No. 18-6943

In the Supreme Court of the United States

GREGORY DEAN BANISTER, PETITIONER

v.

LORIE DAVIS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether and under what circumstances a timely Rule 59(e) motion should be recharacterized as a second or successive habeas petition under *Gonzalez* v. *Crosby*, 545 U.S. 524 (2005).

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INTEREST OF THE UNITED STATES

This case concerns whether and under what circumstances a court may treat a state prisoner's postjudgment submission, presented as a motion to alter or amend a judgment under Federal Rule of Civil Procedure 59(e), as an unauthorized second or successive application for a writ of habeas corpus under 28 U.S.C. 2244(b). Similar limitations on second or successive collateral attacks generally apply in the context of postconviction review of federal judgments under 28 U.S.C. 2255. See 28 U.S.C. 2255(h). Because this Court's resolution of the question presented may therefore affect postconviction proceedings for federal prisoners, the United States has a substantial interest in this case.

STATEMENT

Following a jury trial in Texas state court, petitioner was convicted of aggravated assault with a deadly weapon, in violation of Tex. Penal Code Ann. § 22.02 (West 1994). J.A. 158-159, 303. The trial court sentenced him to 30 years of imprisonment. J.A. 159, 303. The state court of appeals affirmed, J.A. 10-24, and this Court denied a petition for a writ of certiorari, 552 U.S. 825. After exhausting state postconviction remedies, petitioner filed an application in federal district court under 28 U.S.C. 2254 for a writ of habeas corpus. J.A. 43-157. The district court denied the application on the merits. J.A. 158-218. Petitioner then presented further merits argument in a submission presented as a motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e). J.A. 219-253. The district court denied relief and declined to issue a certificate of appealability. J.A. 254. The court of appeals likewise denied a certificate of appealability. J.A. 303-306.

1. In 2002, petitioner struck and killed a bicyclist while driving a car. J.A. 10-11, 159. Petitioner consented to the collection of a blood sample, which indicated recent use of cocaine. J.A. 10-11. The State of Texas charged petitioner with aggravated assault with a deadly weapon, in violation of Tex. Penal Code Ann. § 22.02 (West 1994). J.A. 11, 158-159, 303. A jury found him guilty on that charge, and he was sentenced to 30 years of imprisonment, which reflected an enhancement based on a prior conviction for cocaine trafficking. J.A. 159, 303. The conviction and sentence were affirmed on direct appeal, J.A. 10-24, and this Court denied certiorari, 552 U.S. 825.

Petitioner subsequently filed an application for postconviction relief in Texas state court, raising 65 claims.

J.A. 160. After the state trial court denied the petition, the Texas Court of Criminal Appeals remanded for further factfinding on some specific claims that alleged ineffective assistance of counsel. J.A. 160-161. After further proceedings, the trial court again denied the habeas application, and the Texas Court of Criminal Appeals affirmed. J.A. 42, 161.

2. Under 28 U.S.C. 2254, state prisoners who have exhausted available state remedies may file an application for a writ of habeas corpus in federal district court. See 28 U.S.C. 2254(b)(1)(A) and (c). In 2014, petitioner filed an application for a writ of habeas corpus under 28 U.S.C. 2254 in the United States District Court for the Northern District of Texas, raising 53 grounds for relief. J.A. 43-157.

On May 15, 2017, the district court denied petitioner's habeas application. J.A. 158-218. The court observed that, under 28 U.S.C 2254(d), a state prisoner cannot obtain federal habeas relief unless the adjudication of a claim in state court resulted in either a decision contrary to (or unreasonably applying) clearly established federal law or a decision based on an unreasonable determination of the facts in light of the evidence presented in the state-court proceedings. J.A. 162. The court then found, in a 49-page opinion, that none of petitioner's 53 claims met that standard on the merits. J.A. 164-218.

3. Title I of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, Tit. I, 110 Stat. 1217, imposes strict constraints on the filing of repeat "second or successive" challenges to state convictions. 28 U.S.C. 2244(b); see *Felker* v. *Turpin*, 518 U.S. 651, 664 (1996). In particular, 28 U.S.C. 2244(b)(3) requires a habeas applicant to secure pre-

approval from the court of appeals before filing a second or successive application. A court of appeals panel may grant such authorization only if "it determines that the application makes a prima facie showing" that the prisoner's claim either "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," or alleges previously undiscoverable facts that, if true, would establish "by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. 2244(b)(2)(A), (B)(ii), and (3)(C); see 28 U.S.C. 2244(b)(3)(B).

The court of appeals cannot authorize a second or successive application based on claims that were already presented in a prior application, or claims that otherwise do not satisfy the requirements above. 28 U.S.C. 2244(b)(1) and (3)(C). If the applicant does not secure appellate authorization to file a second or successive habeas application, a district court is "without jurisdiction to entertain" one. *Burton* v. *Stewart*, 549 U.S. 147, 157 (2007) (per curiam). And even when the court of appeals authorizes such an application based on a prima facie showing, the district court must dismiss any claim if during the subsequent proceedings the applicant does not "show[] that the claim satisfies the requirements of this section." 28 U.S.C. 2244(b)(4). To the extent that those statutory provisions and procedures are "inconsistent with" any provision of the Federal Rules of Civil Procedure that would otherwise apply, the statutory provisions set out in AEDPA take precedence. *Gonzalez* v. *Crosby*, 545 U.S. 524, 529 (2005) (quoting Rule 11 of the Rules Governing Section 2254 Cases (Supp. V

2005)); see Rule 12 of the Rules Governing Section 2254 Cases (Habeas Rule 12).

