

1 APPEARANCES:
2 PETER A. BRULAND, Washington, D.C.; on behalf of the
3 Petitioner.
4 AARON L. NIELSON, Solicitor General, Austin, Texas; on
5 behalf of the Respondent.
6 MATTHEW GUARNIERI, Assistant to the Solicitor General,
7 Department of Justice, Washington, D.C.; for the
8 United States, as amicus curiae, supporting the
9 Respondent.
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23
24
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1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	PETER A. BRULAND, ESQ.	
4	On behalf of the Petitioner	4
5	ORAL ARGUMENT OF:	
6	AARON L. NIELSON, ESQ.	
7	On behalf of the Respondent	34
8	ORAL ARGUMENT OF:	
9	MATTHEW GUARNIERI, ESQ.	
10	For the United States, as amicus	
11	curiae, supporting the Respondent	47
12	REBUTTAL ARGUMENT OF:	
13	PETER A. BRULAND, ESQ.	
14	On behalf of the Petitioner	53
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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3
4
5
6
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11
12
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P R O C E E D I N G S

(11:46 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 23-1345, Rivers versus Guerrero.

Mr. Bruland.

ORAL ARGUMENT OF PETER A. BRULAND

ON BEHALF OF THE PETITIONER

MR. BRULAND: Mr. Chief Justice, and may it please the Court:

Congress did not slam the door on exculpatory evidence that emerges while a prisoner's first habeas case is on appeal. Outside of habeas, there's always been a pathway to bring late-breaking claims to an appellate court's attention.

And, historically, habeas was no different. The near-uniform practice in the decades before AEDPA was to consider such claims on the merits, as part and parcel of a prisoner's first habeas case, without a word about successive litigation. Congress enacted AEDPA against that backdrop, and as Banister tells us, it did not redefine what counts as successive.

1 The other side's rule is unmoored from
2 text and history, and IT also comes at a cost.
3 Viable constitutional claims that would have
4 warranted habeas relief will fall through the
5 cracks under their rule. That means every claim
6 of sentencing error, every claim of structural
7 error, and every Brady or Napue claim that
8 doesn't show innocence by clear and convincing
9 evidence.

10 The reason those claims don't fly
11 under 2244 is that Congress decided the state's
12 interest in repose outweighs the interest in
13 getting those claims right. But the other side
14 has never explained why they're entitled to
15 repose while they're still defending the
16 conviction on appeal. And you're not going to
17 hear an explanation this morning.

18 The small universe of cases where our
19 rule makes a difference is the universe of cases
20 where both the district court and the court of
21 appeals agree that a new claim deserves its day
22 in court. Those cases will be rare, but when
23 they arise, AEDPA does not strip district courts
24 of the power to consider new evidence that would
25 warrant habeas relief.

1 The lower courts here made a threshold
2 jurisdictional error and so never reached the
3 merits or any procedural issues. This Court
4 should reverse and remand.

5 I welcome your questions.

6 JUSTICE THOMAS: How would you defined
7 "second and successive"?

8 MR. BRULAND: I would define it,
9 Justice Thomas, based on the history, because
10 Banister says you look at the history --

11 JUSTICE THOMAS: Well, you --
12 post-AEDPA, how would you define it?

13 MR. BRULAND: Post-AEDPA, I would say
14 the second or successive petition is something
15 that, in 1996, when Congress used that phrase,
16 ordinary members of the bar would have
17 recognized as settled is second or successive.
18 And AEDPA says we look at the purpose behind --
19 I'm sorry, Banister says we look at the purposes
20 behind the statute, judicial economy, piecemeal
21 litigation, hastening finality. And Banister
22 tells us that that's how you look at it.

23 And this case, I think, is easier than
24 Banister or Gonzalez because the statute itself
25 answers that. Here we have Congress

1 specifically considering how amendments should
2 work in habeas, and Congress says amendments in
3 habeas work just like amendments in ordinary
4 civil litigation. And Congress said that
5 there's a small sliver of amendments that are
6 subject to the second or successive rules and
7 only those.

8 JUSTICE THOMAS: And don't we
9 normally -- in the mine-run cases consider
10 second-in-time to be "second and successive"?

11 MR. BRULAND: So, Justice Thomas, if I
12 were just looking at the phrase, I would say
13 yes, that's how I would look at "second or
14 successive." But this Court has said "second or
15 successive" is a term of art. And so all I'm
16 saying today is what this Court said in
17 *Banister*, which is that we look at the history
18 and the purposes.

19 And, again, I think this case is
20 easier than *Banister* because we have a statutory
21 hook. And going to that statutory hook, 2242
22 gives us the general rule. And then
23 2266(b)(3)(B) gives us the only exception.
24 Congress specifically thought about which
25 amendments should be subject to the rules

1 governing second or successive petitions, and it
2 said in 2266(b)(3)(B), it's only this tiny
3 sliver, filed by prisoners on death row in
4 opt-in states after the state files its answer.

5 And I think it would disregard
6 Congress's drafting choices to apply the rules
7 governing second or successive petitions outside
8 that tiny sliver. And I think my friend, Mr.
9 Guarnieri is with me on that. Page 17 of their
10 brief, they say 2266(b)(3)(B), that's the
11 exception and then other amendments follow the
12 federal rules.

13 And if there's any question about
14 that, I would turn to history, as I said,
15 Justice Thomas, and here you had the
16 near-uniform practice leading up to AEDPA was
17 that mid-appeal efforts to amend were not
18 treated as successive.

19 And I think my favorite case on that
20 is the Harisiades case because Texas needs the
21 Court to say that the district court and the
22 court of appeals with Learned Hand on the panel
23 and all nine members of this Court plus, I
24 guess, the Solicitor General and the line
25 prosecutor, all saw the effort to amend after

1 the appeal was filed and didn't say a word about
2 it, like, I guess forgot that it was second or
3 successive.

4 And this is not a case where that
5 issue was just lurking in the record. If you
6 look at the prisoner's blue brief, he says on
7 page 10 to 11 I filed my notice of appeal, and
8 then I moved to amend. And then he argues the
9 core of the amendment issue in his merits brief.

10 JUSTICE JACKSON: And he had a
11 judgment. I guess what I'm trying to understand
12 -- so, first of all, is your primary argument
13 that after judgment against him on the habeas
14 claim that existed, he appeals it, and during
15 the pendency of an appeal, if he seeks to amend
16 the existing habeas claim, you say what?
17 Because the appeal is still pending, he can do
18 it?

19 MR. BRULAND: Not necessarily, Justice
20 Jackson. Because the appeal is still pending,
21 it's not second or successive. It might be a
22 bad amendment. It might die for Rule 15
23 reasons. It might be --

24 JUSTICE JACKSON: How do you square
25 that with Gonzalez and the idea that the

1 judgment is doing some work here?

2 MR. BRULAND: So, Justice Jackson,
3 Gonzalez did not face the question presented
4 here, because there was no pending appeal in
5 Gonzalez. The -- really, Gonzalez comes in a
6 year after abandoning his appeal, when all of us
7 up here agree that a habeas claim in that
8 posture would be second or successive.

9 And so, in Gonzalez, anything that
10 comes in would be second or successive. And
11 that's why the Court is saying, well, you can't
12 come in and circumvent the statute. And --

13 JUSTICE JACKSON: Well, why wouldn't
14 you be circumventing the statute here by just,
15 you know, interpreting anything that comes in
16 during an appeal as not being second or
17 successive?

18 MR. BRULAND: Well --

19 JUSTICE JACKSON: I mean, we have a
20 statute in which Congress was very clear about
21 limiting the number of filings or at least
22 applying pretty restrictive rules to the ability
23 to file another application.

24 And so I guess what I -- it -- it
25 boils down to for me at least is trying to

1 understand the work of the judgment in providing
2 the dividing line as to whether things filed
3 after that -- assuming the judgment remains in
4 effect, are -- are -- why aren't they second or
5 successive and wouldn't you be undermining AEDPA
6 to say otherwise?

7 MR. BRULAND: So two responses,
8 Justice Jackson. First, if you assume that what
9 Rivers filed was second or successive and were
10 just trying to circumvent the statute, then I
11 lose. But that's not how Banister looked at it.

12 Banister said we have a statutory
13 phrase, "second or successive" habeas corpus
14 application, that event meant something in 1996
15 when Congress enacted the statute. And the way
16 we figure out what it meant is we look at
17 pre-AEDPA history and practice and doctrine and
18 AEDPA's purposes.

19 So going squarely to your question, my
20 point is that, leading up to AEDPA, a filing
21 that came in during the appeal might have lost
22 on the merits. Banister says, well, that
23 doesn't count for the analysis.

24 JUSTICE JACKSON: I understand. But
25 -- aren't you reading a lot into Banister? I

1 mean, wasn't that in a 59(e) scenario?

2 MR. BRULAND: It was in a 59(e)
3 scenario, Justice --

4 JUSTICE JACKSON: And didn't that have
5 something to do with the analysis? I mean, the
6 point there was that the judgment was suspended,
7 such that -- you know, it's very -- a limited
8 amount of time, and it wasn't really the appeal
9 or lack of an appeal or whatnot that seemed to
10 be doing the work.

11 It was about the nature of the
12 judgment under a 59(e) scenario.

13 MR. BRULAND: So, Justice Jackson, I
14 agree that Banister was focused on that
15 question, and Banister wasn't focused on the
16 question before you today, the question of well,
17 what do we do when new evidence arises on the
18 appeal?

19 My point is that Banister gives us the
20 logic that we're supposed to use in analyzing,
21 well, how do we treat a claim or a filing that's
22 not a 59(e). And what I would say is Banister
23 says look to the history, look to the purposes.
24 And here I think we have history in droves.

25 We give you the Harisiades case, the

1 Strand case out of the Tenth Circuit, all of
2 these other cases where prisoners leading up to
3 AEDPA lob in motions to the court and then --

4 JUSTICE KAVANAUGH: Well, the SG says
5 that the considered trend in the years shortly
6 before the enactment of AEDPA in 1996 was to
7 treat efforts to amend a habeas application
8 mid-appeal as second or successive applications.

9 So they say by the time we got to
10 1996, what you're talking about really wasn't
11 the case. Do you want to address that?

12 MR. BRULAND: Two points, Justice
13 Kavanaugh. First, I disagree with them on the
14 history. I don't think that was the considered
15 trend.

16 But just to take a step back, you
17 could say the same thing about Banister. If you
18 look at Banister, the opinion cites one case
19 from 1965, one case from 1988, where 59(e)
20 motions were not deemed successive. And then
21 Texas comes in on the other side with a case
22 from 1993.

23 But that didn't turn the tide in
24 Banister because for purposes of the historical
25 analysis, I think the best place to look is page

1 325 of the Scalia-Garner treatise. And what
2 they say is when you're trying to figure out
3 what sort of history Congress would have picked
4 up, you look at, well, would a member of the bar
5 view this as settled?

6 And they say if it's just a couple of
7 opinions going one way or the other way, well,
8 that's not the kind of history that Congress
9 would have picked up. And going back to
10 Banister, I think the history here is even
11 stronger, at least as strong as it was in
12 Banister.

13 Petitioners there come in with cases
14 out of five circuits where courts didn't treat
15 59(e) motions as second or successive. We give
16 you cases out of six circuits. Then on the
17 other side of the ledger it's déjà vu, Justice
18 Kavanaugh.

19 Texas and its amici come in in
20 Banister. They have one case out of the Eighth
21 Circuit, where the court says, 59(e), second or
22 successive. And here they found one case out of
23 the Eighth Circuit applying the very same logic
24 that this Court wrote off as a historical
25 outlier in Banister.

1 So I think the history is at least as
2 clear here as it was in Banister.

3 JUSTICE GORSUCH: If we're going to
4 look at history, and habeas being civil
5 litigation, you know, the default rule is that
6 when the district court relieves itself of a
7 case, after 59, and it goes to the court of
8 appeals, you don't just get to Rule 15 file an
9 amendment willy-nilly. The case is in the court
10 of appeals. I mean, that's -- you know, a
11 baseline historical practice is -- is -- is
12 relevant.

13 What about that? I mean, you're
14 asking for us to treat habeas differently than
15 any other form of civil litigation.

16 MR. BRULAND: So I sure hope not,
17 Justice Gorsuch. The point that I'm trying to
18 make is that --

19 JUSTICE GORSUCH: Well, explain to me
20 why not. Because I've never heard of being able
21 to amend my complaint when I'm on appeal in --
22 in -- in a 12(b)(6) -- after a 12(b)(6)
23 dismissal. Boy, I would have liked to have done
24 that a couple of times.

25 (Laughter.)

1 MR. BRULAND: Justice Gorsuch, I think
2 you're absolutely right. And I want to take a
3 step back because I think it's important to be
4 precise about the doctrine.

5 So I'm not saying that you get to
6 amend your 12(b)(6) complaint after -- while
7 you're up on appeal.

8 My point is historically appellate
9 courts were open to new evidence or new claims
10 that come in. I think the best case there is
11 the Shotwell case. That's a case where the
12 Solicitor General comes into this Court at the
13 cert stage. They lost in the court of appeals.
14 And the Solicitor General says, look, I've got
15 two new affidavits that I think show that the
16 respondent pulled a past -- pulled a fast one on
17 the lower courts. So please, Supreme Court,
18 would you kick it back down?

19 And the Court says, look, we are a
20 court of review, not first view, so we're not
21 going to take a crack at the merits, but they
22 say two things. They say, first, we believe the
23 Solicitor General. This is new.

24 JUSTICE GORSUCH: Yeah, I accept that
25 we have that power, especially when this -- the

1 government is admitting an error, right, or --
2 or some other important new considerations.

3 But as a general rule in civil
4 practice, if I come in and say, boy, I got a
5 great amendment and I'm in front of a panel of
6 -- they roll their eyes and they say, nice,
7 that's a nice thing you have there. You
8 probably should have done that earlier, friend,
9 you know, go file a 60(b). That's what they
10 say.

11 MR. BRULAND: Well, Justice Gorsuch, I
12 think you're right. If you come in to the court
13 of appeals or even the district court, you're
14 probably going to get laughed out of court most
15 of the time but my point is a different one.

16 My point is about the power that
17 courts have. And what I would say is for a long
18 time appellate courts have been open to claims
19 and denied most of them, but been open to
20 claims. And so I -- I hope I'm not asking for
21 anything in habeas that we wouldn't have in
22 ordinary civil litigation.

23 My point is when you file that in
24 habeas, it's not second or successive. It's
25 probably dead for other reasons but it's not

1 second or successive.

2 JUSTICE SOTOMAYOR: Sorry. I'm -- I'm
3 not sure I follow your argument. If it's normal
4 civil litigation and not habeas, if you file a
5 motion to amend between a final judgment in the
6 district court and an appeal, the district court
7 has no inherent power to open -- to grant that
8 motion, correct?

9 MR. BRULAND: Correct.

10 JUSTICE SOTOMAYOR: All it could do is
11 a 62.1, make a suggestion to the court of
12 appeals, correct?

13 MR. BRULAND: Yes.

14 JUSTICE SOTOMAYOR: Here you didn't
15 ask them to make a suggestion. So not having
16 asked them to do it, why do you think the motion
17 is still alive after the court of appeals
18 affirmed the judgment below?

