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

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

BRIEF FOR RESPONDENT

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

KYLE D. HAWKINS
Solicitor General
Counsel of Record

MATTHEW H. FREDERICK
Deputy Solicitor General

NATALIE D. THOMPSON
Assistant Solicitor General

TREVOR W. EZELL
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Kyle.Hawkins@oag.texas.gov
(512) 936-1700

QUESTION PRESENTED

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).

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The order of the court of appeals denying a certificate of appealability (J.A. 303–06) is not reported. The district court's orders denying habeas relief (J.A. 158–218) and denying Banister's Rule 59(e) motion (J.A. 254) are likewise unreported.

JURISDICTION

The district court had jurisdiction to entertain Banister's initial application for habeas corpus relief, but no jurisdiction to entertain his Rule 59(e) motion. 28 U.S.C. § 2244(b)(3)(A). The court of appeals correctly determined that it had no jurisdiction to entertain Banister's appeal. *Id.* § 2107(a). This Court has jurisdiction under 28 U.S.C. section 1254(1), notwithstanding AEDPA's limitations on certiorari review. *See Castro v. United States*, 540 U.S. 375, 379–81 (2003).

STATUTORY PROVISIONS INVOLVED

The text of 28 U.S.C. §§ 2244, 2253, and 2254, Federal Rules of Civil Procedure 59 and 60, Federal Rule of Appellate Procedure 4(a), and Rule 12 of the Rules Governing Section 2254 Cases are provided in an appendix to this brief.

INTRODUCTION

The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1217 ("AEDPA"), circumscribes federal court review of state criminal convictions, particularly where a state prisoner files a "second or successive" application for habeas relief. When a state prisoner has been denied habeas relief by a federal district court, he cannot seek the same relief *again* in a post-judgment motion under Federal Rule of Civil

Procedure 60(b)—at least not without first obtaining appellate court permission, 28 U.S.C. § 2244(b)(3), and then showing that his claim falls within one of two narrow exceptions, *id.* § 2244(b)(4). *See Gonzalez*, 545 U.S. at 529–30. That result follows from AEDPA's plain text, and it necessarily applies to any motion that seeks to relitigate federal habeas claims that have already been rejected in a final judgment.

As four courts of appeals correctly recognize, *Gonzalez* controls post-judgment motions filed under Rule 59(e). After all, Rules 59(e) and 60(b) provide similar (and sometimes identical) vehicles for asserting habeas claims after a district court has entered judgment denying relief. Whatever formal vehicle the habeas petitioner may choose, a post-judgment motion presenting a habeas claim that has been or could have been adjudicated is a second or successive habeas application. *See* 28 U.S.C. § 2244(b).

Banister asks this Court to single out Rule 59(e) motions for special treatment, but nothing about Rule 59(e) justifies an exemption from AEDPA's clear limits on second or successive habeas applications. Banister notes, for example, that Rule 59(e) motions must be filed within 28 days of judgment and that such motions extend the time to appeal. But Rule 60(b) motions can do the very same thing. Banister has not identified any principled rationale for exempting Rule 59(e) motions. And there is none; recognizing that Rule 59(e) motions—like Rule 60(b) motions—can assert second or successive habeas claims and requiring those that do to comply with section 2244(b) follows from AEDPA's text, this Court's

precedent, basic principles of judgments and finality, and common-law habeas practice.

That reality dooms Banister's appeal here. Banister failed to obtain the Fifth Circuit's permission before making a second request for habeas relief. *Id.* § 2244(b)(3). Accordingly, the district court had no power to accept his Rule 59(e) motion. And even if he had sought permission, it would have been denied. Banister's motion simply reasserted claims the district court had just rejected. Under AEDPA, "[a] claim presented in a second or successive habeas corpus application . . . that was presented in a prior application shall be dismissed." *Id.* § 2244(b)(1).

Because the district court had no jurisdiction to consider it, Banister's Rule 59(e) motion never extended the appeal deadline. He filed his notice of appeal more than 60 days after the district court entered final judgment dismissing his habeas petition with prejudice. The Fifth Circuit correctly concluded it lacked jurisdiction over that untimely appeal. This Court should affirm.

STATEMENT

I. State Trial and Direct Review

Gregory Banister hit and killed a bicyclist with his car. J.A. 10. When Texas law enforcement officers arrived at the scene, Banister consented to a blood draw. *Ibid.* Blood tests showed he had been using cocaine. J.A. 11. The State charged Banister with intoxicated manslaughter and, later, aggravated assault. *See* Tex. Penal Code §§ 22.02, 49.08; J.A. 18 n.6.

Trial counsel urged Banister to plead guilty, but Banister refused because he considered the charges "just a bunch of bull-shit." *See Banister v. Davis*, No. 5:14-cv-00049-C (N.D. Tex. June 6, 2014), ECF No. 10-19, at 48. At trial, witnesses testified that when a deputy sheriff asked why Banister was in jail, Banister replied that he had been charged with intoxicated manslaughter. J.A. 11. Then he volunteered a question of his own: "How can they charge me with Intoxicated Manslaughter when I wasn't drunk, when I was on cocaine at the time?" J.A. 12, 15.

The jury convicted Banister of aggravated assault with a deadly weapon. J.A. 159. Normally, a second-degree felony like aggravated assault would carry a maximum sentence of twenty years in prison. *See* Tex. Penal Code § 12.33(a). But the trial court sentenced Banister to thirty years because his prior felony conviction for trafficking cocaine required him to be punished for a first-degree felony. J.A. 11, 158–59; Tex. Penal Code § 12.42(b).

On appeal, Banister argued the trial court erred by admitting both his confession and expert testimony regarding the effects of cocaine withdrawal. J.A. 10. The Texas Court of Appeals for the Seventh District disagreed, concluding that the introduction of both pieces of evidence complied with the Constitution and state rules of evidence and procedure. J.A. 13, 20. The Texas Court of Criminal Appeals denied discretionary review. *See Banister v. State*, No. 07-04-0479-CR, 2006 WL 2795250 (Tex. App.—Amarillo Sept. 29, 2006, pet ref'd). This

Court denied certiorari. *See Banister v. Texas*, 552 U.S. 825 (2007).

II. State Habeas Review

Banister then sought relief in state habeas proceedings. *See* Tex. Code Crim. P. art. 11.07. Banister's state habeas application spanned nearly 100 pages and raised 65 claims. *See Banister v. Davis*, No. 5:14-cv-00049-C (N.D. Tex. June 6, 2014), ECF No. 9-3 at 35–124.

The Texas Court of Criminal Appeals directed the trial court to conduct factfinding on Banister's claim that trial counsel was ineffective. *See Banister v. Davis*, No. 5:14-cv-00049-C (N.D. Tex. June 6, 2014), ECF No. 10-9. It ordered the court to determine whether trial counsel had misadvised Banister, causing him to refuse the State's plea offers. *See* Order, *Ex parte Bannister*, No. WR-70,854-03, 2012 WL 1554200, at *2 (Tex. Crim. App. May 2, 2012) (per curiam).

The trial court concluded Banister's claim lacked merit. It found that trial counsel repeatedly conveyed the State's plea offers, the State left its pre-trial offer open throughout the trial, and counsel encouraged Banister to accept it. *See Banister v. Davis*, No. 5:14-cv-00049-C (N.D. Tex. June 6, 2014), ECF No. 10-19, at 7–11.

The Texas Court of Criminal Appeals issued a postcard denial rejecting Banister's application. J.A. 42.

III. Federal Habeas Review

A. Banister then filed a federal habeas petition raising 53 claims. J.A. 43–157. Some of those claims were unexhausted. For example, Banister never argued to the state courts that trial counsel was ineffective for not

moving to strike a certain prosecution expert's testimony. J.A. 63.

Rather than dismissing Banister's mixed petition for lack of exhaustion, the district court denied relief on the merits. J.A. 217–18. (It is hard to fault the district court for that mistake, given that Banister's filings totaled nearly 300 pages and were sometimes stylized as "a play or short story." J.A. 165.) The district court entered final judgment dismissing Banister's habeas claims with prejudice on May 15, 2017. J.A. 6.

Twenty-seven days later, Banister filed a Rule 59(e) motion reasserting claims the district court had already rejected. J.A. 219. He raised no new claims. In his own words, his motion focused "on the most obvious errors" in the district court's analysis. *Ibid.* Throughout the motion, Banister urged the court to revisit its merits determinations. *See, e.g.*, J.A. 227 ("re-evaluate Banister's claims"), 230 ("revisit this claim"), 238 ("revisit this ground"), 243 ("revisit this ground"), 247 ("revisit this ground"), 250 ("revisit [this] claim under the proper standard"). The district court denied the motion on June 20, 2017. J.A. 254.

Sixty-six days after the district court entered final judgment, on July 20, 2017, Banister filed a notice of appeal. J.A. 255. Relying on circuit precedent nearly a decade old, the Fifth Circuit held that Banister's Rule 59(e) motion was a second or successive application because it "merely attacked the merits of the district court's reasoning in denying the § 2254 petition." J.A. 306 (citing *Williams v. Thaler*, 602 F.3d 291, 302–04 (5th Cir. 2010)).

Accordingly, the motion did not extend the time to appeal, and Banister's appeal was untimely.

B. The Fifth Circuit is one of four courts of appeals to hold that the principle articulated in *Gonzalez* applies with equal force to motions filed pursuant to Rule 59(e). *See Williams*, 602 F.3d at 303; *Ward v. Norris*, 577 F.3d 925, 935 (8th Cir. 2009); *United States v. Pedraza*, 466 F.3d 932, 934 (10th Cir. 2006); *United States v. Martin*, 132 F. App'x 450, 451 (4th Cir. 2005) (per curiam) (decided before *Gonzalez*). They reason that both Rule 59(e) and 60(b) motions can contain habeas claims and attack a final judgment, and when they do, they are subject to AEDPA's strictures on second or successive habeas petitions. *See, e.g.*, *Ward*, 577 F.3d at 933–35. Both motions "permit the same relief—a change in judgment." *Williams*, 602 F.3d at 303.[1]

The Ninth Circuit agrees that a Rule 59(e) motion can contain habeas claims. But it treats such a motion as a second or successive application only when it asserts "entirely *new* claims," not when it urges reconsideration of

[1] Petitioner attempts to segregate the Eighth and Tenth Circuits from this group because their decisions dealt with Rule 59(e) motions attacking the denial of a Rule 60(b) motion. Pet'r BOM 28 n.8. Banister asserts this is a "materially different situation." *Ibid.* But he does not explain why that is so. And it is not. A Rule 59(e) motion can raise a habeas claim whether it attacks the judgment initially denying habeas relief or a judgment denying a subsequent Rule 60(b) motion. The Eighth and Tenth Circuits recognized as much. *See United States v. Lambros*, 404 F.3d 1034, 1036 (8th Cir. 2005) (observing that the Rule 59(e) motion "sought ultimately to resurrect the denial of" habeas relief); *Pedraza*, 466 F.3d at 933 (same).

the claims already denied (as Banister's did). *Rishor v. Ferguson*, 822 F.3d 482, 492–93 (9th Cir. 2016).

