No. 23-1345

In the Supreme Court of the United States

DANNY RICHARD RIVERS, PETITIONER,

v.

BOBBY LUMPKIN, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION

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

BRIEF OF *AMICI CURIAE* FORMER FEDERAL JUDGES SUPPORTING PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

Amici Curiae are 11 former Article III judges[2] who have devoted much of their professional lives to the criminal justice system and who maintain a continuing interest in restoring a system of justice that is fair both in practice and procedure. Collectively, they served decades in the federal judiciary. Based on their experience as former Article III judges, *Amici* submit this brief to emphasize the reasons that federal judges, specifically, would benefit from this Court's resolution of the question presented.

Amici are:

Judge William G. Bassler (Ret.)—District Judge (1991-2005), Senior Judge (2005-2006) for the U.S. District Court for the District of New Jersey.

Judge Mark. W. Bennett (Ret.)—District Judge (1994-2015), Chief Judge (2000-2007), Senior Judge (2015-2019) for the U.S. District Court for the Northern District of Iowa; Magistrate Judge (1991-1994) for the U.S. District Court for the Southern District of Iowa.

Judge Robert J. Cindrich (Ret.)—District Judge (1994-2004) for the U.S. District Court for the Western District of Pennsylvania.

Judge W. Royal Furgeson, Jr. (Ret.)—District Judge (1994-2008), Senior Judge (2008-2013) for the U.S. District Court for the Western District of Texas.

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[1] No counsel for a party authored this brief in whole or in part. No person other than *Amici* or its counsel made a monetary contribution to its preparation or submission. The parties were given timely notice of *Amici's* intent to file this brief.

[2] The views in this brief are those of the *Amici Curiae* only and not necessarily of any institutions with which they are or have been affiliated.

Judge Nancy M. Gertner (Ret.)—District Judge (1994-2011), Senior Judge (2011) for the U.S. District Court for the District of Massachusetts.

Judge Alex Kozinski (Ret.)—Circuit Judge (1982-2017), Chief Judge (2007-2014) for the U.S. Court of Appeals for the Ninth Circuit.

Judge Timothy K. Lewis (Ret.)—Circuit Judge (1992-1999) for the U.S. Court of Appeals for the Third Circuit; District Judge (1991-1992) for the U.S. District Court for the Western District of Pennsylvania.

Judge John S. Martin Jr. (Ret.)—District Judge (1990-2003), Senior Judge (2003) for the U.S. District Court for the Southern District of New York.

Judge Stephen M. Orlofsky (Ret.)—District Judge (1996-2003), Magistrate Judge (1976-1980) for the U.S. District Court for the District of New Jersey.

Judge Shira A. Sheindlin (Ret.)—District Judge (1994-2011), Senior Judge (2011-2016) for the U.S. District Court for the Southern District of New York; Magistrate Judge (1982-1986) for the U.S. District Court for the Eastern District of New York.

Judge T. John Ward (Ret.)—District Judge (1999-2011) for the U.S. District Court for the Eastern District of Texas.

SUMMARY OF ARGUMENT

This case presents a question of critical importance to federal judges nationwide: when a habeas petitioner appeals the denial of a habeas application, are all further requests to supplement or amend that habeas application "second or successive" habeas applications that must first be channeled to (and authorized by) the courts of appeals, or are they like all other post-appeal filings in ordinary litigation that go to the district court?

As the petition establishes, the courts of appeals are intractably divided over this question. In retrospect, that result was inevitable because the text of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") does not answer this question. The phrase used in AEDPA "second or successive application, on which all this rides, is a term of art, which is not self-defining." *Banister v. Davis*, 590 U.S. 504, 511 (2020) (cleaned up).

It may seem intuitive to conclude that once a district court issues a final judgment on a habeas petition, all later requests to supplement or modify that petition are "second or successive" habeas applications; but a moment's reflection shows that cannot be right. After all, this Court held in *Banister* that requests for reconsideration—by definition always made after the judgment—are not second or successive habeas petitions. 590 U.S. at 507. And it has recognized that Rule 60(b)(6) motions seeking to reopen habeas applications—by definition always made after the judgment—are not always second or successive habeas petitions, either. *See Buck v. Davis*, 580 U.S. 100, 128 (2017); *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005). And then there is the problem of remands after successful appeals. Certainly requests to amend or supplement a habeas application following a successful appeal are not "second or successive" habeas applications. *Cf. United States v. Santarelli*, 929 F.3d 95, 106 (3d Cir. 2019).