19 MR. BRULAND: Well, two responses,
20 Justice Sotomayor.

21 JUSTICE SOTOMAYOR: How could the
22 court -- the district court reopen absent 60(b)?
23 That's my point. You could reopen under -- you
24 could reopen under 60(b) to consider your
25 motion, correct?

1 MR. BRULAND: Correct.

2 JUSTICE SOTOMAYOR: All right. But
3 none of that happened. You didn't ask them to
4 indicate under 62.1 and the court of appeals
5 didn't vacate or remand the matter to the
6 district court to make the motion to amend still
7 live, right?

8 MR. BRULAND: So I -- I agree with you
9 on the second half, Justice Sotomayor. I
10 disagree about what the record shows on the
11 first half.

12 If you look at Joint Appendix 107,
13 Rivers is asking, he says, look, please,
14 district court, would you consider an
15 interlocutory review.

16 Now, in --

17 JUSTICE SOTOMAYOR: He can't do a --
18 that's the point. It may have been a product of
19 him being pro se. And if he had hired you then,
20 you probably would have made a motion --

21 MR. BRULAND: So, Justice Sotomayor --

22 JUSTICE SOTOMAYOR: -- the proper
23 motion, but he didn't.

24 MR. BRULAND: Well, my point is -- is
25 twofold. First, I think he did ask for an

1 interlocutory review. I will grant he --

2 JUSTICE SOTOMAYOR: There is no
3 interlocutory relief, meaning you admitted that
4 the district court does not have the power to
5 adjudicate the motion to amend. The most it
6 could do is what 62.1 permits, which is an
7 indication to the court of appeals.

8 MR. BRULAND: Yes. And my --

9 JUSTICE SOTOMAYOR: And that's not an
10 interlocutory appeal.

11 MR. BRULAND: So I take what he was
12 asking for. The only plausible way to construe
13 what he was asking for is as an indicative
14 ruling.

15 Now, the district court took up his
16 motion to amend and didn't reach the merits. It
17 said: Look, I don't have the jurisdiction to
18 open the front cover because this is a second or
19 successive petition.

20 JUSTICE SOTOMAYOR: That's correct.

21 MR. BRULAND: So we're asking you to
22 hold that that was a mistake under AEDPA. And
23 you asked about the relief on --

24 JUSTICE SOTOMAYOR: But he -- he
25 presented the same thing to the court of

1 appeals, basically the same motion, and the
2 court of appeals did not grant a vacate and
3 remand.

4 MR. BRULAND: Well, that --

5 JUSTICE SOTOMAYOR: It wasn't
6 convinced by whatever he presented. It may have
7 made an error, but that wasn't appealed either.

8 MR. BRULAND: So, Justice Sotomayor, I
9 don't think the court of appeals saying we're
10 not going to enlarge the record shows us what it
11 would do in response to an interlocutory -- or
12 I'm sorry --

13 JUSTICE SOTOMAYOR: It could have done
14 -- it could have done what we did in the case
15 you cite.

16 MR. BRULAND: Well, that's --

17 JUSTICE SOTOMAYOR: If there had been
18 a confession of error or if it was convinced
19 that something truly untoward had happened, it
20 could have vacated and remanded.

21 MR. BRULAND: Well, Justice Sotomayor,
22 I think there's a meaningful difference between
23 a prisoner mailing in some typewritten pages and
24 one of the court of appeals' colleagues picking
25 up the phone and saying, look --

1 JUSTICE SOTOMAYOR: In civil
2 litigation, absent a vacate and remand by the
3 court of appeals, would the motion have to be
4 considered under 60(b)?

5 MR. BRULAND: If there's no indicative
6 ruling and if there's no vacatur and remand,
7 then the only way to reopen the judgment would
8 be 60(b), unless the court of appeals reverses
9 or vacates otherwise.

10 JUSTICE SOTOMAYOR: Correct. Thank
11 you.

12 JUSTICE JACKSON: Counsel, can I have
13 you address the threshold arguments that are
14 being made about standing and the relief?

15 MR. BRULAND: Yes. So, first, as to
16 standing, this Court has -- or, I'm sorry, as to
17 standing, we have appellate standing because an
18 order from this Court reversing the Fifth
19 Circuit would lead to the potential for redress.

20 And what we would say there is we
21 would go back to the district court and we would
22 file a 60(b)(6) motion to bring back the order
23 -- I'm sorry -- bring back the initial habeas
24 petition. And for purposes of standing and
25 mootness, the probability of success is -- is

1 not on the table, so it's just a question about
2 the district court's power.

3 And there the argument would be --
4 it's an integrity-based argument under footnote
5 4 of Gonzalez. We would be saying in this
6 position, the Supreme Court has just decided
7 that we were right about the AEDPA question.
8 So, district court, respectfully, would you
9 please reopen the judgment denying the initial
10 appeal -- or initial petition. Then the motion
11 to amend would still be pending and the --

12 JUSTICE JACKSON: You're saying we
13 don't have to care about whether or not that is
14 going to be successful?

15 MR. BRULAND: Yes, that's right.

16 JUSTICE JACKSON: Just have the
17 opportunity to do it?

18 MR. BRULAND: That's right. It's a
19 question about the district court's power.
20 Texas is coming in and saying, well, look,
21 there's nothing that you could on remand. And
22 we've identified a procedure that would let the
23 district court grant Rivers redress.

24 JUSTICE JACKSON: What about the
25 habeas jurisdiction and the fact that he's in

1 custody on one charge versus the other?

2 MR. BRULAND: Yes. We're challenging
3 the convictions for which he's still in custody.
4 I don't take the other side to be arguing that
5 the new exculpatory evidence doesn't undermine
6 those convictions. They certainly didn't argue
7 that in the brief in opposition or below.

8 I take them to be challenging us on
9 the merits, but I don't take them to be saying,
10 as a matter of habeas jurisdiction, that there's
11 -- that the -- the evidence wouldn't go as a
12 jurisdictional matter.

13 JUSTICE JACKSON: Thank you.

14 MR. BRULAND: Now, my -- my friends on
15 the other side, I think, are going to stand up
16 and say a word about the floodgates. And so I
17 do want to address that. And the reason that
18 our approach doesn't open the floodgates is that
19 it comes with a structural barrier and an
20 absolute jurisdictional backstop. And that's
21 borne out by what we've seen in the Second
22 Circuit over the last two decades.

23 So I'll start with the structural
24 piece. For any of this to get off the ground,
25 the habeas petitioner has to go to the district

1 court, convince the district court to issue an
2 inter- -- an indicative ruling on a habeas
3 petition that it's just denied. And then the
4 absolute jurisdictional backstop is the court of
5 appeals has to agree to remand the case for
6 further proceedings.

7 And at both steps of those analysis,
8 the prisoner has the burden of showing that
9 amendment here would not be futile, that it's
10 timely. That kicks out a lot of cases because
11 AEDPA has a one-year statute of limitations.
12 The prisoner is also going to have to show that
13 it's not going to be a dead case on the merits.

14 Then you go up to the court of
15 appeals. And we've -- we've cited cases. The
16 Louisiana against Becerra case, where the
17 Western District of Louisiana sent up a flare to
18 the Fifth Circuit, and the Fifth Circuit said,
19 no, we -- we don't think this amendment should
20 go forward. It's not timely. You should have
21 brought it earlier.

22 So the court of appeals is doing
23 another review. And all of this is borne out by
24 what we've seen in the Second Circuit over the
25 last 20 years because the Second Circuit has

1 read AEDPA our way. They've said 2244 doesn't
2 kick in until the end of the appeal.

3 And I will tell you I've read more of
4 these cases than I care to remember. There's
5 about one or two per year over the last 20
6 years. And what you see, time and time again,
7 is prisoners come in and they say, look, I just
8 got some new evidence, or something changed and
9 I want to fight it out. And in one- or two- or
10 three-page opinions, a magistrate judge or the
11 district court judge has no trouble addressing
12 those claims.

13 And just to take a step back, at
14 bottom, I think this case is really a venue
15 case, like the EPA cases you had last week
16 because, these claims are coming in one way or
17 the other. The question is just who's the
18 frontline decisionmaker going to be.

19 I can tell you when a prisoner gets
20 new evidence or thinks the prisoner has a new
21 claim while the appeal is pending, he's going to
22 send something in to some court. And then some
23 decisionmaker is going to have to decide, well,
24 what do I do with it? And what --

25 JUSTICE ALITO: Mr. Bruland, is the

1 argument that you're making today and the
2 primary argument that you make in your brief the
3 same argument that you made in your petition?

4 MR. BRULAND: Justice Alito, it's the
5 same claim. We say at the --

6 JUSTICE ALITO: Is it the same
7 argument?

8 MR. BRULAND: The 2242 argument is new
9 at the merits stage, yes. And this Court has
10 been very clear that I can come in and make
11 arguments at the merits stage in support of the
12 same claim raised in a petition. I don't take
13 my friends --

14 JUSTICE ALITO: Is there a conflict in
15 the circuits in this new argument that you're
16 making today?

17 MR. BRULAND: Well, there's a conflict
18 in the circuits because a bunch of circuits
19 reject the idea that an amendment is not a
20 second or successive petition. That's what the
21 Fifth Circuit said below. Rivers said all along
22 I filed an amendment. That means it's okay
23 under Rule 15 and, therefore, it's not second or
24 successive.

25 The Fifth Circuit said not so fast.

1 We think 2244 applies right after final
2 judgment. They didn't cite Banister. And so
3 that is the same argument that Rivers has been
4 making. And the Fifth Circuit rejected the
5 argument that it's an amendment; therefore, it
6 should be okay.

7 Now, I do want to go to the point that
8 --

9 JUSTICE ALITO: Well, we've had a
10 mini-epidemic of cert petitions that have
11 convinced us to take a case because there's
12 supposedly a conflict on a certain issue, and
13 then once cert is granted, the argument that is
14 advanced by the petitioners, quite a bit
15 different from what we were sold at the petition
16 stage.

17 Is this another outbreak of the same
18 disease?

19 MR. BRULAND: I don't think so,
20 Justice Alito, and I think the best evidence
21 there is the United States is never shy about
22 pointing out when a petitioner strays from the
23 QP or the petition. And I don't hear my friends
24 from the United States to be making that
25 argument.

1 But even if you're worried about the
2 amendment theory, I would say the timing
3 argument, even Texas agrees, that that is
4 squarely within the question presented. And
5 that is an issue over which the lower courts
6 have certainly disagreed.

7 JUSTICE ALITO: Thank you.

8 MR. BRULAND: And what I would say
9 there on the timing question, we also have
10 context and history on our side there.

11 And, again, to go back to your
12 question, Justice Gorsuch, this is not a case
13 where I'm coming in and asking for special
14 favors for habeas petitioners. All I'm saying
15 is it might be a bad amendment. The lower
16 courts might take five minutes to take a look at
17 it and say this is going nowhere. All I'm
18 asking you to say is whatever it is, it's not
19 second or successive.

20 And one reason to think that it's not
21 second or successive is, as your opinion, your
22 separate opinion, in Edwards against Vannoy
23 pointed out, we have this long-standing
24 principle in habeas that finality means this
25 court says go away or affirms on the merits or

1 the opportunity to seek cert runs out.

2 So, again, I'm not saying let's create
3 a special loophole or porthole or anything for
4 habeas prisoners to come in. All I'm saying is,
5 whatever the words "second or successive" habeas
6 application meant in 1996, they don't refer to
7 this sort of filing because, historically, those
8 kinds of filings were not deemed abuses of the
9 writ.

10 And so if you agree with us on the
11 AEDPA question, I will grant Texas will have a
12 lot of civil procedure arguments below. I'm
13 sure they'll have a lot of merits arguments
14 below. All we're asking to you decide is this
15 narrow question of -- may I finish, Mr. Chief?

16 CHIEF JUSTICE ROBERTS: Sure.

17 MR. BRULAND: All I'm asking you to
18 decide is this narrow question of what counted
19 as a second or successive habeas corpus
20 application in 1996, and it wasn't this.

21 CHIEF JUSTICE ROBERTS: Thank you
22 counsel.

23 Justice Thomas?

24 Justice Alito?

25 Justice Sotomayor?

1 JUSTICE SOTOMAYOR: You did point out
2 to us in the -- your cert petition a circuit
3 split. I'm not sure the Third Circuit rule is
4 consistent with what you claim it is. It's more
5 consistent with what we were speaking about
6 earlier.

7 The Third Circuit rule says, when a
8 district court gets a motion to amend, it should
9 exercise its discretion to hold the appeal
10 pending the court of appeals' decision. And it
11 can only consider it or grant it if the court of
12 appeals vacates and remand.

13 So that's always the case, correct?

14 MR. BRULAND: That's right, Justice
15 Sotomayor.

16 JUSTICE SOTOMAYOR: So the Third
17 Circuit, I don't think, is inconsistent with
18 anything.

19 The Second Circuit does have some very
20 charitably loose language that -- that a motion
21 to amend is never second or successive. But I,
22 like you, had my law clerk look at what the
23 Second Circuit was doing, and I got a bunch of
24 cases where the district court didn't wait for
25 the court of appeals to rule but instead said it

1 was an abuse of -- that the motion to amend was
2 an abuse of the writ. So I don't know -- and
3 they dismissed and the circuit didn't do
4 anything.

5 So I'm not sure the rule is as
6 absolute as you say. They're basically
7 following and saying hold it until the circuit
8 acts. And if we vacate and remand, then you can
9 consider it.

10 MR. BRULAND: I think that's right,
11 Justice Sotomayor. Here's how I understand it.
12 Under Federal Rule of Civil Procedure 62.1, it
13 says the district court can always consider
14 something that comes in. And the district court
15 has three options. It can deny it outright. I
16 think that's most of the cases that you and I
17 were discussing. It can also defer ruling. I
18 think that's one of the things that the Third
19 Circuit was focused on. I think your opinion in
20 the Ching case has the footnote that says the
21 same thing. Or -- and this is the -- the other
22 alternative we were talking about -- it can send
23 up a flare to the court of appeals and say this
24 raises a substantial issue.

25 So my -- what I'm suggesting here is

1 the Second Circuit --

2 JUSTICE SOTOMAYOR: So you're
3 suggesting sort of a, what should I call it,
4 procedural thing? Don't call it second or
5 successive and refer to the court of appeals,
6 but instead deny it now?

7 MR. BRULAND: Justice Sotomayor, I
8 want to be very clear about the doctrine because
9 there are two separate questions. There's the
10 question of is it second or successive as
11 Congress used that phrase in 1996? And then
12 there is an analytically distinct question of
13 what should you do with it procedurally.

14 My -- the only question I'm asking you
15 to answer is what is the meaning of "second or
16 successive" habeas corpus application in 1996?
17 And then we've also tried to give you some
18 comfort about the procedural pathway. And so,
19 yes, that is one of the things that a district
20 court can do.

21 And, in fact, that's what most of the
22 courts in the Second Circuit that we've seen
23 have done, is just take one look, deny them
24 outright.

25 And the last thing I would add is the

1 other side comes in and says: Well, how does
2 that square with your efficiency argument, if
3 the prisoner can just file something in the
4 middle of the appeal and then file a second or
5 successive petition?

