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
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

BRIEF OF *AMICI CURIAE* LAW PROFESSORS WITH EXPERTISE IN HABEAS CORPUS AND CIVIL PROCEDURE IN SUPPORT OF PETITIONER

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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 AMICI CURIAE

Amici curiae, listed in the Appendix, are law professors and legal scholars who study federal post-conviction law and civil procedure. *Amici curiae* have no personal interest in the outcome of this case. They all share an interest in seeing habeas law applied in a way that ensures the just and timely adjudication of claims while preserving the traditional and intended operation of the Federal Rules of Civil Procedure.[1]

SUMMARY OF ARGUMENT

Timely Rule 59(e) motions should never be recharacterized as second or successive habeas petitions under *Gonzalez v. Crosby*. Doing so, and thereby treating them like Rule 60(b) motions, is inconsistent with the history of Rule 59 and the basic purpose of 28 U.S.C. § 2244: to foreclose procedural vehicles for abusing the writ of habeas corpus.

First, AEDPA's restrictions on "second or successive" habeas petitions, appearing in 28 U.S.C. § 2244, were adopted to prevent prisoners from abusing the habeas writ by inundating the courts with claims already disposed of in a final judgment or unjustifiably omitted from a prior petition. The statute largely incorporated preexisting, judge-made limitations on successive habeas petitions. But the abuse-of-the-writ doctrine incorporated into § 2244(b) never limited prisoners' ability to ask a trial court to fix its own

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[1] In accordance with Supreme Court Rule 37.6, *Amici* state that no counsel for a party authored this brief in any part, and that no person or entity, other than *Amici* and their counsel, made a monetary contribution to fund its preparation and submission. All parties have consented in writing to the filing of this brief.

errors, prior to appeal and during a prisoner's *first* federal habeas proceeding.

Second, Rule 59(e)'s origins make clear that—unlike Rule 60(b)—it represents a court's exercise of inherent authority to perfect the *initial* judgment. Rule 59(e) traces to the English legal tradition permitting trial courts to modify judgments during the court term. The opportunity to seek amendment of the judgment for a limited period of time—to, for example, correct clear errors—was considered essential to the formation of a final, appealable judgment. The key distinction between what has become Rule 59(e) and what has become Rule 60(b) was timing. Motions for in-term rehearings or new trials (the predecessors to Rule 59(e) motions) provided courts with the opportunity to correct their own errors while tolling the time for appeals. Conversely, Rule 60(b) derives from exceptions to the general rule preventing courts from modifying judgments after the end of the term, which permitted parties to seek vacatur or to prevent enforcement *after* the term had ended.

Third, in light of this history and of the operation of the current Rule 59(e), a Rule 59(e) motion in a federal habeas case does not present the abuse-of-the-writ concerns to which § 2244(b) is addressed. Because a Rule 59(e) motion must be brought within a limited period of time after judgment and because it tolls the time to appeal, it forestalls—rather than allows—piecemeal litigation. Nor does it threaten the finality of judgments or dissipate judicial resources. And because the rule does not allow petitioners to reallege old claims or abusively raise new ones, it does not encourage the repetitive petitions that the abuse-

of-the-writ doctrine—and § 2244(b) itself—guards against.

ARGUMENT

Rule 59(e) motions, unlike Rule 60(b) motions, do not present the abuse-of-the-writ concerns motivating Congress's restrictions on successive habeas petitions. Comparing the history of § 2244(b) to that of Rules 59(e) and 60(b) makes clear that Rule 59(e) motions should not be recharacterized as second or successive petitions under § 2244(b).

I. 28 U.S.C. § 2244(B) CODIFIED LONGSTANDING JUDGE-MADE RULES DISCOURAGING PRISONERS FROM MOUNTING REDUNDANT AND PIECEMEAL ATTACKS ON A JUDGMENT.

The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996), ("AEDPA"), amended the statutes governing federal post-conviction process. Relevant here, 28 U.S.C. § 2244(b) restricts "second or successive" habeas corpus applications.

Although the term "second or successive" is undefined in the habeas statutes, it "takes its full meaning from [the] case law, including decisions predating the enactment of [AEDPA]." *Panetti v. Quarterman*, 551 U.S. 930, 943-44 (2007). Indeed, § 2244(b) largely codified the judge-made "abuse-of-the-writ doctrine." Its provisions foreclose serial, piecemeal attacks on a prisoner's conviction or sentence. But as the history of the abuse-of-the-writ doctrine makes clear, the bar on "second or successive" petitions was never aimed at limiting prisoners' ability to use their *first* federal habeas proceeding to fully litigate available claims.

A. Amendments to § 2244 Incorporated Preexisting Judge-Made Limitations on Abuses of the Habeas Writ.

The 1996 amendments to § 2244(b) reflect the judge-made restrictions that this Court had placed on prisoners seeking to assert claims that either were presented in a previous federal habeas petition or were new, but previously available. Specifically, AEDPA tightened restrictions on reasserting previously adjudicated claims, and it largely codified a judge-made "cause and prejudice" standard for new claims. In the process, it also transformed the judge-made affirmative defense into a jurisdictional rule that requires appellate authorization before successive habeas litigation can begin. The judge-made law that preceded AEDPA therefore provides important guidance as to the meaning of § 2244(b)—and its limitations. *See Panetti*, 551 U.S. at 943-44.

1. The abuse-of-the-writ doctrine developed in response to legislation and corresponding judicial decisions expanding the role the writ played in scrutiny of state judgments.

