No. 18-6943

IN THE

Supreme Court of the United States

GREGORY DEAN BANISTER,
Petitioner,

v.

LORIE DAVIS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

ADRIENNE McFARLAND
Deputy Attorney General
For Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

JOSEPH PETER CORCORAN*
Assistant Attorney General
Criminal Appeals Division
*Counsel of Record

SUSAN SAN MIGUEL
Assistant Attorney General
Criminal Appeals Division

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 936-1400
Joseph.Corcoran@oag.texas.gov

Counsel for Respondent

QUESTIONS PRESENTED

1. Did Banister's postjudgment motion, which was styled a Rule 59(e) motion but challenged the district court's resolution of his claims on the merits, extends the thirty-day period for filing a notice of appeal? Or did the Fifth Circuit correctly construe the motion as a successive habeas petition under *Gonzalez v. Crosby*, 545 U.S. 524 (2005)?

2. Should a pro se prisoner be warned and given the opportunity to timely file a notice of appeal when an appellate court has characterized his postjudgment motion as successive?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treatises

BRIEF IN OPPOSITION

Respondent, Lorie Davis, Director of the Texas Department of Criminal Justice, Criminal Institutions Division respectfully files this brief in opposition to Gregory Dean Banister's petition for writ of certiorari.

INTRODUCTION

The Fifth Circuit construed Banister's Fed. R. Civ. P. 59(e) Motion to Alter or Amend the Judgment as a successive habeas petition pursuant to *Gonzalez v. Crosby*, 545 U.S. at 530–31, because it merely attacked the merits of the district court's reasoning in denying his § 2254 petition. ECF 37.[1] Though the type of motion at issue in *Gonzalez* was filed pursuant to Fed. R. Civ. P. 60(b), the scope of *Gonzalez* extended to any postjudgment motion that attacks the district court's resolution of a petitioner's claims on the merits. A minority of circuits—the Third, Sixth, and Seventh—interpret *Gonzalez* narrowly to apply only to a Rule 60(b) motion, but their reasoning controverts the language of *Gonzalez* and mistakenly favors Rule 59(e)'s purpose of allowing the district court to correct minor defects over AEDPA's[2] purpose of promoting finality in state court convictions. In fact, the majority of circuits interpret *Gonzalez* as the Fifth Circuit does, examining the substance of the

[1] Documents filed in the district court will be referred to by their electronically filed (ECF) docket entry number on PACER account.

[2] AEDPA is the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

postjudgment motion rather than its label. Because Banister's motion is not a true Rule 59(e) motion, but a successive federal petition—over which the district court had no jurisdiction—he is not entitled to receive an extension for filing an appeal under Fed. R. App. P. 4(a)(4)(A)(iv). The Fifth Circuit correctly found Banister's Notice of Appeal untimely and dismissed his Motion for Certificate of Appealability (COA) for lack of jurisdiction.

Banister is also not entitled to notice and an opportunity to withdraw his mislabeled motion. His reliance on *Castro,* which requires a court to give notice and an opportunity to respond before recharacterizing a prisoner's postjudgment motion as an initial filing, is misplaced. *Castro v. United States*, 540 U.S. 375, 383 (2003). *Castro* does not apply to Banister, whose petition has already been decided on the merits; rather, it applies only to initial filings. Nor does *Castro* mandate extending the time for filing a notice of appeal. Banister's argument amounts to an attempt to evade the appellate filing deadline as well as AEDPA's strict jurisdictional bar against successive habeas challenges. Banister has failed to present a compelling issue for this Court to review. Certiorari should be denied.

STATEMENT OF THE CASE

I. Facts of the Crime

The state court succinctly summarized the evidence supporting Banister's conviction on direct appeal:

> On a Saturday morning in May 2002 appellant Gregory Bannister was driving with a friend from Lubbock to his home in Clovis, New Mexico. Near the city of Amherst his vehicle left the roadway, striking and killing a bicyclist on the shoulder. Appellant was present when deputies and DPS troopers arrived and he consented to collection of a blood sample. Because there was no indication he was intoxicated, appellant was not arrested. The sequence of events leading to his subsequent arrest is not clear from this record. It does show that testing of appellant's blood indicated the use of cocaine and he was charged with intoxication manslaughter and aggravated assault under two different cause numbers. This record concerns appellant's trial and conviction for aggravated assault and punishment, enhanced by prior convictions, of 30 years confinement.

