

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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

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Washington, D.C.

Wednesday, December 4, 2019

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

APPEARANCES:

BRIAN T. BURGESS, ESQ., Washington, D.C.;  
 on behalf of the Petitioner.

KYLE D. HAWKINS, Solicitor General, Austin, Texas;  
 on behalf of the Respondent.

BENJAMIN SNYDER, Assistant to the Solicitor General, Department of Justice, Washington, D.C.;  
 for the United States, as amicus curiae,  
 supporting the Respondent.

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P R O C E E D I N G S

(11:07 a.m.)

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

Mr. Burgess.

ORAL ARGUMENT OF BRIAN T. BURGESS

ON BEHALF OF THE PETITIONER

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

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

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

Rule 60(b) motions present obvious

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

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

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

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

25 And we think this Court should reject

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

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

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

22 MR. BURGESS: Right. But we think  
23 that can't be the test for what counts as being  
24 second or successive. The Court has noted that  
25 "second or successive" is a term of art. So not

1 anything that is literally filed after the first  
2 application will be treated as second or  
3 successive. For example, an amended complaint  
4 is going to be presenting, you know, claims that  
5 could be overlapping again.

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

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

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

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

23 JUSTICE ALITO: So, basically, what  
24 you're saying is that although AEDPA restricts  
25 the filing of a second or successive habeas

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

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

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

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

22 MR. BURGESS: No. I mean, of -- the  
23 -- the relevant rule here, I think, is Habeas  
24 Rule 12, which provides that the Rules of  
25 Federal Civil Procedure apply as default unless



1 they are inconsistent with AEDPA, with the  
2 statute, or any habeas-specific rule.

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

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

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

23 But, in terms of what would count as  
24 being second or successive in the first place,  
25 that's a term of art that basically carries

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

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

7 CHIEF JUSTICE ROBERTS: What if --

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

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

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

21 MR. BURGESS: I think within -- you  
22 know, our rule is within the 28 days, when the  
23 court still has authority because -- and -- and  
24 the filing of a motion can suspend the judgment,  
25 that, no, we don't think that that should be

1 treated --

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

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

9 MR. BURGESS: Uh-huh.

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

14 MR. BURGESS: Right.

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

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

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

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

20                 JUSTICE GORSUCH: Is it -- is -- is --

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

25                 MR. BURGESS: If it were not a -- if

1 it were not a real Rule 59(e) motion?

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

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

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

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

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

25 So how natural would it be for a

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

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

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

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

25           I think it makes very little sense to

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

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

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

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

22 MR. BURGESS: We don't --

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

25 MR. BURGESS: So there are courts that

1 have taken that position that -- that the first  
2 is not over until the whole appellate process  
3 completes.

4 JUSTICE SOTOMAYOR: Right.

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

8 JUSTICE SOTOMAYOR: Why not?

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

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

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

23 MR. BURGESS: Sure. The rule that we  
24 apply is that if a motion is filed at a time  
25 when the court still has authority to enter or



1 amend its judgment before any potential appeal,  
2 it's still part of the first habeas proceeding  
3 rather than a second application.

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

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

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

20 MR. BURGESS: Right.

21 JUSTICE GORSUCH: -- there's never  
22 going to be an abuse of discretion? It would be  
23 very unlikely for there to be an abuse of  
24 discretion to refuse to --

25 MR. BURGESS: To deny the motion?

1 JUSTICE GORSUCH: Yeah, to deny it.

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

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

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

21 MR. BURGESS: Sure, Justice Kagan.

22 JUSTICE KAGAN: Your friends on the  
23 other side cite Crosby, Gonzalez v. Crosby, and  
24 -- and note that there was no distinction made  
25 there between petitions -- Rule 60(b) petitions

1 that were filed within the 28 days and after the  
2 28 days.

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

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

19 Some courts have adopted a bright-line  
20 rule that anything filed within the 28 days is  
21 going to be treated as though it is a 59(e)  
22 motion. And that's the position the Rules  
23 Committee adopted and it makes it clear in the  
24 Advisory Committee notes that Rule 60(b) is on  
25 the list within 4(a).

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

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

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

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

25 So it creates a risk of piecemeal

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

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

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

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

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

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

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

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

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

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

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

23 And after the court makes that  
24 determination, it then has to decide, well,  
25 suppose this is a mixed, you know, Rule 59(e)

1 motion in the sense that it raises some things  
2 that are claims but some things that are not  
3 because it goes into the integrity of the  
4 federal proceeding. There's no clarity under  
5 the other side's approach how the court is  
6 supposed to handle that.

