**No. 23-1345**

IN THE

# Supreme Court of the United States

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DANNY RICHARD RIVERS,
*Petitioner*,
*v.*

BOBBY LUMPKIN, DIRECTOR TDCJ-CID,
*Respondent*.

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

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## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Petitioner, Danny Richard Rivers (Rivers), filed a second-in-time federal habeas petition approximately three years after his initial petition was denied on the merits. The second petition, dubbed by Rivers as an attempt to amend his initial petition, reiterated an ineffective-assistance-of-counsel claim from his first petition as well as raised new habeas claims, again challenging his underlying state convictions. At the time he filed his second petition, the denial of his first petition was pending on appeal.

In lieu of Rivers' question presented, Respondent suggests:

Did the Fifth Circuit correctly hold that Rivers' post-judgment motion, which advanced habeas claims attacking his underlying convictions, was a successive habeas petition subject to the gatekeeping provisions of 28 U.S.C. § 2244?

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## INTRODUCTION

Rivers fails to present a question warranting this Court's review. The court below—and the majority of the circuits—have issued decisions fully consistent with this Court's precedents and with AEDPA's clear purposes. The circuit majority rule minimizes the waste of judicial resources, restricts piecemeal litigation, and promotes the finality of criminal convictions. The remaining circuits—a small minority—should self-correct, especially under the guidance of this Court's more recent decision in *Banister v. Davis*, 590 U.S. 504 (2020). Accordingly, Rivers should be denied certiorari review.

## OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals is reported at *Rivers v. Lumpkin*, 99 F.4th 216 (5th Cir. 2024). Pet. App. 1a–11a. The district court's order adopting the magistrate judge's findings, conclusions, and recommendation (Pet. App. 12a–17a), is unreported. Pet. App. 18a–19a.

## JURISDICTION

The Fifth Circuit's judgment was entered on April 15, 2024. Pet. App. 1a. This Court has jurisdiction under the provisions of 28 U.S.C. §§ 1254(1) and 2253(c).

## STATUTORY PROVISION INVOLVED

The Question Presented involves the application of 28 U.S.C. § 2244(a)–(b):

> **(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.
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> **(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.

## STATEMENT OF THE CASE

A Texas jury found Rivers guilty of one count of continuous sexual abuse of a young child (Count I), two counts of indecency with a child by contact (Counts II and III), one count of indecency with a child by exposure (Count IV), and two counts of possession of child pornography (Counts V and VI). *Rivers v. State*, No. 08-12-00145-CR, 2014 WL 3662569 (Tex. App.—El Paso Jul. 23, 2014, pet. ref'd). Rivers received sentences of thirty years' incarceration for Count I, three years' incarceration each for Counts II and III, and two years' incarceration for Count IV, all to run consecutively. *Id.* He received two concurrent two-year sentences for Counts V and VI. *Id.*

After exhausting his available state remedies, Rivers first sought federal habeas relief in August 2017. Pet. App. 2a. The district court entered final judgment and denied Rivers' claims on the merits in September 2018. *Id.* Rivers appealed from the denial, and the Fifth Circuit granted a certificate of appealability on his claim that his trial counsel was

ineffective for failing to conduct a reasonable investigation and interview witnesses. *Id.* The Fifth Circuit ultimately affirmed the district court's final judgment in May 2022. Pet. App. 3a.

Back in February 2021, while the appeal of his first petition was still pending, Rivers filed a second petition to challenge the same convictions. Pet. App. 2a. In the second petition, Rivers reasserted that his trial counsel was ineffective and added a myriad of new claims. *Id.* Rivers alleged that the new claims arose from information he gleaned from his attorney-client file, which he obtained in October 2019. *Id.* The district court found that it lacked jurisdiction over this petition because it was "second or successive" to his previous petition and transferred it to the Fifth Circuit Pet. App. 12a–19a. Pursuant to the transfer order, an original proceeding was docketed in the Fifth Circuit for Rivers to file a motion for authorization to file a successive habeas petition. *See In re Rivers*, No. 21-10967 (5th Cir. Sep. 24, 2021); *see* 28 U.S.C. § 2244(b)(3). Instead of moving for authorization, Rivers filed a notice of appeal challenging the district court's transfer order and urged the Fifth Circuit to construe his second petition as a motion to amend his first petition. Pet. App. 3a–4a. The Fifth Circuit dismissed the authorization proceeding because Rivers never filed a supporting motion. Order, *In re Rivers*, No. 21-10967 (5th Cir. Nov. 15, 2021).

