No. 20-1207

In the Supreme Court of the United States

ALEXANDER BALBUENA,

Petitioner,

v.

BRIAN CATES, ACTING WARDEN,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a motion for relief from a final judgment under Federal Rule of Civil Procedure 60(b) that seeks to present a new claim for federal habeas relief constitutes a "second or successive" petition, 28 U.S.C. § 2244(b), if it is filed in district court when an appeal from the district court's denial of the initial habeas petition is pending in the court of appeals.

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STATEMENT

1. In January 2006, a group of assailants shot and killed Jose Segura while he was sitting in his car with Oralia Giron and their two children. Pet. App. 6a-7a. Giron later testified that the man standing nearest to Segura said that the shooting was revenge for the murder of Luis Ochoa, also known as "Gizmo," who had been shot and killed the previous day. *Id.* at 6a-7a & n.1; *see People v. Balbuena*, No. A122043, 2010 WL 1783558, at *2 (Cal. App. May 5, 2010).

At the scene of the murder, police found shell casings for .32-caliber and 9-millimeter handguns. Pet. App. 7a. They obtained a search warrant for a nearby house owned by Juan Herrera; after searching the house they recovered a handgun and ammunition. *Id.* Kristina Lawson, who rented a room in the house, told officers that she had seen petitioner Alexander Balbuena and Julius Stinson with guns just before the shooting. *Id.* She heard gunshots, saw Balbuena and Stinson running toward the house, and saw Balbuena enter the house, apparently trying to hide a gun under a couch. *Id.* She also told officers that, later on the day of the shooting, Balbuena had told her that he shot Segura in the head. *Id.*

After obtaining a warrant, the police arrested Balbuena at his apartment at around 2:00 a.m. Pet. App. 8a. They took him to a police station, where two detectives sought to question him about Segura's murder. *Id.* at 8a-9a. At the beginning of the interview, one of the detectives read Balbuena his *Miranda* rights as follows:

> So, you know you have the right to remain silent[,] anything you say can be used against you in a court, you have the right to an attorney, you

> have the right to an attorney prior to your questioning if you desire, if you can't afford to hire one, one will be represented to you free of charge. You understand all those rights? You're nodding your head like you do, right? Okay, you're probably curious as to why we're wanting to talk [to] you tonight, is that true? With that in mind, are you willing to talk to us about why we were at your house tonight?

Pet. App. 9a (second alteration in original). Balbuena responded: "Yup. Yup." *Id.*

Balbuena initially denied being at the scene of the murder. Pet. App. 9a. The detectives then told Balbuena (falsely) that they had already talked to Stinson, who had placed Balbuena at the scene. *Id.* The detectives told Balbuena, "it's important for you to be honest with us so if there is some way to help yourself out[,] this is the time to do it." *Id.* The detectives suggested that Balbuena might have acted out of anger that his friend Gizmo had been killed, or that Stinson might have forced Balbuena to kill Segura. *Id.* at 10a.

Balbuena acknowledged being at the scene of the murder, but denied having a gun. Pet. App. 10a. The detectives told Balbuena that witnesses had seen him shooting a gun at the scene; they asked Balbuena what kind of gun he had, because "only one of them hit somebody . . . so it's important which one you had." *Id.* (alterations omitted). Balbuena then admitted having a .32-caliber handgun, seeing two people in the car, and shooting three or four rounds at the car's front window. *Id.* After the detectives suggested Balbuena might receive more lenient treatment if he showed remorse, he told them that Herrera had given him the gun and had instructed him to shoot Segura in retaliation for the murder of Gizmo. *Id.* at 11a.

2. Prosecutors charged Balbuena with first-degree murder, attempted murder, and street terrorism. Pet. App. 11a. Before trial, Balbuena moved to suppress his confession as involuntary. *Id.* The trial court denied the motion. *Id.* A jury convicted Balbuena on all counts and the trial court sentenced him to 82 years to life in prison. *Id.*

On direct appeal, Balbuena argued (among other things) that his confession should have been excluded because it was coerced and involuntary. Pet. App. 11a. The court of appeal rejected that argument. *Balbuena*, 2010 WL 1783558, at *7 (Kline, P.J.). It reasoned that while there were "places in the interrogation where the detectives crossed the line" by appearing to offer Balbuena "leniency in exchange for honesty," the key question for purposes of Balbuena's coercion claim was whether, "given all the circumstances, the promise was a motivating factor in the giving of the statement." *Id.* at *14. The court concluded that it was not. Balbuena's "critical admissions"—including "that he was in front of the car, that he had the .32 caliber gun, and that he had shot three or four rounds at the front window of the car"—were made "before improper tactics were employed." *Id.* And the "totality of the circumstances" confirmed that Balbuena's "crucial admissions were voluntary and not coerced." *Id.* at *15. "Having reviewed the videotape of [the] confession," the court "agree[d] with the trial court's commendably thorough and detailed" conclusion that the interview occurred in "a non-threatening atmosphere for a police interrogation." *Id.*

