CAPITAL CASE NO. 18-9265

IN THE

Supreme Court of the United States

JUAN RAMON MEZA SEGUNDO,

Petitioner,

v.

LORIE DAVIS,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR CERTIORARI

This case presents the ideal instrument for this Court to address a question left lingering since this Court held in *Gonzalez v. Crosby* that Rule 60(b)(6) motions are permissible in federal habeas cases so long as they are not disguised successive habeas petitions—whether a petitioner may argue that the merits of his case make it "extraordinary" and worthy of re-opening.[1] Under Rule 60(b)(6), a federal habeas petitioner may seek to reopen the judgment of his case by attacking a defect in the integrity of the habeas proceedings and identifying "extraordinary circumstances" that warrant relief from judgment. A petitioner may not use a Rule 60(b)(6) motion to raise or re-litigate habeas claims. While five circuits permit equitable arguments relating to the merits of the case under the extraordinary circumstances prong, the Fifth Circuit does not, instead holding that any merits-based arguments transform an otherwise proper Rule 60(b)(6) motion into a successive habeas petition. Respondent attempts to claim that no split exists but the published Fifth Circuit caselaw is clear—a Rule 60(b)(6) motion must be limited in its entirely to non-merits aspects of the federal habeas case.

Notably, Respondent uses the majority of her brief to argue, not the split, but the merits of Petitioner's case. Like the Fifth Circuit, Respondent ignores the *Ayestas* defect Petitioner sought to remedy in his Rule 60(b)(6) motion and instead harps on the instances where Petitioner discussed non-procedural aspects of his case, such as trial counsel's reliance on racial stereotypes while ignoring a viable *Atkins* defense.

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[1] Stated otherwise, whether the extraordinary circumstances must be procedural in nature.

But the question presented here is a legal one and it is clear. The circuit courts require this Court's guidance on how to identify a habeas claim in a Rule 60(b)(6) motion and whether the merits of the case are relevant to the extraordinary circumstances determination.

Moreover, this Court's precedent does not sanction the result here. Under the Fifth Circuit's interpretation of *Gonzalez v. Crosby*, Rule 60(b)(6) relief is all but impossible. A petitioner may argue only the non-merits defect—which the Fifth Circuit will deem not extraordinary—or additionally argue that the merits of his case make it extraordinary and have the motion tossed as a successive habeas petition. *Gonzalez* does not support the Fifth Circuit's rule. For that reason, this Court should grant certiorari to resolve the circuit split and clarify whether the extraordinary circumstances pled in a Rule 60(b)(6) motion must be procedural in nature. This Court may also hold the petition pending the result of the reason grant of certiorari in *Banister v. Davis*.

I. The second question presented—whether the extraordinary circumstances pled in support of reopening a judgment under Rule 60(b)(6) may relate to the merits of the case—involves a deep-rooted circuit split.

In the wake of this Court's decision in *Gonzalez v. Crosby*, 545 U.S. 524 (2005), the circuits have split over whether the extraordinary circumstances pled in support of a Rule 60(b)(6) motion must be procedural in nature. At least five circuits permit merits-based extraordinary circumstance arguments, while the Fifth Circuit construes such arguments as habeas claims and holds that those Rule 60(b)(6)

motions are successive habeas petitions. The Fifth Circuit's rule is unworkable, necessitating direction from this Court.

The Third, Sixth, Seventh, Ninth, and Tenth Circuits will consider merits-based arguments when determining whether to deem a case "extraordinary" and worthy of the rare relief available under Rule 60(b)(6). *See, e.g., Satterfield v. District Attorney Philadelphia*, 872 F.3d 152, 162–63 (3d Cir. 2017) (holding "the severity of the underlying constitutional violation is an equitable factor that may support a funding of extraordinary circumstances under Rule 60(b)(6)"); *Ramirez v. United States*, 799 F.3d 845, 851 (7th Cir. 2015); *Hall v. Haws*, 861 F.3d 977, 988 (9th Cir. 2017); *United States v. Marizcales-Delgadillo*, 243 F. App'x 435, 438 (10th Cir. 2007); *Zagorksi v. Mays*, 907 F.3d 901, 907 (6th Cir. 2018). But, as Respondent concedes, the Fifth Circuit limits extraordinary circumstances arguments to the alleged non-merits defect itself. *See* BIO at 30 ("Had [Segundo] merely complained about the district court's denial of his funding motion and nothing more, the motion may have been non-successive.").