The Act of February 5, 1867 (the "1867 Act") expanded the scope of federal courts' power to issue habeas writs. Among other things, the Act extended the privilege to state prisoners for whom "the conviction has been in disregard of the[ir] constitutional rights," *Waley v. Johnston*, 316 U.S. 101, 105 (1942); *see also* Act of Feb. 5, 1867 ch. 28, 14 Stat. 385, 385-86; *Felker v. Turpin*, 518 U.S. 651, 659 (1996). Thus, for the first time with the passage of the 1867 Act, the writ could be used to collaterally review state convictions.

The 1867 Act also granted to prisoners, for the first time, the right to appeal adverse habeas rulings. *See* 14 Stat. at 385-86 (granting right to appeal denials of writ to federal courts of appeals and the Supreme Court); *McCleskey v. Zant*, 499 U.S. 467, 477-79 (1991) (summarizing early history of scope of the writ); Note, *The Freedom Writ – The Expanding Use of Federal Habeas Corpus*, 61 Harv. L. Rev. 657 (1948) (same).[2]

Before the 1867 Act, orders denying habeas petitions could not be reviewed by an appellate court, which meant that a successive habeas petition was a prisoner's only recourse after an adverse ruling. *See McCleskey*, 499 U.S. at 479. Once prisoners were granted the right to appeal, however, courts sought to reduce successive habeas filings through procedural limitations.

2. Specifically, judges developed the abuse-of-the-writ doctrine in reaction to the concern that prisoners would abuse the habeas process by filing "endless applications" raising the same arguments or new arguments that could have been presented in their first federal habeas action. *Id.* at 481; *see also Dorsey v. Gill*, 148 F.2d 857, 862 (D.C. Cir. 1945) (noting concerns that prisoners would submit meritless requests, unduly delay the court process, or harass the court).

This concern was driven in part by the fact that at common law, *res judicata* did not attach to a court's

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[2] The right to appeal an adverse ruling was removed and replaced several times by subsequent statutes, including Revised Statutes §§ 763 & 764. *See Horn v. Mitchell*, 243 U.S. 247, 249-50 (1917); *Ex Parte Royall*, 117 U.S. 241 (1886).

denial of habeas relief. *See Sanders v. United States*, 373 U.S. 1, 7-8 (1963). This Court has often reiterated that because *res judicata* did not apply, a "renewed application could be made to every other judge or court in the realm, and each court or judgment was bound to consider the question of the prisoner's right to a discharge independently, and not to be influenced by the previous decisions refusing discharge." *Schlup v. Delo*, 513 U.S. 298, 317 (1995) (citations omitted). Unlimited, successive petitions were routine, and courts noted that some prisoners were filing upwards of 50 petitions each. *See Dorsey*, 148 F.2d at 862.

Once prisoners obtained the right to appeal denials of habeas petitions, the question of how to evaluate repetitive collateral attacks percolated through the lower courts, until a pair of 1924 cases, *Salinger v. Loisel*, 265 U.S. 224, and *Wong Doo v. United States*, 265 U.S. 239, set forth the guideposts federal courts were to use for successive petitions. They held that *res judicata* did not formally apply to the denial of a prior habeas petition, but the fact that a first application had been refused might justify a refusal of the second. *Salinger*, 265 U.S. at 231-32 (citing *Ex parte Cuddy*, 40 F. 62, 65-66 (C.C.S.D. Cal. 1889); *In re Simmons*, 45 F. 241, 241 (C.C.E.D.N.Y. 1891); *Ex parte Moebus*, 148 F. 39, 40-41 (C.C.D.N.H. 1906)). Specifically, the court directed that "a prior refusal to discharge on a like application" "may be considered, and even given controlling weight," *id.* at 231, as could a previous denial of the writ when the petitioner "had [a] full opportunity to offer proof of [the grounds] at the hearing *on the first petition*" but had simply "reserve[d] the proof . . . to support a later petition," *Wong Doo*, 265 U.S. at 241 (emphasis added).

3. The statutory precursor to the current version of 28 U.S.C § 2244(b) was enacted in 1948, and *Sanders v. United States*, 373 U.S. 1 (1963), set forth the standard courts were to apply for evaluating successive petitions under that statute. Abuse of the writ was an affirmative defense that the Government had the burden of pleading. *Id.* at 10-11. For previously raised claims, "controlling weight" might be given to the previous denial if it involved the same ground, determined on the merits, and "the ends of justice would not be served by reaching the merits of the subsequent application." *Id*. at 15.

For claims not previously raised or not adjudicated on the merits, the Court applied a "deliberate[ ] abandon[ment]" standard. A court was to give "[f]ull consideration of the merits of the new application" unless "there ha[d] been an abuse of the writ or motion remedy." *Id*. at 17-18. Referring to *Wong Doo*, the Court explained that one example of such an abuse was if "a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, *in the hope of being granted two hearings rather than one*." *Id.* at 18 (emphasis added).

Some 30 years later, the Court again addressed the abuse-of-the-writ standard in *McCleskey v. Zant*, 499 U.S. 467 (1991). For successive petitions, *McCleskey* brought the abuse-of-the-writ standard into line with the "cause and prejudice" standard applied to determine when a state prisoner's procedural default may be excused. *See id.* at 493-96 (citing *Wainwright v. Sykes*, 433 U.S. 72 (1977)). For new claims not raised in an initial petition, the Court held that abuse of the writ was not confined to instances of deliberate

abandonment. *Id*. at 489. It also included failing to raise a claim through inexcusable neglect. *Id*.