On June 12, 2017, petitioner mailed a submission containing 25 pages of argument to the district court, in which he contested its denial of many of the claims he had presented in his habeas application. J.A. 219-253. The motion was styled as a "Motion to Alter or Amend Judgment," invoking Federal Rule of Civil Procedure 59(e), which governs such motions in civil cases. J.A. 219 (emphasis omitted; capitalization altered). On June 20, 2017, the district court issued an order in which it stated that it had considered petitioner's submission, along with its underlying materials, and was denying relief. J.A. 254.

4. Under 28 U.S.C. 2253, a habeas applicant may obtain appellate review of a final order in a habeas proceeding if and only if a court issues a certificate of appealability, which requires a determination that the habeas applicant "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). In petitioner's case, the district court's May 15, 2017 judgment had, in addition to rejecting petitioner's claims on the merits, denied a certificate of appealability. J.A. 218. An applicant who is denied a certificate of appealability by the district court, however, may seek one from the court of appeals. 28 U.S.C. 2253(c). On July 20, 2017, petitioner filed a notice of appeal and an application for a certificate of appealability. J.A. 255-302.

The court of appeals denied petitioner's request for a certificate of appealability and dismissed the appeal, determining that it lacked jurisdiction because the notice of appeal was untimely. J.A. 303-306. Under 28 U.S.C. 2107, a litigant wishing to bring "any judgment, order, or decree" in a civil case before a court of

appeals must file a notice of appeal "within thirty days after the entry of such judgment, order or decree." That time limitation is a jurisdictional requirement, "meaning that late filing of the appeal notice necessitates dismissal of the appeal." *Hamer* v. *Neighborhood Housing Servs.*, 138 S. Ct. 13, 16 (2017).

The court of appeals here observed that the district court had entered judgment denying petitioner's habeas application on May 15, 2017, and that petitioner had not filed a notice of appeal until July 20, 2017—66 days later. J.A. 305. The court explained that it therefore lacked jurisdiction "unless there was a reason the time to file was extended." *Ibid.* The court recognized that, under Federal Rule of Appellate Procedure 4, the timely filing of a Rule 59(e) motion (as well as certain other types of postjudgment motions) would cause "the time to file an appeal" to run not from the judgment, but from "the order disposing of [that] motion," and that petitioner had appealed within 30 days of the rejection of his postjudgment submission. Fed. R. App. P. 4(a)(4)(A); see J.A. 305-306. The court explained, however, that because petitioner's submission "merely attacked the merits of the district court's reasoning in denying the [Section] 2254 petition," it was a second or successive habeas application, which would not toll the time for filing a notice of appeal. J.A. 306 (citing Fed. R. App. P. 4(a)(4)(A)).

SUMMARY OF ARGUMENT

The court of appeals correctly dismissed petitioner's appeal on the ground that his postjudgment merits submission was an impermissible second or successive habeas application. AEDPA includes a variety of procedural limitations that ensure that federal postconviction review is not unduly prolonged. Among other things,

habeas applicants do not have the same rights as ordinary civil litigants to seek review or relitigation of their claims after they have already been adjudicated by a federal court. As particularly relevant here, this Court explained in *Gonzalez* v. *Crosby*, 545 U.S. 524 (2005), that habeas applicants may not invoke the ordinary civil rules in a manner that would be "inconsistent" with Section 2244(b)'s strict limits on second or successive habeas applications. *Id.* at 529 (quoting Rule 11 of the Rules Governing Section 2254 Cases (Supp. V 2005)).

In *Gonzalez*, the Court applied that principle to a postjudgment submission under Federal Rule of Civil Procedure 60(b), holding that AEDPA bars such motions where they raise new claims or seek readjudication of old claims. That analysis applies equally to postjudgment submissions under Rule 59(e) like petitioner's. When a district court has already entered a final judgment denying habeas relief, a motion that raises new claims or seeks readjudication of previously rejected claims is "inconsistent with" AEDPA's bar on second or successive habeas applications, irrespective of which particular Federal Rule of Civil Procedure it may invoke.

Allowing such claims would flout both the text of Section 2244(b)'s relitigation bar and the express design of AEDPA to eliminate extensive and burdensome postconviction proceedings. Indeed, petitioner provides no meaningful support for his suggestion (Br. 26, 45) that Rule 59(e) would have authorized repetitive submissions like his even *before* AEDPA. The primary decision on which he relies, *Browder* v. *Director, Department of Corrections of Illinois*, 434 U.S. 257 (1978), addressed requests for reconsideration by *state officials*,

which by definition cannot constitute second or successive habeas applications, and which do not implicate concerns about abuse of the writ of habeas corpus.

Petitioner's additional arguments likewise lack merit. His main premise—that prisoners are entitled to one "'full and fair opportunity'" to seek habeas relief in federal court, which must necessarily include all of the "procedural rights available in 'every civil case,'" Pet. Br. 18, 21 (citations omitted)—is impossible to reconcile with the numerous ways in which AEDPA streamlines habeas litigation in comparison to ordinary civil litigation, including by limiting appellate rights. Petitioner's argument that submissions invoking Rule 59(e) should be allowed by analogy to appellate motions for rehearing disregards that AEDPA expressly contemplates appellate rehearing motions, but does not contemplate Rule 59(e) motions. See 28 U.S.C. 2253(a) and (c); 28 U.S.C. 2266(b) and (c). And petitioner's suggestion that extra submissions like his might correct significant errors has no meaningful support—particularly because habeas applicants who would prevail under Rule 59(e) would also typically prevail on appeal.

