Case No. 21-6847

IN THE SUPREME COURT OF THE UNITED STATES

JOHN WILLIAM CHILDERS,
***Petitioner*,**

v.

SCOTT CROW,
Director, Oklahoma Department of Corrections,
***Respondent*.**

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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April 1, 2022

No. 21–6847

QUESTIONS PRESENTED

1. Whether this Court should review the Tenth Circuit's application of liberal construction to a habeas petitioner's pleadings—a fact-intensive inquiry—to assess if that petitioner adequately preserved his claim for appellate review?

2. Whether this Court should revise the Tenth Circuit's holding, based on the facts presented below, that the habeas petitioner had waived his claim of actual innocence on appeal by failing to present that same claim to the federal district court?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

RULES

No. 21–6847

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully urges this Court to deny Petitioner John William Childers's Petition for Writ of Certiorari to review the published opinion of the United States Court of Appeals for the Tenth Circuit, entered in this case on June 14, 2021. *See Childers v. Crow*, 1 F.4th 792 (10th Cir. 2021). Pet'r Appx. A.[1]

STATEMENT OF THE CASE

In 1998, Petitioner was charged in Oklahoma state court with three counts of rape stemming from acts he inflicted against his minor half-niece in Delaware County, Oklahoma. Petitioner pled guilty to those charges in March of 1999, and as part of his plea agreement with the State, Petitioner received three consecutive ten-year prison sentences for his crimes. Pet'r Appx. A, 2a–3a. Petitioner ultimately served far less than his agreed-upon sentences, however, and was released from state prison on March 29, 2005, with the balance of his sentences to be served on probation. Pet'r Appx. A, 3a. Petitioner's release from prison marked the start of the legal saga now laid before this Court.

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[1] Citations to Petitioner's Appendix will be referred to as "Pet'r Appx. __," using the exhibit letter and pagination supplied by Petitioner. Citations to Petitioner's Petition for Writ of Certiorari will be referred to as "Petition at __." Citations to pleadings filed in the proceedings below, before the Tenth Circuit Court of Appeals, will utilize original pagination and will be referred to in concise and logical fashion—*e.g.*, the State's Brief at the Tenth Circuit will be referred to as "State's Br. at __," etc. *See* SUP. CT. R. 12.7. When necessary, citations to the Record on Appeal ("ROA") before the Tenth Circuit will be referred to as "R. at __," using the green electronic docket stamps at the top of each page. Since Petitioner's habeas petition was procedurally barred in the federal district court, discussed *infra*, the ROA lacks the original state court record, transcripts, and evidentiary materials, and simply consists of the relevant state court pleadings from Petitioner's direct appeal and post-conviction review.

Following his release from confinement in March of 2005, Petitioner registered under the Oklahoma Sex Offenders Registration Act ("SORA"), pursuant to the statutory authority codified under OKLA. STAT. tit. 57, § 583(A) (2005). Pet'r Appx. A, 3a. At the time of his registration, SORA outlined a series of restrictions placed on registered sex offenders like Petitioner, including a prohibition from living within 2,000 feet of a school and a requirement that any sex offender notify law enforcement of a change of address, *inter alia*. *See* OKLA. STAT. tit. 57, § 584(D) (2003) (SORA address change provision); OKLA. STAT. tit. 57, § 590 (2003) (SORA restriction on the locations where a sex offender may lawfully reside). Petitioner, a probationer and registered sex offender, violated these two provisions of SORA in September and October of 2007, and was charged under the 2006 version of those statutes, again in Delaware County, Oklahoma. Pet'r Appx. A, 3a. On September 8, 2009, Petitioner agreed that he violated those provisions of SORA and entered a blind plea of guilty to both crimes. Since Petitioner was enhanced as a recidivist offender under state law, Petitioner was sentenced to life imprisonment on each conviction, with his sentences ordered to run consecutively. Pet'r Appx. A, 3a.[2]

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[2] Petitioner suggests in passing that the life sentences he received for his SORA convictions were somehow unlawfully enhanced under Oklahoma law. Petition at 10 n.2. In other parts of his brief, Petitioner boldly refers to his sentences as "draconian" and "indefensible." Petition at 2, 5. But Petitioner's sentence enhancement claim was already presented to the state courts multiple times and was found to be meritless. *See* Pet'r Appx. A, 4a–5a. His attempt to rehash the same state law challenge is an unconvincing basis for this Court's review. *See Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) (emphasizing that "it is not the province of a federal habeas court to reexamine state-court determinations on state-court questions"); *Johnson v. Cowley*, 40 F.3d 341, 345 (10th Cir. 1994) (recognizing that sentence enhancement procedure is a matter of state law).

Even so, Petitioner's authority for his sentence enhancement claim is misleading, since he only selectively quotes the reasoning in *Ruth v. State*, 966 P.2d 799, 801 (Okla. Crim. App. 1998). Petition at 10 n.2. Indeed, that case announced that "if an offense requires proof of a prior conviction, that prior conviction may not be used to enhance punishment, *but may be used to revitalize convictions for which*

Petitioner moved to withdraw his guilty pleas, and on December 8, 2009, the District Court of Delaware County rejected Petitioner's request. So Petitioner took his cause to the Oklahoma Court of Criminal Appeals ("OCCA") on certiorari direct appeal, the state-law mechanism for a defendant to seek withdrawal of a guilty plea. On appeal, Petitioner complained that his counsel was ineffective, that his sentences were excessive, and that his pleas were not knowing and voluntary. Pet'r Appx. A, 3a. The OCCA rejected Petitioner's request for relief on September 24, 2010, and left Petitioner's guilty pleas—and his convictions and sentences—intact.

Petitioner then returned to the District Court of Delaware County and sought state post-conviction relief, claiming that his sentences were "void" since they allegedly lacked a proper factual basis, that his counsel allegedly labored under a conflict of interest, and that he received ineffective assistance of both trial and appellate counsel. Pet'r Appx. A, 4a. The district court denied Petitioner's post-conviction application on June 17, 2013, and Petitioner opted not to appeal that denial of relief to the OCCA.

Petitioner filed a second request for post-conviction relief on July 29, 2013, seeking the district court's permission to file an unspecified document out-of-time,

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the sentence has been completed more than ten years prior." *Ruth*, 966 P.2d at 801 (emphasis supplied for portion omitted by Petitioner). What Petitioner's argument fails to recognize is that he pled guilty after multiple prior felony offenses, over and above the rape convictions for which he initially became a sex offender, and his rape convictions revitalized his other prior offenses, just as *Ruth* authorizes. *See* Pet'r Appx. A, 3a ("Because both offenses occurred after former convictions for two or more felonies, Childers was sentenced to life in prison on each conviction."); R. at 79, 82, 92 (in Petitioner's post-conviction application filed on December 16, 2011, admitting that he had prior burglary offenses in addition to his rape case). *See also Ruth*, 966 P.2d at 801. Contrary to Petitioner's suggestion, there is no "serious doubt" whether his sentences were lawfully enhanced under state law. Petition at 10 n.2.

due to an alleged mailing error. Pet'r Appx. A, 4a. Relief was denied on March 20, 2014. That issue was entirely peripheral to the legal arguments at stake in this case.

