No. 20-1233

IN THE

Supreme Court of the United States

JOHNNY GATEWOOD,
Petitioner

v.

UNITED STATES OF AMERICA
Respondent.

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

BRIEF FOR *AMICI CURIAE* THE CENTER ON THE ADMINISTRATION OF CRIMINAL LAW AT NYU SCHOOL OF LAW AND KENTUCKY ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES..... ii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. The Decision Below Affects All Stages of Criminal Proceedings.....4

II. The Decision Below Prevents a Defendant from Presenting the Most Effective Defense. 7

III.The Decision Below Unnecessarily Burdens the Judicial System.....14

CONCLUSION 17

TABLE OF AUTHORITIES

Page

Cases

Audler v. CBC Innovis Inc.,
519 F.3d 239 (5th Cir. 2008) 6

Benning v. Warden, Lebanon Corr. Inst.,
2008 WL 339702 (S.D. Ohio Feb. 6, 2008) 13

Betco Corp., Ltd. v. Peacock,
876 F.3d 306 (7th Cir. 2017) 5

CTS Corp. v. E.P.A.,
759 F.3d 52 (D.C. Cir. 2014) 6

Davis v. Harris,
2018 WL 6308657 (S.D. Ohio Dec. 3, 2018) 13

El-Moussa v. Holder,
569 F.3d 250 (6th Cir. 2009) 6

Garrett v. Selby Connor Maddux & Janer, 425
F.3d 836 (10th Cir. 2005) 6

Hargrove v. Sec'y, Dep't of Corr.,
2008 WL 4665767 (M.D. Fla. Oct. 21, 2008) 12

Jones v. Barnes,
463 U.S. 745 (1983) 10, 11, 13

Kehr v. Smith Barney, Harris Upham & Co.,
736 F.2d 1283 (9th Cir. 1984) 13

Kimble v. Marvel Ent., LLC,
576 U.S. 446 (2015) 14

Knox v. Johnson,
224 F.3d 470 (5th Cir. 2000) 12

Koufakis v. Carvel,
425 F.2d 892 (2d Cir. 1970) 12

Leer v. Murphy,
844 F.2d 628 (9th Cir. 1988) 6

Lukehart v. Sec'y, Fla. Dep't of Corr.,
2020 WL 2183150 (M.D. Fla. Apr. 28, 2020) 12

Lyons v. Jefferson Bank & Tr.,
994 F.2d 716 (10th Cir. 1993) 6

Massaro v. United States,
538 U.S. 500 (2003) 4

McPherson v. Kelsey,
125 F.3d 989 (6th Cir. 1997) 6

Reed v. Ross,
468 U.S. 1 (1984) 9

Robinson v. United States,
625 F. App'x 721 (6th Cir. 2015) 12

Smith v. Murray,
477 U.S. 527 (1986) 10

Smith v. Smith,
184 F.R.D. 420 (S.D. Fla. 1998) 9

United States v. Ansberry,
976 F.3d 1108 (10th Cir. 2020).....5

United States v. Nordlicht,
2018 WL 1796542 (E.D.N.Y. Apr. 16, 2018) 13

United States v. Smith,
250 F.3d 1073 (7th Cir. 2001).....14

United States v. Wolf,
787 F.2d 1094 (7th Cir. 1986).....12

United States v. Zannino,
895 F.2d 1 (1st Cir. 1990) 5, 6

Utahns for Better Transp. v. U.S. Dep't of Transp., 305 F.3d 1152 (10th Cir. 2002).....6

Wisconsin v. Glick,
782 F.2d 670 (7th Cir. 1986).....9

Rules

Fed. R. App. P. 32.....11

Fed. R. Civ. P. 11.....9

Fed. R. Crim. P. 51 5

Other Authorities

2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act Program, Committee to Review the Criminal Justice Act Program (April 2018), http://cjastudy.fd.org/sites/default/files/public-resources/Ad%20Hoc%20Report%20June%202018.pdf 15, 16

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Guide to Judiciary Policy, Vol. 7A, CJA Model Plan XI(A)(1) 16