McCleskey therefore culminates a line of cases, dating back at least to *Salinger* and *Wong Doo*, reflecting concerns that, in order to delay the imposition of final judgment, prisoners were serially presenting the same claims or asserting new ones that they withheld from a prior petition. But in *none* of these cases did this Court apply, or even consider applying, the abuse-of-the-writ doctrine to limit a prisoner's ability to fully litigate his claims in his *first* federal habeas proceeding. Rather, throughout the development of this doctrine, it was taken as a given that the prisoner would have the opportunity to litigate his first petition to final judgment.

4. Building on this history, AEDPA's amendments to § 2244 incorporated these judge-made standards for abuse of the writ, while also placing additional limitations on the availability of successive petitions.

First, subsection (b)(1) is an outright bar to claims previously presented in a prior application: "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) (emphasis added). Under *Sanders*, it had been the rule that "successive applications were properly denied [when the prisoner] sought to retry a claim previously fully considered and decided against him." 373 U.S. at 9. AEDPA's mandatory language, however, supplants the *Sanders*' exception, which applied when "the ends of justice would . . . be served by reaching the merits of the subsequent application" concerning the same claim. *See id.* at 15-17.

Second, subsection (b)(2) bars new claims presented in a second or successive application that were not presented in a prior application, except under specified narrow circumstances: the claim relies on a new rule of constitutional law that is made retroactive by the Supreme Court, or the claim is based on a new factual predicate not previously discovered through due diligence that, if proven, would establish the prisoner's innocence by clear and convincing evidence. 28 U.S.C. § 2244(b)(2)(A)-(B). The new factual predicate provision of section (b)(2)(B) thereby tracks the cause-and-prejudice standard that existed under *McCleskey*. Moreover, subsections (b)(3) and (b)(4) convert what had been an affirmative defense into a jurisdictional bar, by requiring that a prisoner move the circuit court for an order authorizing a successive application before filing the second or successive petition in district court, and mandating that the district court nevertheless dismiss any such authorized claim if it does not satisfy the statutory requirements of (b)(2). *Id.* § 2244(b)(3), (b)(4); *see also Burton v. Stewart*, 549 U.S. 147, 152-53 (2007) (describing authorization process); *Stewart v. Martinez-Villareal*, 523 U.S. 637, 641-42 (1998) (describing the AEDPA "gatekeeping mechanism"). As the next step in the "evolutionary process" of the abuse-of-the-writ doctrine after *McCleskey*, AEDPA's "added restrictions" further limit prisoners' ability to assert new claims in a successive petition. *See Felker*, 518 U.S. at 664.

B. The Purpose of § 2244(b), Like the Purpose of the Abuse-of-the-Writ Doctrine Before It, Was to Force Petitioners to Consolidate All of Their Existing Arguments into One Proceeding Rather Than Bring Serial Attacks.

Section 2244(b)—like the abuse-of-the-writ doctrine before it—was adopted to foreclose procedural vehicles that would enable prisoners to bring serial attacks on their sentence. The statute targets the two familiar strategies for extending litigation: re-asserting old claims and asserting new ones that could have been included in a prior petition. As a result, prisoners are required to consolidate all of their available arguments into one federal habeas proceeding, subject to a single appeal.

1. Legislative history confirms that the primary purpose of § 2244(b) was to prevent prisoners from abusing habeas procedures to re-allege old claims or allege previously available claims for the first time. The goal was to require prisoners to bring all of their claims in a single federal petition.

Section 2244(b)'s restrictions were implemented after years of discussion and review by Congress, the American Bar Association, and committees of the Court. In 1988, Chief Justice Rehnquist commissioned the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases to examine "the necessity and desirability of legislation directed toward avoiding delay and the lack of finality" in capital habeas cases, and appointed retired Justice Lewis F. Powell to chair it. Judicial Conference of the United States, Ad Hoc Comm. on Fed. Habeas Corpus in Capital Cases, Comm. Report and Proposal (Lewis F. Powell, Jr.,

Chairman, Aug. 23, 1989), *reprinted in* Habeas Corpus Reform: Hearings Before the S. Comm. on the Judiciary, S. Hrg. 101-1253, 101st Cong. 7-30 (1991), at 8 [hereinafter "Powell Report"]; *see* Report on Habeas Corpus in Capital Cases, 45 Crim. L. Rep. 3239, 3239 (1989).

The resulting report of the Committee, usually referred to as the "Powell Report," recommended limiting the availability of habeas relief in cases of "unnecessary delay and repetition." Powell Report at 9. Echoing the same concerns raised by the judiciary, the Committee observed that the habeas process "fosters piecemeal and repetitive litigation of claims. Because *res judicata* is inapplicable to federal habeas proceedings, many capital litigants return to federal court with second—or even third and fourth—petitions for relief. Current rules governing abuse of the writ and successive petitions have not served to prevent these endless filings." *Id.* at 10. The report recommended eliminating entirely successive petitions that raise a previously considered claim, and curtailing courts' power to hear new-but-previously-available claims to cases where the facts underlying the claim cast doubt on guilt.