Then, Petitioner filed his third application for state post-conviction relief in the district court on August 15, 2014, raising four issues of alleged error. Among these were Petitioner's argument that his sentences were improperly enhanced, that the length of his sentences stemmed from an allegedly unlawful ex post facto application of the intervening amendments to the SORA provisions he was convicted under, that his guilty pleas were not knowingly and intelligently entered, and that he received ineffective assistance of counsel in the proceedings below and on appeal. Pet'r Appx. A, 4a–5a. When Petitioner's arguments were unsuccessful at the district court, Petitioner brought his claims to the OCCA in a post-conviction appeal. The OCCA denied relief on December 14, 2016, finding Petitioner's arguments—including his challenge to the allegedly unlawful enhancement of his sentences—had already been previously raised, either on direct appeal or in his first post-conviction application, and were therefore procedurally barred from further review by the doctrine of *res judicata*. Pet'r Appx. A, 5a–6a.

At that point, Petitioner shifted gears and took his complaint to the federal courts. Petitioner filed a *pro se* Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 on July 14, 2017, in the United States District Court for the Northern District of Oklahoma. Pet'r Appx. A, 6a. Petitioner raised four grounds for relief, including a state law ex post facto complaint about the lawfulness of his SORA sentences, a claim that his sentences were improperly enhanced, a challenge to counsel's effectiveness

in allegedly failing to ensure his pleas were knowing and voluntary, and an argument related to the inadequacy of the state courts' factual findings issued in the rejection of his post-conviction applications. Pet'r Appx. A, 6a. Petitioner incorrectly claimed that his habeas petition was timely since it was filed within one year of his latest denial of post-conviction relief in state court. In moving to dismiss Petitioner's habeas petition as untimely, the State did not address the actual innocence exception since Petitioner made no argument to that effect in his petition. *See* R. at 43–49. In reply, Petitioner doubled down on his sentence-enhancement complaint and did not attempt to justify his untimeliness by claiming outright innocence of his convictions. *See, e.g.*, R. at 156 (arguing that "his sentence is therefore void"); R. at 157 ("The State had the opportunity to correct the illegal sentence and has failed to do so"); R. at 157 ("His sentence is illegal. It was illegal when he made his plea."); R. at 159 ("However, the failure of the state to act and adjust Petitioner's sentence to a lawful sentence has now left him incarcerated well past [what] the law allows for his conviction.").

The federal district court issued a written Opinion and Order on January 6, 2020, dismissing Petitioner's habeas petition as untimely under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Pet'r Appx. A, 6a; *see also* Pet'r Appx. D, 61a. First, the federal district court observed that Petitioner's judgment on certiorari direct appeal became final no later than December 23, 2010, and that Petitioner's habeas petition was filed well beyond the one-year AEDPA statutory deadline. Pet'r Appx. A, 6a–7a; Pet'r Appx. D, 60a. The federal district court also rejected Petitioner's suggestion that two Oklahoma Supreme Court decisions—

Starkey v. Okla. Dep't of Corr., 305 P.3d 1004 (Okla. 2013) and *Cerniglia v. Okla. Dep't of Corr.*, 349 P.3d 542 (Okla. 2013), which considered the ex post facto application of SORA provisions under state law—created a new trigger date for the AEDPA statute of limitations. Pet'r Appx. A, 7a; Pet'r Appx. D, 60a–61a. The federal district court did not broach the issues of cause, prejudice, or actual innocence to overcome Petitioner's time-bar because, simply put, Petitioner did not even attempt to raise such claims in his habeas petition or reply. Pet'r Appx. A, 7a.

Petitioner received a Certificate of Appealability ("COA") from the Tenth Circuit Court of Appeals on May 13, 2020. That COA, which was granted on the issue of whether Petitioner could overcome the untimeliness of his habeas petition based on a claim of actual innocence, and in particular, his ex post facto sex offender registry claim, announced that "[r]easonable jurists could debate whether Mr. Childers has advanced a colorable claim of actual innocence," and that, relatedly, "[r]easonable jurists could also debate whether Mr. Childers' ex post facto claim entitles him to relief." Pet'r Appx. A, 8a; Pet'r Appx. B, 52a–54a. The COA acknowledged that Petitioner's *pro se* COA application did not use the words "actual innocence" but, under the guise of liberally construing his application, the COA reasoned that Petitioner's "ex post facto argument necessarily implicates his guilt." Pet'r Appx. A, 8a; Pet'r Appx. B, 52a n.3. Counsel for Petitioner was appointed that same day, and the issue entered its next phase of the litigation.

On September 21, 2020, Petitioner, through counsel, filed his Supplemental Opening Brief in the Tenth Circuit. At that point, Petitioner acknowledged that his

habeas claims were untimely under the AEDPA, but claimed his alleged actual innocence should excuse any procedural impediment precluding federal review of his claims on the merits. *See* Supp. Op. Br. at 17–18, 25–26, 32, 61. In an effort to make a showing of actual innocence—an argument not heard or considered in the federal district court—Petitioner cut a new claim from whole cloth, arguing that the residency prohibition under OKLA. STAT. tit. 57, § 590 did not apply to him whatsoever. *See* Supp. Op. Br. at 23–30. That issue was "nowhere mentioned in the COA application or the COA itself." Pet'r Appx. A, 14a. And Petitioner also significantly transformed the factual basis of another argument, presenting a new reason why he had no duty to register as a sex offender in the first place. *See* Supp. Op. Br. at 33–49; *see also* Pet'r Appx. A, 14a. Even worse, Petitioner only sought an expansion of the COA in his reply brief, belatedly asking permission to engineer new claims and reasons for relief. *See* Reply Br. at 24–25; *see also* Pet'r Appx. A, 14a.

On December 18, 2020, Respondent, by and through the undersigned, filed the Brief of Respondent in the Tenth Circuit. Respondent urged the Tenth Circuit to uphold the federal district court's dismissal of Petitioner's habeas petition, since the claims raised in his petition were both untimely and unexhausted but anticipatorily procedurally barred. *See* State's Br. at 12–47. Respondent also invoked well-established principles of waiver and forfeiture, offering an additional basis upon which to dispose of Petitioner's ever-evolving habeas arguments. *See* State's Br. at 11–12 & n.5, 37. Oral argument was held on March 9, 2021, and the Tenth Circuit took the case under advisement.

On June 14, 2021, the Tenth Circuit issued a published opinion vacating the COA previously granted and dismissing the case. Pet'r Appx. A, 16a. *See also Childers*, 1 F.4th at 801. In so doing, the Tenth Circuit held that since the federal district court's procedural ruling was correct, and because Petitioner had not raised a claim of actual innocence in his habeas petition—even after affording his *pro se* pleadings the benefit of liberal construction—a COA should not have been granted. Pet'r Appx. A, 12a–13a. The Tenth Circuit also observed that Petitioner's claims had evolved over the course of the litigation and had morphed into new arguments not presented in the federal district court below, which ran afoul of the Tenth Circuit's firmly established role as a court of review. Pet'r Appx. A, 14a–16a. Put another way, cloaking a claim with "actual innocence" does not give a habeas petitioner free license to flout the proper course of an appeal with arguments previously unheard in the proceedings below. Pet'r Appx. A, 16a.

