No. 15-1193

IN THE

# Supreme Court of the United States

DONNIE E. JOHNSON,

*Petitioner*,

*v.*

WAYNE CARPENTER, WARDEN,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## BRIEF FOR FORMER FEDERAL DISTRICT JUDGES AS AMICI CURIAE IN SUPPORT OF PETITIONER

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## INTEREST OF AMICI CURIAE[1]

Amici curiae are former federal district court judges. Their names, former titles, and years of service are listed in the Appendix. As former judges, amici have a special interest in ensuring that district courts retain the flexibility to offer relief in exceptional circumstances in accord with their sound discretion and the interests of justice.

Federal Rule of Civil Procedure 60(b)(6) grants district courts discretion to award relief when a movant demonstrates extraordinary circumstances. As amici are uniquely aware, district judges have substantial experience in deciding whether justice requires relief from a final judgment based on the movant's particular circumstances. While on the bench, amici decided countless 60(b)(6) motions involving myriad circumstances, from the mundane to the exceptional. Because no two sets of circumstances are the same, amici decided those motions based on the particular facts presented to the court. It is a disservice to habeas petitioners, the justice system, and acting federal judges to supplant that discretion with a *per se* rule that places certain extraordinary cases beyond the reach of the equitable power granted by Rule 60(b)(6). This Court should grant review to preserve district judges' discretion to award 60(b)(6) relief whenever justice requires.

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[1] The parties received timely notice of amici's intent to file this brief and have consented to its filing. Pursuant to Rule 37.2(a), letters consenting to the filing of this brief are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than amici or their counsel, made a monetary contribution to the preparation or submission of this brief.

## SUMMARY OF ARGUMENT

Rule 60(b)(6) acts as an important safety valve when justice demands a result that would otherwise be foreclosed. But several circuit courts have limited judges' ability to provide such relief in a specific subset of cases. In particular, those courts have held that 60(b)(6) relief is categorically unavailable for habeas petitioners relying on the change in law announced in *Martinez* v. *Ryan*, 132 S. Ct. 1309 (2012), and *Trevino* v. *Thaler*, 133 S. Ct. 1911 (2013). In contrast, other circuits have preserved district judges' ability to grant relief in truly extraordinary circumstances, while simultaneously recognizing that 60(b)(6) relief based on *Martinez* will be rare.

Without this Court's intervention, the circuit conflict will result in disparate treatment of habeas petitioners in federal court. Petitioners in several circuits will be denied the opportunity even to argue that their circumstances are extraordinary, while others will be able to contend that their circumstances justify 60(b)(6) relief. That unequal treatment could be the difference between life and death. A petitioner sentenced to death in one circuit might be able to reopen his previous habeas judgment to raise an ineffective-assistance-of-trial-counsel claim previously thought to be procedurally defaulted; but another petitioner with an equally meritorious claim in another circuit will be put to death without the opportunity to seek review of his previously defaulted claim. This case provides an ideal opportunity to resolve the consequential and inequitable division among the circuits and to preserve the broad discretion provided under Rule 60(b)(6).

There is no justification for preventing judges from using their judgment to resolve such motions on an

individualized basis. Judges are accustomed to discretionary decisionmaking. Numerous decisions across a wide range of situations within our judicial system are left to their good judgment. District judges constantly use their decisionmaking skills to balance competing factors and reach a just result. And appellate courts allow those decisions to stand so long as they are reasonable. There is no indication that 60(b)(6) motions based on *Martinez* differ from those other discretionary decisions. Instead, the considerations underlying such motions are well known to district judges and present no particular novelty. Allowing judges to decide on an individualized basis whether a petitioner's circumstances are extraordinary under Rule 60(b)(6) will therefore pose no problems for the judiciary. Amici urge this Court to grant review and hold that Rule 60(b)(6) is not susceptible to a categorical rule that removes certain cases from a district judge's discretion.

