

No. 10-\_\_\_

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IN THE  
**Supreme Court of the United States**

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RAPHAEL ARRIAZA GONZALEZ,

*Petitioner*

v.

RICK THALER, DIRECTOR,  
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,  
CORRECTIONAL INSTITUTIONS DIVISION,

*Respondent.*

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*On Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the Fifth Circuit*

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, Title I, 110 Stat. 1217, establishes a one-year statute of limitations for a state prisoner to file a federal habeas corpus petition. As relevant here, that limitation period runs from “the date on which the judgment [of conviction] became final by the conclusion of direct review or the expiration of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A).

The Questions Presented are:

I. Whether state law is relevant to determining when the States’ direct review processes conclude, as the Seventh, Eighth, and Eleventh Circuits have held, or whether AEDPA dictates a single federally prescribed point in time when all state direct-review processes are deemed to have concluded, as the Fifth and Ninth Circuits have held

II. Whether, under AEDPA, the “conclusion of direct review” occurs upon (i) issuance of an intermediate appellate court’s mandate, as the Eighth Circuit has held, (ii) expiration of the time for seeking discretionary review in the state’s highest court, as the Fifth Circuit held, or (iii) issuance of the intermediate appellate court’s decision, as the Ninth Circuit has held.

III. Whether “expiration of the time for seeking [direct] review” under Section 2244(d)(1)(A) includes the ninety-day period for filing a petition for a writ of certiorari with this Court even when the petitioner forewent discretionary review in the state’s highest court, as the Fourth and Seventh Circuits have held, or excludes that time, as the Fifth, Eighth, Ninth, and Eleventh Circuits have held.

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## PETITION FOR A WRIT OF CERTIORARI

Raphael Arriaza Gonzalez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-8a) is reported at 623 F.3d 222. The district court's opinion (App., *infra*, 9a-10a) is not reported. The magistrate judge's recommendation (App., *infra*, 11a-21a) is also not reported.

### JURISDICTION

The court of appeals entered its judgment on October 6, 2010. App., *infra*, 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

### RELEVANT STATUTORY PROVISIONS

Section 2244 of Title 28 of the United States Code provides, in relevant part:

§ 2244. Finality of determination

\* \* \*

**(d) (1)** A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

**(A)** the date on which the judgment became final by the conclusion of direct

review or the expiration of the time for seeking such review.

The full text of 28 U.S.C. § 2244(d) is reproduced at App., *infra*, 22a.

### STATEMENT OF THE CASE

The enactment of the Antiterrorism and Effective Death Penalty Act (“AEDPA”) in 1996 imposed a one-year statute of limitations on all habeas petitions filed in federal court by state prisoners. Pub. L. No. 104-132, Title I, Section 101, 110 Stat. 1217. That limitations period commences at “the latest of” four specified dates, including, as relevant here, “the date on which the judgment [of conviction] became final by the conclusion of direct review or the expiration of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A).

This case arises at the intersection of three circuit conflicts concerning that trigger point for Section 2244(d)(1)(A)’s limitation period.

First, when a state prisoner on direct appeal forgoes discretionary review by the state’s highest court, the federal courts of appeals have issued conflicting decisions concerning whether state law plays any role in determining when a state-court judgment of conviction becomes “final by the conclusion of direct review.” The Fifth Circuit here, like the Ninth Circuit, holds that state law is irrelevant in determining whether Section 2244(d)(1)(A)’s “conclusion of direct review” test has been met. See App., *infra*, 7a-8a; *Roberts v. Cockrell*, 319 F.3d 690 (5th Cir. 2003); *Wixom v. Washington*,

264 F.3d 894 (9th Cir. 2001), cert. denied, 534 U.S. 1143 (2002). The Seventh, Eighth, and Eleventh Circuits, however, have ruled that state-law processes are relevant in determining when the state's own direct review process has concluded. *See Riddle v. Kemna*, 523 F.3d 850 (8th Cir. 2008) (en banc); *Balsewicz v. Kingston*, 425 F.3d 1029 (7th Cir. 2005), cert. denied, 546 U.S. 1144 (2006); *Tinker v. Moore*, 255 F.3d 1331 (11th Cir. 2001), cert. denied, 534 U.S. 1144 (2002). *See generally* Brian R. Means, *Federal Habeas Manual* § 9A:14 (2010) (discussing the circuit conflict).

Second, if AEDPA dictates a uniform federal point when the conclusion of direct review is deemed to occur, then, as the Fifth Circuit expressly acknowledged, App., *infra*, 7a-8a, its holding that the expiration of the time period for seeking discretionary review alone determines finality squarely conflicts with the holding of the en banc Eighth Circuit in *Riddle v. Kemna*, *supra* (which deems direct review to be final when the appellate court issues its mandate), and with the law of the Ninth Circuit (which treats the appellate court's issuance of its decision as uniformly concluding direct review), *Wixom*, *supra*.

Third, with respect to Section 2244(d)(1)(A)'s second clause, which addresses the expiration of time for seeking further review, the courts of appeals have issued conflicting decisions concerning whether the ninety-day timeframe for seeking certiorari review in this Court should be counted when

state prisoners do not seek discretionary review in their highest state court. Fifth Circuit law does not factor that ninety-day time period into its calculation of the relevant time period, App., *infra*, 4a; *Roberts*, 319 F.3d 690. Nor would the Eighth, Ninth, or Eleventh Circuits. *Riddle*; 523 F.3d at 855; *Hemmerle v. Schriro*, 495 F.3d 1069 (9th Cir. 2007), cert. denied, 129 S. Ct. 33 (2008); *Pugh v. Smith*, 465 F.3d 1295 (11th Cir. 2006). But the Fourth and Seventh Circuits have held that expiration of the time for seeking direct review must include the ninety-day certiorari timeframe regardless of whether the prisoner sought discretionary review from the State's highest court. *See Balsewicz, supra*; *Hill v. Braxton*, 277 F.3d 701 (4th Cir. 2002). *See generally* Means, *supra*, § 9A:14 (noting and documenting the circuit conflict).

