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 Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent's submission reads more like a preview of her merits brief than a true brief in opposition. Most conspicuously, respondent does not deny that the circuits are deeply divided on the first question presented: *i.e.*, 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). Indeed, respondent *admits* (at 17-18) that "the Sixth, Seventh, and Third Circuits exclude all motions filed under Rule 59(e) from successive petition analysis"—a result that is directly contrary to the Fifth Circuit's decision below. Respondent tries to minimize this split (at 17-19) by claiming that those three circuits are in the "minority." That is incorrect: both the Second Circuit and the Ninth Circuit also would have declined to recharacterize petitioner's Rule 59(e) motion under the facts of this case, whereas only the Eighth and Tenth Circuits have joined the Fifth Circuit's side in published decisions. But even by respondent's tally, the circuits are badly fractured and need this Court's guidance.

Notably, respondent also never disputes that this case is a good vehicle to resolve the split. Nor could she. All agree that under the ordinary operation of Fed. R. App. P. 4(a), petitioner's notice of appeal was timely. Pet. App. 3. The Fifth Circuit nonetheless dismissed his appeal for lack of jurisdiction based *entirely* on the court's conclusion that petitioner's Rule 59(e) motion should be recharacterized as a second habeas petition. The first question is thus squarely

presented here, and there are no obstacles to this Court's review.

Left without anything else to say, respondent argues the merits and insists that *Gonzalez* resolves this case. But *Gonzalez* involved a petitioner who filed a Rule 60(b) motion more than a year after his first habeas proceeding had ended. 545 U.S. at 526, 530-531. The *Gonzalez* Court thus had no occasion to consider whether AEDPA's restrictions on second habeas petitions apply to timely Rule 59(e) motions, which 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 and citation omitted).

Moreover, *Gonzalez* plainly does not sanction the result here, in which the Fifth Circuit deprived petitioner of appellate review based on its conclusion that petitioner's motion—which the district court denied on the merits—was not a *real* Rule 59(e) motion for purposes of Fed. R. App. P. 4(a)(A)(iv). This Court has made clear that a timely motion for reconsideration makes "an otherwise final decision of a district court not final" for purposes of appeal, *United States v. Ibarra*, 502 U.S. 1, 6 (1991) (per curiam), and has never suggested that AEDPA's restrictions displace that ordinary rule. If, however, the Court were to adopt such an approach, it should ensure that habeas applicants are at least put on notice before a court may cause forfeiture of appellate rights by retroactively recharacterizing timely Rule 59(e) motions. For that reason, the Court should also grant the second question presented, which would allow the Court to fully consider and address the consequences of the Fifth Circuit's rule.

I. Respondent Concedes That There Is An Acknowledged And Deeply-Entrenched Split On The First Question Presented.

The existence of a split on the first question presented is beyond dispute. Indeed, both courts and commentators have repeatedly acknowledged that the circuits are divided on this issue.[1]

Unable to deny that a conflict exists, respondent instead tries to tilt the split in her direction by insisting that the Fifth Circuit has adopted the "majority" view. It is not clear why respondent believes this assertion counsels against review given her acknowledgment that several circuits are on each side of the divide. *See* BIO 17-21. But while the need for review does not turn on a precise circuit headcount, respondent's characterization of the circuit breakdown is wrong. At least five circuits would have reached a different result from the Fifth Circuit under the facts of this case, while only two other circuits (the Eighth and the Tenth) have joined the Fifth Circuit's approach in published decisions.

Respondent concedes (at 1, 17-18) that precedent from the Third, Sixth, and Seventh Circuits is directly contrary to the decision below, because those circuits "exclude all motions filed under Rule 59(e) from

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[1] *See, e.g.*, *Rishor v. Ferguson*, 822 F.3d 482, 491 (9th Cir. 2016) ("Our sister circuits disagree over the application of *Gonzalez* and second-or-successive principles to Rule 59(e) motions."); *Blystone*, 664 F.3d at 415 ("[W]e … disagree with the Court of Appeals for the Fifth Circuit's holding[.]"); *see also* 2 Randy Hertz & James S. Lieberman, Federal Habeas Corpus Practice and Procedure § 34.3 n.21 (7th ed. 2016) ("The circuits are divided on the issue whether a Civil Rule 59(e) motion is exempt from the requirements for successive petitions.").