## ARGUMENT

### I. RESOLUTION OF THE QUESTION PRESENTED IS OF VITAL IMPORTANCE TO THE ADMINISTRATION OF JUSTICE

Absent this Court's review, habeas petitioners in at least four circuits will be denied the opportunity to explain why they deserve relief under Rule 60(b)(6). Even the most extraordinary circumstances will be cast aside so long as the motion relies on *Martinez* v. *Ryan*, 132 S. Ct. 1309 (2012), or *Trevino* v. *Thaler*, 133 S. Ct. 1911 (2013). In the other circuits, judges remain free in such cases to exercise their routine discretion under Rule 60(b)(6). That division among the courts stems in part from a broader disagreement about whether a change in decisional law can ever constitute extraordinary circumstances justifying 60(b)(6) relief, with seven circuits having taken a categorical approach to that

broader question. That circuit conflict results in indefensible disparate treatment of similarly situated habeas petitioners.

### A. The Circuits Are Split Over Whether A Change In Decisional Law Can Warrant Rule 60(b)(6) Relief, Resulting In Disparate Treatment Of Similarly Situated Petitioners

The Sixth Circuit decided below that the change in law in *Martinez* and *Trevino* cannot qualify as an extraordinary circumstance warranting relief under Rule 60(b)(6). Pet. App. 3a. As the petition explains, the Sixth Circuit is joined by the Fourth, Fifth, and Eleventh Circuits in adopting a *per se* rule against granting 60(b)(6) relief for motions based on *Martinez*. *See* Pet. 14-17. In contrast, the Third, Seventh, and Ninth Circuits have held that district judges can consider the change in law along with other factors to determine whether relief from the final judgment is justified. *See* Pet. 17-21. The circuits have acknowledged their divergence on several occasions. *See* Pet. 13.

The disagreement among the circuits can be traced in part to conflicting interpretations of this Court's decision in *Gonzalez* v. *Crosby*, 545 U.S. 524 (2005). In *Gonzalez*, the petitioner sought relief under Rule 60(b)(6) from a judgment dismissing his federal habeas petition as time-barred, arguing that this Court's subsequent decision in *Artuz* v. *Bennett*, 531 U.S. 4 (2000), rendered that judgment erroneous. This Court rejected the contention that *Artuz* was an extraordinary circumstance warranting Rule 60(b)(6) relief. *Gonzalez*, 545 U.S. at 536-538. "It [was] hardly extraordinary," the Court explained, "that … after petitioner's case was no longer pending, this Court arrived at a different interpretation" of the limitations period; "not every

interpretation of the federal statutes setting forth the requirements for habeas provides cause for reopening cases long since final." *Id.* at 536. The Court went on, however, to note that the petitioner's particular case was "all the less extraordinary … because of his lack of diligence in pursuing review of the statute-of-limitations issue." *Id.* at 537. That lack of diligence confirmed that the change in law was "not an extraordinary circumstance justifying relief from the judgment in petitioner's case." *Id.*

Courts have reached divergent conclusions about the implications of *Gonzalez* for Rule 60(b)(6) motions premised in part on an intervening change in law. The Ninth Circuit, for example, has read *Gonzalez* to require a multifactor analysis to decide whether a change in decisional law justifies relief under Rule 60(b)(6). *See Phelps* v. *Alameida*, 569 F.3d 1120, 1137-1140 (9th Cir. 2009). Although the Ninth Circuit had previously followed a "*per se* rule that Rule 60(b)(6) motions cannot be predicated on intervening changes in the law," the *Phelps* court determined that *Gonzalez* "directly refuted the [*per se*] rule" in favor of "a case-by-case approach." *Id.* at 1132-1133. According to the Ninth Circuit, *Gonzalez* "did *not* hold that denial of the motion was required because it rested on a subsequent change in the law," but emphasized multiple factors to demonstrate that the petitioner's case did not present extraordinary circumstances. *Id.* The Ninth Circuit pointed to this Court's favorable citation to the Eleventh Circuit's decision in *Ritter* v. *Smith*, 811 F.2d 1398 (11th Cir. 1987), as evidence that a court must "evaluate the circumstances surrounding the specific motion before the court." *Phelps*, 569 F.3d at 1133.