The Fifth Circuit affirmed the district court's transfer order on April 15, 2024, holding that the second petition was successive and thus subject to the requirements of § 2244. Pet. App. 11a. Rivers now seeks certiorari to challenge that decision.

## ARGUMENT

### I. The Court Should Deny Certiorari Because the Fifth Circuit's Decision Is Consistent with, and Mandated by, This Court's Cases.

Certiorari is unwarranted. The Fifth Circuit correctly held that Rivers' second petition is an unauthorized successive petition subject to the requirements of § 2244(b). *See* Pet. App. 11a. This holding is consistent with *Gonzalez* and *Banister*. *See Gonzalez v. Crosby*, 545 U.S. 524 (2005) (holding that a post-judgment filing is a successive habeas petition if it advances habeas claims); *Banister v. Davis*, 590 U.S. 504 (holding that a motion to amend or alter a judgment under Federal Rule of Civil Procedure 59(e) is not successive because it is part of the final judgment in the initial habeas proceeding).

The restrictions on "second or successive" federal habeas petitions in § 2244(b) apply to Rivers' second petition because it challenged the same six-count judgment of conviction as his initial petition. *See Magwood v. Patterson*, 561 U.S. 320, 331 (2010) (holding that § 2244(b) applies "only to a 'second or successive' application challenging the same state-court judgment."). The Fifth Circuit properly relied on this Court's analysis in *Gonzalez* to determine whether Rivers' post-judgment "motion to amend" his initial habeas petition, i.e., his second habeas petition, was "second or successive" to his initial habeas petition under § 2244(b). Pet. App. 9a–10a (citing *Gonzalez*, 545 U.S. at 531–32). The court below found Rivers' second petition to be successive because it was a post-judgment filing that advanced habeas claims. Pet. App.

9a–10a ("[F]ilings introduced after a final judgment that raise habeas claims, no matter how titled, are deemed successive") (citing *Gonzalez*, 545 U.S. at 531–32). Chronology does not end the inquiry, however, as this Court has clarified that not all habeas filings made after an initial application qualify as "second or successive." *Banister*, 590 U.S. at 511–12; *Magwood*, 561 U.S. at 332; *Panetti v. Quarterman*, 551 U.S. 930, 944 (2007).

Thus, relying on *Gonzalez*, the Fifth Circuit properly looked "*at the nature of the relief sought* rather than the filing's label to determine whether failing to subject [Rivers' second petition] to the same requirements would be inconsistent with the statute." Pet. App. 10a (quoting *Gonzalez*, 545 U.S. at 531) (cleaned up) (emphasis added). Although Rivers' second petition was characterized as a motion to amend and not a Rule 60(b) motion, "that is a distinction without a difference." Pet. App. 9a–10a (citing *Gonzalez*, 545 U.S. 527). His second petition—though "couched in the language" of a motion to amend—was properly construed as a successive petition because it both "attack[ed] the federal court's resolution of [his ineffective-assistance-of-counsel] claim on the merits" by raising ineffective assistance of counsel yet again and "sought to add [] new grounds for relief." Pet. App. 10a (citing *Gonzalez*, 545 U.S. 531–32). AEDPA afforded Rivers one chance to challenge his convictions, and he availed of that chance with his initial habeas petition. *See Magwood*, 561 U.S. at 333–34. The court below rightly relied on *Gonzalez* and saw Rivers' second petition for what it was: an attempted second bite of the proverbial apple and thus subject to authorization requirements of § 2244(b). The transfer

order was not only correct; it was mandated. Failure to read Rivers' second petition in tandem with § 2244 would have "circumvent[ed] the requirement that a successive habeas petition be precertified by the court of appeals as falling within an exception to the successive-petition bar." *See Gonzalez*, 545 U.S. at 532 (citation and internal quotation omitted).

Rivers' complaint that the Fifth Circuit's decision "ignores this Court's guidance in *Banister*" is wholly non-sequitur. Pet. Cert. 13. As in *Gonzalez*, the final judgment of the initial habeas proceeding is the crux of the inquiry in *Banister*. The Court explicitly distinguished a Rule 59(e) motion to alter or amend a judgment as not subject to § 2244(b) because the motion suspends the finality of the judgment, and the ruling on the motion *merges* into the final judgment, thus ultimately making the Rule 59(e) motion "part and parcel" of the initial habeas proceeding. *Banister*, 590 U.S. at 507–09. This Court's holding in *Gonzalez* that a post-judgment filing "counts as a second or successive habeas application if it 'attacks the federal court's previous resolution of a claim on the merits' . . . does not alter that conclusion." *Id.* at 505 (citing *Gonzalez*, 545 U.S. 532).