the successive petition analysis." In addition, the Ninth Circuit also would reach a different result from the Fifth Circuit here. As respondent notes (at 18), the Ninth Circuit "has adopted a hybrid approach" to the question presented, under which a Rule 59(e) motion will not be recharacterized as a second habeas petition provided the motion "asks the district court to correct manifest errors of law upon which the judgment rests" and does not raise "entirely *new* claims." *Rishor v. Ferguson*, 822 F.3d 482, 492 (2016) (quotation marks omitted). Here, it is undisputed that petitioner's motion did *not* raise new challenges to his conviction, but rather "attacked the merits of the district court's reasoning in denying the § 2254 petition." Pet. App. 3; *accord* BIO 1. Thus, if petitioner's case had been in the Ninth Circuit, the court would not have recharacterized his Rule 59(e) motion and his appeal would have been timely.[2]

Precedent in the Second Circuit is also irreconcilable with the Fifth Circuit's decision. The Second Circuit has held that motions filed by habeas petitioners are not "second or successive" habeas application so long as "the initial petition remain[s] pending"—a concept the Second Circuit understands to include "appellate proceedings" up through potential Supreme Court review. *Whab v. United States*, 408

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[2] In a dissenting opinion, Judge Boggs advocated for a standard that mirrors the Ninth Circuit's "hybrid" approach. *See Howard v. United States*, 533 F.3d 472, 476-477 (6th Cir. 2008) (Boggs, C.J., dissenting). Judge Boggs rejected the same categorical position that the Fifth Circuit applied here, finding it "clear … that not every Rule 59(e) motion should be treated as a second habeas." *Id.* at 476. He further asserted, however, that a Rule 59(e) motion that includes "wholly new claims" should be recharacterized as a second habeas petition. *Id.*

F.3d 116, 118 (2005); *see also Garcia v. Superintendent of Great Meadow Corr. Facility*, 841 F.3d 581, 582 (2d Cir. 2016) (per curiam) (applying this rule in a case involving a section 2254 petition). It follows that the Second Circuit would not recharacterize timely Rule 59(e) motions; by definition, Rule 59(e) motions are filed before "adjudication of an earlier petition has become final." *Whab*, 408 F.3d at 118.[3]

On the other side of the split, the Fifth, Eighth, and Tenth Circuits have issued published decisions that treat Rule 59(e) motions as second or successive if they include one or more habeas "claims" within the meaning of *Gonzalez*. *See, e.g.*, *Williams v. Thaler*, 602 F.3d 291, 303 (5th Cir. 2010); *Ward v. Norris*, 577 F.3d 925, 935 (8th Cir. 2009); *United States v. Pedraza*, 466 F.3d 932, 933 (10th Cir. 2006). The Fourth Circuit also reached that conclusion in an unpublished decision. *See United States v. Martin*, 132 F. App'x 450, 450 (4th Cir. 2005) (per curiam). And although respondent places the Eleventh Circuit on the Fifth Circuit's side of the split, she cites only two district court decisions in support. *See* BIO 20-21. In fact, as petitioner explained (Pet. 10 n.3), district courts within the Eleventh Circuit are divided on the question presented. *See Thomas v. Owens*, No. 08-cv-414, 2009 WL 3747162, at *2 n.1 (M.D. Ga. Nov. 4, 2009) (colleting decisions and noting the absence of on-point Eleventh Circuit precedent).

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[3] Some circuits have agreed that motions should not be recharacterized as second habeas applications while a first habeas application is pending, but they have made the filing of an appeal (or the expiration of the time to appeal) the relevant dividing line. *See Moreland v. Robinson*, 813 F.3d 315, 324-325 (6th Cir. 2016). Either approach is inconsistent with the Fifth Circuit's decision here.

Thus, contrary to respondent's assertion, more circuits reject the Fifth Circuit's approach to Rule 59(e) motions than "follow" it. BIO 20. But regardless of the precise breakdown, the circuit division is both deep and firmly entrenched.

II. This Case Is An Excellent Vehicle For Deciding Whether Rule 59(e) Motions May Be Recharacterized As Second Habeas Petitions.

The question of whether and how to apply *Gonzalez* to Rule 59(e) motions is important. Indeed, the issue is central to habeas procedure, for at least two reasons.

