No. 13-1406

In the Supreme Court of the United States

LOUIS CASTRO PEREZ,
Petitioner,

v.

WILLIAM STEPHENS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

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

BRIEF OF AMICUS CURIAE THE CONSTITUTION PROJECT IN SUPPORT OF PETITIONER

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CAPITAL CASE

QUESTION PRESENTED

In *Maples v. Thomas*, 132 S. Ct. 912 (2012), this Court held that attorney abandonment is an "extraordinary circumstance" that may excuse a procedural default caused by the abandonment during the state habeas proceedings. The overriding question in this case is whether the result is different when the default—as a result of attorney abandonment—occurs during a *federal* habeas proceeding.

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INTEREST OF AMICUS CURIAE[1]

The Constitution Project is a bipartisan nonprofit organization that seeks solutions to contemporary constitutional issues through scholarship and public education. The Project seeks to promote constitutional dialogue. It creates bipartisan committees whose members are former government officials, judges, scholars, and other prominent citizens. These committees reach across ideological and partisan lines to craft consensus recommendations for policy reforms. The Project is deeply concerned with the preservation of our fundamental constitutional guarantees and ensuring that those guarantees are respected and enforced by all three branches of government.

The Constitution Project regularly files amicus briefs in the U.S. Supreme Court and other courts in cases, like this one, that implicate its bipartisan positions on constitutional issues, in order to better apprise courts of the importance and broad consequences of those issues. Beginning in 2000, the Project convened a blue-ribbon committee on the death penalty, which includes supporters and opponents of capital punishment, Democrats and Republicans, former judges, prosecutors, defense lawyers, victim advocates, and others with extensive and varied experience in the criminal justice system. Although

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[1] In accordance with Supreme Court Rule 37.6, *amicus curiae* represents that this brief was authored solely by *amicus curiae* and its counsel and that no person or entity, other than *amicus curiae* and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties were notified of *amicus curiae*'s intention to file this brief in accordance with Supreme Court Rule 37, and all parties consent to the filing of this brief.

this committee does not take a position on the death penalty, it is concerned that, as currently administered, the death penalty lacks adequate procedural safeguards and other assurances of fundamental fairness. The committee has issued three comprehensive reports—in 2001, 2005, and May 2014. Each of these reports have consistently concluded that "[t]he lack of adequate counsel to represent capital defendants is likely the gravest of the problems that render the death penalty, as currently administered, arbitrary, unfair, and fraught with serious error."[2]

The representation of inmates sentenced to death is unique both in its difficulty and in the consequences for inmates when the representation is inadequate. The Project seeks to ensure that individuals are not put to death without an opportunity for federal court review of habeas claims on the merits solely because of errors resulting from attorney abandonment. The Project participated as an amicus at both the certiorari and merits stages in *Maples v. Thomas*, in which this Court held that attorney abandonment is an "extraordinary circumstance" that may excuse a procedural default caused by the abandonment during the state habeas proceedings. 132 S. Ct. 912, 924 (2012). This case—in which the habeas petitioner, a death row inmate, defaulted because of attorney abandonment during his *federal* habeas proceeding—implicates the same important principles in *Maples*.

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[2] *See, e.g.*, The Constitution Project, *Irreversible Error: Recommended Reforms for Preventing and Correcting Error in the Administration of Capital Punishment*, ch. 7 at 86 (2014), *available at* http://www.constitutionproject.org/documents/irreversible-error/ (last visited June 26, 2014) [hereinafter *Irreversible Error*].

Accordingly, the Constitution Project has a direct interest in the question presented by this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This capital case raises an important question on which the circuits are expressly divided: whether attorney abandonment—which this Court in *Maples v. Thomas* held may excuse a procedural default during a state habeas proceeding—may excuse a default during a *federal* habeas proceeding, because it constitutes an "extraordinary circumstance" warranting relief under Federal Rule of Civil Procedure 60(b)(6).

The district court below found that the habeas petitioner in this case—a death row inmate in Texas—was abandoned by his attorney during his federal habeas proceeding, causing him to miss the deadline for appealing the order denying his habeas petition. Pet. App. 43a. Drawing from this Court's decision in *Maples*, the district court reasoned that attorney abandonment is an "extraordinary circumstance" that warranted granting petitioner's motion for relief under Rule 60(b)(6) and vacating and re-entering the court's judgment denying habeas relief. The time for filing an appeal then began anew. *Id.* at 43a-44a.