6 I didn't find a single case in the
7 Second Circuit where that happened. Prisoners
8 are taking no for an answer. And if they
9 didn't, boy, if I were a court of appeals judge,
10 I would be glad to have a short opinion
11 explaining why this amendment goes nowhere.

12 JUSTICE SOTOMAYOR: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice Kagan?
14 Justice Gorsuch?

15 Justice Kavanaugh?

16 Justice Jackson?

17 Thank you, counsel.

18 Mr. Nielson.

19 ORAL ARGUMENT OF AARON L. NIELSON

20 ON BEHALF OF THE RESPONDENT

21 MR. NIELSON: Mr. Chief Justice and
22 may it please the Court:

23 Rivers' new petition filed years after
24 an appeal of the final judgment is second or
25 successive under AEDPA for multiple reasons.

1 I'm going to start with precedent.

2 Under Gonzalez and Banister, Rule
3 59(e) motions aren't successive, while Rule
4 60(b) motions generally are, because, quoting
5 from Banister, a Rule 59(e) motion is a one-time
6 effort to bring alleged errors in a just issue
7 decision to a habeas court's attention before
8 taking a single appeal.

9 Rivers' theory, however, would allow
10 him to repeatedly allege new claims having
11 nothing to do with the final judgment issued
12 years ago, after he appealed.

13 I think Banister's logic is all but
14 dispositive here.

15 I would also like to respond to some
16 of the things I heard from my friend during his
17 argument. He says that the time before AEDPA in
18 1996 there were six circuits on his side. I
19 don't agree with that at all. I urge the Court
20 to look at the brief from Arkansas. Arkansas
21 goes through the cases right before AEDPA's
22 enactment.

23 I would also urge the Court to look at
24 page 16 and 17 of the reply brief. I think
25 that's where he's getting that. You will notice

1 he cites cases on his side, Fourth, Fifth, and
2 Eighth, and then he says Fourth, Fifth, and
3 Eighth agree with us. The cases that agree with
4 us were later in time. They were closer to
5 1996.

6 He also says -- you know, we talked
7 about this was a pro se, which I understand and
8 I am sympathetic to, but Sidley was brought in
9 not, you know, just for the cert stage. They
10 filed the motion to stay the Fifth Circuit's
11 judgment pending certiorari.

12 None of their new argument is in that
13 either. This isn't an example of a pro se
14 person not knowing what to do. This was Sidley
15 Austin not raising the argument.

16 As to standing, the Court has
17 jurisdiction to address the split that it
18 thought it was hearing. That is a question
19 about res judicata from the first judgment, does
20 it bar the second case.

21 What the Court doesn't have
22 jurisdiction to do is to open a case that is not
23 in front of it. That case was closed. The
24 first petition was dismissed in a final judgment
25 in 2018. The Fifth Circuit affirmed in 2022.

1 This Court denied cert in 2023. That case is
2 done. I don't know how the Court could reopen
3 that case.

4 As the habeas jurisdiction, again,
5 he's not in custody for what he's talking about.
6 I don't know how he can have -- how this Court
7 can have habeas jurisdiction there.

8 As to the Second Circuit rule, look,
9 you definitely have the opportunity to have
10 multiple appeals under that rule. Because you
11 could have the first one, and then you amend,
12 and you get another final judgment, and you have
13 a second one.

14 This Court said in *Banister* you can't
15 do that.

16 And as to the new argument, there is
17 no split, Justice Alito. In fact, on our side
18 *United States v. Arrington*, 2014, from the D.C.
19 Circuit, Judge Srinivasan, joined by Judges
20 Garland and Millett, said you can't use 2106 to
21 get around AEDPA in that way.

22 I welcome the Court's questions.

23 JUSTICE THOMAS: How would you define
24 "second or successive"? I think they're -- some
25 think that it -- the appeal has to be final.

1 And I think most would just simply say the
2 judgment of the district court. What -- what's
3 your view?

4 MR. NIELSON: I think the Court
5 answered it in Banister. I think if you have
6 the first application, and then you have another
7 application after the final judgment, sometimes
8 suspended by Rule 59(e), if you're doing it
9 again the second time, that is second and
10 successive.

11 I think that's how we take the Court's
12 decision in Banister. I think that answers the
13 question, respectfully, Your Honor.

14 JUSTICE JACKSON: What if the judgment
15 is vacated? I'm trying to understand the
16 scenario. Even if we agree with you that, you
17 know, the judgment is the line and the person
18 appeals, goes up to the Fifth Circuit or
19 whatever circuit, and they agree and vacate the
20 judgment and send it back.

21 Any filings that had been submitted by
22 the prisoner in that interim, could they be
23 considered by the district court on remand?

24 MR. NIELSON: No, we don't think so,
25 Your Honor, but I want to make sure that we

1 understand. If that is this Court's rule, Texas
2 still prevails because there wasn't a remand
3 after the Fifth --

4 JUSTICE JACKSON: No, I understand.

5 MR. NIELSON: Okay.

6 JUSTICE JACKSON: That's not this
7 case. But I -- I guess I'm a little worried
8 about a world in which if we are pegging this to
9 the judgment, the judgment is subsequently
10 vacated and there's new evidence now in the
11 record and the district court is being called
12 upon by the vacatur and the remand to review it,
13 I don't understand why -- totally not this case
14 --

15 MR. NIELSON: Yeah.

16 JUSTICE JACKSON: -- but I don't
17 understand why at that point now the new
18 evidence doesn't get considered as an amendment
19 of the initial habeas filing.

20 MR. NIELSON: So -- so the way this
21 works in ordinary civil litigation -- and then I
22 will do an AEDPA gloss on it. In ordinary
23 litigation, if there is a remand from the court
24 of appeals --

25 JUSTICE JACKSON: Accompanying a

1 vacatur of the judgment.

2 MR. NIELSON: With a vacatur of the
3 judgment, you still are going to be limited by
4 the scope of the remand. It's not like if
5 there's a remand, now everything is up for
6 grabs.

7 It's still you're limited -- and,
8 again, if the Court needs to look at cases on
9 this, Wright and Miller Section 1488, I think
10 it's footnote 811 is the one that discusses this
11 line of cases, the -- the scope of the mandate
12 rule.

13 So, you know, for instance, you have a
14 case about a contract claim and --

15 JUSTICE JACKSON: So could the court
16 of appeals indicate, having, you know, been
17 alerted to the fact that there's this new
18 evidence out there -- I mean, I guess I -- I
19 don't understand a world in which new evidence
20 surfaces that everyone agrees could not have
21 been found before, and here it is, and it's
22 relevant to the issue of habeas.

23 I appreciate your argument that after
24 we have a judgment, you -- you know, as long as
25 the judgment stands, consideration of that would

1 be a second or successive kind of scenario under
2 AEDPA.

3 But if there is no judgment, because
4 it goes up to the court of appeals and the
5 judgment is vacated, it's unclear to me why the
6 new evidence that is relevant to the initial
7 habeas petition couldn't be looked at by a
8 district court reviewing that habeas petition.

9 If -- if the court of appeals says you
10 can, then you can?

11 MR. NIELSON: Again, it would be -- as
12 long as it is within the scope of the mandate.

13 JUSTICE JACKSON: Of -- of the
14 mandate. Yeah.

15 MR. NIELSON: Which often would be --
16 again, it would depend on the facts of the case.

17 But the AEDPA gloss on all of this is
18 under AEDPA, you have the COA requirement.

19 JUSTICE JACKSON: Yes.

20 MR. NIELSON: So the scope of the
21 appeals are inherently going to be limited. So
22 the scope of the mandate is going to be narrower
23 than in an ordinary case.

24 So imagine you have a case where
25 somebody says: I have a Brady claim and a

1 Strickland claim. And the district court says:
2 You lose on both. The Fifth -- the court of
3 appeals -- I said the Fifth Circuit. The court
4 of appeals grants a COA as to the Brady issue
5 and then reverses.

6 Back in front of the district court,
7 you can't say, well, I'm going to bring a
8 different Strickland claim and an AEDPA claim.
9 Because that's not within the scope of --

10 JUSTICE JACKSON: I see.

11 JUSTICE KAVANAUGH: On the Second
12 Circuit experience, I think your initial
13 response is precedent in text, but taken on its
14 own, it's workability.

15 Do you have a concern about how
16 workable it's been in the Second Circuit? It
17 seems like it's worked fine.

18 MR. NIELSON: Well, I -- we -- we
19 don't think it's worked fine. The case that we
20 cite was the Anderson case out of Connecticut,
21 where, you know, it seemed like a pretty
22 straightforward issue. The poor judge has to go
23 through three separate lines of analysis to try
24 to figure out what to do with this thing. And
25 that's, I think, a pretty straightforward case.

1 But I would also, you know, recognize
2 that, by definition, you're going to have
3 multiple appeals possible out of -- out of a
4 single case. So you have the very first one
5 that is up on appeal. While that's happening,
6 all the way up to this Court, up in certiorari
7 petition, they file a second one. They can keep
8 litigating that.

9 Well, that means you're going to get
10 two appeals out of a single -- what they claim
11 is a single application. That doesn't make any
12 sense.

13 And I think it's important to
14 recognize that 2244(b) doesn't mean you lose.
15 2244(b) means you have to go to the court of
16 appeals. And we're talking about mid-appeal
17 cases.

18 So that means, you know, unless it's,
19 like, day 29, so we're not just past Rule
20 59(e) -- 59(b) -- 59(e), rather, we're talking
21 about a case where you already have a court of
22 appeals panel who is already looking at this
23 thing.

24 It seems to me a lot more efficient
25 for that panel to be able to have the

1 opportunity to look at the new material, rather
2 than sending it back to a district court or a
3 magistrate judge three years ago, you know, 1500
4 cases later. They're not going to possibly
5 remember what that case was about, whereas you
6 have a panel looking at it right now.

7 JUSTICE KAVANAUGH: If we -- if we
8 conclude the pre-'96 case law is just a mixed
9 bag, doesn't -- doesn't cut either way?

10 MR. NIELSON: Well, I mean, I would
11 urge -- I think the Court already answered the
12 history, in both Gonzalez and Bannister.

13 JUSTICE KAVANAUGH: On -- on -- on
14 this issue.

15 MR. NIELSON: Sure. But, again --

16 JUSTICE KAVANAUGH: Okay.

17 MR. NIELSON: I think the Court has
18 already answered the history in Gonzalez and
19 Banister.

20 Because in every Circuit Court, if you
21 file a motion to amend a case that has been
22 closed for years, it's either one of two things:
23 It's either a nullity, does not exist, or it
24 will be construed as a Rule 60(b) motion. That
25 is the rule in Moore's Federal Practice.

1 We can cite other cases as well, we
2 have a whole string cite of these cases.

3 What we know from Gonzalez and
4 Banister, that if it's a Rule 60(b), well, then
5 it's already second -- second and successive.

6 So I don't think the history works for
7 them. They do have a couple of cases where they
8 say, well, that looks like amendment, but they
9 didn't grant relief in any of those cases.
10 We're reading a lot into silence, especially
11 because we have cases like Judge Arnold's
12 decision from the Eighth Circuit. You know, he
13 knows a little thing about civil procedure, and
14 he says no, you can't -- you can't do this. I
15 think that would be the relevant history.

16 So you have all the cases that say
17 60(b) mid-appeal, that counts as second or
18 successive, and you have someone who tries to
19 get around that with Rule 15, and they say,
20 well, that's second and successive too. That's
21 the history in 19 -- leading up right to 1996.

22 If there are no further questions.

23 JUSTICE GORSUCH: Just one on habeas
24 jurisdiction. Why don't -- why -- why don't we
25 have it? I understand he may have completed one

1 -- one sentence, but he's serving concurrent
2 sentences for other things. He claims his
3 amendment will help him with those.

4 MR. NIELSON: Yeah. A couple of
5 answers. One --

6 JUSTICE GORSUCH: One will do.

7 MR. NIELSON: Okay. Well -- well, the
8 easier answer is hall --

9 JUSTICE GORSUCH: The better answer
10 hopefully.

11 (Laughter.)

12 MR. NIELSON: Well, then -- all -- all
13 right.

14 JUSTICE GORSUCH: Just answer it.

15 MR. NIELSON: I will give you -- the
16 easier answer to write an opinion is that was
17 the subject of the first habeas proceeding. The
18 state post-conviction court said there's three
19 lawyers that said you did this. You say they --
20 you didn't -- you didn't say that; they did.
21 That's a finding of fact.

22 Then he goes to the federal
23 post-conviction court about that, and that's
24 about the sexual abuse charges. And he has to
25 show that that is wrong. And he has no

1 evidence. And the district court says no
2 habeas, the Fifth Circuit affirms, and this
3 Court denies certiorari. That issue is closed.

4 CHIEF JUSTICE ROBERTS: Anything
5 further? No?

6 Thank you, counsel.

7 Mr. Guarnieri.

8 ORAL ARGUMENT OF MATTHEW GUARNIERI
9 FOR THE UNITED STATES, AS AMICUS CURIAE,
10 SUPPORTING THE RESPONDENT

11 MR. GUARNIERI: Mr. Chief Justice, and
12 may it please the Court:

13 Petitioner litigated his first Section
14 2254 application to a final judgment and was
15 granted a certificate of appealability. Two and
16 a half years later, while his appeal was still
17 pending, he went back to the district court and
18 filed what he came to characterize as a motion
19 to amend his first application.

20 Neither the Rules of Civil Procedure
21 nor the statutes applicable to habeas
22 proceedings grant -- permit granting such a
23 post-judgment request to amend. As a matter of
24 black-letter civil procedure law, a party may
25 not amend its pleadings after the entry of

1 judgment without first obtaining relief from the
2 judgment.

3 And in habeas proceedings, when a
4 prisoner requests relief from the judgment
5 mid-appeal to add new claims or to replead old
6 claims on the basis of allegedly new evidence,
7 Section 2244(b) applies.

8 Petitioner's request to inject new
9 claims or new evidence into these proceedings
10 cannot go forward unless he can satisfy AEDPA's
11 stringent gatekeeping requirements.

12 I welcome the Court's questions.

13 CHIEF JUSTICE ROBERTS: Is there any
14 way in which your argument for the United States
15 differs from that of Respondent?

16 MR. GUARNIERI: I -- I don't think so,
17 Mr. Chief Justice. Texas has taken a position
18 on a number of subsidiary issues with respect to
19 the operation of Federal Rule of Civil Procedure
20 62.1. The United States has not taken a
21 position on those issues.

22 But with respect to the main points at
23 issue in this case, I think the United States
24 and Texas are fully aligned. And I -- I --

25 JUSTICE BARRETT: Counsel, I was just

1 going to say Petitioner points out that the
2 government doesn't complain about the new
3 argument injected in the brief. And you didn't
4 say anything in your brief. Do you want to say
5 anything now?

6 MR. GUARNIERI: I -- I -- I could
7 share the Court's frustration. I don't -- I
8 don't want to presuppose how the Court has
9 reacted to the merits arguments in this case,
10 but if there is a sense of frustration that
11 Petitioner's arguments have evolved
12 substantially from the certiorari stage to the
13 merits stage, I -- I could entirely understand
14 that frustration.