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

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

23           And if there is something there or if  
24 there's something that needs to be clarified,  
25 the judge can do that as well, and that can



1 greatly make the appellate process more  
2 efficient.

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

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

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

22 And to return to the point I was  
23 making at the outset, that's quite different  
24 from the situation in Gonzalez, where you have a  
25 Rule 60(b) motion that can be filed years after

1 the judgment and presents obvious opportunities  
2 to circumvent AEDPA's restrictions by reopening  
3 cases that would otherwise be closed, unless you  
4 could satisfy 2244.

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

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

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

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

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

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

22 And we think it -- it does not make  
23 sense to rewrite the plain terms of Appellate  
24 Rule 4(a) in a way that is going to make it such  
25 that individuals like Mr. Banister, often pro se

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

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

12 CHIEF JUSTICE ROBERTS: Thank you,  
13 counsel.

14 Mr. Hawkins.

15 ORAL ARGUMENT OF KYLE D. HAWKINS  
16 ON BEHALF OF THE RESPONDENT

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

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

1 in Gonzalez.

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

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

17           The third is AEDPA's purposes. As  
18 Justice Alito pointed out, AEDPA exists to  
19 promote finality and to streamline proceedings  
20 by moving cases along to their next stage.  
21 That's why Habeas Rule 11 allows a petitioner to  
22 seek reconsideration of the district court's  
23 order denying a certificate of appealability,  
24 but it also provides that such a motion for  
25 reconsideration does not extend the notice of

1 appeal deadline. Yet, according to Banister, he  
2 could thwart that rule by simply attacking the  
3 merits of the judgment and thereby grant himself  
4 an extension that Rule 11 would otherwise deny.

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

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

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

25 MR. HAWKINS: Well, Your Honor, first,

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

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

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

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

22                If he'd simply refiled that thousand  
23       pages' worth of material stylized as a Rule  
24       59(e) motion, it likely would have taken the  
25       district court much longer to go through that

1 and figure out whether there's any --

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

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

25 So you tell me who -- who's got the



1 better of the efficiencies?

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

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

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

22 MR. HAWKINS: Well, Your Honor, this  
23 Court has recognized that baked into that is a  
24 requirement that the motion satisfy the  
25 preconditions to filing. For example, we see in

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

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

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

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

1 59(e) so that it extends the appeal time  
2 inordinately?

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

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

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

23 JUSTICE BREYER: We can -- we can -- I  
24 don't know if we can find that out, but, I mean,  
25 intuitively, I do not have that experience, but

1 there are judges on this bench who do have the  
2 experience of being a district judge, so I guess  
3 they'll have a view.

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

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

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

19 JUSTICE BREYER: Well, is that the  
20 reason, or is it because it's an efficient way  
21 of getting the judge to correct his own errors?  
22 You don't have to answer that, but what I'm  
23 thinking of is you're right, that if 59 does  
24 about the same thing after the final judgment,  
25 in 28 days, most of them will be dismissed,

1 28-day extension, 20-day extension. But let's  
2 look at the ones that are granted.

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

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

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

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

25 MR. HAWKINS: Well, Justice Breyer, a

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

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

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

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

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

1 clerical error, we don't object to the district  
2 court fixing that because that's not a habeas  
3 claim.

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

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

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

1 another. It can immediately form --

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

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

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

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



1 versus Perkins.

2 JUSTICE KAGAN: Well, I thought that  
3 that --

4 MR. HAWKINS: AEDPA --

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

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

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

24 JUSTICE GINSBURG: But -- but 60 --  
25 60(b) is a discrete proceeding, and it results

1 in a separate appeal from the ruling. 59(e) is  
2 so tightly tied to that first judgment, I mean,  
3 if -- if the -- if the motion is denied, then  
4 that disposition merges into the final judgment  
5 and you have one, not two documents, from which  
6 you appeal.

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

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

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

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

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

1 judgment, the district court has to say whether  
2 it's granting a certificate of appealability or  
3 denying a certificate of appealability.

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

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

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

22 MR. HAWKINS: Well, Justice Kavanaugh,  
23 I think that Congress did include text that  
24 clearly supplanted that, and it is the second or  
25 successive bar in Section 2244 which says that

1 if you're filing a piece of paper that has  
2 habeas claims and it's --

3 JUSTICE KAVANAUGH: How about an  
4 amended complaint then?

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

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

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

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

1 the case out of the district court into the  
2 court of appeals.