Justice Robert H. Jackson, *Advocacy Before the Supreme Court*, 25 Temple L.Q. 115 (1951) 10, 13

Lawrence Kaplan, Comment Note, *Sufficiency, in Federal Court, of Raising Issue Below to Preserve Matter for Appeal*, 157 A.L.R. Fed. 581 (originally published in 1999) 5

Randy Kozel, *Settled Versus Right: A Theory of Precedent* (Cambridge Univ. Press 2017) 14

Steven Lubet, *Objecting*, 16 Am. J. Trial Advoc. 213 (1992) 13

Peter S. Menell & Ryan G. Vacca, *Revisiting and Confronting the Federal Judiciary Capacity "Crisis": Charting a Path for Federal Judiciary Reform*, 108 Cal. L. Rev. 789 (2020) 15

Craig Lee Montz, *Trial Objections from Beginning to End: The Handbook for Civil and Criminal Trials*, 29 Pepp. L. Rev. 243 (2020) 12

Antonin Scalia & Bryan A. Garner, Making Your Case: The Art of Persuading Judges (4th ed. 2008) 2, 13

2 Peter F. Vaira & James A. Backstrom, Criminal Defense Techniques § 48.03 (2020) 10

Judge Randy Wilson, *What Do Jurors Say*, 68 Tex. B.J. 152 (2005) 13

INTEREST OF *AMICI CURIAE*

The Center on the Administration of Criminal Law at NYU School of Law (the "Center") is dedicated to defining and promoting good government practices in the criminal justice system through academic research, litigation, and public policy advocacy.[1] The Center regularly participates as *amicus curiae* in cases raising substantial legal issues regarding interpretation of the Constitution, statutes, regulations, or policies. The Center supports challenges to practices that raise fundamental questions of defendants' rights or that the Center believes constitute a misuse of government resources. The Center also defends criminal justice practices where discretionary decisions align with applicable law and standard practices and are consistent with law-enforcement priorities.

The Center's appearance as *amicus curiae* in this case is prompted by its belief that criminal defendants should not be required to expend their limited resources at trial and appeal toward preserving legal arguments that are foreclosed by binding legal precedent. In the Center's experience, such a requirement will severely damage defendants' advocacy efforts at both the trial and appellate stages, and it will create needless administrative burdens on defendants, their counsel, and the courts.

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[1] No party or counsel for any party authored any part of this brief or made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief. The Center is affiliated with New York University, but no part of this brief purports to represent the views of New York University School of Law or New York University.

The Kentucky Association of Criminal Defense Lawyers ("KACDL") is a non-profit organization composed of attorneys who practice criminal law in the Kentucky Court of Justice. KACDL joins this *amicus* brief because the Sixth Circuit's opinion under review proposes a rule that would greatly enlarge the scope of the defense lawyer's duty to raise constitutional arguments and objections in trial and on appeal. Compliance with the Sixth Circuit's direction would require defense counsel to litigate issues presently foreclosed by circuit precedent, lest the client lose the ability to raise the issue by habeas corpus petition in the event the Supreme Court later changes the adverse circuit precedent. This is a new and burdensome obligation that KACDL members would encounter with great frequency in their practices.

INTRODUCTION AND SUMMARY OF ARGUMENT

"The most important—the very most important—step you will take in any presentation, whether before a trial court or an appellate court, is selecting the arguments that you'll advance." Antonin Scalia & Bryan A. Garner, Making Your Case: The Art of Persuading Judges 22 (4th ed. 2008). The reason is clear: "Scattershot argument is ineffective. It gives the impression of weakness and desperation, and it insults the intelligence of the court. If you aren't going to win on your stronger arguments, you surely aren't going to win on your weaker ones. It is the skill of the lawyer to know which is which." *Id.*

The decision below prevents criminal defense lawyers from heeding Justice Scalia's advice. Counsel

cannot limit their defense strategy to those arguments with the greatest likelihood of success. They must also raise arguments that are foreclosed by existing law to ensure that the arguments are adequately preserved for future collateral proceedings in the event that this Court issues a ruling favorable to the defendant. That rule undermines a criminal defendant's right to receive an effective defense and imposes significant, unnecessary burdens on defendants, their counsel, and the courts. The Court should grant the petition and reverse the Sixth Circuit's decision.