In contrast, the Eleventh Circuit has construed *Gonzalez* as rejecting the multifactor analysis that the

Eleventh Circuit previously applied. In *Ritter*, the Eleventh Circuit had held that 60(b)(6) relief was "plainly" allowed when there was "a clear-cut change in the law," but "that a change in the law will not *always* provide the truly extraordinary circumstances necessary to reopen a case." 811 F.2d at 1401. The court relied on several factors, "in addition to the fact of the change in the law," to support 60(b)(6) relief under the circumstances. *Id.*; *accord Booker* v. *Singletary*, 90 F.3d 440, 442 (11th Cir. 1996) ("In addition to citing a change in the law, a Rule 60(b)(6) movant 'must persuade [the court] that the circumstances are sufficiently extraordinary to warrant relief.'" (alteration in original)). But in the wake of *Gonzalez*—and despite this Court's citation of *Ritter*—the Eleventh Circuit reversed course and held that a change in decisional law is not an extraordinary circumstance under Rule 60(b)(6). *See Howell* v. *Secretary, Fla. Dep't of Corr.*, 730 F.3d 1257, 1261 (11th Cir. 2013). And the court subsequently refused even to consider "other factors beyond [the] change in decisional law," *Arthur* v. *Thomas*, 739 F.3d 611, 633 (11th Cir. 2014), explaining that "the U.S. Supreme Court has already told us that a change in decisional law is insufficient to create the 'extraordinary circumstance' necessary to invoke Rule 60(b)(6)," *id.* at 631 (citing *Gonzalez*, 545 U.S. at 535-538).

The remaining circuits are divided between those two camps. The D.C., Fourth, Fifth, Sixth, Tenth, and Federal Circuits hold that 60(b)(6) relief is generally unavailable based on a change in decisional law. *See Abdur'Rahman* v. *Carpenter*, 805 F.3d 710, 716 (6th Cir. 2015); *Adams* v. *Thaler*, 679 F.3d 312, 320 (5th Cir. 2012); *Martin* v. *Howard Univ.*, 2011 WL 2262489, at *1 (D.C. Cir. May 9, 2011) (per curiam); *Concept Design Elecs. & Mfg., Inc.* v. *Duplitronics, Inc.*, 104 F.3d 376

(Fed. Cir. 1996) (unpublished table decision); *Dowell* v. *State Farm Fire & Cas. Auto. Ins. Co.*, 993 F.2d 46, 48 (4th Cir. 1993); *Colorado Interstate Gas Co.* v. *Natural Gas Pipeline Co. of Am.*, 962 F.2d 1528 (10th Cir. 1992). In contrast, the First, Second, Third, Seventh, and Eighth Circuits have left open the possibility that a change in decisional law may justify relief under Rule 60(b)(6). *See Ramirez* v. *United States*, 799 F.3d 845, 850 (7th Cir. 2015); *Cox* v. *Horn*, 757 F.3d 113, 121 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 1548 (2015); *In re Terrorist Attacks on Sept. 11, 2001*, 741 F.3d 353, 357 (2d Cir. 2013); *Kansas Pub. Emps. Ret. Sys.* v. *Reimer & Koger Assocs., Inc.*, 194 F.3d 922, 925-926 (8th Cir. 1999); *Biggins* v. *Hazen Paper Co.*, 111 F.3d 205, 212 (1st Cir. 1997). This petition provides an opportunity not only to clarify the proper treatment of Rule 60(b)(6) motions premised specifically on *Martinez*, but also to resolve this broader disagreement about the import of *Gonzalez*.

### B. The Circuit Split Has Dire Consequences For Habeas Petitioners, Particularly Those On Death Row

Habeas petitioners in the Fourth, Fifth, Sixth, and Eleventh Circuits are precluded from reopening final judgments when their motions assert that, under *Martinez*, they were wrongly denied the opportunity to present a substantial ineffective-assistance-of-trial-counsel claim. Those circuits deny such claims regardless of the timeliness of the motion, the diligence of the petitioner, the strength of the underlying constitutional claim, or whether the claim could prevent the petitioner from being put to death. Instead, district courts in those circuits simply recite that *Martinez* is not an extraordinary circumstance warranting relief and deny the motion.

