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 INDIANA, ALABAMA, FLORIDA, GEORGIA, HAWAII, IDAHO, KANSAS, LOUISIANA, MONTANA, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, AND TENNESSEE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT


Office of the Indiana
Attorney General
IGC South, Fifth Floor
302 W. Washington St.
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

*Counsel of Record

CURTIS T. HILL, JR.
Attorney General
THOMAS M. FISHER*
Solicitor General
KIAN J. HUDSON
Deputy Solicitor General
JULIA C. PAYNE
ROBERT L. YATES
Deputy Attorneys General

*Counsel for Amici States*
*Additional counsel with signature block*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**CASES**

**CASES [CONT'D]**



**STATUTES**

**STATUTES [CONT'D]**



**OTHER AUTHORITIES**

**OTHER AUTHORITIES [CONT'D]**

## INTEREST OF THE *AMICI* STATES

The States of Indiana, Alabama, Florida, Georgia, Hawaii, Idaho, Kansas, Montana, Nebraska, Louisiana, Ohio, Oklahoma, South Carolina, South Dakota, and Tennessee respectfully submit this brief as *amici curiae* in support of Respondent. Due to their responsibility for enforcing state criminal laws and their interest in preserving state-court judgments, *Amici* States have a keen interest in the correct interpretation and application of AEDPA, particularly its restrictions on successive habeas petitions. That interest extends to ensuring that habeas petitioners are prohibited from evading those restrictions with Rule 59(e) motions. *Amici* States file this brief to explain why the Court should affirm the Fifth Circuit's decision and hold that Rule 59(e) motions asking the court to reweigh its denial of habeas relief on the merits cannot be used to circumvent AEDPA.

## SUMMARY OF THE ARGUMENT

When a State has obtained a final judgment denying federal habeas relief, "the State's interests in finality are all but paramount." *Calderon v. Thompson,* 523 U.S. 538, 557 (1998). "At that point, having in all likelihood borne for years 'the significant costs of federal habeas review,' the State is entitled to the assurance of finality." *Id.*, 523 U.S. at 556 (quoting *McCleskey v. Zant,* 499 U.S. 467, 490–491 (1991)). The final judgment gives the State the reasonable expectation that it may execute its lawful judgment without interference from federal courts, and to "unsettle these expectations is to inflict a profound injury to the 'powerful and legitimate interest in punishing the guilty.'" *Id.* (quoting *Herrera v. Collins,* 506 U.S. 390, 421 (1993) (O'Connor, J., concurring)).

States thus have a strong interest in preserving the finality of both their own criminal judgments and of federal habeas corpus decisions. Finality ensures state criminal law effectively serves its essential functions, for "[f]ederal habeas review of state convictions frustrates 'both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.'" *Id.* at 555–56 (quoting *Murray v. Carrier,* 477 U.S. 478, 487 (1986)). Finality also maintains the balance of federalism struck by the Constitution: America's "federal system recognizes the independent power of a State to articulate societal norms through criminal law," and "the power of a State to pass laws means little if the State cannot enforce them." *McCleskey,* 499 U.S. at 491.

Accordingly, due to the "profound societal costs that attend the exercise of habeas jurisdiction," this Court has long imposed significant limits on federal courts' authority to grant habeas relief. *Calderon*, 523 U.S. at 554–55 (internal quotation marks and citations omitted). These limits reflect the Court's "enduring respect for the State's interest in the finality of convictions that have survived direct review within the state court system." *Id.* at 555 (internal quotation marks and citations omitted) (collecting cases).

Congress incorporated and augmented the Court's limitations on federal habeas review with the passage of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *See Felker v. Turpin*, 518 U.S. 651, 664 (1996) (noting that AEDPA "codifies some of the pre-existing limits on successive petitions, and further restricts the availability of relief to habeas petitioners"). Like the Court's own decisions, AEDPA was "grounded in respect for the finality of criminal judgments," *Calderon*, 523 U.S. at 558, and was enacted precisely "to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases . . . ." Joint Explanatory Statement of the Committee of Conference, H. Conf. Rep. No. 104-518, at 111, *reprinted in* 1996 U.S.C.C.A.N. 944. AEDPA's central purpose, in other words, was to "streamline the lengthy appeals process" by limiting the convicted individual "to one Federal habeas petition," among other limitations. 141 Cong. Rec. S7803-01, 7877 (daily ed. June 7, 1995) (statement of Sen. Dole) (explaining that passage of bill that would become AEDPA "will go a long, long way to streamline the

lengthy appeals process" in capital cases "[b]y imposing filing deadlines . . . and by limiting condemned killers . . . to one Federal habeas petition").

