No. 25-7026

In the Supreme Court of the United States

COREY DURAN BERRY, PETITIONER,

v.

UNITED STATES

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

BRIEF OF *AMICI CURIAE* FORMER FEDERAL JUDGES SUPPORTING PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

Amici Curiae are six former Article III judges[2] who have devoted much of their professional lives to the criminal justice system and who maintain a continuing interest in restoring a system of justice that is fair both in practice and procedure. Collectively, they served decades in the federal judiciary. Based on their experience as former Article III judges, *Amici* submit this brief to emphasize the reasons that federal judges, specifically, would benefit from this Court's resolution of the question presented.

Amici are:

Judge Mark W. Bennett (Ret.)—District Judge (1994-2015), Chief Judge (2000-2007), Senior Judge (2015-2019) for the U.S. District Court for the Northern District of Iowa; Magistrate Judge (1991-1994) for the U.S. District Court for the Southern District of Iowa.

Judge W. Royal Furgeson, Jr. (Ret.)—District Judge (1994-2008), Senior Judge (2008-2013) for the U.S. District Court for the Western District of Texas.

Judge Richard J. Holwell (Ret.)—District Judge (2003-2012) for the U.S. District Court for the Southern District of New York.

Judge Alex Kozinski (Ret.)—Circuit Judge (1982-2017), Chief Judge (2007-2014) for the U.S. Court of Appeals for the Ninth Circuit.

Judge Beverly B. Martin (Ret.)—Circuit Judge (2010-2021) for the U.S. Court of Appeals for the Eleventh

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[1] No counsel for a party authored this brief in whole or in part. No person other than *Amici* or its counsel made a monetary contribution to its preparation or submission. The parties were given timely notice of *Amici's* intent to file this brief.

[2] The views in this brief are those of the *Amici Curiae* only and not necessarily of any institutions with which they are or have been affiliated.

Circuit; District Judge (2000-2010) for the U.S. District Court for the Northern District of Georgia.

Judge Kevin H. Sharp (Resigned)—District Judge (2011-2017), Chief Judge (2014-2017) for the U.S. District Court for the Middle District of Tennessee.

SUMMARY OF ARGUMENT

This case presents an important and recurring question about the gateway to appellate review in federal habeas and § 2255 proceedings: whether a certificate of appealability ("COA") must be denied solely because the petitioner's claim is foreclosed by binding precedent in the petitioner's circuit, even when another court of appeals has resolved the same legal issue in favor of the petitioner's position.

The courts of appeals are divided on that question. The Fifth, Sixth, and Eleventh Circuits have held that no certificate may issue when circuit precedent forecloses the petitioner's claim. In their view, reasonable jurists in that circuit must follow binding circuit precedent, so the issue cannot be "debatable" for purposes of 28 U.S.C. § 2253(c). The Ninth and Tenth Circuits have taken the opposite view. They hold that disagreement among courts of appeals is powerful evidence that a claim is debatable among jurists of reason, even if existing precedent in the petitioner's own circuit currently forecloses relief.

That conflict warrants review for three reasons of special concern to federal judges.

First, the certificate-of-appealability standard should be clear and uniform. The split over the effect of a circuit conflict on the debatability standard reflects basic confusion over what courts are supposed to be doing when assessing COA requests. The need for this Court to announce a clear, easy-to-apply standard is especially acute because COAs are a jurisdictional prerequisite to appeal. District judges must issue or deny a COA when

entering final judgment in § 2254 and § 2255 proceedings, and circuit judges must review COA requests when district courts deny them. The standard thus affects the day-to-day administration of justice in federal courts.

Second, the rule announced below is wrong. Section 2253(c)(2) asks whether "the applicant has made a substantial showing of the denial of a constitutional right." That text does not ask whether a panel of the court of appeals is currently free to grant relief under existing circuit precedent. It asks whether the constitutional claim is substantial. The standard calls on judges to look to the totality of the circumstances of the applicant's claim and determine whether the applicant *could* ultimately succeed on the claim—even if that would require the court of appeals to abandon its existing precedent or would require this Court to grant certiorari and reverse. The existence of a circuit conflict, in particular, is highly relevant to whether a showing is "substantial."

Third, the Eleventh Circuit's rule makes the COA standard unnecessarily stringent. The COA standard was created to curb frivolous and vexatious litigation. But that purpose is not served by denying threshold appellate review to claims that have divided federal courts of appeals. Such claims are not frivolous. They are not abusive. They are not the sort of insubstantial filings the COA requirement was designed to screen out. They are, instead, precisely the kind of claims for which appellate review serves a useful function: allowing the court of appeals to apply its precedent, preserve the issue for en banc review or certiorari, and permit this Court to resolve recurring conflicts of federal law.