These inter-circuit conflicts are entrenched and recurring, given the large number of federal habeas petitions filed by state prisoners each year. As the existence of the multi-tiered conflicting interpretations by the federal courts of appeals documents, a significant percentage of state prisoners on direct review forgo discretionary review in their State's highest court, repeatedly confronting the courts of appeals with these questions and perpetuating and expanding the inconsistency in federal law. This Court's review is needed to bring harmony to federal law and to ensure that AEDPA operates with the respect for state-law processes that Congress intended and this Court's decisions have enforced.

Indeed, given Congress's careful balancing of prisoners' substantial interest in obtaining federal habeas corpus review with the need for finality and stability in collateral review processes, this Court has long been particularly attentive to the need to eliminate recurring conflicts in the interpretation and application of AEDPA's habeas review provisions.<sup>1</sup> This case would allow the Court to consider and resolve these three intersecting conflicts efficiently in a single case.

1. Petitioner Raphael Arriaza Gonzalez was convicted of murder in Texas state court on June 14, 2005, and was sentenced to thirty years in prison. App., *infra*, 2a. He filed a timely appeal to the Texas intermediate court of appeals, which affirmed his conviction on July 12, 2006. *Ibid.*; see *Gonzalez v. State*, No. 05-05-01140-CR, 2006 WL 1900888 (Tex. App. July 12, 2006). Gonzalez's counsel did not file a petition for discretionary review with the Texas Court of Criminal Appeals within the thirty-day timeframe permitted by state law, Tex. R. App. P. 68.2(a). App., *infra*, 2a. The court of appeals issued its mandate on September 26, 2006. *Ibid.* Under Texas law, the issuance of

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<sup>1</sup> See, e.g., *Magwood v. Patterson*, 130 S. Ct. 2788 (2010); *Holland v. Florida*, 130 S. Ct. 2549 (2010); *Jimenez v. Quarterman*, 129 S. Ct. 681 (2009); *Allen v. Siebert*, 552 U.S. 3 (2007); *Lawrence v. Florida*, 549 U.S. 327 (2007); *Burton v. Stewart*, 549 U.S. 147 (2007); *Day v. McDonough*, 547 U.S. 198 (2006); *Evans v. Chavis*, 546 U.S. 189 (2006).



the appellate court's mandate marked the conclusion of direct review in the state court system. *See, e.g., Ex parte Johnson*, 12 S.W.3d 472 (Tex. Crim. App. 2000).

2. On July 19, 2007, Gonzalez filed in Texas state court a petition for a writ of habeas corpus under Texas Rule of Criminal Procedure 11.07. App., *infra*, 2a. The Texas Court of Criminal Appeals denied that petition on the merits on November 21, 2007. *Ibid.*

3. On January 24, 2008, Gonzalez filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Texas. App., *infra*, 2a. Excluding the time during which his properly filed state habeas petition was pending, 28 U.S.C. § 2244(d)(2), Gonzalez's federal habeas petition was filed 360 days after the state court of appeals issued its mandate concluding direct review of his conviction, and 346 days after the time period for seeking certiorari review in this Court expired. The filing, however, was 436 days after the Texas court of appeals entered its order affirming his conviction and 406 days after expiration of the time to seek discretionary review by the Texas Court of Criminal Appeals.

The district court, adopting the report and recommendation of a magistrate judge, App., *infra*, 11a-21a, dismissed the petition, *id.* at 9a-10a. Following Fifth Circuit precedent, the district court held that Gonzalez's direct appeal became "final" at the expiration of the time period for seeking discretionary review with the

Texas Court of Criminal Appeals, not the issuance of the mandate or expiration of the time period for seeking certiorari review in this Court. App., *infra*, 9a, 15a (citing *Roberts v. Cockrell*, 319 F.3d at 694-695).

4. The court of appeals granted a certificate of appealability and affirmed. App., *infra*, 1a-8a.

In concluding that Gonzalez's petition was untimely, the court of appeals held that federal courts should not rely on "state court definitions to determine finality" under 28 U.S.C. § 2244(d)(1)(A), App., *infra*, 8a. The court held instead that Section 2244(d)(1)(A) imposes "a uniform federal rule" for deeming state-law direct-review processes to be concluded. App., *infra*, 7a-8a. (quoting *Clay v. United States*, 537 U.S. 522, 531 (2003)).

In so holding, the Fifth Circuit acknowledged, App., *infra*, 7a, that its decision directly conflicted with that of the en banc Eighth Circuit in *Riddle v. Kemna*, 523 F.3d 850 (8th Cir. 2008), but declared the Eighth Circuit's decision "unpersuasive," App., *infra*, 7a. The court instead expressly reaffirmed an earlier Fifth Circuit decision, *Roberts v. Cockrell*, *supra* (followed at App, *infra*, 8a), which had similarly held that state-law definitions of when the State's direct review processes conclude are "of no consequence for the purposes of § 2244(d)(1)(A)." *Roberts* itself had acknowledged the conflict between Fifth Circuit law and that of the Eleventh Circuit, which (like the Eighth Circuit) held that

Section 2244(d)(1)(A) required reference to a Florida rule that direct review by an intermediate court of appeals ends when the mandate issues. *Roberts*, 319 F.3d at 694 (disagreeing with *Tinker v. Moore, supra*).

