No. 24-

IN THE

Supreme Court of the United States

RICHARD STANTON WHITMAN,
Petitioner,

v.

DAVID W. GRAY, Warden,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Procedural default is a "defense that the State is obligated to raise and preserve if it is not to lose the right to assert the defense thereafter." *Trest* v. *Cain*, 522 U.S. 87, 89 (1997). And this Court has made clear, federal courts have "the authority to resurrect only forfeited defenses"—not waived ones. *Wood* v. *Milyard*, 566 U.S. 463, 471 n.5 (2012).

In *Wood*, this Court clarified that a state responding to a petition for habeas corpus has waived an affirmative defense when, "after expressing its clear and accurate understanding of the [defense]," it "deliberately steer[s] the District Court away from the question and toward the merits." *Id.* at 474. Now more than a decade after *Wood*, the circuits are split on whether a state's decision to raise a procedural-default defense in its answer for some claims in a habeas petition, but not for others, waives the defense.

When a federal court of appeals concludes that a procedural-default defense has been forfeited, it has discretion to forgive the forfeiture and "resurrect[]" the defense. *Id*. at 466. But the circuits are in disarray concerning the considerations that should guide the decision whether to forgive a forfeiture of a procedural-default defense.

The questions presented are:

1. Whether a state waives a procedural-default defense when, in its answer to a state habeas petition in district court, it chooses to raise the defense to some claims in the petition but not to others?

2. Whether a court of appeals errs when it fails to consider the balance of the equities between the parties when deciding whether to forgive a state's forfeited procedural default defense?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner, the petitioner-appellant below, is Richard Stanton Whitman.

Respondent, the respondent-appellee below, is David W. Gray, Warden.

No corporate parties are involved in this case.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings in the United States District Court for the Northern District of Ohio and the United States Court of Appeals for the Sixth Circuit: *Richard Stanton Whitman* v. *Warden David W. Gray*, Case No. 5:19-cv-01818 (N.D. Ohio); and *Richard Stanton Whitman* v. *David Gray, Warden*, Case No. 21-3858 (6th Cir.). And from the following proceedings in Ohio state court: *Ohio* v. *Richard Stanton Whitman*, No. 2016CR2255 (Ohio Ct. Common Pleas May 4, 2017); *Ohio* v. *Richard Stanton Whitman*, No. 2017CA00079 (Ohio Ct. App., 5th Dist. July 23, 2018); *Ohio* v. *Richard S. Whitman*, No. 18-1222 (Ohio Nov. 7, 2018).

No other proceedings are directly related to this case.

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Richard Whitman respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's opinion is reported at 103 F.4th 1235 and reproduced at Pet. App. 1a–10a. The district court's opinion and order denying Whitman's habeas corpus petition is available at 2021 WL 4078298 and reproduced at Pet. App. 11a–22a.

JURISDICTION

The Sixth Circuit issued its opinion and judgment on June 10, 2024. On August 29, 2024, Justice Kavanaugh extended the time for petitioner to file a petition for certiorari to and including November 7, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2254(d) of Title 28, U.S. Code, provides, in relevant part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application if, clearly established federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

INTRODUCTION

A cornerstone of our legal system—one that "distinguishes our adversary system of justice from the inquisitorial one"—is that "points not argued will not be considered." *United States* v. *Burke,* 504 U.S. 229, 246 (1992) (Scalia, J., concurring) (citation omitted). In *Wood* v. *Milyard*, 566 U.S. 463 (2012), the Court built upon this foundation, holding that federal courts have "the authority to resurrect only forfeited defenses"—those a party fails to raise through inadvertence. *Id.* at 471 n.5. Even more, the Court in *Wood* clarified that a State waives a defense if it expresses a "clear and accurate understanding" of the defense and "deliberately steer[s] the District Court away from the question and toward the merits" of a habeas petition. *Id.* at 474.

The Sixth Circuit joined the wrong side of a circuit split by failing to follow *Wood*'s clear teaching. In his jurisdictional memorandum filed *pro se* with the Ohio Supreme Court, Richard Whitman argued that an instructional error at his trial—the court's failure to give a Castle Doctrine instruction—violated his federal due process right to present a complete defense. After the court denied discretionary review, he filed a writ of habeas corpus raising ten claims, including his due process claim. In response, the State offered a detailed explanation why *nine* out of Whitman's ten claims were procedurally defaulted—all but his due process claim. As to that claim, the State argued only that the failure to give the instruction was a state law error not cognizable on habeas or harmless under

the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), and the district court denied the petition on those grounds.

At the Sixth Circuit, Whitman admitted that he procedurally defaulted his claim and argued that, because of that, no state court had ever adjudicated the claim on the merits. The Sixth Circuit agreed. Whitman also argued that, because the state had failed to raise procedural default to his due process claim claim—and only that claim—in its response to his habeas petition, it had waived that defense on appeal. If Whitman were correct—*i.e.*, if the state waived its procedural default—the Sixth Circuit "would apply de novo review in considering" his due process claim. Pet. App. 9a.

The Sixth Circuit recognized the same, though it couched the observation in state-friendly terms. "If we failed to enforce Whitman's procedure default," the court noted—that is, if it failed to find some way to forgive the state's waiver—"it would apply de novo review … *a seeming windfall for Whitman*." *Id.* (emphasis added). Staring down this windfall, the decision below dispatched Whitman's waiver argument, citing *Wood* and concluding that the state merely "forfeited [the defense] in the district court." Pet. App. 7a (citing *Wood*, 566 U.S. at 471 ("[T]he bar to court of appeals' consideration of a forfeited habeas defense is not absolute"). Now within the forfeiture framework where it has the authority to override the state's so-named forfeiture on policy grounds, the court did just that, finding that "good reasons" like "preservation, judicial economy, and comity" were grounds to "enforce the doctrine of procedural default" against Whitman.

Good reasons or not, this Court's decision in *Wood* does not permit courts to forgive a waived procedural-

default defense. And as several circuit courts have made clear, where a state's response to a habeas petition does what Ohio's did here—raise a procedural-default defense to some claims but not others—the state waives the defense. This case presents the opportunity to clarify *Wood* and prevent disparate waiver calls across the circuits. Even more, the Sixth Circuit's forfeiture analysis strikes at the heart of a deep circuit split regarding the considerations that should guide courts in deciding whether to forgive a forfeiture of procedural default, offering the Court a chance provide guideposts and guidance to circuits in disarray.