I. The Sixth Circuit's rule requires defense counsel to raise all arguments not squarely foreclosed by Supreme Court precedent, including arguments foreclosed by binding circuit and state precedent, to prevent these claims from being procedurally defaulted on collateral review. Pet. App. 9a–10a. This procedural-default rule is often stated in terms of requiring an issue to be raised "on direct appeal," *id.*, but the effects of the rule are not limited to appellate proceedings. That is because issues generally must be raised at trial to be adequately preserved for appeal. Consequently, the Sixth Circuit's rule imposes severe and disruptive consequences on all stages of a criminal case.

II. By requiring defense counsel to expansively preserve issues for collateral review, the Sixth Circuit's rule disadvantages defendants both at trial and on direct appeal. At trial, defense counsel will be forced to raise arguments foreclosed by circuit precedent, disrupting the trial and damaging the defendant's presentation before judge and jury. Defense counsel may even be required to alter their

case theory to adopt arguments that are foreclosed by circuit precedent. On direct appeal, as a result of the Sixth Circuit's rule, defense counsel will be forced to adopt practices contrary to longstanding principles of effective appellate advocacy, dilute the strength of the appeal with weak arguments, balance the limited briefing available and the need to raise issues sufficiently, and engage in advocacy in a way that could undermine credibility before the court.

III. In addition to the negative consequences falling on defense counsel, courts will be needlessly burdened by the Sixth Circuit's rule. Courts will have to expend resources addressing the new category of claims raised for the purpose of preservation for collateral review. The judiciary's financial resources will also be taxed by the added duties imposed on defense counsel appointed to represent criminal defendants. Rather than permit these negative repercussions, the Court should grant the petition and reconsider how petitioners on collateral review can show cause to avoid procedural default.

ARGUMENT

I. The Decision Below Affects All Stages of Criminal Proceedings.

Under the procedural default rule, "claims not raised on direct appeal may not be raised on collateral review unless the petitioner shows cause and prejudice" that would excuse his or her failure to raise the issue. *Massaro v. United States*, 538 U.S. 500, 504 (2003). In the decision below, the Sixth Circuit applied this procedural-default rule to hold that futility cannot serve as cause to excuse procedural default unless

the argument has been expressly foreclosed by the Supreme Court itself, even if state and circuit court precedent foreclosed the argument at the time of the direct appeal. Pet. App. 9a–10a.

The Sixth Circuit's rule directly addresses preservation of a claim on direct appeal, but the effects of the rule are not so limited. "Appellate courts generally will not consider issues raised for the first time on appeal": the "general rule is that an issue must be presented to, considered by, and decided by the trial court before it will be reviewed by an appellate court." Lawrence Kaplan, Comment Note, *Sufficiency, in Federal Court, of Raising Issue Below to Preserve Matter for Appeal*, 157 A.L.R. Fed. 581 (originally published in 1999); *see also* Fed. R. Crim. P. 51(b). Thus, to preserve issues for direct appeal, criminal defendants must first raise those issues at trial.

This preservation requirement will significantly affect all stages of criminal proceedings because counsel cannot simply raise arguments in passing in the trial court and expect them to be treated as adequately preserved for appeal. At trial, preservation requires more than a passing reference: criminal defendants will have to set out these foreclosed arguments specifically and in detail to avoid waiver. A "party does not preserve an issue merely . . . by presenting the issue to the district court in a vague and ambiguous" or "perfunctory and underdeveloped manner," nor "by making a fleeting contention before the district court." *United States v. Ansberry*, 976 F.3d 1108, 1124–25 (10th Cir. 2020); *see also Betco Corp., Ltd. v. Peacock*, 876 F.3d 306, 309 (7th Cir. 2017); *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir.

1990); *Leer v. Murphy*, 844 F.2d 628, 634 (9th Cir. 1988). Some courts have gone so far as to hold that an issue that was "never mentioned during the actual trial" is waived even when the defense was raised in a pre-trial order and in counsel's opening statement. *See, e.g.*, *Lyons v. Jefferson Bank & Tr.*, 994 F.2d 716, 722 (10th Cir. 1993).