The court of appeal further held that "to the extent any portions of appellant's confession should have been suppressed as induced by improper interrogation tactics, the error was harmless beyond a reasonable

doubt." *Balbuena*, 2010 WL 1783558, at *15. The other evidence against Balbuena was "very strong," particularly Lawson's statements to the police that Balbuena had confessed to shooting Segura and that she saw Balbuena running back to the house immediately after the shooting to hide a gun. *Id.*

Balbuena did not raise any claim that the police failed to properly advise him of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). The court of appeal observed that Balbuena "was advised of his *Miranda* rights and waived them." *Balbuena*, 2010 WL 1783558, at *5.

The court reduced Balbuena's sentence to 72 years to life because two sentencing enhancements had not properly been submitted to the jury, but affirmed his conviction and sentence in all other respects. Pet. App. 12a; *see Balbuena*, 2010 WL 1783558, at *27.[1] The California Supreme Court denied review. Pet. App. 12a.

3. In January 2011, Balbuena filed a habeas petition in federal district court. Pet. App. 12a. Among other claims, he asserted that the state court had unreasonably rejected his claim that his confession should have been excluded as involuntary in violation of the Due Process Clause. *Id.* In May 2012, the district court denied his petition, rejecting that claim on the merits. *Id.*; *see id.* at 66a-85a. It also denied a certificate of appealability. *Id.* at 84a. The Ninth Circuit granted a certificate of appealability limited to the due process claim and appointed counsel to represent Balbuena. *Id.* at 12a-13a.

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[1] Under current law, Balbuena will be eligible for "youth offender" parole consideration beginning in his 25th year of incarceration. *See* Cal. Penal Code § 3051(b)(3); C.A. SER 10-11.

In August 2013, Balbuena asked the Ninth Circuit to stay his appeal and remand the case to the district court to allow him to "file an amended petition" raising a *Miranda* claim. Pet. App. 13a. He "acknowledged" that if the court of appeals "denied his motion he would be 'left to file a new successive habeas petition'" subject to the restrictions of 28 U.S.C. § 2244(b). *Id.* The court of appeals remanded the case to the district court, *see* Fed. R. App. P. 12.1(b), for it to consider Balbuena's motion for relief from a final judgment under Federal Rule of Civil Procedure 60(b). Pet. App. 13a.

The district court initially denied the Rule 60(b) motion without prejudice because Balbuena had not exhausted the new claim in state court. Pet. App. 13a. After further litigation in state court, Balbuena filed a renewed motion, and in February 2018 the district court denied that motion as an unauthorized second or successive habeas petition. *Id.* at 13a-14a; *see id.* at 53a-60a.[2] "'[A]lthough labeled a Rule 60(b) motion,'" the court concluded that Balbuena's filing was in "'substance a successive habeas petition and should be treated accordingly." *Id.* at 56a (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 531 (2005)). It explained that "[c]ase law supports this conclusion." *Id.* at 57a-59a &

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[2] On state collateral review, Balbuena raised his *Miranda* claim and argued that his prior attorneys' failure to raise that claim at trial and on direct appeal constituted ineffective assistance of counsel. *See* C.A. SER 3; C.A. ER 51-62. He also raised a separate Eighth Amendment claim regarding the length of his sentence as a juvenile offender. C.A. SER 3. The state court of appeal denied relief on all his claims, except that it ordered that Balbuena be permitted to make a record of mitigating factors pertaining to his youth for use at a future parole hearing, as required by state law. *See id.* at 1-11 & 3 n.3; C.A. ER 49-50; *People v. Franklin*, 63 Cal. 4th 261, 283-284 (2016). The California Supreme Court denied review. C.A. ER 48.

nn.2, 3 (discussing, *inter alia*, *Beaty v. Schriro*, 554 F.3d 780 (9th Cir. 2009)).

The court of appeals affirmed both the district court's denial of Balbuena's initial habeas petition and its denial of his Rule 60(b) motion as an unauthorized second or successive petition. Pet. App. 1a-44a. As to the merits of Balbuena's coerced-confession claim, the court of appeals reasoned that under "AEDPA's highly deferential standard . . . the state court's determination that Balbuena's confession was voluntary was not unreasonable." *Id.* at 27a; *see id.* at 14a-27a.