First, under the view respondent defends, Rule 59(e) "functionally ha[s] been repealed in habeas cases" since essentially "every 59(e) motion" must now be recharacterized as "a successive petition requiring Court of Appeals permission." *Howard*, 533 F.3d at 476 (Boggs, C.J., dissenting). There is no evidence that Congress intended for AEDPA "to so impede Rule 59(e)'s operation." *Blystone*, 664 F.3d at 414 (quotation marks and citation omitted). But that is now the rule in several circuits.

Second, the Fifth Circuit's conclusion that a recharacterized Rule 59(e) motion does not stop the time for filing an appeal will, as a practical matter, regularly strip habeas petitioners of appellate rights as to their *first* habeas petitions.[4] This case is illus-

[4] The decision in this case applied existing Fifth Circuit precedent on this issue. *See* Pet. App. 3-4 (citing *Uranga v. Davis*, 893 F.3d 282, 284 (5th Cir. 2018) ("[A] purported Rule 59(e) motion that is, in fact, a second or successive § 2254 application is subject to the restrictions of [AEDPA] and would not toll the time for filing a notice of appeal.")).

trative. Petitioner complied with the relevant procedural rules *exactly*. He filed a timely Rule 59(e) motion that did not raise any new issues and instead fit squarely within the purpose of the rule—to permit "reconsideration of matters properly encompassed in a decision on the merits." *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 174 (1989) (quotation marks and citation omitted).[5] Petitioner then filed a timely notice of appeal after the district court denied his motion. Pet. App. 3. But the Fifth Circuit nevertheless held that petitioner forfeited the ability to seek appellate review because he filed a standard Rule 59(e) motion and then assumed that Fed. R. 4(a)(4)(iv) means what it says. Such a complete loss of appellate rights is highly prejudicial. *Cf. Garza v. Idaho*, 139 S. Ct. 738, 742 (2019).

But despite the importance of the question presented and how frequently it recurs, the issue is often insulated from review. Consider how it typically arises. In circuits that apply the Fifth Circuit's rule, district courts have been instructed to transfer "improper" Rule 59(e) motions to the court of appeals to decide whether to authorize a second or successive petition. *E.g., Pedraza*, 466 F.3d at 934; *see* 28 U.S.C. § 2244(b)(3)(A). If the court allows the petition, then the question whether to apply the second or successive bar becomes moot. If the court denies the application, the habeas petitioner's ability to

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[5] Respondent suggests in passing that petitioner's motion "was not even proper under Rule 59(e)" because the motion "relitigated old matters." BIO 11-12 (quotation marks omitted). But that is just another way of arguing that the district court properly denied petitioner's motion *on the merits*; it provides no basis for treating his Rule 59(e) motion as retroactively void for purposes of the deadline to appeal.

seek this Court's review is strictly limited. *See* 28 U.S.C. § 2244(b)(3)(E). On the other side of the split, decisions will also regularly be shielded from review. For example, even if circuit precedent allows the district court to rule on a Rule 59(e) motion, there will be no basis for the Warden to file a petition for certiorari challenging that precedent if the court concludes the motion fails on the merits. *E.g.*, *Rishor*, 822 F.3d at 501; *Blystone*, 664 F.3d at 415-416.

By contrast, there are no procedural obstacles to review here. Respondent recognizes (at 13) that the Fifth Circuit's extension of *Gonzalez* to Rule 59(e) motions was outcome-determinative, because the court's jurisdictional decision was premised on its view "that the generalized statutory and judicial concepts applicable to Rule 59(e)" and Fed. R. App. P. 4(a) "must give way" to AEDPA's bar on second petitions. And it is clearly true that a decision by this Court rejecting the Fifth Circuit's approach to Rule 59(e) motions would clear the way for petitioner to pursue an appeal. It is undisputed that the court of appeals would have had jurisdiction but for its recharacterization of petitioner's motion because: (1) he "timely filed a Rule 59(e) motion" within the 28-day deadline, *see* Pet. App. 3; BIO 3-4; and (2) he filed his notice of appeal 30 days after the district court denied his Rule 59(e) motion, *see* BIO 4 (citing ECF 30, 31).[6] Moreover, in this case the Court is not limited to reviewing the denial of a certificate of appealabil-

[6] The prison mailbox rule applied to petitioner's filings, which were thus deemed filed on the date they were delivered to prison officials. *See* Rules Governing Section 2254 & 2255 Proceedings 3(d); *Uranga*, 893 F.3d at 284-285; *see also* ECF 31 at 1 (certificate of service for inmate filing of notice of appeal); ECF 28 at 26 (same for Rule 59(e) motion).

ity (COA). Rather, the petition presents a pure question of law for plenary consideration, as in *Gonzalez*.