The Court should grant the petition.

STATEMENT OF THE CASE

A. Factual Background

Richard Whitman moved to Canton Ohio to live with his sister Janeann and her boyfriend David Eadie in August 2016. R. 8-3, PageID 1187. A few months later, Janeann became concerned for Whitman's safety and asked Eadie to come over and try to talk Whitman down. R. 8-3, PageID 1190–93. But instead of talking Whitman down, Eadie proceeded immediately to Whitman's upstairs bedroom and began assaulting him. Eadie headbutted Whitman, hit Whitman, and pinned him to the ground. R. 8-3, PageID 1196–99. After taking everything Eadie could see that Whitman might use to defend himself, Eadie relented for a few moments and went downstairs. R. 8-3, PageID 1201, 1265–66. Whitman sat on his bed to try and catch his breath. R. 8-3, PageID 1268. Then, despite Janeann's pleas, Eadie proceeded back up the stairs and began charging into Whitman's bedroom. R. 8-3, PageID 1205. As Eadie reached the threshold of Whitman's room, Whitman fired three

shots from a pistol, killing Eadie. R. 8-3, PageID 1272.

B. Proceedings Below

Whitman was indicted by an Ohio grand jury for murder and unlawful possession of a firearm. Pet. App. 2a. The key dispute at trial was whether Whitman acted in justified self-defense. *Id.* At the time of Whitman's trial, Ohio law regarded the defense as an affirmative one that required a defendant to prove all of the elements by a preponderance of the evidence. *Id.* Whitman requested that the trial court instruct the jury on both self-defense and the Ohio Castle Doctrine. *Id.* The trial court granted Whitman's request as to the self-defense instruction; it did not as to the castle doctrine instruction. *Id.* Had the trial court granted Whitman's request as to the castle doctrine, the jury would have been instructed that "a person who is lawfully in that person's residence has no duty to retreat before using force in self-defense." *Id.* The jury ultimately found Whitman guilty, and the trial court sentenced him to a prison term of 21 years to life. *Id.*

Whitman appealed his conviction to the Ohio Court of Appeals, where he argued that the trial court erred under Ohio law by failing to instruct the jury that he had no duty to retreat under the Ohio Castle Doctrine. Pet. App. 2a. The State confessed error. *Id.* The Ohio Court of Appeals agreed that a castle doctrine instruction would have been appropriate. *Id.* Even so, the court held that the error did not affect Whitman's substantial rights and upheld the conviction. *Id.* at 2a–3a.

Whitman proceeded *pro se* and sought leave to appeal to the Ohio Supreme Court. Pet. App. 3a. This time, Whitman "argued for the first time that the tri-

al court's error [in refusing to give the castle doctrine instruction] violated his federal due process right to a complete defense." *Id.* The Ohio Supreme Court denied discretionary review. *Id.*

Having exhausted his state court remedies, Whitman, again proceeding *pro se*, filed a petition for habeas corpus in federal district court. Pet. App. 3a. In his petition, Whitman raised ten grounds for relief. *Id.*; see *id.* at 12a. His first and chief ground was that the trial court's refusal to instruct the jury on the castle doctrine violated his right to present a complete defense under the Due Process Clause of the Fourteenth Amendment. *Id.* at 15a. As to nine of Whitman's ten claims, the State responded with detailed explanations of why Whitman's claims were procedurally defaulted. See Dkt. 8, PageID 136–38.

As to Whitman's castle doctrine claim, however, the State argued only that "the failure to give" the castle doctrine instruction "was merely an error of state law that is not cognizable on federal habeas review," or "[i]n the alternative," that "the state court's harmlessness" determination was "not unreasonable under [AEDPA]." Pet. App. 3a. The district court denied Whitman's petition. *Id.* at 22a. Relevant here, the court held the instructional error was a "quintessential state law question" not cognizable on federal review, but granted a certificate of appealability on that claim. *Id.* at 16a, 22a. Whitman appealed the district court's decision on his castle doctrine claim to the Sixth Circuit. *Id.* at 4a.

Before the Sixth Circuit, Whitman again argued that the failure of the trial court to give the castle doctrine instruction violated his federal due process rights. Pet. App. 4a. The court recognized that the State "never argued that Whitman's due process claim" regarding the state court's denial of the castle

doctrine instruction "was procedurally defaulted." *Id.* at 6a. The court likewise made clear that it did "not condone" the State's approach to the castle doctrine claim, and noted that the state's counsel "conceded at oral argument that the state made 'a mistake[ ]' by not raising in district court Whitman's procedural default of the due process claim," and instead raising the defense to each of Whitman's other nine claims. *Id.*

Although the court recognized that, "[b]efore the district court," the state argued procedural default on Whitman's nine other claims but "never argued that Whitman's due process claim was procedurally defaulted," the court held that, "[i]n that respect, the [state] forfeited the argument." Pet. App. 6a. Having found the procedural default argument forfeited, the court reasoned that it was "empowered to raise procedural default" if it "'was raised on appeal, even if forfeited in the district court." *Id.* at 7a (quoting *Wood*, 566 U.S. at 471 ("[T]he bar to court of appeals' consideration of a forfeited habeas defense is not absolute.")). The court rejected Whitman's argument that the state had waived the defense, concluding that "the warden simply forfeited the opportunity to contest Whitman's procedural default." *Id.* at 9a.

In deciding whether to "enforc[e] Whitman's procedural default," the panel pointed to "the many institutional interests underlying AEDPA's review framework," including "comity," "respectful, harmonious relations between the state and federal judiciaries," "judicial efficiency and conservation of judicial resources," "safeguard[ing] the accuracy of state court judgments," and "finality." Pet. App. 7a–8a. In light of these "good reasons," the Court decided to "enforce the doctrine of procedural default" and affirmed the district court's judgment. *Id.* at 10a.

This petition followed.

REASONS FOR GRANTING THE PETITION

I. The Courts of Appeals Are Split On Whether A State Waives A Procedural-Default Defense When, In Its Answer To A Habeas Petition, It Raises The Defense To Some Claims But Not To Others.