Of particular import here are AEDPA's restrictions on successive habeas petitions, codified at 28 U.S.C. § 2244(b), which require dismissal of (1) any "claim presented in a second or successive habeas corpus application" already adjudicated in an earlier petition, and (2) any new claim not reliant on either a new and retroactive rule of constitutional law or new facts showing a high probability of actual innocence. Before a district court may accept a successive petition for filing, the court of appeals must determine that it meets these new-rule or actual-innocence requirements. *Id.*

In light of the important federalism and finality principles served by § 2244(b), the Court has been vigilant to prevent circumvention of its requirements. In *Gonzalez v. Crosby*, 545 U.S. 524, 531 (2005), it held that habeas petitioners cannot use Rule 60(b) motions to evade § 2244(b)'s limitations on successive petitions where such motions challenge the merits of a district court's denial of habeas relief. As the Court put it, simply as a matter of statutory text, a Rule 60(b) motion "alleging that the court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief." *Id.* at 532. Such a motion therefore qualifies as a successive habeas corpus application.

The Court's reasoning as to Rule 60(b) motions applies with equal force to Rule 59(e) motions. Under both rules, permitting petitioners to challenge the merits of a district court's denial of habeas relief would contravene AEDPA's text and its purposes.

The Court should affirm the Fifth Circuit's decision below to preclude habeas petitioners from circumventing Congress's explicit restrictions on repetitive habeas applications.

## ARGUMENT

### I. Congress enacted AEDPA to circumscribe and streamline federal habeas review of state criminal judgments

AEDPA was not the first time policymakers saw the trouble created by invasive federal habeas review of state court judgments. In the decades leading to the adoption of AEDPA, this Court repeatedly recognized that federal habeas review—particularly unrestricted, repetitive federal reconsideration of state-court decisions—can undermine the principles of federalism and finality. In order to protect these important constitutional principles, the Court imposed limitations on federal habeas courts' authority to disturb state criminal convictions: It circumscribed federal courts' authority to reexamine final state-court convictions and restricted prisoners' ability to call their convictions into doubt with repeat petitions.

AEDPA later codified and expanded these limitations, further streamlining federal habeas practice in

order to promote the constitutional framework of federalism and to preserve the finality of state criminal judgments. And in *Gonzales v. Crosby*, 545 U.S. 524 (2005), the Court ensured that state prisoners could not use Rule 60(b) to evade and frustrate AEDPA's limitations. The Court should do the same here.

### A. In the decades preceding AEDPA, the Court imposed multiple limitations on federal habeas review of state criminal judgments

Federal habeas review of state criminal judgments began with the passage of the Habeas Corpus Act of 1867, which authorized federal courts to grant the writ "in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." 14 Stat. 385. The 1867 Act thereby "extended federal habeas corpus to prisoners held in state custody." *McCleskey v. Zant*, 499 U.S. 467, 478 (1991).

Over the course of the following one hundred and twenty-nine years, the Court developed rules for federal habeas proceedings largely on its own. *See* 17B Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 4261 (3d ed.) (noting that "the scope of the writ, insofar as the statutory language was concerned, had not been altered substantially between 1867 and 1996, when Congress adopted [AEDPA]"). For a time the Court experimented with permissive rules that allowed federal habeas courts to look past prior state-court decisions, procedural de-

faults, and even earlier federal denials of habeas petitions. But later the Court began to recognize the problems caused by such federal-court high-handedness, particularly the degree to which it undermined the principles of federalism and finality. The Court accordingly began imposing stricter limitations on federal courts' authority to invalidate state criminal judgments, and in 1996 Congress codified and expanded these limitations with the passage of America's second landmark habeas statute—AEDPA.