This *amicus* brief is submitted to encourage the Court to grant the petition for writ of certiorari for two reasons beyond those offered therein. *First*, the Court should grant the petition because it is especially critical in this context, involving the question of which court has jurisdiction over a party's filings, that the rule of decision be clear and uniform. *Second*, the Court should grant the petition because the majority position among the circuits—which holds that requests to supplement or

modify applications are "second or successive" applications and thus channels habeas applicants who wish to supplement or modify habeas petitions to the courts of appeals rather than district courts—burdens the courts and thus should be rejected. Congress's purpose in enacting AEDPA was to reduce the burdens on courts and judges. This Court should avoid construing AEDPA in a manner that would impose additional burdens on them. Because district courts are best positioned to deal with and dispose of these types of post-appeal filings, and can readily handle them using tools already at their disposal without resort to the "second or successive" bar, the best place to direct these filings is to the district courts.

ARGUMENT

I. REVIEW IS NECESSARY BECAUSE JURISDICTIONAL RULES SHOULD BE CLEAR AND UNIFORM

The Court should address and resolve the question presented because of the importance of clarity and uniformity in jurisdictional rules. This Court has consistently recognized the importance of predictability in jurisdictional rules. In "jurisdictional matters" it has said "simplicity is a virtue." *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 595 (2013); *see also Sisson v. Ruby*, 497 U.S. 358, 375 (1990) (Scalia, J., concurring in the judgment) (explaining that "vague boundar[ies] . . . [are] to be avoided in the area of . . . jurisdiction wherever possible"). As this Court has repeatedly explained: "jurisdictional rules should be clear." *Lapides v. Bd. of Regents of Univ. Sys. of Georgia*, 535 U.S. 613, 621 (2002).

As former judges, *amici* know all too well that the predictability that comes with clear jurisdictional rules is "valuable" not only to litigants but to judges. *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) (explaining "judicial resources too are at stake"). Indeed, "[t]he first characteristic of a good jurisdictional rule is predictability

and uniform application." *Exch. Nat. Bank of Chicago v. Daniels*, 763 F.2d 286, 292 (7th Cir.) (Easterbrook, J.). Uncertainty over jurisdictional matters "eat[s] up time"—judges' time—"as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims." *Hertz Corp.*, 559 U.S. at 94; *see Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 464 n.13 (1980) ("litigation over whether the case is in the right court is essentially a waste of time and resources") (citation omitted). Federal courts "benefit from straightforward rules under which they can readily assure themselves of their power to hear a case." *Hertz Corp.*, 559 U.S. at 94.

"As many courts have emphasized, '[c]ourts and litigants are best served by [a] bright-line rule' in matters involving jurisdiction." *Inter-Coastal Xpress, Inc. v. United States*, 296 F.3d 1357, 1367 (Fed. Cir. 2002) (quoting *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988)) (Michel, J.). In fact, "[t]he more mechanical the application of a jurisdictional rule, the better" for "[t]he chief and often the only virtue of a jurisdictional rule is clarity." *In re Kilgus,* 811 F.2d 1112, 1117 (7th Cir. 1987) (Easterbrook, J.). So powerful is the interest in uniform procedure, it can sometimes result in the appearance that such rules are "overtechnical" or "senseless." *Willie v. Cont'l Oil Co.*, 746 F.2d 1041, 1046 n.1 (5th Cir. 1984) (Jolly, J.). But "uniform and consistent . . . procedural and jurisdictional rules" are important enough that often that is the "only route to follow." *Id.* "[S]hort cut[s]" can "haunt us and others as bad precedent difficult to avoid." *Id.*

Review in this case is especially important because at least one court in the circuit split has eschewed bright line rules in favor of a flexible and uncertain test. The Tenth Circuit exempts some second-in-time filings from § 2244(b)(2), depending on whether a prisoner satisfies a seven-factor test. *See United States v. Espinoza-Saenz*,

235 F.3d 501, 503, 505 (10th Cir. 2000). The overwhelming opacity judges in the Tenth Circuit face in determining whether to apply the "second or successive" bar in that Circuit is reason enough for this Court to step in and provide a clear rule.