Three courts of appeals have held a Rule 59(e) motion is never a second or successive habeas application, even when it contains habeas claims. *See Blystone v. Horn*, 664 F.3d 397 (3d Cir. 2011); *Howard v. United States*, 533 F.3d 472 (6th Cir. 2008); *Curry v. United States*, 307 F.3d 664 (7th Cir. 2002) (decided pre-*Gonzalez*).

This Court granted certiorari. *Banister v. Davis*, 139 S. Ct. 2742 (2019).

SUMMARY OF THE ARGUMENT

AEDPA's text controls this case. Section 2244(b) imposes a bar on second or successive habeas "applications." *See infra* Part I.A. A post-judgment motion is a habeas application when it contains a "claim" for relief from the underlying state court judgment. *Gonzalez*, 545 U.S. at 531–32. Though sometimes an application filed later is not "second or successive," the nature of the exceptions demonstrates why a Rule 59(e) motion must clear AEDPA's second-or-successive hurdles: In every case, the claim was not—and never could have been—adjudicated in the prior application. *See infra* Part I.B. The *Gonzalez* principle applies with equal force to Rule 59(e) motions. *See infra* Part I.C.

There is no principled reason to exempt Rule 59(e) motions that contain habeas claims from AEDPA's second-or-successive requirements. *See infra* Part I.D. First, Banister argues that a Rule 59(e) motion is different from a Rule 60(b) motion because it "suspends the finality of the judgment." But the same can be true of

Rule 60(b) motions. Both motions suspend finality only for purposes of the appeal deadline, not "finality" writ large. *See infra* Part I.D.1. Banister next attempts distinction by analogy. He contends a Rule 60(b) motion is equivalent to a motion to recall an appellate court's mandate, while a Rule 59(e) motion is akin to a motion for rehearing in the court of appeals. But this argument misunderstands appellate procedure. *See infra* Part I.D.2. Banister then relies on the common law rule allowing a court to reconsider its judgment during the term. A comprehensive view of common law procedure, however, provides no help to Banister. He may not pick up and set down the common law when it suits him. *See infra* Part I.D.3. Finally, Banister asks the Court to exempt Rule 59(e) motions because doing so would permit district courts to promptly correct errors. That exalts the ordinary rules of procedure over AEDPA—precisely what courts may not do. *See infra* Part I.D.4.

A prisoner must obtain permission from the court of appeals before filing a second or successive application. *See* 28 U.S.C. § 2244(b)(3)(A). This permission is jurisdictional; without it, the district court cannot entertain the filing. *See infra* Part II.A. And a filing the district court lacks jurisdiction to entertain cannot extend the deadline to appeal under Appellate Rule 4. *See infra* Part II.B. Recognizing this involves no "recharacterization." A late appeal is a jurisdictional defect that no recharacterization created and no recharacterization can cure. *See infra* Part II.C. And jurisdictional limits are part and parcel of habeas review under AEDPA. *See infra* Part II.D.

Here, Banister attempted to use Rule 59(e) to re-argue the same claims for habeas relief that had just been denied in a final judgment. That constituted a second or successive application for habeas relief. J.A. 6, 219–53. AEDPA therefore required Banister to obtain authorization before filing his Rule 59(e) motion. He did not do so (and there is no argument his claims would qualify under section 2244(b) even if he had). The district court therefore lacked jurisdiction to entertain his Rule 59(e) motion, and that motion could not reset the deadline to appeal. Banister's appeal was untimely. *See infra* Part III.

The judgment of the court of appeals should be affirmed. J.A. 305–06.

ARGUMENT

I. A Rule 59(e) Motion Is a Second or Successive Habeas Application When It Presents a Habeas Claim That Has Been or Could Have Been Adjudicated.

The text of AEDPA and the Federal Rules of Civil Procedure control this case. When a district court issues a final judgment, a post-judgment motion urging habeas claims already adjudicated (or that could have been adjudicated) is a second or successive habeas application. *See* 28 U.S.C. §§ 2244, 2254. This follows not only from the statutory text, but also from *Gonzalez v. Crosby*, which held that Rule 60(b) motions that present habeas claims are second or successive habeas applications. *Gonzalez*'s analysis, squarely grounded in AEDPA's text, controls Rule 59(e) motions, too.

Banister asks this Court to create a special doctrine for Rule 59(e) motions and exempt them from AEDPA's strictures. But he provides no basis for doing so. His arguments run contrary to AEDPA's text, this Court's precedent, common-law precepts, and the law of judgments. At core, Banister asks this Court to disregard the bedrock principle that when AEDPA conflicts with the Federal Rules of Civil Procedure, AEDPA prevails. Fed. R. Civ. P. 81(a)(4); *Gonzalez*, 545 U.S. at 530.

A. AEDPA broadly circumscribes federal review of habeas "claims" presented in an "application" that is "second or successive" to "a prior application."

When interpreting any statute, this Court's "inquiry begins with the statutory text." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 631 (2018). That principle applies fully in AEDPA cases, as this Court demonstrated in *Gonzalez*. *See* 545 U.S. at 528–29.

Here, the relevant statute is 28 U.S.C. section 2244, which generally governs federal review of "claims" presented in a "habeas corpus application" that is "second or successive." 28 U.S.C. § 2244(b)(1), (2). The terms *claim*, *application*, and *second or successive* are not defined in AEDPA's text. But this Court broadly construed each of those terms in *Gonzalez*.

Claim. AEDPA uses "claim" to mean "an asserted federal basis for relief from a state court's judgment of conviction." *Gonzalez*, 545 U.S. at 530–31; *see also id.* at 532 & n.4 (adjudication "of a claim on the merits" means "a determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief"). Other

cases similarly treat the term "claim" broadly. *See, e.g.*, *Cristin v. Brennan*, 281 F.3d 404, 418 (3d Cir. 2002) ("a substantive request for the writ of habeas corpus"); *Brannigan v. United States*, 249 F.3d 584, 588 (7th Cir. 2001) (similar).

Application. The term "application" is also broad; it refers to "a filing that contains one or more 'claims.'" *Gonzalez*, 545 U.S. at 530; *see also Woodford v. Garceau*, 538 U.S. 202, 207 (2003) (under section 2254(d), an application is a filing that seeks "an adjudication on the *merits* of the petitioner's claims"). A filing does not have to be labeled "application for writ of habeas corpus" to qualify. "Call it a motion for a new trial, arrest of judgment, mandamus, prohibition, coram nobis, coram vobis, audita querela, certiorari, capias, habeas corpus, ejectment, quare impedit, bill of review, writ of error, or an application for a Get-Out-of-Jail Card; the name makes no difference. It is substance that controls." *Melton v. United States*, 359 F.3d 855, 857 (7th Cir. 2004). AEDPA's text is concerned with a filing's objective, not its label.

Second or successive. As *Gonzalez* recognized, AEDPA does not define "second or successive," but instead pairs that term alongside its antonym: "a prior application." 28 U.S.C. § 2244(b)(1). *Gonzalez* said little else about the meaning of "second or successive" because it did not need to: *Gonzalez* took it as obvious that an "application" presented after final judgment is "second or successive." 545 U.S. at 530. That is because a "prior application" presenting the same "claims" has already been finally rejected by the district court. *Id.* at 530–31.

Indeed, AEDPA's treatment of "second or successive" applications underscores that term's meaning. Before a prisoner may file a second or successive application in district court, he first "shall move in the appropriate court of appeals for" authorization. 28 U.S.C. § 2244(b)(3)(A). A district court lacks jurisdiction to even consider a second or successive application absent that authorization. *See Gonzalez v. Thaler*, 565 U.S. 134, 142 (2012).

Whether the court of appeals may grant authorization to file a second or successive application depends on whether the claim in that application "was presented in a prior application." 28 U.S.C. § 2244(b)(1). If so, it "shall be dismissed." *Ibid.*

If the claim was *not* "presented in [the] prior application," it also "shall be dismissed" *unless* it meets one of two narrow exceptions: (A) The claim "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," *id.* § 2244(b)(2)(A); or (B) "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence," and considering that factual predicate "no reasonable factfinder would have found the applicant guilty," *id.* § 2244(b)(2)(B).

B. *Gonzalez* holds that habeas claims in a post-judgment motion render that motion a second or successive habeas application.

Against that statutory backdrop, the *Gonzalez* Court reached two conclusions relevant here. First, it held that post-judgment motions may be habeas "applications"

insofar as they contain habeas claims. 545 U.S. at 530–32. Second, such a filing—even if "couched in the language of" a post-judgment motion—is a "second or successive" application. *Id.* at 531. Even though a Rule 60(b) motion is filed in the *original* district court proceeding, it is second or successive because it follows the district court's earlier entry of judgment adjudicating the claims. *See id.* at 531 ("claim previously denied"), *ibid.* ("previous denial of a claim"), *id.* at 532 ("previous resolution of a claim"). Those conclusions support the controlling principle here: When a "prior application" has been reduced to final judgment, a post-judgment motion presenting habeas "claims" that were or could have been adjudicated is a "second or successive" habeas "application." *Id*. at 530–52.

1. In *Gonzalez,* a federal district court dismissed the prisoner's first federal habeas petition as time-barred by AEDPA's one-year statute of limitations under then-controlling circuit precedent. 545 U.S. at 526–27. He was denied a certificate of appealability and did not seek review in this Court. *Id.* at 527. But later that year, this Court abrogated the circuit precedent that barred his claim. *See ibid.* (citing *Artuz v. Bennett*, 531 U.S. 4 (2000)). Gonzalez returned to the district court and filed a "Motion to Amend or Alter Judgment" asking for reconsideration in light of this Court's new precedent. *Ibid.* That filing made its way to this Court, which construed it as a Rule 60(b) motion, *id.* at 527 n.1, and proceeded to address how Rule 60(b) operates in a case controlled by AEDPA.

The Court hypothesized both Rule 60(b) motions raising new habeas claims and Rule 60(b) motions re-urging old ones. It concluded that *both* would count as habeas applications because AEDPA's limits on second-or-successive applications govern both kinds of claims.

As to the first type, "[u]sing Rule 60(b) to present new claims for relief from a state court's judgment of conviction . . . circumvents AEDPA's requirement that a new claim be dismissed unless it relies on either a new rule of constitutional law or newly discovered facts." *Id.* at 531 (citing 28 U.S.C. § 2244(b)(2)). As to the second, a motion that "attacks the federal court's previous resolution of a claim *on the merits*" can also be a claim. *Id.* at 531–32. That is because "alleging that the court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is . . . entitled to habeas relief." *Ibid.* Allowing such a claim to be raised under Rule 60(b) would circumvent AEDPA's requirement that any previously adjudicated claim be dismissed. *Ibid.* (citing 28 U.S.C. § 2244(b)(1)).