The Fifth Circuit further ruled that, under Section 2244(d)(1)(A), the appropriate uniform federal rule for determining when direct intermediate-level review concludes is the expiration of the time period for seeking discretionary review from the state's highest court. App., *infra*, 4a.

The Fifth Circuit also rejected (App., *infra*, 4a-8a) the Eighth Circuit's alternative holding that, under *Lawrence v. Florida*, 549 U.S. 327 (2007), the appellate court's issuance of its mandate is the proper determinant of finality under AEDPA. Compare *Riddle*, 523 F.3d at 855-856.

Finally, as required by *Roberts*, the court of appeals excluded from its calculation of the "time for seeking [direct] review" under Section 2244(d)(1)(A) the ninety-day timeframe for seeking certiorari review in this Court. App., *infra*, 4a; see *Roberts*, 319 F.3d at 693 & n.14.

### **REASONS FOR GRANTING THE WRIT**

The trio of circuit conflicts that has now been cemented in the courts of appeals' decisions interpreting 28 U.S.C. § 2244(d)(1)(A) necessitates this Court's intervention. The Fifth Circuit has now expressly reaffirmed its precedent, acknowledging its direct conflict at

two different levels with an intervening en banc decision of the Eighth Circuit. App., *infra*, 7a-8a. That decision, moreover, expanded a preexisting conflict between the law of the Fifth Circuit on the one hand, and the law of the Seventh and Eleventh Circuits on the other hand concerning the role of state law in determining the finality of the state's own direct review processes under Section 2244(d)(1)(A). Whether the conclusion of direct review in the state-court system should be determined with reference to state law – or whether state law is irrelevant to that inquiry – are critically important and recurring questions of law that have arisen repeatedly among the more than 17,000 federal habeas petitions filed by state prisoners each year. See, e.g., James C. Duff, *Judicial Business of the United States Courts: 2009 Annual Report of the Director of the Administrative Office of the United States Courts* at 142 (Table C-2) (2010).

And even if the Fifth Circuit were correct that a single wooden federal rule defining the conclusion of all state court appellate review processes applied, the “uniform federal rule” sought by the Fifth Circuit here, App., *infra*, 7a, cannot exist until this Court determines whether that single rule is exclusively the expiration of the time for seeking discretionary review in the state's highest court (as the Fifth Circuit held), the issuance of the intermediate appellate court's mandate (as the en banc Eighth Circuit held), or the issuance of the

intermediate court's decision (as the Ninth Circuit has held).

On top of that, the Fifth Circuit's decision compounded yet another circuit conflict concerning whether this Court's certiorari timeframe defines "the expiration of the time for direct review" when, for differing reasons, discretionary review in a State's highest court is not sought.

Allowing these conflicts to fester deprives AEDPA and the federal habeas process of the very stability and federalism-based respect for state criminal processes that this Court has long recognized as central to AEDPA's purpose. *See Carey v. Saffold*, 536 U.S. 214, 222 (2002) (AEDPA's purpose is to promote "comity, finality, and federalism" by "respecting the interest in the finality of state court judgments.") (quoting *Duncan v. Walker*, 533 U.S. 167, 178 (2001)). The ability of state prisoners to obtain federal habeas review, and the ability of States to obtain definitive conclusion of the collateral review process, should not vary based on circuit court geography. Had Gonzalez's habeas petition been filed in the Seventh, Eighth, or Eleventh Circuits, it would have been timely. There should not be a different rule for the Fifth and Ninth Circuits. By the same token, States in the Seventh, Eighth, and Eleventh Circuits now have the finality of their convictions determined differently than do their sister States in the Fifth and Ninth Circuits. Viewed

from either perspective, the inconsistency and variability in the interpretation of a single provision of a single federal law are wrong and should be harmonized by this Court.

**I. THE COURT OF APPEALS' DECISION CEMENTED A THREE-TIERED CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS**

This Court noted in *Clay v. United States*, 537 U.S. 522, 531 (2003) that Section 2244(d)(1)(A) prescribes a “uniform” statutory standard for determining the finality of direct appellate review in state court proceedings. *See also Jimenez v. Quarterman*, 129 S. Ct. 681, 686 (2009). That test is “the latest of \* \* \* the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A). This case presents the subsidiary questions of how Congress intended AEDPA’s test of “the conclusion of direct review” and “the time for seeking such review” to be interpreted and applied. In three different respects, the Fifth Circuit’s decision in this case expands acknowledged circuit conflicts on those questions that necessitate this Court’s review.

**A. The Holding That State Law Is Irrelevant To Determining When A State’s Direct Review Process Concludes Comports With Ninth Circuit Law But Conflicts With Four Other Circuits**

1. While AEDPA dictates that “the date on which the judgment [of conviction] became final by the conclusion of direct review” is one trigger for the federal limitations period, 28 U.S.C. § 2244(d)(1)(A), that statutory language leaves open the question of the extent to which state law determines when “the conclusion of direct review” in the State’s own processes has occurred. The Fifth Circuit’s express reaffirmance of its prior ruling in *Roberts v. Cockrell*, *supra*, despite its acknowledged conflict with the law of the Eleventh Circuit and the en banc Eighth Circuit, has entrenched an inter-circuit conflict on that important and recurring question of federal law.