1. In the first half of the twentieth century, and even as the statutory language remained unchanged, the Court "through judicial decisionmaking" steadily expanded the class of claims cognizable in federal habeas review to include "all dispositive constitutional claims presented in a proper procedural manner." *McCleskey*, 499 U.S. at 478–79. And even as the Court expanded the habeas statute's substantive scope, it pared back procedural hurdles, making it easier for state prisoners to launch repeated attacks on their convictions: Res judicata was inapplicable to habeas proceedings, appeals of denials of habeas relief were permitted, and even plainly successive habeas applications were permissible if the petitioner "present[ed] adequate reasons for not making the allegation earlier . . . which [made] it fair and just for the trial court to overlook the delay." *Id.* at 479–82 (quoting *Price v. Johnston*, 334 U.S. 266, 291–92 (1948)).

These developments encouraged prisoners to file petition after petition, with courts noting that some prisoners were filing upwards of *50 petitions* each. *Dorsey v. Gill*, 148 F.2d 857, 862 (D.C. Cir. 1945). The

predictable consequence was to deluge federal courts "with a flood of groundless applications for habeas corpus," which in turn "imposed upon the federal judges a wholly unnecessary burden of work, constituted an ever present source of disturbance to the penal system of the country and were a constant threat to harmonious relations between state and federal judiciaries." Hon. John J. Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171, 172 (1949).

2. These "evils arising from this abuse of the writ of habeas corpus soon engaged the attention of the Judicial Conference of the United States," *id.* at 173, which convinced Congress to add § 2254 to the 1948 recodification of the federal habeas statute, *id.* at 175–176. Section 2254 prohibited federal courts from granting habeas relief to a prisoner in state custody unless the petitioner "exhausted the remedies available in the courts of the State," and provided that a petitioner "shall not be deemed to have exhausted the remedies available . . . if he has the right under the law of the State to raise, by any available procedure, the question presented." *Id.* Because many States at the time allowed for successive applications for post-conviction relief, Chief Judge Parker, the chairman of the Judicial Conference committee that drafted the 1948 statute, expected § 2254 to "eliminate most applications for habeas corpus from state prisoners." 17B Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 4264 (3d ed.). The Court, however, refused to give such effect to the 1948 statute and has instead held that a habeas petitioner satisfies § 2254 by presenting a claim to state courts at least

once, whether on direct appeal or postconviction review. *See id.*

3. In addition to minimizing the limitations imposed by the 1948 statute, in the mid-twentieth century the Court continued to expand the scope of federal habeas review. The Court, for example, authorized district courts to review constitutional issues *de novo*, *see Brown v. Allen*, 344 U.S. 443, 500 (1953) (opinion of Frankfurter, J.), to relitigate factual issues considered in state courts so long as the petitioner did not engage in "deliberate by-passing of state procedures," *Townsend v. Sain*, 372 U.S. 293, 317 (1963), and to grant relief notwithstanding a petitioner's failure to comply with a procedural requirement under state law, *Fay v. Noia*, 372 U.S. 391, 398–99 (1963).

The problems with the Court's approach soon became evident. Expansive federal-court review of state criminal judgments "tend[ed] to detract from the perception of the trial of a criminal case in state court as a decisive and portentous event" and encouraged litigants to view the state criminal proceeding as "a 'tryout on the road' for what will later be the determinative federal habeas hearing." *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977). Such routine interruption of final criminal judgments inverted the proper place of the state criminal trial: "Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens." *Id.* Accordingly, over the last several decades the Court has imposed strict limitations on federal habeas review in

order to safeguard the finality of state criminal judgments and ensure that "the state trial on the merits" remains "the 'main event.'" *Id.*

In *Wainwright*, for example, the Court overturned *Fay v. Noia* and held that federal courts could *not* entertain an issue not properly preserved in state court proceedings unless the habeas petitioner demonstrates "cause and prejudice" for the procedural default. *Id.* at 87–91. Similarly, in *McCleskey v. Zant*, 499 U.S. 467, 493 (1991), the Court limited—but did not eliminate—petitioners' ability to bring successive petitions by applying the "cause and prejudice" standard to the successive-petition context, in the hope that it would "curtail the abusive petitions that in recent years have threatened to undermine the integrity of the habeas corpus process," *id.* at 496. In particular, the Court held that when a State argues that a petitioner has abused the writ by filing "a second or subsequent application," the petitioner "must show cause for failing to raise [the new claim] and prejudice therefrom." *Id.* at 494.