That approach has resulted in denial of relief even in cases, like this one, that appear to present extraordinary circumstances. *See* Pet. 27-30 (describing extraordinary circumstances in Mr. Johnson's case). The Southern District of Texas, for example, denied Duane Buck's 60(b)(6) motion seeking to vacate the court's earlier judgment that his ineffective-assistance-of-trial-counsel claim was procedurally barred. *See Buck* v. *Stephens*, 623 F. App'x 668, 669 (5th Cir. 2015), *petition for cert. filed* (U.S. Feb. 4, 2016) (No. 15-8049). In that case, to rebut the state's evidence of future dangerousness during the sentencing phase, Buck's trial attorney called a clinical psychologist to testify about the influence of race on a defendant's future dangerousness. *Buck* v. *Thaler*, 132 S. Ct. 32, 33 (2011) (Alito, J., statement respecting denial of certiorari). On cross-examination, the psychologist testified "that the race factor, black, increases [Buck's] future dangerousness," and the prosecution relied on that testimony in its closing argument to obtain a death sentence. *Id.* at 34. Four years later, the State conceded that the psychologist's testimony was unconstitutional and undermined the integrity of Buck's death sentence, *see id.* at 36 (Sotomayor, J., dissenting from denial of certiorari); a majority of this Court has similarly recognized that the testimony was problematic, *id.* at 33 (Alito, J., statement respecting denial of certiorari); *id.* at 38 (Sotomayor, J., dissenting from denial of certiorari). But when Buck sought to reopen his federal habeas proceedings to present the merits of his ineffective-assistance-of-trial-counsel claim after *Martinez* removed the procedural bar, the district court and the Fifth Circuit applied the categorical rule to deny relief. *See Buck*, 623 F. App'x at 673-674.

The 60(b)(6) motions of Johnson, Buck, and other similarly situated habeas petitioners have all received the same cursory treatment under the categorical approach, regardless of the strength of their ineffective-assistance-of-trial-counsel claims and other factors that favor granting relief. *See* Pet. 5-10, 28-30; *Buck*, 623 F. App'x at 673-674. And the circuits have denied certificates of appealability on the ground that no reasonable jurist could disagree with the lower courts' application of the *per se* rule. *See* Pet. App. 3a; *Buck*, 623 F. App'x at 674.

Similarly situated petitioners in the Third, Seventh, and Ninth Circuits, in contrast, do have the opportunity to argue that a case implicating *Martinez* or *Trevino* presents the rare circumstances that warrant relief. The effect of this opportunity can be profound. In *Barnett* v. *Roper*, 941 F. Supp. 2d 1099 (E.D. Mo. 2013), for example, the court held that extraordinary circumstances justified reopening the final judgment in Barnett's federal habeas proceeding so that Barnett could present evidence supporting an ineffective-assistance claim that had been procedurally barred under pre-*Martinez* law. The court considered the change in law, Barnett's diligence in pursuing his ineffectiveness claim, the State's and victim's interests in finality, the degree of connection between Barnett's case and *Martinez*, and the underlying strength of Barnett's ineffectiveness claim. *See id.* at 1120. The court concluded that "the equitable factors offered in conjunction with the strength of the underlying constitutional error alleged enable[d] [the petitioner] to satisfy the high standard of Rule 60(b)(6)." *Id.* at 1120-1121. The capital nature of the case also weighed heavily on the court's decision. *Id.* at 1118. In subsequent proceedings, the court vacated Barnett's death sentence after

finding that both his post-conviction and trial counsel were constitutionally ineffective. *See Barnett* v. *Roper*, 2016 WL 278861, at *5 (E.D. Mo. Jan. 22, 2016). Had Barnett's case arisen in a circuit that applies the categorical approach, Barnett's death sentence would stand despite the constitutional error.

Particularly in the capital context, these disparate outcomes are untenable. The availability of 60(b)(6) relief should not vary based on jurisdiction. This case presents an ideal opportunity to resolve the division between the circuits and guarantee that habeas petitioners, including those on death row, receive the benefit of district judges' discretion under Rule 60(b)(6) in extraordinary cases.