The same is true on appeal. In the Sixth Circuit, for example, "[i]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *El-Moussa v. Holder*, 569 F.3d 250, 257 (6th Cir. 2009) (quoting *McPherson v. Kelsey*, 125 F.3d 989, 995–96 (6th Cir. 1997)). "It is not sufficient for a party to mention a possible argument in [a] skeletal way, leaving the court to put flesh on its bones." *Id.* (alteration in original). All other courts of appeals have similar, well-established rules regarding the degree to which arguments must be developed in an opening brief to avoid waiver.[2]

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[2] *See, e.g.*, *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived."); *Audler v. CBC Innovis Inc.*, 519 F.3d 239, 255 (5th Cir. 2008) ("The mere mention of a claim that has been appealed does not constitute a supported argument or adequate briefing, nor does it preserve the issue for review, so this issue is waived."); *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 841 (10th Cir. 2005) ("We do not consider merely including an issue within a list to be adequate briefing." (quoting *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1175 (10th Cir. 2002)); *CTS Corp. v. E.P.A.*, 759 F.3d 52, 64 (D.C. Cir. 2014) ("A footnote is no place to make a substantive legal argument on appeal; hiding an argument there and then articulating it in only a conclusory fashion results in forfeiture.").

In short, the Sixth Circuit's procedural-default rule may be stated in terms of presenting issues on direct appeal, but the rule necessarily disrupts a criminal defendant's presentation of his case at every stage of the case.

II. The Decision Below Prevents a Defendant from Presenting the Most Effective Defense.

By encouraging defense counsel to expansively preserve issues for post-conviction relief in case the law changes in the future, the Sixth Circuit's rule disadvantages defendants and their counsel in a variety of ways both at trial and on direct appeal.

A. The Sixth Circuit's rule diverts counsel's time and attention from developing and presenting the best available defenses.

Very few defendants can afford to hire a team of lawyers that can exhaustively research every conceivable defense. Most defendants and their counsel must instead make strategic decisions about which defenses and arguments are worth developing and which ones are not. Indeed, at the state and county level, public defense attorneys are notoriously "overworked, underpaid, undertrained, and lack adequate support resources," and fewer than 30 percent of state and county public defender offices "have enough attorneys to adequately handle their caseloads." Brennan Center for Justice, *A Fair Fight: Achieving Indigent Defense Resource Parity* at 3 (Sept. 9, 2019).

Given this reality, defendants are necessarily hurt by a rule that encourages counsel to devote a portion

of their time to developing and pursuing arguments that are foreclosed by existing precedent. To ensure that a defendant receives the best defense possible, counsel should instead be permitted to focus exclusively on defenses and arguments that have some chance of success under existing law.

The burden imposed by the Sixth Circuit's rule should not be underestimated. Deciding which foreclosed arguments warrant preservation will be a time-consuming task because of the breadth of potential arguments that could be raised. In some cases, counsel may move to dismiss an indictment on double jeopardy grounds by raising an argument that is foreclosed under circuit precedent in the hopes that this Court would interpret the Double Jeopardy Clause differently. Then at a pretrial suppression hearing, counsel may want to present arguments that are currently foreclosed by circuit precedent in case this Court changes the law relating to a defendant's *Miranda* rights, the voluntariness of a confession under the Fifth Amendment, or the reasonableness of any search or seizure under the Fourth Amendment. Potential issues to raise will continue through trial, for example about the scope of a defendant's rights under the Confrontation Clause, and even at sentencing. This case provides a good example where, in hindsight, counsel should have presented a constitutional challenge to the Armed Career Criminal Act that many courts had already rejected. Pet. 22–24.

