No. 23-1345

IN THE

Supreme Court of the United States

DANNY RICHARD RIVERS,

Petitioner,

v.

ERIC GUERRERO, 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 *AMICUS CURIAE* U.S. SENATOR JOHN CORNYN IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Cited Authorities

Federal Statutes

Rules

Cited Authorities

Other Authorities

INTEREST OF AMICUS CURIAE[1]

John Cornyn is the senior United States Senator from Texas. He is a member of the 119th Congress of the United States and sits on the Senate Judiciary Committee, which has responsibility for all title 28 legislation, including the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). As a Senator in the Legislative Branch of the Federal Government, a former Justice of the Supreme Court of Texas, and the former Attorney General of the State of Texas—where Petitioner is currently incarcerated—Senator Cornyn brings a perspective to this case which neither the parties nor the other amici can provide. Accordingly, this brief will provide "relevant matter not already brought to" the Court's attention which "may be of considerable help" in deciding this case.

SUMMARY OF ARGUMENT

Rivers's petition relies on a novel and atextual interpretation of Federal Rule of Civil Procedure 15 that would allow not just habeas petitioners—but all civil litigants—to bypass the safeguards of final judgments imposed by Rules 59(e) and 60. Such an attack on finality is directly contrary to AEDPA, which was specifically enacted to (1) reduce delays in the execution of criminal sentences and (2) advance "the principles of comity, finality, and federalism." *Shoop v. Twyford*, 596 U.S. 811, 818 (2022) (citations omitted).

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1. Pursuant to Supreme Court Rule 37.6, counsel for amicus states that no counsel for a party authored this brief in whole or in part, and no person or entity other than amici or their counsel made a monetary contribution to this brief 's preparation or submission.

Rivers's position, if accepted, would not be cabined to habeas proceedings, but would broadly harm civil litigation across the federal system, replacing the well-established rules (and heightened burdens) for challenging final judgments with the "virtually unlimited discretion to allow amendments" set forth in Rule 15. *See* 6 Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. § 1489 (3d ed. 2024). Allowing such a result—which has no place in the text of Rule 15—would create "a brave new world of trial practice in which Rule 60 has been swallowed whole by Rule 15(b)." *Summers v. Earth Island Inst.*, 555 U.S. 488, 500 (2009) (Scalia, J.).

The Court should reject Rivers's position and, instead, reaffirm the procedures established by AEDPA and the Federal Rules of Civil Procedure for challenging final judgments.

ARGUMENT

Justice Scalia aptly described the problem with Rivers's position in *Summers v. Earth Island Institute*. *See* 555 U.S. at 500. Relying on the interplay between Rules 15 and 21, the dissent in *Summers* argued that the Court was entitled to consider post-judgment affidavits because (1) Rule 15 "says that '[t]he court may permit supplementation even though the original pleading is defective in stating a claim,'" and (2) Rule 21 permits joinder of parties "at any time." *Id.*

Writing for the Court, Justice Scalia rejected that position, explaining that:

> [Rule 21] no more permits joinder of parties, than [Rule 15] permits the supplementation of the record, in the circumstances here: ***after the trial is over, judgment has been entered, and a notice of appeal has been filed.*** The dissent cites no instance in which "supplementation" has been permitted to resurrect and alter the outcome in a case that has gone to judgment, and indeed after notice of appeal had been filed. If Rule 15(b) allows additional facts to be inserted into the record after appeal has been filed, we are at the threshold of a brave new world of trial practice in which Rule 60 has been swallowed whole by Rule 15(b).

Id. (emphasis in original).

Just so. Rivers's argument therefore fails at the outset, as his foundational contention that "[t]he civil rules"—incorporated into AEDPA by 28 U.S.C. § 2242—"permit motions to amend or supplement a pleading while a case is pending on appeal," is false.

Rivers's position is particularly flawed in this context, as it directly contravenes the express text and purpose of AEDPA, which was designed to promote—rather than undermine—efficiency, comity, finality, and federalism.

The Court should reject Rivers's invitation to step into his "brave new world" where the safeguards of finality—erected by AEDPA and Federal Rules of Civil Procedure 59 and 60—are "swallowed whole" by the "virtually unlimited discretion to allow amendments" set forth in Rule 15. Wright & Miller, *supra*, § 1489.