As to the Rule 60(b) motion, the court explained that circuit precedent controlled the analysis. Pet. App. 30a-33a. "[L]ike the petitioner in *Beaty*, Balbuena sought to add a new claim after the district court denied his petition and he appealed that denial," so the restrictions on second or successive petitions set forth in Section 2244 applied. *Id.* at 32a-33a; *see Beaty*, 554 F.3d at 782-783 & n.1. The court reasoned that out-of-circuit authorities invoked by Balbuena were "distinguishable" from *Beaty* because they "do not address Rule 60(b) motions or apply *Gonzalez*," Pet. App. 33a, and they arose in different procedural postures, *see id.* at 33a-34a (discussing *Ching v. United States*, 298 F.3d 174 (2d Cir. 2002), *Whab v. United States*, 408 F.3d 116 (2d Cir. 2005), and *United States v. Santarelli*, 929 F.3d 95 (3d Cir. 2019)).

The court of appeals also explained that this Court's precedent supported treating the Rule 60(b) motion as "a disguised habeas petition" because it "'seeks to add a new ground for relief'"—*i.e.*, the new *Miranda* claim. Pet. App. 38a (quoting *Gonzalez*, 545 U.S. at 532); *see id.* at 35a-38a. And *Banister v. Davis*, 140 S. Ct. 1698 (2020), "further supports" that conclusion. Pet. App. 40a; *see id.* at 39a-44a. *Banister*'s

"analysis of Rule 60(b) motions as removed from the initial habeas proceeding, collaterally attacking the judgment, and threatening serial habeas petition, applies with equal force to Rule 60(b) motions filed during the appeal of an initial habeas proceeding." *Id.* at 42a.

Judge Fletcher concurred in the result. Pet. App. 45a-52a. He agreed that *Beaty* "require[d]" the panel "to hold that Balbuena's Rule 60(b) motion was a second or successive habeas petition." *Id.* at 45a. But he wrote "separately to register [his] disagreement with *Beaty* and to urge" this Court to grant review. *Id.*

ARGUMENT

Nearly two years after the district court entered a final judgment denying his initial habeas petition, Balbuena filed a Rule 60(b) motion advancing a new constitutional claim that he had never previously raised in state or federal court. The lower courts held that Balbuena's motion was a "second or successive" habeas petition under 28 U.S.C. § 2244(b). There is no circuit conflict on the question whether a Rule 60(b) motion like Balbuena's is a second or successive petition. And the decision below is consistent with this Court's precedent. *See Banister v. Davis*, 140 S. Ct. 1698, 1708-1711 (2020); *Gonzalez v. Crosby*, 545 U.S. 524, 531-532 (2005).

1. Balbuena urges the Court to grant review to resolve an "intractable split in the courts of appeals," Pet. 13, but that mischaracterizes the state of the law on the central issue in this case. Every decision invoked by Balbuena that addressed a Rule 60(b) motion presenting a new claim reached the same result as the decision below. The two circuits that he describes as comprising the short side of an "active 5-2 circuit split"

(*id.*) did not consider the application of Section 2244 to a Rule 60(b) motion; and it is not at all clear that those courts would reach a different result from the decision below on the facts presented here.

a. As Balbuena acknowledges, the decision below "align[s]" with the approach taken by other courts in the context of Rule 60(b) motions. Pet. 15; *see id.* at 13-16. The Ninth Circuit concluded that "a Rule 60(b) motion that asserts a new claim is in effect a habeas corpus petition that is subject to the requirements of § 2244(b)." Pet. App. 37a. It next reviewed this Court's precedent and held that this conclusion "applies with equal force to Rule 60(b) motions filed during the appeal of an initial habeas proceeding," like this one, "and to such motions filed after the appeal is completed." *Id.* at 42a.

That holding accords with decisions from the Sixth, Seventh, and Eighth Circuits. In *Moreland v. Robinson*, 813 F.3d 315, 325 (6th Cir. 2016), the court held that a "Rule 60(b) motion or motion to amend that seeks to raise habeas claims is a second or successive habeas petition when that motion is filed after the petitioner has appealed the district court's denial of his original habeas petition[.]" In *Phillips v. United States*, 668 F.3d 433, 436 (7th Cir. 2012), the Seventh Circuit agreed that a "Rule 60(b) motion [filed] while the appeal was pending" constitutes "a new application for collateral relief," which may not be granted unless the petitioner satisfies the requirements for filing a second or successive petition. And in *Williams v. Norris*, 461 F.3d 999, 1002-1004 (8th Cir. 2006), the Eighth Circuit rejected the argument that a Rule 60(b) motion seeking to add a new claim "is not a successive

habeas if it occurs after the petition is denied, but before the denial is affirmed on appeal."[3]

b. Balbuena asserts that decisions of the Second and Third Circuit are in conflict with the decision below. Pet. 16-21. But he substantially overstates the degree of tension between the lower courts in this area—and his assertion that there is a "stark conflict" (*id.* at 21) on the particular question presented by this case is incorrect.