Counsel must also devote significant time and effort in deciding which foreclosed arguments to preserve in light of the possibility that a court will view the argument as frivolous and could consider

sanctioning the defendant or counsel. Federal Rule of Civil Procedure 11 does not apply in criminal proceedings, but that has not stopped courts on some occasions from sanctioning criminal defense lawyers for raising frivolous arguments. *See Smith v. Smith*, 184 F.R.D. 420, 422 (S.D. Fla. 1998) (finding Rule 11 sanctions appropriate, in part, because one of plaintiff's claims was clearly foreclosed by Eleventh Circuit precedent). As the Seventh Circuit has cautioned, "[c]riminal defendants and their lawyers must abide by the rules that apply to other litigants, including the principle that litigating positions must have some foundation in existing law or be supported by reasoned, colorable arguments for change in the law." *Wisconsin v. Glick*, 782 F.2d 670, 673 (7th Cir. 1986) (citations omitted); *see also id.* ("An argument in the teeth of the law is vexatious, and a criminal defendant who chooses to harass his prosecutor may not do so with impunity.").

B. Even if counsel can adequately raise all possible arguments, presenting foreclosed arguments will necessarily detract from the force of meritorious arguments.

This Court has already recognized the severe and disruptive consequences of the Sixth Circuit's rule. *See Reed v. Ross*, 468 U.S. 1, 16–17 (1984). "[I]f we were to hold that the novelty of a constitutional question does not give rise to cause for counsel's failure to raise it, we might actually disrupt state-court proceedings by encouraging defense counsel to include any and all remotely plausible constitutional claims that could, some day, gain recognition." *Id.* The Sixth Circuit's rule goes further still, finding that, not only

novelty, but binding state or circuit precedent foreclosing the claim does not suffice to give rise to cause for counsel's failure to raise a claim that this Court subsequently finds is meritorious.

This Court and treatises on advocacy have emphasized the importance of focusing the issues raised on appeal. In *Smith v. Murray*, 477 U.S. 527, 536 (1986), the Court referred to the process of narrowing issues on appeal to the strongest issues as "the hallmark of effective appellate advocacy." And in *Jones v. Barnes*, 463 U.S. 745, 751–52 (1983), the Court observed that "[e]xperienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." As one treatise on criminal defense explains, "[a] lawyer's instinct is to raise as many issues as conceivable. If this approach is ever sound, it is certainly a mistake in a criminal appeal." 2 Peter F. Vaira & James A. Backstrom, Criminal Defense Techniques § 48.03 (2020).

Raising a multitude of weak arguments on direct appeal—as the Sixth Circuit rule encourages—distracts from the stronger claims presented. Quoting Justice Jackson, the Court explained that "[l]egal contentions, like the currency, depreciate through overissue." *Jones*, 463 U.S. at 752 (quoting Jackson, *Advocacy Before the Supreme Court*, 25 Temple L.Q. 115, 119 (1951)). While "[t]he mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error," that "receptiveness declines as the number of assigned errors increases." *Id.*

Justice Jackson's "experience on the bench convince[d] [him] that multiplying assignments of error will dilute and weaken a good case and will not save a bad one." *Id.* Similarly, treatises on advocacy emphasize this point. Quoting from an "authoritative work on appellate practice," the Court noted that weaker arguments "are not likely to help, and to attempt to deal with a great many [issues] in the limited number of pages allowed for briefs will mean that none may receive adequate attention." *Id.* (quoting R. Stern, Appellate Practice in the United States 266 (1981)). Accordingly, under the Sixth Circuit's rule, when defense counsel preserves weak arguments for future collateral review, the force of stronger arguments is diluted and the integrity of the appellate process is harmed.

Defense counsel are also placed in the difficult position of simultaneously having to adhere to court rules limiting briefing while adequately raising all of these issues for review. The Court has previously recognized the limited briefing available to appellate advocates. *See Jones*, 463 U.S. at 752–53 (discussing how "the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review" "has assumed greater importance in an era when oral argument is strictly limited in most courts—often to as little as 15 minutes—and when page limits on briefs are widely imposed"). And these limits have become stricter in recent years. *See* Fed. R. App. P. 32 (amended in 2016 to allow 1,000 fewer words in principal briefs on appeal than previously allowed).

C. Raising foreclosed arguments also undermines an effective defense by damaging the credibility of the defense counsel and the defendant.