Petitioner's back-up argument—(Br. 47-52) that a prisoner should be able to extend his time for filing a notice of appeal by invoking Rule 59(e) *even if* his submission is barred as a second or successive application—is likewise flawed. Congress required habeas applicants to receive approval from the court of appeals before they can file a second or successive habeas application. See 28 U.S.C. 2244(b)(3). Without such authorization, the district court is "without jurisdiction to entertain" the prisoner's successive collateral attack. *Burton* v. *Stewart*, 549 U.S. 147, 153 (2007) (per curiam). In that scenario, it would be unsound to treat the unauthorized

submission as a properly filed Rule 59(e) motion that further extends federal proceedings.

ARGUMENT

I. A SUBMISSION PRESENTED UNDER RULE 59(e) IS SUBJECT TO AEDPA'S LIMITATIONS ON SECOND OR SUCCESSIVE HABEAS APPLICATIONS

Federal Rule of Civil Procedure 59(e) does not allow a state prisoner to prolong his postconviction proceedings by relitigating in the district court the merits of federal habeas corpus claims that the district court has already rejected. The federal civil rules apply to habeas applications "only 'to the extent that [they are] not inconsistent with' applicable federal statutory provisions and rules" governing habeas cases. *Gonzalez* v. *Crosby*, 545 U.S. 524, 529 (2005) (quoting Rule 11 of the Rules Governing Section 2254 Cases (Supp. V 2005)); see Habeas Rule 12. AEDPA, in turn, restricts the rights of habeas applicants in a variety of ways, such as by limiting appeals and—as particularly relevant here—generally precluding a prisoner from repetitively challenging his final state conviction, see 28 U.S.C. 2244(b). Petitioner's efforts to analogize himself to an ordinary civil litigant are accordingly misplaced. Rule 59(e) cannot and does not provide an automatic free pass for a submission that would otherwise be barred as a second or successive habeas application.

A. Rule 59(e) Provides No Exception To AEDPA's General Bar On Relitigating The Denial Of Habeas Relief

1. AEDPA generally limits state prisoners to a single federal collateral attack on their final state convictions. Under Section 2244(b)(1), a "claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application

shall be dismissed." 28 U.S.C. 2244(b)(1). And under Section 2244(b)(2), a "claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless" it relies on a new rule of constitutional law made retroactive by this Court or presents newly available and convincing evidence of the prisoner's factual innocence. 28 U.S.C. 2244(b)(2). Even the filing of a second or successive application is itself barred unless a panel of the court of appeals certifies that the prisoner has made a prima facie showing that it meets one of those narrow criteria. See 28 U.S.C. 2244(b)(3).

The restrictions on second or successive habeas applications are central to AEDPA's "goal of streamlining federal habeas proceedings." *Rhines* v. *Weber*, 544 U.S. 269, 277 (2005); see *Woodford* v. *Garceau*, 538 U.S. 202, 206 (2003) ("Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases."). To prevent habeas petitioners from circumventing them through creative nomenclature and procedural maneuvering, Habeas Rule 12 provides that where the ordinary rules and practices of civil cases would allow the sorts of readjudications addressed by Section 2244(b), those rules and practices are displaced. See *ibid.* (providing that the Federal Rules of Civil Procedure "may be applied" to Section 2254 cases only if "they are not inconsistent with any statutory provisions"). Instead, Section 2244(b) itself provides the governing standards and procedures. See *Gonzalez*, 545 U.S. at 529-530.

2. In *Gonzalez* v. *Crosby*, *supra*, this Court adopted a functional approach, focused on the substance of a state prisoner's submission, for determining whether a

postjudgment submission presented under Federal Rule of Civil Procedure 60(b) constitutes a second or successive habeas application. Rule 60(b) authorizes a court to relieve a party in civil litigation from a final judgment if the party can establish (1) mistake, inadvertence, surprise, or excusable neglect; (2) certain newly discovered evidence; (3) fraud, misrepresentation, or misconduct by an opposing party; (4) voidness of the judgment; (5) certain events that would implicate the validity or equity of continuing to apply the judgment; or (6) any other reason justifying relief from the judgment's operation. Fed. R. Civ. P. 60(b)(1)-(6). The Court held that even if a submission would be permissible under that Rule in an ordinary civil case, it would constitute an impermissible second or successive habeas application if it asserted a "federal basis for relief from a state court's judgment of conviction" that had previously "been adjudicated" in federal court. *Gonzalez*, 545 U.S. at 530.

The Court recognized that even where a state prisoner has couched his submission "in the language of a true Rule 60(b) motion," it is necessary to look to the substance of that submission to determine whether it is "a 'habeas corpus application'" for purposes of Section 2244(b), or "at least similar enough [to a habeas corpus application] that failing to subject it to the same requirements would be 'inconsistent with' the statute." *Gonzalez*, 545 U.S. at 531 (citation omitted). The Court observed that some submissions presented under Rule 60(b)—namely, those that "attack[], not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings," such as fraud on the court or a misappli-

cation of the statute of limitations—would be permissible in a habeas case. *Id.* at 532; see *id.* at 532 n.5, 533. But it drew a line between such validly presented motions and ones that "address[] federal grounds for setting aside the movant's state conviction," or seek relief from a federal judgment that does so, holding that to allow those latter sorts of motions would create "inconsistency with the habeas statute or rules." *Id.* at 533.