i. In *United States v. Santarelli*, 929 F.3d 95, 99 (3d Cir. 2019), a habeas applicant filed in the district court a "[m]otion to [a]mend" seeking to add new claims while her initial petition "was still pending before" that court. The district court denied that motion on the ground that it did not satisfy the "relation back" standard of Federal Rule of Civil Procedure 15, and then denied the initial habeas petition on the merits. *Id.* at 99-100. The applicant sought review in the court of appeals; while that appeal was pending, she filed in the court of appeals a motion for leave to file a second or successive petition. *Id.* at 100, 103; *see* 28 U.S.C. § 2244(b)(3).

With respect to the appeal of the initial petition, the court of appeals held that the district court erred in denying the motion to amend under Rule 15, remanding the case to the district court on that basis. *Santarelli*, 929 F.3d at 101, 103. The court of appeals then concluded that the motion for leave to file a second or successive petition was unnecessary because a second habeas petition filed in district court while the

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[3] Although the case did not arise from a Rule 60(b) motion, the Tenth Circuit's discussion in *Ochoa v. Sirmons*, 485 F.3d 538, 539-541 (10th Cir. 2007) (per curiam), also supports the reasoning of the decision below.

appeal of the initial petition was pending was not (yet) "'second or successive' under AEDPA." *Id.* at 104. The court thus "transfer[red]" that motion to the district court. *Id.* at 107.

But the court of appeals explained that only in narrow circumstances could the district court actually consider the merits of such a subsequent filing. *Santarelli*, 929 F.3d at 105-106. The district court would "lack[] jurisdiction to consider" it while the appeal of the denial of the initial petition was pending because the "filing of a notice of appeal . . . divests the district court" of jurisdiction. *Id.* at 106. For that reason, the subsequent filing "should remain stayed" in district court "pending the resolution of the appeal with respect to the initial habeas petition." *Id.* "In the event that a petitioner exhausts her appellate remedies to no avail" with respect to the initial petition, the district court "should refer" the subsequent filing "to the court of appeals as a 'second or successive' habeas petition" at that point. *Id.* Only if the court of appeals "vacates or reverses, in whole or in part, the district court's denial of the initial habeas petition and remands the matter"—as the Third Circuit did in *Santarelli*—would the district court "be vested with jurisdiction to consider" the subsequent filing. *Id.*

Importantly, the Third Circuit viewed its precedent as "generally consistent" with decisions that Balbuena acknowledges are aligned with the decision below. *Santarelli*, 929 F.3d at 105; *see* Pet. 15. The court distinguished the circumstances of the case before it from those involving Rule 60(b) motions. *Santarelli*, 929 F.3d at 105 (citing *Phillips*, 668 F.3d at 435). And it explained that its approach would not "'undermine the policy against piecemeal litigation embodied in

§ 2244(b),'" *id.* (quoting *Ochoa* 485 F.3d at 541), because of its guidance that district courts stay the subsequent filings pending resolution of the initial appeal and then treat them as a second or successive petitions if the initial appeal does not succeed, *id.* at 105-106.

It is thus not clear that the result in Balbuena's case would have been different had it been litigated in the Third Circuit instead of the Ninth Circuit. *See* Pet. App. 33a-35a. Unlike *Santarelli*, Balbuena's case involves a Rule 60(b) motion. *See* 929 F.3d at 105. It appears likely that the Third Circuit would have treated that motion as a "second or successive" petition based on *Gonzalez* and "the inherent nature of Rule 60(b) motions." *Id.*[4] And even if the filing had been allowed, any proceedings in the district court would have been "stayed pending the resolution" of the appeal of the initial petition, *id.* at 106; after that appeal was unsuccessful (*see* Pet. App. 14a-27a), the district court would have been obligated to treat the pending filing as a second or successive petition under AEDPA, *see Santarelli*, 929 F.3d at 106.

ii. The Second Circuit decisions Balbuena invokes (Pet. 16-18) arose in different procedural settings as well—and they predate this Court's decisions in *Gonzalez* and *Banister*, which heavily informed the Ninth Circuit's analysis here.