As Justice Powell explained, the proposal "would enhance finality by limiting the circumstances in which federal relief may be sought after one full course of litigation up to the Supreme Court. The proposal would strictly limit subsequent and successive petitions. That is, after having one full and fair course of review, a prisoner should not be allowed to return to court to seek delay." *Id.* at 42; *see also* Vivian Berger, *Justice Delayed or Justice Denied? A Comment on Recent Proposals to Reform Death Penalty Habeas*

Corpus, 90 Colum. L. Rev. 1665, 1682-83 (1990); *Legislative Modification of Habeas Corpus in Capital Cases*, 44 Rec. NYC Bar Assoc. 848, 857-59 (1989).

The Powell Report was submitted to Congress in September 1989, and its findings heavily influenced Congressional habeas reform. Over the next several years, Congress considered several bills that would limit repeated attempts for habeas relief, culminating in AEDPA.

The 1995 Senate Judiciary Committee hearing on AEDPA confirms that Congress was centrally concerned with preventing multiple, successive petitions. *See Federal Habeas Corpus Reform: Eliminating Prisoners' Abuse of the Judicial Process: Hearing on S. 623 Before the S. Comm. on the Judiciary*, 104th Cong. (Mar. 28, 1995) [hereinafter "*S.623 Hearing*"]. For example, Senator Arlen Specter, a co-sponsor of the bill and a pivotal figure in the post-Powell Report era of habeas reform, noted that the proposed legislation would "provide for a timely filing of a petition, time limits for the courts to consider it, subsequent petitions on very limited grounds filed in the district court only if there is an allowance specially from the court of appeals, and a definite way of trying to stop the virtually endless litigation." *Id.* at 4; *see generally* Lee Kovarsky*, AEDPA's Wrecks: Comity, Finality, and Federalism,* 82 Tul. L. Rev. 443 (2007).

At the same time, legislators did not intend to curtail a prisoner's first opportunity to fully litigate his federal habeas petition. Senator Orrin Hatch, co-sponsor and Chairman of the Committee, explained that the legislation would "guarantee prisoners one complete and fair course of collateral review in the Federal System," while also "establish[ing] time limits

to eliminate unnecessary delay and to discourage those who would use the System to prevent the imposition of a just sentence" and "abuse[] the writ in an effort to delay the imposition of just punishment." *S.623 Hearing* at 2, 3. Then-Senator Joe Biden also cited the lack of statutory limits on the number of petitions or on the time within which a petition must be filed as contributing to abuse of the writ and frivolous habeas petitions. *Id.* at 21. He encouraged the Committee to "abolish abuse of the writ without losing the great writ itself." *Id.*

The ultimate bill attempted to address these concerns and implemented key recommendations from the Powell Report. Its amendments were designed to "curb the abuse of the statutory writ of habeas corpus." H.R. Conf. Rep. No. 104-518, at 111 (1996).

2. Shortly after § 2244(b) was enacted, this Court explained that "[t]he new restrictions on successive petitions constitute a modified *res judicata* rule, a restraint on what is called in habeas corpus practice 'abuse of the writ.'" *Felker*, 518 U.S. at 664. Because the statute "codified the longstanding abuse-of-the-writ doctrine," *Boumediene v. Bush*, 553 U.S. 723, 774 (2008), the concerns motivating that doctrine pervade application of § 2244(b). *See Panetti*, 551 U.S. at 943-44 (holding that the phrase "second or successive" takes its meaning from pre-AEDPA case law); *see also Martinez-Villareal*, 523 U.S. at 644. And as already demonstrated, this Court had never deemed a prisoner's efforts to fully litigate his claims in his first federal habeas proceeding an abuse of the writ.

II. THE COMPARATIVE HISTORY OF RULES 59(E) AND 60(B) ESTABLISHES THAT A RULE 59(E) MOTION ENABLES THE DISTRICT COURT TO PERFECT A FINAL JUDGMENT PRIOR TO APPEAL.

The historical antecedents to Rule 59(e) establish that the rule is part of the process of producing an *initial* final judgment prior to appeal. It is not—and has never been—a vehicle to bring successive challenges to a final judgment.

Specifically, the Rule derives from the plenary power of common law and equity courts to correct their own judgments during term, for a *limited* time after judgment is entered. Its historical analogues tolled the time for appeal and allowed trial courts to correct errors of law or fact in order to perfect a single, final judgment subject to one appeal.

In contrast, Rule 60(b) derives from procedures used by litigants to challenge judgments after term had ended and that could be brought even after an appeal had concluded. In short, Rule 59(e) is process necessary to perfect a final judgment, and Rule 60(b) is process for attacking one.

A. Rule 59(e) Traces to Courts' Inherent Authority to Grant New Trials or to Grant Rehearing During the Court Term and Before an Appeal.

Under Rule 59(e), litigants may move to "alter or amend a judgment" within "28 days after the entry of the judgment." Fed. R. Civ. P. 59(e). Federal courts invoke this rule to "support reconsideration of matters properly encompassed in a decision on the merits." *White v. New Hampshire Dep't of Emp't Sec.*, 455 U.S. 445, 451 (1982). The district court's authority under

Rule 59(e) to reconsider a judgment traces back to Equity Rule 69, which allowed litigants to seek rehearing of a court's judgment during the court term; and to the court's inherent power in cases at law to grant a new trial.

