

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

GREGORY DEAN BANISTER,)
)
) Petitioner,)
)
) v.) No. 18-6943
)
LORIE DAVIS, DIRECTOR, TEXAS)
)
DEPARTMENT OF CRIMINAL JUSTICE,)
)
CORRECTIONAL INSTITUTIONS DIVISION,)
)
) Respondent.)

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7 DEPARTMENT OF CRIMINAL JUSTICE,)

8 CORRECTIONAL INSTITUTIONS DIVISION,)

9 Respondent.)

10 - - - - -

11 Washington, D.C.

12 Wednesday, December 4, 2019

13

14 The above-entitled matter came on for
15 oral argument before the Supreme Court of the
16 United States at 11:07 a.m.

17 APPEARANCES:

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19 on behalf of the Petitioner.

20 KYLE D. HAWKINS, Solicitor General, Austin, Texas;

21 on behalf of the Respondent.

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23 General, Department of Justice, Washington, D.C.;

24 for the United States, as amicus curiae,

25 supporting the Respondent.

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P R O C E E D I N G S

(11:07 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 18-6943, Banister versus Davis.

Mr. Burgess.

ORAL ARGUMENT OF BRIAN T. BURGESS

ON BEHALF OF THE PETITIONER

MR. BURGESS: Thank you, Mr. Chief Justice, and may it please the Court:

The Fifth Circuit's decision should be reversed for either of two independent reasons. First, a Rule 59(e) motion filed within 20 days of judgment is part of the first full opportunity to pursue habeas relief. It is not a second habeas application.

In the 50 years between Rule 59's adoption and AEDPA's enact, there is no record of a court ever treating a timely Rule 59 motion merely seeking reconsideration as though it were a second habeas application. AEDPA did not change this settled practice, and nothing in this Court's Gonzalez decision suggests otherwise.

Rule 60(b) motions present obvious

1 opportunities to circumvent AEDPA's restrictions
2 as the facts in Gonzalez itself well illustrate.
3 There, the motion was filed years after the
4 judgment and well after the end of any appellate
5 proceedings.

6 Rule 59(e) motions are different.
7 They have to be filed within 28 days of
8 judgment, they suspend the judgment's finality,
9 and they result in a single appeal.

10 Second, by dismissing Mr. Banister's
11 appeal as untimely, the Fifth Circuit
12 effectively penalized him for following the
13 plain terms of Appellate Rule 4(a). There's no
14 basis in the rule or in AEDPA for retroactively
15 recharacterizing a timely Rule 59(e) motion and
16 treating it as though it were never filed for
17 purposes of Rule 4(a).

18 On this issue, Texas and the United
19 States notably rely on a new argument, as their
20 position is that Mr. Banister's Rule 59 motion
21 shouldn't count because it wasn't filed
22 properly. But the basic problem with that
23 argument is there's no properly filed
24 requirement in Rule 4(a).

25 And we think this Court should reject

1 the government's invitation to rewrite the plain
2 terms of that rule, which would significantly
3 complicate what is supposed to be a clear,
4 straightforward jurisdictional inquiry and would
5 have implications for all civil proceedings in
6 addition to habeas.

7 I'd like to start with our first
8 argument, and on that issue, our -- our rule is
9 clear. If a motion is filed when a court still
10 has authority to enter or revise the judgment,
11 before any appeal, it is part of the first
12 habeas proceeding. As a result, cannot be a
13 second petition. That --

14 JUSTICE GINSBURG: But the -- but the
15 motion is repetitive of the habeas petition.
16 That is, it's -- and it's made after the entry
17 of judgment. So if you were thinking is -- is
18 this second? Yes, it is in the sense that I
19 said it in my habeas petition, and now I'm
20 saying it again in my Rule 59(e) motion. It's
21 identical argument, and it's repeated a second
22 time.

23 MR. BURGESS: Right. But we think
24 that can't be the test for what counts as being
25 second or successive. The Court has noted that

1 "second or successive" is a term of art. So not
2 anything that is literally filed after the first
3 application will be treated as second or
4 successive. For example, an amended complaint
5 is going to be presenting, you know, claims that
6 could be overlapping again.

7 JUSTICE ALITO: What if a pro se,
8 within the 28 days, files what is styled as a
9 petition -- as a second petition?

10 MR. BURGESS: We -- we think it
11 probably should be characterized as a Rule 59(e)
12 motion in that context to the extent it is
13 seeking to alter or amend the judgment. So, no,
14 we don't think that that would be treated as --
15 as being a second habeas application.

16 JUSTICE GINSBURG: It would -- it
17 would have to meet the 28-day --

18 MR. BURGESS: It would -- it would
19 have to meet the 28-day deadline, and, of
20 course, it wouldn't have this sort of effect
21 under Rule 4(a) for suspending the time to
22 appeal because, to get that suspension, in fact,
23 it actually has to be a motion --

24 JUSTICE ALITO: So, basically, what
25 you're saying is that although AEDPA restricts

1 the filing of the second or successive habeas
2 petition, a prisoner can, in effect, file a
3 second or successive habeas petition, indeed,
4 one that is styled as a habeas petition, so long
5 as it's done within 28 days?

6 MR. BURGESS: I mean, I think on our
7 view or their view, there's going to be a cutoff
8 time. Certainly, a petitioner could file
9 something styled as "here is my second habeas
10 application" while the first case is still
11 pending, and every court would treat that as a
12 motion to amend the initial habeas application.

13 So our position is only that while the
14 district court still has authority over its
15 initial judgment, before there's a process to
16 appeal, you would apply the same rule.

17 JUSTICE ALITO: When we have two rules
18 here, two laws here -- one is the habeas statute
19 which was enacted by Congress; the other is a
20 rule governing habeas proceedings which took
21 effect under the Rules Enabling Act -- are they
22 of equal stature?

23 MR. BURGESS: No. I mean, of -- the
24 -- the relevant rule here, I think, is Habeas
25 Rule 12, which provides that the Rules of

1 Federal Civil Procedure apply as default unless
2 they are inconsistent with AEDPA, with the
3 statute, or any habeas-specific rule.

4 JUSTICE ALITO: But since the habeas
5 statute was actually enacted by Congress -- it
6 is a law under the Constitution -- shouldn't we
7 take special care to make sure that it is heeded
8 and not compromise it based on a rule that
9 cannot alter a statute?

10 MR. BURGESS: I -- I certainly agree
11 that the statute gets precedence, but you have
12 to determine the key term, "second or
13 successive." And on that term, this Court has
14 recognized that that's a term of art that
15 basically carried forward pre-AEDPA practice and
16 precedent as sort of relevant to incorporating
17 it.

18 So AEDPA no doubt tightened the
19 restrictions on when a second or successive
20 application could be allowed, both sort of
21 substantively in terms of when it would be
22 allowed and procedurally you have to first go to
23 the court of appeals and get preclearance.

24 But, in terms of what would count as
25 being second or successive in the first place,

1 that's a term of art that basically carries
2 forward. And the other side has -- has not
3 disagreed with our proposition that there's just
4 no evidence that Rule 59(e) motions, merely
5 seeking reconsideration, were ever treated as
6 successive petitions.

7 JUSTICE ALITO: Well, why wouldn't --

8 CHIEF JUSTICE ROBERTS: What if --

9 JUSTICE ALITO: -- what -- I'm sorry.

10 CHIEF JUSTICE ROBERTS: I -- I don't
11 know if this is the same question Justice Alito
12 was -- was asking or that you answered, where
13 things that are styled second habeas. But what
14 if it is exactly the same thing? I mean, I
15 think it may be fairly common with respect to
16 pro se petitioners. They just take the habeas
17 petition and put another cover on it and say
18 59(e).