The Court accordingly explained that Section 2244(b) precludes the operation of Rule 60(b) whenever a state prisoner seeks to use "a Rule 60(b) motion [to] advance[] one or more 'claims'" for relief from a state-court judgment. *Gonzalez*, 545 U.S. at 532. The Court made clear that the bar encompasses not only any "motion that seeks to add a new ground for relief," but also any motion that "attacks the federal court's previous resolution of a claim on the merits." *Ibid.* (emphasis omitted).

3. The framework that this Court used to analyze submissions presented under Rule 60(b) in *Gonzalez* applies fully to submissions presented under Rule 59(e) as well.

The grounds on which Rule 59(e) motions are typically granted—clear errors of law or fact in the judgment, newly discovered or previously unavailable evidence, manifest injustice, or an intervening change in the controlling law, see 11 Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 2810.1, at 150-162 (3d ed. 2012)—overlap substantially with the grounds for relief under Rule 60(b). See, *e.g.*, Fed. R. Civ. P. 60(b)(2) and (6) (allowing motions based on "newly discovered evidence" or "any other reason that justifies relief"). Indeed, petitioner himself recognizes that a Rule 60(b) motion filed within 28 days of the district court's

judgment is "substantively equivalent to a Rule 59(e) motion." Pet. Br. 31 n.9; see, *e.g.*, 11 Wright § 2817, at 235 ("There is a considerable overlap between Rule 59(e) and Rule 60.").

Accordingly, as with a motion under Rule 60(b), a motion under Rule 59(e) will often "contain[] one or more 'claims'" that "assert[] [a] federal basis for relief from a state court's judgment of conviction," *Gonzalez*, 545 U.S. at 530. For example, a state prisoner might assert that he has discovered a significant legal error by his attorney in the original proceedings and submit a Rule 59(e) motion raising a new claim under *Strickland* v. *Washington*, 466 U.S. 668 (1984), that he did not include in his earlier application (and that the district court thus did not address in its earlier judgment). The substance of such a submission would plainly qualify it as a habeas "application" under the logic of *Gonzalez*, see 545 U.S. at 531, irrespective of whether the state prisoner invoked Rule 60(b) or Rule 59(e) when he submitted it. And allowing such applications to be filed as Rule 59(e) motions after the district court has already adjudicated a prisoner's previously filed habeas application would circumvent AEDPA's strict limitations, just as identical motions filed on the same day under Rule 60(b) would. Cf. *id.* at 531-532 (recognizing that a similar motion under Rule 60(b) "is in substance a successive habeas petition and should be treated accordingly").

4. The primary distinction that petitioner would draw between Rule 59(e) motions and Rule 60(b) motions—that the former come before direct review while the latter sometimes come after, see Br. 27-33—does not justify elevating Rule 59(e) into a categorical exception to

Section 2244(b)'s limitation on second or successive habeas applications. As a matter of practice, the advisory committee notes to the Federal Rules of Appellate Procedure observe that "[l]awyers sometimes move under Civil Rule 60 for relief that is still available under another rule such as Civil Rule 59." Fed. R. App. P. 4 advisory committee's note (2009 Amendment); see Fed. R. App. P. 4(a)(4)(A)(vi). And a distinction between post-judgment submissions based on whether they come before or after appellate review has much less salience in the habeas context than it might in a regular civil case. Unlike ordinary civil litigants, who typically have an automatic right to appellate review of a district court's final decision, see 28 U.S.C. 1291, habeas applicants do not. Instead, the default rule is that "an appeal may not be taken," with an exception for cases in which a court determines that the requirements for a certificate of appealability are met. 28 U.S.C. 2253(c).

Habeas applicants may, of course, still rely on Rule 59(e) motions in appropriate circumstances that do not conflict with the limitations on federal habeas corpus review. So long as a Rule 59(e) motion does not reassert the merits of the state prisoner's earlier claims to habeas relief or add new claims, it would be permissible. For example, Rule 59(e) motions would be an appropriate mechanism by which to "relieve [prisoners] from the effect of a default judgment mistakenly entered against them," which would not reflect any consideration of the merits of any habeas claims. *Gonzalez*, 545 U.S. at 534. Prisoners could also use Rule 59(e) to seek reconsideration of a district court's application of AEDPA's one-year statute of limitations, see *id.* at 533, or to ask the district court to revisit its decision denying a certificate

of appealability, see Rule 11 of the Rules Governing Section 2254 Cases (Habeas Rule 11). But a prisoner cannot seek to have a court entertain a submission under Rule 59(e) that would be "inconsistent with" AEDPA's limitation on second or successive habeas applications. Habeas Rule 12.

Petitioner offers little reason why a Rule 59(e) motion raising *new* claims following a district court's denial of habeas relief would "not [be] inconsistent," Habeas Rule 12, with those limitations. He asserts, however, that "[w]hatever might be said of Rule 59(e) motions that present *new* habeas claims, there clearly is no conflict between AEDPA's second-or-successive restrictions and a motion that merely seeks 'to bring to the attention of a district [court] judge errors . . . in the judge's decision on the case as it was before him.'" Pet. Br. 44 (quoting *Howard* v. *United States*, 533 F.3d 472, 476 (6th Cir. 2008) (Boggs, C.J., dissenting)) (emphasis added). But *Gonzalez* already rejected any distinction between submissions that raise new habeas claims and submissions that seek to raise previously denied ones for a second time. The Court explained that "alleging that the court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief." *Gonzalez*, 545 U.S. at 532. "When a movant asserts * * * that a previous ruling regarding one of those grounds [for habeas relief] was in error," the Court reasoned, "he is making a habeas corpus claim." *Id.* at 532 n.4. And AEDPA strictly limits the manner and circumstances in which such second or successive claims can be made. See 28 U.S.C. 2244(b).