Bannister v. State, No. 07-04-00479-CR, 2006 WL 2795250, at *1 (Tex. App.—Amarillo 2006).

II. Relevant Procedural History

Banister pursued direct review of his aggravated assault conviction, ending with this Court's denial of his petition for writ of certiorari. *Banister v. State*, 552 U.S. 825 (2007). In 2008, he filed a state habeas application, but the Texas Court of Criminal Appeals denied it without written order.[3] Then, in 2014, Banister filed a 28 U.S.C. § 2254 federal habeas petition, raising more than fifty claims. ECF 1. On May 15, 2017, the district court issued a lengthy and thorough opinion denying Banister's federal petition and dismissing it with prejudice. ECF 26, 27. Twenty-eight days later, Banister filed a Motion

[3] *See* <http://search.txcourts.gov/Case.aspx?cn=WR-70,854-03&coa=coscca> (Last visited April 3, 2019).

to Alter or Amend the Judgment, attempting to relitigate the manner in which the district court interpreted the evidence and resolved his claims. ECF 28. The district court considered but denied the motion on June 20, 2017. ECF 30. On July 20, 2017, Banister finally filed a notice of appeal. ECF 31. The Fifth Circuit dismissed his motion for COA for lack of jurisdiction. ECF 37. That Court found that even if his COA motion was construed as an appeal of the district court's denial of his Rule 59(e) motion (rather than the denial of his § 2254 petition), the court would lack jurisdiction. *Id*. Specifically, Judge Elrod determined that Banister's Rule 59(e) motion was, in reality, a successive § 2254 petition, which could not toll the time for filing a notice of appeal. *Id*. (citing Fed. R. App. P. 4(a)(4)(A)); *e.g., Uranga v. Davis*, 893 F.3d 282, 284 (5th Cir. 2018), *cert. denied*, No. 18-6899, 2019 WL 659941 (U.S. Feb. 19, 2019)); ECF 38. Banister filed a motion for rehearing *en banc*, but the court denied it. *Banister v. Davis*, No. 17-10826, Mot. Reh'g (5th. Cir. Jun. 18, 2018). The instant petition for writ of certiorari followed.

ARGUMENT

I. Certiorari Should Be Denied because the Fifth Circuit's Characterization of Banister's Postjudgment Motion As a Successive § 2254 Petition Adheres to This Court's Decision in *Gonzalez v. Crosby*.

A. Section 2244 of the AEDPA was enacted, in part, to restrict petitioners like Banister from relitigating claims the district court has already rejected on the merits.

In *Gonzalez v. Crosby*, 545 U.S. at 530–31, this Court determined that a postjudgment motion filed pursuant to Rule 60(b) that presents one or more substantive claims is subject to AEDPA's stringent successive petition requirements. Section 2244(b), one of AEDPA's many gatekeeping provisions, was enacted to preclude prisoners from repeatedly attacking the validity of their convictions and sentences. *Felker v. Turpin*, 518 U.S. 651, 662 (1996); *In re Cain*, 137 F.3d 234, 235 (5th Cir. 1998). Prior to AEDPA's enactment, this Court recognized the growing problem of prisoners burdening the courts with successive and abusive federal petitions and so, in a series of decisions, gradually defined and tightened the common-law rule that allowed petitioners to file endless applications. *McCleskey v. Zant*, 499 U.S. 467, 479-86 (1991) (considering the origins and meaning of the abuse of the writ doctrine). Today, § 2244's purpose of preventing abuse of the writ and preserving the finality of state court judgments is apparent in its rigid jurisdictional screening provisions. *Gonzalez*, 545 U.S. at 530; *Felker*, 518 U.S. at 664, 656-57 (finding

the new restrictions on successive petitions constitute a modified *res judicata* rule); *In re Cain*, 137 F.3d at 235 n.1.