Next, in *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 8 (1992), the Court overruled *Townsend* and applied the "cause and prejudice" standard to reconsideration of state factual findings as well, holding that a federal habeas court may conduct an evidentiary hearing only if the petitioner shows cause and prejudice to excuse his failure to develop material facts in state court. As in the procedural default cases, "application of the cause-and-prejudice standard to excuse a state prisoner's failure to develop material facts in state

court will appropriately accommodate concerns of finality, comity, judicial economy, and channeling the resolution of claims into the most appropriate forum." *Id.*

4. In addition to reversing many of its earlier decisions, in the 1980s and '90s the Court went further and imposed additional limitations on federal habeas courts' authority to invalidate state criminal judgments. In *Rose v. Lundy*, 455 U.S. 509 (1982), for example, the Court strengthened the exhaustion-of-state-remedy requirements by imposing a "total exhaustion" rule requiring *all* claims raised in a habeas petition to have been previously presented to state courts.

The Court observed that the exhaustion requirement "is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings." *Id.* at 518. The exhaustion requirement thus safeguards the principles of comity and federalism, which teach "that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter." *Id.* (internal quotation marks and citation omitted). And to advance these principles further, the Court adopted a rule precluding federal courts from adjudicating "mixed" habeas petitions containing both exhausted and unexhausted claims, reasoning that a "rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts

the first opportunity to review all claims of constitutional error." *Id.* at 518–19.

In addition to strengthening habeas doctrine's exhaustion requirements, the Court has limited how new constitutional law applies to federal habeas proceedings. In an effort to "validate[] reasonable, good-faith interpretations of existing precedents made by state courts," *Butler v. McKellar*, 494 U.S. 407, 414 (1990), the Court has crafted a non-retroactivity rule wherein, except in rare cases, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced," *Teague v. Lane*, 489 U.S. 288, 310 (1989). Again, in *Teague* the Court "recognized that interests of comity and finality must be considered in determining the proper scope of habeas review." *Id.* at 308. To that end, it observed that "[t]he costs imposed upon State[s] by retroactive application of new rules of constitutional law on habeas corpus... generally far outweigh the benefits of this application," and applying new rules to cases on collateral review "*continually* forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." *Id.* at 310 (internal quotation marks and citation omitted; emphasis in original).

In each of these decisions providing for less invasive federal habeas review, the Court explained that the interests of comity, finality, and federalism justified limiting state prisoners' ability to challenge final criminal convictions. The Court thus recognized that "the profound social costs that attend the exercise of

habeas jurisdiction" support "impos[ing] significant limits on the discretion of federal courts to grant habeas relief." *Calderon v. Thompson*, 523 U.S. 538, 554–55 (1998).

### B. AEDPA incorporates and augments the Court's limitations on federal habeas review

Following the Court's decades-long efforts to rein in federal habeas practice, in 1996 Congress stepped in with the passage of AEDPA. Congress sought "to streamline the criminal justice system" by codifying and further expanding the Court's recent limitations on federal habeas relief. Joseph M. Ditkoff, *The Ever More Complicated "Actual Innocence" Gateway to Habeas Review:* Schlup v. Delo*, 115 S. Ct. 851 (1995)*, 18 Harv. J.L. & Pub. Pol'y 889, 889 (1995). In particular, Congress enacted AEDPA to codify the Court's recent focus on the principles of comity, finality, and federalism; to reduce delays in the execution of state and federal criminal sentences, especially in capital cases; and to encourage the exhaustion of state remedies before seeking federal habeas relief. *Construction and Application of Antiterrorism and Effective Death Penalty Act (AEDPA)—U.S. Supreme Court Cases*, 26 A.L.R. Fed. 2d 1.