To preserve foreclosed arguments for collateral review, counsel will often need to raise objections at trial. But numerous, unsuccessful objections can disadvantage criminal defendants' presentation of their case, because too-frequent objections can "be counterproductive to a defendant," *Lukehart v. Sec'y, Fla. Dep't of Corr.*, 2020 WL 2183150, at *23 (M.D. Fla. Apr. 28, 2020). Such objections are harmful because they "quickly annoy both judges and juries—especially when those objections are overruled." *Robinson v. United States*, 625 F. App'x 721, 724 (6th Cir. 2015). "Every trial lawyer knows that frequent objection is a potentially dangerous course of action the effect of which upon the jury cannot be estimated." *Koufakis v. Carvel*, 425 F.2d 892, 901 (2d Cir. 1970).

Making objections that are constantly overruled gives the impression that counsel is incompetent or engaging in obstructionist tactics to hide the truth from the jury.[3] And even apart from these impressions

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[3] *Knox v. Johnson*, 224 F.3d 470, 480 (5th Cir. 2000) (acknowledging that there are "dangers inherent in objecting," including "appearing obstructionist to the jury"); *Hargrove v. Sec'y, Dep't of Corr.*, 2008 WL 4665767, at *8 (M.D. Fla. Oct. 21, 2008) ("Too many objections run the risk of a jury thinking a lawyer is being obstructionist or the party he represents has something to hide."); *United States v. Wolf*, 787 F.2d 1094, 1099 (7th Cir. 1986) (recognizing common belief that "too-frequent objecting will irritate the jury or make it think the defendant is trying to hide the truth"); Craig Lee Montz, *Trial Objections from Beginning to End: The Handbook for Civil and Criminal Trials*, 29 Pepp. L.

of defense counsel, too-frequent objections can be disruptive, distracting the jury's focus from the issues that matter by breaking up the trial.[4]

Counsel will similarly damage their credibility by raising foreclosed arguments on appeal. As Justice Jackson observed, "[m]ultiplicity [of issues raised on appeal] hints at lack of confidence in any one." *Jones*, 463 U.S. at 752 (quoting Jackson, *supra* at 119). Similarly, putting forth many arguments on appeal suggests that a case has been "underanalyzed" and that "[c]ounsel has not taken the trouble to determine which arguments are strongest or endured the pain of eliminating those that are weakest." Scalia & Garner, *supra*, at 23. In these ways, the Sixth Circuit's rule

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Rev. 243, 247 n.12 (2020) ("Jurors see lawyers who make constant objections as lawyers who are trying to keep the real truth from them."); Judge Randy Wilson, *What Do Jurors Say*, 68 Tex. B.J. 152, 154 (2005) ("If you continually lose your objections, the jury perceives you are weak and don't know what you are talking about.").

[4] *United States v. Nordlicht*, 2018 WL 1796542, at *2 (E.D.N.Y. Apr. 16, 2018) (acknowledging that "frequent objections" can "seriously disrupt[] trial in a manner that would test any jury"); *Davis v. Harris*, 2018 WL 6308657, at *7 (S.D. Ohio Dec. 3, 2018), *report and recommendation adopted*, 2019 WL 140106 (S.D. Ohio Jan. 9, 2019) ("Juries do not like constant interruption by objection."); *Benning v. Warden, Lebanon Corr. Inst.*, 2008 WL 339702, at *14 (S.D. Ohio Feb. 6, 2008), *aff'd in relevant part*, 345 F. App'x 149 (6th Cir. 2009) ("It is also a truism of trial practice that juries dislike the constant interruptions of objecting counsel."); *Kehr v. Smith Barney, Harris Upham & Co.*, 736 F.2d 1283, 1286 (9th Cir. 1984) (recognizing that "constant objections . . . could antagonize the jury"); Steven Lubet, *Objecting*, 16 Am. J. Trial Advoc. 213, 219–20 (1992) (explaining that attorneys risk frustrating the jury's patience with objections that frequently interrupt the opposition and are repeatedly overruled).

encourages practices antithetical to effective appellate advocacy.

The Sixth Circuit's rule thus undermines a defendant's ability to present his defense as effectively as possible. Rather than requiring counsel to raise foreclosed arguments, the Court should permit counsel to focus the defense on those arguments with the greatest likelihood of success.