Surmounting the hurdles in § 2244 is not easy, nor is it meant to be. Section 2244(b) places powerful jurisdictional limits on petitioners who have already had their claims adjudicated in federal court. *Felker*, 518 U.S. at 664. First, a petitioner must obtain certification from the appropriate circuit court under § 2244(b)(3) by successfully making a prima facie showing that he can meet both requirements of section 2244(b)(2); *Gonzalez,* 545 U.S. at 529-530; *Felker,* 518 U.S. at 656-657, 664. Under the first prong of section 2244(b)(2), he must demonstrate due diligence, that he could not have discovered the factual predicate of the claim sooner. 28 U.S.C. § 2244(b)(2)(B)(i). Under the second prong, he must show that the facts underlying the claim establish his innocence by clear and convincing evidence. 28 U.S.C. § 2244(b)(2)(B)(ii); *Calderon v. Thompson*, 523 U.S. 538, 558 (1998) (describing second prong as an actual innocence standard). A petitioner must satisfy both requirements of section 2244 before the merits will be addressed." *Burton v. Stewart*, 549 U.S. 147, 152 (2007); *In re Swearingen,* 566 F.3d 344, 347 (5th Cir. 2009).

If petitioner makes a prima facie showing to the circuit court on both prongs, he must then pass an even more rigorous test in the district court, which will independently determine whether the "petition *actually satisfies* the stringent § 2244(b)(2) requirements." *Burton*, 549 U.S. at 153; *Swearingen,* 556

F.3d at 347 (emphasis original). Thus, given AEDPA's central concern that the merits of concluded proceedings not be revisited, the obstacles Banister has encountered after the district court denied his claims on the merits, were predictable. Banister is now attempting to circumvent § 2244's stringent jurisdictional bar. If Banister has found that returning to the district court for reconsideration of his denied claims to be difficult, that is because Congress intended it to be.

Notably, though AEDPA's successive provision provides strict guidelines for how a petitioner can present a new claim or relitigate an old one, it left open the definition of a "second or successive" application. *Magwood v. Patterson*, 561 U.S. 320, 331–32 (2010); *In re Cain*, 137 F.3d at 235-36 (citing 28 U.S.C. § 2244(b)(2)(B)). It is not surprising, then, that whether a pro se petitioner's filing constitutes a successive petition under § 2244 is not necessarily clear from its title. The Court in *McCleskey* recognized that, "the doctrine of abuse of the writ refers to a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions." 499 U.S. at 467.

Given the evolutionary nature of this area of the law, this Court has addressed whether various filings, styled as motions or independent claims, were in fact successive petitions. *See Herrera v. Collins*, 506 U.S. 390, 416-17 (1993) (recognizing that a motion for new trial based on newly discovered

evidence is ordinarily regarded as successive, unless the petitioner can show actual innocence); *Calderon*, 523 U.S. at 553 (considering whether a motion to recall the mandate is a second or successive application); *Abdur'Rahman v. Bell*, 537 U.S. 88, 93–94 (2002) (considering whether petitioner's Rule 60(b) motion was actually an application to file a second or successive petition); *Panetti v. Quarterman*, 551 U.S. 930, 943 (2007) (addressing whether petitioner's *Ford*-based incompetency claims were successive). Thus, do equitable principles evolve and adapt to circumstances that, like Banister's, do not by their title, appear to fall within the confines of § 2244.

B. *Gonzalez* prohibits Banister from disguising his successive habeas petition as a postjudgment motion.

In *Gonzalez*, the petitioner, like Banister, styled his pleading a Motion to Alter or Amend the Judgment, but unlike Banister, explicitly filed it pursuant to Rule 60(b) rather that Rule 59(e). 545 U.S. at 527. This difference, according to Banister, is significant, as he maintains other circuits have not extended *Gonzalez* to include Rule 59(e) motions. Pet's Brief at 7. But in *Gonzalez* this Court emphasized the nature of the "claim," rather than the title of a motion. *Id*. at 530. The Court delineated the claims that virtually all appellate courts agree render a motion successive: When a petitioner (1) asserts that he omitted a constitutional claim in his federal petition; (2) presents newly discovered evidence in support of a claim; (3) presents

evidence in support of a claim previously denied; or (4) alleges a change in substantive law. *Id*. Thus, under *Gonzalez*, a pleading that falls into one of the above four categories, whatever its label, is in substance a successive habeas petition and should be treated accordingly. *Id.* at 531.

The Court in *Gonzalez* then expanded the four categories of claims to include motions that seek to add a new ground for relief and motions that attack the federal court's previous resolution of the claim on the merits, because "alleging that the district court erred in denying habeas relief on the merits is . . . indistinguishable from . . . asserting entitlement to habeas relief." *Id*. at 532. While motions raising substantive claims on the merits, or refuting the district court's denial on the merits are successive, a motion that alleges a defect in the integrity of the proceeding, such as fraud upon the court, is not. *Id*. Thus, in *Gonzalez*, petitioner's motion challenging the district court's statute of limitations calculation, was not a successive petition. *Id*. at 533.