1. Historically, a court's inherent authority to set aside its own judgments was subject to the "term rule." Terms of the court, the commencement of which was prescribed by statute or rule, set the time within which the business of the court must be transacted. During the "term," "all the judgments, decrees, or other orders of the courts, however conclusive in their character, [we]re under the control of the court which pronounce[d] them . . . and they [might] then be set aside, vacated, modified, or annulled by that court." *Bronson v. Schulten*, 104 U.S. 410, 415 (1881). Indeed, when a court set aside a judgment during the term in which the judgment was rendered, "it [was] as though it had never been." *Henderson v. Carbondale Coal & Coke Co.*, 140 U.S. 25, 40 (1891); *see also Basset v. United States*, 76 U.S. 38, 41 (1869); *Doss v. Tyack*, 55 U.S. 297, 313 (1852); *see generally* James W.M. Moore & Eizabeth B.A. Rogers, *Federal Relief from Civil Judgments*, 55 Yale L.J. 623, 627-31 (1946). The court was empowered during the term to modify its judgment either on motion of a party or on its own volition. *See, e.g.*, *Zimmern v. United States*, 298 U.S. 167, 169-70 (1936) ("The judge had plenary power while the

term was in existence to modify his judgment for error of fact or law or even revoke it altogether.").[3]

Once the term ended, however, under the term rule, the district court lost this plenary authority to revisit, amend, or alter its judgment to correct mistakes of fact or law. *See, e.g.*, *United States v. Mayer*, 235 U.S. 55, 67 (1914) ("[T]he general principle obtains that a court cannot set aside or alter its final judgment after the expiration of the term at which it was entered, unless the proceeding for that purpose was begun during that term.").[4]

2. For courts sitting in equity, the term rule was explicitly codified in the Federal Rules of Equity. Under Equity Rule 69 of the Federal Rules of Equity of

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[3] The court "term" was typically a number of months, and although commencement of the court term could be set by statute or rule, adjournment of the court term rested in the discretion of the court. *See United States v. Pitman*, 147 U.S. 669, 670-71 (1893); *see also* Act of Sept. 6, 1916, Pub L. No. 64-258, 39 Stat. 726 ("The Supreme Court shall hold at the seat of government one term annually, commencing on the first Monday in October and such adjourned or special terms as it may find necessary for the dispatch of business."). For example, in the Act of Jan. 16, 1925, Congress provided for bi-annual terms for the federal district court in Indianapolis; the term started on the first Mondays of May and November each year and was not "limited to any particular number of days." Pub. L. No. 68-324, 43 Stat. 751.

[4] With the codification of 28 U.S.C. § 452 in 1948 and the adoption of Federal Rule of Civil Procedure Rule 6(c), both of which provided that the power of courts was not limited by the term of the court, the significance of the court term has lessened under federal law. It remains true, however, that the origins of Rule 59 are closely linked to the court's inherent authority during the term to reconsider its rulings.

1912, petitions for rehearing were for correcting mistakes of fact or law and "for the purpose of directing attention to matters said to have been overlooked or mistakenly conceived in the original decision, and thus [to] invite[] a reconsideration upon the record upon which that decision rested." *Atchison, T. & S.F. Ry. Co. v. United States*, 284 U.S. 248, 259-60, (1932); *see generally Motorfrigerator Co. v. Frigidaire Sales Corp.*, 59 F.2d 622, 626 (4th Cir. 1932) (denying petition for rehearing because it was supported by merely cumulative evidence and untimely under Equity Rule 69); *Sheeler v. Alexander*, 211 F. 544, 545 (N.D. Ohio 1913) (evaluating petition for rehearing under Equity Rule 69 after discovery of new evidence).[5]

Equity Rule 69 strictly limited the timing of such petitions, providing that "[n]o rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Circuit Court of Appeals or the Supreme Court." Equity Rules of 1912, Rule 69; *see also Roemer v. Simon*, 91 U.S. 149, 150 (1875) ("The court below cannot grant a rehearing after the term at which the final decree was rendered.").

While the Rule went on to provide that "if no appeal lies, the petition may be admitted at any time before the end of the next term of the court in the discretion of the court," this was also a firm time limitation on the court's authority. *See Easton v. Houston & T.C. Ry. Co.*, 44 F. 7, 10 (C.C.E.D. Tex. 1890) (holding this

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[5] The 1912 Rule 69 is substantively identical to Rule 88 of the Equity Rules of 1842, *see* Equity Rules of 1912, Rule 69 (note), and Rule 31 of the Equity Rules of 1822, *see* Equity Rules of 1822, Rule 31 (text).

time bar to be "equally absolute" and an order granting rehearing in violation of the rule to be void). And in either case, a petition for rehearing under Equity Rule 69 could not be used to attack a judgment that had already been litigated on appeal. *See also infra* Part II.A.4 (discussing relationship between timely rehearing petitions and timing of appeal).

3. For courts sitting at law, during the term, new trials were granted "'for all sorts of errors and mistakes on the part of the jury;' and . . . for error of law on the part of the trial judge." 12 Moore's Federal Practice – Civil § 59 App. 100; *see also* Judiciary Act of 1789, § 17, 1 Stat. 83. Courts sitting at law also availed themselves of the equitable power to entertain, and grant, petitions for rehearing. *See, e.g.*, *Kingman & Co. v. W. Mfg. Co*., 170 U.S. 675, 679 (1898) (noting that previous court decisions didn't make "any distinction between a motion for a rehearing in a suit in equity and a motion for a new trial in an action at law"); *Bronson*, 104 U.S. at 415.