Like a Rule 60(b) motion that advances habeas claims and would thus unequivocally count as a successive petition, Rivers' second petition "differs from a Rule 59(e) [motion] in just about every way that matters to the inquiry here." *See Banister*, 590 U.S. at 516. That is, Rivers' second petition is unlike a Rule 59(e) motion in timing, scope, and procedural posture. A Rule 59(e) motion must be brought within 28 days of final judgment and requests only "reconsideration of

matters properly encompassed" in the challenged judgment. *Id.* at 516. It is a "one-time effort to bring alleged errors in a just-issued decision to a habeas court's attention, *before taking a single appeal*." *Id.* Despite Rivers' wishes, his second petition cannot be treated akin to a Rule 59(e) motion as "part and parcel" of his initial habeas proceeding because it was: (1) filed in a new, separately numbered district court proceeding; (2) more than 28 days after final judgment; and (3) exceeded the scope of claims that were raised in his initial petition.

In sum, the Fifth Circuit's decision comports with both *Gonzalez* and *Banister*. Certiorari is unwarranted because this Court has provided sufficient guidance as to what constitutes a successive petition, and the lower court's analysis correctly relied on that guidance. The only legally available way to merge Rivers' new habeas claims into his first-in-time petition's already completed judgment is a Rule 60(b) motion, which this Court in *Gonzalez* already established would be a successive petition.

## II. The Court Should Deny Certiorari Because the Fifth Circuit's Decision Is Consistent with AEDPA's Aims.

Rivers argues that the lower court was wrong because its approach "would frustrate AEDPA's aims." Pet. Cert. 27. His arguments have no force because he disregards Congress' intent in enacting § 2244(b). Oddly enough, Rivers faults the Fifth Circuit for not asking whether his filing "would have constituted an abuse of the writ," as the historical doctrine is explained in *Banister*. Pet. Cert. 30 (citing *Banister*,

590 U.S. at 512) (cleaned up). In doing so, Rivers suggests that the abuse-of-the-writ doctrine should supplant § 2244(b) as gatekeeper. However, this Court has previously explained that the text of AEDPA as written—and not pre-AEDPA doctrines like abuse of the writ—controls whether a filing is successive. *See Magwood*, 561 U.S. at 338 ("In light of this complex history of the phrase 'second or successive,' we must rely upon the current text to determine when the phrase applies, rather than pre-AEDPA precedents or superseded statutory formulations.").

Moreover, the debate over AEDPA reveals that Congress likely intended to override the pre-AEDPA legal standards such as abuse of the writ. *See, e.g.*, 141 Cong. Rec. 15047 (1995) ("We are into that school that says . . . drastically curtail the time within which someone is able to file a habeas petition and how many times they are able to file one and what constitutes a successive petition"); *accord id.* at 15054–055 ("[S]ome reform of habeas corpus is necessary. . . . I support limits on successive, repetitive petitions."). The historical abuse-of-the-writ doctrine "was more forgiving than AEDPA's gatekeeping provision" to the extent that successive petitions were a persistent, recurring issue prior to AEDPA's enactment. *See Banister*, 590 U.S. at 514 (citing *McCleskey v. Zant*, 499 U.S. 467, 485 (1991)); 141 Cong. Rec. 15039 ("[T]he court as well as the Congress has found that the writs of habeas corpus . . . the petition, more accurately, seeking a writ, has been used excessively. This has been happening for many, many years."). It thus follows that more stringent amendment to § 2244(b) was Congress' solution to curtail the problem of successive habeas petitions, to serve as gatekeeper

where the abuse-of-the-writ doctrine failed. The Fifth Circuit did not consider whether Rivers' second petition constituted abuse of the writ because the text of § 2244, not abuse of the writ, was the relevant inquiry.

### A. Congress determined that the application of AEDPA's successive bar conserves judicial resources, while pre-AEDPA doctrines wasted them.

Rivers suggests that the procedural impediments of § 2244(b) are, *in of themselves*, inefficient at conserving judicial resources. *See* Pet. Cert. 27–30 ("If section 2244(b)(2) is a 'rock[y]' path for prisoners, that goes double for courts.") (quoting *Banister*, 590 U.S. at 509). In other words, he suggests that the plain text of § 2244(b) should not control because the historical pre-AEDPA doctrines such as abuse of the writ better conserved judicial resources. *See id.* at 30 ("Had Congress wanted all post-judgment habeas filings to count as second or successive petitions, it easily could have written such a law. But it's hard to squeeze that rule from the text of § 2244(b)(2) and the history against which it was written.").