There is no dispute that, as a matter of Texas law, the date on which the intermediate court of appeals issued its mandate was the date on which Gonzalez’s judgment of conviction became final by the conclusion of direct review in the state court system. *See, e.g., Ex parte Johnson*, 12 S.W.3d 472 (Tex. Crim. App. 2000); *In re Long*, 984 S.W.2d 623,

626 (Tex. 1999) (per curiam).<sup>2</sup> The dispute instead is whether Section 2244(d)(1)(A) factors

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<sup>2</sup> Almost half of the States define finality by issuance of the mandate or an analogous procedure. See *Siebert v. State*, 778 So. 2d 842, 848-849 (Ala. Crim. App. 1999), disapproved of on other grounds in *State v. Hutcherson*, 847 So. 2d 378 (Ala. Crim. App. 2001) (utilizing a “certificate of judgment,” which is similar to a mandate); *State v. Febles*, 115 P.3d 629, 632-6333 (Ariz. Ct. App. 2005) (mandate); *Johnson v. State*, 900 S.W.2d 940, 951 (Ark. 1995) (mandate); *People v. Alexander*, 129 P.3d 1051, 1056 (Colo. Ct. App. 2005) (mandate); *LaBoy v. State*, 981 A.2d 1173 (Del. 2009) (unpublished table decision) (mandate); *Jones v. Florida*, 602 So. 2d 606, 607-08 (Fla. Ct. App. 1992) (mandate); *Yetman v. Gilbert Corp. of Delaware*, 483 S.E.2d 878, 881 (Ga. Ct. App. 1997) (“remittitur”); *Leer v. State*, 218 P.3d 1173, 1175 (Idaho Ct. App. 2009) (utilizing a “remittitur”); *Polk v. State*, 789 N.W.2d 437 (Iowa Ct. App. 2010) (unpublished table decision) (utilizing “procedendo”); *Massey v. Secretary Dep’t of Pub. Safety & Corr. Servs.*, 886 A.2d 585, 602 (Md. 2005) (mandate); *Foxworth v. St. Amand*, 929 N.E.2d 286, 291 (Mass. 2010) (“rescript”); *Puckett v. State*, 834 So. 2d 676, 677 (Miss. 2002) (mandate); *Riddle*, 523 F.3d at 856 (mandate); Mo. S.Ct. Op. R. 8.02(D)(1) & (D)(3)(b) (same); *State v. White*, 590 N.W.2d 863, 869 (Neb. 1999) (mandate); Nev. Rev. Stat. § 34.726(1) (2010) (same); *State v. Gubitosi*, 888 A.2d 1262, 1265 (N.H. 2005) (mandate); *Woodson v. Lee*, 392 P.2d 419, 420 (N.M. 1964) (same); *State v. Dorton*, 641 S.E.2d 357, 360 (N.C. Ct. App. 2007) (mandate); N.C. Gen. Stat. § 15A-1415(a)(2) (2010) (same); *Matter of Disciplinary Action Against Larson*, 485 N.W.2d 345, 348 n.2 (N.D. 1992) (mandate); *Carver v. Mack*, No. 2005CA0053, 2006 WL 1537754 \*3 (Ohio Ct. App. June 5, 2006) (mandate); *Baker v. Darr Equip. Co.*, 233 P.3d 419, 423 (Okla. Civ. App. 2010) (mandate); S.C. Code 1976 § 17-27-45(A) (2010) (utilizing “remittitur”); *In re Runyan*, 853 P.2d 424, 429 n.4 (Wash. 1993) (mandate); *State v. Simmons*,



that state-law rule into its determination of when that State's own direct review process ends, or whether AEDPA categorically forbids any such consideration of state law and instead superimposes a federal rule for when all fifty States' individual direct review processes terminate.

The Fifth Circuit held in *Roberts* and reaffirmed here that state law is “of no consequence for the purposes of § 2244(d)(1)(A),” and that federal courts have “no reason to look to state law” in applying Section 2244(d)(1)(A). 319 F.3d at 694-695. Instead the Fifth Circuit held that a single, homogenized standard – the expiration of the time period for seeking direct review – defines when every State's direct review process terminates, regardless of what state law says. *Ibid.*; App., *infra*, at 8a.

That decision comports with the law of the Ninth Circuit, which held in *Wixom v. Washington*, 264 F.3d 894 (2001), that state law defining the issuance of the mandate as the final conclusion of the direct review process is irrelevant under Section 2244(d)(1)(A):

That the Washington courts have interpreted the term ‘final’ in [Wash. Code] § 10.73.090 to mean the date at which the mandate issues is their prerogative. We, as stated above, are

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659 N.W.2d 507, \*4 (Wis. Ct. App. 2003) (unpub. table decision) (“remittitur”).

constrained by Congress's definition of the term.

*Id.* at 898 n.4. The court held instead that "Congress's definition of the term" final meant that, as a matter of AEDPA law, the unappealed decision of the Washington Court of Appeals signified the end of direct review. *Id.* at 897-898; see also *Hemmerle v. Schriro*, 495 F.3d 1069 (9th Cir. 2007), cert. denied, 129 S. Ct. 33 (2008).

2. As the Fifth Circuit has acknowledged, however, that rule of law directly conflicts with the law of the Eleventh and the en banc Eighth Circuits. See App., *infra*, 7a; *Roberts*, 319 F.3d at 694 & n.16. It is also contrary to the law in the Seventh Circuit.

In *Riddle v. Kemna*, 523 F.3d 850 (2008), the Eighth Circuit went en banc to resolve the question of how to determine when a state's direct review process ends for purposes of Section 2244(d)(1)(A). The en banc court expressly rejected the argument that AEDPA demands a regimented definition of finality for all state intermediate appellate court processes. *Id.* at 853, 856.

In so holding, the court specifically disagreed with the Fifth Circuit's central rationale in this case – that *Clay v. United States*, 537 U.S. 522 (2003) requires a single federal rule of finality that ignores variations among State processes. App., *infra*, 7a-8a. As the Eighth Circuit explained, *Clay* held only that Section 2244(d)(1)(A) prescribed a uniform federal statutory measure for finality, but it did

not hold that, in applying that statutory standard, courts must ignore that test's differing "application to the varying facts of the state procedure." *Riddle*, 523 F.3d at 856.