Here, Banister has labeled his thirty-one-page postjudgment pleading a Motion to Alter or Amend the Judgment, but relying on *Gonzalez*, the Fifth Circuit found that the motion was in fact a successive habeas petition because it merely attacked the merits of the district court's reasoning in denying his § 2254 petition. ECF 37 at 3. Indeed, the Fifth Circuit's interpretation of Banister's postjudgment motion is plainly correct given that he merely re-asserts most of the claims he raised in his federal petition and attempts to

invalidate the district court's analysis and resolution of each claim on the merits. ECF 28. In his first ground, he attacks the district court's adoption of the state court's summary of the evidence, then proceeds to argue insufficient evidence. *Id*. at 1-2. His second ground is no different. He challenges the sufficiency of the State's evidence of cocaine in his system. *Id*. at 2. Clearly, Banister's motion attacks the substance of the court's resolution of the claims on the merits, and under *Gonzalez,* must be considered a successive petition. *Gonzalez*, 545 U.S. at 532. Therefore, the Fifth Circuit correctly dismissed his pleading as a successive application.

But Banister argues that because the district court denied his motion on the merits, rather than dismissing it as a successive petition, it was reasonable for him to assume that it was not successive and that he would receive tolling under Rule 4(a)(4)(A)(iv) of the Federal Rules of Appellate Procedure. Pet.'s Brief at 5. However, § 2244(b) does not authorize the district court to perform the Fifth Circuit's gatekeeping function; that duty rests with the court of appeals. 28 U.S.C.A. § 2244(b)(3); *Felker*, 518 U.S. at 664 (requirement that petitioner must obtain leave from court of appeals before filing second or successive petition in district court, transfers screening function from district court to court of appeals). The petitioner in *Gonzalez*, for whom tolling was also at stake, could have asserted the same argument, but though the district court also denied petitioner's Rule 60(b) motion on the merits, it was not a

deciding factor in the Court's determination of whether the motion was in fact a successive petition. *See Gonzalez*, 545 U.S. at 524. Therefore, that the district court did not recognize Banister's motion as successive is immaterial; that determination was appropriately made by the Fifth Circuit.

C. There is no remarkable difference between a Rule 59(e) motion and a Rule 60(b) motion in § 2244 analysis.

Banister also maintains that he is excluded from the *Gonzalez* holding because it applies only to Rule 60(b) motions. Pet.'s Brief at 7. But the difference between a Rule 59(e) and Rule 60(b) motion is not remarkable. Under Rule 60(b), a petitioner may file a Motion for Relief from Final Judgment on the grounds of mistake or excusable neglect, newly discovered evidence, fraud, or a void judgment. Fed. Rule Civ. P 60(b). The motion must be filed within a reasonable time or within one year if petitioner asserts excusable neglect, newly discovered evidence, or fraud. *Id.*; *Gonzalez*, 545 U.S. at 535. A Rule 59(e) motion also seeks relief from the judgement by asserting a factual or legal defect in the district court's judgment but must be filed within twenty-eight days. Fed. R. Civ. P. 59(e); *Uranga*, 893 F.3d at 284; *Williams v. Thaler*, 602 F.3d 291, 305 (5th Cir. 2010). Notably, a Rule 59(e) motion "'may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment.'" *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 486 n.5 (2008) (quoting 11 C. Wright & A. Miller,

Federal Practice and Procedure § 2810.1, pp. 127–128 (2d ed.1995) (footnotes omitted)). Banister's motion which, by refuting the district court's judgment on the merits, clearly "relitigated old matters" and therefore, was not even proper under Rule 59(e).