Petitioner, unsatisfied with the outcome at the Tenth Circuit (and through newly-appointed counsel), sought panel rehearing and/or rehearing *en banc* on August 23, 2021. *See generally* Reh'g Pet. Respondent, by and through the undersigned, filed a Response to Petitioner's Petition for Panel Rehearing and Rehearing *En Banc* on September 20, 2021. Shortly thereafter, on October 13, 2021, the Tenth Circuit denied Petitioner's request for rehearing and left the opinion and judgment intact. Pet'r Appx. C, 56a. The mandate was issued on October 21, 2021.

On January 11, 2022, Petitioner filed a petition for writ of certiorari with this Court seeking review of the Tenth Circuit's decision. Thereafter, on March 2, 2022,

this Court requested a response from Respondent. The instant Brief in Opposition is offered in accordance with this Court's directive. For the reasons discussed below, this Court should decline Petitioner's request for certiorari review.

REASONS FOR DENYING THE WRIT

Although not exhaustive, this Court's Rule 10 outlines certain circumstances where the grant of a petition for writ of certiorari may be warranted, as a matter of judicial discretion and "only for compelling reasons." SUP. CT. R. 10. These circumstances include a conflict among United States courts of appeals on the same matter of importance, a conflict between a United States court of appeals and a state court of last resort on an important federal question, an instance where a United States court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power," or when a state court or a United States court of appeals "has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court," *inter alia*. SUP. CT. R. 10(a)–(c). In the same sense, this Court has issued the following caution: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." SUP. CT. R. 10.

For starters, the petition at issue is Petitioner's attempt to secure error-correction, inasmuch as he seeks review of the manner in which the Tenth Circuit interpreted his *pro se* pleadings in the proceedings below. As noted above, such error-

correction is "rarely" a basis for this Court's intervention, and Petitioner's case is a particularly poor vehicle for certiorari review. SUP. CT. R. 10. Regardless, the legal issue at bottom—whether a gateway claim of "actual innocence" can be raised for the first time on appeal—was correctly decided by the Tenth Circuit, does not conflict with this Court's precedent, and does not warrant this Court's scrutiny. *See Thompson v. Lumpkin*, 141 S. Ct. 977 (Mem.) (2021) (Kagan, J., concurring in the denial of certiorari) (in a petition for writ of certiorari brought by a habeas petitioner in state custody, agreeing that certiorari review was not warranted and reaffirming the narrow criteria under Rule 10). And moreover, given the lack of regularity with which this waiver question has arisen in the lower courts, the issue at stake requires further percolation before this Court's review might be warranted.

This Court should decline Petitioner's invitation to second-guess the Tenth Circuit's fact-bound reading of Petitioner's pleadings and the limited record before it. In any event, the Tenth Circuit's legal determination on the issue of waiver was correct, and regardless, the issue presented requires additional percolation before this Court's intervention. On balance, Petitioner's challenge to the Tenth Circuit's well-reasoned and careful analysis is unworthy of this Court's review, and certiorari should be denied.

I. This Court's review is not necessary because the Tenth Circuit's decision correctly applied the doctrine of liberal construction, and this Court seldom operates in error-correction on issues of fact.

First and foremost, Petitioner's case is a poor vehicle for resolution of his core claim—whether an actual innocence claim can be waived on appeal if not asserted in

the proceedings below—since the predicate issue hinges on a fact-intensive scrutiny of Petitioner's *pro se* pleadings. *See* Petition at 17–23. Put differently, in order to even approach the bedrock legal question of waiver, this Court would need to reevaluate the Tenth Circuit's factual application of liberal construction to Petitioner's habeas and state post-conviction pleadings. As set forth above, this Court seldom grants certiorari review to resolve an allegation of "erroneous factual findings or the misapplication of a properly stated rule of law." SUP. CT. R. 10.

Petitioner's first question presented purportedly takes issue with the Tenth Circuit's application of liberal construction which, in Petitioner's view, "conflicts with this Court's precedent on liberally construing pro se filings." Petition at 17. Petitioner then proceeds to sketch out a series of reasons why the Tenth Circuit's use of liberal construction allegedly warrants review, including attempting to draw a razor-thin distinction between the Tenth Circuit's "role-of-advocate" precedent and this Court's longstanding word in the liberal construction context. *Compare Barnett v. Hargett*, 174 F.3d 1128, 1133 (10th Cir. 1999) (recognizing that the Court "should not assume the role of advocate for the pro se litigant," and the Court "may not rewrite a petition to include claims that were never presented" (citation and internal quotation marks omitted)), *with Haines v. Kerner*, 404 U.S. 519, 520 (1972) (this Court's general caution that *pro se* pleadings are held "to less stringent standards than formal pleadings drafted by lawyers"). Petitioner's complaint about some alleged discrepancy in the liberal construction caselaw is illusory. Rather, Petitioner is challenging the

result of the way the Tenth Circuit read his pleadings, not the *mechanism* by which it read them. Petitioner's challenge is an unworthy question for this Court's review.

This Court has made clear that a *pro se* litigant's pleadings, even if inartfully crafted, must be held to less demanding standards than the formal pleadings drafted by counsel. *See, e.g.*, *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam); *Hughes v. Rowe*, 449 U.S. 5, 15 (1980); *Haines*, 404 U.S. at 520. The Tenth Circuit has faithfully followed that approach. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) ("A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers."); *see also Barnett*, 174 F.3d at 1133; *Ogden v. San Juan Cty.*, 32 F.3d 452, 455 (10th Cir. 1994). Even so, the doctrine of liberal construction does not exempt a *pro se* litigant from his obligation "to comply with the fundamental requirements of the Federal Rules of Civil and Appellate Procedure." *Ogden*, 32 F.3d at 455. *See also Nielsen v. Price*, 17 F.3d 1276, 1277 (10th Cir. 1994) (collecting cases discussing the well-established principle that *pro se* parties are not excused from compliance with the same procedural rules that control all other litigants). And the requirement of liberal construction does not obligate the courts "to assume the role of advocate for the pro se litigant." *Hall*, 935 F.2d at 1110. *See also Parker v. Champion*, 148 F.3d 1219, 1222 (10th Cir. 1998) ("[W]e will not rewrite a petition to include claims that were never presented.").