This brief will begin with the specific—explaining why the Court should reject Rivers's arguments in the habeas context—and then address just a few of the implications of Rivers's position for civil litigation generally.

I. AEDPA was designed to encourage finality.

Danny Rivers admitted to sexually abusing his own daughters. He was convicted in a state court of competent jurisdiction, and his conviction was affirmed on direct review.

That would have spelt the end of the matter had Rivers been convicted "[b]efore 1953." *Wright v. West*, 505 U.S. 277, 285 (1992) (Thomas, J.) (citations omitted). Then—as was the case "[f]or much of our history"—the writ of "habeas corpus would not lie for a [state] prisoner [who] had been given an adequate opportunity to obtain full and fair consideration of his federal claim in the state courts" "[a]bsent an alleged jurisdictional defect." *Id.* (quotation omitted).

The limited nature and function of habeas review "reflect[s] the common-law principle that a prisoner . . . could challenge only the jurisdiction of the court that had rendered the judgment under which he was in custody." *Id.* At common law, "[c]ustody pursuant to a final judgment" entered by a court of competent jurisdiction was dispositive "proof" of the legality of a prisoner's confinement. *Edwards v. Vannoy*, 593 U.S. 255, 284 (2021) (Gorsuch, J., concurring, joined by Thomas, J.) (emphasis removed); *see In re Swan*, 150 U.S. 637, 652 (1893) ("[T]he circuit court had jurisdiction, and it necessarily follows that its determination . . . is not open to review.").

To be sure, a state prisoner may now petition a federal court for a writ on the ground that he "is in custody in violation of the Constitution or laws or treaties of the United States." *Shinn v. Ramirez*, 596 U.S. 366, 375 (2022) (quoting 28 U.S.C. § 2254(a)). But that does not change the essential "nature and function of the writ" as a mere "guard against extreme malfunctions in the state criminal justice systems." *West*, 505 U.S. at 292 (quotation omitted). Nothing in the Constitution requires—or has ever required—federal courts to entertain collateral attacks on state court convictions. *See id.* at 285.

Likewise unchanged are the "significant costs" imposed by habeas review. *Id.* at 293. Meritorious or not, each application for the writ "disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Id.* (quotation omitted). Such costs made plain the need for "limits" on the federal courts' "exercise of habeas jurisdiction." *Calderon v. Thompson*, 523 U.S. 538, 555 (1998) (citations omitted). So Congress responded by "enact[ing] AEDPA." *Twyford*, 596 U.S. at 818 (citations omitted).

AEDPA's aims are two-fold: First, it "reduce[s] delays in the execution of state and federal criminal sentences, particularly in capital cases[.]" *Id.* (quoting *Woodford v. Garceau*, 538 U.S. 202, 206 (2003)) (internal quotation marks omitted). Second, it "advance[s] 'the principles of comity, finality, and federalism[.]'" *Id.* (quoting *Williams v. Taylor*, 529 U.S. 420, 436 (2000)).

As relevant here, AEDPA reaffirms the common-sense and time-honored maxim that "[p]ublic policy requires a finality to litigation." *Tanner v. United States*, 483 U.S. 107, 124 (1987) (citation omitted). Finality—"the idea that at ***some*** point a criminal conviction reaches an end, a conclusion, a termination"—"'is essential to the operation of our criminal justice system.'" *Edwards*, 593 U.S. at 290 (Gorsuch, J., concurring) (quotation omitted). Its absence imposes "profound societal costs" and "deprive[s]" "the criminal law . . . of much of its deterrent effect." *Calderon*, 523 U.S. at 554 (quotation omitted).

In furtherance of "the essential need to promote the finality of state convictions," *Twyford*, 596 U.S. at 820 (quotation omitted), AEDPA imposes three requirements specific to second or successive applications for collateral review of state court convictions. For such applications, AEDPA dictates that: (1) any claim that has already been adjudicated in a previous application must be dismissed; (2) any claim not so adjudicated must be dismissed unless it relies on a new rule of constitutional law or new facts that establish actual innocence "by clear and convincing evidence"; and (3) any claim may be considered only after a court of appeals has authorized its filing. 28 U.S.C. § 2244(b)(1)–(3).