1. To advance these purposes, Congress not only codified the Court's limitations on federal habeas review, but also added further limits of its own. *See* John H. Blume, *AEDPA: The "Hype" and the "Bite,"* 91 Cornell L. Rev. 259, 272–73 (2006). AEDPA's "cen-

terpiece", *id.*, for example, 28 U.S.C. § 2254(d), categorically prohibits granting a state prisoner's habeas claim that a state court has denied on the merits unless the state court's decision (1) was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by this Court; or (2) was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

Compared to federal habeas courts' previous plenary review over questions of federal law—in addition to the relatively limited deference accorded state courts' factual findings—§ 2254(d) significantly limits federal habeas courts' authority to invalidate state criminal judgments. Its standard, of course, "was meant to be" difficult and, like AEDPA as a whole, "reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Harrington v. Richter*, 562 U.S. 86, 102–03 (2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 332, n. 5 (1979) (Stevens, J., concurring in judgment)).

Similarly, AEDPA added a one-year statute-of-limitations bar, 28 U.S.C. § 2244(d)(1), which "quite plainly serves the well-recognized interest in the finality of state court judgments." *Rhines v. Weber*, 544 U.S. 269, 276 (2005) (quoting *Duncan v. Walker*, 533 U.S. 167, 179 (2001)). Notably, the one-year statute of limitations also reduces delays in executing criminal sentences by forbidding prisoners from sitting on their claims indefinitely.

2. AEDPA also codified several of the Court's limitations on federal habeas review. For example, to streamline federal habeas procedure and encourage criminal defendants to make the state-court proceedings the "main event," AEDPA adopts the rule from *Keeney v. Tamayo-Reyes* and strictly limits opportunities for evidentiary hearings over facts not developed in state court: Under AEDPA, such hearings are available only with respect to claims involving new rules of constitutional law, newly available evidence, or showings "by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. 2254(e)(2).

AEDPA also altered federal habeas doctrine's exhaustion requirement by permitting district courts to deny unexhausted claims on the merits and by precluding courts from deeming exhaustion defenses waived absent *express* State waiver. *See id.* § 2254(b)(2)–(3). In addition to encouraging prisoners to exhaust state remedies before seeking federal habeas relief, this provision reduces delays in executing sentences by requiring swift rejection of claims the prisoner could have alleged at an earlier stage.

3. Finally, AEPDA's amendments to 28 U.S.C. § 2244(b) codify and strengthen the Court's limitations on successive habeas petitions. *See Felker v. Turpin*, 518 U.S. 651, 664 (1996). Prior to AEDPA, *McCleskey* permitted successive petitions raising new claims if the prisoner could show cause and prejudice. 499 U.S. at 495. AEDPA, however, narrows such opportunities: (1) any claim already adjudicated in an

earlier petition must be dismissed; (2) any claim not already adjudicated must be dismissed unless it relies on either a new and retroactive rule of constitutional law or new facts showing a high probability of actual innocence; and (3) before the district court may accept a successive petition for filing, the court of appeals must determine that it presents a claim not previously raised sufficient to meet the new-rule or actual-innocence requirements. 28 U.S.C. § 2244(b).

***

For the last several decades federal habeas doctrine has moved consistently in the direction of limiting the scope of federal courts' authority to set aside final state criminal judgments. This movement began with decisions from this Court and continued with the passage of AEDPA. And the purpose of all of these limitations, including § 2244(b)'s successive-petition rules at issue here, was to further the interests of federalism and finality by streamlining and circumscribing federal habeas proceedings.

## II. AEDPA's Limitations on Successive Habeas Petitions Apply to Rule 59(e) Motions That Attack a District Court's Denial of Habeas Relief on the Merits

As noted, § 2244(b)'s rules strictly limiting state prisoners' ability to file successive petitions are meant to streamline federal habeas proceedings and prevent prisoners from abusing the writ by repeatedly challenging long-final state criminal judgments. And in *Gonzalez v. Crosby*, 545 U.S. 524 (2005), the Court held that § 2244(b)'s restrictions on successive habeas

petitions apply to Rule 60(b) motions that challenge a district court's denial of habeas relief on the merits. The Court pointed out that AEDPA's text makes clear that a filing—whatever label it carries—arguing that a petitioner is entitled to habeas relief contains a habeas "claim" and therefore constitutes a habeas "application" to which § 2244(b)'s successive-petition rules apply. *Id.* at 531–32. And even beyond AEDPA's text, motions that seek to relitigate the denial of habeas relief inherently evade the successive-petition rules, undermine AEDPA's purposes, and "would be 'inconsistent with' the statute." *Id.* at 531 (quoting 28 U.S.C. § 2254 Rule 11).[1]

The reasons for treating such 60(b) motions as successive petitions apply with equal force to Rule 59(e) motions that challenge a district court's denial of habeas relief on the merits.