In *Wood*, this Court held that when a state "express[es] its clear and accurate understanding" of a defense in its answer to a habeas petition and "deliberately steer[s] the District Court away from the question and toward the merits of [the] petition," it waives the defense. 566 U.S. at 474. Yet now more than a decade after *Wood*, the circuits are in sharp disagreement over whether a state waives a procedural-default defense when, in its answer to a habeas petition, it raises the defense to some claims in the petition but not to others. The Seventh, Eighth, and Ninth Circuits say it's waiver; the Second the Sixth Circuits say its forfeiture. At bottom, the circuits are intractably split—only this Court can clarify *Wood* and resolve the conflict.

A. The Seventh, Eighth, And Ninth Circuits Hold That A State's Choice To Raise The Defense To Some Claims But Not Others Constitutes Waiver.

1. In the Seventh Circuit, a state's choice to raise the procedural-default defense as to some claims and not to others constitutes waiver. In *Henderson* v. *Thieret*, 859 F.2d 492 (7th Cir. 1988), Henderson raised five claims in his federal habeas petition. *Id.* at 497. In its response to Henderson's petition, the state raised a procedural-default defense to only one of those claims, but the district court raised the de-

fense *sua sponte* for the other claims and held that *all* of Henderson's claims were procedurally barred. *Id.* at 494–96.

On appeal, the Seventh Circuit recognized that a district court may "raise the question of procedural default *sua sponte* even where the state has failed to raise it" in response to a federal habeas petition. *Id.* at 493. But the court held that "the court may not raise and consider procedural default where the state implicitly indicates a desire to waive that defense." *Id.* In so holding, the court reasoned that "it is one thing to omit the defense altogether in the district court and quite another to raise it as to one claim and yet fail to pursue it as to other claims." *Id.* at 497.

Ultimately, the court reversed the district court, holding that courts are "not permitted to override the state's decision implicit or explicit (as we believe it was in this case) to forego that defense." *Id.* at 98; see also *Lewis* v. *Sternes*, 390 F.3d 1019, 1029 (7th Cir. 2004) (noting that "[o]ne might infer that the State has implicitly waived a procedure default defense when it has asserted that defense as to some of the petitioner's claims but not as to the particular claim in question," but concluding that the state did not waive the defense there because it "did not respond to those claims at all").

2. In the Eighth Circuit, a state's decision to raise the procedural-default defense to some claims but not others likewise waives the defense.

In *Jones* v. *Norman*, 633 F.3d 661 (8th Cir. 2011), Jones filed an amended habeas petition raising eighteen counts, including a *Faretta* claim alleging that "the state trial court erred by denying [his] motion and request to proceed pro se without counsel." *Id.* at

665 (citing *Faretta* v. *California*, 422 U.S. 806 (1975)). The district court ordered the state to file a response to the petition that addressed "the merits … *in addition to any procedural default issues which may be relevant*." *Id.* (noting that the emphasis was present in the original order). The state filed a response arguing that fourteen of the counts were procedurally defaulted. The state did not raise the procedural-default defense as to the *Faretta* claim; instead, it expressly argued that the court should consider and reject the merits of the *Faretta* claim under AEDPA. *Id.* at 664–66. The district court granted habeas relief on Jones's *Faretta* claim, and the state appealed.

The Eighth Circuit explained that, "[w]hen a state fails 'to advance a procedural default argument, such argument is waived.'" *Id.* at 666 (citing *Robinson* v. *Crist*, 278 F.3d 862, 865 (8th Cir. 2002)). Thus, because the state expressed an understanding of the procedural-default defense by raising it as to Jones's other claims but "specifically argued the *Faretta* claim on the merits," it waived the defense. *Id.* All told, the court's holding was unmistakable: "The State's response did raise procedural default defenses to a number of Jones's claims, but not to his *Faretta* claim. Rather, it specifically argued the *Faretta* claim on the merits. The district court correctly concluded that the State waived its procedural default defense." *Id.* at 666.

3. In the Ninth Circuit, too, the state waives a procedural-default defense when it raises the defenses as to some claims in a habeas petition and not others.

In *Vang* v. *Nevada*, 329 F.3d 1069 (9th Cir. 2003), Vang sought federal habeas relief in district court. *Id.* at 1071. In responding to Vang's operative petition, the state raised a procedural-default defense on two claims, arguing that those claims could have

been raised on direct appeal, but "did not rely on the defense of procedural default" for "claims 4, 5, and 6." *Id.* at 1072. A magistrate judge evaluated the petition and determined that all *five* of those claims were procedurally defaulted. The magistrate recommended denial, and the district court adopted that recommendation and denied the petition. *Id.* at 1071–72.

The Ninth Circuit reversed in part. "Generally," the court explained, "the state must assert the procedural default as a defense to the petition before the district court; otherwise the defense is waived." *Id.* at 1073 (citing *Franklin* v. *Johnson*, 290 F.3d 1223, 1229 (9th Cir. 2002)). The court noted that, in addition to failing to raise the defense in the district court, the state failed to offer explanation for "failure" to argue procedural default as to *five* claims. *Id.* The court ultimately "h[e]ld the state to its waiver and … reverse[d] the district court's decision that claims 4, 5, and 6 were procedurally defaulted." *Id.*; see also *Gonzalez* v. *United States*, 33 F.3d 1047, 1049 (9th Cir. 1994) ("[T]he government failed to assert procedural default in the district court proceedings on Gonzalez's § 2255 motion, and indeed it argued the merits of these claims. Other circuits have held that such a failure to assert default waives the issue.") (citing *United States* v. *Metzger*, 3 F.3d 756, 758 (4th Cir. 1993); *United States* v. *Hicks*, 945 F.2d 107, 108 (5th Cir. 1991); *Valladares* v. *United States*, 871 F.2d 1564, 1566 n.2 (11th Cir. 1989); *United States* v. *Hall*, 843 F.2d 408, 410 (10th Cir. 1988)).[1]

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[1] Underscoring the split, the Eleventh Circuit has held in a Section 2255 case that the government "waives the affirmative defense of procedural default" when it fails to raise the defense in its response to a habeas petition, *even* where it "submit[s] no written response" to the petition at all and, thus, does not raise

B. The Second Circuit And Sixth Circuit Hold That A State's Decision To Raise The Defense To Some Claims But Not Others Merely Forfeits The Defense.

1. In *Washington* v. *James*, 996 F.2d 1442 (2d Cir. 1993), Washington raised in his federal habeas petition, among other claims, a due process challenge that he had failed to raise on direct review. *Id.* at 1446. Having "deemed" that a procedural-default defense had no merit on his due process claim, the state "never raised the procedural default." *Id.* at 1448. After the district court denied Washington's petition on the merits, he appealed to the Second Circuit. *Id.* at 1445.