Put together, these provisions prevent prisoners from "needlessly prolong[ing]" the habeas process and "frustrat[ing] the State's interest[] in finality." *Twyford*, 596 U.S. at 821 (citation omitted). But that is exactly Rivers's game.

II. Rivers's Proposed Interpretation Damages AEDPA's Ability to Provide Finality.

A. Rivers Seeks to Circumvent AEDPA's Successive Petition Bar.

AEDPA's finality-promoting provisions—and specifically, its restrictions on second or successive applications—are not susceptible to attack through the Federal Rules of Civil Procedure.

As this Court explained in *Gonzalez v. Crosby*, 545 U.S. 524 (2005), AEDPA only incorporates those Rules "to the extent that [they are] not inconsistent with applicable federal statutory provisions and rules," *id.* at 529 (quotation omitted); *see* 28 U.S.C. § 2254 Rule 12; Fed. R. Civ. P. 81(a)(4). Accordingly, where a prisoner uses a Rule of Civil Procedure to "circumvent . . . the successive-petition bar," AEDPA dictates that the Rule of Civil Procedure must yield. *Gonzalez*, 545 U.S. at 532.

Gonzalez demonstrates that principle in action. There, this Court recognized that a Rule 60(b) motion "seek[ing] to add a new ground for relief" or "attack[ing] the federal court's previous resolution of a claim on the merits" is "in substance a successive habeas petition and should be treated accordingly." *Id.* at 531–32 (emphasis removed). That is undoubtedly correct, as Rule 60(b) serves as a "mechanism" to attack a trial court's "already completed judgment." *Banister v. Davis*, 590 U.S. 504, 518–19 (2020). So that mechanism cannot be used in instances where it would "enable a prisoner to abuse the habeas process by stringing out his claims over the years," thereby

"undermining AEDPA's scheme to prevent delay and protect finality." *Id.* at 520–21.

Fatally for Rivers, his interpretation of Rule 15—even if taken at face value—does precisely that. Both in operation and in consequence, his purported post-final-judgment ("mid-appeal") Rule 15 motion suffers from the same conflicts ailing Rule 60(b) motions of the sort held impermissible in *Gonzalez*:

1. A post-final-judgment Rule 15 motion necessarily "attacks the federal court's previous resolution of a claim on the merits." *Gonzalez*, 545 U.S. at 532.

Such a motion, if granted, permits a movant-prisoner to do one of two things. Either (a) the prisoner can amend his application, or (b) he can supplement his application. *See* Fed. R. Civ. P. 15(a)(2), (d). The former "present[s] new claims for relief from a state court's judgment of conviction," while the latter "present[s] new evidence in support of a claim already litigated." *Gonzalez*, 545 U.S. at 531. Thus, ***the only*** grounds for a Rule 15 motion are those that "attack[] the federal court's previous resolution of a claim on the merits" and are "in substance a habeas corpus application." *Id.* at 531–32.

So even if Rule 15 motions were permissible post-notice of appeal (which they are not, *see infra* Part III.B), ***all*** "mid-appeal" Rule 15 motions "impermissibly circumvent . . . the successive-petition bar." *Id.* at 532. Subjecting them to a standard any less restrictive than that applicable to successive petitions would "undermin[e] AEDPA's scheme to . . . protect finality." *Banister*, 590 U.S. at 519.

2. But under Rivers's view of Rule 15, it would be ***easier*** to lodge an attack on the merits of a final judgment than to bring an "unquestionably valid" Rule 60(b) motion based on "some defect in the integrity of the federal habeas proceedings." *Gonzalez*, 545 U.S. at 532, 534. This cannot be correct.

a. For starters, Rules 60(b)(1)–(3) are subject to explicit timing requirements that are absent from Rule 15, as Rule 60(c) requires that a motion based on those reasons must be filed within a year. *See* Fed. R. Civ. P. 60(c). Rivers's use of Rule 15 would eliminate that restriction. That is particularly true under Rivers's reading of Rule 15, which would permit a petition to "amend" or "supplement" his petition "***at any time***," even after judgment. *See* Pet. Br.22–25.