D. The Fifth Circuit's determination that Banister's Rule 59(e) motion was successive is jurisdictional.

By determining that Banister's Rule 59(e) motion was in fact a successive petition, the Fifth Circuit was asserting its well-settled authority to decide whether it had jurisdiction over his case. *Bowles v. Russell*, 551 U.S. 205, 208–13 (2007) ("This Court has long held that the taking of an appeal within the prescribed time is 'mandatory and jurisdictional.'"). As this Court explained in *Bowles*, "[B]ecause Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them." 551 U.S. at 213. Thus, in *Calderon*, this Court determined that the lower court's decision to recall its mandate was an abuse of discretion and inconsistent with the policies embodied in the AEDPA. *Calderon*, 523 U.S. 554-59. There the Court explained,

> [W]e measure it not only against standards of general application, *but also against the statutory and jurisprudential limits applicable in habeas corpus cases* . . . . Otherwise, petitioners could evade the bar against relitigation of claims presented in a prior application, § 2244(b)(1), or the bar against litigation of claims not presented in a prior application, § 2244(b)(2). *If the court grants such a motion, its action is subject to AEDPA* irrespective of whether the

> motion is based on old claims (in which case § 2244(b)(1) would apply) or new ones (in which case § 2244(b)(2) would apply).

Calderon, 523 U.S. at 553 (emphasis added).

Calderon makes clear, then, that when a petitioner files a postjudgment motion that merely relitigates the decision to deny relief, as Banister has done, § 2244(b) effectively overrides the generally applicable legal standards governing those motions. Similarly, in *Williams,* the Fifth Circuit concluded that a habeas petitioner should not have the opportunity to circumvent AEDPA's jurisdictional bar on second or successive applications based on little more than the petitioner's ability to file his motion within [28] days of judgment. *Williams*, 602 F. 3d at 304 (citing Fed. R. Civ. P. 59(e)).

In Banister's case, the generalized statutory and judicial concepts applicable to Rule 59(e), must give way to § 2244(b). Under Fed. R. App. P. 4(a)(1)(A), Banister had thirty days after entry of the district court's judgment to file a notice of appeal. If Banister's postjudgment motion had not been a successive attempt to *again* relitigate his claims, the thirty-day filing period would have commenced on the date the district court denied the motion. *See* Fed. R. Civ. P. 4(a)(4)(A)(iv). More important, had Banister simply filed a notice of appeal within thirty days of final judgment, the Fifth Circuit would have obtained jurisdiction over his COA application, *see* 28 U.S.C. § 2107(a),

and that notice of appeal would not have prejudiced his effort to also seek postjudgment review under Rule 59(e), *see* Fed. R. App. P. 4(a)(4)(B)(i).

It bears repeating, even though the district court may have believed it had jurisdiction to consider the Rule 59(e) motion on its merits—it did not because § 2244(b) limited the court's jurisdiction to entertain a postjudgment motion that merely relitigates the decision to deny relief—no matter what Banister may have labeled it. As the Court made clear in *Calderon*, whether Banister's postjudgment motion is "subject to § 2244(b) depends on the underlying basis of" what Banister asks the court to do. *See Calderon*, 523 U.S. at 554. Where, as here, Banister sought to relitigate his claims in his postjudgment motion, "§ 2244(b)(2) applies irrespective of [how] the court characterizes the action . . . *sua sponte*." *Id.*; *see also Gonzalez*, 545 U.S. 534 (analogizing *Calderon's* motion to recall the mandate to Rule 60(b) motion and concluding both are successive if they revisit the merits). Plainly, how a court might "characterize" a postjudgment motion makes no difference; if that motion is a disguised successive application, then the jurisdictional gateway in § 2244(b) applies.

The Fifth Circuit determines whether a motion asking the court to reconsider a prior decision is governed by Rule 60(b) or Rule 59(e) based on when it is filed. *Teal v. Eagle Fleet, Inc.*, 933 F.2d 341, 347 n.3 (5th Cir. 1991), *abrogated on other grounds by Little v. Liquid Air Corp.*, 37 F.3d 1069, 1076

n.14 (5th Cir. 1994). If the motion is served within [28] days of the rendition of judgment, it falls under Rule 59(e). *Id.*; Fed. R. Civ. P. 59(e). If it is served after that time, but not more than a year after entry of the judgment, then the motion is governed by Rule 60(b). *Id.* Fed. R. Civ. P. 60(b).