In the case at bar, the Tenth Circuit explicitly recognized that Petitioner's pleadings were entitled to liberal construction, in line with this Court's general precedent on the matter. Pet'r Appx. A, 11a. By the same token, however, the Tenth

Circuit reaffirmed its reluctance to rewrite the pleadings on Petitioner's behalf in order to include claims previously unheard in the lower courts. Pet'r Appx. A, 11a (citing *Barnett*, 174 F.3d at 1133). Armed with fundamental principles of liberal construction, the Tenth Circuit engaged in an exhaustive fact-intensive scrutiny of the pleadings below to ascertain whether, even after affording his pleadings liberal construction, Petitioner had attempted to raise his claim of actual innocence in the federal district court. Pet'r Appx. A, 9a–11a. In essence, the Tenth Circuit questioned whether Petitioner's pleadings below could reasonably be read to challenge his *convictions*, or rather only his *sentences*, for the SORA-related offenses secured in state court. In a detailed footnote, the Tenth Circuit concluded that Petitioner's stray words and sentences mentioning his "convictions" were not adequate to put the federal district court on notice of an alleged claim of actual innocence:

> The dissent believes that Childers has challenged his convictions all along. But despite the few words and phrases picked from Childers's § 2254 petition and reply brief, we believe the focus of his challenge before the district court was to his life sentences, not his convictions. *See Eizember v. Trammell*, 803 F.3d 1129, 1141 (10th Cir. 2015) ("[T]his court has repeatedly instructed that stray sentences . . . are insufficient to present an argument . . . in a way that might fairly inform opposing counsel or a court of its presence in a case."). Indeed, when read in context, the phrases the dissent cites on pages 3 and 4 clearly refer only to his sentences. *See* ROA at 11 (arguing that the Oklahoma state courts have ignored the ex post facto "enhancement of [his] sentences" under *Starkey* and *Cerniglia*, and that "[t]his avoidance . . . clearly shows [him] to be illegally incarcerated"); *id.* at 12 (arguing that "[h]is sentences are unconstitutional" and a "proper modification of his sentences" would result in his "immediate[ ] release[ ] from imprisonment"); *id.* at 15 (alleging that he should not be in prison because "he has satisfied his sentences in full," and so "he is being illegally restrained"); *id.* at 28 (explaining that limitations period should not apply because his "sentence was wrongfully enhanced at the time of his conviction," meaning he is "illegally restrained of liberty"); *id.* at 156 ("[H]is sentence

> is unconstitutional, a violation of ex-post facto clause . . . And, as such his sentence is therefore void. He has served the maximum sentence the State law allows for."); *id.* at 157 ("Petitioner is now in prison on a sentence that does not exist."); *id.* at 160 (arguing that he is "unlawfully restrained" because "he is being kept in prison on an unlawful life sentence" when "he should not be serving more than ten (10) years").
>
> And even if the dissent's quoted phrases can be read to refer to Childers's convictions, the dissent fails to offer any explanation as to how Childers's petition challenged his convictions on the same ex post facto grounds that he raises on appeal—that his registration period expired or that § 590 of SORA did not exist when he committed his underlying crimes. If we were to say that the petition's stray references to "convictions" encompassed these arguments, we would be making Childers's arguments for him. Although we must construe pro se pleadings liberally, "this rule of liberal construction stops . . . at the point at which we begin to serve as [an] advocate." *United States v. Pinson*, 584 F.3d 972, 975 (10th Cir. 2009).

Pet'r Appx. A, 9a–10a n.3.

Accordingly, applying the legal principles outlined above, the Tenth Circuit made a factual determination that Petitioner had not presented a claim of actual innocence to the federal district court, even with the benefit of liberal construction. Pet'r Appx. A, 11a (announcing that "[e]ven after applying a liberal construction to Childers's § 2254 petition, we conclude that Childers did not present a claim of actual innocence to the district court," and noting that "regardless of how one construes Childers's application for a COA, Childers did not raise a claim of actual innocence in his § 2254 petition before the district court, which is the relevant pleading for determining whether Childers has preserved a claim for our review"). As the passage quoted above makes clear, the Tenth Circuit's application of liberal construction was predicated on a fact-bound scrutiny of Petitioner's pleadings in weighing whether he had preserved his claim for appeal. Petitioner's complaint with the outcome of the

Tenth Circuit's factual analysis is nothing more than a request for error-correction, and this Court should decline Petitioner's invitation to wade into the weeds already carefully considered by the Tenth Circuit. *See* SUP. CT. R. 10.[3]

Simply put, Petitioner's first question is not a compelling issue for this Court's certiorari review under Rule 10. And even if this Court were inclined to intervene to correct an error, it would do so only where Petitioner has shown that the error is a recurring problem in the lower courts requiring this Court's intervention—which Petitioner has certainly not done. *See Massachusetts v. Sheppard*, 468 U.S. 981, 988 n.5 (1984) (stating that the issue not reached by this Court was "a fact-bound issue of little importance since similar situations are unlikely to arise with any regularity"). *Cf. Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232 (1959) ("Since the question is important and recurring we granted certiorari."); *Sanson v. United States*, 467 U.S. 1264, 1265 (1984) (White, J., dissenting from the denial of certiorari) ("Because of the substantial confusion surrounding this frequently recurring issue, I would grant certiorari to resolve the conflict."). This Court should decline to grant certiorari to review the Tenth Circuit's factual application of liberal construction to Petitioner's *pro se* pleadings. *See* SUP. CT. R. 10.

[3] Indeed, as Judge Seymour's dissent recognized, the allegations encapsulated within Petitioner's *pro se* pleadings were "messy," "tangled and difficult to distinguish," and "w[ove] together facts, arguments, and legal theories, often jumping from one claim to another," which is an inherently fact-bound observation. Pet'r Appx. A, 19a. The majority carefully analyzed Petitioner's arguments and reasonably concluded that, even with the benefit of liberal construction, Petitioner had not raised his actual innocence claim at any point before counsel was appointed in supplemental briefing, and thus had waived his claim. Pet'r Appx. A, 9a–12a & nn.3, 5. Petitioner's request for this Court to reinterpret the Tenth Circuit's reading of his "messy" pleadings should be rejected as an effort at error-correction. *See* Pet'r Appx. A, 19a. *See also* SUP. CT. R. 10.

Even if this case ostensibly presents a chance for error-correction review, *arguendo*, Petitioner's argument does not present a convincing issue for this Court to consider on certiorari. Among Petitioner's reasons for granting certiorari is his claim that "the Tenth Circuit effectively split two-judge-to-two-judge" on the question of whether Petitioner had alleged a gateway innocence claim. Petition at 19. But Petitioner's framing of this issue only tells half the story. True enough, the Tenth Circuit's opinion was reached over the dissent of Judge Seymour, but the mere fact that Judge McHugh granted the COA from the outset does not mean she would have aligned with the dissent at the time the case was considered after briefing and oral argument. Rather, a threshold COA analysis is generally limited to whether "jurists could conclude the issues presented are adequate to deserve encouragement to proceed further," and such a finding "is not coextensive with a merits analysis." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (citation and internal quotation marks omitted).

Petitioner also fails to mention that he raised a nearly identical "two-judge-to-two-judge split" argument in seeking panel and/or *en banc* rehearing. *Compare* Petition at 19 (claiming the result in this case was "just luck of the draw"), *with* Reh'g Pet. at 13–14 (arguing that the outcome was "just luck of the draw"). Thus, Petitioner's "luck of the draw" split-judges argument was already considered and rejected in his request for rehearing, and his Petition here attempts to revive that same empty logic. Indeed, although Judge Seymour would have granted panel rehearing, the Tenth Circuit's Order denying rehearing noted that Petitioner's rehearing petition "was transmitted to all of the judges of the court who are in regular

active service," and that "no member of the panel and no judge in regular active service on the court requested that the court be polled," which meant his rehearing petition was denied and the Tenth Circuit's decision continued to endure as published precedent. Pet'r Appx. C, 56a. If the Tenth Circuit was truly divided on this issue, as Petitioner has repeatedly insisted, that alleged divide would have been uncovered at the rehearing stage. Petitioner's perceived "split" within the Tenth Circuit is nonexistent and does not require this Court's intervention. *See* SUP. CT. R. 10.