But Rivers' argument is inapposite, because Congress concluded that the pre-AEDPA legal standards were *inefficient* and *wasted* judicial resources. Rivers cannot take issue with Congress' policy determinations, and neither should the Court. *See Felker v. Turpin*, 518 U.S. 651, 664 (1996) ("[W]e have likewise recognized that judgments about the proper scope of the writ are normally for Congress to make."). Furthermore, Rivers ignores the fact that a

circuit court's authorization decision is not itself an "appeal," and cannot be further appealed, either en banc or to this Court. 28 U.S.C. § 2244(b)(3)(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."). Because this limitation represents the "maximum" conservation of judicial resources, as contemplated by Congress, Rivers' arguments necessarily expend more judicial resources in comparison.

Moreover, it cannot follow that the district court should have issued an indicative ruling on his second petition under Federal Rule of Civil Procedure 62.1 if it found that Rivers "new evidence was [not] worth the candle." Pet. Cert. 29 (citing Fed. R. Civ. P. 62.1). It was the prerogative of the Fifth Circuit to assess the basis of Rivers' new claims, had he complied with AEDPA's mandate that he move for authorization. *See* 28 U.S.C. § 2244(b). Such an analysis under § 2244(b) supplants the ruling Rivers desired under Rule 62.1. As this Court in *Banister* admonished, the restrictions of § 2244(b), "like all statutes and rules pertaining to habeas, trump any 'inconsistent' Federal Rule of Civil Procedure otherwise applicable to habeas proceedings." *Banister*, 590 U.S. at 509. This argument, too, falters.

### B. The Fifth Circuit's application of § 2244(b) decreases piecemeal litigation.

Rivers argues that the Fifth Circuit's approach increases piecemeal litigation because the district court should have considered his second petition on the merits rather than transfer it to the Fifth Circuit. Pet. Cert. 29. Rivers again suggests that the procedural impediments of § 2244(b) themselves promote piecemeal litigation. First, Rivers' argument fails to acknowledge that the district court lacked authority to reopen the judgment while the denial of his first petition remained pending on appeal because it had no jurisdiction to consider an "amended" petition. Second, the *only* way Rivers could have reopened the judgment to amend his first petition more than 28 days after final judgment would have been a Rule 60(b) motion, which would be plainly successive under *Gonzalez* because it increases piecemeal litigation.

### C. Congress intended for AEDPA and its successive bar to promote finality.

Rivers argues that if the evidence that formed the basis of his new claims "isn't the bombshell that Rivers reckons," the district court should have denied the claims in his second petition on the merits. Pet. Cert. 29 ("Had it done that, this case would be over."). But because the district court lacked jurisdiction to consider the second petition, § 2244(b) required that the court transfer it to the Fifth Circuit. Yet again, he suggests that the procedural requirements of § 2244(b) are themselves impediments to conviction finality. *Id.* at 29–30 ("Instead, the lower courts sent Rivers and Texas down a path that could prolong this case.").

In enacting § 2244(b), Congress "aimed to prevent serial challenges to a judgment of conviction." *Banister*, 590 U.S. at 515. Yet Rivers' proposed approach would allow petitioners to make an infinite number of post-judgment "amendments" to an initial petition so long as that petition remains pending on appeal. *See id.* at 521. Allowing petitioners to raise habeas claims ad infinitum during the post-judgment pendency of the initial petition runs contrary to § 2244(b)'s purpose to "'conserve judicial resources, reduc[e] piecemeal litigation,' and 'lend[ ] finality to state court judgments within a reasonable time.'" *Id.* at 512 (citing *Panetti*, 551 U.S. at 945–46). In sum, the Fifth Circuit's decision below aligns with AEDPA and Congress' intent therein.

## III. The Decision Below Is Fully Consistent with the Majority of Circuit Courts to Have Addressed This Issue; the Court Should Deny Certiorari to Allow the Minority Circuits to Self-Correct.

The rule followed by the majority of circuits is correct, for the reasons explained above. The Fifth Circuit, along with the Fourth, Seventh, Eighth, Ninth, and Eleventh Circuits, all agree that an initial habeas proceeding is "concluded" once the district court has issued a final judgment, regardless of a pending appeal; any later attempts to advance habeas claims are deemed successive under § 2244(b). *See Bixby v. Stirling*, 90 F.4th 140 (4th Cir. 2024); *Phillips v. United States*, 668 F.3d 433, 435 (7th Cir. 2012); *Williams v. Norris*, 461 F.3d 999, 1003 (8th Cir. 2006); *Beaty v. Schriro*, 554 F.3d 780, 783 n.1 (9th Cir. 2009); *Ochoa v. Sirmons*, 485 F.3d 538, 540 (10th Cir. 2007); *Boyd v.*

*Sec'y, Dep't of Corr.*, 114 F.4th 1232, 1239 (11th Cir. 2024).