On appeal, the Second Circuit held that Washington procedurally defaulted his due process claim. Notably, the court recognized that, "[w]hen met with these circumstances, the Seventh Circuit held [in *Henderson*] that a federal court may not refuse to accept the conscious waiver." *Id.* at 1448 (citing *Henderson*, 859 F.2d at 498–99). But here, the court said, "the government simply failed to raise the defense" because "it incorrectly deemed that it had no merit." *Id.* More still, the court reasoned that, "even if the government['s]" conduct could be viewed "as a concession regarding procedural default," where the concession is "merely an innocent error, there is no analytic or policy reason to treat it any differently than a failure to raise the defense at all." *Id.* Accordingly, having found the defense forfeited, the court held that it could "raise the procedural default issue *sua sponte*." *Id.*

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the defense to other claims. *Foster* v. *United States*, 996 F.3d 1100, 1106–07 (11th Cir. 2021).

2. In the decision below, the Sixth Circuit joined the wrong side of the split by holding that the state merely forfeited its procedural-default defense. The court recognized that the state, despite raising procedural default on nine of the ten claims raised in Whitman's habeas petition, "never argued that Whitman's due process claim" targeting the state court's denial of the castle doctrine instruction "was procedurally defaulted." Pet. App. 6a. Even more, the court noted that the state argued the claim on the merits, contending that the state court's failure to give the instruction constituted "an error of state law" not cognizable on federal habeas review and that, in any event, the state court's harmlessness analysis was not unreasonable under AEDPA. *Id.* at 3a.

The court made clear that it did "not condone" the state's approach and even highlighted that counsel "conceded at oral argument that the state made 'a mistake[]' by not raising in district court Whitman's procedural default of the due process claim." Pet. App. 6a. Nonetheless, the panel held that, despite raising the procedural-default defense for *every single one* of Whitman's other claims, the state's decision to argue the merits and not raise procedural default on Whitman's due process claim merely "forfeited the argument." *Id.* Citing this Court's decision in *Wood* for the proposition that the "bar to court of appeals' consideration of a forfeited habeas defense is not absolute," the court decided that it could raise the defense because the state "raised it on appeal, even if [it] forfeited [the defense] in the district court." *Id.* at 7a.

II. The Courts of Appeals Are Split Four Ways On What Considerations Are In Play When Deciding Whether To Forgive A Forfeiture Of Procedural Default.

All eleven regional circuits have weighed in on the second question presented. Four circuits—the Second, Fourth, Tenth, and Eleventh—take some sort of an interest-balancing approach, where they weigh the benefits and detriments of forgiving the respondent's forfeiture in that particular case. The Third Circuit takes a similar balancing approach, but with an important wrinkle: on top of the interest balancing, it considers the balance of the equities between the parties' litigation conduct. The Ninth Circuit has eschewed the balancing approach, instead requiring the respondent to show "extraordinary circumstances" justifying forgiveness of the forfeiture—an inquiry that closely resembles the "cause" prong of procedural default doctrine. Finally, five circuits—the First, Fifth, Sixth, Seventh, and Eighth—forgive "inadvertent" forfeitures of procedural default as a matter of course, provided that the petitioner was provided with notice of the defense and an opportunity to present counterargument (and sometimes not even then). Here again, the circuits are deeply split and in need of guidance only this Court can provide.

A. The Second, Fourth, Tenth, and Eleventh Circuits Consider A Balance Of Values In Deciding Whether To Forgive Forfeiture Of A Procedural Default Defense.

1. The Second Circuit balances a number of considerations in deciding whether to forgive a forfeiture. First, the court considers the strength of society's interest in the finality of the judgment, which is at its zenith "with respect to convictions based on guilty

pleas." *Rosario* v. *United States*, 164 F.3d 729, 732 (2d Cir. 1998). Second, the court considers the government's "blameworth[iness] in failing to raise this issue." *Id.* at 732–33. Third, whether forgiving the forfeiture would further judicial efficiency—whether the default is manifest from the record, and whether the parties have adequately briefed the issue on appeal. *Id.* at 733; *Kuhali* v. *Reno*, 266 F.3d 93, 101 (2d Cir. 2001).

Fourth, the appearance of impropriety that might be caused by departing from the party-presentation principle. See *Rosario*, 164 F.3d at 733 ("We are aware that prisoners seeking *habeas corpus* relief lack the resources available to the government. We should hesitate to lend the weight of the judiciary to this already uneven fight, lest we be cast in the role of a second line of defense, protecting government prosecutors from their errors."). And fifth, whether forgiving the forfeited defense would otherwise result in a miscarriage of justice, such as when the defaulted claim "challenges the validity of the trial itself" or concerns unlawful conduct by a state actor "motivated by malice and not caused by mere inadvertence or poor judgment." *Washington*, 996 F.2d at 1450. In § 2254 cases, the court also considers whether "the default [wa]s 'primarily the fault of the state court system itself,' such as one in which state officials and courts had consistently delayed any determination of a petitioner's claims." *Batts* v. *Artuz*, 254 F. App'x 855, 857 (2d Cir. 2007) (citation omitted). All things considered, it is the rare case in which the Second Circuit will forgive a forfeited procedural default defense. Cf. *Young* v. *Conway*, 698 F.3d 69, 86 (2d Cir. 2012) ("The Supreme Court has enforced strict procedural forfeitures on habeas petitioners in the interests of efficient and final adjudication. Why should

not the state be similarly held to a pedestrian rule of appellate procedure? Concerns of federalism and respect for a state's criminal judgments are marginal here because the state brought the problem on itself."

2. The Fourth Circuit also takes a balancing approach when considering whether to forgive forfeiture of a procedural default defense, weighing "'the interests of comity and judicial efficiency that transcend the parties' against 'the petitioner's substantial interest in justice.'" *Wilson* v. *Ozmint*, 352 F.3d 847, 868 (4th Cir. 2003) (quoting *Yeatts* v. *Angelone*, 166 F.3d 255, 261–62 (4th Cir. 1999)), *opinion amended on denial of reh'g*, 357 F.3d 461 (4th Cir. 2004). This balancing inquiry considers, among other things, whether "the parties [have] 'thoroughly briefed and argued' th[e] issue," *Royal* v. *Taylor*, 188 F.3d 239, 247 (4th Cir. 1999); whether the procedural default is obvious; and whether "[the petitioner's] claim [is] 'patently without merit,' and therefore easily disposed of, *Wilson*, 352 F.3d at 868 (quoting *Yeatts*, 166 F.3d at 261).