Petitioner further complains that the United States Code does not adequately put a *pro se* petitioner on notice that he must invoke an "actual innocence" argument in order to secure such review. Petition at 21–22. Essentially, Petitioner argues the doctrine of liberal construction should be used as a judicial safety valve to rescue the alleged ambiguities in the statutory code. But Petitioner's claim cuts against the reality that countless habeas petitioners have historically known how to raise an actual innocence gateway claim, even without unambiguous guidance from the federal code. *See In re Byrd*, 269 F.3d 544, 553 (6th Cir. 2001) (collecting cases) (recognizing that "Byrd was on notice, certainly as early as his first federal habeas petition, that he could avail himself of the actual innocence/fundamental miscarriage of justice exception to excuse any procedural default"). *See also McQuiggin v. Perkins*, 569 U.S. 383, 411 (2013) (Scalia, J., dissenting) ("From now on, each time an untimely petitioner claims innocence—*and how many prisoners asking to be let out of jail do not?*—the district court will be obligated to expend limited judicial resources wading into the murky merits of the petitioner's innocence claim." (emphasis added)).

And even so, the Tenth Circuit has never viewed the words "actual innocence" as a talismanic predicate to gateway review; rather, the Tenth Circuit has used liberal construction to decide the core thrust of a petitioner's *pro se* claims, based on the entirety of the pleadings presented. *See Hall*, 935 F.2d at 1110 (though a petitioner's compliant should be read broadly, liberal construction "does not relieve the plaintiff of the burden of alleging sufficient facts on which a recognized legal claim could be based"); *cf. Eizember v. Trammell*, 803 F.3d 1129, 1141 (10th Cir. 2015) (in a counseled capital habeas petition, reaffirming the longstanding rule that "stray sentences" are not enough to present an argument or put the court and opposing counsel on notice). As the discussion above makes clear, the Tenth Circuit found the totality of Petitioner's federal district court pleadings were aimed only as a challenge to his sentence enhancement, *not* to the lawfulness of his convictions in the first place. Pet'r Appx. A, 9a–10a & n.3 (reading Petitioner's claims in context and finding, over and over, that Petitioner's complaint below challenged only his sentences and his punishment enhancement for his SORA offenses).

Nor is there merit to Petitioner's suggestion, in various places in his Petition, that the Tenth Circuit's treatment of this issue somehow competed with the decisions of other lower courts. *See* Petition at 19, 27–28. Petitioner cites two cases from other United States courts of appeals, but he offers only the most cursory analysis of each case, without contextualizing the reasoning therein. Petition at 19 (citing *United States v. Garth*, 188 F.3d 99, 108 (3d Cir. 1999) and *Mills v. Jordan*, 979 F.2d 1273, 1277–78 (7th Cir. 1992)). The Third Circuit in *Garth* found the habeas petitioner had,

in fact, raised his claim of actual innocence in the federal district court when he lodged a complaint that his guilty plea lacked an adequate factual basis to support his conviction. *Garth*, 188 F.3d at 108. The same was true in *Mills*, which involved the Seventh Circuit's determination that the habeas petitioner had "at least a plausible claim" that he had raised his miscarriage of justice argument in the federal district court. *Mills*, 979 F.2d at 1277. As already discussed, the Tenth Circuit carefully reviewed Petitioner's *pro se* pleadings and reasonably understood the fundamental purpose of his arguments to be an attack on his sentences alone, which meant that his conviction-based innocence claim had not been pled in the federal district court and was therefore subject to waiver. *See* Pet'r Appx. A, 9a–11a & n.3.

Simply because the Tenth Circuit reached a different factual outcome than in *Garth* or *Mills* does not mean the decision in this case created a conflict among the courts, especially because those cases adhered to the same bedrock principles at issue here. *See Garth*, 188 F.3d at 110 ("Of course, a habeas petitioner cannot circumvent the restrictions of the procedural default rule merely by asserting 'actual innocence' where the assertion is belied by the record."); *Mills*, 979 F.2d at 1277–78 (rhetorically asking whether the habeas petitioner had waived his miscarriage of justice argument, signaling the Court's recognition waiver can be a principle at play). Petitioner's alleged circuit-split is nothing more than lower courts reaching different factual outcomes based on common legal concepts. Because Petitioner is requesting error-correction on a factual issue, and since Petitioner's argument is not a compelling issue for review, certiorari is not warranted here. *See* SUP. CT. R. 10.

II. This Court's review is not necessary because the Tenth Circuit's decision reasonably held that an actual innocence claim cannot be raised for the first time on appeal, and in any event, further percolation among the lower courts is necessary on this issue.

Petitioner next claims the outcome in this case warrants review since the Tenth Circuit's application of waiver to a gateway innocence claim allegedly runs afoul of this Court's precedent. Petition at 23–25, 27. In so doing, Petitioner outlines a variety of reasons why review is allegedly necessary, including his insistence that resolution of this issue "is exceptionally important to the administration of federal habeas law" because it has "serious consequences for federal habeas law." Petition at 25–26. As discussed below, the Tenth Circuit's decision was not inconsistent with this Court's prior treatment of actual innocence gateway claims and does not present an important question that requires this Court's intervention. *See* SUP. CT. R. 10. In any event, the issue at stake has seldom arisen in the United States courts of appeals and thus requires further percolation before this Court's review might be necessary.

For starters, Petitioner claims the Tenth Circuit's holding ran against the grain of this Court's precedent allowing actual innocence claims to excuse the procedural hurdles of untimeliness and unexhaustion. Petition at 24–25, 27. Put simply, assuming Petitioner did not raise his innocence claim below (as already discussed, *see supra*), the question hinges on whether Petitioner can shoehorn new arguments into an appeal under the guise of an innocence argument. As the procedural history makes clear, Petitioner argued his case a certain way until counsel was appointed for supplemental briefing, at which point counsel took the COA as license to blow the case open with brand new claims and theories previously unheard

at any stage in the lower courts. *See* Pet'r App. A, 13a–14a (observing that Petitioner's *pro se* arguments in his COA brief would have been unsuccessful, and so Petitioner's counsel, "[f]aced with that reality," "pivot[ed] to two new claims" in his supplemental opening brief, including adding an entirely new claim and changing the details underpinning another argument, and only belatedly asked permission to do so in his reply brief). By Petitioner's logic, styling his claims on appeal as "actual innocence" should give him free reign to bypass the ordinary channels and course of appellate review and usher in a barrage of new arguments not heard below. Such reasoning is dangerous and cannot be squared with this Court's precedent, and the Tenth Circuit correctly rejected Petitioner's approach.