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[4] Balbuena contends that "[t]he Third Circuit considered *Gonzalez* in deciding *Santarelli* but nonetheless rejected the interpretation adopted by" the decision below. Pet. 22. But *Santarelli* distinguished *Gonzalez* on the ground that it involved a Rule 60(b) motion, and "Santarelli's motion to file [a] subsequent petition is *not* such a motion." 929 F.3d at 105 (capitalization omitted). That suggests the court envisioned that the result would be different in a case involving a Rule 60(b) motion.

In *Ching v. United States*, 298 F.3d 174 (2d Cir. 2002), a habeas applicant sought to file a second petition in the district court while his appeal of the district court's denial of the initial petition was pending. 298 F.3d at 175-176. The court of appeals ultimately granted relief in that appeal on unrelated procedural grounds, vacating the district court's denial and remanding for further consideration. *Id.* The district court nonetheless held that the subsequent petition was second or successive and transferred it to the court of appeals for further consideration. *Id.* at 176; *see* 28 U.S.C. § 2244(b)(3).

The court of appeals then held that the subsequent filing was not a second or successive petition because, at the time it was filed, the district court's denial of the initial petition was "still pending on appeal" and thus "no final decision had been reached." *Ching*, 298 F.3d at 178. The court of appeals explained that by the time the district court considered the subsequent filing, "the district court had pending before it" the initial petition as well, because the court of appeals had vacated the district court's initial denial of that petition and remanded. *Id.* "Under these facts," the Second Circuit could not "say that adjudication of the initial [petition was] complete when Ching filed his [subsequent] petition." *Id.* at 178. The district court "therefore erred in treating Ching's" subsequent filing as a "second or successive" petition instead of as a motion to amend his initial petition. *Id.* at 178-179.

Like the Third Circuit in *Santarelli*, the Second Circuit emphasized that the "filing of the notice of appeal divested the district court of jurisdiction over" the original petition, and "[t]he district court could not rule on any motion affecting an aspect of the case" that

was on appeal—including the motion to amend the initial petition—"while that appeal was pending." *Ching*, 298 F.3d at 180 n.5. If the court of appeals had "affirmed the district court's denial" of the initial petition (as the Ninth Circuit did here with respect to Balbuena's initial petition), "Ching would have been foreclosed from bringing [his] additional claims unless he satisfied the requirements applicable to second or successive" petitions. *Id.* Only because the court of appeals "vacated the [district court's] original dismissal" could Ching proceed with his motion to amend. *Id.*

The Second Circuit's later decision in *Whab v. United States*, 408 F.3d 116 (2d Cir. 2005), arose in a similar posture. The district court denied Whab's initial habeas petition and he sought a certificate of appealability in the court of appeals. *Id.* at 118. Separately, he filed a motion in the court of appeals for leave to file a second or successive petition. *Id.* While that motion was pending, the court of appeals denied a certificate of appealability. *Id.* at 119. Relying on *Ching*, the court held that because the initial appeal was still pending on the date of the second filing, Whab's attempted subsequent filing was "not subject to the 'second or successive' petition rule." *Id.* But because the initial petition was not remanded to the district court, the court of appeals could "see no reason in these circumstances to instruct the district court to treat the new petition as a motion to amend the initial petition," as it had done in *Ching*. *Id.* Instead, the court of appeals "transfer[red]" the filing "to the district court for whatever further action the district court finds appropriate." *Id.*

In dicta, *Whab* then addressed "whether our transfer to the district court is futile" in light of its denial of the certificate of appealability with respect to the first

petition. 408 F.3d at 120. "It would be a useless gesture if, upon receipt, the district court would determine that the adjudication of the initial petition has now become final, with the consequence that the subsequent petition has become 'second or successive[.]'" *Id.* But the court thought the transfer would not be futile, "for two reasons." *Id.* First, the adjudication of the initial petition "will not be final until petitioner's opportunity to seek review in the Supreme Court has expired." *Id.* Second, in the court's view, "the proper reference point for determining whether a petition is 'second or successive' is the moment of filing." *Id.*

Although *Ching* and *Whab* appear to reflect a somewhat different analytical approach than most other circuits take, neither case establishes a "stark conflict" with the decision below warranting this Court's review. Pet. 21. Unlike this case, neither *Ching* nor *Whab* involved a Rule 60(b) motion. If confronted with the issue presented here, the Second Circuit could (and should) determine that this Court's precedent requires a different analysis in cases involving Rule 60(b) motions. *Cf. Santarelli*, 929 F.3d at 105; Pet. App. 33a. And even if the Second Circuit allowed a motion like Balbuena's to be filed in district court, it is not clear whether the district court could reach the new claim where (as here) the court of appeals has affirmed the denial of the initial petition. *See Ching*, 298 F.3d at 180 n.5.