15 We have not urged the Court to dispose
16 of the case on those grounds, principally
17 because the United States does not have any
18 particular federal interest in whether
19 Petitioner preserved specific arguments in this
20 case. We are participating here so that the
21 Court -- because -- we think it's important to
22 get the underlying legal rules correct, and on
23 those points, again, I think we are in lockstep
24 agreement with Texas on all the points that
25 matter.

1 JUSTICE BARRETT: Well, speaking of
2 those rules, do you want to articulate exactly
3 what rule statement you would be looking for and
4 how you think it might affect 2255?

5 MR. GUARNIERI: Sure. I think the key
6 -- and this is -- comes directly from the
7 opinion of the Fifth Circuit in this case. The
8 key point is that the limitations in Section
9 2244(b) on the filing of second or successive
10 applications come into play when a district
11 court has entered a judgment on a first
12 application on the merits. It is the entry of
13 judgment that marks the terminal point in the
14 proceedings after which the gatekeeping
15 procedures in AEDPA apply.

16 And it doesn't -- I think, if you
17 agree with us on that, then it doesn't really
18 matter whether the Petitioner comes into court
19 and characterizes the relief that he is
20 requesting as a form of post-judgment amendment
21 or as a motion for relief from the judgment
22 under 60(b) or perhaps as a request to the court
23 of appeals itself to vacate and remand under 28
24 U.S.C. 2106 for the purpose of granting an
25 amendment.

1 All of those things, those are just
2 the procedural vehicles for requesting relief
3 from the judgment in order to add new claims or
4 to replead old claims with new evidence. Those
5 are two of the things that this Court identified
6 in Gonzalez as the kinds of arguments made after
7 judgment that are properly treated as second or
8 successive applications under Section 2244(b).

9 JUSTICE SOTOMAYOR: So where -- are --
10 you're not disagreeing with your colleague that
11 -- or are you -- that if the court of appeals
12 vacates and remands and vacates the judgment, is
13 it then second and successive?

14 MR. GUARNIERI: No, I think -- I think
15 the point that my colleague was making was that
16 the constraint there is going to be the scope of
17 the remand from the court of appeals. But if
18 you set that constraint aside, if the court of
19 appeals has vacated the judgment on a first
20 application for some reason other than just
21 clearing the way for amendment and the case goes
22 back to the district court, then we do think
23 that in that case the state prisoner is in the
24 same posture as pre-judgment before the case
25 went up on appeal, and they can seek to amend as

1 permitted under Rule 15.

2 Now, that's not this case. The Fifth
3 Circuit properly affirmed in the Petitioner's
4 initial appeal, and in the second appeal, I
5 think, the Fifth Circuit correctly recognized
6 that Section 2244(b) requires treating the --
7 the filing that Petitioner made in this case as
8 an application to file a second or successive
9 application and was properly transferred to the
10 Fifth Circuit for AEDPA gatekeeping.

11 JUSTICE BARRETT: Given that this is
12 not this case, do you think we need to ask -- or
13 answer Justice Sotomayor's question in the
14 opinion about the vacate and remand scenario?

15 MR. GUARNIERI: No, there's -- there
16 was no occasion to do that here, but I do think
17 that that is how, in general, the -- the
18 situation would properly be governed on the --
19 on a remand.

20 Now, again, I want to emphasize that
21 that presupposes that the court of appeals is
22 remanding for some reason other than just to
23 clear the way for amendment. I mean, that is
24 the kind of vacatur that my friend is requesting
25 here.

1 On his view of how this works, if you
2 discover -- claim to discover some new evidence
3 in the course of your appeal from a final
4 judgment on your first application, the -- the
5 state prisoner could go to the court of appeals
6 and request a vacatur and remand for no purpose
7 other than avoiding the limitations that would
8 otherwise apply to a Rule 60(b) motion filed in
9 the district court itself, which, again, under
10 Gonzalez, would have to be treated as a second
11 or successive application.

12 We don't think that kind of remand is
13 -- is permissible as a matter both under the
14 authority vested in the courts of appeals under
15 Section 2106 and just under AEDPA gatekeeping.

16 But if you were in a situation in
17 which the court of appeals vacates and remands
18 for some other reason, the district court made a
19 mistake in its entry of the first judgment and
20 the case goes back down, then, yes, I do think
21 there could be an opportunity for amendment in
22 those circumstances.

23 CHIEF JUSTICE ROBERTS: Anything
24 further? No?

25 Thank you, counsel.

1 MR. GUARNIERI: Thank you, Mr. Chief
2 Justice.

3 CHIEF JUSTICE ROBERTS: Mr. Bruland,
4 rebuttal?

5 REBUTTAL ARGUMENT OF PETER A. BRULAND
6 ON BEHALF OF THE PETITIONER

7 MR. BRULAND: Thank you. Justice
8 Sotomayor, Justice Barrett, I want to resist the
9 idea that that's not this case. Our whole
10 point, the only question we're asking you to
11 decide is, did the district court make a
12 threshold jurisdictional error about the meaning
13 of AEDPA?

14 I think it did for the textual
15 reasons, the historical reasons, the purposive
16 reasons. And if that's right, then I think the
17 correct remedy would be to reverse and to send
18 it back down. And what we would say then is we
19 could have the debate about, well, maybe they
20 would say harmless error because they don't like
21 the procedures or they have merits arguments,
22 but we would be asking you to correct the
23 threshold jurisdictional error that they made
24 about the meaning of 2244(b). That was what cut
25 everything off.

1 Now, I don't think there's any
2 daylight between what I'm asking you to do and
3 what the Third Circuit and even the Second
4 Circuit have said. It all goes to what
5 Mr. Guarnieri just said about, well, for some
6 other reason. And I don't understand where
7 that's coming from, because 2106 doesn't say
8 "for some other reason." And I don't see there
9 being any sort of penumbral emanations from Rule
10 60(b) that curtail the appellate court's power
11 to vacate.

12 So then the question becomes, well,
13 where are we getting this you can't ask the
14 district court to send up a flare so that the
15 court of appeals can vacate just because you
16 want to amend. It seems like what they're
17 asking to you do is put an atextual gloss on
18 2106 such that if you're asking for a certain
19 form of relief, then that doesn't fly.

20 I'm not sure where that comes from,
21 but it certainly doesn't come from AEDPA. And
22 this Court could reverse just saying the meaning
23 of 2244(b) is not what the lower court said.
24 And you could save all of this stuff about the
25 procedures and 2106 for another day.

1 We're just asking you to reverse on
2 the threshold AEDPA ground, which is
3 analytically distinct from the procedural
4 pathway.

5 Justice Alito, I want to take just one
6 more crack at addressing your concerns about the
7 QP. What I would say is the amendment argument
8 is a narrower ground that answers directly the
9 QP. We framed it broadly. We said does 2244
10 apply to all, some, or no mid-appeal habeas
11 filings? The amendment argument says, well, it
12 sure doesn't apply to all because textually,
13 historically, and looking at AEDPA's purposes,
14 an amendment is not a second or successive
15 petition.

16 I could understand the other side's
17 argument, if I were coming up here asking you to
18 accept something broader, but usually as an
19 advocate, it's a good thing to be standing up
20 here offering a narrow ground for relief with a
21 statutory hook.

22 Justice Kavanaugh, I want to say a few
23 words to you about workability because I think
24 that is the key or a key point in this case. It
25 really does come down to what is the proper

1 venue because a prisoner who gets new evidence
2 is going to race to court no matter what
3 decision this Court reaches today. And then
4 some district court or some court of appeals is
5 going to have to decide what to do.

6 But please don't take my word for it.
7 Don't take General Nielson's word for it. I
8 urge to you look at the judge's amicus brief,
9 because you have 17 of your former Article III
10 colleagues with nearly 300 years -- or 300 years
11 of experience collectively as appellate judges
12 and district court judges and magistrate judges
13 and what they're in here telling you is the
14 other side's rule is burdensome for the judicial
15 system as a whole. That's because the court of
16 appeals is going to happen -- have to open a
17 brand new original proceeding every time one of
18 these claims comes through the door.

19 And, remember, these claims are coming
20 whatever this Court says. So I think it's a
21 whole lot more efficient looking at AEDPA's
22 purposes to channel these things through the
23 district court, the single decisionmaker most
24 familiar with the case, which as Banister said
25 and Magwood said, the district court can take a

1 five-minute glance at this and say, no, it loses
2 on the merits, so no need to bother the court of
3 appeals.

4 These claims are coming. And the most
5 workable solution is to say they get channeled
6 through the district court while the appeal is
7 pending. I will be the first to grant Congress
8 inverted the normal presumption that appellate
9 courts are courts of review, not first view,
10 once the first case is over.

11 But while the first case is still
12 pending, 2244 does not apply. And it does not
13 flip that presumption. And I think the judges
14 well explain why there's no evidence that's what
15 Congress intended.

16 Again, the last thing I'll say and
17 then I'll sit down early, we are just asking you
18 to reverse the lower court's threshold error
19 about the meaning of 2244, and then we can fight
20 out whether Danny Rivers has merits issues or
21 procedural issues.

22 Bottom line, Danny Rivers might have
23 99 problems; it's just 2244 isn't one of them.
24 We would ask you to reverse. Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel. The case is submitted.

2 (Whereupon, at 12:38 p.m., the case
3 was submitted.)

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Official - Subject to Final Review

1	811 ^[1] 40:10	21 52:23 53:21 56:7,11,14	Arrington ^[1] 37:18
10 ^[1] 9:7	9	amendments ^[6] 7:1,2,3,5,25 8:11	art ^[1] 7:15
107 ^[1] 19:12	99 ^[1] 58:23	amici ^[1] 14:19	Article ^[1] 57:9
11 ^[1] 9:7	A	amicus ^[4] 2:8 3:10 47:9 57:8	articulate ^[1] 50:2
11:46 ^[2] 1:18 4:2	a.m. ^[2] 1:18 4:2	amount ^[1] 12:8	aside ^[1] 51:18
12(b)(6) ^[3] 15:22,22 16:6	AARON ^[3] 2:4 3:6 34:19	analysis ^[5] 11:23 12:5 13:25 25:7 42:23	Assistant ^[1] 2:6
12:38 ^[1] 59:2	abandoning ^[1] 10:6	analytically ^[2] 33:12 56:3	assume ^[1] 11:8
1488 ^[1] 40:9	ability ^[1] 10:22	analyzing ^[1] 12:20	assuming ^[1] 11:3
15 ^[5] 9:22 15:8 27:23 45:19 52:1	able ^[2] 15:20 43:25	Anderson ^[1] 42:20	atextual ^[1] 55:17
1500 ^[1] 44:3	above-entitled ^[1] 1:16	another ^[6] 10:23 25:23 28:17 37:12 38:6 55:25	attention ^[2] 4:16 35:7
16 ^[1] 35:24	absent ^[2] 18:22 22:2	answer ^[8] 8:4 33:15 34:8 46:8,9,14,16 52:13	Austin ^[2] 2:4 36:15
17 ^[3] 8:9 35:24 57:9	absolute ^[3] 24:20 25:4 32:6	answered ^[3] 38:5 44:11,18	authority ^[1] 53:14
19 ^[1] 45:21	absolutely ^[1] 16:2	answers ^[4] 6:25 38:12 46:5 56:8	avoiding ^[1] 53:7
1965 ^[1] 13:19	abuse ^[3] 32:1,2 46:24	appeal ^[33] 4:13 5:16 9:1,7,15,17,20 10:4,6,16 11:21 12:8,9,18 15:21 16:7 18:6 20:10 23:10 26:2,21 31:9 34:4,24 35:8 37:25 43:5 47:16 51:25 52:4,4 53:3 58:6	away ^[1] 29:25
1988 ^[1] 13:19	abuses ^[1] 30:8	appealability ^[1] 47:15	B
1993 ^[1] 13:22	accept ^[2] 16:24 56:18	appealed ^[2] 21:7 35:12	back ^[16] 13:16 14:9 16:3,18 22:21,22,23 26:13 29:11 38:20 42:6 44:2 47:17 51:22 53:20 54:18
1996 ^[11] 6:15 11:14 13:6,10 30:6,20 33:11,16 35:18 36:5 45:21	Accompanying ^[1] 39:25	appeals ^[49] 5:21 8:22 9:14 15:8,10 16:13 17:13 18:12,17 19:4 20:7 21:1,2,9 22:3,8 25:5,15,22 31:12,25 32:23 33:5 34:9 37:10 38:18 39:24 40:16 41:4,9,21 42:3,4 43:3,10,16,22 50:23 51:11,17,19 52:21 53:5,14,17 55:15 57:4,16 58:3	backdrop ^[1] 4:23
2	acts ^[1] 32:8	appellate ^[7] 4:15 16:8 17:18 22:17 55:10 57:11 58:8	backstop ^[2] 24:20 25:4
20 ^[2] 25:25 26:5	add ^[3] 33:25 48:5 51:3	Appendix ^[1] 19:12	bad ^[2] 9:22 29:15
2014 ^[1] 37:18	address ^[4] 13:11 22:13 24:17 36:17	appellations ^[2] 21:24 31:10	bag ^[1] 44:9
2018 ^[1] 36:25	addressing ^[2] 26:11 56:6	APPEARANCES ^[1] 2:1	Banister ^[32] 4:23 6:10,19,21,24 7:17,20 11:11,12,22,25 12:14,15,19,22 13:17,18,24 14:10,12,20,25 15:2 28:2 35:2,5 37:14 38:5,12 44:19 45:4 57:24
2022 ^[1] 36:25	adjudicate ^[1] 20:5	appellate ^[7] 4:15 16:8 17:18 22:17 55:10 57:11 58:8	Banister's ^[1] 35:13
2023 ^[1] 37:1	admitted ^[1] 20:3	application ^[17] 10:23 11:14 13:7 30:6,20 33:16 38:6,7 43:11 47:14,19 50:12 51:20 52:8,9 53:4,11	Bannister ^[1] 44:12
2025 ^[1] 1:14	admitting ^[1] 17:1	applications ^[3] 13:8 50:10 51:8	bar ^[3] 6:16 14:4 36:20
2106 ^[6] 37:20 50:24 53:15 55:7,18,25	advanced ^[1] 28:14	applies ^[2] 28:1 48:7	BARRETT ^[4] 48:25 50:1 52:11 54:8
2242 ^[2] 7:21 27:8	advocate ^[1] 56:19	apply ^[6] 8:6 50:15 53:8 56:10,12 58:12	barrier ^[1] 24:19
2244 ^[7] 5:11 26:1 28:1 56:9 58:12,19,23	AEDPA ^[28] 4:19,23 5:23 6:18 8:16 11:5,20 13:3,6 20:22 23:7 25:11 26:1 30:11 34:25 35:17 37:21 39:22 41:2,17,18 42:8 50:15 52:10 53:15 54:13 55:21 56:2	applying ^[2] 10:22 14:23	based ^[1] 6:9
2244(b) ^[8] 43:14,15 48:7 50:9 51:8 52:6 54:24 55:23	AEDPA's ^[5] 11:18 35:21 48:10 56:13 57:21	appreciate ^[1] 40:23	baseline ^[1] 15:11
2254 ^[1] 47:14	affect ^[1] 50:4	approach ^[1] 24:18	basically ^[2] 21:1 32:6
2255 ^[1] 50:4	affidavits ^[1] 16:15	aren't ^[3] 11:4,25 35:3	basis ^[1] 48:6
2266(b)(3)(B) ^[3] 7:23 8:2,10	affirmed ^[3] 18:18 36:25 52:3	argue ^[1] 24:6	Becerra ^[1] 25:16
23-1345 ^[1] 4:4	affirms ^[2] 29:25 47:2	argues ^[1] 9:8	becomes ^[1] 55:12
28 ^[1] 50:23	ago ^[2] 35:12 44:3	arguing ^[1] 24:4	behalf ^[8] 2:2,5 3:4,7,14 4:8 34:20 54:6
29 ^[1] 43:19	agree ^[12] 5:21 10:7 12:14 19:8 25:5 30:10 35:19 36:3,3 38:16,19 50:17	argument ^[36] 1:17 3:2,5,8,12 4:4,7 9:12 18:3 23:3,4 27:1,2,3,7,8,15 28:3,5,13,25 29:3 34:2,19 35:17 36:12,15 37:16 40:23 47:8 48:14 49:3 54:5 56:7,11,17	behind ^[2] 6:18,20
3	agreement ^[1] 49:24	arguments ^[9] 22:13 27:11 30:12,13 49:9,11,19 51:6 54:21	believe ^[1] 16:22
300 ^[2] 57:10,10	agrees ^[2] 29:3 40:20	arise ^[1] 5:23	below ^[5] 18:18 24:7 27:21 30:12,14
31 ^[1] 1:14	alerted ^[1] 40:17	arises ^[1] 12:17	best ^[3] 13:25 16:10 28:20
325 ^[1] 14:1	aligned ^[1] 48:24	Arkansas ^[2] 35:20,20	better ^[1] 46:9
34 ^[1] 3:7	ALITO ^[10] 26:25 27:4,6,14 28:9,20 29:7 30:24 37:17 56:5	Arnold's ^[1] 45:11	between ^[3] 18:5 21:22 55:2
4	alive ^[1] 18:17	around ^[2] 37:21 45:19	bit ^[1] 28:14
4 ^[2] 3:4 23:5	allege ^[1] 35:10		black-letter ^[1] 47:24
47 ^[1] 3:11	alleged ^[1] 35:6		blue ^[1] 9:6
5	allegedly ^[1] 48:6		boils ^[1] 10:25
53 ^[1] 3:14	allow ^[1] 35:9		borne ^[2] 24:21 25:23
59 ^[1] 15:7	already ^[5] 43:21,22 44:11,18 45:5		both ^[5] 5:20 25:7 42:2 44:12 53:13
59(b) ^[1] 43:20	alternative ^[1] 32:22		bother ^[1] 58:2
59(e) ^[12] 12:1,2,12,22 13:19 14:15,21 35:3,5 38:8 43:20,20	amend ^[22] 8:17,25 9:8,15 13:7 15:21 16:6 18:5 19:6 20:5,16 23:11 31:8,21 32:1 37:11 44:21 47:19,23,25 51:25 55:16		bottom ^[2] 26:14 58:22
6	amendment ^[23] 9:9,22 15:9 17:5 25:9,19 27:19,22 28:5 29:2,15 34:11 39:18 45:8 46:3 50:20,25 51:11		Boy ^[3] 15:23 17:4 34:9
60(b) ^[12] 17:9 18:22,24 22:4,8 35:4 44:24 45:4,17 50:22 53:8 55:10			Brady ^[3] 5:7 41:25 42:4
60(b)(6) ^[1] 22:22			brand ^[1] 57:17
62.1 ^[5] 18:11 19:4 20:6 32:12 48:20			brief ^[10] 8:10 9:6,9 24:7 27:2 35:20,24 49:3,4 57:8
8			bring ^[5] 4:15 22:22,23 35:6 42:7