19 Are you still going to treat that
20 as -- as not a second and successive habeas
21 petition?

22 MR. BURGESS: I think within -- you
23 know, our rule is within the 28 days, when the
24 court still has authority because -- and -- and
25 the filing of a motion can suspend the judgment,

1 that, no, we don't think that should be treated
2 --

3 JUSTICE SOTOMAYOR: How about putting
4 the labels aside a moment? One could argue that
5 restyling the first as a Rule 59(e) is a motion
6 for reconsideration.

7 But how about a totally new claim, one
8 that indisputably is not a reconsideration
9 motion but a motion to amend basically --

10 MR. BURGESS: Uh-huh.

11 JUSTICE SOTOMAYOR: -- to add a claim,
12 something like what happened in the one decision
13 in those 50 years that did say that adding a due
14 process claim was an abuse of the writ, okay?

15 MR. BURGESS: Right.

16 JUSTICE SOTOMAYOR: It was not a
17 proper 59(e); it was an abuse of the writ
18 because it was adding a new claim. What about
19 that situation?

20 MR. BURGESS: So our position is that
21 the right way to think about that is -- is
22 exactly that it is not a proper use of Rule
23 59(e) and that it is certainly going to fail for
24 that reason, but it should not be treated as a
25 second habeas application if it is filed within

1 that time period.

2 That's how the Third Circuit, for
3 example, in the Blystone decision dealt with
4 that decision. They said, no, this was -- this
5 was a -- styled as a Rule 59(e) motion. It was
6 seeking to alter or amend a judgment and
7 including adding new claims. We don't think
8 that that's a second habeas petition, but, of
9 course, you can't do that under Rule 59. Rule
10 59 is not something you're supposed to be using
11 to -- to raise new claims.

12 Now there is a fallback position,
13 Chief Judge Boggs in the Sixth Circuit decision,
14 and his approach was then adopted by the Ninth
15 Circuit, which was to say that if you are
16 basically using -- you know, you use the title
17 Rule 59, but it's clear that's not what you're
18 doing, you're using it to raise a wholly new
19 claim, we think that that would be potentially
20 inconsistent with AEDPA and abusive.

21 JUSTICE GORSUCH: Is it -- is -- is --

22 CHIEF JUSTICE ROBERTS: And it would
23 be jurisdictional I guess in the sense it would
24 not toll the statute of limitations or the time
25 -- I mean the time to appeal?

1 MR. BURGESS: If it were not a -- if
2 it were not a real Rule 59(e) motion?

3 CHIEF JUSTICE ROBERTS: Yeah, the one
4 you just described, yeah.

5 MR. BURGESS: Well, I think the
6 question about whether it's going to suspend the
7 judgment turns on just whether it is seeking
8 Rule 59(e) relief in terms of whether it is
9 actually seeking to alter or amend the judgment.

10 And if it is also raising arguments
11 that you just can't get under Rule 59, I think
12 that is different.

13 And, you know, this goes to our second
14 argument. But our position is that even -- on
15 this second piece, even if the motion were
16 jurisdictionally barred, that does not mean that
17 it was not filed and was not pending and was not
18 disposed of as -- as the language used by Rule
19 4.

20 JUSTICE ALITO: Well, before you get
21 to that, can we come back to what we can or
22 can't infer from pre-AEDPA practice? In those
23 days, whether to entertain a second or
24 successive petition was within the discretion of
25 the district court.

1 So how natural would it be for a
2 district court in that situation, upon receiving
3 a 59(e) motion, to say before I get to this
4 discretionary question about whether I would
5 entertain this, if it was a second or successive
6 petition, I have to decide whether it is
7 something that has to be considered that or can
8 be considered a Rule 59(e) motion.

9 Wouldn't there be a natural tendency
10 for the judge just to jump to the final question
11 about whether the judge is going to entertain it
12 in -- as -- as a discretionary matter?

13 MR. BURGESS: I think that's quite
14 right, but it supports our point because the
15 discretion wasn't to be open-ended. Certainly,
16 after this Court's Coleman decision in 1986
17 dealing with the ends of justice standard, the
18 idea, you know, a plurality opinion of the Court
19 said you had to make a plausible showing of
20 actual innocence in order to bring a successive
21 petition.

22 Even Justice Stevens in his
23 concurrence said that a showing of actual
24 innocence was relevant to whether the ends --
25 the ends of justice were satisfied.

1 I think it makes very little sense to
2 think that a -- a petitioner would need to --
3 merely to seek reconsideration within 10 days of
4 having the order entered is going to need --
5 make a plausible showing of actual innocence to
6 do that. So it was not an open-ended the -- the
7 judge could do it for any reason.

8 The end of justice really cabined that
9 discretion. And there's no reason to think that
10 courts ever thought that that would be the
11 standard, that you would need to satisfy that
12 merely to seek reconsideration.

13 JUSTICE SOTOMAYOR: Mr. Burgess, if
14 I'm understanding your argument right, you're
15 basically saying our definition of second and
16 successive habeas should be defined by whether
17 you had a first full opportunity not just to
18 receive a judgment but to appeal that judgment.

19 Yes, yeah, that it -- it -- that it's
20 the -- that that first judgment, that first
21 habeas terminates at the time in which your
22 appeal terminates --

23 MR. BURGESS: We don't --

24 JUSTICE SOTOMAYOR: -- the right to
25 it.

1 MR. BURGESS: So there are courts that
2 have taken that position that -- that the first
3 is not over until the whole appellate process
4 completes.

5 JUSTICE SOTOMAYOR: Right.

6 MR. BURGESS: We -- we don't think the
7 Court needs to resolve that and it doesn't need
8 to go that far to rule in our favor.

9 JUSTICE SOTOMAYOR: Why not?

10 MR. BURGESS: Because, in our
11 situation, the court -- the -- Mr. Banister
12 filed his petition within the 28 days when the
13 district court still had discretion or still had
14 the ability to revise the judgment.

15 And we think that's important because,
16 as a result of the way Rule 59(e) operates in
17 conjunction with appellate Rule 4(a), the filing
18 of it suspends the finality of the judgment. It
19 means that everything is going to merge into a
20 single appeal?

21 JUSTICE SOTOMAYOR: Yes, that's -- I'm
22 sorry. Then I misspoke when I spoke the way I
23 did. How would you articulate your rule then?

24 MR. BURGESS: Sure. The rule that we
25 apply is that if a motion is filed at a time

1 when the court still has authority to enter or
2 amend its judgment before any potential appeal,
3 it's still part of the first habeas proceeding
4 rather than a second application.

5 JUSTICE GORSUCH: Is my recollection
6 correct then -- please do tell me it's not if it
7 isn't -- that Rule 59 motions are discretionary
8 in terms of their treatment by the district
9 court and reviewed by -- for abuse of discretion
10 by -- by the courts of appeals?

11 MR. BURGESS: That's the correct
12 standard of review, that's right. In terms of
13 like what the substantive standard is for
14 granting a Rule 59(e) motion, it's supposed to
15 be stringent. It is not a basis just to -- you
16 have to show a significant error or -- or
17 potentially an intervening decision that changes
18 the issue.

19 JUSTICE GORSUCH: So if it's -- it's
20 just an appended repetition of the complaint --

21 MR. BURGESS: Right.

22 JUSTICE GORSUCH: -- there's never
23 going to be an abuse of discretion, it would be
24 very unlikely for there to be an abuse of
25 discretion to refuse to --

1 MR. BURGESS: To deny the motion?

2 JUSTICE GORSUCH: Yeah, to deny it.

3 MR. BURGESS: No, that's quite --
4 that's quite right. And I think, you know, the
5 -- the other side complains about the potential
6 burdens that district courts would face. But we
7 think the way that the rule operates and the
8 fact that the motions have to be filed within 28
9 days to a judge who has just ruled on the merits
10 of the proceeding, the judge is going to be able
11 to quickly determine whether there is anything
12 new here, whether there's any there there to the
13 complaint that he or she made a significant
14 mistake.