## II. THERE IS NO JUSTIFICATION FOR A CATEGORICAL APPROACH TO RULE 60(b)(6) MOTIONS PREMISED ON *MARTINEZ*

Rule 60(b)(6) allows a district court to "relieve a party … from a final judgment, order, or proceeding" when "any other reason justifies relief." The Rule is an equitable catch-all provision that "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Klapprott* v. *United States*, 335 U.S. 601, 614-615 (1949) (Black, J., opinion). But the Rule is not without its limits. Courts must exercise their authority under Rule 60(b)(6) only when presented with "extraordinary circumstances." *Ackermann* v. *United States*, 340 U.S. 193, 199 (1950). Such circumstances will be rare, *Gonzalez*, 545 U.S. at 535, and "[i]ntervening developments in the law by themselves [will] rarely" satisfy that standard, *Agostini* v. *Felton*, 521 U.S. 203, 239 (1997). A Rule 60(b)(6) motion thus calls for an exercise of the court's sound discretion consistent with the interests of justice.

District judges are well accustomed to exercising such discretion. They make similar discretionary decisions in numerous other contexts. Nothing about *Martinez* alters the case-by-case determination normally required under 60(b)(6), nor is a *Martinez*-based 60(b)(6) motion materially different from other discretionary judgments. Accordingly, no basis exists for applying an anomalous approach to Rule 60(b)(6) motions resting on *Martinez*.

### A. District Judges Regularly Exercise Discretion In A Wide Range Of Circumstances In Which This Court Has Rejected *Per Se* Approaches

District judges are entrusted with numerous discretionary decisions throughout the course of litigation. They regularly use their judgment in diverse factual and legal contexts, subject to review for abuse of discretion.

District judges must often decide, for example, whether the "interests of justice" warrant appointment or substitution of counsel. *See* 18 U.S.C. § 3006A(a)(2)(B) (appointment of counsel for certain misdemeanors and non-capital habeas cases); *id.* § 3006A(c) (substitution of counsel in non-capital cases); *id.* § 3599(e) (substitution of counsel in capital cases). As this Court has explained in that context, "the 'interest of justice' standard contemplates a peculiarly context-specific inquiry." *Martel* v. *Clair*, 132 S. Ct. 1276, 1287 (2012). It is not susceptible to a strict definition, but instead requires consideration of several factors, including the timeliness of the motion and the asserted cause for the petitioner's complaint. *Id.*

District judges must also decide whether the "interest of justice" requires a forum transfer. *See* 28 U.S.C. § 1404(a). In making that determination, courts

consider the convenience of the parties and various public-interest considerations. *Atlantic Marine Constr. Co.* v. *United States Dist. Ct. for W. Dist. of Tex.*, 134 S. Ct. 568, 581 (2013). And because each case turns on its own particular circumstances, this Court has "repeatedly rejected the use of *per se* rules in applying the doctrine." *American Dredging Co.* v. *Miller*, 510 U.S. 443, 455 (1994).

District judges likewise hold "first line discretion" to allow interlocutory appeals under 28 U.S.C. § 1292(b) and Federal Rule of Civil Procedure 54(b). *Swint* v. *Chambers Cty. Comm'n*, 514 U.S. 35, 47 (1995). Like Rule 60(b)(6), those provisions require district judges to identify a subset of cases that warrant unusual treatment. Under § 1292(b), for example, interlocutory appeals are warranted only when "'exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment.'" *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 475 (1978). District judges must exercise discretion to decide whether exceptional circumstances justify an immediate appeal, and they do so only on rare occasions. *See Camacho* v. *Puerto Rico Ports Auth.*, 369 F.3d 570, 573 (1st Cir. 2004) ("[A]ppeals under [§ 1292(b)] are … hen's-teeth rare."); *Koehler* v. *Bank of Bermuda Ltd.*, 101 F.3d 863, 866 (2d Cir. 1996) (recognizing "§ 1292(b) has not caused a large problem in the federal appellate courts").[2]

[2] In 2014, the federal courts of appeals considered only 570 applications for interlocutory appeals, *see* U.S. Courts, *Table 2.7–U.S. Courts of Appeals Judicial Facts and Figures* (Sept. 30, 2014)—less than one per year on average for each of the more than 600 sitting district judges.