The Fourth and Eleventh Circuits most recently issued clear decisions aligning with the majority view. *Bixby*, 90 F.4th at 146–50 (relying on *Gonzalez*, the Fourth Circuit determined this year that under AEDPA, only it may authorize a second or successive habeas petition); *Boyd*, 114 F.4th at 1239 (finding that, even if filed during an appeal for an adjudicated "earlier application," a habeas petition or motion "that presents new evidence in support of a claim" should be deemed successive and "'treated accordingly.'") (quoting *Gonzalez*, 545 U.S. at 531). This position—that upon a final judgment by the district court, if a petitioner wishes to present new claims or new evidence for old claims during the pendency of an appeal, AEDPA grants only the circuit courts the power to authorize. 28 U.S.C. § 2244(b)(3)(A).

The Seventh Circuit, along with the Eighth and Ninth, have had long-standing views on this issue, finding that upon an appeal, a habeas petitioner's additional claims would be successive. *Phillips*, 668 F.3d at 435; *Williams v. Norris*, 461 F.3d at 1003; *Beaty v. Schriro*, 554 F.3d at 783 n.1. As the Seventh Circuit warned, ruling otherwise would allow a petitioner to "file[] an entirely independent § 2255 petition raising a distinct claim of relief; indeed, he could *still* file one or more, as many as he likes, because this appeal is not over." *Phillips*, 668 F.3d at 435. As such, "[t]reating motions filed during appeal as part of the original application," would potentially "drain most force from the time-and-number limits," of AEDPA. *Id*. A district

court's final judgment, therefore, must "mark[] the terminal point." *Id*.

By contrast, only the Second and Third Circuits have ruled that a petition is not successive if filed during the pendency of the initial petition's appeal. *Whab v. United States*, 408 F.3d 116, 118 (2d Cir. 2005); *United States v. Santarelli*, 929 F.3d 95, 106 (3d Cir. 2019) (holding that a prior proceeding has not concluded for purposes of § 2244(b) until all appeals have been exhausted.).

To strengthen his circuit-split argument, Rivers asserts that the Tenth Circuit applies a "seven-factor test" to determine if a petitioner may supplement an initial petition before the district court rendered judgment. Pet. Cert. 19–20. In *Douglas v. Workman*, 560 F.3d 1156 (10th Cir. 2009), the Tenth Circuit carved out an exception for prosecutorial misconduct claims to its normal rule concerning AEDPA's bar of successive petitions. Specifically, when the "prosecutor acted willfully, and not just negligently or inadvertently, his conduct warrants special condemnation and justifies permitting [the petitioner] to supplement his initial habeas petition." *Id*. at 1190. That court then laid out "seven factors on which [it based its] conclusion" that a petitioner may supplement. *Id*. at 1190–96. But to be clear, the Tenth Circuit has explicitly declined to follow the Second Circuit's position detailed in *Whab*, 408 F.3d 116, for most second petitions filed during the appeal of the initial habeas petition. *Ochoa*, 485 F.3d at 540. Indeed, the Tenth Circuit stated that the minority rule "would greatly undermine the policy against piecemeal litigation embodied in § 2244(b)." *Id.*

Nevertheless, there is a mature circuit split on whether § 2244(b) applies to post-judgment motions filed when the initial habeas application is pending on appeal. Moreover, this is a jurisdictional question, and this Court has repeatedly described the importance of clear jurisdictional rules. *See, e.g.*, *Lapides v. Bd. of Regents of Univ. Sys. Of Georgia*, 535 U.S. 613, 621 (2002). Thus, this could be a sufficient basis to justify certiorari, even if only to affirm the majority rule.

On the other hand, the circuits are not "intractably" split as Rivers claims, nor is it certain that "the conflict won't disappear on its own." *See* Pet. Cert. 2. Even looking at Rivers' assertions more favorably, all of the courts that do or *could* take the minority view—the Second, Third, and Tenth Circuits—lacked the guidance and historical examination of AEDPA from this Court's intervening decision in *Banister*. *See, e.g., Whab*, 408 F.3d at 118 (decided fifteen years prior to *Banister*); *Santarelli*, 929 F.3d at 106 (decided one year prior); *Douglas*, 560 F.3d at 1196 (decided eleven years prior). Certiorari is unwarranted at this stage because the minority circuits have yet to self-correct. This Could should grant certiorari only if they fail to do so at the next opportunity.

## CONCLUSION

Based on the foregoing reasons, the petition for a writ of certiorari should be denied.

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