Moreover, both *Ching* and *Whab* were decided before this Court's decisions in *Gonzalez* and *Banister*—which powerfully support the consensus view of the Sixth, Seventh, Eighth, and Ninth Circuits that a Rule 60(b) motion like Balbuena's qualifies as a second or successive petition under AEDPA. *See infra* pp. 16-17. If it were to confront the question in the context of a

Rule 60(b) motion and in light of *Gonzalez* and *Banister*, the Second Circuit could well opt to align itself with that consensus approach and treat the subsequent filing as a second or successive petition.[5]

2. The decision below is consistent with this Court's precedent construing AEDPA's restrictions on second or successive petitions.

a. AEDPA sharply limits federal courts' review of "second or successive" habeas petitions. 28 U.S.C. § 2244(b). "The phrase 'second or successive application' . . . is a 'term of art,' which 'is not self-defining.'" *Banister*, 140 S. Ct. at 1705 (quoting *Slack v. McDaniel*, 529 U.S. 473, 486 (2000)). To determine whether a filing qualifies as a second or successive petition, courts look to both "historical habeas doctrine and practice" and "AEDPA's own purposes." *Id.* at 1705-1706. Those purposes include Congress's desire to "'conserve judicial resources, reduce piecemeal litigation,' and 'lend finality to state court judgments within a reasonable time.'" *Id.* at 1706 (alterations omitted) (quoting *Panetti v. Quarterman*, 551 U.S. 930, 945-946 (2007)).

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[5] Balbuena asserts that "[t]he Second Circuit has declined to reconsider its position post-*Gonzalez*." Pet. 22. That characterization is significantly overstated. The two opinions Balbuena cites for that proposition do not cite *Gonzalez* at all; and in both cases the Second Circuit denied habeas relief without any need or occasion to reconsider its analysis in *Ching* or *Whab*. *See Garcia v. Superintendent of Great Meadow Corr. Facility*, 841 F.3d 581, 582 (2d Cir. 2016) (per curiam) ("an order denying a § 2254 petition as incomprehensible is 'on the merits' for the purposes of the successive-petition requirements"); *Fuller v. United States*, 815 F.3d 112, 113 (2d Cir. 2016) (per curiam) (a *third* habeas petition was second or successive because it was filed after the first petition became final).

In *Gonzalez*, this Court recognized that Rule 60(b) motions will often implicate AEDPA's restrictions on second or successive petitions. It held that a Rule 60(b) motion constitutes a habeas petition for purposes of AEDPA if the motion "contain[s] one or more 'claims'"—that is, one or more asserted grounds for why the petitioner is "entitled to habeas relief." *Id.* at 530-531, 532. "A motion that seeks to add a new ground for relief . . . will of course qualify" as second or successive, as will a motion that "attacks the federal court's previous resolution of a claim *on the merits*." *Id.* at 532. "Using 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" limitations on second or successive petitions. *Id.* at 531.[6]

The Court elaborated on that rationale in *Banister*, which held that, "unlike a Rule 60(b) motion," a motion to alter or amend a judgment under Federal Rule of Civil Procedure 59(e) "does not count as a second or successive habeas application." 140 S. Ct. at 1711. The Court explained that "Rule 60(b) differs from Rule 59(e) in just about every way that matters to the inquiry" of whether a filing constitutes a second or successive petition. *Id.* at 1709. While Rule 59(e) "aid[s] the trial court to get its decision right in the first instance," Rule 60(b) "threaten[s] an already final judgment with successive litigation." *Id.* "[A] Rule 59(e)

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[6] In contrast, "when a Rule 60(b) motion attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings," or addresses a "nonmerits aspect of the first federal habeas proceeding," AEDPA's restrictions on second or successive petitions generally are not implicated. *Gonzalez*, 545 U.S. at 532, 534.

motion suspends the finality of the habeas judgment," but a Rule 60(b) motion does not. *Id.* at 1710. And while a Rule 59(e) motion must be filed within 28 days of a judgment, "Rule 60(b) motions can arise long after the denial of a prisoner's initial petition . . . within either a year or a more open-ended 'reasonable time'," thus "undermining AEDPA's scheme to prevent delay and protect finality." *Id.*