15 In this case, the -- the judge acted
16 on Mr. Banister's Rule 59(e) motion within five
17 days before the state was even required to
18 respond. So we don't think there was any
19 burden. And --

20 JUSTICE KAGAN: Mr. Burgess, were you
21 finished? Sorry.

22 MR. BURGESS: Sure, Justice Kagan.

23 JUSTICE KAGAN: Your friends on the
24 other side cite Crosby, Gonzalez v. Crosby, and
25 -- and note that there was no distinction made

1 there between petitions -- Rule 60(b) petitions
2 that were filed within the 28 days and after the
3 28 days.

4 So what is your response to that? Is
5 it -- is it a feature of your argument that a
6 Rule 60(b) motion even within the 28 days would
7 be treated differently from a Rule 59 motion?

8 MR. BURGESS: Well, no. We -- we
9 think that anything filed within 28 days is --
10 is subject to our rule. And -- and the reason
11 for that is Rule 60(b) motions that are filed
12 within 20 days -- 28 days are treated under the
13 rule as effectively as though they are Rule
14 59(e) motions. That is the way the rules were
15 adopted, because prior to, I think, the 1993
16 amendments, there was real confusion about --
17 courts were faced with the question, is this a
18 60(b) motion, is this a Rule 59(e) motion, and
19 it's hard to tell the difference.

20 Some courts have adopted a bright line
21 rule that anything filed within the 28 days is
22 going to be treated as though it is a 59(e)
23 motion. And that's the position the Rules
24 Committee adopted and it makes it clear in the
25 Advisory Committee notes that Rule 60(b) is on

1 the list within 4A.

2 JUSTICE KAGAN: So all courts are
3 doing that now, they essentially convert --
4 whatever you label it, they treat it as a Rule
5 59 motion?

6 MR. BURGESS: Certainly for purposes
7 of the timing to appeal. I mean, the -- the
8 standards between them are quite overlapping.
9 And -- and a lot of instances, of course, we're
10 dealing with pro se petitioners who might not
11 label it in either event. They say motion to
12 reconsider or -- or something to that effect.
13 And it's -- it's treated as a Rule 59 if it's
14 within the 28 days.

15 JUSTICE KAGAN: And does it bother you
16 at all that, say, a Rule 60(b) motion filed on
17 the 29th day will be treated very differently
18 from the Rule 59 motion?

19 MR. BURGESS: It doesn't because the
20 rules set that up to have different effects. If
21 the motion is filed after 28 days, the district
22 court no longer has authority to amend the
23 judgment. It's not going to be something that
24 suspends the finality of the judgment and allows
25 for a single appeal.

1 So it creates a risk of piecemeal
2 litigation that AEDPA was designed to prevent
3 that if something is filed within the 28-day
4 period would not. I mean, of course, under
5 either side's approach, there's going to be a
6 question of the day after, you know, what counts
7 as being -- is the first proceeding having ended
8 and -- and the second having started.

9 JUSTICE KAVANAUGH: Can you -- can you
10 address the Solicitor General's reference to
11 2266 and how you would respond to that argument?

12 MR. BURGESS: Sure. So, I mean, of
13 course, 2266 is a provision that's never
14 actually been in use because it's the -- the
15 opt-in provision. As I understand their
16 argument, they say that because there are
17 specific deadlines that are listed for different
18 sorts of motions, but Rule 59 is not on the
19 list, that that means it should be excluded from
20 the statute.

21 Well, that's not consistent with their
22 own position, because they recognize that Rule
23 59(e) motions are permissible. Their -- their
24 position is that only if it is raising a claim
25 within the meaning of Gonzalez would it -- would

1 it present a potential issue.

2 So the fact that they're not
3 specifically enumerated there can't prove any --
4 or it would simply prove too much because it's
5 contrary to their own position.

6 We -- the way we would handle that is
7 to be -- if 2266 were ever operationalized and
8 if its deadlines ever sort of went into effect,
9 one could reasonably make an argument that in
10 that specific context, perhaps Rule 59(e)
11 motions, and all Rule 59(e) motions, not
12 specifically ones that raise Gonzalez claims,
13 maybe those would be inconsistent with the text
14 of the statute or with -- with the text of the
15 statute. But that doesn't suggest that all Rule
16 59(e) motions outside of that context are going
17 to be inconsistent.

18 JUSTICE ALITO: Why is your position
19 favorable to habeas petitioners in general?
20 Wouldn't it be easier for them just to ask for a
21 certificate of appealability?

22 MR. BURGESS: Certainly, they can do
23 that. We think the reason, you know, this Court
24 has recognized in other contexts that Rule 59(e)
25 motions are useful is because they provide an

1 opportunity to quickly correct potential errors
2 and to avoid the whole appeal process, even in
3 the -- you know, we acknowledge that those
4 actual orders changing the outcome are -- are
5 rare, but less rare is a decision that clarifies
6 the basis for the decision and might clarify the
7 grounds for an appeal and make things go
8 smoother.

9 I think the flip side of that I do
10 want to comment on is that we believe the other
11 side's position is much -- going to be much more
12 inefficient, sort of perversely, even though
13 they argue that their approach is designed to
14 streamline the -- the habeas review process,
15 because, under their approach, any time a Rule
16 59(e) motion is filed, a judge cannot just look
17 at it and say: I don't see anything here.
18 Denied.

19 Instead, the judge has to make a
20 threshold inquiry to determine is there
21 something that constitutes a habeas claim within
22 the meaning of Gonzalez? In some instances,
23 that might be simple; in others, not so much.

24 And after the court makes that
25 determination, it then has to decide, well,

1 suppose this is a mixed, you know, Rule 59(e)
2 motion in the sense that it raises some things
3 that are claims but some things that are not
4 because it goes into the integrity of the
5 federal proceeding. There's no clarity under
6 the other side's approach how the court is
7 supposed to handle that.

8 If it is something that raises a
9 claim, rather -- again, rather than simply
10 having the motion denied and moving on with the
11 appellate process, what happens is that the
12 motion would be transferred to the court of
13 appeals, which then has to take its new
14 independent look to determine whether the
15 requirements of 2244(b) are satisfied.

16 And we think it would just be -- it's
17 much more efficient for a court that has just
18 ruled on a motion -- and, by its nature, a Rule
19 59(e) motion has to be filed immediately after
20 the judgment -- to be able to review it and, if
21 there's nothing there, deny it, and then the
22 process can move forward with the certificate of
23 appealability.

24 And if there is something there or if
25 there's something that needs to be clarified,

1 the judge can do that as well, and that can
2 greatly make the appellate process more
3 efficient.

4 JUSTICE ALITO: But AEDPA was intended
5 to move habeas petitions along quickly and is
6 full of deadlines. But there is no deadline for
7 a ruling on a 59(e) motion. Isn't that an
8 anomaly?

9 MR. BURGESS: There's no deadline for
10 ruling on a habeas petition either. We don't
11 see any reason to think that a district judge
12 who has just invested the time to rule on the
13 habeas petition is for some reason going to
14 spend a lot of time with a Rule 59(e) motion
15 that has been just filed.

16 And, again, I keep emphasizing that it
17 has to be filed promptly. That cannot be
18 changed -- under Rule -- Federal Rule of Civil
19 Procedure 6(b), there can be no extensions to
20 the 28-day deadline for filing a Rule 59(e)
21 motion. So there's no way to avoid it being
22 something that -- that moves quickly.

23 And to return to the point I was
24 making at the outset, that's quite different
25 from the situation in Gonzalez, where you have a

1 Rule 60(b) motion that can be filed years after
2 the judgment and presents obvious opportunities
3 to circumvent AEDPA's restrictions by reopening
4 cases that would otherwise be closed, unless you
5 could satisfy 2244.

6 And that's why we think Gonzalez just
7 -- just does not speak to the key question here.
8 There, there was no -- there's no doubt that the
9 first proceeding had ended. So the only
10 question the court faced was whether the 60(b)
11 motion could be close enough, is similar enough
12 to a new habeas application that it would be
13 inconsistent with the statute not to subject it
14 to 2244(b).