Applying its rule that Section 2244(d)(1)(A)'s statutory standard allows consideration of the State's definition of when its own review process concludes, the Eighth Circuit then held – in direct opposition to the Fifth Circuit's decisions here and in *Roberts* – that the intermediate court's issuance of its mandate was the functional "conclusion of direct review" under Missouri state law and thus under AEDPA Section 2244(d)(1)(A). *Riddle*, 523 F.3d at 856 (citing Mo. Sup. Ct. R. 30.24(b); Mo. Sup. Ct. Op. R. 8.02(D)(1); and *Payne v. Kemna*, 441 F.3d 570, 572 (8th Cir. 2006)).

The Fifth and Ninth Circuits' law also conflicts with the law of the Eleventh Circuit, as the Fifth Circuit has acknowledged. *Roberts*, 319 F.3d at 694 & n.16. In *Tinker v. Moore*, 255 F.3d 1331 (2001), cert. denied, 534 U.S. 1144 (2002), the Eleventh Circuit explained that, "[u]nder Florida law, a judgment against a criminal defendant becomes final upon issuance of the mandate on his direct appeal." *Id.* at 1333 (citing *Jones v. State*, 602 So. 2d 606, 607-608 (Fla. Ct. App. 1992)). The court accordingly held that the date of the issuance of the mandate also determined the conclusion of direct review for purposes of Section 2244(d)(1)(A). 255 F.3d at 1333 ("Tinker's mandate issued on February

14, 1997, and thus he had until February 13, 1998, to file his § 2254 petition.”).

The law of the Seventh Circuit accords with that of the Eighth and Eleventh Circuits. See *Balsewicz v. Kingston*, 425 F.3d 1029, 1032 (7th Cir. 2005), cert. denied, 546 U.S. 1144 (2006) (enforcing under Section 2244(d)(1)(A) the rule that, “[i]n Wisconsin, a direct challenge to a conviction becomes ‘final’ the day the Remittitur issues,” and measuring the timeliness of the habeas petition from that date); cf. *Frasch v. Peguese*, 414 F.3d 518, 522 (5th Cir. 2005) (“To determine what constitutes ‘direct review’ for purposes of 2244(d)(1)(A), we look to state (Maryland) law.”).

3. That conflict in the circuits is widespread, encompassing five different federal courts of appeals. And it is entrenched, with the Fifth Circuit having expressly reaffirmed its contrary rule of law despite the acknowledged circuit conflicts and the Eighth Circuit’s consideration of the issue en banc. Furthermore, the importance and frequent recurrence of the question presented is underscored by both the number of appellate decisions presenting the question and the Eighth Circuit’s recognition that en banc consideration of the question was warranted.

The conflict in the law, moreover, is outcome determinative. Had Gonzalez’s case arisen in the Seventh, Eighth, or Eleventh Circuits, his habeas petition would have been deemed timely. But, because circuit geography placed him within the Fifth Circuit, his petition

was deemed untimely and his opportunity for review through the Great Writ has been lost.

No such widespread disuniformity for both prisoners and States should exist under AEDPA. That Act's goals of obtaining stability, consistency, and reliable rules of finality for state-law convictions – purposes that are just as important for States as they are for prisoners – are confounded when AEDPA's provisions are applied disparately solely because of the disagreements of federal courts.<sup>3</sup> This Court's review is the only mechanism for resolving the conflict and affording AEDPA the consistent interpretation that Congress intended and principles of federalism and evenhandedness require.

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<sup>3</sup> Unlike the Fifth Circuit, this Court has frequently held that AEDPA respects and preserves the role of state law in its operation, especially in determining the finality of state convictions. *See, e.g., Carey*, 536 U.S. at 220, 223, 226 (State's determination that a state habeas petition was untimely was conclusive for purposes of determining whether the petition was "properly filed" within the meaning of AEDPA's tolling provision; "Ordinarily, for purposes of applying federal statute that interacts with state procedural rules, we look to how a state procedure functions."); *Evans v. Chavis*, 546 U.S. 189, -197-198 (2006) (state law controls in determining when an application for state collateral review was "properly filed" under Section 2244(d)(2)'s tolling provision).

**B. The Fifth Circuit’s Decision Creates A Conflict In What Finality Rule Applies**

Even if the Fifth Circuit were correct that Section 2244(d)(1)(A) imposes a single federal definition of finality for all State direct appeal processes, the federal circuits would still be left with conflicting measures of finality.

As noted, the Fifth Circuit has determined that the “conclusion” of a direct appeal that terminates at the intermediate appellate stage necessarily occurs “when the time for seeking further direct review in the state court expires.” App., *infra*, 4a (citing *Roberts*, 319 F.3d at 694). See also *Wesley v. Snedeker*, 159 Fed. App’x 872, 873 (10th Cir. 2005) (unpub. mem.) (treating the expiration of time for seeking review by the state’s highest court as the date on which direct review concluded).

The Ninth Circuit in *Wixom* held that, when further discretionary review was not sought within the state court system, the direct review process concluded on the date that the intermediate appellate court decision issued – not the date that the opportunity for further review expired or the date that the mandate issued. 264 F.3d at 897-898 (date of appellate court’s “denial of his appeal” marked the “conclusion” of direct review).<sup>4</sup>

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<sup>4</sup> To be sure, the Ninth Circuit ultimately ruled that, under Section 2244(d)(1)(A)’s second clause, finality attached after the expiration of *Wixom*’s time to seek

As the Fifth Circuit acknowledged here, however, App., *infra* 7a, the Eighth Circuit invoked the appellate court's issuance of its mandate as the trigger for finality in *Riddle v. Kemna, supra*. In so doing, the Eighth Circuit relied not only on Missouri law, but on this Court's decision in *Lawrence v. Florida*, 549 U.S. 327 (2007), which referred "five times to the issuance of the mandate by [the] state court as the 'final judgment'" for purposes of AEDPA Section 2244(d). *Riddle*, 523 F.3d at 856; *see also Lawrence*, 549 U.S. at 330-332. *See also Brown v. Milyard*, 373 Fed. App'x 853, 853-855 (10th Cir. 2010) (unpubl. mem.) (relying upon state court issuance of mandate as the date that direct review concluded), cert. denied, 131 S. Ct. 532 (2010)..