Rule 54(b) similarly requires district courts to determine whether particular circumstances warrant deviating from "'the historic federal policy against piecemeal appeals.'" *Curtiss-Wright Corp.* v. *General Elec. Co.*, 446 U.S. 1, 8 (1980). The Rule allows a judge to enter final judgment on a subset of claims in an action only if "there is no just reason for delay," considering both judicial administrative interests and the equities of the case. *Id.* at 5. Sound judicial administration suggests that requests are not to be routinely granted, but "discretion 'is, with good reason, vested by the rule primarily' in the district courts." *Id.* at 10. And since the circumstances before judges may vary considerably, this Court has refused to cabin their Rule 54(b) authority with specific guidelines, *see id.* at 11, or categorical rules, *see Reiter* v. *Cooper*, 507 U.S. 258, 270 (1993).

District judges exercise discretion in numerous other settings in which this Court has repeatedly shunned categorical approaches. *See, e.g.*, *Sprint/United Mgmt. Co.* v. *Mendelsohn*, 552 U.S. 379, 384 (2008) (evidentiary issues); *Gall* v. *United States*, 552 U.S. 38, 51-52 (2007) (sentencing).[3] Given that district judges routinely exercise their discretion in these other contexts without difficulty and without undue burden on the judicial system, it is unclear why courts should be precluded from exercising that discretion in the context of certain 60(b)(6) motions.

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[3] This Court has cautioned that *per se* evidentiary rules are inappropriate because evidentiary decisions are made in the context of the facts and arguments in a particular case. *Mendelsohn*, 552 U.S. at 387. Sentencing similarly requires an individualized determination because "'every case [is] a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.'" *Gall*, 552 U.S. at 52.

Like other discretionary decisions, a motion under Rule 60(b)(6) requires judges to exercise the same discretion they routinely employ in other settings. Indeed, this Court has recognized that "60(b)(6) relief is … neither categorically available nor categorically unavailable[.]" *Liljeberg* v. *Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988). Instead, "it is appropriate to consider the risk of injustice to the parties in the particular case[.]" *Id.; see also Polites* v. *United States*, 364 U.S. 426, 433 (1960) (refusing to "inflexibly" withhold 60(b)(6) relief for "clear and authoritative change in governing law").

Many courts thus agree that *per se* rules are generally inappropriate for Rule 60(b)(6). *See, e.g.*, *Budget Blinds, Inc.* v. *White*, 536 F.3d 244, 251 (3d Cir. 2008) ("We decline to establish a categorical rule stating that registering courts lack the power to use Rule 60(b)(6) to vacate the judgments of rendering courts, but we emphasize that registering courts should exercise this power only under very limited circumstances."); *Ford Motor Co.* v. *Mustangs Unlimited, Inc.*, 487 F.3d 465, 470 (6th Cir. 2007) ("'[A] district court has a duty to vacate a prior order of dismissal when required in the interests of justice, not whenever a settlement agreement has been breached.'" (emphasis omitted)). Even in the context of a willful default, the First Circuit has refused to accept that a willful defaulter could never demonstrate that his specific circumstances and the interests of justice compel relief from a final judgment. *See Ungar* v. *Palestine Liberation Org.*, 599 F.3d 79, 86 (1st Cir. 2010). The court recognized that the contours of Rule 60(b)(6) "are peculiarly malleable" and require "fact-specific considerations informed by the nature and circumstances of the particular case." *Id.* at 83-84. For that reason, the court rejected a broad-scale categorical rule concerning willful

defaults. *Id.* at 84. Although relief for a willful defaulter will be exceedingly rare, the possibility remains open that a movant will demonstrate truly extraordinary circumstances sufficient to obtain relief.