III. Respondent's Merits Arguments Provide No Reason To Deny Review.

Respondent devotes most of her opposition to defending the Fifth Circuit's decision on the merits. BIO 8-21. Those arguments are irrelevant to the split's certworthiness and unconvincing on their own terms.

Respondent relies most heavily on *Gonzalez*, but she fails to confront the obvious differences between that case and this one. In *Gonzalez*, the petitioner's first habeas application had been fully adjudicated by the time he filed a Rule 60(b) motion—the court of appeals had denied him a COA more than a year earlier, and the mandate had issued. 545 U.S. at 527. Thus, the Court's analysis focused on whether the Rule 60(b) motion contained "claims" for habeas relief. *Id.* at 530-532. If so, there was no doubt that the motion would represent a second collateral attack on the petitioner's conviction.

This case is fundamentally different for reasons that cannot be reduced to the "label" on petitioner's motion. BIO 2. A timely Rule 59(e) motion is not a *new* collateral attack; it is "part and parcel" of the *initial* habeas proceeding, with a petitioner invoking the district court's traditional authority to correct its own mistakes "immediately after judgment is entered." *Blystone*, 664 F.3d at 414. By contrast, a Rule 60(b) motion, like the motion in *Gonzalez*, seeks to set aside a judgment "after the time to appeal has expired and the judgment has become final." *Id.* at 413. Indeed, under this Court's precedent, a timely

Rule 59(e) motion *by definition* does not attack a final judgment because "a motion for rehearing in a civil case renders an otherwise final decision of a district court not final" until the district court rules. *Ibarra*, 502 U.S. at 6.

For similar reasons, nothing in this Court's precedents supports the Fifth Circuit's further decision to not only recharacterize petitioner's motion, but to dismiss his appeal because of that recharacterization. The Rules of Civil Procedure apply in section 2254 proceedings "to the extent that [they are] not inconsistent with" federal statutes and rules. *Gonzalez*, 545 U.S. at 529. The Court identified one such inconsistency in *Gonzalez*, reasoning that AEDPA limits a district court's ability to grant Rule 60(b) motions that are "similar enough" to habeas applications that "failing to subject [the motions] to the same requirements" for successive applications "would be 'inconsistent with' the statute." *Id.* at 531 (citation omitted). But nothing in AEDPA's restrictions on successive habeas petitions is inconsistent with applying Fed. R. App. P. 4(a)(A)(iv) to Rule 59(e) motions filed in habeas cases. To the contrary, the rules make clear that "Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered" in section 2254 cases. *See* Rules Governing Section 2254 & 2255 Proceedings 11(b).

IV. The Court Should Grant The Second Question Presented To Allow Full Consideration Of The Consequences Of The Fifth Circuit's Approach.

The Court should also grant the second questioned presented, which asks whether a *pro se* petitioner must be warned and given an opportunity to

withdraw a motion if recharacterizing it as a second habeas petition will affect his ability to file a timely notice of appeal. As already explained (Pet. 13-17), the reasoning underlying this Court's decision in *Castro v. United States*, 540 U.S. 375 (2003), supports mandating such a procedure in this context.

Respondent argues (at 21-23), that *Castro* only restricts a court's ability to recharacterize an applicant's "initial" habeas petition. But respondent ignores the fact that the Fifth Circuit's recharacterization of petitioner's Rule 59(e) motion blocked him from seeking an appeal *in his initial habeas proceeding*. Petitioner is not seeking to extend *Castro* to all subsequent habeas applications, but only to circumstances where involuntary recharacterization would compromise the habeas applicant's "one full opportunity to seek collateral review." *Blystone*, 664 F.3d at 414. None of the unpublished decisions that respondent cites (at 22) addresses this circumstance. Petitioner respectfully suggests that the Court should grant review of this question to allow full consideration of the consequences of the Fifth Circuit's extension of *Gonzalez* to Rule 59(e) motions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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