A divided panel of the Fifth Circuit reversed. Without questioning the district court's finding that petitioner had been abandoned by counsel, the panel majority held that attorney abandonment did not justify excusing the default by operation of Rule 60(b). The panel majority concluded that *Maples* is distinguishable because the default in this case occurred during the federal habeas proceeding, Pet. App. 9a-10a, and that *Bowles v. Russell*, 551 U.S. 205 (2007), precludes the entry of Rule 60 relief here, *id.* at

10a-12a. Judge Dennis dissented. *Id.* at 16a-17a. In his view, the equitable principles recognized in *Maples* warrant the entry of Rule 60(b) relief based on attorney abandonment, and *Bowles* does not preclude that result. *Id.* at 30a. Judge Dennis also explained that the Fifth Circuit's decision in this case directly conflicts with the Ninth Circuit's decision in *Mackey v. Hoffman*, 682 F.3d 1247 (9th Cir. 2012). *Id.* at 23a-26a.

The role of counsel is nowhere more important than in capital cases, where the punishment is death. Attorney abandonment poses a unique threat to adequate representation and, indeed, the legitimacy of the criminal justice system, especially in capital cases. The circuits in which nearly half of all death row inmates nationwide are imprisoned—the Fifth and Ninth—are now split on whether, in the wake of *Maples*, attorney abandonment may excuse a procedural default in a federal habeas proceeding. This case presents a clean vehicle with which to resolve that conflict. Certiorari is accordingly warranted.

STATEMENT OF THE CASE

This case stems from a tragic, multiple murder in Texas, which petitioner has consistently maintained he did not commit. After petitioner was arrested for the murders, his attorney advised him to remain silent. Pet. App. 34a-35a. And he did just that. Apart from pleading not guilty, he made no statements about the offense until he went to trial and took the stand to testify that he was in fact innocent. *Id.* at 35a. The prosecutor then stated during summation that it took petitioner "a year to come up with" his story and that "[w]hat he's done is he's worked for a full year on making up a story to fit the evidence." *Id.* Arguing, among other things, that these remarks violated his

Fifth Amendment rights under *Doyle v. Ohio*, 426 U.S. 610 (1976), petitioner appealed his conviction to the Texas Court of Criminal Appeals and then filed a state habeas petition. Pet. App. 2a.

The Texas Court affirmed his conviction and denied his habeas claims. *Id.* After exhausting his state-court remedies, petitioner filed a federal habeas petition in the Western District of Texas. The district court denied petitioner's petition and his request for a certificate of appealability (COA). R. 598-603. At that point, the clock to appeal the denial of his habeas claims began ticking. Petitioner, however, did not know of these developments at the time. His counsel, Sadaf Khan, failed to inform petitioner that his petition had been denied or that he had a right to appeal, and instead made the unilateral decision not to pursue any further recourse. Pet. App. 3a. Petitioner did not hear from his attorney until after the deadline to appeal and the deadline to request an extension to act had passed. *Id.* at 3a-4a. Khan later admitted that the failure to appeal was "[d]ue to no fault of Petitioner," and further admitted that had she notified petitioner of the orders before the deadline to appeal, she "would have learned that he wanted to prosecute an appeal." *Id.* at 7a n.3.

On August 15, 2013, petitioner obtained existing counsel, who promptly filed several motions in the district court seeking to remedy Khan's abandonment, including a motion under Rule 60(b)(6) to vacate and reenter the judgment denying habeas relief. *Id.* at 40a. The district court found that Khan abandoned petitioner, and that "[b]ecause [petitioner] was not aware he had been abandoned during the time period in which he could have filed a notice of appeal," he had

established "the kind of extraordinary circumstances that warrant relief under Rule 60(b)(6)." *Id.* at 41a-42a.

A divided panel of the Fifth Circuit reversed. *Id.* at 1a-14a. The majority did not disturb the district court's finding that Khan had in fact abandoned petitioner but concluded that *Bowles* does "not permit appellate courts to create exceptions to circumvent the appellate deadlines" in Rule 4(a) and 28 U.S.C. § 2107. *Id.* at 9a. The majority reasoned that *Maples* is distinguishable because it involved "equitable exceptions to judge-created procedural bars" and did not "involve exceptions to statutory limits on appellate jurisdiction." *Id.* at 10a. In reaching that result, the majority also expressly disagreed with a nearly-identical case from the Ninth Circuit, *Mackey v. Hoffman*, presenting the same issue. *Id.* at 12a-13a.