The language and reasoning of *Gonzalez* and *Banister* support the view that all Rule 60(b) motions presenting new claims qualify as second or successive petitions. *See Gonzalez*, 545 U.S. at 532 ("A [Rule 60(b)] motion that seeks to add a new ground for relief . . . will of course qualify."); *cf. Banister*, 140 S. Ct. at 1709 (under *Gonzalez*, "a Rule 60(b) motion 'for "relie[f] from a final judgment' denying habeas relief counts as a second or successive habeas application . . . so long as the motion 'attacks the federal court's previous resolution of a claim on the merits'"). As the court below observed, nothing in those decisions "suggest[s] that a Rule 60(b) motion advancing a new claim is not a successive petition if it is filed during the appeal of the initial petition." Pet. App. 39a. And "[n]one of [the] reasons" articulated in *Banister* "for distinguishing Rule 59(e) motions from Rule 60(b) motions . . . is in any way affected by or related to the timing of when a Rule 60(b) motion is filed." *Id.* at 42a. To the contrary, this "Court's analysis of Rule 60(b) motions as removed from the initial habeas proceeding, collaterally attacking the judgment, and threatening serial habeas litigation, applies with equal force to Rule 60(b) motions filed during the appeal of an initial habeas proceeding." *Id.*

In this case, Balbuena acknowledges that his Rule 60(b) motion sought relief from the district court's final judgment on the merits in order to advance a "new claim." Pet. 10. That claim—his theory that the admission into evidence of his confession violated his *Miranda* rights—could have been brought in his initial petition. Under this Court's precedent, the motion is a second or successive petition under Section 2244.

b. Balbuena advances an array of merits arguments for his position that his Rule 60(b) motion was not a second or successive petition. Pet. 23-33. None is persuasive.

He first contends that the decision below fails to heed AEDPA's guidance that habeas applicants are permitted "one full course of litigation up to the Supreme Court" and instead limits them to "'one full opportunity to seek collateral review *in the district court*.'" Pet. 23; *see id.* at 23-24; *see also* Pet. App. 48a-49a (Fletcher, J., concurring in the result). A habeas applicant is undoubtedly entitled to seek review of the claims in his initial petition at every level of the federal court system, subject to the limitations Congress imposed in AEDPA. *See* 28 U.S.C. § 2253 (describing certificate of appealability requirement). But that does not suggest that an applicant must be allowed to add *new* claims even after the district court enters a final judgment denying the initial petition.

Balbuena next asserts that this Court's precedent "foreclose[s]" (Pet. 24) the court of appeals' conclusion that a petition is second or successive when it presents a "new claim" in the guise of a Rule 60(b) motion following the district court's "previous[] adjudicati[on] . . . on the merits" of an initial habeas petition. Pet. App. 27a-28a. But none of the cases Balbuena invokes (Pet.

24-26) involved a habeas applicant seeking, after a final judgment on the merits denying his initial petition, to raise a new claim that he could have raised in the initial petition. In *Slack*, the initial petition was "dismissed without adjudication on the merits for failure to exhaust state remedies." 529 U.S. at 478. And *Panetti v. Quarterman*, 551 U.S. 930, 934-935 (2007), and *Stewart v. Martinez-Villareal*, 523 U.S. 637, 639 (1998), involved claims that a prisoner lacked the mental competency required for the state to execute him under *Ford v. Wainwright*, 477 U.S. 399 (1986). Such claims generally "are not ripe until after the time has run to file a first federal habeas petition." *Panetti*, 551 U.S. at 943. So petitioners may assert them in a subsequent petition once the claim ripens without implicating the restrictions on second or successive petitions. *Id.*; *see id.* at 947; *Martinez-Villareal*, 523 U.S. at 644-645. Here, in contrast, there is no indication that Balbuena's *Miranda* claim was unripe or otherwise could not have been raised in his initial petition.

Balbuena also argues that the decision below "depart[s] from 'this Court's consistent understanding of finality in the context of collateral review.'" Pet. 26 (quoting *Clay v. United States*, 537 U.S. 522, 524 (2003)). But "[f]inality is a concept that has been 'variously defined; like many legal terms, its precise meaning depends on context.'" *Jimenez v. Quarterman*, 555 U.S. 113, 119 (2009) (quoting *Clay*, 537 U.S. at 527). The cases Balbuena cites (Pet. 26-28) considered "finality" in contexts far removed from this one. They addressed issues such as when a conviction on direct review becomes final for purposes of triggering AEDPA's one-year time limit for filing a habeas petition, *see Clay*, 537 U.S. at 524-525; *Jimenez*, 555 U.S. at 121; when a pending state collateral review petition tolls that limitations period, *Carey v. Saffold*, 536 U.S.