III. The Decision Below Unnecessarily Burdens the Judicial System.

The Sixth Circuit's rule inflicts the most harm on defendants and their counsel, but the courts are not spared entirely from its negative effects.

The Sixth Circuit's overly narrow view of the cause exception to procedural default is likely to create "an administrative nightmare" for district courts and courts of appeals. *United States v. Smith*, 250 F.3d 1073, 1077 (7th Cir. 2001) (Wood, J. dissenting). Indeed, a principle justification for *stare decisis* is that it is often more important for a legal issue to be settled than for it to be correctly decided. *See, e.g.*, *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455 (2015) ("Respecting *stare decisis* means sticking to some wrong decisions."). "If judges could not treat some issues as settled, they might be obliged to spend immense amounts of time revisiting foundational issues over and over again. . . . By treating certain issues as settled, a court makes its docket easier to manage and focuses attention on new and unresolved questions." Randy Kozel, *Settled Versus Right: A Theory of Precedent* (Cambridge Univ. Press 2017); *see also Kimble*, 576 U.S. at 455 (*stare decisis* "reduces incentives for

challenging settled precedents, saving parties and courts the expense of endless relitigation").

The need to save the courts and parties from the expense of relitigation is especially great today given how crowded court dockets already are. For example, in the federal district courts, the annual number of filed cases increased by 145 percent between 1970 and 2017. Peter S. Menell & Ryan G. Vacca, *Revisiting and Confronting the Federal Judiciary Capacity "Crisis": Charting a Path for Federal Judiciary Reform*, 108 Cal. L. Rev. 789, 844 (2020). And in the federal courts of appeals, the caseload per judge has roughly doubled since 1971. *Id.* at 853. Yet the Sixth Circuit's rule will needlessly add to this burden by requiring the courts to expend their limited resources to address a new category of weaker claims brought for the purpose of preserving issues for future potential collateral review.

Federal courts could also be additionally burdened by the increasing amounts they must spend to compensate court-appointed defense attorneys. Ninety percent of all criminal defendants in the federal system, roughly 250,000 people, are represented by appointed attorneys.[5] The federal courts pay all of the

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[5] *2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act Program*, Committee to Review the Criminal Justice Act Program x (April 2018), http://cjastudy.fd.org/sites/default/files/public-resources/Ad%20Hoc%20Report%20June%202018.pdf.

expenses for this representation.[6] Among the appointed lawyers are more than 10,000 private practitioners,[7] who handle about 40% of the federal criminal caseload (approximately 90,000 people per year).[8]

Altogether, the federal judiciary spends over a billion dollars every year to provide defense services to the indigent.[9] Appointed attorneys are rightly required to "provide high quality representation consistent with the best practices of the legal profession and commensurate with those services rendered when counsel is privately retained."[10] Therefore, even a modest increase in a defense attorney's required duties, multiplied by fees for services to 90,000 defendants, adds millions of dollars to the annual cost of providing representation to the indigent: just one additional hour of work in every case will cost the federal judiciary almost $14 million per year.[11] It makes

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[6] *Id.* at xxiii.

[7] *Id.* at xviii.

[8] *Criminal Justice Act: At 50 Years, a Landmark in the Right to Counsel*, Judiciary News (August 2014) ("CJA Representations" chart), https://www.uscourts.gov/news/2014/08/20/criminal-justice-act-50-years-landmark-right-counsel.

[9] *2017 Report*, *supra* note 5, at x.

[10] *Guide to Judiciary Policy*, Vol. 7A, Appx. 2A, CJA Model Plan XI(A)(1), https://www.uscourts.gov/sites/default/files/vol07a-ch02-appx2a.pdf.

[11] *See id.*, Vol 7A, § 230.16(a), https://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-2-ss-230-compensation-and-expenses#a230_16 (current reimbursement rate of $155.00 per hour for attorney services).

little sense for the judiciary to incur these added expenses to fund the unreasonable requirement that counsel develop arguments that the governing federal courts have already concluded are meritless.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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