In dissent, Judge Dennis disagreed with the panel's reliance on *Bowles*, explaining that *Bowles* did not involve the application of Rule 60(b) and did not address the issue of attorney abandonment. *Id.* at 16a-17a. In his view, *Maples*—not *Bowles*—controlled. *Id.* at 30a. Judge Dennis also reviewed petitioner's COA application and concluded that the prosecutor's conduct during closing arguments "is precisely the situation that the Supreme Court confronted in *Doyle*," and that petitioner "made a strong showing 'that reasonable jurists could debate whether (or for that matter agree that) the petition should have been resolved in a different manner.'" *Id.* at 36a. Thus, Judge Dennis would have granted petitioner's COA. *Id.*

REASONS FOR GRANTING THE WRIT

The customary criteria for certiorari are met. As the Fifth Circuit recognized below, the circuits are

expressly divided on whether attorney abandonment may excuse a federal procedural default by operation of Rule 60(b). That question is undeniably important, as underscored by this Court's decision in *Maples* holding that attorney abandonment may excuse a state procedural default in habeas. This case presents a clean vehicle for resolving the question presented. And there is no basis to subject habeas petitioners in different parts of the country to different rules that will impact the availability of federal court review of the merits of their habeas claims when they are unfortunate enough to have been abandoned by counsel. The petition should be granted.

I. IN CAPITAL CASES ABOVE ALL, ADEQUATE REPRESENTATION IS VITAL

This Court has long recognized that federal habeas review is key to safeguarding the integrity of the criminal justice process, especially in capital cases. As Justice Kennedy observed in *Murray v. Giarratano*, "[i]t cannot be denied that collateral relief proceedings are a central part of the review process for prisoners sentenced to death." 492 U.S. 1, 14 (1989) (concurring). But experience also teaches that "[p]ostconviction review cannot serve its 'quality control' or 'safety net' function . . . without the assistance of competent post-conviction counsel." Celestine Richards McConville, *Protecting the Right to Effective Assistance of Capital Postconviction Counsel: The Scope of the Constitutional Obligation to Monitor Counsel Performance*, 66 U. Pitt. L. Rev. 521, 522-23 (2005) (footnotes omitted).

Failure to secure adequate representation is itself often case-dispositive, especially in complex capital cases. Not only will shoddy representation result in

the ineffectual presentation of claims, but it can result in the *loss* of claims that are not properly raised or presented—and thus defaulted. As Justice Kennedy explained in *Murray*, "[t]he complexity of [the Court's] jurisprudence in this area . . . makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law." 492 U.S. at 14 (concurring). And once retained, counsel must stay engaged—and on top of his client's case.

Too often, the death penalty has become not the punishment "for committing the worst crime, but for being assigned the worst lawyer." Stephen B. Bright, *Death by Lottery—Procedural Bar of Constitutional Claims in Capital Cases Due to Inadequate Representation of Indigent Defendants*, 92 W. Va. L. Rev. 679, 695 (1990). Indeed, some have concluded that "the quality of capital defense counsel seems to be the most important factor in predicting who is sentenced to die—far more important than the nature of the crime or the character of the accused." *Irreversible Error*, ch. 7 at 86 (citing Stephen B. Bright, *Turning Celebrated Principles into Reality*, The Champion 6 (2003)). Qualified counsel is no less important when it comes to navigating habeas review.

This capital case illustrates the dangers of inadequate—and, indeed, absent—representation during federal habeas review. As Judge Dennis concluded, petitioner has what is, at a minimum, a serious constitutional claim that the prosecutor's comment about petitioner's decision not to tell his story earlier contravened his Fifth Amendment rights under *Doyle*. Pet. App. 36a. Yet petitioner was denied a

COA solely because of a procedural default caused by the admitted abandonment of his habeas counsel.

II. THE CIRCUITS ARE EXPRESSLY DIVIDED ON THE QUESTION PRESENTED

In holding that attorney abandonment cannot excuse the federal procedural default in this case by permitting reentry of judgment under Rule 60(b)(6), the Fifth Circuit explicitly recognized that its decision conflicts with the Ninth Circuit's decision in *Mackey v. Hoffman*. Pet. App. 12a-13a. That direct circuit conflict is itself a sufficient basis for certiorari given the undeniable importance of the question presented.