Official - Subject to Final Review

<p>broader ^[1] 56:18 broadly ^[1] 56:9 brought ^[2] 25:21 36:8 BRULAND ^[52] 2:2 3:3, 13 4:6,7,9 6:8, 13 7:11 9:19 10:2, 18 11:7 12: 2, 13 13:12 15:16 16:1 17:11 18:9, 13, 19 19:1, 8, 21, 24 20:8, 11, 21 21: 4, 8, 16, 21 22:5, 15 23:15, 18 24:2, 14 26:25 27:4, 8, 17 28:19 29:8 30: 17 31:14 32:10 33:7 54:3, 5, 7 bunch ^[2] 27:18 31:23 burden ^[1] 25:8 burdensome ^[1] 57:14</p>	<p>circumstances ^[1] 53:22 circumvent ^[2] 10:12 11:10 circumventing ^[1] 10:14 cite ^[5] 21:15 28:2 42:20 45:1, 2 cited ^[1] 25:15 cites ^[2] 13:18 36:1 civil ^[14] 7:4 15:4, 15 17:3, 22 18:4 22:1 30:12 32:12 39:21 45:13 47: 20, 24 48:19 claim ^[19] 5:5, 6, 7, 21 9:14, 16 10:7 12:21 26:21 27:5, 12 31:4 40:14 41:25 42:1, 8, 8 43:10 53:2 claims ^[20] 4:15, 19 5:3, 10, 13 16:9 17:18, 20 26:12, 16 35:10 46:2 48: 5, 6, 9 51:3, 4 57:18, 19 58:4 clear ^[6] 5:8 10:20 15:2 27:10 33:8 52:23 clearing ^[1] 51:21 clerk ^[1] 31:22 closed ^[3] 36:23 44:22 47:3 closer ^[1] 36:4 COA ^[2] 41:18 42:4 colleague ^[2] 51:10, 15 colleagues ^[2] 21:24 57:10 collectively ^[1] 57:11 come ^[12] 10:12 14:13, 19 16:10 17: 4, 12 26:7 27:10 30:4 50:10 55:21 56:25 comes ^[13] 5:2 10:5, 10, 15 13:21 16:12 24:19 32:14 34:1 50:6, 18 55:20 57:18 comfort ^[1] 33:18 coming ^[7] 23:20 26:16 29:13 55: 7 56:17 57:19 58:4 complain ^[1] 49:2 complaint ^[2] 15:21 16:6 completed ^[1] 45:25 concern ^[1] 42:15 concerns ^[1] 56:6 conclude ^[1] 44:8 concurrent ^[1] 46:1 confession ^[1] 21:18 conflict ^[3] 27:14, 17 28:12 Congress ^[15] 4:11, 22 5:11 6:15, 25 7:2, 4, 24 10:20 11:15 14:3, 8 33: 11 58:7, 15 Congress's ^[1] 8:6 Connecticut ^[1] 42:20 consider ^[8] 4:19 5:24 7:9 18:24 19:14 31:11 32:9, 13 consideration ^[1] 40:25 considerations ^[1] 17:2 considered ^[5] 13:5, 14 22:4 38: 23 39:18 considering ^[1] 7:1 consistent ^[2] 31:4, 5 constitutional ^[1] 5:3 constraint ^[2] 51:16, 18 construe ^[1] 20:12 construed ^[1] 44:24 context ^[1] 29:10 contract ^[1] 40:14 conviction ^[1] 5:16 convictions ^[2] 24:3, 6</p>	<p>convince ^[1] 25:1 convinced ^[3] 21:6, 18 28:11 convincing ^[1] 5:8 core ^[1] 9:9 corpus ^[3] 11:13 30:19 33:16 correct ^[11] 18:8, 9, 12, 25 19:1 20: 20 22:10 31:13 49:22 54:17, 22 CORRECTIONAL ^[1] 1:8 correctly ^[1] 52:5 cost ^[1] 5:2 couldn't ^[1] 41:7 Counsel ^[7] 22:12 30:22 34:17 47: 6 48:25 53:25 59:1 count ^[1] 11:23 counted ^[1] 30:18 counts ^[2] 4:24 45:17 couple ^[4] 14:6 15:24 45:7 46:4 course ^[1] 53:3 COURT ^[140] 1:1, 17 4:10 5:20, 20, 22 6:3 7:14, 16 8:21, 21, 22, 23 10: 11 13:3 14:21, 24 15:6, 7, 9 16:12, 13, 17, 19, 20 17:12, 13, 14 18:6, 6, 11, 17, 22, 22 19:4, 6, 14 20:4, 7, 15, 25 21:2, 9, 24 22:3, 8, 16, 18, 21 23:6, 8, 23 25:1, 1, 4, 14, 22 26:11, 22 27:9 29:25 31:8, 10, 11, 24, 25 32:13, 14, 23 33:5, 20 34:9, 22 35:19, 23 36: 16, 21 37:1, 2, 6, 14 38:2, 4, 23 39:11, 23 40:8, 15 41:4, 8, 9 42:1, 2, 3, 6 43: 6, 15, 21 44:2, 11, 17, 20 46:18, 23 47: 1, 3, 12, 17 49:8, 15, 21 50:11, 18, 22 51:5, 11, 17, 18, 22 52:21 53:5, 9, 17, 18 54:11 55:14, 15, 22, 23 57:2, 3, 4, 4, 12, 15, 20, 23, 25 58:2, 6 court's ^[11] 4:16 23:2, 19 35:7 37: 22 38:11 39:1 48:12 49:7 55:10 58:18 courts ^[13] 5:23 6:1 14:14 16:9, 17 17:17, 18 29:5, 16 33:22 53:14 58: 9, 9 cover ^[1] 20:18 crack ^[2] 16:21 56:6 cracks ^[1] 5:5 create ^[1] 30:2 CRIMINAL ^[1] 1:7 curiae ^[3] 2:8 3:11 47:9 curtail ^[1] 55:10 custody ^[3] 24:1, 3 37:5 cut ^[2] 44:9 54:24</p>	<p>12 57:3 decisionmaker ^[3] 26:18, 23 57: 23 deemed ^[2] 13:20 30:8 default ^[1] 15:5 defending ^[1] 5:15 defer ^[1] 32:17 define ^[3] 6:8, 12 37:23 defined ^[1] 6:6 definitely ^[1] 37:9 definition ^[1] 43:2 denied ^[3] 17:19 25:3 37:1 denies ^[1] 47:3 deny ^[3] 32:15 33:6, 23 denying ^[1] 23:9 DEPARTMENT ^[2] 1:7 2:7 depend ^[1] 41:16 deserves ^[1] 5:21 die ^[1] 9:22 difference ^[2] 5:19 21:22 different ^[4] 4:18 17:15 28:15 42:8 differently ^[1] 15:14 differs ^[1] 48:15 directly ^[2] 50:6 56:8 DIRECTOR ^[1] 1:6 disagree ^[2] 13:13 19:10 disagreed ^[1] 29:6 disagreeing ^[1] 51:10 discover ^[2] 53:2, 2 discretion ^[1] 31:9 discusses ^[1] 40:10 discussing ^[1] 32:17 disease ^[1] 28:18 dismissal ^[1] 15:23 dismissed ^[2] 32:3 36:24 dispose ^[1] 49:15 dispositive ^[1] 35:14 disregard ^[1] 8:5 distinct ^[2] 33:12 56:3 district ^[46] 5:20, 23 8:21 15:6 17: 13 18:6, 6, 22 19:6, 14 20:4, 15 22: 21 23:2, 8, 19, 23 24:25 25:1, 17 26: 11 31:8, 24 32:13, 14 33:19 38:2, 23 39:11 41:8 42:1, 6 44:2 47:1, 17 50:10 51:22 53:9, 18 54:11 55:14 57:4, 12, 23, 25 58:6 dividing ^[1] 11:2 DIVISION ^[1] 1:9 doctrine ^[3] 11:17 16:4 33:8 doing ^[5] 10:1 12:10 25:22 31:23 38:8 done ^[6] 15:23 17:8 21:13, 14 33: 23 37:2 door ^[2] 4:11 57:18 down ^[6] 10:25 16:18 53:20 54:18 56:25 58:17 drafting ^[1] 8:6 droves ^[1] 12:24 during ^[4] 9:14 10:16 11:21 35:16</p>
C			
<p>call ^[2] 33:3, 4 called ^[1] 39:11 came ^[3] 1:16 11:21 47:18 cannot ^[1] 48:10 care ^[2] 23:13 26:4 Case ^[70] 4:4, 13, 21 6:23 7:19 8:19, 20 9:4 12:25 13:1, 11, 18, 19, 21 14: 20, 22 15:7, 9 16:10, 11, 11 21:14 25:5, 13, 16 26:14, 15 28:11 29:12 31:13 32:20 34:6 36:20, 22, 23 37: 1, 3 39:7, 13 40:14 41:16, 23, 24 42: 19, 20, 25 43:4, 21 44:5, 8, 21 48:23 49:9, 16, 20 50:7 51:21, 23, 24 52:2, 7, 12 53:20 54:9 56:24 57:24 58: 10, 11 59:1, 2 cases ^[26] 5:18, 19, 22 7:9 13:2 14: 13, 16 25:10, 15 26:4, 15 31:24 32: 16 35:21 36:1, 3 40:8, 11 43:17 44: 4 45:1, 2, 7, 9, 11, 16 cert ^[7] 16:13 28:10, 13 30:1 31:2 36:9 37:1 certain ^[2] 28:12 55:18 certainly ^[3] 24:6 29:6 55:21 certificate ^[1] 47:15 certiorari ^[4] 36:11 43:6 47:3 49: 12 challenging ^[2] 24:2, 8 changed ^[1] 26:8 channel ^[1] 57:22 channeled ^[1] 58:5 characterize ^[1] 47:18 characterizes ^[1] 50:19 charge ^[1] 24:1 charges ^[1] 46:24 charitably ^[1] 31:20 CHIEF ^[15] 4:3, 9 30:15, 16, 21 34: 13, 21 47:4, 11 48:13, 17 53:23 54: 1, 3 58:25 Ching ^[1] 32:20 choices ^[1] 8:6 Circuit ^[41] 13:1 14:21, 23 22:19 24:22 25:18, 18, 24, 25 27:21, 25 28: 4 31:2, 3, 7, 17, 19, 23 32:3, 7, 19 33:1, 22 34:7 36:25 37:8, 19 38:18, 19 42:3, 12, 16 44:20 45:12 47:2 50:7 52:3, 5, 10 55:3, 4 Circuit's ^[1] 36:10 circuits ^[6] 14:14, 16 27:15, 18, 18 35:18</p>	<p>circumstances ^[1] 53:22 circumvent ^[2] 10:12 11:10 circumventing ^[1] 10:14 cite ^[5] 21:15 28:2 42:20 45:1, 2 cited ^[1] 25:15 cites ^[2] 13:18 36:1 civil ^[14] 7:4 15:4, 15 17:3, 22 18:4 22:1 30:12 32:12 39:21 45:13 47: 20, 24 48:19 claim ^[19] 5:5, 6, 7, 21 9:14, 16 10:7 12:21 26:21 27:5, 12 31:4 40:14 41:25 42:1, 8, 8 43:10 53:2 claims ^[20] 4:15, 19 5:3, 10, 13 16:9 17:18, 20 26:12, 16 35:10 46:2 48: 5, 6, 9 51:3, 4 57:18, 19 58:4 clear ^[6] 5:8 10:20 15:2 27:10 33:8 52:23 clearing ^[1] 51:21 clerk ^[1] 31:22 closed ^[3] 36:23 44:22 47:3 closer ^[1] 36:4 COA ^[2] 41:18 42:4 colleague ^[2] 51:10, 15 colleagues ^[2] 21:24 57:10 collectively ^[1] 57:11 come ^[12] 10:12 14:13, 19 16:10 17: 4, 12 26:7 27:10 30:4 50:10 55:21 56:25 comes ^[13] 5:2 10:5, 10, 15 13:21 16:12 24:19 32:14 34:1 50:6, 18 55:20 57:18 comfort ^[1] 33:18 coming ^[7] 23:20 26:16 29:13 55: 7 56:17 57:19 58:4 complain ^[1] 49:2 complaint ^[2] 15:21 16:6 completed ^[1] 45:25 concern ^[1] 42:15 concerns ^[1] 56:6 conclude ^[1] 44:8 concurrent ^[1] 46:1 confession ^[1] 21:18 conflict ^[3] 27:14, 17 28:12 Congress ^[15] 4:11, 22 5:11 6:15, 25 7:2, 4, 24 10:20 11:15 14:3, 8 33: 11 58:7, 15 Congress's ^[1] 8:6 Connecticut ^[1] 42:20 consider ^[8] 4:19 5:24 7:9 18:24 19:14 31:11 32:9, 13 consideration ^[1] 40:25 considerations ^[1] 17:2 considered ^[5] 13:5, 14 22:4 38: 23 39:18 considering ^[1] 7:1 consistent ^[2] 31:4, 5 constitutional ^[1] 5:3 constraint ^[2] 51:16, 18 construe ^[1] 20:12 construed ^[1] 44:24 context ^[1] 29:10 contract ^[1] 40:14 conviction ^[1] 5:16 convictions ^[2] 24:3, 6</p>	<p>convince ^[1] 25:1 convinced ^[3] 21:6, 18 28:11 convincing ^[1] 5:8 core ^[1] 9:9 corpus ^[3] 11:13 30:19 33:16 correct ^[11] 18:8, 9, 12, 25 19:1 20: 20 22:10 31:13 49:22 54:17, 22 CORRECTIONAL ^[1] 1:8 correctly ^[1] 52:5 cost ^[1] 5:2 couldn't ^[1] 41:7 Counsel ^[7] 22:12 30:22 34:17 47: 6 48:25 53:25 59:1 count ^[1] 11:23 counted ^[1] 30:18 counts ^[2] 4:24 45:17 couple ^[4] 14:6 15:24 45:7 46:4 course ^[1] 53:3 COURT ^[140] 1:1, 17 4:10 5:20, 20, 22 6:3 7:14, 16 8:21, 21, 22, 23 10: 11 13:3 14:21, 24 15:6, 7, 9 16:12, 13, 17, 19, 20 17:12, 13, 14 18:6, 6, 11, 17, 22, 22 19:4, 6, 14 20:4, 7, 15, 25 21:2, 9, 24 22:3, 8, 16, 18, 21 23:6, 8, 23 25:1, 1, 4, 14, 22 26:11, 22 27:9 29:25 31:8, 10, 11, 24, 25 32:13, 14, 23 33:5, 20 34:9, 22 35:19, 23 36: 16, 21 37:1, 2, 6, 14 38:2, 4, 23 39:11, 23 40:8, 15 41:4, 8, 9 42:1, 2, 3, 6 43: 6, 15, 21 44:2, 11, 17, 20 46:18, 23 47: 1, 3, 12, 17 49:8, 15, 21 50:11, 18, 22 51:5, 11, 17, 18, 22 52:21 53:5, 9, 17, 18 54:11 55:14, 15, 22, 23 57:2, 3, 4, 4, 12, 15, 20, 23, 25 58:2, 6 court's ^[11] 4:16 23:2, 19 35:7 37: 22 38:11 39:1 48:12 49:7 55:10 58:18 courts ^[13] 5:23 6:1 14:14 16:9, 17 17:17, 18 29:5, 16 33:22 53:14 58: 9, 9 cover ^[1] 20:18 crack ^[2] 16:21 56:6 cracks ^[1] 5:5 create ^[1] 30:2 CRIMINAL ^[1] 1:7 curiae ^[3] 2:8 3:11 47:9 curtail ^[1] 55:10 custody ^[3] 24:1, 3 37:5 cut ^[2] 44:9 54:24</p>	<p>12 57:3 decisionmaker ^[3] 26:18, 23 57: 23 deemed ^[2] 13:20 30:8 default ^[1] 15:5 defending ^[1] 5:15 defer ^[1] 32:17 define ^[3] 6:8, 12 37:23 defined ^[1] 6:6 definitely ^[1] 37:9 definition ^[1] 43:2 denied ^[3] 17:19 25:3 37:1 denies ^[1] 47:3 deny ^[3] 32:15 33:6, 23 denying ^[1] 23:9 DEPARTMENT ^[2] 1:7 2:7 depend ^[1] 41:16 deserves ^[1] 5:21 die ^[1] 9:22 difference ^[2] 5:19 21:22 different ^[4] 4:18 17:15 28:15 42:8 differently ^[1] 15:14 differs ^[1] 48:15 directly ^[2] 50:6 56:8 DIRECTOR ^[1] 1:6 disagree ^[2] 13:13 19:10 disagreed ^[1] 29:6 disagreeing ^[1] 51:10 discover ^[2] 53:2, 2 discretion ^[1] 31:9 discusses ^[1] 40:10 discussing ^[1] 32:17 disease ^[1] 28:18 dismissal ^[1] 15:23 dismissed ^[2] 32:3 36:24 dispose ^[1] 49:15 dispositive ^[1] 35:14 disregard ^[1] 8:5 distinct ^[2] 33:12 56:3 district ^[46] 5:20, 23 8:21 15:6 17: 13 18:6, 6, 22 19:6, 14 20:4, 15 22: 21 23:2, 8, 19, 23 24:25 25:1, 17 26: 11 31:8, 24 32:13, 14 33:19 38:2, 23 39:11 41:8 42:1, 6 44:2 47:1, 17 50:10 51:22 53:9, 18 54:11 55:14 57:4, 12, 23, 25 58:6 dividing ^[1] 11:2 DIVISION ^[1] 1:9 doctrine ^[3] 11:17 16:4 33:8 doing ^[5] 10:1 12:10 25:22 31:23 38:8 done ^[6] 15:23 17:8 21:13, 14 33: 23 37:2 door ^[2] 4:11 57:18 down ^[6] 10:25 16:18 53:20 54:18 56:25 58:17 drafting ^[1] 8:6 droves ^[1] 12:24 during ^[4] 9:14 10:16 11:21 35:16</p>
D			
<p>D.C ^[4] 1:13 2:2, 7 37:18 déjà ^[1] 14:17 DANNY ^[3] 1:3 58:20, 22 day ^[3] 5:21 43:19 55:25 daylight ^[1] 55:2 dead ^[2] 17:25 25:13 death ^[1] 8:3 debate ^[1] 54:19 decades ^[2] 4:19 24:22 decide ^[5] 26:23 30:14, 18 54:11 57:5 decided ^[2] 5:11 23:6 decision ^[5] 31:10 35:7 38:12 45:</p>	<p>circumstances ^[1] 53:22 circumvent ^[2] 10:12 11:10 circumventing ^[1] 10:14 cite ^[5] 21:15 28:2 42:20 45:1, 2 cited ^[1] 25:15 cites ^[2] 13:18 36:1 civil ^[14] 7:4 15:4, 15 17:3, 22 18:4 22:1 30:12 32:12 39:21 45:13 47: 20, 24 48:19 claim ^[19] 5:5, 6, 7, 21 9:14, 16 10:7 12:21 26:21 27:5, 12 31:4 40:14 41:25 42:1, 8, 8 43:10 53:2 claims ^{[20]</}</p>		