But *Gonzalez* made clear there is still room for Rule 60(b) motions in federal habeas. If a motion filed pursuant to Rule 60(b) raises "some defect in the integrity of the federal habeas proceedings" (as opposed to seeking "an adjudication on the merits of the petitioner's claims"), it would not come within AEDPA's ambit. *Id.* at 530, 532. That was the case with Gonzalez's motion, which attacked the district court's dismissal of his habeas application as time-barred. *Id.* at 533–34.

2. *Gonzalez* thus stands for the proposition that the dividing line between a "prior application" and a "second

or successive" application is a final judgment—the "court's last action" that "disposes of all issues in controversy." Black's Law Dictionary 971 (10th ed. 2014); *see Gonzalez*, 545 U.S. at 531. "A motion is caught by § 2244(b) . . . only if it is second or successive to a proceeding that 'counts' as the first. A petition that has reached *final decision* counts for this purpose." *Johnson v. United States*, 196 F.3d 802, 805 (7th Cir. 1999) (emphasis added).

This explains why motions to amend the pleadings, first amended complaints, and the like are not second or successive applications. *See, e.g.*, *Mayle v. Felix*, 545 U.S. 644, 655 (2005); *Calhoun v. Bergh*, 769 F.3d 409, 411 (6th Cir. 2014); *In re Morris*, 363 F.3d 891, 893 (9th Cir. 2004) (per curiam); *Littlejohn v. Artuz*, 271 F.3d 360, 362–63 (2d Cir. 2001) (per curiam); *cf.* 28 U.S.C. §§ 2242, 2266(b)(3)(B). Such motions are "filed before the district court renders judgment." *United States v. Sellner*, 773 F.3d 927, 931 (8th Cir. 2014); *accord Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1344 (11th Cir. 2010) ("Rule 15(a), by its plain language, governs amendment of pleadings *before* judgment is entered; it has no application *after* judgment is entered."). But where "judgment *has* been entered" on a petitioner's habeas application, "it cannot be disputed that" even a motion to amend "is a second or successive" application. *United States v. Nelson*, 465 F.3d 1145, 1149 (10th Cir. 2006) (emphasis added).

One of the cases Banister relies on proves that a final judgment is the dividing line. In *Johnson v. United States*, a federal prisoner attempted to amend his

application to include four additional bases for relief "[b]efore the judge could make a final decision." 196 F.3d at 803. The district court concluded the motion was a second or successive application the prisoner had no permission to file. *Ibid.* The Seventh Circuit reversed because the court had not yet entered final judgment: "A prisoner receives one complete round of litigation, which as in other civil suits includes the opportunity to amend a pleading *before judgment*." *Id.* at 805 (emphasis added). Where a court *has* entered judgment, however, a subsequent motion "can be a 'second or successive'" application even "in a case already on file." *Ibid.* (quoting 28 U.S.C. § 2244(b)).

What is true at the district court level is likewise true at the appellate court level. Initial requests for relief from a higher tribunal are part and parcel of the first application. Notices of appeal, certiorari petitions, and merits briefs all seek review of the initial application from a higher tribunal. *See* 28 U.S.C. § 2253 (permitting appeal from a "final order" denying habeas relief). They are not second or successive because they do not ask a tribunal for relief a second time after that tribunal has already entered a final judgment. By contrast, a motion to recall the mandate—which is a renewed request for relief at the same level of review after that court has entered final judgment—is a second or successive application. *See Calderon v. Thompson*, 523 U.S. 538, 554 (1998); *see infra* Part I.D.2.

Whether viewed from the vantage of a district court, *Gonzalez*, 545 U.S. at 531, or an appellate court, *Calderon*, 523 U.S. at 554, the governing principle remains the

same. Entry of final judgment is the dividing line between a first and a second application.

3. This Court's precedent recognizes a limited exception to this general rule. A habeas application filed after final judgment might not be second or successive when it presents a claim that could not have been adjudicated in the prior judgment. In those rare and narrow circumstances, AEDPA's second-or-successive bar does not apply. This Court has applied the exception in two narrow circumstances—ripeness and exhaustion.

First, claims that were not ripe until after final judgment can be raised later because such claims could not have been adjudicated before.

For example, in *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), a prisoner argued in his initial application that he was incompetent to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986). The district court dismissed that claim as premature because the State had not set an execution date. 523 U.S. at 640. Once the State did so, the prisoner moved to reopen his initial habeas proceedings to assert the ripened *Ford* claim. *Id.* at 643. The motion was not second or successive because it raised a claim that previously could not have been adjudicated: "There was only one application for habeas relief, and the District Court ruled (or should have ruled) on each claim at the time it became ripe." *Id.* at 643; *see also Panetti v. Quarterman*, 551 U.S. 930, 946–47 (2007).

Second, claims that were dismissed for failure to exhaust may be raised in a later application. A district court must dismiss a habeas application containing both exhausted and unexhausted claims. *See Rose v. Lundy*, 455

U.S. 509, 522 (1982). In *Slack v. McDaniel*, 529 U.S. 473 (2000), this Court suggested that a prisoner who returns to federal court with a subsequent, newly exhausted habeas application would not run into the second-or-successive bar. *Id.* at 486–87. Because dismissal of an application for lack of exhaustion occurs "before the district court [has] adjudicated any claims," the new application should be "treated as 'any other first petition' [rather than] a second or successive petition." *Id.* at 487.

In every case, this Court emphasized that something prevented the prisoner from obtaining an adjudication of his habeas claim in the earlier application. *See Martinez-Villareal*, 523 U.S. at 645 (noting "the habeas petitioner d[id] not receive an adjudication of his [unripe] claim"); *Panetti*, 551 U.S. at 946 (noting "federal courts [would not] be able to resolve a prisoner's [unripe] *Ford* claim"); *Slack*, 529 U.S. at 487 (noting prisoner's application was dismissed "before the district court adjudicated any claims"); *accord Magwood v. Patterson*, 561 U.S. 320, 331–32 (2010) (a federal district court could not have adjudicated claims arising under a judgment that did not yet exist).

So the general rule is limited in one sense; it may not apply to post-judgment applications if the judgment did not adjudicate—and could not have adjudicated—the claim. But that limitation does *not* allow a habeas petitioner to re-raise claims that *have* been adjudicated on the merits to final judgment. *See Burton v. Stewart*, 549 U.S. 147, 155 (2007) (per curiam) (noting prisoner's initial application "in fact was adjudicated on the merits"). That is why *Gonzalez* had no trouble concluding that a Rule

60(b) motion re-urging habeas claims already adjudicated is a second or successive habeas application. *See* 545 U.S. at 531–32. Banister agrees that his Rule 59(e) motion contained only claims that the district court already adjudicated in its final judgment. Pet'r BOM 44. His Rule 59(e) motion falls squarely within the general rule.

Because Rule 60(b) and Rule 59(e) motions are filed only after the district court enters judgment, in the mine-run case those motions will be filed after the prisoner's habeas claims have been (or could have been) "adjudicated," *Burton*, 549 U.S. at 155, or "resolved," *Panetti*, 551 U.S. at 946. That is what happened here. Banister obtained a district court adjudication on his habeas claims. J.A. 217–18. That adjudication was memorialized in a judgment dismissing his claims with prejudice. J.A. 6. Any subsequent motion raising those same claims is a second or successive application.

C. *Gonzalez*'s text-based rule confirms that a Rule 59(e) motion is a second or successive habeas application when it re-urges habeas claims that were already rejected.

There is no reason to treat Rule 59(e) motions differently from Rule 60(b) motions. Both provide vehicles to assert habeas claims.

In ordinary civil cases, both Rule 59(e) and Rule 60(b) provide a means to seek reconsideration of the district court's judgment. Rule 59(e) requires that any "motion to alter or amend a judgment must be filed no later than 28 days after the entry of judgment." Rule 60(b) says a party may ask the district court to "relieve" it "from a

final judgment" based on five enumerated circumstances or "any other reason that justifies relief." A Rule 60(b) motion "must be made within a reasonable time," and certain grounds for relief must be raised within a year. Fed. R. Civ. P. 60(c).

Though the two rules are similar in that both allow reconsideration of the judgment, they have distinct applications. A Rule 59(e) motion can seek "reconsideration of matters properly encompassed in a decision on the merits," *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 200 (1988), but "a Rule 60(b) motion cannot be used to relitigate the merits of a district court's prior judgment," *In re SDDS, Inc.*, 225 F.3d 970, 972 (8th Cir. 2000); *see also Agostini v. Felton*, 521 U.S. 203, 257 (1997) (Ginsburg, J., dissenting). Rule 60(b), however, "deals primarily with some irregularity or procedural defect in the procurement of the judgment." *Rodwell v. Pepe*, 324 F.3d 66, 70 (1st Cir. 2003). And Rule 60(b) motions are used to address circumstances that arose or came to light after the judgment was entered. *See, e.g.*, *id.* at 255–56; *Pioneer Inv. Services Co. v. Brunswick Associates Ltd. P'ship*, 507 U.S. 380, 393 (1993); *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863–64 & n.11 (1988).

As with Rule 60(b), the text of Rule 59(e) is plainly broad enough to be used to present habeas claims. It allows any motion to "alter or amend a judgment" in any way. Like a Rule 60(b) motion, a Rule 59(e) motion might "seek leave to present 'newly discovered evidence.'" *Gonzalez*, 545 U.S. at 531 (quoting Fed. R. Civ. P. 60(b)(2)); *see* 11 Wright & Miller, Federal Practice &

Procedure § 2810.1 n.17 (3d ed. 2019) (collecting cases). Like a Rule 60(b) motion, a Rule 59(e) motion might "contend that a subsequent change in substantive law is a 'reason justifying relief' from the previous denial of a claim." *Gonzalez*, 545 U.S. at 531 (quoting Fed. R. Civ. P. 60(b)(6)); *see* 11 Wright & Miller, *supra*, § 2810.1 n.20 (collecting cases). And like a Rule 60(b) motion, a Rule 59(e) motion might "attack[] the federal court's previous resolution of a claim *on the merits*" by "alleging that the court erred in denying habeas relief." *Gonzalez*, 545 U.S. at 532; *see* 11 Wright & Miller, *supra*, § 2810.1 n.15 (collecting cases).

In short, a Rule 59(e) motion—just like a Rule 60(b) motion—can "assert[] [a] federal basis for relief from a state court's judgment of conviction." *Gonzalez*, 545 U.S. at 530. When it does, it contains a "claim" and therefore constitutes an "application" under 28 U.S.C. § 2244(b). *See ibid.*

The next step follows ineluctably. When a Rule 59(e) motion presents habeas claims that were already adjudicated in the final judgment, the motion is a second or successive application. Like any other second or successive application, a Rule 59(e) motion containing habeas claims must comply with AEDPA's strictures. *See* 28 U.S.C. § 2244(b)(3).

D. There is no principled reason to exempt Rule 59(e) motions containing habeas claims from AEDPA's second-or-successive requirements.

To exempt Rule 59(e) motions from section 2244(b), Banister must establish they are materially different from Rule 60(b) motions. They are not. The law of

judgments, appellate procedure, common law habeas procedure, and AEDPA's trump card over the civil rules all point to the same outcome.