This case and *Mackey* involve near-identical fact patterns. Like the attorney in *Perez*, Mackey's counsel filed a federal habeas petition on Mackey's behalf but, after receiving notice that the district court had denied the petition, he did not inform his client or file a timely notice of appeal. *Mackey*, 682 F.3d at 1248-49. He later admitted—just like petitioner's counsel did here—that his client "has been deprived of counsel in this habeas corpus proceeding through no fault of his own." *Id.* at 1250. Likewise, both petitioner and Mackey ultimately learned that not only had their claims been denied, but that the deadlines for their appeals had already passed. *Id.* at 1249. And faced with a procedural default, both Mackey's attorney and petitioner's new counsel moved the district court under Rule 60(b)(6) to vacate the court's judgment and reopen the case on the ground that the attorney abandonment constituted an "extraordinary circumstance" warranting Rule 60(b) relief. *Id.* at 1250; Pet. App. 40a.

But the similarities end there. Relying on *Maples*, the Ninth Circuit held that the court could grant relief

under Rule 60(b)(6) in extraordinary circumstances "amounting to attorney abandonment." *Mackey*, 682 F.3d at 1253. Following the reasoning of *Maples*, the court held that attorney abandonment "'vitiat[es] the agency relationship that underlies our general policy of attributing to the client the acts of his attorney.'" *Id.* at 1251 (alteration in original) (citation omitted). Thus, "when a federal habeas petitioner has been inexcusably and grossly neglected by his counsel in a manner amounting to attorney abandonment in every meaningful sense that has jeopardized the petitioner's appellate rights, a district court may grant relief pursuant to Rule 60(b)(6)." *Id.* at 1253 (citing *Maples*, 132 S. Ct. at 924). The court also held that the availability of such relief was not barred by this Court's decision in *Bowles*, reasoning that "Mackey is not receiving relief pursuant to Rule 4(a)(6)" but rather "is seeking relief pursuant to Rule 60(b)(6) to cure a problem caused by attorney abandonment." *Id.*

The divided Fifth Circuit below reached the opposite conclusion—explicitly refusing to follow *Mackey*. Pet. App. 12a-13a. The court held that attorney abandonment cannot constitute an extraordinary circumstance warranting relief under Rule 60(b)(6). In its view, *Maples* concerned only an "equitable exception[] to judge-created procedural bars," and *Bowles* precluded using Rule 60(b)(6) in a way that would "circumvent" the jurisdictional limits set forth in 28 U.S.C. § 2107. *Id.* at 10a, 9a. Judge Dennis disagreed, explaining that he would follow the Ninth Circuit's decision in *Mackey* applying "*Maples's* reasoning to grant relief from judgment under Rule 60(b)(6) in a situation materially indistinguishable from the present case." *Id.* at 23a (dissenting).

Perez and *Mackey* thus reach opposite conclusions on the same legal issue—creating irreconcilable rules for habeas petitioners based solely on the circuit in which they are imprisoned. Since these decisions were issued, other cases in the Fifth[3] and Ninth[4] Circuits have followed *Perez* and *Mackey*, respectively, solidifying the conflict. The existence of such a direct circuit conflict is a quintessential reason to grant certiorari. *See* Sup. Ct. R. 10(a). But the conflict here is particularly significant given that the Fifth and Ninth Circuits account for such a large proportion of the nation's death row inmates. In 2013, these two circuits combined account for over 46% of all death row inmates in the U.S.[5] So this circuit split potentially

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[3] *See, e.g.*, *Edwards v. Stephens*, No. 13-40535, 2014 U.S. App. LEXIS 4219, at *2 (5th Cir. Mar. 6, 2014) (denying Rule 60(b) relief and citing *Perez* for the propositions that "[a] Rule 60(b) motion is not an appropriate vehicle to extend the time for filing an appeal," and that "[e]quitable tolling principles do not apply to the periods for filing timely notices of appeal in civil cases.").