B. A Rule 59(e) Exception To AEDPA's Relitigation Bar Would Flout Congressional Design

As this Court has recognized, AEDPA was enacted in substantial part to curtail extended collateral attacks on final criminal convictions. See *Rhines*, 544 U.S. at 277; *Garceau*, 538 U.S. at 206. "The enactment of AEDPA in 1996 dramatically altered the landscape for federal habeas corpus petitions," *Rhines*, 544 U.S. at 274, including by placing strict limitations on repeated requests for postconviction relief. Nothing suggests that Congress anticipated, let alone intended, that Rule 59(e) would provide an end-around to those limitations.

1. Over the course of the twentieth century, federal courts had gradually developed a set of limited restrictions on repeat habeas applications, representing a "modification of the common-law rule allowing endless [habeas] applications" to the federal courts. *McCleskey* v. *Zant*, 499 U.S. 467, 481 (1991). Those "abuse of the writ" restrictions grew out of language in the habeas statute and the federal habeas rules that allowed, but did not require, judges to refuse to entertain habeas applications in circumstances where considering the application would not serve the "ends of justice." See, *e.g.*, 28 U.S.C. 2244 (1958) (providing that a court would not "be required to entertain an application for a writ of habeas corpus" if the court was "satisfied that the ends of justice will not be served by such inquiry"); Rule 9(b) of the Rules Governing Section 2254 Cases (1976) ("A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.").

That discretionary standard, which the State could invoke as an affirmative defense, generated substantial disagreement and confusion. In *Kuhlmann* v. *Wilson*, 477 U.S. 436 (1986), for example, Justice Powell and three other Justices took the view "that the 'ends of justice' require federal courts to entertain [successive] petitions only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence." *Id.* at 454 (opinion of Powell, J.). Other Justices, however, favored an approach that left "the decision whether to hear successive petitions to the 'sound discretion of the federal trial judges.'" *Id.* at 463 n.2 (Brennan, J., dissenting) (quoting *Sanders* v. *United States*, 373 U.S. 1, 18 (1963)); see *id.* at 476 (Stevens, J., dissenting) ("[A] 'colorable claim of innocence' * * * is not an essential element of every just disposition of a successive petition."). And "[i]n the wake of *Kuhlmann*, the circuits * * * split on the interpretation of the 'ends of justice' principle." 2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 28.4[f], at 1753 (7th ed. 2018) (*Federal Habeas Practice*). Some courts, in line with Justice Powell, required a colorable showing of actual innocence, but others looked to such varied factors as whether the earlier decision was "plainly erroneous" and whether "[t]he prior [habeas] proceeding was not full and fair because the petitioner was not represented" by habeas counsel. *Id.* at 1754-1756; see *id.* at 1753-1756 & nn.81-94 (collecting and describing pre-AEDPA cases).

2. AEDPA eliminated that confusion by adopting strict and nondiscretionary limits on habeas applicants' ability to seek readjudication of their right to federal habeas relief. The statute both "codifies some of the pre-existing limits on successive petitions, and further

restricts the availability of relief to habeas petitioners." *Felker* v. *Turpin*, 518 U.S. 651, 664 (1996). The "added restrictions" include not only a precise delineation of the narrow circumstances in which second or successive applications may be entertained, but also a "transfer[] from the district court to the court of appeals [of the] screening function" for such applications. *Ibid.*; see *id.* at 662-663.

Petitioner accordingly errs in suggesting (Br. 26) that Congress did not intend AEDPA to displace courts' pre-existing practices regarding second or successive petitions. Before AEDPA, a district court could, for example, have elected to entertain a request to readjudicate previously decided claims (like petitioner's here) if it believed that the "ends of justice" warranted doing so, *Federal Habeas Practice* § 28.4[a], at 1737. AEDPA's provision for appellate gatekeeping under determinate standards was a sharp departure from that pre-AEDPA practice. Congress would not have intended to leave open the possibility that pre-AEDPA "ends of justice" practices might nonetheless substantially survive in the guise of Rule 59(e) motions, which do not require appellate approval, must be entertained by district courts, and may be granted under an indeterminate "manifest injustice" standard, 11 Wright § 2810.1, at 161-162.

3. In any event, to the extent that pre-AEDPA abuse-of-the-writ practices are relevant, they do not support petitioner. The only pre-AEDPA decision that petitioner identifies (Br. 45) that squarely addressed whether a state prisoner's submission invoking Rule 59(e) was a second or successive application held that presenting a "claim in a 59(e) motion *was* the functional equivalent of a second petition, and as such was subject to dismissal as abusive," *Bannister* v. *Armontrout*,

4 F.3d 1434, 1445 (8th Cir. 1993) (emphasis added), cert. denied, 513 U.S. 960 (1994). Petitioner characterizes that decision (Br. 45) as an "outlier," but cites no contrary, on-point authority.