1. Principles of finality and the law of judgments show why Rules 59(e) and 60(b) warrant the same treatment under AEDPA.

Banister argues that Rule 59(e) motions are different because they "suspend[] the finality of the original judgment." Pet'r BOM 23 (quoting *FCC v. League of Women Voters*, 468 U.S. 364, 373 n.10 (1984)); *see id.* at 27–33. To be sure, the Court has said filing a "motion for reconsideration" "renders an otherwise final decision of a district court not final *for purposes of appeal*." *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710, 717 (2019) (emphasis added) (quotation marks omitted) (addressing a "motion for reconsideration" challenging an order certifying a class under Rule 23).[2]

The fundamental problem with Banister's argument is that the same is true of a Rule 60(b) motion filed within 28 days of judgment. Moreover, it disregards the limited

[2] The Court has used similar language in other decisions, but always in reference to finality for purposes of appeal and, notably, never with reference to Rule 59(e). *See United States v. Ibarra*, 502 U.S. 1, 6 (1991) (per curiam) (addressing a motion for rehearing of the denial of a motion to suppress in a criminal case); *League of Women Voters*, 468 U.S. at 373 n.10 (discussing Supreme Court Rule 11.3); *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441, 445 (1974) (addressing a motion for reconsideration of a three-judge panel decision in an election case).

context in which a Rule 59(e) motion affects the judgment's finality.

a. This Court's references to Rule 59(e)'s ability to "suspend the finality" refer to finality for purposes of the appeal deadline. It does not mean the judgment is not final in any sense. The judgment that a party seeks to "alter" (Rule 59(e)) or obtain "relief from" (Rule 60(b)) *is* final; the parties can execute it immediately. The motion merely suspends the appeal deadline to allow the district court to reconsider its final judgment. *See Dep't of Banking v. Pink*, 317 U.S. 264, 266 (1942) (per curiam).

And "a Rule 59(e) motion does not suspend the finality of a judgment for purposes of claim or issue preclusion." *Blystone*, 664 F.3d at 414 n.10. In fact, the district court's judgment has claim- and issue-preclusive effect not only during the 28-day period, but even while a timely Rule 59(e) motion is pending. *See Coleman v. Tollefson*, 135 S. Ct. 1759, 1764 (2015); 18A Wright & Miller, *supra*, § 4432; Restatement (Second) of Judgments § 13 cmt. f; *accord Hubbell v. United States*, 171 U.S. 203, 210 (1898) (doubting "whether the pendency of a motion for a new trial would interfere in any way with the operation of the judgment as an estoppel").

A judgment is also final in that it is immediately subject to execution. "Unless a court issues a stay, a trial court's judgment . . . normally takes effect despite a pending appeal." *Coleman*, 135 S. Ct. at 1764. To avoid execution of a judgment against him, a losing party must seek a stay of execution. *See ibid.*; Fed. R. Civ. P. 62. That a final judgment can be divested of finality for

purposes of the appeal clock does not mean it loses finality for other purposes.

Moreover, a distinction based on the appeal deadline would contravene *Gonzalez*. Parties may—and do—file Rule 60(b) motions within 28 days. *See Stone v. I.N.S.*, 514 U.S. 386, 401 (1995); *see, e.g.*, *Santos-Santos v. Torres-Centeno*, 842 F.3d 163, 167 n.6 (1st Cir. 2016); *Smith v. Missouri*, 804 F.3d 919, 920 (8th Cir. 2015) (per curiam); *"R" Best Produce, Inc. v. DiSapio*, 540 F.3d 115, 121–22 (2d Cir. 2008); *Miller v. Marriott Int'l, Inc.*, 300 F.3d 1061, 1064 (9th Cir. 2002); *Brumley v. Wingard*, 269 F.3d 629, 637 (6th Cir. 2001). And since 1993, the Rules of Appellate Procedure have given such a filing the same effect on finality as a Rule 59(e) motion. *See* Fed. R. App. P. 4(a)(4)(A)(vi). When filed within 28 days, a Rule 60(b) motion also "renders an otherwise final decision of a district court not final for purposes of appeal." *Nutraceutical*, 139 S. Ct. at 717. Yet the *Gonzalez* Court made no distinction between a Rule 60(b) motion filed within 28 days of judgment and a Rule 60(b) motion filed years later.

By the time this Court decided *Gonzalez* in 2005, Rule 60(b) motions had been included for over a decade in Appellate Rule 4's list of motions that extend the time to appeal. There can be no serious argument that *Gonzalez*, which spoke about Rule 60(b) in blanket terms, intended its decision to apply to only some Rule 60(b) motions. Accordingly, there is no reason to apply one rule for 60(b) motions filed within 28 days but a different rule for 59(e) motions. Suspended finality for purposes of extending

the appeal deadline provides no distinction between the two types of motions.

In a footnote, Banister acknowledges that a Rule 60(b) motion can also be filed within 28 days. Pet'r BOM 31 n.9. He brushes this aside with the observation that "courts treat the Rule 60(b) motion as substantively equivalent to a Rule 59(e) motion." *Ibid.*; *see also* Professor Br. at 24 n.6. That distorts how the rules operate today. The two motions serve similar purposes and often run in parallel, but they are not substantively equivalent.

The two types of motions are substantively distinct. As one court explained, "a Rule 59(e) motion is normally granted only to correct manifest errors of law or to present newly discovered evidence," while a Rule 60(b) motion can be granted under the particular circumstances contemplated by that Rule, such as "counsel's mistake, inadvertence, or excusable neglect." *Jennings v. Rivers*, 394 F.3d 850, 854–57 (10th Cir. 2005) (citing Fed. R. Civ. P. 60(b)(1)); *see also, e.g.*, *United States v. $23,000 in U.S. Currency*, 356 F.3d 157, 165 (1st Cir. 2004); *United States v. Fiorelli*, 337 F.3d 282, 288 (3d Cir. 2003); *Romo v. Gulf Stream Coach, Inc.*, 250 F.3d 1119, 1121 n.3 (7th Cir. 2001).

There is also a historical explanation for why courts of appeals sometimes conflate the two types of motions. That history hurts Banister. The lower courts began treating Rule 60(b) motions filed within the Rule 59(e) deadline as filed pursuant to Rule 59(e) in order to eliminate uncertainty regarding the deadline to appeal. *See, e.g.*, *Ball v. City of Chi.*, 2 F.3d 752, 760 (7th Cir. 1993). That uncertainty arose under the 1979 version of Rule 4,

which reset the deadline to appeal after a timely Rule 59(e) motion, but not after a Rule 60(b) motion filed within the same timeframe. *See Borrero*, 456 F.3d at 701–02 (explaining the origins of the practice); *Grantham v. Ohio Cas. Co.*, 97 F.3d 434, 435 (10th Cir. 1996) (same).

Litigants could not mitigate their risk with a protective notice of appeal because, until 1993, a premature notice of appeal was void. *See Acosta v. La. Dept. of Health & Human Res.*, 478 U.S. 251, 253–54 (1986) (per curiam); *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982) (per curiam). That problem has been eliminated by further amendment to the Rules. *See* Fed. R. App. P. 4(a)(4)(B)(i) advisory committee's note to 1993 amendments. As of 1993, a premature notice of appeal is not void, but will take effect only after the district court disposes of the deadline-extending motion. Fed. R. App. P. 4(a)(4)(B)(i).

In short, the conflation of Rule 59(e) and 60(b) motions arose from their erstwhile disparate effects on the appeal deadline. And, as explained, that has no impact on whether the motion contains a second or successive "claim." *Gonzalez*, 545 U.S. at 531. There is no principled reason to exempt a Rule 59(e) motion from AEDPA while requiring compliance for a Rule 60(b) motion filed on the same day.

b. Some courts of appeals have exempted Rule 59(e) motions from AEDPA's second-or-successive requirements by reasoning that such a motion is not a "collateral attack" on the judgment, but that a Rule 60(b) motion is. *See Howard*, 533 F.3d at 475; *Curry*, 307 F.3d at 665. That reasoning is faulty. A Rule 60(b) motion is "a

continuation of the original suit," not a collateral attack. *Bankers Mortg. Co. v. United States*, 423 F.2d 73, 78 (5th Cir. 1970); *see also Indian Head Nat'l Bank of Nashua v. Brunelle*, 689 F.2d 245, 249 (1st Cir. 1982); *cf. United States v. Denedo*, 556 U.S. 904, 913 (2009); *United States v. Morgan*, 346 U.S. 502, 511 (1954) (describing a request for *coram nobis* as "[c]ontinuation of litigation after final judgment"). Neither a Rule 59(e) motion nor a Rule 60(b) motion is a collateral attack.

This rationale also suffers from the same deficiency that dooms Banister's reliance on the suspension of finality under Appellate Rule 4(a)(4)(A). Even assuming a Rule 60(b) motion is a "collateral attack" on the judgment, the same would be true of Rule 59(e). Both ask the district court to revisit the same judgment, and both can render it "not final" for purposes of the appeal deadline. It did not matter to the *Gonzalez* Court that a Rule 60(b) motion is a "continuation of the original suit." *Banker's Mortg.*, 423 F.2d at 78. It should not matter for habeas claims couched in Rule 59(e) motions either.

Banister also supposes that appeal of a Rule 59(e) denial brings up the underlying judgment for review, while appeal of a Rule 60(b) denial does not. *See* Pet'r BOM 24, 31. That blanket statement is untrue. When a Rule 60(b) motion is filed within 28 days of final judgment, it is reviewed along with that judgment. *See, e.g.*, *"R" Best Produce*, 540 F.3d at 121–22; *Brumley*, 269 F.3d at 637; *cf. York Grp., Inc. v. Wuxi Taihu Tractor Co.*, 632 F.3d 399, 401 (7th Cir. 2011) (a Rule 60(b) motion "filed later" than 28 days from judgment is separately appealable). An

early-filed 60(b) motion, just like a timely 59(e) motion, "merges" with the underlying judgment.

Because both Rule 59(e) and Rule 60(b) motions can precede appeal, applying the same AEDPA standards to both is in keeping with AEDPA's goal of speedy and final disposition. A prisoner can appeal the final judgment after disposition of his Rule 59(e) motion, and he can likewise appeal the final judgment after disposition of his Rule 60(b) motion when it is filed promptly. The *Gonzalez* Court did not view that possibility as a reason to exempt Rule 60(b) motions from AEDPA's strictures.

2. Post-judgment motions in the district court are fundamentally different from post-judgment motions in the court of appeals.

Banister also tries to differentiate Rule 59(e) and Rule 60(b) by drawing an analogy between trial and appellate procedures. *See* Pet'r BOM 33–37. He says a Rule 60(b) motion is like a motion to recall the mandate, which this Court has suggested could be a second or successive habeas petition. *Id.* at 33–36 (citing *Calderon*, 523 U.S. 538). And a Rule 59(e) motion, he says, is similar to a motion for rehearing in the court of appeals. *Id.* at 34–36. Because a motion for rehearing is not considered a second or successive petition even if it contains "claims," he concludes that a Rule 59(e) motion cannot be a second or successive petition either. *Ibid.* Banister's argument has no grounding in the reality of trial or appellate court practice.