[4] *See, e.g.*, *Norwood v. Vance*, 517 F. App'x 557, 558 (9th Cir. 2013) (denying relief for lack of sufficiently egregious attorney conduct but reiterating *Mackey*'s holding that, to warrant Rule 60(b)(6) relief, the appellant must "establish extraordinary circumstances"), *cert. denied*, 134 S. Ct. 1344 (2014); *Andrade v. Cate*, No. S-09-2270 KJM TJB, 2013 U.S. Dist. LEXIS 136932, at *5-6 (E.D. Cal. Sept. 24, 2013) (relying on *Mackey* and holding that "Petitioner has presented evidence that Masuda and Giffard effectively abandoned him after filing the traverse in this case . . . . This is a sufficient basis for relief under Rule 60(b)(6)."); *Foley v. Rowland*, No. S-01-0714 MCE JFM P, 2012 U.S. Dist. LEXIS 130334, at *4-5 (E.D. Cal. Sept. 11, 2012) (reiterating *Mackey*'s holding but finding no abandonment).

[5] Death Penalty Information Center, *Death Row Inmates by State* (Oct. 2013), http://www.deathpenaltyinfo.org/ death-row-inmates-state-and-size-death-row-year (last visited June 26, 2014).

affects nearly half of the country's capital habeas petitioners.[6]

III. ONLY THIS COURT CAN RESOLVE THE BASIS FOR THE CIRCUIT CONFLICT

This circuit conflict stems from a disagreement over the proper reading of this Court's own decisions and, in particular, the interplay between *Maples* and *Bowles*. *Compare* Pet. App. 9a-11a (reasoning that *Bowles* controls), *with id.* at 30a-31a (reasoning that *Maples*, instead of *Bowles*, controls) (Dennis, J., dissenting), *and Mackey*, 682 F.3d at 1252-53 (same). Because only this Court can resolve that disagreement, certiorari is warranted. *See* Pet. App. 11a ("[E]ven assuming *arguendo* we were convinced that the current Court would not (or should not) continue to follow *Bowles*, we are not free to disregard *Bowles*.").

In *Maples*, this Court considered whether—and in what circumstances—attorney misconduct might rise to the level of "extraordinary circumstances beyond a [petitioner's] control," so as to establish cause to excuse a state procedural default. 132 S. Ct. at 924. The Court reaffirmed the general rule that, "under 'well-settled principles of agency law,'" a petitioner "bears the risk of negligent conduct on the part of his [attorney]." *Id.* at 922. But the Court found that "[a] markedly different situation is presented . . . when an attorney abandons his client without notice" and thereby

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[6] Although other circuits have not yet ruled on the question presented in the wake of *Maples* and *Bowles*, the Second Circuit has held, in a pre-*Bowles* opinion, that "[t]o obtain relief under Rule 60(b)(6), a habeas petitioner must show that his lawyer *abandoned* the case and prevented the client from being heard, either through counsel or pro se." *Harris v. United States*, 367 F.3d 74, 77 (2d Cir. 2004) (emphasis added).

"sever[s] the principal-agent relationship," at which point counsel's "acts or omissions . . . 'cannot fairly be attributed to [the client].'" *Id.* at 922-23 (alteration in original) (citation omitted). The Court held that attorney abandonment constitutes "cause" supplying the "'extraordinary circumstances'" necessary to excuse a state procedural default. *Id.* at 924 (citation omitted).[7]

In a footnote in *Maples*, this Court noted that there is "no reason . . . why the distinction between attorney negligence and attorney abandonment should not hold in both [the state and federal habeas] contexts." *Id.* at 923 n.7. But generally speaking, any relevant differences between the two contexts should weigh in favor of giving *Maples* more, not less, weight in the federal habeas context. Whereas state procedural default cases require that federal courts pass upon "the state court's determination that its own rules had been violated" (something the Court has been loath to do), excusing *federal* procedural default "does not implicate a state court's interpretation of state law," *Holland v. Florida*, 560 U.S. 631, 650 (2010), and does not raise the same prudential "concerns of comity and federalism," *Coleman v. Thompson*, 501 U.S. 722, 730 (1991).

The Fifth Circuit nevertheless held that *Maples* was distinguishable because it did not address the "exceptions to statutory limits on appellate jurisdiction" and that, instead, *Bowles* controlled. Pet. App. 10a. In *Bowles*, this Court held that "the timely

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[7] *Maples* followed this Court's decision in *Holland v. Florida*, in which the Court held that attorney misconduct rising to the level of attorney abandonment could constitute an extraordinary circumstance triggering equitable principles tolling *federal* timing rules in AEDPA. 560 U.S. 631, 650-51 (2010).

filing of a notice of appeal in a civil case is a jurisdictional requirement," and that the "Court has no authority to create equitable exceptions to [statutory] jurisdictional requirements." 551 U.S. at 214. The Fifth Circuit recognized that *Bowles* did not "refer[] specifically to Civil Rule 60(b)." Pet. App. 9a. But the court concluded that *Bowles* precluded the district court from invoking Rule 60(b) to set aside the default judgment since that would restart the clock on the time for filing an appeal from that judgment. *Id.* In dissent, Judge Dennis—siding with the Ninth Circuit in *Mackey*—rejected this reading of *Bowles*.