The premise of the Eleventh Circuit's rule is true but irrelevant. Of course, a reasonable judge must follow binding circuit precedent. But the COA question is not whether a district court or a panel may disregard precedent. It is whether the petitioner has made a

substantial showing that a constitutional right was denied. A judge can faithfully follow binding precedent while also recognizing that the precedent itself is reasonably debatable.

Given the importance of the question presented to the work of federal judges nationwide, the petition should be granted.

ARGUMENT

I. THE COURT SHOULD GRANT REVIEW BECAUSE THE COA STANDARD SHOULD BE CLEAR AND UNIFORM

The Court should address and resolve the question presented because of the importance of clarity and uniformity in this area. A COA is not an ordinary case-management device. It determines whether the court of appeals has jurisdiction to review the denial of postconviction relief. *See* 28 U.S.C. § 2253(c)(1); *Gonzalez v. Thaler*, 565 U.S. 134, 142 (2012). That makes the standard for issuing a COA critically important. A petitioner who cannot obtain a COA cannot obtain appellate review of the district court's ruling, even if the legal issue is substantial and even if other courts have reached the opposite conclusion. The COA inquiry is a recurring threshold determination that district judges and circuit judges must make across a large and consequential category of criminal cases. Congress requires district courts to issue or deny a certificate of appealability at the time they enter a final adverse order in a habeas or § 2255 case, and unsuccessful applicants may then seek a certificate from the court of appeals. A rule of such constant application should be easy to state, easy to administer, and the same in every circuit.

II. THE COURT SHOULD GRANT REVIEW BECAUSE THE RULE APPLIED IN AT LEAST THREE CIRCUITS IS WRONG

A rule that categorically denies COAs solely on the basis of adverse circuit precedent cannot be squared with the text of § 2253(c).

The relevant question under the statute is whether the applicant has made a substantial showing of the denial of a constitutional right. The statute does not ask whether the district judge, bound by current circuit precedent, would be compelled to dismiss the petition. Nor does it ask whether the applicant has already shown that the circuit's existing law will be overruled. The question is whether reasonable jurists could debate the issue. When another federal court of appeals has already accepted the same argument, that is real-world evidence that reasonable jurists can and do debate it.

Moreover, § 2253(c)(1) assigns the same gatekeeping task to a "circuit justice or judge"; Federal Rule of Appellate Procedure 22 and Rule 11(a) of the Rules Governing § 2254 Cases and § 2255 Proceedings then spread that obligation across district judges, circuit judges, and circuit justices, with district judges required to grant or deny a COA at the moment they enter a final adverse order. That architecture strongly suggests Congress created one national threshold standard, not a geographically variable one that becomes harder or easier depending on which circuit's precedent happens to bind the lower court.

The history of the COA requirement confirms that conclusion.

Before the Antiterrorism and Effective Death Penalty Act ("AEDPA"), a state prisoner seeking to appeal the denial of federal habeas relief had to obtain a certificate of probable cause. The pre-AEDPA statute did not define the showing required for such a certificate. In *Barefoot v.*

Estelle, 463 U.S. 880 (1983), this Court supplied the governing standard. The Court held that a certificate required more than a showing that the appeal was nonfrivolous, but it did not require a showing that the petitioner would prevail. Rather, the petitioner had to make a substantial showing of the denial of a federal right. *Id.* at 893. That showing was satisfied when the issues were "debatable among jurists of reason; *that a court could resolve the issues in a different manner*; or that the questions are adequate to deserve encouragement to proceed further." *Id.* at 893 n.4 (cleaned up) (emphasis added).

Barefoot thus established a modest, but meaningful, threshold. The standard screened out frivolous appeals without requiring the prisoner to win the merits at the jurisdictional stage. It also looked beyond the view of any one court. The question was whether reasonable jurists could debate the issue, not whether the court that had just denied relief would change its mind or whether the petitioner's own circuit had already adopted the petitioner's position.

AEDPA retained that basic framework. Congress replaced the certificate of probable cause with the certificate of appealability. Congress also changed the required showing from the denial of a "federal" right to the denial of a "constitutional" right, and required the certificate to identify the specific issue or issues that satisfy the standard. *See* 28 U.S.C. § 2253(c)(2)-(3). But this Court has held that, with those modifications, AEDPA codified *Barefoot*'s standard. *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

That history defeats the rule below as clearly as the text. Nothing in *Barefoot* suggested that a claim becomes nondebatable whenever the petitioner's own circuit has rejected it. To the contrary, *Barefoot*'s formulation—

whether the issue is debatable among jurists of reason or could be resolved differently by another court—naturally contemplates disagreement among courts. And nothing in AEDPA's text or history suggests that Congress intended to narrow the certificate inquiry by making local circuit precedent dispositive.

The existence of an inter-circuit conflict is not merely relevant to the COA inquiry; as held in *Barefoot*, it is often among the strongest possible evidence that the inquiry is satisfied. If one court of appeals has adopted a prisoner's constitutional argument, then, by definition, another "court could resolve the issues in a different manner." *Barefoot*, 463 U.S. at 893 n.4 (cleaned up). A district judge or circuit judge need not agree with the out-of-circuit authority to recognize that another court could resolve the claim differently. The judge need only recognize that the disagreement exists.