Official - Subject to Final Review

<p>economy ^[1] 6:20 Edwards ^[1] 29:22 effect ^[1] 11:4 efficiency ^[1] 34:2 efficient ^[2] 43:24 57:21 effort ^[2] 8:25 35:6 efforts ^[2] 8:17 13:7 Eighth ^[5] 14:20,23 36:2,3 45:12 either ^[5] 21:7 36:13 44:9,22,23 emanations ^[1] 55:9 emerges ^[1] 4:12 emphasize ^[1] 52:20 enacted ^[2] 4:22 11:15 enactment ^[2] 13:6 35:22 end ^[1] 26:2 enlarge ^[1] 21:10 entered ^[1] 50:11 entirely ^[1] 49:13 entitled ^[1] 5:14 entry ^[3] 47:25 50:12 53:19 EPA ^[1] 26:15 ERIC ^[1] 1:6 error ^[10] 5:6,7 6:2 17:1 21:7,18 54:12,20,23 58:18 errors ^[1] 35:6 especially ^[2] 16:25 45:10 ESQ ^[4] 3:3,6,9,13 even ^[6] 14:10 17:13 29:1,3 38:16 55:3 event ^[1] 11:14 everyone ^[1] 40:20 everything ^[2] 40:5 54:25 evidence ^[22] 4:12 5:9,24 12:17 16:9 24:5,11 26:8,20 28:20 39:10,18 40:18,19 41:6 47:1 48:6,9 51:4 53:2 57:1 58:14 evolved ^[1] 49:11 exactly ^[1] 50:2 example ^[1] 36:13 exception ^[2] 7:23 8:11 exculpatory ^[2] 4:12 24:5 exercise ^[1] 31:9 exist ^[1] 44:23 existed ^[1] 9:14 existing ^[1] 9:16 experience ^[2] 42:12 57:11 explain ^[2] 15:19 58:14 explained ^[1] 5:14 explaining ^[1] 34:11 explanation ^[1] 5:17 eyes ^[1] 17:6</p>	<p>few ^[1] 56:22 Fifth ^[19] 22:18 25:18,18 27:21,25 28:4 36:1,2,10,25 38:18 39:3 42:2,3 47:2 50:7 52:2,5,10 fight ^[2] 26:9 58:19 figure ^[3] 11:16 14:2 42:24 file ^[11] 10:23 15:8 17:9,23 18:4 22:22 34:3,4 43:7 44:21 52:8 filed ^[10] 8:3 9:1,7 11:2,9 27:22 34:23 36:10 47:18 53:8 files ^[1] 8:4 filing ^[6] 11:20 12:21 30:7 39:19 50:9 52:7 filings ^[4] 10:21 30:8 38:21 56:11 final ^[10] 18:5 28:1 34:24 35:11 36:24 37:12,25 38:7 47:14 53:3 finality ^[2] 6:21 29:24 find ^[1] 34:6 finding ^[1] 46:21 fine ^[2] 42:17,19 finish ^[1] 30:15 first ^[27] 4:13,21 9:12 11:8 13:13 16:20,22 19:11,25 22:15 36:19,24 37:11 38:6 43:4 46:17 47:13,19 48:1 50:11 51:19 53:4,19 58:7,9,10,11 five ^[2] 14:14 29:16 five-minute ^[1] 58:1 flare ^[3] 25:17 32:23 55:14 flip ^[1] 58:13 floodgates ^[2] 24:16,18 fly ^[2] 5:10 55:19 focused ^[3] 12:14,15 32:19 follow ^[2] 8:11 18:3 following ^[1] 32:7 footnote ^[3] 23:4 32:20 40:10 forgot ^[1] 9:2 form ^[3] 15:15 50:20 55:19 former ^[1] 57:9 forward ^[2] 25:20 48:10 found ^[2] 14:22 40:21 Fourth ^[2] 36:1,2 framed ^[1] 56:9 friend ^[4] 8:8 17:8 35:16 52:24 friends ^[3] 24:14 27:13 28:23 front ^[4] 17:5 20:18 36:23 42:6 frontline ^[1] 26:18 frustration ^[3] 49:7,10,14 fully ^[1] 48:24 further ^[4] 25:6 45:22 47:5 53:24 futile ^[1] 25:9</p>	<p>glad ^[1] 34:10 glance ^[1] 58:1 gloss ^[3] 39:22 41:17 55:17 Gonzalez ^[13] 6:24 9:25 10:3,5,5,9 23:5 35:2 44:12,18 45:3 51:6 53:10 GORSUCH ^[12] 15:3,17,19 16:1,24 17:11 29:12 34:14 45:23 46:6,9,14 got ^[5] 13:9 16:14 17:4 26:8 31:23 governed ^[1] 52:18 governing ^[2] 8:1,7 government ^[2] 17:1 49:2 grabs ^[1] 40:6 grant ^[9] 18:7 20:1 21:2 23:23 30:11 31:11 45:9 47:22 58:7 granted ^[2] 28:13 47:15 granting ^[2] 47:22 50:24 grants ^[1] 42:4 great ^[1] 17:5 ground ^[4] 24:24 56:2,8,20 grounds ^[1] 49:16 GUARNIERI ^[13] 2:6 3:9 8:9 47:7,8,11 48:16 49:6 50:5 51:14 52:15 54:1 55:5 GUERRERO ^[2] 1:6 4:5 guess ^[6] 8:24 9:2,11 10:24 39:7 40:18</p>	<p style="text-align: center;">I</p> <p>idea ^[3] 9:25 27:19 54:9 identified ^[2] 23:22 51:5 Ill ^[1] 57:9 imagine ^[1] 41:24 important ^[4] 16:3 17:2 43:13 49:21 inconsistent ^[1] 31:17 indicate ^[2] 19:4 40:16 indication ^[1] 20:7 indicative ^[3] 20:13 22:5 25:2 inherent ^[1] 18:7 inherently ^[1] 41:21 initial ^[7] 22:23 23:9,10 39:19 41:6 42:12 52:4 inject ^[1] 48:8 injected ^[1] 49:3 innocence ^[1] 5:8 instance ^[1] 40:13 instead ^[2] 31:25 33:6 INSTITUTIONS ^[1] 1:9 integrity-based ^[1] 23:4 intended ^[1] 58:15 inter ^[1] 25:2 interest ^[3] 5:12,12 49:18 interim ^[1] 38:22 interlocutory ^[5] 19:15 20:1,3,10 21:11 interpreting ^[1] 10:15 inverted ^[1] 58:8 isn't ^[2] 36:13 58:23 issue ^[13] 9:5,9 25:1 28:12 29:5 32:24 35:6 40:22 42:4,22 44:14 47:3 48:23 issued ^[1] 35:11 issues ^[5] 6:3 48:18,21 58:20,21 itself ^[4] 6:24 15:6 50:23 53:9</p>
<p style="text-align: center;">F</p> <p>face ^[1] 10:3 fact ^[5] 23:25 33:21 37:17 40:17 46:21 facts ^[1] 41:16 fall ^[1] 5:4 familiar ^[1] 57:24 fast ^[2] 16:16 27:25 favorite ^[1] 8:19 favors ^[1] 29:14 federal ^[6] 8:12 32:12 44:25 46:22 48:19 49:18</p>	<p style="text-align: center;">G</p> <p>Garland ^[1] 37:20 gatekeeping ^[4] 48:11 50:14 52:10 53:15 General ^[10] 2:4,6 7:22 8:24 16:12,14,23 17:3 52:17 57:7 generally ^[1] 35:4 gets ^[3] 26:19 31:8 57:1 getting ^[3] 5:13 35:25 55:13 give ^[4] 12:25 14:15 33:17 46:15 Given ^[1] 52:11 gives ^[3] 7:22,23 12:19</p>	<p style="text-align: center;">H</p> <p>habeas ^[42] 4:13,14,17,21 5:4,25 7:2,3 9:13,16 10:7 11:13 13:7 15:4,14 17:21,24 18:4 22:23 23:25 24:10,25 25:2 29:14,24 30:4,5,19 33:16 35:7 37:4,7 39:19 40:22 41:7,8 45:23 46:17 47:2,21 48:3 56:10 half ^[3] 19:9,11 47:16 hall ^[1] 46:8 Hand ^[1] 8:22 happen ^[1] 57:16 happened ^[3] 19:3 21:19 34:7 happening ^[1] 43:5 Harisiades ^[2] 8:20 12:25 harmless ^[1] 54:20 hastening ^[1] 6:21 hear ^[3] 4:3 5:17 28:23 heard ^[2] 15:20 35:16 hearing ^[1] 36:18 help ^[1] 46:3 hired ^[1] 19:19 historical ^[4] 13:24 14:24 15:11 54:15 historically ^[4] 4:17 16:8 30:7 56:13 history ^[20] 5:2 6:9,10 7:17 8:14 11:17 12:23,24 13:14 14:3,8,10 15:1,4 29:10 44:12,18 45:6,15,21 hold ^[3] 20:22 31:9 32:7 Honor ^[2] 38:13,25 hook ^[3] 7:21,21 56:21 hope ^[2] 15:16 17:20 hopefully ^[1] 46:10 however ^[1] 35:9</p>	<p style="text-align: center;">J</p> <p>JACKSON ^[25] 9:10,20,24 10:2,13,19 11:8,24 12:4,13 22:12 23:12,16,24 24:13 34:16 38:14 39:4,6,16,25 40:15 41:13,19 42:10 joined ^[1] 37:19 Joint ^[1] 19:12 judge ^[7] 26:10,11 34:9 37:19 42:22 44:3 45:11 judge's ^[1] 57:8 Judges ^[5] 37:19 57:11,12,12 58:13 judgment ^[44] 9:11,13 10:1 11:1,3 12:6,12 18:5,18 22:7 23:9 28:2 34:24 35:11 36:11,19,24 37:12 38:2,7,14,17,20 39:9,9 40:1,3,24,25 41:3,5 47:14 48:1,2,4 50:11,13,21 51:3,7,12,19 53:4,19 judicata ^[1] 36:19 judicial ^[2] 6:20 57:14 jurisdiction ^[8] 20:17 23:25 24:10 36:17,22 37:4,7 45:24 jurisdictional ^[6] 6:2 24:12,20 25:4 54:12,23 JUSTICE ^[118] 1:8 2:7 4:3,9 6:6,9,</p>