First, the notion that a Rule 60(b) motion is "the district court equivalent of a motion to recall the mandate," Pet'r BOM 33, ignores the different functions of an

appellate court mandate and a district court judgment. A mandate is "[a]n order from an appellate court directing a lower court to take a specified action." Black's Law Dictionary 1105 (10th ed. 2014); *accord West v. Brashear*, 39 U.S. 51, 53 (1840) ("The mandate is the judgment of the Supreme Court, transmitted to the Circuit Court."). There is no equivalent in the district court. The district court hearing a habeas application is not an appellate court; there is no lower court to which it could send direction in the form of a mandate. *Cf. Hunt v. Palao*, 45 U.S. 589, 590 (1846) (holding the Court could not review a petition from a decision of a territorial court where that court had subsequently been dissolved because "there is no tribunal to which we are authorized to send a mandate"). Banister's analogy between a Rule 60(b) motion and a motion to recall the mandate is inapt.

Second, the analogy confuses finality concepts. A district court judgment is final when it is entered. *See Coleman*, 135 S. Ct. at 1764. It has immediate finality for purposes of issue preclusion, *see ibid.*, and it can be executed. *Cf.* Fed. R. Civ. P. 62 advisory committee's notes to 2018 amendments. But when a *court of appeals* enters its judgment, that judgment is not final until the mandate issues. *See* Fed. R. App. P. 41(c) advisory committee's note to 1998 amendments ("A court of appeals' judgment or order is not final until issuance of the mandate; at that time the parties' obligations become fixed."); *see, e.g.*, *United States v. Swan*, 327 F. Supp. 2d 1068, 1072 (D. Neb. 2004) ("[U]ntil the mandate . . . issues, this court is not obliged to follow the dictates of [the Eighth Circuit's] decision.").

But to the extent a Rule 60(b) motion resembles a motion to recall the mandate on appeal, that analogy necessarily extends to Rule 59(e) motions, as well. In the court of appeals, a motion for rehearing always precedes finality because it precedes the issuance of the mandate. *See* Fed. R. App. P. 41(b). Motions under Rules 59(e) and 60(b), however, both come after the entry of final judgment in the district court. In that sense, *both* Rule 59(e) and Rule 60(b) motions are akin to motions to recall the mandate because all three come after the pertinent court's judgment has attained finality at that level of review.

Finally, AEDPA expressly contemplates motions for rehearing in the court of appeals, making it unsurprising that they are not considered second or successive habeas applications. Section 2244 specifies that a certain type of order—"[t]he grant or denial of an authorization by a court of appeals to file a second or successive application"—"shall not be the subject of a petition for rehearing." *See* 28 U.S.C. § 2244(b)(3)(E). The negative implication is that in other contexts a motion for rehearing is proper and consistent with AEDPA. *See also id.* § 2266(c)(1)(B). Banister recognizes as much. *See* Pet'r BOM 35.

AEDPA makes no similar reference to Rule 59(e) motions, Rule 60(b) motions, motions to recall the mandate, writs of *coram nobis*, or any other vehicle in which a prisoner might seek to bring a habeas claim after judgment. When such a motion seeks a different merits determination after finality attaches, it is a second or successive habeas application. *See Gonzalez*, 545 U.S. at 531; *cf.*

Calderon, 523 U.S. at 553–54. Allowing that application to bypass the second-or-successive requirements would be inconsistent with AEDPA.

3. Common law analogues do not require a different outcome.

Perhaps recognizing that AEDPA's text and this Court's precedent do not support him, Banister relies on common-law antecedents that he imagines animate Rule 59 and differentiate Rule 60. Specifically, he argues that Rule 59 grows out of a common law court's ability to revisit its own judgments during the term in which it issued them. That practice, he says, shows that the court's power to reopen judgments was part of one continuous proceeding. *See* Pet'r BOM 21–22; *see also* Professor Br. 14–24. And he claims that Rule 59 "is thoroughly consistent with the spirit of the habeas statutes." *Browder v. Director, Dep't of Corr.*, 434 U.S. 257, 271 (1978); *see* Pet'r BOM 25–27. But when both points are considered in the proper context, they provide no support for Banister's argument.

a. Courts do not borrow legal concepts without being mindful of the soil from which they are lifted or the soil where they will be transplanted. *See* R.C. Dale, *The Adoption of the Common Law by the American Colonies*, 30 Am. L. Reg. 553, 569 (1882); *cf. Stokeling v. United States*, 139 S. Ct. 544, 551 (2019). Banister and his amici may not engage in "halfway originalism" by plucking up the common-law rules they think will help while ignoring those that hurt. *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448,

2470 (2018). And a comprehensive view of common-law practice most assuredly hurts Banister.

"The writ of habeas corpus known to the Framers was quite different from that which exists today." *Felker v. Turpin*, 518 U.S. 651, 663 (1996). At common law Banister could *never* have collaterally attacked his conviction. *See Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202–03 (1830). Of course, any prisoner could petition a court for the writ of *habeas corpus ad subjiciendum*. That court would issue the writ to the jailer, ordering him to "return" a lawful reason for confining the prisoner. *See* An Act for the Better Secureing the Liberty of the Subject and for Prevention of Imprisonments Beyond the Seas, 31 Car. 2 c. 2 (1679). But a prisoner who, like Banister, was confined pursuant to a final criminal conviction could not obtain the "privilege"—i.e., the remedy of release—from a habeas court because a criminal judgment entered after a full-fledged trial *was* a lawful reason for confinement. *See Bushell's Case* (1670), 124 Eng. Rep. 1006, 1009–10; Vaugh. 135, 142–43 (C.P.); *see also Langley v. Prince*, 926 F.3d 145, 153–54 (5th Cir. 2019) (en banc).

Even if the claim Banister asserts today were cognizable at common law (it was not), it would not have led to a new trial. Habeas proceedings were purely summary. *Opinion on the Writ of Habeas Corpus* (1758), 97 Eng. Rep. 29, 43; Wilm. 77, 107 (K.B.) ("The writ is not framed or adapted to litigating facts: it is a summary short way of taking the opinion of the Court upon a matter of law."). The court issued a writ and the custodian brought back a return. The prisoner, however, could not

"impeach" (or contest) the truthfulness of the jailer's return. *See ibid.* There was nothing like a trial to be renewed.

The closest actual analogue—ordinary criminal proceedings—confirms Banister's error. The new-trial mechanism was not available in cases involving crimes like Banister's. At England's criminal assizes of Gaol Delivery and Oyer and Terminer, commissioners were tasked with inquiring into treasons, felonies, and trespasses. *See Gaol Delivery* and *Oyer and Terminer*, Giles Jacob, A New Law-Dictionary (1st ed. 1729). "It is quite certain that the commissioners of [those assizes] had no power to grant a new trial. In cases of felony there was no power *anywhere* to grant a new trial." William Renwick Riddell, *New Trial at the Common Law*, 26 Yale L.J. 49, 57–58 (1916) (emphasis added).

And even if a prisoner could have challenged a final judgment in habeas and sought a new trial, the common law still does not help Banister. Only appellate courts could utilize the new-trial mechanism: "[I]f any defect of justice happened at the trial . . . the party may have relief *in the court above*, by obtaining a new trial." 3 William Blackstone, Commentaries *387 (emphasis added); *see* Riddell, *supra*, at 49, 60. There is no common-law basis for Banister's imagined same-term power of trial courts to revisit their own judgments in post-conviction habeas proceedings. *Accord* 2 Matthew Hale, Historia Placitorum Coronæ 306, 308 (1st ed. 1736) (recognizing new-trial power only where an intoxicated jury returns an *acquittal*).

b. Banister also misreads *Browder*. He focuses on this Court's statement that Rule 59 "is thoroughly consistent with the spirit of the habeas corpus statutes." 434 U.S. at 271. That much is true. But what Banister neglects to mention is that *Browder* involved a late appeal from the habeas *respondent*—the Director of the Illinois Department of Corrections. *Id.* at 258. It had nothing to do with a prisoner seeking to alter or amend the federal district court's judgment. It goes without saying that AEDPA's second-or-successive bar, and the abuse-of-the-writ doctrine that it replaced, are not concerned with repetitive filings by *prison wardens*. *See Felker*, 518 U.S. at 664; *McCleskey v. Zant*, 499 U.S. 467, 490 (1991) (noting the abuse-of-the-writ doctrine "concentrate[s] on a petitioner's acts").

The *Browder* Court did not address the only question that matters here: whether repeated post-judgment requests for habeas relief by *prisoners* are consistent with AEDPA. Even if the abuse-of-the-writ doctrine defined the full scope of AEDPA's second-or-successive bar, *but see Magwood*, 561 U.S. at 337–38 (opinion of Thomas, J.), *Browder* said nothing about it.

That is not the only problem with Banister's reliance on *Browder*. The *Browder* Court applied the civil rules to constrict, not to expand, the appeal deadline. While the warden argued no rules applied, this Court held that, together, Rule 59 and Appellate Rule 4 made the government's appeal late. *See* 434 U.S. at 270 (noting the "combined application" of those rules "has resulted in dismissal of appeals"). Moreover, the habeas cases this Court cited in support of Rule 59's compatibility with habeas

practice involved executive detention, *not* post-conviction challenges to a judgment. *See id.* at 270–71 (citing *Aderhold v. Murphy*, 103 F.2d 492 (10th Cir. 1939) and *Tiberg v. Warren*, 192 F. 458 (9th Cir. 1911)).

And even if this Court could cherry pick the common law, ignore the procedural posture in *Browder*, and give Banister the benefit of every serious doubt, his term-time rule still cannot differentiate Rule 60(b). A Rule 60(b) motion filed within 28 days of judgment bears as much affinity to term-time reopening as a motion under Rule 59(e). *See supra* Part I.D.1.

4. AEDPA trumps contrary rules of procedure.

Banister makes one final argument. He asks the Court to adopt the Ninth Circuit's "hybrid" approach, under which a Rule 59(e) motion is not a second or successive application if it re-raises the identical claims just rejected. That argument wrongly elevates the federal rules over AEDPA.

Banister complains that subjecting motions like his to second-or-successive treatment strikes at Rule 59(e)'s "most common" use—asking the district court to revisit its merits determination. Under the Ninth Circuit's approach, however, the second-or-successive restrictions do not apply to a Rule 59(e) motion that "asks the district court to reconsider a previously adjudicated claim on grounds already raised." *Rishor*, 822 F.3d at 493. Instead, they apply "*only when* the motion raises entirely new claims." *Ibid.* That approach, as Banister sees it, would preserve the core function of Rule 59(e).