In all cases, this authority was curtailed by the expiration of the court's term. *See Giant Powder Co. v. California Vigorit Powder Co.*, 5 F. 197, 202 (C.C.D. Cal. 1880) (describing the court's term jurisdiction over the case in both law and equity). "[J]udgments at law [could] not be vacated or substantially modified by the courts which rendered them subsequent to the expiration of the terms at which they were entered, in the absence of motions or proceedings for that purpose during such terms[.]" *City of Manning v. German Ins. Co.,* 107 F. 52, 56 (8th Cir. 1901).

Indeed, the term limitation was understood to be an inherent restriction on federal courts' authority. Prior to the Federal Rules of Civil Procedure, federal

courts sitting at law generally borrowed from the procedural rules of the state in which they were located. *Austin v. Riley*, 55 F. 833, 835 (C.C.S.D. Iowa 1893) (stating that "[t]he practice, pleadings, and forms and modes of proceeding in [federal] civil cases" generally "conform[ed] to the practice and modes of proceeding existing in the courts of the state"). But the term rule limited federal courts' ability to entertain and grant new trials or rehearing motions even where state procedural rules would have allowed them. *See Fishburn v. Chicago, M. & St. P. Ry. Co.*, 137 U.S. 60, 60 (1890) ("In regard to motions for new trial and bills of exceptions, courts of the United States are independent of any statute or practice prevailing in the courts of the state in which the trial is had."). This was because, as this Court explained, "[t]he question relates to the *power* of the [federal] courts, and not the mode of procedure"—something state rules could not change. *Bronson*, 104 U.S. at 417.

4. At both law and equity, the timely filing of a motion for rehearing or a motion for a new trial suspended the time for appeal. *Morse v. United States*, 270 U.S. 151, 153-54 (1926) ("There is no doubt under the decisions and practice in this court that where a motion for a new trial in a court of law, or a petition for a rehearing in a court of equity, is duly and seasonably filed, it suspends the running of the time for taking a writ of error or an appeal, and that the time within which the proceeding to review must be initiated begins from the date of the denial of either the motion or petition."); *see also, e.g.*, *Aspen Mining & Smelting Co. v. Billings*, 150 U.S. 31, 36 (1893) (holding the same with respect to rehearing petitions); *United States v. Ellicott*, 223 U.S. 524, 539 (1912)

(holding the same with respect to new trial motions). This was so even in the rarer instances when a party first sought to appeal and then sought reconsideration from the district court, although the party might have had to file a second notice seeking appellate review after the district court disposed of its motion. *See Vorhees v. John T. Noye Mfg. Co.*, 151 U.S. 135, 137 (1894); *Shallas v. United States*, 37 F.2d 692, 694 (9th Cir. 1929).

5. Motions to alter or amend the judgment under Rule 59 "represent[ ] an amalgamation" of the petitions for rehearing under Equity Rule 69 and the motions for new trial available in the common law courts. Fed. R. Civ. P. 59 (advisory committee's note to 1937 adoption); *see Safeway Stores v. Coe*, 136 F.2d 771, 773 (D.C. Cir. 1943); *Jusino v. Morales & Tio*, 139 F.2d 946, 948 (1st Cir. 1944).

From the inception of the Federal Rules of Civil Procedure, Rule 59 allowed federal courts to grant new trials in cases tried before or without a jury. Fed. R. Civ. P. 59(a) (1937). For cases tried without a jury, the Rule provided that a new trial may be granted "for any of the reasons for which rehearings have heretofore been granted in suits in equity." *Id.* 59(a)(2). And, incorporating the power previously provided by Equity Rule 69, Rule 59 allowed the court to open the judgment, amend its findings of fact and conclusions of law, and direct the entry of a new judgment. *Id.*

Substantively, courts interpreted Rule 59 to encompass all requests that the court rehear or reconsider final orders regardless of whether there had been a trial, holding that the rule encompassed what were formerly petitions in equity. *See Jusino*, 139 F.2d at 948; *Safeway Stores*, 136 F.2d at 774. In 1946,

Rule 59(e) was added to the Federal Rules to confirm this understanding. *See* Fed. R. Civ. P. 59 advisory committee's notes to 1946 amendment (citing *Boaz v. Mut. Life Ins. Co. of N. Y.*, 146 F.2d 321 (8th Cir. 1944)).

The Rule eliminated, however, reliance on court "terms," originally mandating instead that Rule 59 motions be served within 10 days after entry of the judgment. *See* Fed. R. Civ. P. 59 advisory committee's note to 1946 amendment; *see also* 28 U.S.C. § 452. The time period for a Rule 59(e) motion is now 28 days. The concept that a court has a limited period of time in which to consider motions to alter or amend a judgment nevertheless remains an animating feature of Rule 59. *See Browder v. Dir., Dep't of Corr. of Ill.*, 434 U.S. 257, 271 (1978) ("The Rules, in abolishing the term rule did not substitute indefiniteness. On the contrary, precise times, independent of the term, were prescribed." (citation omitted)).

Moreover—and also like previous motions at law and equity—when a motion to alter or amend a judgment is under consideration, the motion suspends the finality of the judgment for purposes of appeal. *See* Fed. R. App. P. 4(a)(4)(A)(iv). Rule 59 thus allows courts, for a limited time after the entry of judgment, to perfect that single, final judgment prior to appeal.

B. In Contrast, Rule 60(b) Evolved from Mechanisms Allowing Courts to Set Aside Judgments *After* the Conclusion of the Court Term, and Even After All Appeals Were Exhausted.