As a general matter, this Court has held that a credible showing of actual innocence offers a gateway to consideration of a belated claim of constitutional error in a habeas petition, and may serve as an equitable exception to the one-year AEDPA limitations period. *See Perkins*, 569 U.S. at 386. Nonetheless, "tenable actual-innocence gateway pleas are rare." *Id.* Indeed, this Court has winnowed the sort of claims that fall into the category of actual innocence. *See Schlup v. Delo*, 513 U.S. 298, 324 (1995) (recognizing that a habeas petitioner alleging actual innocence must "support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial."). *See also Perkins*, 569 U.S. at 395 (underscoring the fact that the miscarriage of justice exception applies only in "a severely confined category" of cases); *House v. Bell*, 547 U.S. 518, 537 (2006)

(reaffirming the rule in *Schlup* that a gateway claim of actual innocence demands *new reliable evidence*).

In line with that reasoning, this Court has also acknowledged that an innocence gateway claim is not a limitless pass for securing federal review of defaulted claims. *See Perkins*, 569 U.S. at 401 ("We have explained that untimeliness, although not an unyielding ground for dismissal of a petition, does bear on the credibility of evidence proffered to show actual innocence."); *Schlup*, 513 U.S. at 324 (explaining that "the fundamental miscarriage of justice exception seeks to balance *finality, comity, and conservation of scarce judicial resources* with the individual interest in justice that arises *in the extraordinary case*" (emphasis added)); *Herrera v. Collins*, 506 U.S. 390, 418–19 (1993) ("But coming 10 years after petitioner's trial, this showing of innocence falls far short of that which would have to be made in order to trigger the sort of constitutional claim which we have assumed, *arguendo*, to exist."). *See also Bousley v. United States*, 523 U.S. 614, 635 (1998) (Scalia, J., dissenting) (although it would be "marvelously inspiring" to entertain an actual innocence claim at any time, "no matter how late it is brought forward, and no matter how much the failure to bring it forward at the proper time is the defendant's own fault," "we do not have such a system, *and no society unwilling to devote unlimited resources to repetitive criminal litigation ever could*" (emphasis added)). The Tenth Circuit's determination that Petitioner had waived his actual innocence claim did not conflict with this Court's precedent on procedural default, especially since tenable gateway innocence claims should be treated as the exceptional rarity, not the norm.

See Perkins, 569 U.S. at 395. *See also* Pet'r Appx. A, 16a (rejecting Petitioner's claim that an actual innocence argument surmounts any federal waiver rules, noting that "Childers provides no direct authority for this contention and we can find none").[4]

Moreover, the Tenth Circuit's decision follows the traditional rule that an appellate court sits as a court of review, not as a forum where new claims are concocted from scratch and on a sparse factual record. *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (recognizing that this Court is "a court of review, not of first view); *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 494 (2001) ("Because the Court of Appeals did not address these claims, we decline to do so in the first instance."); *United States v. Higgins*, 282 F.3d 1261, 1275 (10th Cir. 2002) (reaffirming the Tenth Circuit's "function as a court of review"). Simply put, the Tenth Circuit was not the appropriate forum for Petitioner to present new innocence arguments, especially given the limited nature of the factual record, and the Tenth Circuit correctly rejected Petitioner's efforts to bypass the ordinary course of review. Pet'r Appx. A, 16a. Since the Tenth Circuit's reasoning on this point makes good sense and certainly does not present "an important question of federal law" that cries out for this Court's resolution, Petitioner should not be granted certiorari. SUP. CT. R. 10.

[4] The reasoning in this case is also consistent with prior decisions from the Tenth Circuit in the waiver context, which the majority acknowledged in its opinion. Pet'r Appx. A, 9a–11a (collecting cases finding claims of actual innocence subject to waiver). *See, e.g.*, *Kenneth v. Martinez*, 771 F. App'x 862, 865–66 (10th Cir. 2019) (unpublished) (noting that the Tenth Circuit does not address issues for the first time on appeal, "[e]ven for actual-innocence claims"); *Heath v. Soares*, 49 F. App'x 818, 821 (10th Cir. 2002) (unpublished) (declining to consider actual innocence argument on appeal when "Heath did not assert actual innocence at critical stages in the proceedings"). Any unpublished federal opinion referred to in this brief is cited for persuasive value. *See* FED. R. APP. P. 32.1(a).

And though Petitioner claims the Tenth Circuit's decision ran contrary to prior guidance from this Court, including *Coleman v. Thompson*, 501 U.S. 722, 751 (1991), and *Perkins*, 569 U.S. at 394, Petitioner's explanation on that point presents a red herring. Petition at 24. The decision in *Coleman* had nothing to do with actual innocence; rather, the Court there emphasized that a federal court collaterally reviewing a state court judgment should not be able to grant relief where this Court would not even have jurisdiction on direct review. *See Coleman*, 501 U.S. at 729 ("Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory.").

Likewise, in *Perkins*, this Court held that, because a federal prisoner could avail himself of actual innocence for untimely habeas petitions, "[i]t would be passing strange to interpret a statute seeking to promote federalism and comity as requiring stricter enforcement of federal procedural rules than procedural rules enforced by the *States*." *Perkins*, 569 U.S. at 394 (emphasis in original). But those same federalism and comity concerns are not present here, and Petitioner has cited no authority that would force a federal court of appeals to hear arguments not asserted below. *See McCleskey v. Zant*, 499 U.S. 467, 493 (1991) (holding that the "cause and prejudice" standard, which applies to excuse a state prisoner's failure to properly present his claims in state court, should also apply to a state prisoner's failure to raise a claim in his first federal habeas petition because "both doctrines seek to vindicate the State's interest in the finality of its criminal judgments").

Petitioner also makes it seem like the Tenth Circuit's analysis in this case allegedly diverged from this Court's historical precedent, inasmuch as it conflicted with the reasoning and decision in *Hormel v. Helvering*, 312 U.S. 552, 555–57 (1941). Petition at 24–25. Petitioner's reliance on *Hormel* is tenuous at best. The Court there addressed a case from the Eighth Circuit in a dispute between the Commissioner of the Internal Revenue and an individual who faced an alleged deficiency in the tax returns on the income of trusts he declared in the year 1934. *Hormel*, 312 U.S. at 553. The Commissioner assessed a deficiency against Mr. Hormel, but the Board of Tax Appeals decided against the Commissioner, finding the income in question was not taxable under the provisions relied upon in assessing the deficiency. *Id.* at 554. On appeal, the Commissioner abandoned his reliance on one taxability statute and urged the applicability of other related statutes, and in response, Mr. Hormel alleged the newly raised statute (referred to as "Section 22(a)," the precursor to the modern statute under 26 U.S.C. § 22(a)) should be precluded from consideration on appeal since it had not been addressed by the Board of Tax Appeals. *Id.* at 554–55. The Circuit Court of Appeals rejected that argument and found the statute not relied upon below could be considered on appeal. *Id.* at 555.