Tellingly, neither petitioner nor his amici has identified a single pre-AEDPA case in which a district court held that a habeas applicant's request for reconsideration under Rule 59(e) was exempt from the standards for second or successive habeas applications. Petitioner instead relies (Br. 26 & n.7) on decisions in which courts rejected such requests on grounds other than the abuse-of-the-writ doctrine. But decisions rejecting second or successive habeas applications on alternative grounds do not support the negative inference that the abuse-of-the-writ doctrine was wholly unavailable as an affirmative defense that the State could elect to raise in appropriate cases.

4. Petitioner asserts (Br. 26) that when it enacted AEDPA, "Congress was presumptively aware of" *Browder* v. *Director, Department of Corrections of Illinois*, 434 U.S. 257 (1978), which he describes as "holding * * * that use of Rule 59 by habeas applicants is 'thoroughly consistent with the spirit of the habeas corpus statutes.'" Pet. Br. 26 (quoting *Browder*, 434 U.S. at 271)). As a threshold matter, the quoted language from *Browder* referred only to the "[a]pplication of the strict time limits" to a postjudgment motion—not the motion itself. 434 U.S. at 271. More importantly, however, *Browder*'s "holding" did not involve the use of Rule 59(e) by "habeas applicants" at all. The postjudgment motion in that case was instead filed by *the state respondent*—a situation that does not present any abuse-of-the-writ concerns. See *id.* at 260-261. A similar situation was present in both of *Browder*'s examples

of circuit decisions in which the rule allowing a court "to alter or amend its own judgments" soon after they were entered was "applied in habeas corpus cases." *Id.* at 270-271; see *Aderhold* v. *Murphy*, 103 F.2d 492 (10th Cir. 1939); *Tiberg* v. *Warren*, 192 F. 458, 462 (9th Cir. 1911).

While a state respondent's postjudgment submission *opposing* habeas relief cannot be considered a second or successive habeas application, a state prisoner's postjudgment submission *seeking* habeas relief can. See *Gonzalez*, 545 U.S. at 531-532. Concerns about burdening the courts with repetitive collateral attacks on final state convictions apply only to state prisoners, and Congress had no obligation to treat the two parties identically. Some of AEDPA's procedural limitations—such as 28 U.S.C. 2244(b)(3)(E)'s preclusion of certiorari review of an appellate decision authorizing or denying a second or successive habeas application—apply to both parties. See *Castro* v. *United States*, 540 U.S. 375 (2003) (cited at Pet. Br. 40). The limitations on second or successive habeas applications, however, are by definition specific to habeas applicants.

C. Petitioner's Arguments For Allowing Second Or Successive Habeas Applications Under Rule 59(e) Are Unsound

Petitioner does not dispute the court of appeals' observation that his postjudgment submission "attacked the merits of the district court's reasoning in denying the [Section] 2254 petition." Pet. Br. 8-9 (quoting J.A. 306). And because it was an attack on the district court's "previous resolution of [his] claim[s] on the merits," *Gonzalez*, 545 U.S. at 532 (emphasis omitted), that submission necessarily qualified as an impermissible second or successive habeas application under Section

2244(b). Petitioner identifies no sound basis why it was nevertheless permissible simply because he invoked Rule 59(e).

1. Petitioner primarily contends (Br. 21-42) that Rule 59(e) motions are always allowed as part of a prisoner's first "full and fair opportunity" to seek habeas relief from a federal court, and thus are not "second or successive" applications. That contention, however, rests on the mistaken premise that the "'one full opportunity'" that AEDPA grants to state prisoners necessarily includes all of the "procedural rights available in 'every civil case.'" Pet. Br. 21 (quoting *Johnson* v. *United States*, 196 F.3d 802, 805 (7th Cir. 1999)). To the contrary, AEDPA limits state prisoners' ability to invoke such procedural rights in significant ways.

Consistent with Congress's "goal of streamlining federal habeas proceedings," *Rhines*, 544 U.S. at 277, and the strong interest in the finality of criminal convictions, see *Calderon* v. *Thompson*, 523 U.S. 538, 554 (1998), many procedural aspects of ordinary civil litigation are inapplicable to habeas proceedings. Discovery, for example, is only available in habeas proceedings when authorized by the district court on a showing of "good cause." Rule 6 of the Rules Governing Section 2254 Cases; see also, *e.g.*, Rule 4 of the Rules Governing Section 2254 Cases (providing that an answer or other responsive motion to a habeas application is not required unless the district court so directs); Resp. Br. 47-50 (cataloging additional habeas-specific limitations).

Of particular relevance here, the manner in which a habeas applicant's procedural rights are more restricted than a normal civil litigant's extends to the means for seeking to have an adverse decision set aside.

As *Gonzalez* itself shows, for example, a habeas petitioner cannot use a Rule 60(b) motion to reopen the merits of a case based on an intervening change in law—even though such motions are ordinarily permitted in civil litigation. 545 U.S. at 531-532. Similarly, an ordinary civil litigant generally has an automatic right to appeal an adverse final judgment by the district court, see 28 U.S.C. 1291, but Congress has not granted that right to habeas petitioners. Instead, a habeas petitioner desiring to appeal must first persuade a court that he has "made a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2).