Rule 60(b), in contrast to Rule 59(e), incorporates courts' equitable powers dating back to their English

origins to modify judgments *after* the term had ended. And Rule 60(b), like its antecedents, does not toll the time to appeal a judgment. A Rule 60(b) motion is, in essence, an attack on an already perfected judgment.

1. In English courts both at law and at equity, certain ancillary remedies were available to give relief to parties *after* the close of the term. These included, for instance, the common law writs of *coram nobis* (or *vobis*) and *audita querela*, and the equitable bill of review and bill in the nature of a bill of review. *See generally* 12 Moore's Federal Practice Civil § 60 App. 101; *Bankers Mortg. Co. v. United States*, 423 F.2d 73, 78 (5th Cir. 1970); *Fraser v. Doing*, 130 F.2d 617, 620 (D.C. Cir. 1942).

Early in this country's history, courts similarly recognized these exceptions to the "term rule"—that under some circumstances courts would correct errors even after the expiration of the term. *See Bronson*, 104 U.S. at 415-18 (surveying development of these principles in state and federal courts through the 1800s); *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944) ("[U]nder certain circumstances, . . . relief will be granted against judgments regardless of the term of their entry."); *Mayer*, 235 U.S. at 67 (similar).

2. Because they lacked time limitations—and in contrast to new trial motions and motions under Equity Rule 69, *see supra* Part II.A.4—these remedies generally did not toll the time for appeal. Indeed, their very function was to attack the final judgment independent of the ordinary course of an appeal. Prisoners could, for instance, use the common law writs to obtain post-judgment relief while in prison or even after having fully served a sentence. *See, e.g.*, *United*

States v. Mandanici, 205 F.3d 519, 524 (2d Cir. 2000) (*coram nobis*); *United States v. Ayala*, 894 F.2d 425, 429 (D.C. Cir. 1990) (*audita querela*); *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984) (vacating conviction of Fred Korematsu after he served his sentence for violating Japanese exclusion laws during WWII). And bills of review, depending on the precise nature of the challenge, would ordinarily be filed either within the same timeframe as the appeal or after appeal was taken, and only after the time period for filing a petition for rehearing had passed. *Thomas v. Brockenbrough*, 23 U.S. 146, 149-51 (1825); *Obear-Nester Glass Co. v. Hartford Empire Co.*, 61 F.2d 31, 33 (8th Cir. 1932); *Fraser*, 130 F.2d at 620; *see* Moore & Rogers, 55 Yale L.J. at 664, 674-81.

3. Rule 60(b) incorporates these ancillary remedies for challenging a judgment after the court's term had ended. *See Bankers Morg. Co.*, 423 F.2d at 78; *Safeway Stores*, 136 F.2d at 773-74; Fed. R. Civ. P. 60(b) advisory committee's note to 1946 amendment; Note, *History and Interpretation of Federal Rule 60(b) of the Federal Rules of Civil Procedure*, 25 Temp. L.Q. 77 (1951). It provides that a court may "*relieve* a party or its legal representative *from a final judgment, order, or proceeding*" for certain specified reasons including mistake, newly discovered evidence, fraud, voided judgment, satisfied judgment, and other reasons that justify relief. Fed. R. Civ. P. 60(b) (emphases added); *Crosby*, 545 U.S. at 529. Its procedures "confirm[] the courts' own inherent and discretionary power, firmly established in English practice long before the foundation of our Republic, to set aside a judgment whose enforcement would work inequity," *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 233-34 (1995)

(citation omitted); *see also, e.g.*, *Agostini v. Felton*, 521 U.S. 203, 237-40 (1997) (under Rule 60(b)(5), vacating continuing prospective injunction 12 years after it was ordered by the district court, in light of subsequent changes in Establishment Clause jurisprudence).

Rule 60(b), like its common law and equity predecessors, does not toll the time period for appeals. For example, the Advisory Committee's note to the 1946 amendment to Rule 60 explains that a motion under Rule 60(b) upon the discovery of new evidence was analogous to the procedure provided by a bill of review; and, that—unlike a motion under Rule 59 raising newly discovered evidence—it did "not affect the finality of the judgment" or "the running of the time for appeal," Fed. R. Civ. P. 60(b) advisory committee's note to 1946 amendment.[6]

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Rule 60(b) therefore derives from courts' authority to grant relief *from* an operative final judgment, even after direct appeals had been fully exhausted. In contrast, the origins of Rule 59(e) motions lie in a more temporally circumscribed set of judicial powers: district courts' authority to revisit their own judgments *during term*, and *before* any appeal had been heard.

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[6] Following the 1993 and 2009 amendments to Federal Rule of Appellate Procedure 4, today Rule 60(b) motions made within 28 days of judgment toll the time for appeal; courts typically treat these motions as Rule 59(e) motions. *See* Fed. R. App. P. 4(a)(4)(A)(vi) & advisory committee's note to 1993 amendment.

III. RULE 59(E) IS CONSISTENT WITH HABEAS PROCEEDINGS UNDER § 2244(B).

As this history indicates, Rule 59(e) motions do not present the abuse-of-the-writ concerns that § 2244(b) guards against. Reclassifying Rule 59(e) motions as second or successive petitions—and thus outside the jurisdiction of the district court—would strip district courts of their plenary authority, exercised since the founding of this country, to protect the integrity of their own judgments for a limited period following the initial entry thereof. Such a step would be entirely unjustified. "[A] prompt motion for reconsideration is well suited to the special problems and character of [habeas] proceedings." *Browder*, 434 U.S. at 271 (citation omitted); *see generally id.* at 270-71.