In extending *Gonzalez* to Rule 59(e) motions, the Fifth Circuit examined the motions' obvious similarities. *Williams*, 601 F.3d at 303-04. They permit the same relief—a change in judgment. *Id.* (citing *Harcon Barge Co.,* 784 F.2d 665, 669 (5th Cir. 1986); *cf. Harcon Barge Co.,* 784 F.2d at 669 ("'[A]ny motion that draws into question the correctness of a judgment is functionally a motion under Civil Rule 59(e), whatever its label.'") *Id.*

Ultimately, the manner in which courts determine if a postconviction motion falls under Rule 59(e) or 60(b) does not appear to be in conflict among the circuits. Like the Fifth, other circuits distinguish between the two motions based on when they are filed. *See Williams v. Norris,* No. 00-1443, 2000 WL 1511396, at *1 (8th Cir. 2000) (assessing whether motions should be construed under Rule 59(e) or 60(b) based first, on when they were filed, and second on whether they set forth grounds enumerated in Rule 60(b)); *Nail v. Wilson*, 344 Fed. Appx. 257, 257–58, 2009 WL 2512414, at *1 (7th Cir. 2009) (construing motion filed after Rule 59(e) deadline as Rule 60(b) motion); *Blakeney v. Branker*, 314 F. App'x. 572, 577, 2009 WL 550873, at *4 (4th Cir. 2009) (treating motion filed under Rules 59(e) and 60(b) as a Rule 59(e) motion and

letting petitioner delete successive claims); *Scarborough v. United States*, No. 1:14-cv-400, 2016 WL 3072258, at *1 (M.D. N.C. 2016); (recommending supplemental objections be construed as a Rule 59(e) and/or Rule 60(b)); *Daggett v. Chappius*, No. 9:12-cv-01822, 2014 WL 3341147, at *1 (N.D. N.Y. 2014)(treating motion for reconsideration as a Rule 59(e) motion based on filing date); *Hampton v. Biter*, 2013 WL 1858419, at *1 (E.D.Cal.,2013) (treating Rule 60(b) motion as a Rule 59(e) if filed within [twenty-eight] days of entry of judgment."); *Pena v. Bellnier*, 2012 WL 4558511, at *1 (S.D. N.Y. 2012) (finding neither Rule 60(b) nor Rule 59(e) may be invoked to circumvent AEDPA's finality provisions.); *Travelers Property Cas. of America v. Eyde Co.*, 2007 WL 541999, at *1 (W.D. Mich. 2007) (finding Rule 59(e) motions are not an opportunity to re-argue case); *Larkin v. U.S.*, 2002 WL 169381, at *1 (E.D. Mich. 2002) (characterizing motion filed pursuant to Rules 59(e) and 60(b) as successive because it exclusively discusses habeas petition).

Banister admits that he filed his motion pursuant to Rule 59(e) because he believed he would receive extra time to file his notice of appeal under Fed. R. Civ. P. 4(a)(4)(A)(iv). *See* Pet.'s Brief at 5. But, motions filed under *both* Rule 59(e) and Rule 60(b) serve to "toll," or extend the deadline for filing a notice of appeal if filed within the twenty-eight-day period). Fed. R. Civ. P. 4(a)(4)(A)(iv), (vi). Had Banister labeled his pleading a Rule 60(b) motion, pursuant to *Gonzalez*, the Fifth Circuit still would have deemed it successive and his notice

of appeal would still have been late. And, after the twenty-eight-day period passed, Banister could have refiled his pleading pursuant to Rule 60(b), but because it raises substantive claims on the merits already adjudicated by the district court, under *Gonzalez*, it would still be deemed a successive application.

Banister should not be permitted to circumvent the stringent successive petition requirements by styling his pleading pursuant to Rule 59(e) rather than Rule 60(b). Nor, for that matter should he be able to circumvent the mandatory filing deadline of the Federal Rules of Appellate Procedure by simply re-arguing the merits of his case in the style of a Rule 59(e) motion. Allowing merits briefs like Banister's to pass as a Rule 59(e) motion, opens the door to abuse of the writ. *Calderon*, 523 U.S. at 553 (finding [otherwise] would allow petitioners to evade the bar against relitigation under both § 2244(b)(1), and § 2244(b)(2)); *Gonzalez*, 545 U.S. 531-32 (allowing habeas petitioner's postjudgment filing to present new claims or re-litigate old ones circumvents the strict provisions of section 2244.).