### A. Petitioner's Rule 59(e) motion is a habeas "application" because it attacks the district court's denial of relief on the merits

The textual inquiry here is straightforward: Because, "'[a]s a textual matter, § 2244(b) applies only where the court acts pursuant to a prisoner's 'application'" for a writ of habeas corpus, the question is whether Petitioner's Rule 59(e) motion is such an "application." *Gonzalez*, 545 U.S. at 530 (quoting *Calderon*, 523 U.S. at 554). And as the Court explained in *Gonzalez*, "it is clear that for purposes of § 2244(b) an

[1] Rule 11 was renumbered to Rule 12 in the 2009 amendments to the Rules Governing § 2254 Cases. *See* Rules Governing § 2254 Cases, Rule 12, 28 U.S.C.A. foll. § 2254.

'application' for habeas relief is a filing that contains one or more 'claims.'" *Id.* In turn, "a 'claim' as used in § 2244(b) is an asserted federal basis for relief from a state court's judgment of conviction." *Id.*

Notably, nothing in this sequence of logical steps has anything to do with the particular features of Rule 60(b) motions. The reasoning instead proceeds entirely from AEDPA's text. Because AEDPA's text means that its restrictions on successive petitions apply to any filing that asserts a "claim," the question in *Gonzalez* was whether the Rule 60(b) motion asserted "a federal basis for relief from a state-court conviction." *Id.* And again, the Court's answer had nothing to do with the label of the motion or the particulars of Rule 60(b), but instead with the substance of the motion.

As relevant here, the Court explained that "[a] motion can also be said to bring a 'claim' if it attacks the federal court's previous resolution of a claim *on the merits*, since alleging that the court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief." *Id.* at 532 (emphasis in original). And a motion attacks a district court's earlier decision "on the merits" when the alleged error does not relate to procedural issues, such as a failure to exhaust administrative remedies, a procedural default, or a statute of limitations bar. *Id.* at 532, n.4.

Petitioner's Rule 59(e) motion easily meets this test. Petitioner initially filed a petition for writ of habeas corpus under § 2254. J.A. 161. That filing is unquestionably an "application" for habeas relief containing 53 "claims" asserting federal bases for relief from a state court's judgment of conviction. After the district court denied his petition, Petitioner filed a Rule 59(e) motion to alter or amend the court's judgment on "some, but not all, of the grounds in his 2254 petition," and pointed out 12 purported "errors of law and fact" in the district court's order. J.A. 219. On each point of error, Petitioner either attacked the district court's legal conclusions (Point 2, J.A. 220; Point 3, J.A. 227; Point 4, J.A. 229; Point 5, J.A. 230; Point 7, J.A. 233; Point 8, J.A. 238; Point 9, J.A. 240; Point 10, J.A. 243; Point 11, J.A. 246; Point 12, J.A. 247), the court's application of a statutory presumption (Point 6, J.A. 232) or the court's acceptance of the state court's factual summary (Point 1, J.A. 219).

None of Petitioner's points of error alleged a procedural infirmity. He sought only to have the district court reweigh its application of the law to the underlying facts of his case. Petitioner's Rule 59(e) motion thus "attacks the federal court's previous resolution of [the] claim[s] on the merits," and seeks to have the merits resolved in his favor. *Gonzalez*, 545 U.S. at 532 (emphasis removed). The Rule 59(e) motion therefore constitutes a successive "application for writ of habeas corpus" because "alleging that the court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief." *Id*.

### B. Failing to treat Rule 59(e) motions challenging the denial of habeas relief on the merits as successive applications is inconsistent with AEDPA's provisions and purposes

A straightforward reading of AEDPA's text is sufficient to resolve this case: Because Petitioner's Rule 59(e) motion presents a "claim" for federal habeas relief, it is a successive habeas petition subject to § 2244(b)'s requirements. But if there were any doubt on the meaning of § 2244(b), Petitioner's Rule 59(e) motion is "at least similar enough that failing to subject it to the same requirements would be 'inconsistent with'" AEDPA's provisions and its fundamental purposes. *Gonzalez*, 545 U.S. at 531 (quoting 28 U.S.C. § 2254 Rule 11).