1. AEDPA's restrictions on second or successive petitions were motivated by concerns that prisoners would serially abuse the writ—seeking a second bite at the apple by re-alleging old claims or by alleging previously available claims for the first time. At the same time, neither § 2244(b) nor the abuse-of-the-writ doctrine that it incorporates was ever intended to limit prisoners' ability to fully litigate their first federal habeas petitions, including pursuing direct appeals. *See supra* Part I.

As its historical origins indicate, Rule 60(b) motions are vulnerable to the type of abuse § 2244(b) guards against. Rule 60(b) derives from remedies available to parties after the close of the term to obtain relief from a perfected, operative final judgment. Today, for some of the grounds specified in the Rule—including its catch-all provision allowing the court to vacate a judgment for "any other reason that justifies

relief," Fed. R. Civ. P. 60(b)(6)—there is no time limitation for bringing an attack on a final judgment. And a Rule 60(b) motion is almost always brought after a prisoner's appeal has been litigated to conclusion.

By contrast, Rule 59(e) cannot be used to cause delay or undermine finality by serially re-alleging old claims or by asserting claims omitted from a prior petition. Like its legal and equitable predecessors, a Rule 59(e) motion provides a limited window for district courts to correct clear errors of law and fact. *See Hayes Family Tr. v. State Farm Fire & Cas. Co.*, 845 F.3d 997, 1005 (10th Cir. 2017). Rule 59(e) contains a strict time limitation—28 days after entry of judgment. Rule 59(e)'s internal substantive requirements track almost precisely the principles animating § 2244(b), insofar as a motion generally "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment," *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 486 n.5 (2008) (citation omitted). In other words, it is a mechanism for the district court "to rectify its own mistakes in the period immediately following the entry of judgment," *White*, 455 U.S. at 450 (citation omitted), but not to open the door to repetitive or novel claims. Moreover, because Rule 59(e) motions toll the time for appeal, the Rule ensures that appellate courts will review only a single, final judgment in a prisoner's federal habeas action.

Combined, these features mean that allowing district courts to entertain Rule 59(e) motions in the context of federal habeas actions *conserves*, rather than "places a heavy burden on[,] scarce federal judicial resources," *McCleskey*, 499 U.S. at 491. The trial court

is in the best position to quickly evaluate motions related to recently-litigated cases and dispose of repetitive, previously available, or meritless arguments. *See Exxon Shipping Co.*, 554 U.S. at 486 n.5. At the same time, because Rule 59(e) motions toll the time to appeal, they allow district courts to quickly correct their mistakes and save appellate courts from unnecessary error correction.

In sum, allowing courts to entertain Rule 59(e) motions in habeas actions "guarantee[s] prisoners one complete and fair course of collateral review in the Federal System," without allowing "use [of] the System to prevent the imposition of a just sentence [or] . . . to delay the imposition of just punishment." *S.623 Hearing* at 2, 3.

2. Consistent with these fundamental differences, it is telling that prior to AEDPA, habeas litigants viewed Rule 59(e) and Rule 60(b) motions differently. As noted above, abuse of the writ was historically an affirmative defense that state defendants had to raise. *Sanders*, 373 U.S. at 10-11. Accordingly, whether pre-AEDPA courts were asked to adjudicate abuse-of-the-writ considerations in the Rule 59 context offers insight into how state actors—and courts—historically understood the function of Rule 59(e) in habeas cases.

Before AEDPA, examples of courts holding a Rule 59(e) motion to be an abuse of the writ are vanishingly rare. In fact, a thorough search for opinions so holding between 1946 and 1996 (in other words, after Rule 59(e) had been adopted and prior to AEDPA's adoption of a jurisdictional approach) yielded only *one* case. *See Bannister v. Armontrout,* 4 F.3d 1434, 1445 (8th Cir. 1993), *aff'g Bannister v. Armontrout*, 807 F. Supp. 516, 556-60 (W.D. Mo. 1991). And there, the district

and appellate courts both deemed the 59(e) motion an abuse of the writ because the movant had sought to litigate an entirely new ground previously available but not raised. *Id.* A Rule 59(e) motion on such grounds would automatically fail on the merits, without any need to invoke the abuse-of-the-writ doctrine. Undersigned counsel have not located *any* pre-AEDPA cases holding a Rule 59(e) motion that asserted district-court errors of law or fact to be an abuse of the writ.

By contrast, prior to AEDPA, cases holding a Rule 60(b) motion to be an abuse of the writ were common. *See, e.g., Brewer v. Ward,* 83 F.3d 431 (10th Cir. 1996) (collecting cases from the 3rd, 4th, 5th, 7th, 8th, 9th, 10th, and 11th Circuits).

This disparity demonstrates that courts and litigants alike have historically understood the basic distinction between these two motions. Rule 59(e), unlike Rule 60(b), is part of producing and perfecting a single final judgment, prior to appeal, and it does not allow repetitive, serial attacks on a final judgment.

Because Rule 59(e) motions are not inconsistent with § 2244(b), Rule 59(e) motions should not be recharacterized as second or successive petitions. *See* Fed. R. Civ. P. 81(a)(4)(A); Rule 12 Governing Section 2254 and 2255 Cases. Indeed, there is no reason grounded in function or history to do so.

CONCLUSION

This Court should reverse the judgment of the Fifth Circuit and hold that Rule 59(e) motions may not be recharacterized as second or successive habeas petitions under *Gonzalez*, 545 U. S. 524.

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