### B. There Is No Reason To Constrain District Judges' 60(b)(6) Discretion In The *Martinez* Context

Nothing about *Martinez* suggests any justification for subjecting motions premised in part on that decision to categorical approaches the Court has rejected in other contexts. In particular, district courts have demonstrated their ability to exercise their discretion soundly and only in appropriate cases even when entertaining motions that implicate *Martinez*. Several familiar factors guide the exercise of discretion under Rule 60(b)(6)—including whether the motion was filed in a reasonable time, whether the petitioner diligently pursued the claim, whether the habeas petition raises a colorable claim of constitutional error, and other equitable factors—and no evidence suggests that courts have struggled to apply those factors in the *Martinez* context or that in doing so they have watered down the extraordinary-circumstances requirement.

First, courts have applied the timeliness factor in cases implicating *Martinez* as an efficient means of winnowing 60(b)(6) motions, just as they do in other Rule 60(b)(6) cases. *See Gonzalez*, 545 U.S. at 534-535 (timeliness requirements of 60(b) ensures federal courts "will not [be] expose[d] … to an avalanche of frivolous postjudgment motions"); *cf. Cox*, 757 F.3d at 116 (warning that "unless a petitioner's motion for 60(b)(6) relief based on *Martinez* was brought within a reasonable time of that decision, the motion will fail"). Rule 60(c) requires that a 60(b)(6) motion be made

within "a reasonable time." The reasonable-time inquiry requires neither intensive fact-finding nor lengthy legal analysis. The Fourth Circuit has recognized, for example, that a district court acted well within its discretion in finding a motion untimely when the petitioner waited two-and-a-half years after *Martinez* and 15 months after *Trevino* to file his 60(b)(6) motion. *See Moses* v. *Joyner*, 2016 WL 878086, at *2-3 (4th Cir. Mar. 8, 2016). The court noted that the petitioner's delay was inexplicable because he was on "high alert" as to the relevancy of *Martinez* to his case. *Id.* at *3. The petitioner also had a 60(b) motion pending when *Martinez* was announced, but never attempted to amend that motion to raise the procedural default argument. *See id.* As the Fourth Circuit noted, "reasonable time" determinations "reflect the considerable latitude of judgment our system reposes in trial courts." *Id.* at *4. District judges have had little difficulty rejecting 60(b)(6) motions based on similar filing delays on a case-by-case basis. *See, e.g.*, *Joseph* v. *Beard*, 2015 WL 1443970, at *5 (E.D. Pa. Mar. 27, 2015) (filing two years after *Martinez* untimely without justification for delay); *Taylor* v. *Wetzel*, 2014 WL 5242076, at *8 (M.D. Pa. Oct. 15, 2014) (filing one year and a day after *Martinez* untimely under the circumstances).

Second, as this Court has explained in other 60(b)(6) contexts, a petitioner's lack of diligence in pursuing a claim can demonstrate that *Martinez*'s change in law is not an extraordinary circumstance in a particular case. *See Gonzalez*, 545 U.S. at 537-538. If a petitioner has abandoned an issue on appeal or otherwise failed to press it, it is within a district court's discretion to find that the case does not present extraordinary circumstances. *See id.* For that reason, the Ninth Circuit affirmed the denial of a 60(b)(6) motion raising a *Martinez*

issue where, "[u]ntil the Supreme Court decided *Martinez*, … [the petitioner] had never pursued the theory that he now advances." *Lopez* v. *Ryan*, 678 F.3d 1131, 1136 (9th Cir. 2012). To the contrary, the petitioner had argued during his federal habeas proceedings that his postconviction counsel diligently developed his ineffective-assistance-of-trial-counsel claim. *See id.* District judges are thus effectively able to identify, in the specific context of each case, when a petitioner relying on *Martinez* has failed to diligently pursue a claimed error in earlier proceedings. *See, e.g.*, *Joseph*, 2015 WL 1443970, at *7 (petitioner failed to diligently pursue claim raised in *Martinez*-based 60(b)(6) motion); *Wood* v. *Ryan*, 2014 WL 3573622, at *6 (D. Ariz. July 20, 2014) (same), *aff'd*, 759 F.3d 1117 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 21 (2014).