3. The Tenth Circuit allows forfeiture of a procedural default defense to be forgiven on the balance of federal interests in comity/finality, "expenditure of scarce federal judicial resources," and judicial efficiency weighed against the interests of the petitioner. *Hardiman* v. *Reynolds*, 971 F.2d 500, 503–05 (10th Cir. 1992). The Tenth Circuit derived this doctrine from the penumbras of Habeas Rule 4, reasoning that, although Rule 4's strict letter cannot justify consideration of a defense "*after* the Government responds and fails to raise th[at] defense," thereby forfeiting it, "that rule indicates that Congress intended the courts to play a more active role in § 2254 cases than they generally play in many other kinds of cases." *Id.* at 504 & n.7. Unlike the Fifth Circuit, however, forgiveness of the forfeiture is hardly a matter

of course. See *Hines* v. *United States*, 971 F.2d 506, 509 (10th Cir. 1992).

Consistent with Rule 4, the Tenth Circuit generally requires that, if procedural default is not "pled by the government as an affirmative defense," the default must "be clear from the face of the petition itself." *See, e.g.*, *Kilgore* v. *Att'y Gen. of Colo.*, 519 F.3d 1084, 1089 (10th Cir. 2008). Moreover, the court has recognized that efficiency considerations do not always cut in favor of forgiving the forfeiture. For instance, when "[t]he merits of [a petitioner's] claims … have been fully briefed and the record is fully developed on the merits," it is "clearly inefficient" to give consideration to an affirmative defense that may have been only half-heartedly briefed, if briefed at all. *United States* v. *Wiseman*, 297 F.3d 975, 980 (10th Cir. 2002).

4. The Eleventh Circuit generally recognizes five situations where a forfeited issue will be considered: "(1) the issue involves a pure question of law and refusal to consider it would result in a miscarriage of justice; (2) the party had no opportunity to raise the issue below; (3) the interest of substantial justice is at stake; (4) the proper resolution is beyond any doubt; or (5) the issue presents significant questions of general impact or of great public concern." *Frey* v. *United States*, 752 F. App'x 878, 881 n.1 (11th Cir. 2018) (declining to forgive forfeiture of procedural default, but electing to do so for a different issue on these grounds). In the mine-run habeas case, those scenarios generally cash out to the rule that considering a forfeited procedural default defense must "serve[] [an] important federal interest." *Esslinger* v. *Davis*, 44 F.3d 1515, 1527 (11th Cir. 1995).

Without context, this rule so formulated might appear to license near automatic forgiveness of a for-

feited procedural default defense. But as the Eleventh Circuit has recognized, "[i]n a given case,… the state is in the best position to know whether, in the interest of justice, its rule needs—indeed, deserves—federal court vindication." *Esslinger*, 44 F.3d at 1527. Moreover, the Eleventh Circuit has recognized that there is a significant federal interest in "requir[ing] the parties to invoke their own claims and defenses." *Burgess* v. *United States*, 874 F.3d 1292, 1300 (11th Cir. 2017). "If a court engages in what may be perceived as the bidding of one party by raising claims or defenses on its behalf, the court may cease to appear as a neutral arbiter, and that could be damaging to our system of justice. Abiding by the Federal Rules of Civil Procedure's rules for raising affirmative defenses avoids that problem." *Id.*

B. The Third Circuit Balances The Equities Of The Parties' Litigation Conduct In Deciding Whether To Forgive Forfeiture Of A Procedural Default Defense.

In considering whether to entertain a forfeited procedural default defense, the Third Circuit—like the Fourth, Tenth, and Eleventh Circuits—balances the various interests at play. See *Smith* v. *Horn*, 120 F.3d 400, 409 (3d Cir. 1997) ("As *Granberry* and its progeny direct, that discretion should be exercised with reference to the values of federalism and comity, judicial efficiency, and the ends of justice."). And much like the Eleventh Circuit, the Third has recognized that there is generally little point in forgiving a forfeited procedural default defense "where the record is well developed and the merits strongly support the petitioner's claim," *id.* at 408 (quoting *Washington*, 996 F.2d at 1453 (Oakes, J., dissenting)), and that the practice of considering a state's forfeited defenses runs headlong into the party-presentation principle,

especially when "the state has never raised the issue at all, in any court," *id.* at 409 ("When we do so, we come dangerously close to acting as advocates for the state rather than as impartial magistrates."). However, the Third Circuit has added an important wrinkle to this balancing inquiry—on top of the interest balancing, the court also considers the equities of the parties' litigation conduct. See *Szuchon* v. *Lehman*, 273 F.3d 299, 321–22 (3d Cir. 2001).

C. The Ninth Circuit Requires "Extraordinary Circumstances" To Be Present Before Forgiving Forfeiture Of A Procedural Default Defense.

The Ninth Circuit, consistent with Habeas Rule 4, permits "district courts [to], sua sponte, raise the issue of procedural default [before the government responds to the petition] when the default is obvious from the face of the petition and when recognizing the default would 'further the interests of comity, federalism, and judicial efficiency.'" *Vang*, 329 F.3d at 1073 (quoting *Boyd* v. *Thompson*, 147 F.3d 1124, 1127–28 (9th Cir. 1998)). But once the government files its answer, if it fails to raise the defense at that time, the Ninth Circuit requires a showing of "extraordinary circumstances … which would suggest that justice would be served by overlooking the government's omission." *United States* v. *Barron*, 172 F.3d 1153, 1156–57 (9th Cir. 1999) (en banc); see also *Franklin* v. *Johnson*, 290 F.3d 1223, 1233 (9th Cir. 2002) (declining to reach the state's procedural default argument because "the state provide[d] no explanation whatsoever for its failure to raise a procedural default argument in the district court, much less any extraordinary reason"); *United States* v. *Draper*, 84 F.4th 797, 801 (9th Cir. 2023) (recognizing *Barron*'s continuing vitality).