AEDPA is the culmination of more than 100 years of federal habeas practice, and it incorporated and augmented the limitations the Court imposed on federal habeas review after experiencing the problems expansive habeas review can cause. And AEDPA's purpose was to further the principles of federalism and finality by ensuring that a prisoner seeking to collaterally attack his state criminal judgment has *one* opportunity to litigate his habeas petition to final judgment. *See* Part I, *supra*.

The AEDPA-amended § 2244(b) thus bars all claims already presented in an earlier petition, and bars claims not already presented in an earlier petition unless they rely on either a new and retroactive rule of constitutional law or new facts showing a high

probability of actual innocence. 28 U.S.C. § 2244(b)(1)–(2). And to ensure these requirements effectively filter out repetitive claims, AEDPA's gatekeeping provision requires confirmation from the court of appeals that a successive petition meets these requirements before a district court may consider it. 28 U.S.C. § 2244(b)(3). These requirements are part of AEDPA's larger framework for streamlining federal habeas proceedings, all of which seek to channel a state prisoner's constitutional claims into a single, straightforward proceeding. Permitting habeas petitioners to force district courts to reconsider their decisions inevitably frustrates this objective.

This case aptly illustrates the problem. Petitioner does not, and cannot, allege any new facts demonstrating his innocence or identify a new and retroactive rule of constitutional law. He merely asserts that the district court wrongly applied the law to the facts of his case and seeks merely to have the court reweigh its decision. Using federal courts in this way is plainly inconsistent with the respect for finality of criminal judgments underlying all of AEDPA, including the amended § 2244(b). *See Calderon*, 523 U.S. at 558.

Allowing a habeas petitioner to question a district court's ruling on the merits with a Rule 59(e) motion only prolongs an already lengthy process. By the time a state prisoner's habeas petition reaches a district court, the individual in custody has been adjudged guilty of a crime in a state trial court; has appealed that criminal conviction on direct appeal in state appellate courts; has likely petitioned this Court for direct review; and has applied for post-conviction relief

in state court. When, at last, the petitioner is denied habeas relief by a federal district court, asking the court to reweigh the merits of its decision adds nothing to the habeas process except the "unnecessary delay" which AEDPA sought to eradicate. Joint Explanatory Statement of the Committee of Conference, H. Conf. Rep. No. 104-518, at 111, *reprinted in* 1996 U.S.C.C.A.N. 944.

Accordingly, as with Rule 60(b) motions, barring Rule 59(e) motions that attack the merits of a district court's rejection of a habeas claim is not only warranted by the text of § 2244(b), but is essential to vindicate AEDPA's central purpose of streamlining the federal habeas process.

## CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

Office of the Indiana
Attorney General
IGC South, 5th Floor
302 W. Washington Street
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

**Counsel of Record*

CURTIS T. HILL, JR.
Attorney General
THOMAS M. FISHER*
Solicitor General
KIAN J. HUDSON
Deputy Solicitor General
JULIA C. PAYNE
ROBERT L. YATES
Deputy Attorneys General

*Counsel for* Amici *States*

Dated: October 25, 2019

ADDITIONAL COUNSEL
*Counsel for* Amici *States*

STEVE MARSHALL
Attorney General
State of Alabama

ASHLEY MOODY
Attorney General
State of Florida

CHRISTOPHER M. CARR
Attorney General
State of Georgia

CLARE E. CONNORS
Attorney General
State of Hawaii

LAWRENCE G. WASDEN
Attorney General
State of Idaho

DEREK SCHMIDT
Attorney General
State of Kansas

JEFF LANDRY
Attorney General
State of Louisiana

TIMOTHY C. FOX
Attorney General
State of Montana

DOUGLAS J. PETERSON
Attorney General
State of Nebraska

DAVE YOST
Attorney General
State of Ohio

MIKE HUNTER
Attorney General
State of Oklahoma

ALAN WILSON
Attorney General
State of South Carolina

JASON R. RAVNSBORG
Attorney General
State of South Dakota

HERBERT H. SLATERY III
Attorney General
State of Tennessee