15 Here, the question is different. It's
16 whether this motion is part of the first habeas
17 proceeding. And it has always been treated that
18 way. And we see no reason for -- no basis in
19 AEDPA to displace that settled practice.

20 I did want to turn again to our
21 argument about Appellate Rule 4(a) because I do
22 want to emphasize that it is a distinct
23 argument. We think that even if Section 2244(b)
24 were relevant in the sense that it -- it barred
25 someone from pursuing 59(e) relief that raised a

1 claim and prevented the district judge from
2 acting upon it, it would not mean that the rule
3 -- that Rule 4(a) did not apply to suspend the
4 judgment.

5 And the reason for that is that the --
6 the relevant requirement is that the -- the
7 motion be filed, not that it be properly filed,
8 not that it be filed with -- in a court with
9 jurisdiction. So, under the plain text of a
10 rule -- of the rule, if a motion is filed
11 improperly in a court that lacks jurisdiction,
12 it nonetheless has been filed because it was
13 received, and it nonetheless has been disposed
14 of.

15 Rule 4(a) uses the term "disposed of,"
16 not denied. If it -- if it used "denied," it
17 might be reasonable for the other side to argue
18 that, well, the judge can't deny a motion that
19 he doesn't have jurisdiction to entertain. But
20 he quite clearly -- a judge quite clearly can
21 dispose of a motion that was -- that was filed
22 that the judge lacked jurisdiction to entertain.

23 And we think it -- it does not make
24 sense to rewrite the plain terms of Appellate
25 Rule 4(a) in a way that is going to make it such

1 that individuals like Mr. Banister, often pro se
2 litigants who are following the plain terms of
3 the text, are -- nonetheless lose their ability
4 to pursue their first habeas appeal because a
5 court, a year after the motion was filed,
6 decides, well, this was actually close enough to
7 a habeas petition that we're not going to give
8 the benefit of Rule 4(a) and we are going to
9 treat it as -- as untimely. We don't think that
10 is consistent with the statute.

11 If the Court has no further questions,
12 I'll reserve to rebuttal.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Mr. Hawkins.

16 ORAL ARGUMENT OF KYLE D. HAWKINS

17 ON BEHALF OF THE RESPONDENT

18 MR. HAWKINS: Mr. Chief Justice, and
19 may it please the Court:

20 A ruling for Banister would give every
21 habeas petitioner the right to file a second
22 round of merits briefing, demand a second
23 decision on his claims, extend automatically his
24 deadline to appeal, and delay the repose of his
25 sentence. That result is contrary to the text

1 and purpose of AEDPA and this Court's decision
2 in Gonzalez.

3 The second or successive bar applies
4 to Rule 59(e) motions for at least three
5 reasons. The first is text. Just like Rule
6 60(b) motions, 59(e) motions are post-judgment
7 vehicles to present habeas claims. And when a
8 Rule 59(e) motion presents claims that have
9 already been rejected by a final judgment, the
10 motion is necessarily a second or successive
11 habeas application for the same reasons that a
12 Rule 60(b) motion would be.

13 Second is precedent. There's no sound
14 reason to have one rule under Gonzalez for 60(b)
15 motions and a categorical exception for 59(e)
16 motions. Both can present habeas claims, and
17 both are filed after final judgment.

18 The third is AEDPA's purposes. As
19 Justice Alito pointed out, AEDPA exists to
20 promote finality and to streamline proceedings
21 by moving cases along to their next stage.
22 That's why Habeas Rule 11 allows a petitioner to
23 seek reconsideration of the district court's
24 order denying a certificate of appealability,
25 but it also provides that such a motion for

1 reconsideration does not extend the notice of
2 appeal deadline. Yet, according to Banister, he
3 could thwart that rule by simply attacking the
4 merits of the judgment and thereby grant himself
5 an extension that Rule 11 would otherwise deny.

6 For these reasons, the Court should
7 hold that a -- that the second or successive bar
8 applies with full force to 59(e) motions. And
9 that rule requires affirmance here. Banister
10 acknowledges that his 59(e) motion presented
11 habeas claims and that those claims had been
12 rejected by the previous final judgment.

13 JUSTICE GINSBURG: May -- may I ask,
14 your introductory statement, this will -- will
15 be -- give an opportunity to file new briefs and
16 all that, but that's not what happened here.
17 The 59(e) motion was filed, and I think it was
18 denied, what, five days later, and there were no
19 briefings. The judge had just denied the
20 habeas. This was a repetition of what was in
21 the habeas. Had no problem disposing of it
22 swiftly.

23 So I don't see all the additional
24 briefing that you -- you said at the outset of
25 your argument.

1 MR. HAWKINS: Well, Your Honor, first,
2 there was an extension that Banister effectively
3 granted himself. That extension in this case
4 was only five days. But, again, as Justice
5 Alito pointed out, there's no deadline for
6 ruling on a 59(e) motion. Other habeas
7 petitioners may get much longer extensions.

8 Banister's 59(e) motion was 30-some
9 pages, and it asked the district court to redo
10 its work on 14 different claims that he'd raised
11 in his original filings.

12 JUSTICE GINSBURG: But the district
13 court had just ruled on the same thing, and it
14 had no problem --

15 MR. HAWKINS: And in this case,
16 Justice Ginsburg, it's true that the district
17 court was able to dispose of that relatively
18 quickly, but it's worth noting that Banister's
19 original motions practice in district court
20 totaled almost a thousand pages of material,
21 much of which was stylized as a stage play
22 complete with stage directions.

23 If he'd simply refiled that thousand
24 pages' worth of material stylized as a Rule
25 59(e) motion, it likely would have taken the

1 district court much longer to go through that
2 and figure out whether there's any --

3 JUSTICE GORSUCH: Or it might have
4 taken the district court no time at all. I
5 mean, you -- you file a stylized play, a
6 thousand pages of a stylized play, twice, I
7 would think the second time around, the district
8 court might be righteously indignant and have
9 very little trouble denying that.

10 And isn't that -- I mean, if -- if you
11 want to talk about equities and efficiencies, I
12 -- I -- I would appreciate some response to the
13 argument that we've already heard, and you're
14 well aware of, that this is more efficient than
15 allowing the court of appeals -- forcing the
16 court of appeals to have to -- you bounce it
17 upstairs -- you're asking the district court
18 judge, instead of ruling on what he well knows
19 to be a very overlong and bad play for a second
20 time, sending it to the court of appeals to
21 decide what to do with, and the court of appeals
22 then has to decide whether it's a true Rule 59
23 or a fake one, I suppose, and -- and that, in
24 the 60(b) context, has proven to be a not
25 inconsiderable burden.

1 So you tell me who -- who's got the
2 better of the efficiencies?

3 MR. HAWKINS: Well, Justice Gorsuch,
4 we've got the better of the efficiencies
5 argument because AEDPA is about moving cases
6 along to the next stage. And by burdening the
7 district courts with yet another motion,
8 presenting a whole bunch of habeas claims, many
9 of which have been rejected already, is simply
10 delaying the process further because it's
11 granting him an extension on his NOA deadline
12 according to --

13 JUSTICE GINSBURG: How do you deal
14 with just -- just look at Federal Rule of
15 Appellate Procedure 4(a)(14), if a party timely
16 files -- it doesn't say properly files -- it
17 says timely files a motion to alter or amend the
18 judgment, the time to file an appeal from the
19 judgment runs from the entry of the order
20 disposing of the motion.

21 Why isn't that instruction dispositive
22 of this case?

23 MR. HAWKINS: Well, Your Honor, this
24 Court has recognized that baked into that is a
25 requirement that the motion satisfy the

1 preconditions to filing. For example, we see in
2 FCC versus League of Women Voters that if you
3 file a 59(e) motion that doesn't go to the
4 objects of Rule 59, that it's not actually
5 filed, and it doesn't extend your notice of
6 appeal deadline.