A single nationwide rule from this Court is also especially important given the frequency of requests to amend, alter, and supplement habeas petitions, and the fact that many requests come from *pro se* applicants. The existence of different rules across the circuits burdens district courts, and appellate judges, who—rather than consult a single definitive rule pronounced by this Court—must canvass circuit precedent to determine whether a habeas applicant has filed in the right court. Because many habeas applicants are *pro se*, courts often confront requests to amend or supplement without the benefit of briefing to aid them in determining whether the request is barred by controlling circuit precedent. A single clear uniform nationwide rule on this issue pronounced by this Court will aid busy district courts and appellate panels in deciding whether these filings are barred because they have been filed in the wrong court.

II. THE COURT SHOULD CONSTRUE AEDPA TO MINIMIZE THE BURDEN ON THE JUDGES REQUIRED TO REVIEW HABEAS FILINGS

The Court should grant the petition for another reason: the majority rule unduly burdens courts and thus represents an untenable construction of AEDPA.

As courts have widely recognized, and as the diversity of approaches the courts have all taken establishes, nothing in AEDPA's text directly answers the question presented. Petitioner persuasively explains why the factors this Court has considered important in its opinions all point to an interpretation of AEDPA that does not interpose AEDPA's "second or successive" bar when a habeas applicant seeks to supplement or amend a habeas

petition while an appeal is pending. As petitioner explains, supplementation or amendment while an appeal is pending would not "have constituted an abuse of the writ, as that concept is explained in [this Court's] pre-AEDPA cases." Pet. 24, 30. Further, steering such requests to district courts, rather than courts of appeals in the first instance, would "conserv[e] judicial resources" or "streamlin[e] habeas cases." Pet. 24, 30. And merely steering such requests to habeas courts does not facilitate "eva[sion]" of AEDPA's strict limitations on habeas applications. Pet. 16, 30.

As former judges who have dealt with numerous filings by habeas petitioners in both district and appellate roles, *amici* are of the view that where AEDPA's text does not furnish a clear answer, it should be construed to minimize the burden on courts. That burden is virtually always minimized where requests for action on habeas applications are channeled, in the first instance, to district courts. Congress recognized that fact in AEDPA by enacting the certificate of appealability ("COA") requirement. *See Miller–El v. Cockrell*, 537 U.S. 322, 337-38 (2003). That requirement reflects Congress's view that district courts should, where possible, protect the courts of appeals from frivolous filings by habeas petitioners.

Moreover, for a variety of reasons, channeling these filings to district courts will lessen the burden on the judicial system as a whole. The district court that has just denied a habeas petition that is now on appeal will have the benefit of having already seen the applicant's petition and will therefore be more familiar with the facts of the case and the context of any follow-on filing. Additionally, district judges can act without needing to obtain consensus from a three-judge panel all of whom must get up-to-speed about a case before they can determine whether to authorize a second-or-successive habeas application. District courts also have significant power to

control their dockets and ensure the orderly and expeditious resolution of the matters before them.

Finally, it bears emphasis that a habeas petitioner who seeks to supplement or amend a habeas application while it is on appeal is likely to be barred from doing so for non-AEDPA reasons. As the petitioner states, the best that such an applicant may be able to obtain is "an indicative ruling under Federal Rule of Civil Procedure 62.1." Pet. 3, 29.[3] The bottom line, however, is that AEDPA's "second or successive" bar should have no relevance to whether a habeas petitioner can obtain relief on a still-live habeas petition that is pending on appeal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[3] As the rule itself states, it is a method of obtaining action from a district court "that the court lacks authority to grant because of an appeal that has been docketed and is pending." Fed. R. Civ. P. 62.1. And district courts are explicitly authorized to "defer" or "deny" such motions under that rule. *Id.*