

No. 19-5990

IN THE SUPREME COURT OF THE UNITED STATES

DAVID ALAN VOGEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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Petitioner contends (Pet. 7-10) that the court of appeals erred in determining that it lacked authority to grant his request for a certificate of appealability. The court determined that petitioner sought review not of the underlying order denying his motion for postconviction relief under 28 U.S.C. 2255, but only of the district court's order denying his motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e), and that the motion should be construed in relevant part as an unauthorized second or successive Section 2255 motion. Pet. App. A3 (citing Gonzalez v. Crosby, 545 U.S. 524, 531-532 (2005)).

This Court has granted review in Banister v. Davis, cert. granted, 139 S. Ct. 2742 (2019) (No. 18-6943), to address whether and under what circumstances a timely motion to alter or amend a judgment under Federal Rule of Civil Procedure 59(e) should be recharacterized as a second or successive habeas corpus application under Gonzalez v. Crosby, supra. The Court's resolution of that question could affect the court of appeals' analysis of petitioner's Rule 59(e) motion. The petition for a writ of certiorari in this case should therefore be held pending the decision in Banister and then disposed of as appropriate in light of that decision.*

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

NOVEMBER 2019

* The government waives any further response to the petition unless this Court requests otherwise.