7 And the courts of appeals have
8 recognized that as well in 59(e) contexts. For
9 example, the Tenth Circuit in an opinion by
10 Judge McConnell, in a case called Allender
11 versus Raytheon, noted that a Rule 59(e) motion
12 that did not comply with Rule 7's pleading
13 requirements was not actually filed and does not
14 have any effect on the notice of appeal
15 deadline.

16 That settled rule flows from cases
17 like Morse, which this Court decided a number of
18 decades ago.

19 JUSTICE SOTOMAYOR: But you're --
20 you're defeating your own point. Do you have
21 any statistics to show how long 59(e) motions
22 actually take to adjudicate? I mean, I can't
23 rely on my personal experience, but mine was not
24 different than what happened in this case, very
25 quick, that there were decisions, but do you

1 have any proof that there's actually an abuse of
2 59(e) so that it extends the appeal time
3 inordinately?

4 MR. HAWKINS: Well, Justice Sotomayor,
5 two answers to that. First, as to statistics,
6 we don't have any because many of these 59(e)
7 decisions don't make it into a database where
8 you could add them up and count them. But the
9 second point is you -- you don't --

10 JUSTICE SOTOMAYOR: Suggesting they're
11 not very long.

12 MR. HAWKINS: I don't think that's
13 correct, Justice Sotomayor. And you don't have
14 to take my word for it. Let me direct the
15 Court's attention to a case out of the Southern
16 District of Alabama called Aird versus United
17 States, it's 339 F. Supp. 2d at 1311, the
18 district court there laments the use of 59(e)
19 motions for the senseless rehashing of frivolous
20 arguments the courts have already rejected. And
21 there are many district courts that cite that
22 decision to express their frustration with this
23 process --

24 JUSTICE BREYER: Well, we can -- I
25 don't know if we can find that out, but, I mean,

1 intuitively, I do not have that experience, but
2 there are judges on this bench who do have the
3 experience of being a district judge. So I
4 guess they'll have a view.

5 Absent the agree, I'm thinking first
6 there's one appeal. It doesn't give you an
7 extra appeal of 59. So the issue in front of us
8 is, is a Rule 59 motion part of the same case,
9 the first habeas that you brought, or is it a
10 new thing? Is it second or successive? That's
11 the question.

12 You agree, I take it, that Judge says
13 we're not going to have 15 witnesses because of.
14 Next day, lawyer says: Judge, you forgot the
15 word "not" in there. Oh, my God. Now everybody
16 agrees you should be able to do that, right?
17 Okay.

18 MR. HAWKINS: Because that's before
19 final judgment, Justice Breyer.

20 JUSTICE BREYER: Well, is that the
21 reason, or is it because it's an efficient way
22 of getting the judge to correct his own errors?
23 You don't have to answer that, but what I'm
24 thinking of is you're right, that if 59 does
25 about the same thing after the final judgment in

1 28 days, most of them will be dismissed, 28-day
2 extension, 20-day extension. But let's look at
3 the ones that are granted.

4 Now the judge says: My God, I made a
5 mistake, et cetera. Which is more likely? Is
6 it more likely if you keep those cases out of
7 the court of appeals that the system is all
8 going to take much longer because the guy's
9 going to bring it up on appeal and everybody
10 will have to deal with this kind of thing, or is
11 it going to be shorter if the person who made
12 the decision deals with it initially?

13 That was the last argument you heard.
14 And I would have thought to have the judge who
15 made the initial decision very quickly correct
16 it will save time, rather than saying: Judge,
17 you are forbidden to correct what you see as a
18 mistake of yourself and we're going to go to the
19 appeals court.

20 MR. HAWKINS: Well, Justice Breyer, if
21 you --

22 JUSTICE BREYER: That was his
23 argument, I think. And I think it was brought
24 up again roughly. And I want to hear what the
25 answer is.

1 MR. HAWKINS: Well, Justice Breyer, a
2 few things in response. Number one, to the
3 extent there's a policy judgment that needs to
4 be made here, Congress has made that in 2244(b)
5 and that's conclusive.

6 To the extent that there are errors
7 that the district court needs to correct, Rule
8 --

9 JUSTICE BREYER: No, 2244(b), I
10 thought, has these words "second or successive."
11 And the issue in front of us is, is the 59(b)
12 second or successive or is it part of the same
13 case during a 28-day period, you can, it's not
14 too late, get that judgment amended, and that's
15 part of the same case. That's the issue. I
16 don't see here the words decided.

17 So I'd like you to go back to what I
18 think was Justice Gorsuch's question -- point,
19 what I think was the last point raised here and
20 certainly was what my basic point was.

21 MR. HAWKINS: Justice Breyer, if the
22 concern is efficiency in correcting errors, Rule
23 60(a) allows the district court to correct
24 clerical errors. The rule that we're advocating
25 today I don't think would touch most of those

1 cases. To the extent you're saying there's a
2 clerical error, we don't object to the district
3 court fixing that because that's not a habeas
4 claim.

5 JUSTICE GORSUCH: There are -- there
6 are other things besides clerical errors,
7 though, right? And what do we do -- I guess
8 what was instructive to me was the historian's
9 brief and that the difference between 60 and 59
10 is a dichotomy that's pretty ancient and that
11 trial courts have since time out of mind, I
12 guess, had the authority to amend their
13 judgments to correct errors, not just clerical
14 ones but other significant ones that they wished
15 to, so long as the court's in session.

16 And -- and that is the end, when it
17 divests itself, when it finishes its term,
18 that's when it goes off to the court of appeals.
19 And that that's what 59 and 60 were aimed to
20 mimic.

21 MR. HAWKINS: I think, Justice
22 Gorsuch, the best place to draw that line is at
23 the final judgment. In any civil litigation,
24 the final judgment is what determines the
25 parties' rights and obligations relative to one

1 another. It can immediately form --

2 JUSTICE GORSUCH: I understand that.
3 I understand that. But you have to -- I'm
4 asking you to deal with the history, which is
5 that that's not the case, right?

6 The history was that after final
7 judgment, so long as the trial court was
8 sitting, it had an opportunity to fix its
9 errors, substantive as well as clerical. And
10 you've already admitted clerical. So why not
11 really egregious errors as well?

12 I would have thought that you would --
13 if you're conceding clerical errors can be
14 corrected during the equivalent term of the
15 court, you'd want egregious ones too.

16 MR. HAWKINS: Well, Your Honor, in --
17 in enacting 2244, Congress made the decision
18 that whatever the history might have been, it
19 wants this going to the court of appeals. AEDPA
20 does not just simply codify all the old abuse of
21 the writ doctrine, as Justice Thomas wrote for
22 the Court in -- for -- for his opinion in
23 Magwood, Justice Scalia's opinion in McQuiggin
24 versus Perkins.

25 JUSTICE KAGAN: Well, I thought that

1 that --

2 MR. HAWKINS: AEDPA --

3 JUSTICE KAGAN: -- was not the
4 precedent of this Court, Mr. Hawkins, that with
5 respect to the meaning of "second and
6 successive" as compared to many, many other
7 things that AEDPA did that were departures from
8 what had preceded it, but that with respect to
9 the meaning of "second and successive," this
10 Court has said multiple times that we are going
11 to look back to the history.

12 And the history suggests what Justice
13 Gorsuch says it did, that Rule 60 motions were
14 treated very differently from Rule 59 motions.

15 MR. HAWKINS: Well, Your Honor, the
16 court in Gonzalez didn't look to history at all.
17 It started with the plain text of AEDPA. It
18 said, what's a claim? What's an application?
19 Is it second or successive? It didn't discuss
20 the abuse of the writ doctrine. It didn't look
21 to common law, didn't look to the equity of
22 rules.

23 JUSTICE GINSBURG: But 60 -- 60(b) is
24 a discrete proceeding, and it results in a
25 separate appeal from the ruling. 59(e) is so

1 tightly tied to that first judgment, I mean, if
2 -- if the -- if the motion is denied, then that
3 disposition merges into the final judgment and
4 you have one, not two documents, from which you
5 appealed.