While declaring that Petitioner's Rule 60(b) motion was successive because he made merits-based extraordinary circumstances arguments, Respondent contrarily argues that there is no circuit split because the Fifth Circuit *does* in fact permit those arguments. BIO at 28 (citing *Diaz v. Stephens*, 731 F.3d 370 (5th Cir. 2013)). Admittedly, in *Diaz* the Fifth Circuit agreed to "assume *arguendo*" that certain equitable factors "may have some application in the Rule 60(b)(6) context[,]" but the vast majority of its reasoning was devoted to holding that this Court's decisions in

Martinez v. Ryan, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), are not extraordinary circumstances. 731 F.3d at 377–79. Its holding does not support Respondent's argument that the Fifth Circuit permits merits-based arguments as to why a case exemplifies extraordinary circumstances.

Notably, Respondent cannot refute the numerous cases in which the Fifth Circuit explicitly refused to consider such equitable circumstances. *See, e.g., In re Segundo*, 757 F. App'x 333, 335 (5th Cir. 2018) (holding that allowing non-procedural extraordinary circumstances arguments would improperly allow movants to "shoehorn all of their merits-based arguments into a Rule 60(b) motion"); *Preyor v. Davis*, 704 F. App'x 331, 340 (5th Cir. 2017) (holding 60(b)(6) motion was successive petition when pled extraordinary circumstances related to the merits of an underlying claim); *Haynes v. Davis*, 733 F. App'x 766, 769 n.1 (5th Cir. 2018) (holding the court was "precluded from conducting a comprehensive merits review" on a 60(b)(6) motion predicated on *Martinez*); *In re Jasper*, 559 F. App'x 366, 370–72 (5th Cir. 2014) (holding 60(b)(6) motion predicated on the district court ruling on an incomplete record was successive because petitioner sought to correct the error in support of underlying claims).

Most tellingly, on July 3, 2019, the Fifth Circuit affirmed Petitioner's reading of the circuit's rule in a published opinion. In *Crutsinger v. Davis*, Billy Jack Crutsinger filed a Rule 60(b)(6) motion alleging that—as in Petitioner's case—the district court denied him 18 U.S.C. § 3599 funding under an erroneous legal standard struck down by this Court in *Ayestas v. Davis*, 138 S. Ct. 1080 (2018) . __ F.3d __ ,

2019 WL 2864445, at *3 (5th Cir. 2019). The district court construed Crutsinger's motion as a successive habeas petition and transferred it to the circuit court. *Id.* at *3. The Fifth Circuit, however, held that Crutsinger's motion was a true Rule 60(b)(6) motion because it was "confined to the federal district court's denial of funding in the first federal habeas proceeding." *Id.* at *4. It remanded the case to the district court to evaluate extraordinary circumstances, but noted that this Court's "holding in *Gonzalez* that 'not every interpretation of the federal statutes setting forth the requirements for habeas provides cause for reopening cases long since final' is at least instructive, *if not dispositive*, of Crutsinger's Rule 60(b) motion." *Id.* at *4 (emphasis added); *see also Williams v. Thaler*, 602 F.3d 291, 312 (5th Cir. 2010) ("Although we have no guidance as to what may constitute an extraordinary circumstance, the Supreme Court has held that a change in law after a court issues a final judgment does not qualify[.]").

Thus, the Fifth Circuit's approach in Petitioner's case and others is at odds with at least five other circuits. This Court should clarify whether the circumstances a litigant offers to establish that his case is extraordinary under Rule 60(b)(6) may relate to the merits of the case without rendering the motion successive.

II. This case presents an ideal vehicle for the Court to decide the issue.

The question of whether the defect addressed in a Rule 60(b) motion must itself be extraordinary is important and affects all federal habeas litigants. This case presents an optimal vehicle for this Court to address the issue.

First, under the view Respondent defends, Rule 60(b)(6) has functionally been repealed in habeas cases because relief is only warranted when the non-merits defect

itself is extraordinary. There is no evidence that this Court intended such a result in *Gonzalez*. But the Fifth Circuit's conclusion that equitable arguments render a Rule 60(b)(6) motion successive will, as a practical matter, end the possibility of relief under Rule 60(b)(6). *Compare In re Segundo*, 757 F. App'x at 335 (holding merits-based extraordinary circumstances arguments rendered motion successive) *with Crutsinger*, 2019 WL 2864445, at *4 (stating a 60(b) motion raising only the *Ayestas* defect almost certainly did not establish extraordinary circumstances).

