the motion "in the district court," (2) "within the time allowed by th[e] rules." Fed. Rule App. Proc. 4(a)(4)(A).

Petitioner satisfied both requirements. He filed a *bona fide* Rule 59(e) motion in the district court—a point even respondent now concedes (at 44). And he did so within the 28 days required under Rule 59(e). Pet. Br. 48. The Court should reject respondent's efforts to add requirements to Rule 4(a)(4)'s plain text.

A. Although respondent admits (at 44) that petitioner's motion "*is* a Rule 59(e) motion," she nonetheless claims (at 40–43) that the motion did not trigger Rule 4(a)(4) because it was filed without section 2244(b)(3) authorization. In other words, respondent argues that the motion was not "properly filed" and was thus never "pending." *Accord* U.S. Br. 28. But that argument fails in its essential premise, because Rule 4(a)(4)'s timing rules are *not* conditioned on whether a filing was "proper."

In *Artuz v. Bennett*, 531 U.S. 4 (2000), this Court distinguished between state habeas applications that are "filed" (*i.e.*, "delivered to, and accepted by, the appropriate court officer") and those that are "*properly* filed" (*i.e.*, filed "in compliance with the applicable laws and rules governing filings"). *Id.* at 8. As the Court explained, an application that "is erroneously accepted by the clerk of a court lacking jurisdiction" is considered "*pending,*" even if it is "not *properly filed.*" *Id.* at 9. Respondent and the United States inexplicably rely on *Bennett*, but the decision clearly favors petitioner. Rule 4(a)(4) requires only that a motion be "file[d]," not that it be "properly filed." Petitioner's Rule 59(e) motion was "filed" and "pending" as this Court understood those terms—it was "delivered to, and accepted by," the district court. *Id.* at 8. Indeed, the court actually *ruled* on the motion. J.A. 254.

Respondent's attempt (at 41–42) to compare petitioner's motion to filings that do not trigger Rule 4(a)(4)(A)(iv) likewise disregards the Rule's text. For example, respondent observes (at 41) that "an untimely Rule 59(e) motion" does not restart the 30-day clock. But that is *because Rule 4 says so*. *See* Fed. Rule App. Proc. 4(a)(4) (motion must be filed "within the time allowed by th[e] rules"); *cf. United States v. Johnson*, 529 U.S. 53, 58 (2000) ("When Congress provides exceptions in a statute, it does not follow that courts have authority to create others.").

Similarly, respondent's observation (at 42) that a post-judgment motion must "actually seek[]" to alter the court's judgment in order to trigger Rule 4(a)(4)(A)(iv) merely reflects Rule 4's text. *See* Fed. Rule App. Proc. 4(a)(4)(A)(iv) (motion must seek "to

alter or amend the judgment"). Once again, respondent *admits* (at 44) that petitioner filed "a 'true' Rule 59(e) motion" seeking precisely this relief. That concession also undermines respondent's reliance on *Morse v. United States*, 270 U.S. 151 (1926). There, the petitioner filed a motion for a new trial, and then—after that motion was denied—"presented a motion for leave to file a motion to reconsider and grant a new trial." *Id.* at 152. The Court held that *the latter* motion had no effect on the appeal deadline, because "*[a]pplications for leave* did not suspend the running of" the time to appeal. *Id.* at 154 (emphasis added). Translated to the present context, *Morse* stands for little more than the undisputed proposition that a motion that does *not* itself seek to alter or amend the judgment—for example, a motion for leave to file a second Rule 59 motion—will not suspend the appeal deadline.

B. There is no basis for departing from Rule 4(a)(4)(A)(iv)'s plain text in habeas cases. As noted, p. 19, *supra*, the habeas rules instruct that Rule 4(a) "governs the time to appeal." 28 U.S.C. § 2254 Rule 11(b). No exceptions are recognized.

Nevertheless, respondent and the United States argue that it would "be at odds" with section 2244(b) if a prisoner could extend the time to appeal by filing a jurisdictionally barred Rule 59(e) motion. U.S. Br. 28; *accord* Resp. Br. 52. They do not explain why, and no reason is apparent: section 2244(b) simply does not speak to the time for noticing an appeal in the *first* habeas proceeding. Pet. Br. 49–50.

Alternatively, the United States suggests (at 28–29) that petitioner's interpretation of Rule

4(a)(4)(A)(iv) brings the Rule into conflict with Habeas Rule 11(a), which stipulates that a motion to reconsider a COA denial does not extend the time to appeal. There is, of course, no actual conflict between these rules—a Rule 59(e) motion is *not* a motion to reconsider a COA denial, so Habeas Rule 11(a) is not implicated. Instead, the United States seems to have in mind the possibility that savvy litigants could "pair[]" improper Rule 59(e) motions with permissible motions to reconsider a COA denial in order to obtain an automatic extension that Habeas Rule 11(a) would otherwise deny. Br. 29. But if that sort of gamesmanship is the concern, the United States' approach would not deter it, since the United States acknowledges (at 14) that habeas petitioners may file Rule 59(e) motions attacking the integrity of the federal habeas proceeding. Under the United States' rule, applicants could still "pair[]" such a motion with a motion to reconsider the COA denial; it would not matter whether there are valid grounds for seeking reconsideration on that basis, since all agree that Rule 4(a)(4)(A)(iv)'s application does not turn on whether the Rule 59(e) motion is substantively valid. Resp. Br. 42–43.

C. The approach to Rule 4(a) championed by respondent and the United States would also complicate what is supposed to be a straightforward jurisdictional inquiry, creating a serious risk that habeas petitioners (who often proceed *pro se*) will inadvertently default a first-habeas appeal. Pet. Br. 50–52.

Respondent contends (at 56–57) that habeas petitioners can avoid this risk by filing a "protective" appeal while a court determines whether a particular Rule 59(e) motion is consistent with section 2244(b).

But this proposed workaround creates new problems. A habeas petitioner would need to proceed on two tracks at once: filing a Rule 59(e) motion, while also preparing a full-fledged COA application—which, unlike a notice of appeal in an ordinary civil case, is a substantive filing requiring legal argumentation. *See, e.g.*, 28 U.S.C. § 2253(c)(2). Given the strict time limits at issue, the burden this would impose on habeas litigants is unreasonable.

Respondent's approach would also leave significant unanswered questions that could create confusion. For example, what happens if a habeas applicant files a "mixed" Rule 59(e) motion—*i.e.*, one that raises some challenges to the judgment on grounds that respondent and the United States concede are permissible, alongside challenges that they say are barred as second or successive? Is such a motion "properly filed"? (Courts are divided over whether district courts may accept such "mixed" applications. *See Stanhope v. Ryan*, No. 4:14-cv-310, 2015 WL 1013716, at *6 (D. Ariz. Mar. 9, 2015) (describing competing approaches)). Applying Rule 4(a)(4)(A)(iv) as written avoids injecting this uncertainty into the process for filing an appeal.

CONCLUSION

The judgment of the Fifth Circuit should be reversed.

Respectfully submitted.

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