6 So it's -- a denial of 59(e) motion,
7 what you're left with is an appeal from the
8 first habeas. So how can it be successive or
9 second if it is so tightly pinned to the first
10 habeas petition and the disposition merges into
11 that final judgment?

12 MR. HAWKINS: Well, two responses,
13 Justice Ginsburg.

14 First, I think the same thing would be
15 true of a 60(b) filed within 28 days. And
16 second --

17 JUSTICE GINSBURG: Yes, and I think
18 that that was conceded, that that is the
19 equivalent of 59(e).

20 MR. HAWKINS: Your Honor, Justice
21 Ginsburg, I'll ask you to look at the way AEDPA
22 treats the final judgment. In Habeas Rule 11,
23 AEDPA requires the district court in the final
24 judgment, the same time it issues final
25 judgment. The district court has to say whether

1 it's granting a certificate of appealability or
2 denying a certificate of appealability.

3 Now, that, I think, is a very
4 important clue from Congress that Congress
5 viewed the final judgment as the turning point.
6 That's when we're done in district court and
7 we're moving the case along to the next stage,
8 which is in the court of appeals. I have a --

9 JUSTICE KAVANAUGH: But the pre- --
10 the pre-AEDPA practice was to treat 59 and 60
11 differently. So you would expect some clear
12 indication, I think, from Congress if they were
13 going to upend that long-standing practice in
14 repeating the "second or successive" language.

15 And you started your argument by
16 saying there's no difference between 59 and 60.
17 But there's the 28-day time period and there is
18 the pre-AEDPA history, where the lower courts
19 really did distinguish the two in this context.
20 So how do you respond to that?

21 MR. HAWKINS: Well, Justice Kavanaugh,
22 I think that Congress did include text that
23 clearly supplanted that, and it is the second or
24 successive bar in Section 2244, which says that
25 if you're filing a piece of paper that has

1 habeas claims and it's --

2 JUSTICE KAVANAUGH: How about an
3 amended complaint, then?

4 MR. HAWKINS: Justice Kavanaugh, an
5 amended complaint is not a second or successive
6 habeas application because it comes prior to
7 final judgment. Our view is that the final
8 judgment of the district court is the dividing
9 line between prior or second.

10 And that makes sense. The Congress --
11 the text of the statute says you've got
12 something that's prior and something that's
13 second or successive. There's got to be a
14 dividing line between them somewhere.

15 JUSTICE KAGAN: Well, why isn't the
16 dividing line when the court has power over the
17 case? The court still has power over the case
18 at this point. It doesn't lose it until the
19 time to appeal runs. Why isn't that the natural
20 dividing line, this court still has this case?

21 MR. HAWKINS: Because it -- a couple
22 of answers, Justice Kagan. First, as I
23 indicated earlier, Rule 11 is a clear signal
24 that Congress views the final judgment as the
25 turning point in the case out of the district

1 court into the court of appeals.

2 Second --

3 JUSTICE GINSBURG: But it's the final

4 --

5 MR. HAWKINS: -- it's a general rule

6 of --

7 JUSTICE GINSBURG: -- judgment that

8 gets suspended, at least for appeal purposes.

9 The finality is suspended.

10 MR. HAWKINS: That's not correct,

11 Justice Ginsburg. The final judgment in any

12 civil case can be executed immediately. It's

13 immediately a basis for collateral estoppel, for

14 claim preclusion, and immediate --

15 JUSTICE GINSBURG: Yes, but for

16 purposes of appeal, it isn't. It -- it is

17 suspended for that purpose.

18 MR. HAWKINS: No, that's also not

19 correct, Justice Ginsburg. The deadline to

20 appeal is suspended when a 59(e) is filed, but

21 you can still file a notice of appeal

22 immediately. That's covered by FRAP 4(a)(4)(B).

23 So the notion that there's any

24 suspension of finality, I think, is a misnomer,

25 and it's not the correct way to look at it.

1 Rule 4 is simply saying that if you file a
2 59(e), the deadline to appeal is suspended, but
3 in all other respects, that judgment is still
4 final, it's still the basis of all the things
5 that I indicated earlier, and within the meaning
6 of Rule 11, that's the turning point when we're
7 done in district court and we're going on to the
8 court of appeals.

9 JUSTICE GINSBURG: What do you do with
10 the merger that -- that this is treated -- if
11 the motion is denied, it merges into the final
12 judgment?

13 MR. HAWKINS: Well, Your Honor, I
14 don't think that has any impact on my argument
15 at all. In ordinary civil litigation, the
16 merger principle means the court of appeals is
17 getting one appeal based on the final judgment
18 and the denial of the 59(e). In this case, the
19 59(e) is not actually filed in district court if
20 it's a second or successive application, because
21 it didn't comply with 2244's routing mechanism,
22 by which it needs permission from the court of
23 appeals.

24 So the district court has no
25 jurisdiction to entertain it, cannot act on it.

1 It's not filed. And at -- at that point, it --
2 it's effectively something the district court
3 doesn't have jurisdiction over.

4 JUSTICE BREYER: So is your -- is it
5 your -- is -- do I have this right or not? In
6 your -- in your view, on day 42 after the
7 original complaint was filed and they had a
8 trial and hearing and so forth, judgment comes
9 in. The lawyer reads it. Next day, he files a
10 piece of paper.

11 Your Honor, the judgment says X. All
12 the evidence was the other way. You must have
13 skipped those pages. And if you go back to the
14 state court, it was the opposite. The judge
15 looks at it and says: My God, he's right. I
16 would like to change this.

17 And you're saying too bad, too bad,
18 you can't change it. The only thing to do is to
19 go to the court of appeals on the first one, on
20 the first judgment before he wants to change it
21 and he can't, and we'll have the court of
22 appeals change it.

23 Is that what your view is?

24 MR. HAWKINS: Not quite, Justice
25 Breyer. What -- my view is this: That piece of

1 paper that Your Honor is talking about has to be
2 routed through the court of appeals in order for
3 the district court to entertain it.

4 JUSTICE BREYER: Yeah.

5 MR. HAWKINS: But I'm not saying that
6 AEDPA divests district courts of their inherent
7 --

8 JUSTICE BREYER: I didn't --

9 MR. HAWKINS: -- power sua sponte --

10 JUSTICE BREYER: -- say that. I said
11 if I take your argument, then you see what the
12 point of my example was, that this is a pretty
13 good waste of time and that's why we have Rule
14 59 to prevent those wastes of time. That's my
15 argument. And that's what I want to hear you
16 respond to, if that's okay.

17 MR. HAWKINS: May I respond, Mr. Chief
18 Justice?

19 CHIEF JUSTICE ROBERTS: Sure.

20 MR. HAWKINS: Well, Your Honor, as was
21 indicated earlier, to the extent there's a
22 policy judgment being made here, Congress has
23 clearly determined that it wants these going to
24 the court of appeals. Congress was surely aware
25 that there may be instances in which the

1 district court could quickly and easily dispose
2 of a second or successive application. Whether
3 it's a 60(b), a 59(e), a 2241. Or anything
4 else, Congress made that decision for us.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 MR. HAWKINS: Thank you.

8 CHIEF JUSTICE ROBERTS: Mr. Snyder.

9 ORAL ARGUMENT OF BENJAMIN SNYDER
10 FOR THE UNITED STATES, AS AMICUS CURIAE,
11 SUPPORTING THE RESPONDENT

12 MR. SNYDER: Mr. Chief Justice, and
13 may it please the Court:

14 Justice Breyer, I'd like to start with
15 the -- the last question that you asked, and
16 then I'd entertain any other questions.