The elimination of these timing barriers is particularly relevant here, as two of the alleged bases for Rivers's petition would fall outside Rule 60(c)'s one-year limitation period. *See* Fed. R. Civ. P. 60(b)(1) ("mistake, inadvertence, surprise, or excusable neglect"); Fed. R. Civ. P. 60(b)(2) ("newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial").

Thus, irrespective of the merits, Rivers's view of Rule 15 would allow him to "string[] out," for years, grounds for reopening a final judgment that would clearly fail on limitations grounds if brought in a run-of-the-mill civil case pursuant to Rule 60(b). *Banister*, 590 U.S. at 517. "Given AEDPA's 'finality' and 'federalism' concerns, it would be anomalous" to afford broader latitude to collateral attacks on a final judgment "in federal habeas

proceedings than in ordinary civil litigation." *Mayle v. Felix*, 545 U.S. 644, 663 (2005) (internal citations omitted).

b. Timing aside, the differences between Rule 15 and Rule 60(b) are substantive and substantial. Whereas Rule 60 relief is limited to the six listed grounds, Rule 15 "vests the district judge with virtually unlimited discretion to allow amendments by stating that leave to amend may be granted when 'justice so requires.'" Wright & Miller, *supra*, § 1489. Moreover, this Court has emphasized that its "cases have required a movant seeking relief under Rule 60(b)(6) to show 'extraordinary circumstances' justifying the reopening of a final judgment." *Gonzalez*, 545 U.S. at 535 (citation omitted).

Allowing amendment post-appeal (particularly under Rivers's view of Rule 15) permits a petitioner to bypass all of these procedural safeguards—which "are designed to protect the finality of judgments," 3 Moore's Federal Practice, § 15.13[2] at 15-22.5 (3d ed. 2024).

Far from requiring petitioners to show "extraordinary circumstances," *Gonzalez*, 545 U.S. at 535, Rule 15 punches through that floor, directing courts to "freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2).

Thus, Rivers's interpretation of Rule 15 lowers the requisite standard for reopening a final judgment ***below*** the level "essential . . . to . . . preserve[]" "finality" for ordinary civil cases. *Gonzalez*, 545 U.S. at 535 (quotation omitted). Such a holding would bring forth the "brave new world of trial practice in which Rule 60 has been swallowed whole" by Rule 15 that Justice Scalia cautioned against in *Summers*. *See* 555 U.S. at 500.

c. In sum, Rivers's interpretation of Rule 15 creates extreme and perverse incentives for a "prisoner to abuse the habeas process by stringing out his claims over the years." *Banister*, 590 U.S. at 517. Identical in substance to—but easier to bring and far more lenient than—the sort of Rule 60(b) motions *Gonzalez* held incompatible with AEDPA, such Rule 15 motions threaten to "undermin[e] AEDPA's scheme to prevent delay and protect finality." *Id.* at 519. Thus, the mere "availability" of Rivers's proposed post-final-judgment Rule 15 motion "threatens serial habeas litigation"—even more so than an already impermissible Rule 60(b) motion. *Id.* at 521.

B. Rivers's Actions Demonstrate Why His View of Rule 15 Should Be Rejected.

The incentives created by Rivers's interpretation of Rule 15 are so great that "it would be foolish for many habeas applicants not to hold back at least some claims" or evidence for claims "as an insurance policy should things go south in the first application." Resp.Br.25–26. Rivers is proof in point. His actions perfectly demonstrate why his interpretation frustrates finality and encourages abuse:

1. To start, Rivers had thirteen months—that is, the period between the filing of his August 2017 (first) application, JA.20–35, and the district court's September 2018 rendition of final judgment denying that application, JA.2—to file a proper Rule 15 motion for leave to amend. He did not do so. Rivers also had twenty-eight days after the entry of final judgment to file a motion to alter or amend the judgment under Rule 59(e). Again, he failed to do so timely. *Rivers v. Lumpkin*, No. 18-11490, 2022 WL 1517027, at *3 (5th Cir. May 13, 2022).