That does not mean every asserted conflict requires a COA. A court may conclude that the supposed conflict is illusory, that later precedent has eliminated the debate, or that the petitioner's case presents procedural or factual obstacles independent of the legal question. But where the same legal issue has divided courts of appeals and the petitioner's claim turns on that issue, a categorical refusal to issue a COA because of local circuit precedent is inconsistent with § 2253(c)(2).

The better rule is the one that the Ninth and Tenth Circuits apply: adverse circuit precedent does not automatically defeat a COA when other courts have resolved the issue differently. *See*, *e.g.*, *Lambright v. Stewart*, 220 F.3d 1022, 1025-28 (9th Cir. 2000); *Allen v. Ornoski*, 435 F.3d 946, 951 (9th Cir. 2006); *Payton v. Davis*, 906 F.3d 812, 820-21 (9th Cir. 2018); *United States v. Gomez-Sotelo*, 18 F. App'x 690, 692 (10th Cir. 2001); *United States v. Crooks*, 769 F. App'x 569, 571-72 (10th Cir. 2019). That rule respects circuit precedent while

preserving the distinct function of the COA inquiry. A panel may grant a COA, acknowledge that circuit precedent controls the merits, and affirm. The petitioner may then seek en banc review or certiorari. That ordinary process allows substantial legal questions to be preserved and presented without requiring a panel to disregard binding law.

The rule below, by contrast, turns circuit precedent into a jurisdictional barrier Congress did not enact. It treats a claim as insubstantial not because the claim lacks merit in an objective sense, but because the petitioner's own circuit has previously rejected it. That approach is contrary to the statutory text, contrary to the history of the certificate requirement, and contrary to this Court's repeated instruction that the COA threshold is not a substitute for appellate review.

III. THE COURT SHOULD GRANT REVIEW BECAUSE THE ELEVENTH CIRCUIT'S RULE MAKES THE COA STANDARD UNNECESSARILY STRINGENT

The Eleventh Circuit's rule is not just inconsistent with the statute. It is also unnecessarily severe. The certificate requirement was designed to screen out frivolous appeals, not to foreclose any appeal that loses under current circuit precedent.

Amici do not minimize the importance of finality. Federal judges understand the costs of repetitive postconviction litigation. Habeas and § 2255 proceedings often follow lengthy criminal prosecutions, direct appeals, and collateral review. Congress was entitled to impose meaningful limits on repetitive, abusive, or dilatory litigation. Congress did so in the AEDPA through statutes of limitation, restrictions on second or successive petitions, deference rules for state convictions, and the COA requirement.

But AEDPA's purposes do not support the rule applied below. A claim that has divided the courts of appeals is not frivolous merely because the circuit has rejected it. It is not abusive merely because the petitioner seeks to preserve the issue for further review. And it does not become a source of unwarranted delay merely because the court of appeals grants a COA and then resolves the appeal under binding precedent.

The COA requirement already screens out insubstantial appeals. *Barefoot* required more than the absence of frivolity. AEDPA preserved that meaningful threshold. This Court's cases confirm that courts should deny COAs where the petitioner has not made a substantial showing, while also warning courts not to demand proof of ultimate entitlement to relief. That standard is fully capable of filtering out weak claims without categorically barring claims that have already persuaded other federal judges.

The Eleventh Circuit's rule is overkill. It excludes not only meritless appeals but also appeals raising genuine legal questions that have divided the federal courts. In doing so, it imposes a threshold stricter than the one Congress wrote. AEDPA requires a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). It does not require a showing that the petitioner can obtain relief from a three-judge panel under existing circuit precedent.

Nor does the categorical rule materially reduce judicial burdens. To decide whether circuit precedent forecloses the claim, judges must still identify the claim, assess the governing precedent, and determine whether the asserted conflict matters. Once that work is done, granting a COA on a genuinely divided legal issue does not require an elaborate merits proceeding. The court of appeals may affirm under circuit precedent in a concise opinion. It may explain that only the en banc court or this

Court can alter the rule. It may deny relief while still allowing the issue to be preserved in the ordinary way. That process is neither wasteful nor inconsistent with AEDPA.

This case illustrates the point. Berry sought a COA on a legal question he contends has divided the courts of appeals. The Eleventh Circuit did not deny a COA because the issue was frivolous, because the asserted conflict was illusory, or because the case was procedurally defective. It denied a COA because Eleventh Circuit precedent foreclosed the claim. App. 2a-3a. That is precisely the wrong reason to deny threshold review. The fact that a court of appeals has taken one side of a legal dispute does not mean the other side is not debatable—especially when other courts of appeals have adopted it.

The Court should grant review to prevent the COA standard from becoming more stringent than its text, history, and purposes permit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2026