The significant procedural differences between proceedings on habeas applications and ordinary civil cases refute any suggestion that a "full opportunity" to litigate such an application must include a second or successive habeas application styled as a Rule 59(e) motion. Petitioner nonetheless asserts that Rule 59(e) is a necessary part of any district-court litigation because it "suspends the finality of the underlying judgment," Br. 12 (emphasis omitted). But even in ordinary civil cases, a Rule 59(e) motion does not deprive the district court's judgment of substantive finality; it simply postpones the notice-of-appeal deadline until the court has resolved the motion. See, *e.g.*, *FCC* v. *League of Women Voters*, 468 U.S. 364, 473 n.10 (1984) (discussing "the rule requiring suspension of a judgment's finality *for purposes of appeal* during the pendency of a postjudgment motion for reconsideration" (emphasis added)). Petitioner has identified no authority suggesting that a Rule 59(e) motion deprives a district court's judgment of finality for other purposes. See, *e.g.*, 18A Charles Alan Wright *et al.*, *Federal Practice and Procedure*

§ 4432, at 58 (3d ed. 2017) (explaining that a court's order remains final for purposes of claim and issue preclusion even where a "motion for new trial or a motion to vacate" has been filed). And any limited suspension of finality that Rule 59(e) might provide cannot shield a submission invoking Rule 59(e) from treatment as a second or successive habeas application when it seeks readjudication of claims that have already "been adjudicated," *Gonzalez*, 545 U.S. at 530, and is thus inconsistent with AEDPA's relitigation bar.

2. Petitioner attempts (Br. 35) to support treating Rule 59(e) as an unqualified exemption to the relitigation bar by analogizing proceedings in district court to proceedings on appeal. According to him (*ibid.*), if a "petition for panel rehearing or rehearing en banc filed by a prisoner in [an appeal during] his first habeas proceedings" would not be viewed as a second or successive habeas application, then neither should a submission invoking Rule 59(e). And he would minimize the significance of *Gonzalez* by analogizing a Rule 60(b) motion to a request that an appellate court recall its mandate, which this Court has suggested "can be regarded as a second or successive application for purposes of § 2244(b)," *Thompson*, 523 U.S. at 553.

Petitioner's effort to equate district-court relitigation and appellate-review proceedings rests on a blinkered view of AEDPA, which in fact substantially differentiates between them. At the same time that Congress strictly limited the opportunities for relitigation of habeas claims in Section 2244(b), it also expressly provided a specific form of appellate review. As discussed, Section 2253 authorizes the court of appeals to "review" a district court's "final order" in a habeas case in which a certificate of appealability has been issued. 28 U.S.C.

2253(a). Such appellate review proceedings therefore cannot be "'inconsistent with' AEDPA," *Gonzalez*, 545 U.S. at 534, because AEDPA itself contemplates them. In contrast, the statute says nothing about district court relitigation of the merits of previously entered final judgments—except to preclude second or successive habeas applications, see 28 U.S.C. 2244(b).

To the extent that some question might exist as to the scope of the appellate "review" that Section 2253 authorizes—*e.g.*, whether it encompasses rehearing petitions—that question is also answered by the statutory text. In 28 U.S.C. 2266, AEDPA specifically details the stages of a habeas case in the course of prescribing deadlines within which the lower courts must complete them in certain capital habeas cases. 28 U.S.C. 2266(b) and (c); see 28 U.S.C. 2261 (describing circumstances in which the time limits of Section 2266 apply). It prescribes time limits for a district court's "final judgment," 28 U.S.C. 2266(b)(1)(A); a court of appeals' "final determination" in any covered appeal, 28 U.S.C. 2266(c)(1)(A); a court of appeals' decision about "whether to grant a petition for rehearing or other request for rehearing en banc," 28 U.S.C 2266(c)(1)(B)(i); and a court of appeals' "final determination" of a "petition for rehearing or rehearing en banc" that it decides to grant, 28 U.S.C 2266(c)(1)(B)(ii). It does not mention Rule 59(e) motions, Rule 60(b) motions, or motions to recall the appellate mandate.

Section 2266's inclusion of petitions for rehearing and rehearing en banc, and its omission of motions under Rule 59(e), belies petitioner's assertion that "[t]he ability to ask the district court to correct its errors under Rule 59(e) is 'part of every [habeas] case.'" Br. 21 (citation omitted). Had Congress shared that view, it

would surely have addressed such motions in Section 2266, just as it did with petitions for rehearing. Otherwise, the reticulated set of deadlines that Congress set out would have a gaping hole in every case. District courts would have a deadline for a final decision on a habeas application—"450 days after the date on which the application is filed, or 60 days after the date on which the case is submitted for decision, whichever is earlier," 28 U.S.C. 2266(b)(1)(A)—but no deadline for additional merits consideration that a habeas applicant might seek under Rule 59(e). See 28 U.S.C. 2266(b)(1)(B) (prescribing time limit for parties "to complete all actions, including the preparation of all pleadings and briefs, and if necessary, a hearing, prior to the submission of the case for decision"); 28 U.S.C. 2266(b)(1)(C) (allowing for 30-day extension of district court's deadline in narrow circumstances). The only reasonable inference from Section 2266 is that Congress did not consider Rule 59(e) to be part of the normal merits adjudication of a habeas application.

3. Finally, petitioner asserts (Br. 36) that "functional considerations" favor allowing a habeas applicant to seek readjudication of a district court's decision on his claims under Rule 59(e) before attempting to seek appellate review. To the extent such functional considerations are relevant, however, they point in the opposite direction. Petitioner's functional argument rests on the assumption (*ibid.*) that prolonging litigation under Rule 59(e) in habeas cases will be justified by the possibility that in some fraction of cases, district courts will "correct errors in [their] just-issued judgment[s]" without involving a court of appeals. But he provides no reason to believe that any such benefits will be significant

—let alone sufficient to offset the burdens on district courts.