2. Moreover, even if the Court were to credit Rivers's assertion that he did not learn about the new evidence until the case was pending on appeal, Rivers had multiple opportunities—through the procedures provided by AEDPA—to seek leave from the Fifth Circuit to file a successive petition. Indeed, the Fifth Circuit bent over backwards to permit Rivers to take advantage of the proper procedures, offering him several opportunities to do so. *See* Resp.Br.9–10. Yet once again, he did nothing. *See* Resp.Br.9 (citing *In re Rivers*, No. 21-10967 (5th Cir. Nov. 15, 2021); JA.13–14); Resp.Br.10 (citing *In re Rivers*, No. 24-10330 (5th Cir. Apr. 15, 2024); JA.17–19).

Finally, to this very day, Rivers ***still*** has the opportunity to file a Rule 60(b) motion for relief on grounds other than "claims of error in [his] state conviction." *Gonzalez*, 545 U.S. at 538. But as with his other avenues for relief, Rivers has eschewed the established procedures in favor of a unique, procedurally tortured approach that has never been embraced by any court.

Should the Court embrace Rivers's conception of Rule 15, over three-and-a-half years of post-final-judgment proceedings would all be for nothing. Worse, should Rivers get his way, nothing stops him from pulling the same stunt again. Sufficiently segregating a single application, or even a single claim for habeas relief, would enable "a prisoner [to] bring such a motion endlessly." *Banister*, 590 U.S. at 521. Even if the motions are not granted, the mere availability of such piecemeal litigation would swamp the district courts with "mid-appeal" "amended" petitions. The district courts would be required to expend the resources to adjudicate each of these amendments anew, which would undoubtedly be followed by an appeal and

another "mid-appeal" amendment. There is no practical end in sight to Rivers's game of procedural ping-pong, which would be replicated *ad infinitum* across the federal system. The Court should reject Rivers's take on Rule 15, which abuses the habeas process and undermines AEDPA's scheme to protect finality.

III. Rule 15 does not permit "mid-appeal" amendments.

Beyond encouraging abuse of the habeas process, Rivers's approach would do significant violence to the well-settled understanding of the Federal Rules of Civil Procedure, which govern all civil litigation in federal courts across the country.

The Court should reject Rivers's novel approach, which not only lacks any support in the plain text of the Rules—indeed, it contradicts the text—but would affirmatively undermine the finality of judgments by eliminating the ability of litigants to rely upon the "safeguards" of finality set forth in Rules 59 and 60.

A. Failure to treat Rivers's application as a Rule 60 motion would "swallow" the requirements of Rule 60(b).

Although Rivers now claims that he filed a Rule 15 motion for leave to amend, such a motion was never filed. *See* ROA.10–23. But even if Rivers's characterization is taken at face value, neither this Court nor the courts of appeals are bound by Rivers's (belated) characterization of his motion as one for leave to amend under Rule 15. 12 Moore's Federal Practice, § 60.64 at 60-219 (3d ed. 2024) ("The label or description that a party put on its motion

does not control whether the party should be granted or denied relief.").

Rather, courts are "free to recharacterize the motion to amend to match the substance of the relief requested." *Ahmed v. Dragovich*, 297 F.3d 201, 208 (3d Cir. 2002) (citing *In re Burnley*, 988 F.2d 1, 2 (4th Cir.1992)) (observing courts have felt free to consider post-judgment motions as Rule 59(e) or Rule 60 motions). *See also*, *e.g.*, Moore's Federal Practice, *supra*, § 60.64 at 60-219 ("Motions seeking to amend a complaint that are made after a judgment of dismissal have been entered have been construed as Rule 60(b) motions. . . ."); *Odishelidze v. Aetna Life & Cas. Co.*, 853 F.2d 21, 24 (1st Cir. 1988); *United States v. Patton*, 750 F. App'x 259, 263 (5th Cir. 2018); *Willis v. Jones*, 329 F. App'x 7, 14 (6th Cir. 2009).

Moreover, a party "may not deliberately mislabel a motion in an attempt to evade the time limits governing motions under Rule 60(b). In order for Rule 60's time limits to have meaning, the court must look to the substance of the motion, not the attempt by a party to characterize the grounds asserted for relief." Moore's Federal Practice, *supra*, § 60.64 at 60-220.