On certiorari, this Court addressed the threshold matter of whether a provision not "directly and squarely presented in the proceedings before the Board of Tax Appeals" could be considered before the Circuit Court. *Id.* at 555–56. Ultimately, this Court held that the Circuit Court properly gave consideration to the Commissioner's reliance on the new statute on appeal, especially since to hold otherwise "would result

in permitting [Mr. Hormel] wholly to escape payment of a tax which under the record before us he clearly owes." *Id.* at 559–60. Thus, this Court affirmed the lower court's decision reversing the Board of Tax Appeals, and remanded the matter for proceedings not inconsistent. *Id.* 560.

Petitioner's application of the reasoning in *Hormel*, which revolved around a tax dispute and the arguments made or omitted before the Board of Tax Appeals, is a stretch. Petitioner claims the Tenth Circuit's decision in this case "cannot be squared" with *Hormel*, but the circumstances in each case could not be more different. Indeed, central to the outcome in *Hormel* was an intervening decision of law, namely, this Court's opinion in *Helvering v. Clifford*, 309 U.S. 331, 338 (1940), which held that the income of certain trusts were taxable under Section 22(a), and which had not yet been handed down at the time the Board of Tax Appeals made its decision below. *Hormel*, 312 U.S. at 559–60 ("But the Board of Tax Appeals neither found the facts nor considered the applicability of 22(a) in the light of the Clifford case."). Unlike in *Hormel*, which allowed the Commissioner to assert reliance on a new statute based on an intervening change of law, Petitioner in the case at bar does not find himself in the same unusual posture. Rather, Petitioner surely could have raised a claim of actual innocence in the federal district court had he chosen to do so, just as countless habeas petitioners before him have known to do, and no intervening law excuses his failure to adhere to the rules of appellate procedure. *See In re Byrd*, 269 F.3d at 553.

To that point, the Tenth Circuit's decision is not in conflict with any of the reasoning in *Hormel*. In fact, Petitioner only selectively reads this Court's analysis

there. True enough, this Court held that lower courts should not maintain an "inflexible" refusal to consider new claims on appeal, since "[t]here may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court." *Hormel*, 312 U.S. at 556–57. What this Court also made clear, however, is that an appellate court ordinarily "does not give consideration to issues not raised below," and that "it is equally essential that *litigants may not be surprised on appeal* by final decision there of issues upon which they have had no opportunity to introduce evidence." *Id.* at 556 (emphasis added). In that sense, this Court recognized the longstanding principle that lower courts act as fact-finders, and appellate courts sit in the posture of review, without consideration of new claims, except in the rare and exceptional circumstance. *See id.* The Tenth Circuit's decision in this case correctly recognized that Petitioner's argument did not fall within one of those extraordinary categories where new claims find shelter on appeal. Pet'r Appx. A, 11a–16a. Since Petitioner has failed to show an actual conflict with this Court's precedent, certiorari should be refused in this case. *See* SUP. CT. R. 10.

But taken a step further, Petitioner's request for certiorari review should fail for another reason—the application of waiver in the alleged innocence context is far from settled among the courts of appeals. Petitioner admits as much in his brief to this Court: "We have found no case from any other court of appeals that holds that a prisoner can waive an actual innocence gateway claim." Petition at 25. Respondent's

diligent research has, on the other hand, uncovered a handful of decisions from other lower courts addressing the actual innocence waiver issue, but the issue scarcely arises. *See, e.g.*, *Awon v. United States*, 308 F.3d 133, 143 (1st Cir. 2002) (declining to find that an actual innocence claim based on insufficiency of the evidence excuses a procedural default, concluding that the petitioner's "assertion of actual innocence to excuse a procedural default does not permit a reviewing court to simply dive into defaulted questions of the sufficiency of the evidence"); *My Van Tran v. Sheldon*, No. 17–4275, 2018 WL 2945946, at *2 (6th Cir. May 1, 2018) (unpublished) ("Tran did not claim in his COA application that he was entitled to equitable tolling on the grounds of actual innocence, and therefore he has waived appellate review of the district court's decision on that issue."); *United States v. Parker*, 176 F. App'x 358, 359 (4th Cir. 2006) (per curiam) (unpublished) (observing that the defendant's actual innocence claim—which was not raised below—was reviewed for only plain error, and ultimately finding that since "Parker's guilty plea was valid, he waived all antecedent nonjurisdictional defects, including claims of actual innocence"); *Franklin v. Stewart*, 13 F. App'x 605, 606 (9th Cir. 2001) (unpublished) ("Franklin did not assert her claim of actual innocence in her petition or before the district court. Thus, as least with respect to this petition, Franklin waived any claim of actual innocence."). This issue is hardly a matter that requires this Court's attention, especially since Petitioner points to no case where a lower court has reached the opposite conclusion—*i.e.*, that

an actual innocence gateway claim is procedurally limitless and immune from the principle of waiver.[5]

In that respect, this Court generally waits for multiple lower courts to address issues left unresolved in its decisions before granting certiorari review, including holding off until lower courts reach different outcomes on a similar issue. *See Arizona v. Evans*, 514 U.S. 1, 24 n.1 (1995) (Ginsburg, J., dissenting) ("We have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court."); *California v. Carney*, 471 U.S. 386, 400–01 & n.11 (1985) (Stevens, J., dissenting) (discussing the value of permitting lower courts "to debate and evaluate the different approaches to difficult and unresolved questions of constitutional law."); *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of petitions for writs of certiorari) ("In my judgment it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court."). In light of the lack of lower courts

[5] Petitioner's earlier citations to *Garth*, 188 F.3d at 108, and *Mills*, 979 F.2d at 1277–78, do not fall within the category of finding an actual innocence claim immune from waiver. Petition at 19. Rather, in each case, the habeas petitioner had, in fact, raised a claim of actual innocence in the federal district court. *See Garth*, 188 F.3d at 108 ("The District Court therefore concluded that Garth did not clear the procedural bar, and accordingly, it never addressed Garth's claim. However, Garth was asserting that he was actually innocent."); *Mills*, 979 F.2d at 1277 ("In his pro se petition, Mills made several statements that could be construed as claims of innocence."). As discussed above, the Tenth Circuit reasonably found that Petitioner had not raised an innocence claim in the federal district court, which makes *Garth* and *Mills* factually inapposite. Petitioner has presented no authority supporting the notion that an actual innocence claim automatically conquers the rules of appellate procedure.

weighing in on this issue, the matter at hand requires further percolation. At this point, certiorari review is unwarranted.

III. This Court need not remand the matter for a fully developed record since consideration of the merits of Petitioner's claims was procedurally barred.