Second, Petitioner's case is illustrative of that result. Petitioner requested § 3599 funding three times from the district court, each time losing under an erroneous legal standard. When this Court corrected the Fifth Circuit's error in *Ayestas*, Petitioner filed a Rule 60(b)(6) motion attacking that defect. Ever mindful of the Fifth Circuit's oft-repeated mantra that a change in decisional law alone is insufficient to establish extraordinary circumstances, Petitioner listed numerous equitable problems that had plagued his case, including that his intellectual disability claim had been thwarted by racial stereotypes and Texas's non-scientific criteria. In doing so, Petitioner continually informed the courts that he did not intend to litigate his extraordinary circumstances if his case were reopened—only the *Ayestas* error. Rather, he detailed these circumstances as evidence that his case warranted a second look. Both the district court and the Fifth Circuit ignored the defect Petitioner actually sought to remedy and instead used his equitable circumstances to contort his motion into a successive petition. And, as *Crutsinger* almost certainly makes clear, the *Ayestas* defect alone is not extraordinary. *See*

Crutsinger, 2019 WL 2864445, at *4. Under the Fifth Circuit's standard, relief is impossible.

Finally, there are no procedural obstacles to review in this case. Respondent recognizes that the Fifth Circuit's reading of *Gonzalez* was outcome-determinative, because the court's jurisdictional decision was premised on its view that any merits-based equity arguments render a 60(b) motion successive. *See* BIO at 30. It is undisputed that the lower courts would have had jurisdiction but for the courts' re-characterization of Petitioner's motion as a successive petition. This 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. Those arguments are unpersuasive and irrelevant to the split's certworthiness.

Respondent repeatedly points to factual distinctions between Petitioner's case and his cited non-Fifth Circuit holdings that considered merits arguments under the extraordinary circumstances prong. BIO at 24–29. That these cases are not factually identical to Petitioner's is unsurprising considering that the Fifth Circuit was the only court applying the "substantial need" test struck down in *Ayestas*. But the fact that a split exists cannot be denied. At least five other circuits permit merits-based arguments to fulfill the extraordinary circumstances prong of a Rule 60(b)(6) motion. The Fifth Circuit does not. This Court should provide guidance on that split.

Moreover, nothing in this Court's precedent supports the Fifth Circuit's decision to re-characterize Petitioner's motion as successive. In *Gonzalez*, this Court

reasoned that a 60(b) motion is only a successive petition when it contains one or more "claims," defined as "an asserted federal basis for relief from a state court's judgment of conviction," or attacks the federal court's previous resolution of a claim "*on the merits*." 545 U.S. at 530–32. Mr. Segundo's Rule 60(b)(6) motion neither added new claims nor attacked the federal court's previous merits rulings. Rather, he identified a defect that he sought to remedy and highlighted several equitable considerations in his case—none of which he requested habeas relief on. The Fifth Circuit's process of analyzing the extraordinary circumstances to the exclusion of the defect is out of line with *Gonzalez* and this Court's line of extraordinary circumstances cases. *See id.* at 535; *Liljeberg v. Health Servs. Acqu. Corp.,* 486 U.S. 847, 868 (1988); *Buck v. Davis*, 137 S. Ct. 759, 772 (2017).

Finally, Respondent's argument that Petitioner would not obtain relief even if his were a true Rule 60(b)(6) motion is irrelevant. *See* BIO at 34–38. Because the district court construed his motion as a successor and transferred it to the Fifth Circuit, Petitioner was never able to fully argue to the district court that he should be given funding under the correct standard. And while the district court made an alternative ruling that funding would still be denied, the Fifth Circuit did not address that ruling. Nothing prevents this Court from addressing the legal question at issue—whether merits-based arguments under the extraordinary circumstances prong of Rule 60(b)(6) render a motion successive.

IV. This Court should grant the first question presented to resolve the circuit split over whether the defect alleged in a Rule 60(b)(6) motion must have precluded a merits determination.