When evaluated on the substance, it becomes clear that Rivers's purported "Rule 15" motion—which was actually (correctly) characterized as a "petition for a writ of habeas corpus" and filed with a different case number, *see* Resp.Br.8—is, and should be treated as, a Rule 60 motion.

"The circuits are largely in agreement that a request to amend pleadings after an adverse judgment is not

governed by Rule 15(a)(2)'s liberal standard, since the trial court must consider competing considerations, such as protecting the finality of judgments." Moore's Federal Practice, *supra*, § 15.13[2] at 15-22.4. Rather, a party seeking to amend or supplement his petition post-judgment "must therefore not only satisfy Rule 15's 'modest requirements,' but also the 'heavier burden' governing requests to reopen a case." *Id.* That burden is found in Rules 59(e) and 60, which "are designed to protect the finality of judgments." *Id.* at 15-22.5.

It is therefore not surprising that "***every*** regional circuit holds that a plaintiff may not use Rule 15 to amend a complaint after final judgment absent relief under Rule 59(e) or Rule 60(b)." Resp.Br.23–24 (collecting authorities). *See also* Moore's Federal Practice, *supra*, § 15.13[2] at 15-22 ("[A] plaintiff may be granted leave to amend by the district court only if that court agrees to alter or reopen the judgment under Rule 59, that court agrees to set it aside under Rule 60, or there is a timely appeal and the judgment is set aside on appeal. For these purposes, if the district court dismisses the action and enters a final judgment, it must be set aside before leave to amend may be granted. . . ."); Wright & Miller, *supra*, § 1489 ("Most courts faced with the problem have held that once a judgment is entered the filing of an amendment cannot be allowed until the judgment is set aside or vacated under Rule 59 or Rule 60.").

B. Rivers's reading of Rule 15 is foreclosed by the plain text.

Rivers attempts to rely on the fact that Rule 15(a) and 15(d) "contain no time limit" to argue that a Rule 15 motion

can be filed "mid-appeal." Pet.Br.16. *Contra Summers*, 555 U.S. at 500 (explaining that Rule 15 does not permit supplementation "after the trial is over, judgment has been entered, and a notice of appeal has been filed"). That supposed right has no basis in the text of Rule 15 or the case law, which confirm that a "mid-appeal" amendment is not a permissible end-around the guardrails to finality imposed by Rule 60.

Federal Rule of Civil Procedure 15(b)(2)—which is not directly at issue here—provides that:

> ***For Issues Tried by Consent.*** When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move—***at any time***, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue.

Fed. R. Civ. P. 15(b)(2) (emphasis added).

Rivers argues that Rule 15(a)(2)'s and 15(d)'s silence as to timing for amended and supplemental petitions means they, too, can be made at any time, even "after judgment." *See* Pet.Br.18. Ordinary interpretative tools demonstrate the errors in his position.

1. Rule 15(b)(2) itself provides the first clue. Unlike Rule 15(b)(2), neither Rule 15(a) nor Rule 15(d) provide that pleadings may be amended or supplemented "at any time, even after judgment." Indeed, Rule 15(a) is explicitly

limited to "Amendments Before Trial"[2]—demonstrating a temporal limitation which, on its face, cannot apply to amendments "after the trial is over, judgment has been entered, and a notice of appeal has been filed." *Summers*, 555 U.S. at 500. *See also, e.g.*, *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1344 (11th Cir. 2010) ("Rule 15(a), by its plain language, governs amendment of pleadings ***before*** judgment is entered; it has no application ***after*** judgment is entered."); *Ahmed*, 297 F.3d at 207–08 ("Rule 15 . . . is no longer applicable once judgment has been entered. At that stage, it is Rules 59 and 60.") (citation omitted). *Palmer v. Champion Mortg.*, 465 F.3d 24, 29–30 (1st Cir. 2006) (similar).

Indeed, even though Rule 21 explicitly allows joinder "at any time," this Court has held that such joinder is not permitted "after . . . judgment has been entered, and a notice of appeal has been filed." *Summers*, 555 U.S. at 500. If the facially expansive phrase "at any time" does not permit joinder after a notice of appeal, the plain text of Rules 15(a) and 15(d)—which do ***not*** contain that language—cannot be read as permitting "mid-appeal" amendment.