Generally speaking, what constitutes "extraordinary circumstances" closely resembles the "cause" prong of procedural default. For instance, a government's failure to argue the issue in the district court will be forgiven if it had no opportunity to make the argument in the first place. *United States* v. *Kaczynski*, 239 F.3d 1108, 1113 (9th Cir. 2001). Similarly, the government's forfeiture will be excused if the circumstances of the petitioner's default were "so unusual 'that [the defense's] legal basis [was] not reasonably available to [government] counsel.'" *United States* v. *Guess*, 203 F.3d 1143, 1146 (9th Cir. 2000). In the absence of any such "extraordinary circumstances," the Ninth Circuit will "proceed to address the petitioner's claim on its merits." *United States* v. *Ware*, 416 F.3d 1118, 1121 (9th Cir. 2005).

D. In The First, Fifth, Sixth, Seventh, And Eighth Circuits, Forgiving The Government's Forfeiture Of A Procedural Default Defense Is The Ordinary Course.

1. The First Circuit has rejected the notion "that appellate courts may excuse the Government's waiver only if the Government proves that the case is 'exceptional.'" *Dimott* v. *United States*, 881 F.3d 232, 238–39 (1st Cir. 2018) (arguing that such a suggestion "is a misreading of *Wood*"). Rather, the First Circuit will decline to forgive a forfeited procedural default defense only if the government engages in "clear gamesmanship" or if forgiving the forfeiture would raise "[an] issue of procedural fairness"—*i.e.*, if the petitioner was not given "notice … and [an] opportunity to actually respond." *Id.* at 238–39. Absent such circumstances, because forgiving the forfeiture would "further '[t]he considerations of comity, finality, and the expeditious handling of habeas proceedings' that are at the very core of AEDPA," the First

Circuit favors consideration of habeas defenses that the government failed to raise below. *Id.* at 239; see also *Oakes* v. *United States*, 400 F.3d 92, 97 (1st Cir. 2005).

2. The Fifth Circuit, despite purporting to "balance[e] the federal interests in comity and judicial economy against the petitioner's substantial interest in justice" when deciding whether to consider a forfeited procedural default defense, tends to forgive the government's forfeiture as a matter of routine practice. *Prieto* v. *Quarterman*, 456 F.3d 511, 518–19 (5th Cir. 2006). In conducting this "balancing," the Fifth Circuit takes a more cabined view of what considerations go into that balancing than does most of its sister circuits. See, *e.g.*, *United States* v. *McGrew*, 397 F. App'x 87, 91 (5th Cir. 2010) ("The relevant concerns are whether the petitioner has been given notice and an opportunity to respond and whether the government has waived the defense intentionally.").

3. The Seventh Circuit adheres to a rule nominally similar to the Ninth Circuit's: Courts "have discretion to forgive a party's forfeiture in exceptional circumstances." *Bourgeois* v. *Watson*, 977 F.3d 620, 631 (7th Cir. 2020). However, the Seventh Circuit defines "exceptional circumstances" much more expansively than the Ninth, allowing excusal of forfeiture "when a forfeited ground is 'founded on concerns broader than those of the parties.'" *Id.* (quoting *United States* v. *Ford*, 683 F.3d 761, 768 (7th Cir. 2012)). In *Bourgeouis*, for instance, the court noted how societal interests in finality and judicial efficiency counseled in favor of forgiving a forfeited procedural default defense. *Id.* at 632 ("The idea of an entitlement to *one* untainted opportunity to make one's case is deeply embedded in our law."). If "these significant interests," standing alone, are sufficient to excuse a

forfeiture, then it will be the ordinary case, not the "exceptional" one, in which the government's forfeitures are forgiven, as these two considerations are present in *every* habeas case.

4. The Eighth Circuit has not given particularly clear guidance as to when a forfeiture of procedural default should be excused. What is clear, however, is that forgiving the government's forfeiture is the normal practice in the circuit.

The canonical case endorsing this practice is *King* v. *Kemna*, 266 F.3d 816 (8th Cir. 2001) (en banc). In *King*, the court adopted the position of its sister circuits that courts "have discretion to consider an issue of procedural default sua sponte" and decided that this case was an appropriate situation for doing so. *Id.* at 822. It did not give much elaboration on what factors should guide a court's discretion, with the only indication being its statement that "[t]he doctrine of procedural default is particularly appropriate when 'an unresolved question of fact or of state law might have an important bearing' on the federal habeas claim." *Id.* (quoting *Granberry*, 481 U.S. at 134–35). Frequently, no elaborated reasoning is supplied for the exercise of discretion, with the clear implication being that all habeas defenses should be considered, whether preserved or not, so long as they were not affirmatively waived. See, *e.g.*, *Bell* v. *Norris*, 586 F.3d 624, 633–34 (8th Cir. 2009) ("[I]t is appropriate to recognize a procedural bar in habeas cases whether or not raised by the state."); *Thomas* v. *Payne*, 960 F.3d 465, 471 n.2 (8th Cir. 2020).

5. The Sixth Circuit's decision is much in the same vein as the First's and the Seventh's doctrines—so long as there is not sufficient evidence that "the state explicitly and deliberately waived" the procedural default defense, the government's omission will be over-

looked. Pet. App. 9a (quoting *Maslonka* v. *Hoffner*, 900 F.3d 269, 276–77 (6th Cir. 2018)). Every single one of the "considerations" relied upon by the court to "justify enforcing Whitman's procedural default" despite the state's failure to assert the defense will be present in every single habeas case. *Id.* at 7a ("'comity,' 'respectful, harmonious relations between the state and federal judiciaries,' 'judicial efficiency and conservation of judicial resources' (quoting *Wood*, 566 U.S. at 471–72)). The court did not engage in any *balancing* of those considerations against countervailing societal interests. See *id.* at 8a–9a ("We need not penalize the Ohio state court system solely due to a state lawyer's mistake in federal district court …. Any other result, it bears noting, would allow Whitman to benefit from his own error.").

Unlike many of its sister circuits, which recognize the strong federal interest in adhering to the party-presentation principle, the Sixth Circuit considered itself tasked with "safeguard[ing] the States' interest in the integrity of their criminal and collateral proceedings," Pet. App. 8a (quoting *Williams* v. *Taylor*, 529 U.S. 362, 436 (2000)), with little regard for the traditional "tenderness of the law for the rights of individuals." *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820); see also *Wiborg* v. *United States*, 163 U.S. 632, 658 (1896) ("[I]f a plain error was committed in a matter so absolutely vital *to defendants*, we feel ourselves at liberty to correct it." (emphasis added)). In making this judgment, the Sixth Circuit departed not only from the majority of its sister circuits, but from the repeated admonitions of this Court that excusing a government's forfeiture of a habeas defense should be reserved for "exceptional cases." *Wood*, 566 U.S. at 473; *Granberry*, 481 U.S. at 134.