But AEDPA's second-or-successive rules apply to claims already raised and claims never raised. Claims "presented in a prior application" must always be dismissed. 28 U.S.C. § 2244(b)(1). New claims, or claims "not presented in a prior application," must be dismissed unless they fit into two narrow categories. *Id.* § 2244(b)(2); *see supra* Part I.A. Thus, the hybrid approach reads half of the second-or-successive rule out of AEDPA by allowing a prisoner to use a Rule 59(e) motion for claims that would be subject to § 2244(b)(1), but not those that would be subject to § 2244(b)(2).

This distinction reveals the fundamental problem with the Ninth Circuit's hybrid approach: It elevates the general rules of civil procedure over AEDPA. When the two conflict, AEDPA controls—not the other way around. *See Gonzalez*, 545 U.S. at 529; 28 U.S.C. § 2254 R. 12 (reprinted at App. 20); Fed. R. Civ. P. 81(a)(4). Banister would have this Court permit AEDPA to work only where it does not conflict with Rule 59(e)'s ordinary function.

Even taken on its own terms, Banister's argument is incorrect. Applying AEPDA's second-or-successive principles to Rule 59(e) filings does *not* reduce Rule 59(e) to a nullity. *Contra* Pet'r BOM 36–40. A Rule 59(e) motion attacking the integrity of the federal proceedings itself would not be a second or successive habeas application. So there is ample room for the district court to "correct [its] own alleged errors." Pet'r BOM 39; *see, e.g.*, *Uranga v. Davis*, 893 F.3d 282, 284 (5th Cir. 2018) (concluding a Rule 59(e) motion was not second or successive under *Gonzalez*); *United States v. Orr*, 643 F. App'x 680, 681

(10th Cir. 2016) (same); *Ama v. United States*, 149 F. Supp. 3d 1323, 1325–26 (D. Utah 2016) (same).

* * *

A post-judgment motion filed pursuant to Rule 59(e) can contain habeas claims. When those claims were or could have been adjudicated, then the Rule 59(e) motion is a second or successive habeas application. There is no valid reason to treat Rule 59(e) motions differently than post-judgment motions for reconsideration filed pursuant to Rule 60(b). Both can be filed immediately after the district court enters judgment, both can extend the appeal deadline, and both can be used to re-urge habeas claims that were already rejected. That a Rule 60(b) motion can *also* be filed after appeal is immaterial. AEDPA streamlined review by putting a stop to repeat filings in the district court once that court has entered judgment.

II. A Rule 59(e) Motion That Is an Unauthorized Second or Successive Habeas Application Does Not Extend the Time to Appeal.

Under AEDPA, a prisoner must obtain court of appeals authorization before filing a second or successive application. If he does not, the district court lacks jurisdiction entirely. And a filing that "the District Court never had jurisdiction to consider . . . in the first place" may not extend the prisoner's time to appeal under Appellate Rule 4. *Burton*, 549 U.S. at 152. So motions like Banister's have no effect on the appeal deadline even if they would be proper Rule 59(e) motions in ordinary civil litigation. That outcome is no anomaly. AEDPA is riddled with hurdles that circumscribe the scope of federal habeas review.

A. Authorization is a jurisdictional prerequisite for filing a second or successive application.

AEDPA requires that a second or successive habeas application be authorized by a court of appeals "[b]efore [it] is filed in the district court." 28 U.S.C. § 2244(b)(3)(A). The court of appeals must decide whether the prisoner has made "a prima facie showing" that he presents a new claim that relies on new law or new facts. *Id.* § 2244(b)(3)(B)–(C); *see supra* p.13. If the court of appeals denies authorization, the prisoner may not appeal that decision. 28 U.S.C. § 2244(b)(3)(E); *see Felker*, 518 U.S. at 657. Even if the court of appeals grants authorization, the district court may consider the prisoner's claims on the merits only if it determines that the prisoner *actually* "satisfies the requirements of" section 2244(b). 28 U.S.C. § 2244(b)(4); *see Tyler v. Cain*, 533 U.S. 656, 660–61 n.3 (2001).

The authorization requirement is not a mere "mandatory claim-processing rule." *See Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 17 (2017). It is a jurisdictional prerequisite—just like a certificate of appealability. *See Gonzalez*, 565 U.S. at 142. If the court of appeals does not authorize a second or successive application, "the district court never had jurisdiction to consider [the application] in the first place." *Burton*, 549 U.S. at 152; *see also Magwood*, 561 U.S. at 331 ("[I]f Magwood's application was 'second or successive,' the District Court should have dismissed it in its entirety because he failed to obtain the requisite authorization from the Court of Appeals.").

In *Burton*, for example, a prisoner filed his second habeas application directly in federal district court believing it was not second or successive. 549 U.S. at 151–52. This Court held that the application was successive, so AEDPA "required [him] to receive authorization from the Court of Appeals before filing" it. *Id.* at 153. Because "Burton neither sought nor received authorization," however, "the District Court was without jurisdiction to entertain" the petition. *Id.* at 157. This Court vacated the Ninth Circuit's judgment denying relief on the merits and "remanded with instructions to direct the District Court to dismiss the habeas petition for lack of jurisdiction." *Ibid.*

This Court's precedent thus confirms that the statutory text means what it says: "[B]efore the district court may accept a successive petition for filing, the court of appeals must determine that it presents a claim not previously raised that is sufficient to meet § 2244(b)(2)'s new-rule or actual-innocence provisions." *Gonzalez*, 545 U.S. at 530. Absent authorization, then, a district court may not "accept a successive petition for filing." *Ibid.*

B. A filing the district court lacks jurisdiction to accept and entertain cannot extend the time to appeal.

A state prisoner's notice of appeal is due 30 days after entry of final judgment. He cannot change that by submitting a document the district court has no jurisdiction to consider, such as an unauthorized second or successive habeas application.

Under Appellate Rule 4, "[i]f a party files [a Rule 59(e) motion] in the district court," then "the time to file

an appeal runs . . . from the entry of the order disposing of the" motion. Fed. R. App. P. 4(a)(4)(A). The premise is that a Rule 59(e) motion resets the appeal clock while the district court "further determin[es] whether the judgment should be modified." *Pink*, 317 U.S. at 266; *see* Fed. R. App. P. 4(a)(4)(A) advisory committee's note to 1979 amendments (extension of time operates "during *pendency* of the motion"), 1993 amendments (extension of time operates "while a posttrial motion is *pending*" (emphasis added)). Upon completion of review, the clock starts anew. *Nutraceutical Corp.*, 139 S. Ct. at 717.

A motion that needs—but lacks—appellate court authorization, however, may not be "file[d] in the district court." 28 U.S.C. § 2244(b)(3)(A). The court may not accept it, review it, or otherwise consider it. *Gonzalez*, 545 U.S. at 530. It is not "pending." And it cannot extend the time to appeal. *See Gypsy Oil Co. v. Escoe*, 275 U.S. 498, 499 (1927) (per curiam). In other words, an unauthorized application couched in a Rule 59(e) motion has no legal significance for the appeal deadline.

That is the rule for an untimely Rule 59(e) motion even in ordinary civil litigation: "A motion made after the time allowed by the Civil Rules will not qualify as a motion that, under Rule 4(a)(4)(A), re-starts the appeal time." Fed. R. App. P. 4 advisory committee's note to 2016 amendments. A late motion is a "nullity." *Morris v. Unum Life Ins. Co. of Am.*, 430 F.3d 500, 502 (1st Cir. 2005); *see Thompson v. I.N.S.*, 375 U.S. 384, 389–90 (1964) (Clark, J., dissenting). It is also the rule for a Rule 59(e) motion that does not ask a district court to alter its judgment: The extension of time "applies only when such

a motion actually seeks an 'alteration of the rights adjudicated' in the court's first judgment." *League of Women Voters*, 468 U.S. at 373 n.10; *see Buchanan v. Stanships, Inc.*, 485 U.S. 265, 268–69 (1988) (per curiam).

There is no reason to apply a different rule to a motion the prisoner has no permission to file and the district court has no jurisdiction to accept. Indeed, this Court applied that very rule to a motion like Banister's in *Morse v. United States*, 270 U.S. 151 (1926) (Taft, C.J.). There the plaintiff sought to file a subsequent motion for a new trial "after the first motion for a new trial had been overruled." *Id.* at 154. At that point, however, he needed "leave of the Court of Claims" to file the motion. *Ibid.* Because the Court of Claims never granted leave, "no motion for a new trial could be duly and seasonably filed," and the plaintiff's motion could not suspend "the running of the period limited for the allowance of an appeal." *Ibid.*; *see also Bowman v. Lopereno*, 311 U.S. 262, 266 (1940).

So too here: Banister needed "leave" of the Court of Appeals to file his Rule 59(e) motion containing habeas claims. *Morse*, 270 U.S. at 154. Because he did not obtain it, his motion "could [not] be duly and seasonably filed." *Ibid.* And it therefore could not extend the appeal deadline.

This Court's precedent on statutory tolling under AEDPA is instructive. AEDPA provides that a "properly filed application for State post-conviction or other collateral review" tolls the time to file a federal habeas petition. 28 U.S.C. § 2244(d)(2). A state collateral review application may be properly filed, and thus toll the federal

limitations period, even if it fails to comply with a "condition to obtaining relief." *Bennett*, 531 U.S. at 10–11. But a state application does *not* toll the time to appeal if it fails to comply with a "condition to filing." *Pace v. DiGuglielmo*, 544 U.S. 408, 412–13 (2005).

Rules specifying the necessary form of a document, imposing time limits for filing, specifying the proper recipient, and requiring the payment of filing fees all constitute conditions to filing. *Bennett*, 531 U.S. at 8. So does a "precondition[] imposed on particular abusive filers," like AEDPA's authorization requirement. *Id.* at 8–9 (citing 28 U.S.C. § 2253(c)). An obligation to obtain permission to file is the quintessential "condition to filing." Banister's motion would not toll his time to file a petition if this were a statutory tolling case. It does not extend his time to appeal here.

The district court had no jurisdiction to entertain the motion that Banister relies on to contend his late appeal was timely. *See* 28 U.S.C. § 2244(b)(3)(A). Accordingly, the court of appeals lacked jurisdiction over Banister's untimely appeal. *See* 28 U.S.C. § 2107(a).

C. This case does not implicate the recharacterization issue the Court addressed in *Castro*.

Contrary to Banister's argument, this case does not involve "recharacterization" of Rule 59(e) motions as second or successive habeas applications. *See* Pet'r BOM 47–52. Applying AEDPA's clear rules does not require recharacterization of Banister's motion. Even accepting it as a Rule 59(e) motion, it did not extend the time to appeal. *See supra* Part II.B.

The question of recharacterization at issue in *Castro* therefore does not arise here. In *Castro*, a federal prisoner filed a motion for a new trial under Federal Rule of Criminal Procedure 33. 540 U.S. at 378. Because the district court thought the motion was actually an effort to vacate his sentence, it "referred to it as a § 2255 motion." *Ibid.* When Castro filed a section 2255 motion a year later, he ran into the second-or-successive hurdles because the federal courts construed his earlier filing as his *first* § 2255 motion. *Id.* at 379; 28 U.S.C. § 2255(h).