Third, the strength of the constitutional claim underlying the 60(b)(6) motion can influence whether the change in law in *Martinez* constitutes extraordinary circumstances. *Cf. Klapprott*, 335 U.S. at 615 ("[T]he complaint in the denaturalization proceeding strongly indicates that the Government here is proceeding on inadequate facts[.]"); *see also Cox*, 757 F.3d at 124-125 ("A court need not provide a remedy under 60(b)(6) [and *Martinez*] for claims of dubious merit[.]"); *Lopez*, 678 F.3d at 1137-1138 (considering whether petitioner's 60(b)(6) motion based on *Martinez* demonstrated a substantial ineffective-assistance-of-trial-counsel claim).[4]

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[4] This Court has instructed district courts to consider the merits underlying habeas procedural disputes in other contexts. A petitioner's actual innocence, for instance, will excuse a procedural bar or the expiration of the statute of limitations. *See McQuiggin* v. *Perkins*, 133 S. Ct. 1924, 1928 (2013). Like Rule 60(b)(6), the Court's "fundamental miscarriage of justice exception" "'see[ks] to balance the societal interests in finality, comity, and conservation

In considering thousands of habeas petitions every year, including ineffective-assistance-of-trial-counsel claims, district judges have shown that they can determine on an individualized basis whether an ineffectiveness claim underlying a *Martinez*-based 60(b)(6) motion has merit. *See Joseph*, 2015 WL 1443970, at *11 ("underlying ineffective assistance of counsel claims now alleged … are not sufficiently substantial to militate in favor of equitable relief"); *Ford* v. *Wenerowicz*, 2013 WL 460107, at *5 (E.D. Pa. Feb. 7, 2013) (deciding "unexhausted claim has no merit")

Fourth, a court entertaining a 60(b)(6) motion may consider other factors, such as whether a petition presents a capital case. This Court has instructed courts to treat capital cases with special care. *See Burger* v. *Kemp*, 483 U.S. 776, 785 (1987) ("Our duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case."). District judges considering such motions based on *Martinez* have efficiently weighed the capital nature of a case with other relevant factors, no differently than in other 60(b)(6) settings. *See Taylor*, 2014 WL 5242076, at *14 (considering "the [capital] nature of this case"); *Barnett*, 941 F. Supp. 2d at 1118 (same). Whether any court had considered the underlying claim on the merits could also affect a court's decision. *See Taylor*, 2014 WL 5242076, at *14; *Cook* v. *Ryan*, 2012 WL 2798789, at *9 (D. Ariz. July 9, 2012), *aff'd*, 688 F.3d 598 (9th Cir. 2012).

As these examples show, there is no indication that allowing district judges to exercise their customary discretion in cases implicating *Martinez* will impose excessive burdens on the courts or allow reopening of an

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of scarce judicial resources with the individual interest in justice that arises in the extraordinary case.'" *Id.* at 1931-1932.

inordinate number of habeas proceedings. The *per se* rule serves no purpose but to prevent courts from applying their seasoned judgment.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 2016

# APPENDIX

# APPENDIX

## List of Amici Curiae

### William G. Bassler

Judge, United States District Court for the District of New Jersey (1991-2006).

### Edward N. Cahn

Chief Judge, United States District Court for the Eastern District of Pennsylvania (1993-1998); Judge, United States District Court for Eastern District of Pennsylvania (1974-1993).

### Robert J. Cindrich

Judge, United States District Court for the Western District of Pennsylvania (1994-2004).

### David H. Coar

Judge, United States District Court for the Northern District of Illinois (1994-2010).

### W. Royal Furgeson

Judge, United States District Court for the Western District of Texas (1994-2008); Senior Judge, United States District Court for the Northern District of Texas (2008-2013).

**John S. Martin**

Judge, United States District Court for the Southern District of New York (1990-2003).

**Stephen M. Orlofsky**

Judge, United States District Court for the District of New Jersey (1996-2003).

**H. Lee Sarokin**

Judge, United States District Court for the District of New Jersey (1979-1994).

**Herbert J. Stern**

Judge, United States District Court for the District of New Jersey (1974-1987).

**Ricardo M. Urbina**

Judge, United States District Court for the District of Columbia (1994-2012).