III. The decision below is wrong.

A. The State's Decision Not To Raise Procedural Default In Response To Whitman's Due Process Claim Was A Conscious Choice That Constitutes Waiver.

As this Court recognized in *Wood*, no magic words are required for a state to waive a defense to habeas relief. Even when a state does not expressly "conced[e]" a defense, where the state "express[es] its clear and accurate understanding of the [defense]" and "deliberately steers the District Court away from the question and toward the merits," it waives that defense. *Wood*, 566 U.S. at 474. So when a state raises a procedural-default defense to some claims and, for others, chooses to steer the court away from that defense and to the merits of the claim by not raising it, the state's has waived the defense. What matters is not the particular words that the state uses to describe its decision, but the decision itself and the intent and knowledge underpinning it. *Id.*

It follows, therefore, that a state may waive an issue not only expressly through words, but also implicitly through its litigation conduct. As has long been recognized by the law of evidence, a person's conduct can be probative evidence of her intent or knowledge, see Fed. R. Evid. 404(b)(2), and conduct can amount to an assertion no less than verbal expression can, *see* Fed. R. Evid. 801(a), 801(d)(2)(B). "The question is not one of form, but rather whether the [party] in fact knowingly and voluntarily waived the rights [at issue]." *North Carolina* v. *Butler*, 441 U.S. 369, 373 (1979).

The difficulty, of course, is that whether a given right is waived is a highly fact-intensive, context-sensitive inquiry. No matter the right involved, "the

question of waiver must be determined on 'the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the [waiving party].'" *Id.* at 374–75 (quoting *Johnson* v. *Zerbst*, 441 U.S. 458, 464 (1938)). Moreover, "[w]hether a particular right is waivable; whether the [party] must participate personally in the waiver; whether certain procedures are required for waiver; and whether the [party]'s choice must be particularly informed or voluntary, all depend on the right at stake." *United States* v. *Olano*, 507 U.S. 725, 733 (1993). Accordingly, in order for there to be uniformity and clarity in the treatment of implicit waiver and forfeiture in the federal courts, this Court must develop a jurisprudence of waiver attuned to particular factual scenarios.

Under *Wood*, the key question is whether the state had an understanding of the defense but made a conscious choice not to raise it. And in the context of procedural default, it will be the rare case where a state's attorney is misinformed about the pure facts underlying the procedural default question—the state will have complete access to the record of proceedings in its courts. Moreover, because procedural default is a possible defense in almost every habeas case, it is hard to imagine the state's attorneys inadvertently forgetting to raise it. In most states, "[the] Attorney General's office is chock-full of excellent attorneys who do nothing but habeas work." *Lucio v. Lumpkin*, 987 F.3d at 506 (5th Cir. 2021) (Haynes, J., dissenting).

And unlike with AEDPA's statute of limitations, there are no math problems for the lawyers to tumble over. Cf. *Day* v. *McDonough*, 547 U.S. 198, 201–02 (2006) (noting that the magistrate judge raised the timeliness issue sua sponte after realizing "that the

State had miscalculated the tolling time"). The only likely "mistakes" to be made with procedural default are "mistake[s] of law"—which, under *Wood*, are not subject to sua sponte correction. Here, guided by *Wood*, the circumstances clearly indicate that the state had an understanding of the defense and made a conscious choice—usually for strategic reasons—not to raise it.

First, the state raised procedural default to all claims *except* one—"Whitman's claim that the state court's denial of the castle doctrine instruction violated his federal due process rights." Pet. App. 3a. And as this Court has recognized, "[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect." *Yarborough* v. *Gentry*, 540 U.S. 1, 8 (2003). *Second*, there was a clear strategic benefit to omitting the argument. Cf. *Pavel* v. *Hollins*, 261 F.3d 210, 218 & n.11 (2d Cir. 2001) (describing a "strategic" decision as, *inter alia*, a decision "that … is expected … to yield some benefit or avoid some harm to the [client]" (quoting *Moore* v. *Johnson*, 194 F.3d 586, 615 (5th Cir. 1999))). The state was presented with a choice of what to argue with regards to Whitman's due process claim.

One path was what the state actually chose: argue that there had been an adjudication on the merits, allowing it to enjoy the benefits of 2254(d)'s deferential standard of review. See Pet. App. 3a. Another path would have been to omit that argument, and instead argue procedural default—perhaps a better argument in a vacuum, but one that came with the risk of de novo federal review of the claim. A third path would have been to make these two arguments in the alternative, which has the benefit of covering all its bases, but the detriment of undermining the state's

credibility by asserting inconsistent positions and diluting the strength of both arguments. Cf. *Mathews* v. *United States*, 485 U.S. 58, 65 (1988) (explaining that taking inconsistent positions as to the facts "seriously impairs and potentially destroys [a party's] credibility"; *Jones* v. *Barnes*, 463 U.S. 745, 750–54 (1983) ("The effect of adding weak arguments will be to dilute the force of the stronger ones."). All three of these options come with benefits and risks, the balancing of which is the paradigm of conscious, "strategic" decisionmaking. Cf. *Hensley* v. *Roden*, 755 F.3d 724, 737 (1st Cir. 2014) (explaining that "strategic" decisions in litigation often "requir[e] a balancing of the benefits and risks of the anticipated [result]").

Had the Sixth Circuit analyzed the state's conduct using this Court's teaching in *Wood*, it would have been clear that the state waived the defense and that, in turn, the court had no discretion to overlook that waiver.

B. Given The Equitable Character Of Procedural Default, The Decision To Forgive The Forfeiture Must Be Made On The Balance Of The Equities *Between The Parties*, Not Vague Policy Considerations.