Finally, Petitioner asks this Court to grant, vacate, and remand the Tenth Circuit's decision back for further proceedings and development of the factual record. Petition at 30–31. As shown in the preceding sections, however, Petitioner's request for certiorari should be denied since he has failed to show how his arguments present a "compelling" reason for this Court's review. SUP. CT. R. 10. Respondent takes this chance to clarify a misconception Petitioner labors under in his Petition, namely, that Respondent is and was amenable to a remand to the federal district court for development of the factual record.[6]

To be clear, Respondent has always argued that a remand would be necessary *only* in the event the Tenth Circuit found his ex post facto arguments offered a credible gateway showing of actual innocence, sufficient to excuse the procedural impediments of untimeliness and unexhaustion. *See* State's Br. at 47–49 (arguing *in the alternative* that even if the Tenth Circuit found Petitioner had made a gateway showing of actual innocence, the nature of relief should be a remand to consider the merits of Petitioner's claims on a developed record). Respondent made that

[6] The parties agree that the factual record in this case was limited before the Tenth Circuit, but that was because the federal district court never had reason to explore the underlying merits of Petitioner's claims in the first place. Pet'r Appx. A, 12a–13a n.6 ("But as a court of review, we cannot fault the district court for not construing Childers's habeas petition as raising such a claim of innocence that did not fully develop until after our grant of a COA."). *See also Eizember*, 803 F.3d at 1141 ("[W]e simply cannot fault the district court for failing to see what wasn't there.").

alternative argument at the Tenth Circuit after Petitioner placed the cart before the horse in his supplemental opening brief; in essence, Petitioner dove straight into the merits of his underlying claims on an undeveloped record, paying only fleeting consideration to the threshold procedural barriers. *See* State's Br. at 3 n.2 ("Petitioner's Statement of the Issues, as well as the substance of his brief, treats the merits of his constitutional claims as somehow preceding the timeliness of his petition and whether he can overcome the time-bar. Petitioner has it backwards.").

Petitioner's approach was, of course, backwards. The federal district court found him procedurally barred and disposed of his claims without a merits adjudication. Pet'r Appx. A, 6a–7a; *see also* Pet'r Appx. D, 57a–62a. Thus, as Respondent argued, the substantive worthiness of Petitioner's underlying claims was completely speculative on appeal, and any consideration of the merits—if even necessary in the first place—would have needed initial presentation at the federal district court level. State's Br. at 47–49. The extremely limited nature of the factual record on appeal, which Petitioner acknowledges made merits-consideration of his claims problematic, is further proof that the Tenth Circuit's holding on waiver was correct.[7] Petitioner cannot ambush an appellate court with new claims and then

[7] As was the case at the Tenth Circuit, Petitioner again attempts to push an incorrect and factually unsupported argument that he is "actually innocent" of the SORA offenses for which he was convicted. *See* Petition at 2 (claiming that he "did nothing wrong when he moved" and that "he will remain [in prison] without this Court's intervention"); Petition at 5 (asserting that Petitioner "was not even prohibited from moving to this home, nor was he even subject to the registration requirements at the time of this move"); Petition at 29 (again repeating that "he was not even prohibited from moving to this home, nor was he even subject to the registration requirements at the time of this move"); Petition at 31 ("It is a small price to pay to ensure that Mr. Childers does not spend the rest of his life in prison because he failed to update his address after allegedly moving near a school, when state law did not even prohibit such a move."). And Petitioner suggests, as he did at the Tenth Circuit, that his duty to register at the time of the crimes had been obviated since he allegedly completed a sex offender

complain when the factual record sheds no light on those new legal theories. *See* FED. R. APP. P. 10(b)(2) (apportioning the burden for ensuring full and adequate completion of the record on appeal); *Piggie v. Cotton*, 342 F.3d 660, 663 (7th Cir. 2003) (reaffirming the principle that an appellant bears the burden of ensuring the appellate record substantiates the claims he raises on appeal).

All told, the Tenth Circuit came nowhere close to considering the merits of Petitioner's ex post facto claims, since the principle of waiver stopped Petitioner well short of having those core claims adjudicated on all fours.[8] Put differently, a remand

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treatment program in prison. *See* Petition at 9 (claiming he "successfully completed a sex offender treatment program while incarcerated"); Supp. Op. Br. at 13, 31 (arguing that the two-year registration period applied to Petitioner because "he completed the treatment program," and that, accordingly, he had no duty to register at the time of his SORA crimes in 2007). But Petitioner's only proof supporting that claim, both then and now, was a citation to his own *pro se* pleadings in post-conviction, asking the court to take him at his word that he finished the sex offender program in prison. *See* State's Br. at 21 n.7 (recognizing that Petitioner's duty-to-register argument was "based on a number of shaky assumptions," including the fact that his entire argument was premised on his own self-serving declarations). Regardless, Petitioner continues to repeat a mantra that his actions were not unlawful, failing to recognize that his purely *legal* defenses and technical complaints about Oklahoma's SORA statutes do not amount to a showing of *factual* innocence. *See Sawyer v. Whitley*, 505 U.S. 333, 340 (1992) ("A prototypical example of 'actual innocence' in a colloquial sense is the case where the State has convicted the wrong person of the crime."). *See also Bousley*, 523 U.S. at 615 ("Actual innocence means factual innocence, not mere legal insufficiency."). Put another way, whether Petitioner was legally subject to the extended registration period—*i.e.*, whether he had a duty to register at the time of his crimes—may have served as a legal defense to his offenses but did not negate an element of the crimes. Certiorari on the waiver issue should be reserved for another day, *arguendo*, in a case where the petitioner truly does have a colorable innocence claim, not simply where, as here, he contrives new legal hypotheses for why his clearly criminal conduct should have skirted punishment. *See Sawyer*, 505 U.S. at 340. Even on the limited record considered below, Petitioner is not actually innocent. For this reason, among others, Petitioner's case is an inappropriate candidate for this Court's review.

[8] And though Petitioner makes it seem like certiorari is his last-ditch effort at securing review of his claims, Petitioner forgets that an actual innocence claim is the very bedrock of Oklahoma's Post-Conviction Procedure Act, and that a petitioner can raise a claim of factual innocence at any time by means of state court post-conviction review. *See* OKLA. STAT. tit. 22, § 1080 (2021) (outlining the bases upon which a post-conviction application can be founded, including a claim that "the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this state," or that "there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice," *inter alia*); *Slaughter v. State*, 108 P.3d 1052, 1054 (Okla. Crim. App. 2005) (reaffirming that "innocence claims are the Post-Conviction Procedure Act's foundation"). Respondent continues to believe that Petitioner's claims fall

for factual development would have been warranted only if Petitioner could first pass the gateway to having his barred claims heard. *See Perkins*, 569 U.S. at 401 (remanding for factual development only after the petitioner's gateway claim of actual innocence justified excusal of his procedural impediments). Since the Tenth Circuit was correct in finding Petitioner's claims waived, further development of the factual record was unnecessary. *See* Pet'r Appx. A, 15a–16a & n.8. On balance, Petitioner's request for certiorari does not present a compelling case for this Court's review.

CONCLUSION

For the reasons set forth above, Respondent respectfully requests this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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short of showing his factual innocence of the crimes he stands convicted of, as Respondent argued extensively below. *See* State's Br. at 13–27, 41–47. But the Tenth Circuit's decision certainly does not forever bar Petitioner from the courthouse doors if his actual innocence claim truly was meritorious; rather, the Tenth Circuit simply recognized that a federal court of appeals is not the appropriate forum for a brand new innocence claim. *See* Pet'r Appx. A, 15a–16a. *But see* Petition at 2 (asserting that Petitioner will remain in prison "without this Court's intervention"). In other words, if Petitioner actually had a credible claim of actual innocence, his avenues for relief would lie elsewhere. *See Slaughter*, 108 P.3d at 1054.