3 Second --

4 JUSTICE GINSBURG: But it's the final  
5 --

6 MR. HAWKINS: -- it's a general rule  
7 of --

8 JUSTICE GINSBURG: -- judgment that  
9 gets suspended at least for appeal purposes.  
10 The finality is suspended.

11 MR. HAWKINS: That's not correct,  
12 Justice Ginsburg. The final judgment in any  
13 civil case can be executed immediately. It's  
14 immediately a basis for collateral estoppel, for  
15 claim preclusion, it can immediate --

16 JUSTICE GINSBURG: Yes, but, for  
17 purposes of appeal, it isn't. It -- it is  
18 suspended for that purpose.

19 MR. HAWKINS: No, that's also not  
20 correct, Justice Ginsburg. The deadline to  
21 appeal is suspended when a 59(e) is filed, but  
22 you can still file a notice of appeal  
23 immediately. That's covered by FRAP 4(a)(4)(B).

24 So the notion that there's any  
25 suspension of finality, I think, is a misnomer,

1 and it's not the correct way to look at it.  
2 Rule 4 is simply saying that if you file a  
3 59(e), the deadline to appeal is suspended, but,  
4 in all other respects, that judgment is still  
5 final, it's still the basis of all the things  
6 that I indicated earlier, and within the meaning  
7 of Rule 11, that's the turning point when we're  
8 done in district court and we're going on to the  
9 court of appeals.

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

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

25 So the district court has no

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

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

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

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

24 Is that what your view is?

25 MR. HAWKINS: Not quite, Justice

1 Breyer. What -- my view is this: That piece of  
2 paper that Your Honor is talking about has to be  
3 routed through the court of appeals in order for  
4 the district court to entertain it.

5 JUSTICE BREYER: Yeah.

6 MR. HAWKINS: But I'm not saying that  
7 AEDPA divests district courts of their inherent  
8 --

9 JUSTICE BREYER: I didn't --

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

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

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

20 CHIEF JUSTICE ROBERTS: Sure.

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



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

6 CHIEF JUSTICE ROBERTS: Thank you,  
7 counsel.

8 MR. HAWKINS: Thank you.

9 CHIEF JUSTICE ROBERTS: Mr. Snyder.

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

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

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

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

1 this happens regularly but have identified just  
2 three cases in more than 20 years in which it's  
3 actually occurred.

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

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

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

22 JUSTICE KAVANAUGH: Well --

23 MR. SNYDER: -- the benefits --

24 JUSTICE KAVANAUGH: -- 59(e) is not  
25 wildly successful in any context. So your

1 argument is really an argument against 59(e). I  
2 mean, I don't know that there's statistics that  
3 say it's any less successful or -- or  
4 significantly less successful in this context.

5 MR. SNYDER: So, Your Honor, I think  
6 that the key distinction is that in the context  
7 of habeas, when you're talking largely about pro  
8 se litigants, you're dealing with people who  
9 don't have the same constraints in terms of the  
10 motions that they're willing to file as regular  
11 litigants. A regular litigant has to pay a  
12 lawyer to file that motion. And if so -- so if  
13 there's no chance that that motion is going to  
14 be granted, they just don't file it.

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

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

19 (Laughter.)

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

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

24 MR. SNYDER: They may, but lawyers  
25 also have responsibilities to their clients to

1 move the case along to the court of appeals.

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

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

12 MR. SNYDER: Justice Kavanaugh, I  
13 don't agree with that. The only case prior to  
14 AEDPA that had asked whether a Rule 59(e) motion  
15 could qualify as a second or successive petition  
16 held that it could.

17 Now my friend on the other side says  
18 that courts entertained Rule 59(e) motions, but,  
19 as Justice Alito pointed out, it made perfect  
20 sense in a pre-AEDPA world to say there's no  
21 jurisdictional bar with respect to second or  
22 successive petitions. The standard that I'm  
23 going to apply is a malleable ends-of-justice  
24 standard. I'm just going to cut to the chase  
25 and say, however you want to think about this

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

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

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

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

1 appropriate.

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

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

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

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

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

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

1 couple of reasons for that.

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

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

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

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

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

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

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

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

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



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

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

11 MR. SNYDER: I'm not -- I'm not --

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

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

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

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

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

25 MR. SNYDER: But --

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

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

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

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

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

1 you know, significantly different.

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

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

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

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

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

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

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

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

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel.

3 Five minutes, Mr. Burgess.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23            Well, that requirement comes right in  
24    the text of the rule itself. It has to be a  
25    motion under Rule 59(e) to alter or amend the



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

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

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

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

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

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## Official

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