This Court has frequently recognized the equitable nature of procedural default doctrine, describing it as "a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions." *Dretke* v. *Haley*, 541 U.S. 386, 392 (2004) (quoting *McCleskey* v. *Zant*, 499 U.S. 467, 489 (1991)). Indeed, the doctrine of procedural default bears a striking resemblance to the traditional equitable defenses of laches and unclean hands. *See* David Kinnaird, *Habeas Corpus and Void Judgments*, 100 Notre Dame L. Rev. (forth-

coming 2025) (manuscript at 80), *available at* https://ssrn.com/abstract=4624001; Erica Hashimoto, *Reclaiming the Equitable Heritage of Habeas*, 108 Nw. L. Rev. 139, 152–53 (2014).

The flaw in the circuit courts' jurisprudence on forgiveness of forfeiture in procedural default is that it has strayed from the doctrine's equitable foundations. Like in many other areas of our modern legal system, "equity has [] been displaced by less apt substitutes such as multifactor balancing tests or has been recast as amorphous discretion." Henry E. Smith, *Equity as Meta-Law*, 130 Yale L.J. 1050, 1071 (2021). That is a mistake. Interest balancing has the unfortunate result of casting courts "in the essentially legislative role of weighing the imponderable—balancing the importance of the [society's] interest in this or that (an importance that different citizens would assess differently) against the degree of impairment of [other abstract values]." *Am. Trucking Ass'ns, Inc.* v. *Smith*, 496 U.S. 167, 203 (1990) (Scalia, J., concurring in the judgment). "Pretending that [courts] could pull that off … result[s] in nothing other than an 'unanalyzed exercise of judicial will' in the guise of a 'neutral utilitarian calculus.'" *June Med. Servs. L.L.C.* v. *Russo*, 591 U.S. 299, 349 (2020) (Roberts, C.J., concurring in the judgment) (quoting *New Jersey* v. *T.L.O.*, 469 U.S. 325, 369 (1985) (Brennan, J., concurring in part and dissenting in part)); see also *Patterson* v. *New York*, 432 U.S. 197, 210 (1977) ("[The] more subtle balancing of society's interests against those of the accused ha[s] been left to the legislative branch.").

Moreover, wanton forgiveness of a defense forfeited by the government runs headlong into the party-presentation principle—a foundational tenet of our adversarial system. As this Court has explained, the

judiciary has been assigned to "the role of neutral arbiter of matters the parties present.... '[Courts] do not, or should not, sally forth each day looking for wrongs to right.'" *Greenlaw* v. *United States*, 554 U.S. 237, 243 (2008) (quoting *United States* v. *Samuels*, 808 F.2d 1298, 1301 (8th Cir. 1987) (R. Arnold, J., concurring in denial of reh'g en banc)). This danger is most acute when procedural default is raised by the court without the respondent having ever raised the defense at all, despite having filed an answer. In such circumstances, courts do not merely "come dangerously close to," but in fact actually start "acting as advocates for the state rather than as impartial magistrates." *Smith* v. *Horn*, 120 F.3d 400, 409 (3d Cir. 1997).

Equity is not—and never has been—an invitation for courts to depart from neutral principles. Cf. *Ogden* v. *Straus Bldg. Corp.*, 202 N.W. 34, 48 (Wis. 1925) ("A court of equity in its effort to do substantial justice between the parties, will not endeavor to commit a wrong, even to a wrongdoer."). Surely it would be an abuse of discretion for a federal court to comb through the record for a viable *claim* for habeas relief; so too then for a habeas defense.

The decision of whether to forgive forfeiture of procedural default should be decided in accordance with traditional equitable principles—the balance of the equities in the litigation conduct of the two parties. Most cases will be able to be decided on the basis of three guiding principles: (1) "Equity aids the vigilant and diligent;" (2) "equity [guards] against hard-to-foresee misuses of the law by the sophisticated and unscrupulous;" and (3) "[b]etween equal equities the law will prevail." Smith, *supra*, at 1076, 1119, 1128.

Using the proper framework, one attuned to the parties and specific circumstances of the case, it is

clear that the Sixth Circuit abused its discretion in forgiving the state's forfeiture. First, it should be clear that Whitman did not attempt to make a deliberate bypass of the state courts—he continually raised the factual basis of his claim in the state courts, and he raised the precise legal basis when, proceeding *pro se*, he sought discretionary review from the Ohio Supreme Court. Pet. App. 3a. By contrast, there is an air of opportunism to the state's default, as it took the opposite position in the district court in an attempt to enjoy the benefit of "deference under 28 U.S.C. § 2254(d)." CA6 Dkt. 42 at 47–54 (cleaned up).

Second, neither party had cause for the default—the bases for the claim and defense were available to each, and neither party impeded the other in asserting the argument. Cf. *Coleman* v. *Thompson*, 501 U.S. 722, 753 (1991) ("Attorney ignorance or inadvertence is not 'cause' because the attorney is the [party]'s agent when acting, or failing to act, in furtherance of the litigation, and the [party] must 'bear the risk of attorney error.'" (quoting *Murray* v. *Carrier*, 477 U.S. 478, 488 (1986))).[2]

Finally, between the two parties, depending on how skeptically one views the state's assertion of procedural default on appeal, the balance of the equities is at worst even, and at best in favor of Whitman. Regardless, the end result is clear—the Sixth Circuit

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[2] This is not to say that attorney negligence could never constitute "extraordinary circumstances beyond [a party's] control. Common sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word." *Holland* v. *Florida*, 560 U.S. 631, 659 (2010) (Alito, J., concurring in part and concurring in the judgment).

should have considered Whitman's due process claim on the merits.

IV. This Case Is An Ideal Vehicle To Resolve Important And Recurring Issues.

This case is an ideal vehicle for resolving these issues. No obstacles prevent reaching the question presented here—the judgment below is final, and the issue was decided *de novo* below, and the relevant facts are undisputed. See Pet. App. 5a (explaining that "[b]oth parties agree" that Whitman procedurally defaulted his federal due process claim," and that—under Ohio law—Whitman is "barred from asserting" this claim "in future proceedings by res judicata").

In addition, the questions presented are both outcome-determinative. On the first, had the court below followed the approach of the Seventh, Eighth, or Ninth Circuits, the State's procedural-default defense would have been deemed waived as to Whitman's due process claim. And as the Sixth Circuit recognized, because no state court ever adjudicated this claim on the merits, "[i]f [the court] failed to enforce Whitman's procedural default of his due process claim, [it] would apply de novo review in considering the issue." Pet. App. 9a. On the second, under the test applied by any the circuits outside the Sixth Circuit's cohort, the court would have not have forgiven the state's failure to raise procedural default.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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