This Court reversed. The majority concluded that before recharacterizing a habeas application, a court must (1) notify the movant that it intends to recharacterize the motion, (2) warn the movant that a subsequent motion would be subject to the second-or-successive hurdles, and (3) provide the movant an opportunity to withdraw or amend the motion. *Castro*, 540 U.S. at 383. The concurrence objected to routine recharacterization of a "litigant's choice of procedural vehicle." *Id.* at 385–86 (Scalia, J., concurring in part and concurring in the judgment). But it agreed that recharacterization is pernicious where "the patronized litigant will be harmed rather than assisted by the court's intervention." *Id.* at 386.

Those concerns are not implicated here. The State does not argue that Banister's was not a "true" Rule 59(e) motion. *Gonzalez*, 545 U.S. at 531; *id.* at 539, 545 (Stevens, J., dissenting). Taking Banister's motion on its face, *Castro*, 540 U.S. at 385 (Scalia, J., concurring in part and concurring in the judgment), it *is* a Rule 59(e) motion. It just happens to be subject to AEDPA's second-or-successive bar because it contains claims for habeas

relief that were already rejected. So Banister was required to obtain appellate court permission before he could file it. Without permission, he could not file the motion. It "involves no similar 'recharacterization' to recognize" that, whatever Banister's motion is, it did not extend the time to appeal. *Burton*, 549 U.S. at 156 n.3.

Moreover, the prophylaxis *Castro* designed makes scant sense in this posture. *Castro*'s insight is that a court faced with a mislabeled motion could permit the movant to withdraw or amend the motion. 540 U.S. at 383. Here, neither the district court nor the Fifth Circuit had jurisdiction to take any action on Banister's motion.

Because Banister's motion was not authorized, the district court lacked jurisdiction to entertain it. *Burton*, 549 U.S. at 157. All it had power to do was dismiss, *see United States v. Key*, 205 F.3d 773, 774 (5th Cir. 2000) (per curiam); *Guenther v. Holt*, 173 F.3d 1328, 1330–32 (11th Cir. 1999); *Nunez v. United States*, 96 F.3d 990, 991 (7th Cir. 1996), or perhaps transfer the motion to the court of appeals under 28 U.S.C. section 1631, *see Jackson v. Sloan*, 800 F.3d 260, 260 (6th Cir. 2015); *In re Cline*, 531 F.3d 1249, 1251–52 (10th Cir. 2008) (per curiam); *Robinson v. Johnson*, 313 F.3d 128, 139–40 (3d Cir. 2002); *Liriano v. United States*, 95 F.3d 119, 122–23 (2d Cir. 1996) (per curiam). Similarly, the sole question before the court of appeals was whether Banister's appeal was timely. If not, then it had no jurisdiction to act on the appeal—much less to direct the district court to permit Banister to amend or withdraw. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 73 (1997).

Finally, it is Banister's view—not the State's—that creates a *Castro* problem. He fails to account for the nature of the motion at issue in *Gonzalez*: The post-judgment motion was "title[d] 'Motion to Alter or Amend Judgment' suggest[ing] that petitioner was relying on Federal Rule of Civil Procedure 59(e)." *Gonzalez*, 545 U.S. at 527 n.1. This Court nevertheless recharacterized the motion because "the substance of the motion made clear that petitioner sought relief under Rule 60(b)(6)." *Ibid.*

If Banister is right—that is, if Rule 60(b) is subject to the second-or-successive hurdles, but Rule 59(e) is not—then the Court would have recharacterized the motion to Gonzalez's detriment by forcing him to use a rule that is subject to the second-or-successive gauntlet (Rule 60(b)) that he should have been permitted to avoid (Rule 59(e)). Banister's argument implies that this Court did in *Gonzalez* what it said courts should not do in *Castro*.

The better view is that Rule 59(e), just like Rule 60(b), may be subject to the second-or-successive hurdles. *See supra* Part I. Only then could this Court have recharacterized Gonzalez's Rule 59(e) motion without "harm[ing]" him. *Castro*, 540 U.S. at 385 (Scalia, J., concurring in part and concurring in the judgment).

D. The second-or-successive hurdles are part of the federal habeas review that AEDPA provides a state prisoner.

Congress conditioned federal habeas review of state judgments on specific substantive and procedural requirements that do not apply in ordinary civil proceedings. Failure to satisfy those conditions can, and often

does, prevent review of federal habeas claims on the merits. So a prisoner's first collateral attack on a state court's judgment is in many ways fundamentally different from "every [other] civil case." Pet'r BOM 21.

1. A habeas petitioner is *not*, as Banister suggests, entitled to file any "motion[] authorized by the Rules of Civil Procedure" so long as it is "filed in [his] first habeas proceeding." Pet'r BOM 21. A habeas petitioner is not entitled to invoke any rule, in any proceeding, if it conflicts with AEDPA.

For instance, AEDPA strictly limits a prisoner's ability to marshal facts in support of his claims. As to the existing record, the state court gets the benefit of the doubt: "[A] determination of a factual issue made by a State court shall be presumed to be correct." 28 U.S.C. § 2254(e)(1). If a prisoner thinks the facts are otherwise, he has the burden of rebutting the presumption by "clear and convincing evidence." *Ibid.* New facts are even harder to come by. Where a prisoner failed to develop the facts in state court, a federal court may not hold an evidentiary hearing unless (1) the prisoner's claim relies on new law or new facts and (2) the facts the prisoner hopes to develop in an evidentiary hearing would establish his innocence "by clear and convincing evidence." *Id.* § 2254(e)(2). These limitations, of course, are inconsistent with the ordinary rules. *See, e.g.*, Fed. R. Evid. 402 ("Relevant evidence is admissible."); Fed. R. Civ. P. 26(b)(1) (scope of discovery), 38(a) (jury right), 53(a)(1)(B) (appointing masters).

Similarly, AEDPA restricts a prisoner's ability to appeal an adverse judgment. Before doing so, he must first

obtain a certificate of appealability by making "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(1)–(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 335–36 (2003). Once again, this looks nothing like the blanket statutory right to appeal that other civil litigants possess. *See* 28 U.S.C. § 1291.

The differences do not end there. A prisoner may be barred from even beginning his first round of federal review if he denies the state courts the first opportunity to address his claims. AEDPA requires a state prisoner to "exhaust[] the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). A court may not find this exhaustion requirement waived "unless the State, through counsel, expressly waives" it. *Id.* § 2254(b)(3). The rule dooms even exhausted claims listed alongside unexhausted claims in a mixed petition. *See Lundy*, 455 U.S. at 510.[3] This exhaustion requirement has no analogue in an ordinary civil case. The typical civil litigant may avail himself of federal question jurisdiction without first presenting his constitutional claim to fully competent state court tribunals. *See* 28 U.S.C. § 1331; *New York v. Printz*, 521 U.S. 898, 907 (1997) (discussing the Madisonian Compromise).

This requirement to give state courts the first opportunity points to yet another hurdle. Procedural default principles may bar federal habeas review where a

[3] As explained above, Banister's petition would not have cleared this hurdle. *See supra* at 4. His federal petition was a mixed petition containing both exhausted and unexhausted habeas claims.

prisoner failed to comply with state procedures. *See Wainwright v. Sykes*, 433 U.S. 72 (1977). That failure could occur at any stage of state-court review: at trial, on appeal, and on collateral review. *Murray v. Carrier*, 477 U.S. 478, 489–90 (1986). "In *all cases* in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

And AEDPA generally bars relitigation of a petitioner's claims when they have been rejected on the merits by a state court. 28 U.S.C. § 2254(d). In that scenario, the federal courts may not grant habeas relief unless the prisoner can first show that the state court's decision flouted the law, *id.* § 2254(d)(1), or flouted the facts, *id.* § 2254(d)(2). In the usual case, section 2254(d) bars a prisoner from "relitigat[ing]" the very claim he wants the federal court to hear. *See Harrington v. Richter*, 562 U.S. 86, 100 (2011); *Greene v. Fisher*, 565 U.S. 34, 39–40 (2011).

Finally, a host of federal laws impose time limits for obtaining review at every stage. AEDPA imposes a one-year limitations period for filing a habeas petition. *See* 28 U.S.C. § 2244(d)(1). Appellate Rule 4 (and the statute it implements) imposes a 30-day deadline to appeal a denial of habeas relief. *See* 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1)(A). And this Court imposes a 90-day deadline to seek certiorari review. *See* Sup. Ct. R. 13.1. Every day, litigants who fail to comply with these deadlines miss the

opportunity to see federal habeas review through to completion. *See, e.g.*, *Pace*, 544 U.S. at 419 (untimely habeas petition under § 2244(d)); *Bowles v. Russell*, 551 U.S. 205, 206–08 (2007) (untimely habeas appeal under Appellate Rule 4).

Habeas petitioners are plainly not entitled to do anything a normal civil litigant can do. *Contra* Pet'r BOM at 21. Characterizing a habeas proceeding as a "civil" one is technically correct but "inexact," as "the proceeding is unique." *Harris v. Nelson*, 394 U.S. 286, 293–94 (1969). It should be unsurprising, then, that Rule 59(e) has limited applicability in habeas proceedings.

Just as Congress decided to require exhaustion of state remedies and condition appeal on a "substantial showing of a constitutional right," it decided that repetitive habeas filings are permissible only under certain narrow circumstances. Congress imposed these requirements on habeas claims however they arise. *See Gonzalez*, 545 U.S. at 530–31. There is nothing unique about requiring a Rule 59(e) motion asserting habeas claims to clear the hurdles required of other second or successive habeas applications.

A failure to satisfy AEDPA's requirements does not mean a prisoner has been deprived of his "one full round" of habeas review. *Contra* Pet'r BOM 1, 11, 16, 19, 21, 29, 41. These requirements are part of the "one full round" Congress has provided. A prisoner who comes up against a procedural hurdle has still received all the review to which he was entitled.

2. These requirements further the purposes that animated AEDPA. Before AEDPA, the federal courts

exercised their authority to review state judgments for constitutional error by conducting *de novo* review of state courts' constitutional rulings. *See Fay v. Noia*, 372 U.S. 391, 461 (1963) (Harlan, J., dissenting) (discussing *Brown v. Allen*, 344 U.S. 443 (1953)). Aiming "to further comity, finality, and federalism," Congress responded with AEDPA. *Williams v. Taylor*, 529 U.S. 420, 421 (2000); *see Duncan v. Walker*, 533 U.S. 167, 178 (2001). AEDPA imposed procedural barriers to federal habeas review and did away with *de novo* re-litigation of constitutional challenges in federal court.