Official - Subject to Final Review

<p>11 7:8,11 8:15 9:10,19,24 10:2,13, 19 11:8,24 12:3,4,13 13:4,12 14: 17 15:3,17,19 16:1,24 17:11 18:2, 10,14,20,21 19:2,9,17,21,22 20:2, 9,20,24 21:5,8,13,17,21 22:1,10, 12 23:12,16,24 24:13 26:25 27:4, 6,14 28:9,20 29:7,12 30:16,21,23, 24,25 31:1,14,16 32:11 33:2,7 34: 12,13,13,14,15,16,21 37:17,23 38: 14 39:4,6,16,25 40:15 41:13,19 42:10,11 44:7,13,16 45:23 46:6,9, 14 47:4,11 48:13,17,25 50:1 51:9 52:11,13 53:23 54:2,3,7,8 56:5,22 58:25</p>	<p>4 16:14,19 19:12,13 20:17 21:25 23:20 26:7 29:16 31:22 33:23 35: 20,23 37:8 40:8 44:1 57:8 looked [2] 11:11 41:7 looking [6] 7:12 43:22 44:6 50:3 56:13 57:21 looks [1] 45:8 loophole [1] 30:3 loose [1] 31:20 lose [3] 11:11 42:2 43:14 loses [1] 58:1 lost [2] 11:21 16:13 lot [7] 11:25 25:10 30:12,13 43:24 45:10 57:21 Louisiana [2] 25:16,17 lower [6] 6:1 16:17 29:5,15 55:23 58:18 lurking [1] 9:5</p>	<p>21 38:1 57:23 58:4 motion [23] 18:5,8,16,25 19:6,20, 23 20:5,16 21:1 22:3,22 23:10 31: 8,20 32:1 35:5 36:10 44:21,24 47: 18 50:21 53:8 motions [5] 13:3,20 14:15 35:3,4 moved [1] 9:8 multiple [3] 34:25 37:10 43:3</p>	<p>operation [1] 48:19 opinion [8] 13:18 29:21,22 32:19 34:10 46:16 50:7 52:14 opinions [2] 14:7 26:10 opportunity [5] 23:17 30:1 37:9 44:1 53:21 opposition [1] 24:7 opt-in [1] 8:4 options [1] 32:15 oral [7] 1:17 3:2,5,8 4:7 34:19 47:8 order [3] 22:18,22 51:3 ordinary [6] 6:16 7:3 17:22 39:21, 22 41:23 original [1] 57:17 other [26] 5:1,13 8:11 13:2,21 14:7, 17 15:15 17:2,25 24:1,4,15 26:17 32:21 34:1 45:1 46:2 51:20 52:22 53:7,18 55:6,8 56:16 57:14 otherwise [3] 11:6 22:9 53:8 out [24] 11:16 13:1 14:2,14,16,20, 22 17:14 24:21 25:10,23 26:9 28: 22 29:23 30:1 31:1 40:18 42:20, 24 43:3,3,10 49:1 58:20 outbreak [1] 28:17 outlier [1] 14:25 outright [2] 32:15 33:24 Outside [2] 4:14 8:7 outweighs [1] 5:12 over [5] 24:22 25:24 26:5 29:5 58: 10 own [1] 42:14</p>
<p style="text-align: center;">K</p> <p>Kagan [1] 34:13 KAVANAUGH [9] 13:4,13 14:18 34:15 42:11 44:7,13,16 56:22 keep [1] 43:7 key [4] 50:5,8 56:24,24 kick [2] 16:18 26:2 kicks [1] 25:10 kind [4] 14:8 41:1 52:24 53:12 kinds [2] 30:8 51:6 knowing [1] 36:14 knows [1] 45:13</p>	<p style="text-align: center;">M</p> <p>made [9] 6:1 19:20 21:7 22:14 27: 3 51:6 52:7 53:18 54:23 magistrate [3] 26:10 44:3 57:12 Magwood [1] 57:25 mailing [1] 21:23 main [1] 48:22 mandate [4] 40:11 41:12,14,22 March [1] 1:14 marks [1] 50:13 material [1] 44:1 matter [9] 1:16 19:5 24:10,12 47: 23 49:25 50:18 53:13 57:2 MATTHEW [3] 2:6 3:9 47:8 mean [9] 10:19 12:1,5 15:10,13 40: 18 43:14 44:10 52:23 meaning [6] 20:3 33:15 54:12,24 55:22 58:19 meaningful [1] 21:22 means [6] 5:5 27:22 29:24 43:9,15, 18 meant [3] 11:14,16 30:6 member [1] 14:4 members [2] 6:16 8:23 merits [18] 4:20 6:3 9:9 11:22 16: 21 20:16 24:9 25:13 27:9,11 29: 25 30:13 49:9,13 50:12 54:21 58: 2,20 mid-appeal [6] 8:17 13:8 43:16 45:17 48:5 56:10 middle [1] 34:4 might [8] 9:21,22,23 11:21 29:15, 16 50:4 58:22 Miller [1] 40:9 Millett [1] 37:20 mine-run [1] 7:9 mini-epidemic [1] 28:10 minutes [1] 29:16 mistake [2] 20:22 53:19 mixed [1] 44:8 Monday [1] 1:14 Moore's [1] 44:25 mootness [1] 22:25 morning [1] 5:17 most [8] 17:14,19 20:5 32:16 33:</p>	<p style="text-align: center;">N</p> <p>Napue [1] 5:7 narrow [3] 30:15,18 56:20 narrower [2] 41:22 56:8 nature [1] 12:11 near-uniform [2] 4:18 8:16 nearly [1] 57:10 necessarily [1] 9:19 need [2] 52:12 58:2 needs [2] 8:20 40:8 Neither [1] 47:20 never [5] 5:14 6:2 15:20 28:21 31: 21 new [34] 5:21,24 12:17 16:9,9,15, 23 17:2 24:5 26:8,20,20 27:8,15 34:23 35:10 36:12 37:16 39:10,17 40:17,19 41:6 44:1 48:5,6,8,9 49: 2 51:3,4 53:2 57:1,17 next [1] 4:4 nice [2] 17:6,7 NIELSON [22] 2:4 3:6 34:18,19,21 38:4,24 39:5,15,20 40:2 41:11,15, 20 42:18 44:10,15,17 46:4,7,12,15 Nielson's [1] 57:7 nine [1] 8:23 none [2] 19:3 36:12 nor [1] 47:21 normal [2] 18:3 58:8 normally [1] 7:9 nothing [2] 23:21 35:11 notice [2] 9:7 35:25 nowhere [2] 29:17 34:11 nullity [1] 44:23 number [2] 10:21 48:18</p>	<p style="text-align: center;">P</p> <p>p.m [1] 59:2 PAGE [5] 3:2 8:9 9:7 13:25 35:24 pages [1] 21:23 panel [5] 8:22 17:5 43:22,25 44:6 parcel [1] 4:20 part [1] 4:20 participating [1] 49:20 particular [1] 49:18 party [1] 47:24 past [2] 16:16 43:19 pathway [3] 4:14 33:18 56:4 pegging [1] 39:8 pendency [1] 9:15 pending [10] 9:17,20 10:4 23:11 26:21 31:10 36:11 47:17 58:7,12 penumbral [1] 55:9 per [1] 26:5 perhaps [1] 50:22 permissible [1] 53:13 permit [1] 47:22 permits [1] 20:6 permitted [1] 52:1 person [2] 36:14 38:17 PETER [5] 2:2 3:3,13 4:7 54:5 petition [18] 6:14 20:19 22:24 23: 10 25:3 27:3,12,20 28:15,23 31:2 34:5,23 36:24 41:7,8 43:7 56:15 Petitioner [13] 1:4 2:3 3:4,14 4:8 24:25 28:22 47:13 49:1,19 50:18 52:7 54:6 Petitioner's [3] 48:8 49:11 52:3</p>
<p style="text-align: center;">L</p> <p>lack [1] 12:9 language [1] 31:20 last [6] 24:22 25:25 26:5,15 33:25 58:16 late-breaking [1] 4:15 later [3] 36:4 44:4 47:16 laughed [1] 17:14 Laughter [2] 15:25 46:11 law [3] 31:22 44:8 47:24 lawyers [1] 46:19 lead [1] 22:19 leading [4] 8:16 11:20 13:2 45:21 Learned [1] 8:22 least [4] 10:21,25 14:11 15:1 ledger [1] 14:17 legal [1] 49:22 limitations [3] 25:11 50:8 53:7 limited [4] 12:7 40:3,7 41:21 limiting [1] 10:21 line [5] 8:24 11:2 38:17 40:11 58: 22 lines [1] 42:23 litigated [1] 47:13 litigating [1] 43:8 litigation [10] 4:22 6:21 7:4 15:5, 15 17:22 18:4 22:2 39:21,23 little [2] 39:7 45:13 live [1] 19:7 lob [1] 13:3 lockstep [1] 49:23 logic [3] 12:20 14:23 35:13 long [3] 17:17 40:24 41:12 long-standing [1] 29:23 look [31] 6:10,18,19,22 7:13,17 9:6 11:16 12:23,23 13:18,25 14:4 15:</p>	<p style="text-align: center;">O</p> <p>obtaining [1] 48:1 occasion [1] 52:16 offering [1] 56:20 often [1] 41:15 okay [5] 27:22 28:6 39:5 44:16 46: 7 old [2] 48:5 51:4 once [2] 28:13 58:10 one [30] 13:18,19 14:7,20,22 16:16 17:15 21:24 24:1 26:5,9,16 29:20 32:18 33:19,23 37:11,13 40:10 43: 4,7 44:22 45:23,25 46:1,5,6 56:5 57:17 58:23 one-time [1] 35:5 one-year [1] 25:11 only [8] 7:7,23 8:2 20:12 22:7 31: 11 33:14 54:10 open [8] 16:9 17:18,19 18:7 20:18 24:18 36:22 57:16</p>		