Although petitioner repeatedly refers (Br. 23, 39, 46) to the "obvious errors" that his approach would assertedly avoid, he fails to identify any cases in which a habeas applicant's Rule 59(e) motion has actually resulted in relief. Amicus National Association of Criminal Defense Lawyers (NACDL) similarly claims (Br. 6) that "district courts regularly rely on Rule 59 motions to change the result of an initial ruling on a habeas petition," but it provides only three examples—the most recent of which is 15 years old. As NACDL acknowledges, moreover, one of those Rule 59(e) motions would have been permissible under the *Gonzalez* framework as applied by the Fifth Circuit (because it addressed a federal procedural ruling, not a substantive claim for relief), and the other two pressed grounds that could have instead been vindicated on appeal. See *id.* at 7, 10, 12; see also Pet. Br. 32-33 (acknowledging that meritorious claims of error can be addressed on appeal, rather than through Rule 59(e)).

In contrast to the unproven—and likely minimal—benefits of allowing habeas applicants to use Rule 59(e) to attack district courts' adjudications of their claims, the burdens of that approach are obvious and substantial. Allowing such motions imposes considerable costs on district courts and state officials, who would be forced to address them in many Section 2254 cases. Petitioner's own submission exemplifies the problem. After filing a 72-page habeas application, a 113-page memorandum in support, and a 98-page reply brief raising 53 claims—each of which was rejected on its merits by the district court, see J.A. 165—petitioner presented another lengthy submission seeking to relitigate many

merits-based issues, J.A. 219-253. Congress added the limitations in Section 2244(b) to avoid just such costs to "comity, finality, and federalism." *Williams* v. *Taylor*, 529 U.S. 420, 436 (2000); see *Panetti* v. *Quarterman*, 551 U.S. 930, 943 (2007) (declining to adopt an interpretation of Section 2244(b) that "would add to the burden imposed on courts, applicants, and the States, with no clear advantage to any").

II. AN UNAUTHORIZED SECOND OR SUCCESSIVE HABEAS APPLICATION DOES NOT EXTEND THE TIME FOR FILING A NOTICE OF APPEAL SIMPLY BECAUSE THE APPLICANT INVOKES RULE 59(e)

Petitioner separately argues (Br. 47-52) that even if his submission was a successive habeas application, his invocation of Rule 59(e) was in itself sufficient to extend the time for filing a notice of appeal under Federal Rule of Appellate Procedure 4(a). That argument lacks merit.

As a successive habeas application, petitioner's submission was subject to the procedural requirements of Section 2244(b). Under Section 2244(b), a second or successive habeas application cannot be filed in the district court unless and until the applicant secures preapproval from the court of appeals. See 28 U.S.C. 2244(b)(3)(A) ("Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application."); 28 U.S.C. 2244(b)(3)(C) (describing circumstances in which "[t]he court of appeals may authorize the filing"). Without such preapproval, the district court is "without jurisdiction to entertain" the second or successive application. *Burton* v. *Stewart*, 549 U.S. 147, 153 (2007) (per curiam).

Here, petitioner had no authorization to file a successive application, so the district court had no jurisdiction to entertain one. His own characterization of his unauthorized submission as a Rule 59(e) motion does not mean that he in fact "file[d] in the district court" a motion "to alter or amend the judgment under Rule 59," so as to extend the time limit for filing a notice of appeal, Fed. R. App. P. 4(a)(4)(A)(iv). Even if the clerk's initial acceptance of such an invalid submission were enough to deem it "file[d]," it would not be "properly filed," *Artuz* v. *Bennett*, 531 U.S. 4, 8 (2000) (emphasis omitted). Cf. *Sebelius* v. *Cloer*, 569 U.S. 369, 378 n.5 (2013) (suggesting that a submission might not be considered "filed" at all if jurisdictionally time-barred). And an extension of the deadline for an appeal in such circumstances would be at odds with Section 2244(b). Cf. Habeas Rule 12; *Gonzalez*, 545 U.S. at 531. It would allow any habeas applicant to obtain a near-automatic extension to the 30-day deadline for filing a notice of appeal by waiting until the 28th day after final judgment and then submitting a jurisdictionally barred second or successive habeas application styled as a Rule 59(e) motion.

Applying Rule 4 in that fashion would conflict not only with Section 2244(b), but also with the law governing requests for reconsideration of the denial of a certificate of appealability in a habeas case. For reasons discussed above, see pp. 14-15, *supra*, such requests are not themselves subject to Section 2244(b)'s limitations on second or successive habeas applications, because they pertain only to a federal procedural question. See *Gonzalez*, 545 U.S. at 531. Habeas Rule 11(a) provides, however, that "[a] motion to reconsider a denial [of a certificate of appealability] does not extend the time to appeal." That express limitation would be virtually

meaningless if a petitioner could extend the time for filing his notice of appeal by pairing his permissible request for reconsideration of a certificate of appealability (which by rule does not extend the time for appeal) with an impermissible request for reconsideration of the substance of the district court's judgment.

Petitioner contends (Pet. Br. 51-52) that unless self-styled Rule 59(e) motions are treated as extending the time for appeal even where they require—but lack—pre-filing authorization, litigants will not know when to file a notice of appeal. But Rule 4(a)(4)(B)(i) already addresses that concern by allowing litigants to file a notice of appeal *before* a putative Rule 59(e) motion has been resolved. See Fed. R. App. P. 4(a)(4)(B)(i). Accordingly, no reason exists to allow an impermissible second or successive habeas application to extend the time for filing a notice of appeal.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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