In *Gonzalez*, this Court noted "[i]f neither the motion itself *nor the federal judgment from which it seeks relief* substantively addresses federal grounds for setting aside the movant's state conviction, allowing the motion to proceed as denominated creates no inconsistency with the habeas statute or rules." 545 U.S. at 533 (emphasis added). Since then, the circuits have split over whether that sentence means it is *required* for Rule 60(b)(6) relief that the defect precluded a merits determination by the federal district court. This Court should clarify whether the defect alleged in a Rule 60(b)(6) motion must have precluded the district court from resolving the petitioner's habeas claims on the merits.

The Fifth Circuit markedly displays the confusion on this question with multiple conflicting opinions. *Compare In re Robinson*, 917 F.3d 856, 863–65 (5th Cir. 2019) (rejecting the movant's attack on the court denying discovery and applying the wrong certificate of appealability standard because neither precluded a ruling on the merits of the underlying claim) *and Haynes v. Davis*, 733 F. App'x 766, 769 (5th Cir. 2018) (categorically stating that Rule 60(b)(6) motions "may challenge *only* erroneous rulings 'which precluded a merits determination'") (quoting *Gonzalez*, 545 U.S. at 532 n.4) (emphasis added) *with Crutsinger*, 2019 2864445, at *4 (holding 60(b)(6) motion based on *Ayestas* defect was appropriate even though it did not preclude a merits determination). The circuit court has frequently, although not exclusively, held that

Rule 60(b)(6) motions must be predicated on a defect that prevented a merits ruling on the underlying habeas claims.

On the other hand, the Sixth, Tenth, and Eleventh Circuits have no such requirement. *See, e.g., Mitchell v. Rees*, 261 F. App'x 825, 829 (6th Cir. 2008) (explicitly rejecting the argument that a "true" Rule 60(b) motion must attack a procedural ruling that precluded a merits determination); *Spitznas v. Boone*, 464 F.3d 1213, 1216 (10th Cir. 2006); *Franqui v. Florida*, 638 F.3d 1368, 1374 n.10 (11th Cir. 2011). Respondent's argument that the facts of these cases differ from that of Petitioner's is a non sequitur. *See* BIO at 21–22. The legal principle applied by the circuits is what is at issue here. Respondent cannot refute this obvious circuit confusion and instead points to irrelevant factual distinctions in Petitioner's case.

This Court should grant certiorari to resolve the circuit split on this question.

V. There is a reasonable probability of a different result in this case if *Banister v. Davis*, 18-6943, is decided favorably to the Petitioner in that case.

A little over a month after Mr. Segundo filed his petition for certiorari, this Court granted the petition in *Banister v. Davis* on the question of "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)." __ S. Ct. __ , 2019 WL 2570655 (June 24, 2019). In *Banister*, the Fifth Circuit held that it lacked jurisdiction over Banister's appeal from the district court's denial of his Rule 59(e) motion because the circuit court construed the motion as a successive habeas petition. *Banister v. Davis*, No. 17-10826 (5th Cir. May 8, 2018). The Fifth Circuit

ruled that the motion was not a true Rule 59(e) motion because it "merely attacked the merits of the district court's reasoning in denying the § 2254 petition[.]" *Id.* at 3.

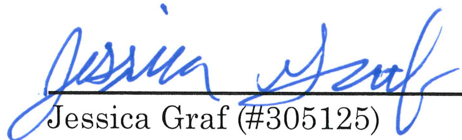
In determining whether and under what circumstances a Rule 59(e) motion is in fact a successive habeas petition, this Court will grapple with a question relevant to Mr. Segundo's petition for certiorari—under what circumstances a post-judgment motion actually raises a "habeas claim." This Court "regularly hold(s) cases that involve the same issue as a case on which *certiorari* has been granted and plenary review is being conducted in order that (if appropriate) they may be 'GVR'd' when the case is decided." *Lawrence v. Chater*, 516 U.S. 163, 181 (1996) (Scalia, J., dissenting). Ultimately, a GVR is appropriate where intervening developments reveal a reasonable probability that the outcome below rests upon a premise that the lower court would reject if given the opportunity for further consideration. *See Lawrence*, 516 U.S. at 168. As in *Banister*, the Fifth Circuit held that Mr. Segundo's Rule 60(b)(6) motion was a successive habeas petition because he was attempting to litigate "habeas claims" rather than address a procedural defect. Thus, this Court's forthcoming decision in *Banister* will likely involve the resolution of questions pertinent to Mr. Segundo's petition. If the Court does not grant his Petition, this Court should hold Mr. Segundo's petition pending the resolution of *Banister v. Davis*.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED: July 15, 2019

Respectfully submitted,



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