17 To the extent that what you're doing
18 here is you're making a practical determination,
19 I think it's relevant that while Petitioner says
20 that this -- that his rule will allow courts to
21 correct obvious errors, he has not identified a
22 single case, since AEDPA was enacted, in which a
23 district court has actually granted a Rule 59(e)
24 motion in this posture. And his amici say that
25 this happens regularly but have identified just

1 three cases in more than 20 years in which it's
2 actually occurred.

3 In one of those cases, the district
4 court could have actually granted that motion
5 under our rule. And in the other two, the --
6 the court of appeals could have entertained
7 exactly the same arguments.

8 So you -- the benefits of his rule are
9 largely hypothetical and quite minimal. And on
10 the other side of that ledger, you have Rule
11 59(e) motions being filed regularly in -- last
12 year, it was 22,000 habeas and Section 2255
13 motions filed in the federal district courts.

14 And so even if it only takes a few
15 days for a judge or -- to read through the
16 25-page motion and say, okay, I've thought about
17 these before, I'm not persuaded by any of these
18 arguments, over the entire course of those
19 22,000 cases, that burden is going to outweigh
20 the --

21 JUSTICE KAVANAUGH: Well --

22 MR. SNYDER: -- the benefits --

23 JUSTICE KAVANAUGH: -- 59(e) is not
24 wildly successful in any context. So your
25 argument is really an argument against 59(e). I

1 mean, I don't know that there's statistics that
2 say it's any less successful or -- or
3 significantly less successful in this context.

4 MR. SNYDER: So, Your Honor, I think
5 that the key distinction is that in the context
6 of habeas, when you're talking largely about pro
7 se litigants, you're dealing with people who
8 don't have the same constraints in terms of the
9 motions that they're willing to file as regular
10 litigants.

11 A regular litigant has to pay a lawyer
12 to file that motion. And if so -- so if there's
13 no chance that that motion is going to be
14 granted, they just don't file it.

15 In this context, though, the upshot of
16 Petitioner's rule --

17 JUSTICE KAVANAUGH: I don't know if
18 that's true, but keep going.

19 (Laughter.)

20 MR. SNYDER: So it -- there may be
21 some that are not meritorious, but they're going
22 to be --

23 JUSTICE GORSUCH: Lawyers sure have
24 incentive to file them, don't they?

25 MR. SNYDER: They may, but lawyers

1 also have responsibilities to their clients to
2 move the case along to the court of appeals.

3 And so, in our view, that's what
4 Congress was doing here. Congress looked at
5 habeas litigation prior to the enactment of
6 AEDPA and recognized that it was flooding the
7 federal courts with repeat filings. So the
8 purpose of the second or successive bar was to
9 prevent those repeat filings.

10 JUSTICE KAVANAUGH: But 59(e) motions
11 had not been considered second or successive
12 before.

13 MR. SNYDER: Justice Kavanaugh, I
14 don't agree with that. The only case prior to
15 AEDPA that had asked whether a Rule 59(e) motion
16 could qualify as second or successive petition
17 held that it could. Now, my friend on the other
18 side says that courts entertained Rule 59(e)
19 motions, but as Justice Alito pointed out, it
20 made perfect sense in a pre-AEDPA world to say
21 there's no jurisdictional bar with respect to
22 second or successive petitions. The standard
23 that I'm going to apply is a malleable
24 ends-of-justice standard. I'm just going to cut
25 to the chase and say, however you want to think

1 about this motion, I'm denying it. So --

2 JUSTICE KAGAN: But isn't that very
3 different from what courts did with respect to
4 Rule 60(b)? So Rule 60(b) provides a kind of
5 comparator, and you can see the -- the -- the
6 very divergent way that courts treated Rule 59
7 motions.

8 MR. SNYDER: So I -- there were far
9 more Rule 60(b) motions in the pre-AEDPA period.
10 And one key reason for that was that at the time
11 AEDPA was enacted, you had to file a Rule 59(e)
12 motion within ten days. So you had motions
13 filed within ten days and then all of the other
14 motions.

15 So it makes sense that you'd see a
16 much broader array of 60(b) motions. And those
17 motions might be filed years and years after the
18 case, where doing the analysis under 60(b) or
19 the Rule 59(e) standard would require you to go
20 back and completely immerse yourself in the
21 case, and so it made sense to look to the
22 standards that courts applied to abuse of the
23 writ in second or successive petitions; whereas
24 for Rule 59(e) motions, you could just sort of
25 cut to the chase, and that was perfectly

1 appropriate.

2 I think it's significant what Congress
3 did in AEDPA was change that. Congress said
4 we're no longer going to use this malleable ends
5 of justice standard. We're going to adopt a bar
6 that says, unless you come within these narrow
7 categories, they're just jurisdictionally
8 prohibited.

9 I -- I want to turn, if I could,
10 though, to the text that Congress actually --

11 JUSTICE KAVANAUGH: It wouldn't bar
12 all 59(e) motions, right?

13 MR. SNYDER: It wouldn't bar all 59(e)
14 motions.

15 JUSTICE KAVANAUGH: And -- and the
16 argument on the other side is, therefore, the
17 district court's going to have to make a
18 threshold jurisdictional determination which
19 could be complicated and mixed, there might be
20 mixed questions there, and what's the point?

21 MR. SNYDER: So -- so, Your Honor, in
22 -- in Gonzalez, this Court said that making that
23 determination in most cases would be relatively
24 simple. That's at page 532 of the opinion. And
25 I think that's been borne out. There are a

1 couple of reasons for that.

2 One is that this goes to the mixed
3 petitions argument. As the Court said in
4 Gonzalez, the question is whether the filing or
5 the submission contains one or more claims, so
6 you don't have to go through the entire
7 submission and figure out is this a claim, is
8 that a claim?

9 Once you find one claim, then you have
10 an application and it has to go through the
11 second or successive bar. The other thing that
12 I'd say about that is that my friend has
13 suggested that perhaps Rule 59 motions that
14 present or, excuse me, new claims would somehow
15 be treated differently from other Rule 59
16 motions.

17 So, once you make that concession, I
18 think the idea that their rule is a perfectly
19 clear rule sort of goes out the window because
20 you're going to have to decide whether the
21 arguments that you're making on the Rule 59(e)
22 motion are so similar to the arguments that you
23 made before that --

24 JUSTICE KAVANAUGH: I think their main
25 argument was that would not be a proper 59(e)

1 motion, and would not be a successful -- I'm
2 sorry -- 59(e) motion. I think that was their
3 main argument in response to that.

4 MR. SNYDER: I -- I think that's fair,
5 Your Honor. If I could, I'm happy to follow up
6 more on that, but I wanted to -- to turn to the
7 text. And, Justice Ginsburg, your first
8 question in the first half of the argument was
9 when you look at this, doesn't this look a
10 little bit like a second application because you
11 had a prior one and then you had the second one
12 filed that makes the same arguments.

13 And what my friend on the other side
14 said and what I think you will find every single
15 time that he touches on this point in the brief
16 is he says, no, it's not a second application,
17 because the prior proceeding has not finished.

18 And with respect, that's just not what
19 the statute says. The statute in -- in Section
20 2250 or 2244(b) says that the way you draw this
21 line is you look at whether there's a second or
22 successive application by asking whether there
23 was a prior application, not a prior proceeding.

24 And so, here, there clearly was a
25 prior application. That application was denied.

1 And then Mr. Banister submitted a second
2 submission that was an application under the
3 understanding that this Court had in Gonzalez.
4 And I don't understand my friend to have really
5 disputed that this comes within that standard of
6 application. So --

7 JUSTICE BREYER: Well, why is -- I
8 move for summary judgment, denied. Now I can't
9 make -- go ahead with the trial, make the same
10 motion, win on the merits.

11 MR. SNYDER: I'm not --

12 JUSTICE BREYER: So they're
13 successive. I'm just going the language. I'm
14 just saying it can't mean that.

15 MR. SNYDER: So -- so, if you move for
16 summary judgment, I mean, or something
17 equivalent in --

18 JUSTICE BREYER: You don't have to
19 deal with that seriously. I'm just saying --

20 MR. SNYDER: No, no, no, but --

21 JUSTICE BREYER: -- there might be
22 many examples in a trial where you repeat what
23 you already said and, therefore, the question is
24 not answered in the statute.