E. A minority of circuits have misinterpreted the holding of *Gonzalez.*

Banister claims the circuits are split on whether a Rule 59(e) motion is subject to *Gonzalez* analysis. Pet. Brief at 7. Indeed, the Sixth, Seventh, and Third Circuits exclude all motions filed under Rule 59(e) from successive

petition analysis. *See Howard v. U.S.,* 533 F.3d 472, 474 (6th Cir. 2008) (holding because the 59(e) motion suspends the finality of the district court's judgment, it is not a collateral action subject to successive petition requirements); *see also Curry v. U.S.*, 307 F.3d 664, 665 (7th Cir. 2002) (same); *Blystone v. Horn*, 664 F.3d 397, 414 (3rd Cir. 2011) (applying successive petition limitations to a 59(e) motion would frustrate its purpose of allowing the district court to correct its errors and impede the goal of avoiding piecemeal appellate review.). The Ninth Circuit has adopted a hybrid approach, holding that *Gonzalez's* successive petition analysis applies to a Rule 59(e) motion only when the motion raises new claims. *Rishor v. Ferguson*, 822 F.3d 482, 491–92 (9th Cir. 2016).

However, such reasoning discounts the reach of the *Gonzalez* holding. The Court in *Gonzalez* defines a successive application under AEDPA's successive provision as a filing that contains one or more claims. *Gonzalez*, 545 U.S. at 531. A "claim" is an asserted federal basis for relief from a state court's judgment of conviction. *Id*. Thus, though a Rule 60(b) motion is at issue in *Gonzalez*, the Court's definition of terms at the outset and use of generic terms throughout, such as "filing" and "motion" indicate that the Court intended its holding to apply to any postjudgment motion or filing that raises substantial claims on the merits which could have been or was filed in a previous petition.

The Third, Sixth, and Seventh Circuits seemingly assume that a petitioner will not attempt to relitigate his claims, refute the district court's resolution of his claims, or abuse the writ, as Banister has done, under the guise of a Rule 59(e) motion. They put faith in Rule 59(e)'s time restriction and a belief that pro se prisoners will understand and adhere to the limits of Rule 59(e), rather than counter the court's resolution of their claims on the merits.

The minority of circuits also ignore *Gonzalez's* reminder that the Federal Rules of Civil Procedure apply to § 2254 habeas proceedings only to the extent that the federal rules do not conflict. *Gonzalez*, 545 U.S. at 529; Fed. R. Civ. P. 81(a)(2). Yet the reasoning of the Third, Sixth, and Seventh Circuits emphasizes Rule 59(e)'s purpose of allowing the district court to correct its defects over § 2244's restrictions on second or successive petitions. Such an interpretation could not have been what Congress intended when it made the federal rules applicable to federal habeas proceedings only to the extent that they don't conflict. Nor could it be what Congress intended when it enacted section 2244's limiting provision to preserve the finality of state court judgments and prevent abuse of the writ. *Calderon*, 523 U.S. at 556.

F. A majority of circuits interpret *Gonzalez* in the manner the Fifth Circuit did below.

Most circuits interpret *Gonzalez* as the Fifth Circuit does, by examining the substance of the postjudgment motion rather than its label, and by

applying the *Gonzalez* framework to determine whether the motion is actually a successive petition. The Fifth Circuit recognized AEDPA's purpose of "avoiding piecemeal litigation and encouraging petitioners to bring all their claims in a single filing," and concluded that Rule 59(e) motions often invoke the same concerns with successiveness as the Rule 60(b) motion in *Gonzalez*. *Williams*, 602 F.3d at 305. More recently in *Uranga*, 893 F.3d at 284, the Fifth Circuit applied *Gonzalez* to conclude that petitioner's Rule 59(e) motion did not add a new claim or attack the district court's resolution of a claim on the merits; rather, petitioner's motion asserted that a previous ruling was in error and that the district court denied his federal petition prematurely. Therefore, under *Gonzalez*, it could not be characterized as successive. *Id*.

The Fourth, Eighth, Tenth, and Eleventh Circuits follow the Fifth and apply the *Gonzalez* analysis to Rule 59(e) motions. *See United States v. Martin*, 132 F. App'x. 450, 451 (4th Cir. 2005) (unpublished) (dismissing as successive petitioner's Rule 59(e) motion, which in substance, attacked his conviction); *Byrd v. U.S.*, 2007 WL 174683, at *2 (W.D. N.C., 2007) (finding motion directly attacking prisoner's conviction or sentence will usually amount to a successive petition); *Ward v. Norris*, 577 F.3d 925, 935 (8th Cir. 2009); (holding 59(e) motion is successive if it asks for the court to reconsider the merits of the proceeding); *United States v. Pedraza*, 466 F.3d 932, 933 (10th Cir. 2006) (Rule 59(e) motion that asserts or reasserts a federal basis for relief, like a Rule 60(b)