If AEDPA imposes a uniform federal date for when State direct-review processes terminate at the intermediate-appellate level, then there should be only one such date, not the three different measures currently enforced by different courts of appeals. If one uniform federal date is to control, then this Court's review is necessary to resolve the conflicting decisions and determine what date Congress intended

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discretionary review in the state supreme court. 264 F.3d at 898. The Fifth Circuit rule, however, collapses those two inquiries by making the end of direct review the same as the expiration of the time period for appeal.

**C. The Fifth Circuit Has Expanded  
A Widespread Conflict Over  
Whether The Certiorari  
Timeframe Applies To State  
Prisoners Who Forgo  
Discretionary Review In Their  
State’s Highest Court**

1. The inter-circuit conflicts embodied in the Fifth Circuit’s decision extend still further. In calculating when Gonzalez’s time for seeking direct review expired under Section 2244(d)(1)(A)’s second clause, the Fifth Circuit – based on its prior decision in *Roberts*, 319 F.3d at 693-95 & n.14 – omitted the ninety-day time period in which Gonzalez could have sought certiorari review in this Court. The Fifth Circuit instead counted only the shorter thirty-day time period for seeking review in the Texas Court of Criminal Appeals. App., *infra*, 4a. While that decision is in accord with the law of two other circuits, two additional circuits have held the opposite. And the Eleventh Circuit is on both sides of the conflict.

As a general rule, under 28 U.S.C. § 1257(a) and this Court’s Rules 10(a), (b), & 13.1, certiorari review can only be sought from a “state court of last resort,” not intermediate appellate courts. There are, however, exceptions to that rule, including when there is a statutory or constitutional bar to higher review. *See, e.g., Brown v. Texas*, 443 U.S. 47, 50 (1979); *Nash v. Florida Indus. Comm’n*, 389 U.S. 235, 237 & n.1 (1967) (requirement does not apply when higher court “apparently”



lacked jurisdiction); *Metlakatla Indian Cmty. Annette Island R. v. Egan*, 363 U.S. 555, 559-560 (1960) (higher court not functioning).

The Fourth and Seventh Circuits, and one panel of the Eleventh Circuit, have held that Section 2244(d)(1)(A)'s calculation of the "expiration of the time for seeking such [direct] review" includes the ninety-day period following the appellate court's decision in which the defendant could have filed a certiorari petition with this Court, regardless of whether the defendant sought discretionary review from the State's highest court. That is because "the one-year limitation of § 2244(d)(1)(A) is concerned solely with the question of time, not with whether a defendant's appeal qualifies on the merits for review by the Supreme Court." *Nix v. Secretary for the Dep't of Corr.*, 393 F.3d 1235, 1237 (11th Cir. 2004) cert. denied, 545 U.S. 1114 (2005).

In *Balsewicz v. Kingston*, *supra*, the Seventh Circuit held that, even though Balsewicz never sought discretionary review of his judgment of conviction in the Wisconsin Supreme Court, the ninety days in which he could have filed a petition for certiorari with this Court must be included before his conviction became final under Section 2244(d)(1)(A), 425 F.3d at 1032. In so holding, the Seventh Circuit relied on this Court's decision in *Bell v. Maryland*, 378 U.S. 226 (1964), under which, "[w]ithout question, review of a state criminal conviction by the United States Supreme Court is considered

‘direct review’ of that conviction,” *Anderson v. Litscher*, 281 F.3d 672, 674-675 (7th Cir. 2002) (cited in *Balsewicz*, 425 F.3d at 1032). “Because the plain terms of section 2244 include the period for seeking direct review, regardless of whether or not a petitioner chooses to avail himself or herself of that opportunity,” the *Anderson* court reasoned, “the ninety day period during which a petition for certiorari may be filed by a state prisoner falls within the meaning of section 2244(d)(1)(A).” 281 F.3d at 674-675.

The Fourth Circuit ruled likewise in *Hill v. Braxton*, 277 F.3d 701 (2002). “If no petition for a writ of certiorari is filed in the United States Supreme Court, then the limitation period begins running when the time for doing so – 90 days – has elapsed,” *id.* at 704, notwithstanding the defendant’s failure to seek review in the State’s highest court, *id.* at 703.

2. The law in the Fifth Circuit is the opposite, *see Roberts*, 319 F.3d at 693-695 & n.14 (citing this Court’s Rules 10(b), 6 & 13), and the court accordingly omitted that ninety-day period when computing the timeliness of Gonzalez’s habeas petition, App, *infra*, 4a.

The Eighth Circuit agrees, as has a different panel of the Eleventh Circuit.