25 MR. SNYDER: But --

1 JUSTICE BREYER: Is it still part of
2 the same case or is it a new thing?

3 MR. SNYDER: Well, Your Honor, though,
4 you're eliding -- again, respectfully, you're
5 eliding again the distinction between -- it's
6 not the same case. It's whether it's part of
7 the same proceeding or -- excuse me -- it's not
8 the proceeding, it's whether it's part of the
9 same application.

10 So the motion for summary judgment
11 says you should grant my complaint in this case,
12 you should award me relief on my complaint, but
13 it's still going to that complaint.

14 Once the case is -- once that
15 complaint has been adjudicated, once you have a
16 final decision on the habeas application,
17 Gonzalez says that a subsequent filing that says
18 that that determination was wrong is also an
19 application. And I don't know how you can think
20 of that as anything other than a second or
21 successive application because you already have
22 a prior --

23 JUSTICE KAGAN: I guess I don't know
24 how, if you draw the line there, you deal with
25 an amended application. An amendment can be,

1 you know, significantly different.

2 MR. SNYDER: That's true, Your Honor,
3 and the statute expressly provides for that. In
4 Section 2242, Congress says that you can amend a
5 habeas petition in accordance with the
6 applicable civil rules.

7 So that provides for amendments, and
8 it makes clear that that amendment still goes to
9 the same application. There's no similar
10 carveout for Rule 59(e).

11 And, if I could, I want to make sure I
12 get to the Section 2266 question that you asked
13 about, Justice Kavanaugh, because I think it's
14 related.

15 In that section, Congress went through
16 and laid out -- it looked very carefully at
17 capital cases where it wanted to move the
18 proceedings along, and it laid out deadlines for
19 every one of the motions that it thought could
20 be filed in every habeas case. Just incredibly
21 detailed there. And it said nothing at all
22 about Rule 59(e).

23 Now my friend says that our argument
24 is over-inclusive because it doesn't say --
25 because we acknowledge that you can file Rule

1 59(e) motions in some cases where they don't
2 actually make habeas claims, but, just to be
3 clear, our argument is more modest. It's not
4 that because Section 2266 doesn't mention Rule
5 59(e) motions, they're categorically prohibited.

6 Our argument is that when Congress
7 looked really carefully at this and tried to set
8 out deadlines for how this system should work in
9 the federal courts, it would have been really
10 odd for Congress to leave out Rule 59(e) motions
11 if, in fact, you could file in every single case
12 a Rule 59(e) motion that asks the district court
13 to readjudicate all of the arguments that it had
14 already considered, because we know in that
15 provision that Congress was trying to light a
16 fire under the courts and make sure that those
17 things are -- are decided.

18 Congress would not have wanted to say
19 you have to make the initial decision, the
20 initial final decision on the habeas application
21 within 450 days or 60 days from when it's
22 submitted for judgment, but then you don't need
23 to adjudicate -- you don't need to adjudicate
24 that if there's a Rule 59(e) motion filed
25 afterwards.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Five minutes, Mr. Burgess.

4 REBUTTAL ARGUMENT OF BRIAN T. BURGESS
5 ON BEHALF OF THE PETITIONER

6 MR. BURGESS: Thank you, Mr. Chief
7 Justice.

8 Three quick points. First, I wanted
9 to address the other side's test. My friend
10 from the United States was focusing on the test
11 being -- whether there was a prior application
12 filed, but, as Justice Kagan pointed out, that
13 can't be the test because that would incorporate
14 amended complaints as well, and everyone agrees
15 that that would not count as a second habeas
16 application.

17 The fallback position that I think
18 Texas has forcefully advocated is that it should
19 be the time of judgment, but that too is
20 inconsistent with the structure of AEDPA
21 because, in that, if you followed that logic, a
22 petition for rehearing, which clearly is
23 something that is in the appellate courts, which
24 clearly is something that is filed after
25 judgment, after the court of appeals has reached

1 a determination, is asking them to say, hey, you
2 got it wrong, we want you to revisit that, would
3 not -- would also be a habeas application.

4 Their answer to both of those points
5 is that, well, AEDPA specifically contemplates
6 amended complaints and specifically contemplates
7 petition for rehearing, but I take that just as
8 an acknowledgment that their test is
9 inconsistent with the structure of the statute,
10 and they're having to develop ad hoc exceptions
11 in order to -- to read them in.

12 Remember, under rule -- habeas Rule
13 12, the Federal Rules of Civil Procedure as a
14 default apply in habeas proceedings. You have
15 to demonstrate an inconsistency with the
16 statute. So the fact that AEDPA doesn't
17 specifically call them out and -- and recognize
18 Rule 59(e) motions does not establish an
19 inconsistency.

20 The other point I wanted to make, I
21 didn't hear a response from the other side to
22 Justice Gorsuch's question about why their
23 process is not going to be much more burdensome
24 in practice. A lot of the other side's
25 arguments go to a theory that there should not

1 be Rule 59(e) motions in habeas at all. But, of
2 course, that's not their position, and they
3 can't get there as a matter of text.

4 So it just is going to be the case
5 that in every instance a district court is going
6 to need to make this threshold inquiry about
7 whether something is presenting a claim.

8 Mr. Snyder said that that inquiry is
9 going to be easy to determine. Maybe in some
10 cases it will. But there certainly are going to
11 be hard cases, and I think Fifth Circuit
12 precedent alone bears that out.

13 For example, the Fifth Circuit
14 considers a motion that -- that argues to the
15 district judge: Hey, you just missed this
16 argument, you didn't rule on it at all, the
17 Fifth Circuit considers that to be an attack on
18 the integrity of the judicial proceeding, which
19 is distinct in their view from arguing, district
20 court, you got it wrong.

21 Similarly, the Fifth Circuit takes the
22 view that alleging a conflict of interest by
23 habeas counsel would be attack on the integrity
24 of the proceeding, even though this Court
25 recognized in Gonzalez that merely arguing that

1 the appellate -- that habeas counsel missed an
2 issue or failed to develop it would not be
3 something that goes to the integrity of the
4 proceeding.

5 The point is not whether the Fifth
6 Circuit is right or wrong about those
7 classifications but that there are boundaries
8 cases and that it can be difficult. And to
9 require a Fifth -- a district court to make
10 those threshold determinations and then
11 potentially to have a court of appeals make a
12 different determination about it is going to be
13 much less efficient, is going to create real
14 uncertainty about rules that are supposed to be
15 clear and -- and -- and are linked to the time
16 to appeal.

17 The last point I'd like to make is
18 with regard to Rule 4(a) and to Texas's argument
19 about that. Their argument, as I understand it,
20 relies on examples that exclusively involve
21 instances that are not seeking genuine Rule
22 59(e) relief and you need to look beyond the
23 pleading to -- to at least that extent.

24 Well, that requirement comes right in
25 the text of the rule itself. It has to be a

1 motion under Rule 59(e) to alter or amend the
2 judgment. If you title something Rule 59(e) and
3 then you ask for attorneys' fees or you title it
4 Rule 59(e) and say I want an extension, but you
5 don't actually ask to alter or amend the
6 judgment, it doesn't satisfy the plain text of
7 the rule.

8 But Texas has expressly conceded --
9 this is at page 44 of their brief -- that Mr.
10 Banister did file a true Rule 59(e) motion.
11 They just think it should be subject to Section
12 2244(b). But even if it is, that doesn't mean
13 that the motion wasn't filed, that it was a true
14 Rule 59(e) motion seeking that relief, and that
15 is all that Rule 4(a) requires.

16 If the Court has no further questions,
17 we ask you to reverse.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel. The case is submitted.

20 (Whereupon, 12:06 p.m., the case was
21 submitted.)

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