2. Rivers's attempt to add the words "at any time, even after judgment" to the text of Rules 15(a) & (d) fails for the additional reason that it would render other language in the rules "mere surplusage." *Contra* Scalia & Garner, *supra*, at 174. If "silence" truly indicated the absence of any deadline—unrestricted even by the entry of judgment

2. "The title and headings are permissible indicators of the meaning." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 221–22 (2012).

and notice of appeal—there would be no need for Rule 21 to emphasize that joinder is permitted "at any time." Nor would there be any reason for Rule 15(b) to include the extra allowance for amendment "even after judgment"—an unusual and incredibly expansive grant of leave that survives even the district court's loss of jurisdiction. Rule 15(b)'s generous allowance of amendment to conform the pleadings to issues that were tried by consent must be restricted to the statutory provision in which it can be found.

3. This reading is confirmed by the "negative-implication" canon—also known as *expressio unius est exclusio alterius*—which recognizes that the "expression of one thing implies the exclusion of others." Scalia & Garner, *supra*, at 107.

Examples of that familiar canon of construction abound. Federal Rule of Civil Procedure 60(c), for example, specifies that "a motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment." Fed. R. Civ. P. 60(c). By explicitly stating that a motion based on "reasons (1), (2), and (3)" must be made within one year, the Rule implicitly excluded motions under reasons (4), (5), and (6) from that limitation. *See*, *e.g.*, *Gonzalez*, 545 U.S. at 542 ("Rule 60(b)(6) contains no specific time limitation on filing") (Stevens, J., dissenting, joined by Souter, J.); *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 873 (1988) ("relief under Rule 60(b)(6) is subject to no absolute time limitation") (Rehnquist, C.J., dissenting, joined by White & Scalia, JJ.).

That canon applies with equal force to Rule 15. Aside from Rule 15(a)'s express limitation to "Amendments

Before Trial," neither Rule 15(a) nor Rule 15(d) contains any references to timing. That places them in stark contrast to Section 15(b)(2), which permits amendments "at any time, even after judgment." Fed. R. Civ. P. 15(b)(2). Far from supporting Rivers's assertion that "silence" implies such motions can be filed "at any time," the decision to allow amendments "after judgment" under Rule 15(b) demonstrates that the Committee knew how to permit post-judgment amendments, but explicitly limited such amendments to situations where an issue was "Tried By Consent." Fed. R. Civ. P. 15(b).

Thus, when Rule 15 is read as a whole, the negative-implication canon confirms that the time for bringing a 15(a)(2) or 15(d) motion is something ***other than*** that specified in 15(b)(2)—i.e., other than "any time, even after judgment"—as the inclusion of that time in Rule 15(b)(2) suggests that it was purposely excluded from Rules 15(a) and (d). The text consequently provides no support for Rivers's key premise that "the civil rules . . . permit motions to amend or supplement a pleading while a case is pending on appeal." Pet.Br.13.

4. Because the plain text of Rule 15 demonstrates that it cannot be used to file an amended petition "mid-appeal," Rivers's entire petition crumbles from its first premise. This alone is sufficient reason to affirm, as Rivers's characterization of his second application as a "mid-appeal" "amendment" is the only basis for Rivers to contend that his petition is not barred by § 2244. *See Banister*, 590 U.S. at 511 ("an amended petition, filed after the initial one but before judgment, is not second or successive"). Once it becomes clear that Rule 15 does not permit amendment "post judgment" and "after the

filing of a notice of appeal"—and that such a motion must be construed as challenging the merits of the underlying decision under Rule 60(b)—there is no escaping the conclusion that Rivers's application was "second-or-successive" under AEDPA.

As such, Rivers application was barred because he either (1) raised the same claims "presented in a prior application," or (2) failed to obtain leave from the Fifth Circuit. *See* 28 U.S.C. § 2244(b)(1), (3). This Court should affirm the district court's and Fifth Circuit's proper denial of his successive habeas petition.

CONCLUSION

Rivers's proposed interpretation of Rule 15 undermines finality in both AEDPA and across the federal system. It should be rejected.

Respectfully submitted,

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