motion that seeks such relief, is actually a second or successive habeas petition)); *accord Ochoa v. Sirmons*, 485 F.3d 538, 540 (10th Cir. 2007) (following *Pedraza*). In addition, a recent district court ruling in the Eleventh Circuit follows the majority. *Jenkins v. Dunn*, No. 4:08-cv-00869, 2017 WL 1927861, at *7 (N.D. Ala. 2017). There, the court also found that if a motion advances a "claim" as defined by *Gonzalez*, it should be construed as a successive petition. *Id*. Thus, Banister's contention of a circuit split is over-stated. In fact, most circuits agree that under *Gonzalez*, the substance of relief sought, rather than the title of the motion controls a court's analysis of a postjudgment motion.

Because Banister's postjudgment motion is not a true Rule 59(e) motion, but a successive federal petition, it is not one of the pleadings listed Fed. R. App. P. 4 to receive an extension for filing an appeal. The filing of this motion did not render Banister's notice of appeal timely. The Fifth Circuit's dismissal of Banister's Motion for COA for lack of jurisdiction was consistent with a majority of circuits as well as this Court's holding in *Gonzalez*. Therefore, it does not warrant this Court's review.

II. Certiorari Should Be Denied Because the Decision Below is Fully Consistent with the Court's Holding in *Castro v. United States*.

Banister argues that he should have been warned and given the opportunity to withdraw his Rule 59(e) motion after the Fifth Circuit

recharacterized it as successive. Pet.'s Brief at 13-14 (citing *Castro*, 540 U.S. at 381–82). But *Castro* does not apply to Banister. There the Court held that a district court must give a prisoner notice and an opportunity to respond before construing his mislabeled postjudgment motion as an *initial* § 2255 motion. 540 U.S. at 383. Banister's postjudgment motion was not construed as an initial § 2254 application; it was construed as a successive application. *Castro's* rationale of preventing pro se petitioners from unwittingly missing the opportunity to file a § 2255 petition does not apply to petitioners who have already filed a first petition. *Id.* at 384; *Burton* 549 U.S. at 156 (*Castro* inapplicable to recharacterization of motion as first petition when petitioner already filed a first petition); *U.S. v. Brown*, 132 F. App'x. 430, 431–32, 2005 WL 1140327, at *1 (4th Cir. 2005) (No reversible error for failure to warn of recharacterization when instant action is not the first); *U.S. v. Watkins*, 510 F. App'x. 325, 326, 2013 WL 425806, at *1 (5th Cir. 2013) (*Castro* requires only that district courts give notice and warning to pro se litigants prior to construing motions as initial 28 U.S.C. § 2255 motions); *United States v. Green*, 2010 WL 9562772 at *1 (W.D. Va, 2010) (*Castro* is limited to situations when a court construes a motion as a first § 2255 petition). Thus, when a court has already adjudicated petitioner's first application, the concerns identified in *Castro* disappear. In other words, in *Castro* the court's recharacterization of an initial postconviction motion without warning would deny petitioner the

opportunity of ever having his claims adjudicated on the merits. Banister, however, has already received a merits adjudication.

But Banister does not contend that he was denied the opportunity for his claims to be heard on the merits because of the court's recharacterization. In essence, he uses *Castro* to argue that he should be exempt from the thirty-day requirement for filing a notice of appeal. Pet.'s Brief at 13-14. Not only is *Castro* inapplicable to Banister, the same argument against limiting the *Gonzalez* holding to Rule 60(b) motions also applies here. Petitioners should not be allowed to circumvent governing rules of law—here the time restraints for filing a notice of appeal as well as § 2244's jurisdictional bar—by filing a successive petition under the guise of a Rule 59(e) motion. To find otherwise would undermine AEDPA's purpose of decreasing delay, promoting judicial efficiency, and lending finality in state court convictions.

CONCLUSION

Based on the foregoing arguments and authorities, the petition for writ of certiorari should be denied.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

JOSEPH P. CORCORAN*
Assistant Attorney General
Supervising Attorney for
Non-Capital Appeals,
Criminal Appeals Division
**Counsel of Record*

SUSAN SAN MIGUEL
Assistant Attorney General,
Criminal Appeals Division

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 936-1400
joseph.corcoran@oag.texas.gov

COUNSEL FOR RESPONDENT