Official - Subject to Final Review

<p>Petitioners [3] 14:13 28:14 29:14 petitions [3] 8:1,7 28:10 phone [1] 21:25 phrase [4] 6:15 7:12 11:13 33:11 picked [2] 14:3,9 picking [1] 21:24 piece [1] 24:24 piecemeal [1] 6:20 place [1] 13:25 plausible [1] 20:12 play [1] 50:10 pleadings [1] 47:25 please [7] 4:10 16:17 19:13 23:9 34:22 47:12 57:6 plus [1] 8:23 point [19] 11:20 12:6,19 15:17 16:8 17:15,16,23 18:23 19:18,24 28:7 31:1 39:17 50:8,13 51:15 54:10 56:24 pointed [1] 29:23 pointing [1] 28:22 points [5] 13:12 48:22 49:1,23,24 poor [1] 42:22 porthole [1] 30:3 position [3] 23:6 48:17,21 possible [1] 43:3 possibly [1] 44:4 post-AEDPA [2] 6:12,13 post-conviction [2] 46:18,23 post-judgment [2] 47:23 50:20 posture [2] 10:8 51:24 potential [1] 22:19 power [8] 5:24 16:25 17:16 18:7 20:4 23:2,19 55:10 practice [6] 4:18 8:16 11:17 15:11 17:4 44:25 pre-'96 [1] 44:8 pre-AEDPA [1] 11:17 pre-judgment [1] 51:24 precedent [2] 35:1 42:13 precise [1] 16:4 presented [4] 10:3 20:25 21:6 29:4 preserved [1] 49:19 presumption [2] 58:8,13 presuppose [1] 49:8 presupposes [1] 52:21 pretty [3] 10:22 42:21,25 prevails [1] 39:2 primary [2] 9:12 27:2 principally [1] 49:16 principle [1] 29:24 prisoner [11] 21:23 25:8,12 26:19, 20 34:3 38:22 48:4 51:23 53:5 57:1 prisoner's [3] 4:13,21 9:6 prisoners [5] 8:3 13:2 26:7 30:4 34:7 pro [3] 19:19 36:7,13 probability [1] 22:25 probably [4] 17:8,14,25 19:20 problems [1] 58:23 procedural [6] 6:3 33:4,18 51:2 56:3 58:21</p>	<p>procedurally [1] 33:13 procedure [7] 23:22 30:12 32:12 45:13 47:20,24 48:19 procedures [3] 50:15 54:21 55:25 proceeding [2] 46:17 57:17 proceedings [5] 25:6 47:22 48:3, 9 50:14 product [1] 19:18 proper [2] 19:22 56:25 properly [4] 51:7 52:3,9,18 prosecutor [1] 8:25 providing [1] 11:1 pulled [2] 16:16,16 purpose [3] 6:18 50:24 53:6 purposes [8] 6:19 7:18 11:18 12:23 13:24 22:24 56:13 57:22 purposive [1] 54:15 put [1] 55:17</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>QP [3] 28:23 56:7,9 question [24] 8:13 10:3 11:19 12:15,16,16 23:1,7,19 26:17 29:4,9, 12 30:11,15,18 33:10,12,14 36:18 38:13 52:13 54:10 55:12 questions [5] 6:5 33:9 37:22 45:22 48:12 quite [1] 28:14 quoting [1] 35:4</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>race [1] 57:2 raised [1] 27:12 raises [1] 32:24 raising [1] 36:15 rare [1] 5:22 rather [2] 43:20 44:1 reach [1] 20:16 reached [1] 6:2 reaches [1] 57:3 reacted [1] 49:9 read [2] 26:1,3 reading [2] 11:25 45:10 really [6] 10:5 12:8 13:10 26:14 50:17 56:25 reason [8] 5:10 24:17 29:20 51:20 52:22 53:18 55:6,8 reasons [6] 9:23 17:25 34:25 54:15,15,16 REBUTTAL [3] 3:12 54:4,5 recognize [2] 43:1,14 recognized [2] 6:17 52:5 record [4] 9:5 19:10 21:10 39:11 redefine [1] 4:24 redress [2] 22:19 23:23 refer [2] 30:6 33:5 reject [1] 27:19 rejected [1] 28:4 relevant [4] 15:12 40:22 41:6 45:15 relief [13] 5:4,25 20:3,23 22:14 45:9 48:1,4 50:19,21 51:2 55:19 56:20 relieves [1] 15:6</p>	<p>remains [1] 11:3 remand [21] 6:4 19:5 21:3 22:2,6 23:21 25:5 31:12 32:8 38:23 39:2, 12,23 40:4,5 50:23 51:17 52:14, 19 53:6,12 remanded [1] 21:20 remanding [1] 52:22 remands [2] 51:12 53:17 remedy [1] 54:17 remember [3] 26:4 44:5 57:19 reopen [6] 18:22,23,24 22:7 23:9 37:2 repeatedly [1] 35:10 replead [2] 48:5 51:4 reply [1] 35:24 repose [5] 5:12,15 request [4] 47:23 48:8 50:22 53:6 requesting [3] 50:20 51:2 52:24 requests [1] 48:4 requirement [1] 41:18 requirements [1] 48:11 requires [1] 52:6 res [1] 36:19 resist [1] 54:8 respect [2] 48:18,22 respectfully [2] 23:8 38:13 respond [1] 35:15 Respondent [8] 2:5,9 3:7,11 16:16 34:20 47:10 48:15 Respondents [1] 1:10 response [2] 21:11 42:13 responses [2] 11:7 18:19 restrictive [1] 10:22 reverse [6] 6:4 54:17 55:22 56:1 58:18,24 reverses [2] 22:8 42:5 reversing [1] 22:18 review [6] 16:20 19:15 20:1 25:23 39:12 58:9 reviewing [1] 41:8 RICHARD [1] 1:3 RIVERS [9] 1:3 4:4 11:9 19:13 23:23 27:21 28:3 58:20,22 Rivers' [2] 34:23 35:9 ROBERTS [9] 4:3 30:16,21 34:13 47:4 48:13 53:23 54:3 58:25 roll [1] 17:6 row [1] 8:3 rule [33] 5:1,5,19 7:22 9:22 15:5,8 17:3 27:23 31:3,7,25 32:5,12 35:2, 3,5 37:8,10 38:8 39:1 40:12 43:19 44:24,25 45:4,19 48:19 50:3 52:1 53:8 55:9 57:14 rules [8] 7:6,25 8:6,12 10:22 47:20 49:22 50:2 ruling [4] 20:14 22:6 25:2 32:17 runs [1] 30:1</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>same [12] 13:17 14:23 20:25 21:1 27:3,5,6,12 28:3,17 32:21 51:24 satisfy [1] 48:10 save [1] 55:24 saw [1] 8:25</p>	<p>saying [14] 7:16 10:11 16:5 21:9, 25 23:5,12,20 24:9 29:14 30:2,4 32:7 55:22 says [27] 6:10,18,19 7:2 9:6 11:22 12:23 13:4 14:21 16:14,19 19:13 29:25 31:7 32:13,20 34:1 35:17 36:2,6 41:9,25 42:1 45:14 47:1 56:11 57:20 Scalia-Garner [1] 14:1 scenario [6] 12:1,3,12 38:16 41:1 52:14 scope [7] 40:4,11 41:12,20,22 42:9 51:16 se [3] 19:19 36:7,13 second [66] 6:7,14,17 7:6,10,13, 14 8:1,7 9:2,21 10:8,10,16 11:4,9, 13 13:8 14:15,21 17:24 18:1 19:9 20:18 24:21 25:24,25 27:20,23 29:19,21 30:5,19 31:19,21,23 33:1,4, 10,15,22 34:4,7,24 36:20 37:8,13, 24 38:9,9 41:1 42:11,16 43:7 45:5, 5,17,20 50:9 51:7,13 52:4,8 53:10 55:3 56:14 second-in-time [1] 7:10 Section [7] 40:9 47:13 48:7 50:8 51:8 52:6 53:15 see [3] 26:6 42:10 55:8 seek [2] 30:1 51:25 seeks [1] 9:15 seemed [2] 12:9 42:21 seems [3] 42:17 43:24 55:16 seen [3] 24:21 25:24 33:22 send [5] 26:22 32:22 38:20 54:17 55:14 sending [1] 44:2 sense [2] 43:12 49:10 sent [1] 25:17 sentence [1] 46:1 sentences [1] 46:2 sentencing [1] 5:6 separate [3] 29:22 33:9 42:23 serving [1] 46:1 set [1] 51:18 settled [2] 6:17 14:5 sexual [1] 46:24 SG [1] 13:4 share [1] 49:7 short [1] 34:10 shortly [1] 13:5 Shotwell [1] 16:11 show [4] 5:8 16:15 25:12 46:25 showing [1] 25:8 shows [2] 19:10 21:10 shy [1] 28:21 side [10] 5:13 13:21 14:17 24:4,15 29:10 34:1 35:18 36:1 37:17 side's [3] 5:1 56:16 57:14 Sidley [2] 36:8,14 silence [1] 45:10 simply [1] 38:1 single [6] 34:6 35:8 43:4,10,11 57:23 sit [1] 58:17 situation [2] 52:18 53:16</p>
--	--	--	--

Official - Subject to Final Review

<p>six ^[2] 14:16 35:18 slam ^[1] 4:11 sliver ^[3] 7:5 8:3,8 small ^[2] 5:18 7:5 sold ^[1] 28:15 Solicitor ^[6] 2:4,6 8:24 16:12,14,23 solution ^[1] 58:5 somebody ^[1] 41:25 someone ^[1] 45:18 sometimes ^[1] 38:7 sorry ^[5] 6:19 18:2 21:12 22:16,23 sort ^[4] 14:3 30:7 33:3 55:9 SOTOMAYOR ^[3] 18:2,10,14,20,21 19:2,9,17,21,22 20:2,9,20,24 21:5,8,13,17,21 22:1,10 30:25 31:1,15,16 32:11 33:2,7 34:12 51:9 54:8 Sotomayor's ^[1] 52:13 speaking ^[2] 31:5 50:1 special ^[2] 29:13 30:3 specific ^[1] 49:19 specifically ^[2] 7:1,24 split ^[3] 31:3 36:17 37:17 square ^[2] 9:24 34:2 squarely ^[2] 11:19 29:4 Srinivasan ^[1] 37:19 stage ^[7] 16:13 27:9,11 28:16 36:9,49:12,13 stand ^[1] 24:15 standing ^[7] 22:14,16,17,17,24 36:16 56:19 stands ^[1] 40:25 start ^[2] 24:23 35:1 state ^[4] 8:4 46:18 51:23 53:5 state's ^[1] 5:11 statement ^[1] 50:3 STATES ^[13] 1:1,18 2:8 3:10 8:4 28:21,24 37:18 47:9 48:14,20,23 49:17 statute ^[8] 6:20,24 10:12,14,20 11:10,15 25:11 statutes ^[1] 47:21 statutory ^[4] 7:20,21 11:12 56:21 stay ^[1] 36:10 step ^[3] 13:16 16:3 26:13 steps ^[1] 25:7 still ^[12] 5:15 9:17,20 18:17 19:6 23:11 24:3 39:2 40:3,7 47:16 58:11 straightforward ^[2] 42:22,25 Strand ^[1] 13:1 strays ^[1] 28:22 Strickland ^[2] 42:1,8 string ^[1] 45:2 stringent ^[1] 48:11 strip ^[1] 5:23 strong ^[1] 14:11 stronger ^[1] 14:11 structural ^[3] 5:6 24:19,23 stuff ^[1] 55:24 subject ^[3] 7:6,25 46:17 submitted ^[3] 38:21 59:1,3 subsequently ^[1] 39:9</p>	<p>subsidiary ^[1] 48:18 substantial ^[1] 32:24 substantially ^[1] 49:12 success ^[1] 22:25 successful ^[1] 23:14 successive ^[52] 4:22,25 6:7,14,17 7:6,10,14,15 8:1,7,18 9:3,21 10:8,10,17 11:5,9,13 13:8,20 14:15,22 17:24 18:1 20:19 27:20,24 29:19,21 30:5,19 31:21 33:5,10,16 34:5,25 35:3 37:24 38:10 41:1 45:5,18,20 50:9 51:8,13 52:8 53:11 56:14 suggesting ^[2] 32:25 33:3 suggestion ^[2] 18:11,15 support ^[1] 27:11 supporting ^[3] 2:8 3:11 47:10 supposed ^[1] 12:20 supposedly ^[1] 28:12 SUPREME ^[4] 1:1,17 16:17 23:6 surfaces ^[1] 40:20 suspended ^[2] 12:6 38:8 sympathetic ^[1] 36:8 system ^[1] 57:15</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>table ^[1] 23:1 talked ^[1] 36:6 tells ^[2] 4:24 6:22 Tenth ^[1] 13:1 term ^[1] 7:15 terminal ^[1] 50:13 TEXAS ^[12] 1:7 2:4 8:20 13:21 14:19 23:20 29:3 30:11 39:1 48:17,24 49:24 text ^[2] 5:2 42:13 textual ^[1] 54:14 textually ^[1] 56:12 theory ^[2] 29:2 35:9 there's ^[19] 4:14 7:5 8:13 21:22 22:5,6 23:21 24:10 26:4 27:17 28:11 33:9 39:10 40:5,17 46:18 52:15 55:1 58:14 therefore ^[2] 27:23 28:5 they'll ^[1] 30:13 They've ^[1] 26:1 thinks ^[1] 26:20 Third ^[5] 31:3,7,16 32:18 55:3 THOMAS ^[8] 6:6,9,11 7:8,11 8:15 30:23 37:23 three ^[4] 32:15 42:23 44:3 46:18 three-page ^[1] 26:10 threshold ^[6] 6:1 22:13 54:12,23 56:2 58:18 tide ^[1] 13:23 timely ^[2] 25:10,20 timing ^[2] 29:2,9 tiny ^[2] 8:2,8 today ^[5] 7:16 12:16 27:1,16 57:3 took ^[1] 20:15 totally ^[1] 39:13 transferred ^[1] 52:9 treat ^[4] 12:21 13:7 14:14 15:14 treated ^[3] 8:18 51:7 53:10 treating ^[1] 52:6</p>	<p>treatise ^[1] 14:1 trend ^[2] 13:5,15 tried ^[1] 33:17 tries ^[1] 45:18 trouble ^[1] 26:11 truly ^[1] 21:19 try ^[1] 42:23 trying ^[6] 9:11 10:25 11:10 14:2 15:17 38:15 turn ^[2] 8:14 13:23 two ^[13] 11:7 13:12 16:15,22 18:19 24:22 26:5,9 33:9 43:10 44:22 47:15 51:5 twofold ^[1] 19:25 typewritten ^[1] 21:23</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>U.S.C ^[1] 50:24 unclear ^[1] 41:5 under ^[24] 5:5,11 12:12 18:23,24 19:4 20:22 22:4 23:4 27:23 32:12 34:25 35:2 37:10 41:1,18 50:22,23 51:8 52:1 53:9,13,14,15 underlying ^[1] 49:22 undermine ^[1] 24:5 undermining ^[1] 11:5 understand ^[15] 9:11 11:1,24 32:11 36:7 38:15 39:1,4,13,17 40:19 45:25 49:13 55:6 56:16 UNITED ^[12] 1:1,18 2:8 3:10 28:21,24 37:18 47:9 48:14,20,23 49:17 universe ^[2] 5:18,19 unless ^[3] 22:8 43:18 48:10 unmoored ^[1] 5:1 until ^[2] 26:2 32:7 untoward ^[1] 21:19 up ^[24] 8:16 10:7 11:20 13:2 14:4,9 16:7 20:15 21:25 24:15 25:14,17 32:23 38:18 40:5 41:4 43:5,6,6 45:21 51:25 55:14 56:17,19 urge ^[4] 35:19,23 44:11 57:8 urged ^[1] 49:15</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>vacate ^[9] 19:5 21:2 22:2 32:8 38:19 50:23 52:14 55:11,15 vacated ^[5] 21:20 38:15 39:10 41:5 51:19 vacates ^[5] 22:9 31:12 51:12,12 53:17 vacatur ^[6] 22:6 39:12 40:1,2 52:24 53:6 Vannoy ^[1] 29:22 vehicles ^[1] 51:2 venue ^[2] 26:14 57:1 versus ^[2] 4:4 24:1 vested ^[1] 53:14 Viable ^[1] 5:3 view ^[5] 14:5 16:20 38:3 53:1 58:9 vu ^[1] 14:17</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>wait ^[1] 31:24 warrant ^[1] 5:25 warranted ^[1] 5:4</p>	<p>Washington ^[3] 1:13 2:2,7 way ^[14] 11:15 14:7,7 20:12 22:7 26:1,16 37:21 39:20 43:6 44:9 48:14 51:21 52:23 week ^[1] 26:15 welcome ^[3] 6:5 37:22 48:12 Western ^[1] 25:17 whatever ^[5] 21:6 29:18 30:5 38:19 57:20 whatnot ^[1] 12:9 whereas ^[1] 44:5 Whereupon ^[1] 59:2 whether ^[5] 11:2 23:13 49:18 50:18 58:20 who's ^[1] 26:17 whole ^[4] 45:2 54:9 57:15,21 will ^[13] 5:4,22 20:1 26:3 30:11,11 35:25 39:22 44:24 46:3,6,15 58:7 willy-nilly ^[1] 15:9 within ^[3] 29:4 41:12 42:9 without ^[2] 4:21 48:1 word ^[5] 4:21 9:1 24:16 57:6,7 words ^[2] 30:5 56:23 work ^[5] 7:2,3 10:1 11:1 12:10 workability ^[2] 42:14 56:23 workable ^[2] 42:16 58:5 worked ^[2] 42:17,19 works ^[3] 39:21 45:6 53:1 world ^[2] 39:8 40:19 worried ^[2] 29:1 39:7 Wright ^[1] 40:9 write ^[2] 30:9 32:2 write ^[1] 46:16 wrote ^[1] 14:24</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>year ^[2] 10:6 26:5 years ^[10] 13:5 25:25 26:6 34:23 35:12 44:3,22 47:16 57:10,10</p>
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