214, 217 (2002); when a case becomes final such that a change in law does not apply to it, *see Patchak v. Zinke*, 138 S. Ct. 897, 909 (2018) (plurality opinion); *Teague v. Lane*, 489 U.S. 288, 295 (1989); *Bradley v. School Bd. of City of Richmond*, 416 U.S. 696, 710-711 & n.14 (1974); or when a case becomes final such that the Constitution prohibits Congress from seeking to reopen or retroactively amend the judgment, *see Miller v. French*, 530 U.S. 327, 344 (2000); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995).

In those contexts, "finality" generally occurs when this Court denies certiorari or the time for seeking further review expires. *See* Pet. 26-28. But a Rule 60(b) motion necessarily seeks relief "from a final judgment, order, or proceeding." Fed. R. Civ. P. 60(b); *see Banister*, 140 S. Ct. at 1709; *Gonzalez*, 545 U.S. at 528. Rule 60(b) thus uses the term "final judgment" in the same sense that a district court judgment is "final for appellate review and claim preclusion purposes." *Clay*, 537 U.S. at 527; *see* 28 U.S.C. § 1291. And that is the understanding of finality that this Court employed in *Banister* in distinguishing between a Rule 60(b) motion and a Rule 59(e) motion—which, unlike a Rule 60(b) motion, "'suspend[s] the finality' of any judgment, including one in habeas." *Banister*, 140 S. Ct. at 1706; *see id.* at 1709-1810. To the extent that the inquiry into whether a Rule 60(b) motion qualifies as a second or successive petition is informed by the "finality" of the district court's judgment denying the initial petition, *see* Pet. 3, 28, it would be more sensible to apply that same understanding of finality. *Cf. Moreland*, 813 F.3d at 324.

Balbuena further argues that a Rule 60(b) motion like his does not implicate the traditional "abuse of the writ" doctrine, which he suggests applies only after a

habeas applicant "'*exhausts appellate remedies*.'" Pet. 29 (quoting *Johnson v. United States*, 196 F.3d 802, 804 (7th Cir. 1999) (emphasis added by Balbuena)). But pre-AEDPA "decisions abound dismissing Rule 60(b) motions" under the abuse-of-the-writ doctrine, *Banister*, 140 S. Ct. at 1709, and many of those decisions invoked the doctrine to reject new claims raised in a Rule 60(b) motion filed while the applicant's initial petition remained pending on appeal, *see, e.g.*, *Hunt v. Nuth*, 57 F.3d 1327, 1331, 1339 (4th Cir. 1995); *Blair v. Armontrout*, 976 F.2d 1130, 1133-1134 (8th Cir. 1992).

Finally, Balbuena and his amici raise a policy concern: They argue that unless habeas applicants are permitted to raise new claims while their initial petitions are pending on appeal, they may be deprived of an "opportunity to have a well-justified grievance adjudicated" in federal habeas, because of the risk that *pro se* applicants might overlook certain claims in their initial petitions. Pet. 30-31; *see* Fed. Public Defenders Br. 3-4. Congress has sought to address that concern by authorizing district courts to appoint counsel for indigent habeas applicants in appropriate cases. 18 U.S.C. § 3006A(a)(2). Balbuena's amici assert that "district courts within the Ninth Circuit differ as far as how frequently they appoint counsel for a petitioner prior to an appeal." Fed. Public Defenders Br. 5. And that is an important question of policy that can and should be considered by the district courts or perhaps by Congress. But it does not provide a basis for Balbuena's interpretation of AEDPA.

Moreover, Balbuena's case is hardly "illustrative" (Pet. 30) of any problem regarding *pro se* petitioners overlooking meritorious claims. He failed to raise the *Miranda* claim that he now seeks to assert not only in

his initial *pro se* federal habeas petition, but also at trial and on direct appeal—when he was represented by counsel. *See Balbuena*, 2010 WL 1783558, at *5. The underlying *Miranda* claim lacks merit. Police told Balbuena: "[Y]ou have the right to remain silent[,] anything you say can be used against you in a court, you have the right to an attorney, you have the right to an attorney prior to your questioning if you desire, if you can't afford to hire one, one will be represented to you free of charge." Pet. App. 9a. That admonition "reasonably conveyed" the nature of his *Miranda* rights. *Florida v. Powell*, 559 U.S. 50, 62 (2010). And the state court correctly rejected Balbuena's argument that he received ineffective assistance of counsel because his trial and appellate attorneys failed to raise that *Miranda* claim. *See supra* p. 5 n.2; *Johnson v. Williams*, 568 U.S. 289, 298-301 (2013); *Harrington v. Richter*, 562 U.S. 86, 98-100 (2011). That conclusion was certainly not an unreasonable application of this Court's precedent. *See* 28 U.S.C. § 2254(d)(1); *Richter*, 562 U.S. at 104-105.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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