Judge Dennis reasoned that—as the petition explains (at 21-27) in detail—*Bowles* is distinguishable in several respects. For example, *Bowles* did not involve a Rule 60(b) motion, did not involve an issue of attorney abandonment, and *did* involve a claim that the defendant failed to receive notice of the judgment under Federal Rule of Civil Procedure 77(d). Pet. App. 16a-17a. At the same time, the petitioner here, unlike the inmate in *Bowles*, did not seek an exception to the jurisdictional requirements in 28 U.S.C. § 2107. Rather, the petitioner here sought to invoke the relief expressly provided for in Rule 60(b)—namely, relief "from a final judgment, order, or proceeding"—on the basis of circumstances—attorney abandonment—that this Court in *Maples* recognized are exceptional. As the Fifth Circuit acknowledged below, *Bowles* does not specifically refer to Rule 60(b). Pet. App. 9a.

At a minimum, the Fifth Circuit's conclusion that *Bowles* forecloses Rule 60(b) relief is in tension with this Court's decision in *Ackermann v. United States*, 340 U.S. 193 (1950). There, this Court rejected a petitioner's Rule 60(b)(6) motion seeking to overcome

his failure to appeal a judgment because petitioner did not "allege[] circumstances showing that his failure to appeal was justifiable." *Id.* at 197. But the Court also explained that petitioner had made a "free choice" *not* to appeal (albeit a "calculated" "risk"). *Id.* at 198. The Court did not suggest, much less hold, that Rule 60(b) was unavailable to relieve a party of the operation of a final judgment where—as here—the failure to appeal was not the result of a "free, calculated, deliberate choice." *Id.* To the contrary, the Court's decision in *Ackermann* appears to assume the opposite.

Nor would giving effect to Rule 60(b)'s plain terms in this context "expose federal courts to an avalanche of frivolous post-judgment motions." *Gonzalez v. Crosby*, 545 U.S. 524, 534-35 (2005). As this Court has recognized, Rule 60(b) has its own internal requirements. *Id.* at 535. Those limits—including the requirement that a movant must "show 'extraordinary circumstances' justifying the reopening of a final judgment"—severely limit the circumstances in which Rule 60(b) applies. *Id.* Moreover, as this Court's decision in *Maples* makes clear, not all attorney misconduct rises to the level of attorney abandonment—a truly "exceptional" situation. As long as attorney abandonment remains rare—something all can hope for—the application of Rule 60(b) in this context will remain infrequent as well.

In any event, what matters for present purposes is that the circuits are divided about the interplay between *Maples* and *Bowles*. And only this Court can resolve that conflict. *See* Pet. App. 11a.

IV. THIS CASE PRESENTS A CLEAN VEHICLE FOR RESOLVING THE IMPORTANT QUESTION PRESENTED

This case also presents a clean vehicle for resolving the important question presented. The Fifth Circuit squarely considered and decided the question presented. It did so on the basis of the accepted premise that petitioner was abandoned by Khan. Pet. App. 37a, 43a. And the panel divided on the proper resolution of the question presented, with both the majority and dissent recognizing that the Ninth Circuit had reached the contrary position in *Mackey*.

Furthermore, the Fifth Circuit's conclusion that *Bowles* controls has the effect of cutting off an appeal that raises what is, at the least, a serious constitutional claim. Judge Dennis concluded that the prosecutor's comments in closing arguments at petitioner's trial were an improper attempt to impeach his trial testimony in violation of his Fifth Amendment right to post-arrest silence. *See Doyle*, 426 U.S. at 617-18. Indeed, Judge Dennis concluded that these remarks were "precisely the situation" that this Court held unconstitutional in *Doyle*. Pet. App. 35a. He therefore concluded that petitioner had a "strong" *Doyle* claim, and that the court's ruling effectively deprived petitioner of the "opportunity to pursue a likely successful COA application." *Id.* at 36a-37a.

In short, not only is the question presented independently cert-worthy, but the resolution of that question here has important practical consequences.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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