In *Riddle*, *supra*, the Eighth Circuit acknowledged the circuit split on the issue, 523 F.3d at 855, and held that the petitioner was not entitled to include the ninety-day certiorari timeframe in computing when his opportunity to seek direct review expired under Section

2244(d)(1)(A). The court reasoned that, “because the United States Supreme Court could not have reviewed Riddle’s direct appeal, ‘the expiration of the time for seeking [direct] review’ does not include the ninety-day period for filing for certiorari.” *Ibid.*

A different panel of the Eleventh Circuit similarly has ruled that, “[b]ecause Pugh was not entitled to petition the Supreme Court of the United States for a writ of certiorari,” due to his failure to seek discretionary review from the State’s highest court, the ninety-day period for certiorari would not be included in determining when the period for seeking direct review expired under Section 2244(d)(1)(A). *Pugh v. Smith*, 465 F.3d 1295, 1299-1300 (11th Cir. 2006). *See also Wesley*, 159 Fed. Appx. at 873-874 (“[I]t would be anomalous to extend the limitation period by 90-days \* \* \* to allow for the potential of a certiorari petition before the United States Supreme Court when the defendant failed to seek discretionary review from the state’s highest court.”).

3. Given the breadth of the circuit conflict and the common recurrence of this question in the federal circuit courts, as well as its central importance to the stable and evenhanded application of federal law governing access to habeas corpus, this Court’s review is warranted to eliminate the conflict. *See Means, supra* (documenting the circuit conflict). Only this Court’s review can bring the needed coherence and consistency in AEDPA law.

## II. THE FIFTH CIRCUIT'S RULING IS ERRONEOUS.

Review is also warranted because the Fifth Circuit is on the wrong end of all three circuit splits.

*First*, with respect to whether state law is relevant to determining whether Section 2244(d)(1)(A)'s "conclusion of direct review" prong is satisfied, the Fifth Circuit's decision disregards this Court's decision in *Jimenez v. Quarterman*, *supra*, and overreads *Clay v. United States*, *supra*.

Implicit in this Court's decision in *Jimenez v. Quarterman* was the principle that federal courts must respect developments in state court review in determining when a conviction becomes final by the "conclusion of direct review" under Section 2244(d)(1)(A). In *Jimenez*, this Court noted that, while the language of Section 2244(d)(1)(A) "pinpoints" a "uniform date of finality set by Congress," that uniform date was "the conclusion of direct appellate proceedings in the state court," and the Court then included a state court ruling reopening *post hoc* the direct review process. 129 S. Ct. at 686. Rather than enforce a wooden federal rule of finality, this Court's decision respected and found dispositive in applying Section 2244(d)(1)(A)'s standard the moment of finality prescribed – in fact, created – by a unique state court ruling. *Ibid*.

To hold that state law is irrelevant, moreover, would deprive many prisoners of the full one-year period in which to seek federal

habeas review that Congress specifically afforded them in AEDPA. That is because, in many States (like Texas), a prisoner cannot initiate the state's post-conviction review procedure until after his conviction becomes "final" under state law. Tex. R. Crim. P. 11.07 § (3).<sup>5</sup> If finality under Section 2244(d)(1)(A) is universalized under AEDPA and the chosen federal rule precedes when State law considers the conviction "final" – as occurred in this case – the AEDPA statute of limitations will start to run for prisoners before they can even initiate state remedies.<sup>6</sup> Given that, in each of the States listed in footnote 2, *supra*, the mandate (or analogous process) will issue well after the actual decision is reached – and in eleven states, would likely issue after the time for seeking further review has expired – the time lost could be substantial.<sup>7</sup>

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<sup>5</sup> See also, e.g., Ala. R. Crim. P. 32.2(c)(1) (petitions for post-conviction relief must be brought within one year of the issuance of the certificate of judgment by the Court of Criminal Appeals); *Jones v. Florida*, 602 So. 2d 606, 607-08 (Fla. Ct. App. 1992) (“[A] judgment and sentence become final for purposes of filing a motion for post-conviction relief when appellate proceedings have concluded, *i.e.*, upon issuance of the mandate”).

<sup>6</sup> In this case, there was a forty-six-day differential under Texas law between the time for seeking discretionary review and issuance of the mandate. App., *infra*, 2a-4a.

<sup>7</sup> The following States have post-conviction review statutes that measure finality from issuance of the mandate or similar procedure, and potentially allow more time for issuance of the mandate than time for

That risk is especially acute in those States that impose no time limit upon the appellate court's issuance of its mandate,<sup>8</sup> and in virtually every State, where the issuance of the

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seeking further review. *Compare* Ala. R. App. P. 39(b)(3) & 41(a) (18 days for issuance of certificate of judgment, 14 days to seek certiorari); Del. Sup. Ct. R. 19(a) (no specific time period for mandate); Fla. R. App. P. 9.340(a) (mandate may issue anytime after expiration of fifteen days after judgment); Idaho R. App. P. 38(b) & (c) (mandate shall issue *no earlier* than twenty-one days after opinion); *compare* Mass. R. App. P. 23 & 27.1(a) (requiring issuance of the rescript twenty-eight days after the opinion, but appeal to the Supreme Judicial Court within twenty days of opinion); Miss. R. App. P. 17(b) & 41(b) (requiring certiorari petition to be filed fourteen days after mandatory rehearing motion, but mandate shall issue twenty-one days after rehearing); Mo. Sup. Ct. R. 30.24(b) (imposing no time limit on issuance of mandate); Neb. Ct. R. App. P. § 2-114(A)(1) (setting no strict time for issuance of mandate, but prohibiting it from issuing *before* expiration of the period for seeking highest court review); N.M. R. App. P. 12-402(C)(providing no definite time for issuance of the mandate, but requiring that it shall not issue before the time for seeking certiorari in the state's highest court expires); S.C. R. App. Prac. 221(b) (allowing issuance of remittitur anytime after fifteen days have expired following the judgment); Wis. Stat. Ann. § 809.26(1) (2010) (allowing issuance of remittitur any time after the expiration of thirty-one days from judgment).

<sup>8</sup> *See, supra*, n.6. *See also* Del. R. Sup. Ct. 19(a); Fl. R. App. P. 9.340(a); Idaho R. App. P. 38(b) & (c); Mo. Sup. Ct. R. 30.24(b); Neb. Ct. R. App. P. § 2-114(A)(1); N.M. R. App. P. 12-402(C); S.C. R. App. Prac. 221(b); Wis. Stat. Ann. § 809.26(1).

mandate can be delayed by the filing of rehearing or reconsideration requests.<sup>9</sup>

To be sure, in *Clay*, this Court noted that Section 2244(d)(1)(A) prescribes a “uniform” statutory rule of finality. 537 U.S. at 531. But that decision said nothing about the role of state law in determining when that federal statutory standard is satisfied. In any event, to the extent there is tension between *Clay* and *Jimenez*, that would simply strengthen the need for this Court’s review, because only this Court can determine definitively the interplay of its own prior decisions.

*Second*, with respect to the question of what the uniform federal rule should be (assuming there is one), the Fifth Circuit’s holding that the appellate court’s issuance of its mandate cannot mark the finality of direct review under Section 2244(d)(1)(A) is, as the Eighth Circuit explained in *Riddle*, 523 F.3d at 856, in substantial tension with this Court’s decision in *Lawrence v. Florida*, which repeatedly referred to and then enforced the issuance of the mandate as the date on which

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<sup>9</sup> See, e.g., Ala. R. App. P. 41(a)(1) (permitting the certificate of judgment to be stayed by timely filing of an application for rehearing); Ariz. R. Crim. P. 31.23(a)(2) (allowing the issuance of the mandate to be delayed by a motion for reconsideration); Del. R. Sup. Ct. 19(a) (permitting stay of the mandate for motion for reargument or motion for rehearing en Banc, and delaying issuance until time for filing such motions has expired).

appellate review concluded in that case for purposes of AEDPA. 549 U.S. at 330-332. See also *Holland v. Florida*, 130 S. Ct. 2549, 2556 (2010) (“on December 1, 2005, the court issued its mandate, making its decision final” for the purposes of Section 2244(d)(2)’s statutory tolling provision) (emphasis omitted).<sup>10</sup>

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<sup>10</sup> In addition, the courts of appeals uniformly measure the finality of appellate court decisions in relation to the mandate when calculating the seventy-day deadline under the Speedy Trial Act, 18 U.S.C. § 3161(d)(2),(e). See, e.g., *United States v. Kington*, 875 F.2d 1091, 1109 (5th Cir. 1989) (“[A]n appellate disposition occasioning a retrial becomes final on the date when the appellate court issues its mandate.”) (emphasis added); *United States v. Rivera*, 844 F.2d 916, 920 (2d Cir. 1988) (“[A]n appeal becomes final on the date the mandate is issued.”) (emphasis added); *United States v. Felton*, 811 F.2d 190, 198 (3d Cir. 1987) (en banc) (“The action of a court of appeals does not become final until its mandate is issued \* \* \* \* [W]e agree with the district court that the language of the statute (‘the date the action ... becomes final’) requires that the date of issuance [of the mandate] be the point of departure.”); *United States v. Robertson*, 810 F.2d 254, 259 & n.6 (D.C. Cir. 1987); *United States v. Scalf*, 760 F.2d 1057, 1059 (10th Cir. 1985); *United States v. Ross*, 654 F.2d 612, 616 (9th Cir. 1981); see also *United States v. Cheek*, 3 F.3d 1057, 1065 (7th Cir. 1993). At least three circuit courts have varied this rule slightly, measuring finality from receipt of the mandate in the lower court, rather than issuance, but they nevertheless treat the mandate as the relevant measure of finality. See *United States v. Long*, 900 F.2d 1270, 1276-1277 (8th Cir. 1990); *United States v. Lasteed*, 832 F.2d 1240, 1243 (11th Cir. 1987), cert. denied, 485 U.S. 1022 (1988); *United States v. Ferris*, 751 F.2d 436, 438-



*Third*, and finally, extensive precedent from this Court has included the ninety-day certiorari timeframe in defining when the time for seeking direct review expires in criminal cases, without regard to the merits of such a certiorari petition. See *Bell*, 378 U.S. at 232 (noting that review by the United States Supreme Court is included in the “direct review” of a state decision); *Griffith v. Kentucky*, 479 U.S. 314, 320-321 (1987) (“direct review” included Griffith’s petition for a writ of certiorari). When Congress incorporated the term “direct review” in Section 2244(d)(1)(A), that phrase presumptively carried forward this Court’s settled precedent. See *Clay*, 537 U.S. at 527-528 (Court “presume[s] that Congress expects its statutes to be read in conformity with this Court’s precedents.”) (quoting *United States v. Wells*, 519 U.S. 482, 495 (1997)).

As a result, while the States’ direct review processes can be expected to “conclu[de]” short of review by this Court, whenever the conviction becomes final under state law, Section 2244(d)(1)(A)’s separate clause concerning the “expiration of the time for seeking [direct] review” cannot occur until the time periods for pursuing all remaining direct appeals – either further state appeals or certiorari review – have expired. *Cf. Clay*, 537 U.S. at 530 (noting, in interpreting 28 U.S.C. § 2255(f)(1) as automatically including the

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439 (1st Cir. 1984); see also *United States v. Staton*, 94 F.3d 643, \*3 (4th Cir. 1996) (unpublished per curiam).

ninety-day certiorari period, that the former provision was “no less broad” than Section 2244(d)(1)(A)). By ignoring the natural import of the term “direct review” and excluding the period for seeking certiorari from its calculation of the “expiration of the time for seeking [direct] review,” the Fifth Circuit ignored not only the contrary decisions of its sister Circuits, but also the straightforward text of Section 2244(d)(1)(A) and the extensive teachings of this Court.

### CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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