In practical terms, AEDPA had the "acknowledged purpose" of "reduc[ing] delays in the execution of state and federal criminal sentences." *Schriro v. Landrigan*, 550 U.S. 465, 475 (2007) (alteration in original)*; see also Garceau*, 538 U.S. at 206. It aimed to "streamlin[e] federal habeas proceedings," *Rhines v. Weber*, 544 U.S. 269, 277 (2005), and eliminate "the shameful overloading of our federal criminal justice system," *Hohn v. United States*, 524 U.S. 236, 264–65 (1998) (Scalia, J., dissenting); *see Ryan v. Gonzales*, 568 U.S. 57, 76 (2013); *Day v. McDonough*, 547 U.S. 198, 205–06 (2006); *Pace*, 544 U.S. at 427.

Subjecting Rule 59(e) motions to AEDPA's second-or-successive bar furthers these goals. The capacity to interrupt and delay federal habeas proceedings by engaging in "gamesmanship" is obvious. *Magwood*, 561 U.S. at 334. To appeal the denial of habeas relief, a prisoner must first obtain a certificate of appealability ("COA"). That requires him to "ma[ke] a substantial showing of the denial of a constitutional right." 28 U.S.C.

§ 2253(c)(2). A prisoner may naturally be tempted to buy extra time to flesh out his COA application.

Imagine the prisoner who waits until day 28 to file a 100-page Rule 59(e) motion in the district court. His primary goal might not be relief; it might be to postpone the deadline for his motion for a COA. On Banister's reading, Appellate Rule 4 would buy that prisoner time for as long as the district court is searching through his 100-page filing. Even if the motion recycles arguments the prisoner previously raised, a dutiful district court judge will read carefully just to make sure. *See Limtiaco v. Camacho*, 549 U.S. 483, 488 (2007) (disapproving "filings used as delaying tactics").

The burdens these filings impose on district courts is especially pernicious because it may crowd out a district court's consideration of other meritorious cases. By the time Banister filed his Rule 59(e) motion, he had already subjected the district court and the Texas Attorney General to a 300-page filing styled in part as a stage play. J.A. 165. His Rule 59(e) motion recycled 14 different grievances in more than 30 pages. *See* J.A. 219–53. Every post-trial motion further "inundate[s] the docket of the lower courts," burying meritorious petitions "in a flood" of initial filings and post-trial motions. *Brown v. Allen*, 344 U.S. 443, 536 (1953) (Jackson, J., dissenting). And with every post-trial motion a prisoner files, "states are compelled to default or to defend the integrity of their judges and their official records." *Id.* at 537. Banister's rule is not "efficient" for States or district courts. *Contra* Pet'r BOM 2, 13, 23, 36.

It is difficult to quantify the scope of the problem. But Banister insists that his motion is the "prototypical use of Rule 59(e)." Pet'r BOM 47. If so, incentivizing filings like Banister's will only interrupt federal habeas review, which itself interrupts the repose of a state conviction.

III. The Fifth Circuit Had No Jurisdiction to Entertain Banister's Untimely Appeal.

These principles apply here in a straightforward way. Banister filed an application containing claims for habeas relief. J.A. 43–157. The district court denied relief because Banister had "not demonstrated that the state court's adjudication of his claims was contrary to or an unreasonable application of clearly established Supreme Court law as required by 28 U.S.C. § 2254(d)." J.A. 217. The same day, the court entered final judgment dismissing Banister's application with prejudice. J.A. 6. By any measure, his claims were "presented," "adjudicated," and "determined." *McCleskey*, 499 U.S. at 484–84; *Burton*, 549 U.S. at 155.

Then Banister filed a Rule 59(e) motion, *again* asserting claims for habeas relief. J.A. 219–53. This renewed request, as Banister concedes, "ask[ed] for a second chance to have the merits determined favorably." *Gonzalez*, 545 U.S. at 532 n.5. In his own telling, the motion "merely addresses itself to correcting the alleged errors made by the district court in its consideration of earlier claims." Pet'r BOM 44 (quotation omitted). All Banister sought to do was "ask[] the district court to correct

its errors," *id.* at 46, and revisit its "adverse decision" denying him relief, *id.* at 46–47.[4]

That is a textbook attack on "the federal court's previous resolution of a claim *on the merits*." *Gonzalez*, 545 U.S. at 532. The district court "determin[ed] that there . . . do not exist grounds entitling [Banister] to habeas corpus relief under 28 U.S.C. §§ 2254(a) and (d)." *Id.* at 532 n.4. Banister's motion argued the district court made "manifest errors of law and fact" in coming to that conclusion. J.A. 219. That motion was a subsequent "application" containing "claim[s]" for habeas relief. *See supra* Part I.

AEDPA required Banister to secure authorization from the court of appeals before filing that application in the district court. 28 U.S.C. § 2244(b)(3)(A). He never sought authorization. Accordingly, the district court had no power to entertain—or even accept—the motion. That filing was never pending and could not extend Banister's time to appeal from the date the district court entered its final judgment denying habeas relief. So Banister's appeal had to be noticed within 30 days of the district court's final judgment. Banister's notice of appeal, filed more than 60 days after the entry of judgment, was untimely. *See supra* Part II.A–B.

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[4] There is no dispute a prisoner could properly raise the same arguments in a request for a COA. *See* Pet'r BOM 38. This illustrates how applying AEDPA to Rule 59(e) motions furthers Congress's goals: It "reduce[s] delays in the execution of state . . . criminal sentences," *Woodford*, 538 U.S. at 206, and "streamlin[es] federal habeas proceedings," *Rhines*, 544 U.S. at 277.

Banister's only remaining response is to complain that this outcome is unfair. After all, he says, the court did not tell him that his motion would not extend the time to appeal until it was already "too late to adjust." Pet'r BOM 48. But fairness concerns cannot displace AEDPA's clear text. In *Burton*, for example, this Court made no exception for a prisoner's confusion. Even though Burton "misread[]" AEDPA's deadline and even though he filed his first petition *while his state court conviction was still pending on direct review*, section 2244(b) barred his second filing. *Burton*, 549 U.S. at 156–57.

Even taking Banister's concerns on their face, however, they are overblown. First, no one took Banister by surprise. The Fifth Circuit's rule that Rule 59(e) motions are subject to the same rules as motions under Rule 60(b) has been the law of the circuit for nearly ten years. *See Williams*, 602 F.3d at 301–04. It has been the rule in other circuits for even longer. *See supra* p.7.

In any event, what Banister sees as a problem has an easy, tried-and-true solution: File a protective petition or application for a COA. In the exhaustion context, for example, this Court has required federal courts to dismiss "mixed petitions"—those containing both exhausted and unexhausted claims—rather than simply adjudicate the exhausted portions. *See Lundy*, 455 U.S. at 510. That rule, however, created the risk that prisoners forced to exhaust in state court might discover that their newly exhausted petition was time-barred when they returned to federal court. *See Rhines*, 544 U.S. at 274–75. The solution was a protective petition: The federal court could

stay and abey the initial filing while the prisoner exhausted. *Id.* at 275–77.

So too in the statutory tolling context. Properly filed applications for state collateral review may toll a prisoner's deadline for filing a federal habeas petition. 28 U.S.C. § 2244(d)(2). But sometimes a prisoner will not know whether his state filings complied with state rules until *after* the time to file his federal petition has lapsed. *See, e.g.*, *Evans v. Chavis*, 546 U.S. 189, 191–92 (2006). Once again, this Court concluded that a prisoner "might avoid this predicament . . . by filing a 'protective' petition in federal court" and requesting a stay and abeyance. *Pace*, 544 U.S. at 416.

Those cases show the way forward here. A prisoner bent on filing a Rule 59(e) motion in the district court may simply file a protective appeal within 28 days of the judgment. *See* Fed. R. App. P. 4(a)(1)(A); 28 U.S.C. § 2253(a), (c). Courts routinely construe a timely filed COA request as a timely notice of appeal if a COA is granted. *See, e.g.*, *Hill v. Johnson*, 114 F.3d 78, 81 (5th Cir. 1997) (citing Fed. R. App. P. 22(b)(2)).

The prisoner may then file what he believes is a non-successive Rule 59(e) motion in the district court. Under Appellate Rule 4, the earlier-filed appeal would not divest the district court of jurisdiction. *See* Fed. R. App. P. 4(a)(4)(B)(i)–(ii); *Stone*, 514 U.S. at 402. If the prisoner is right, the district court may entertain the motion, and any appeal will follow based on the already-filed notice of appeal. If he is wrong, the district court will dismiss or transfer the motion. In either case, the earlier-filed appeal will be timely.

Other prisoners and courts have already taken this approach. *See, e.g.*, *Williams v. Kelley*, 858 F.3d 464, 466–67, 475 (8th Cir. 2017) (per curiam) (consolidating COA application with the transferred 60(b) motion). Banister could have done that here. He simply chose not to do so despite long-settled circuit precedent.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

KYLE D. HAWKINS
Solicitor General
Counsel of Record

MATTHEW H. FREDERICK
Deputy Solicitor General

NATALIE D. THOMPSON
Assistant Solicitor General

TREVOR W. EZELL
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
kyle.hawkins@oag.texas.gov
(512) 936-1700

OCTOBER 2019

Appendix

28 U.S.C. § 2244. Finality of determination:

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)

(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless --

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)

(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)

(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a

person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2253. Appeal:

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2254. State custody; remedies in Federal courts:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)

(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)

(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State,

through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)

(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall

determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

Fed. R. App. P. 4(a). Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

(B) The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is:

(i) the United States;

(ii) a United States agency;

(iii) a United States officer or employee sued in an official capacity; or

(iv) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf--including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.

(C) An appeal from an order granting or denying an application for a writ of error coram nobis is an appeal in a civil case for purposes of Rule 4(a).

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) Multiple Appeals. If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party files in the district court any of the following motions under the Federal Rules of Civil Procedure—and does so within the time allowed by those rules—the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.

(B)

(i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.

(6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

(7) Entry Defined.

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58(a) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or

(ii) if Federal Rule of Civil Procedure 58(a) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or
- 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

(B) A failure to set forth a judgment or order on a separate document when required by

Federal Rule of Civil Procedure 58(a) does not affect the validity of an appeal from that judgment or order.

Fed. R. Civ. P. 59. New Trial; Altering or Amending a Judgment:

(a) In General.

(1) Grounds for New Trial. The court may, on motion, grant a new trial on all or some of the issues--and to any party--as follows:

(A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; or

(B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.

(2) Further Action After a Nonjury Trial. After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.

(b) Time to File a Motion for a New Trial. A motion for a new trial must be filed no later than 28 days after the entry of judgment.

(c) Time to Serve Affidavits. When a motion for a new trial is based on affidavits, they must be filed with the motion. The opposing party has 14 days after being served to file opposing affidavits. The court may permit reply affidavits.

(d) New Trial on the Court's Initiative or for Reasons Not in the Motion. No later than 28 days after the entry of judgment, the court, on its own, may order a

new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either event, the court must specify the reasons in its order.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.

Fed. R. Civ. P. 60. Relief From a Judgment or Order:

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) Timing. A motion under Rule 60(b) must be made within a reasonable time--and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) Effect on Finality. The motion does not affect the judgment's finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) Bills and Writs Abolished. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS:

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Rule 12. Applicability of the Federal Rules of Civil Procedure:

The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules.