No. 25-7026

IN THE

Supreme Court of the United States

COREY DURAN BERRY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This case involves a circuit split about circuit splits. The question presented is: should a certificate of appealability (COA) issue when a habeas petitioner's claim would be foreclosed by precedent in his home circuit but accepted by another circuit? The government opposes review but fails to meaningfully dispute the grounds for it.

Split. The government does not dispute that the circuits are divided 2–1. That would suffice even under the government's own practice. But the actual split is 3–3.

Merits. The government does not defend the decision below. So there is no dispute that multiple circuits are wrongfully denying habeas petitioners their right to appeal, contravening AEDPA's plain text and numerous precedents of this Court.

Cert-worthy. The government does not explain why the right to appeal should depend on geography. And the government does not dispute that the COA question presented has recurred with great frequency since AEDPA's inception. Instead, the government disputes only that the COA question has broader structural implications. But the erroneous COA-denying rule adopted by three circuits impedes the uniform development of federal habeas law. That is because it dramatically limits the ability of en banc courts of appeals and this Court to resolve circuit splits. The government's contrary argument—that such review remains readily available—lacks any support.

Vehicle. The government does not dispute that the COA question is squarely presented here. The government argues only that petitioner may not obtain relief in the end. But the lower courts did not address the government's arguments. And for good reason: it did not even properly raise them. At worst, they would be for remand.

I. The government does not dispute the circuit split.

As explained in the petition, the Fifth, Sixth, and Eleventh Circuits have held that a COA may not issue where binding precedent in the prisoner's home circuit forecloses his claim, even where another circuit has disagreed. *See* Pet. 12–14. By contrast, the Ninth and Tenth Circuits have held that a COA must issue in that scenario, and the Third Circuit has also followed that same approach. *See* Pet. 14–17.

1. Curiously, the government devotes just a single paragraph to the split, and the government limits its cursory discussion to just three circuits. BIO 10–11. In doing so, the government does not dispute that there is at least a 2–1 split—with the Fifth and Eleventh Circuits on one side, and the Ninth Circuit on the other. That acquiescence is wise: those three circuits have issued precedential opinions squarely addressing the COA question. And the Ninth and Eleventh Circuit's opinions have been repeatedly applied by courts in those circuits. *See* Pet. 12–13 & n.1, 15 & n.2.

All the government can do is characterize this undisputed "disagreement" as "limited" (BIO 11), but it does not even argue that the split is too shallow to warrant review. Nor could it credibly do so. In recently seeking review itself, the government has emphasized that "this Court has recently and repeatedly granted certiorari in cases arising from 1–1 or 2–1 circuit conflicts." *U.S. Postal Serv. v. Konan*, 146 S. Ct. 736 (2025), Pet. for Cert. 19 (U.S. No. 24-351) (Sept. 27, 2024).[1] And the government

[1] For examples from just this Term alone, see *M&K Employee Solutions, LLC v. Trustee of IAM Nat'l Pension Fund*, __ S. Ct. __, 2026 WL 1423319, at *4 (2026) (1–1 split); *Galette v. N.J. Transit Corp.*, 146 S. Ct. 854, 864–65 (2026) (1–1); *FS Credit Opportunities Corp. v. Saba Capital Master Fund, Ltd.*, 145 S. Ct. 2842 (2025) (2–1).

has recently acquiesced to review of such splits as well (and this Court has followed those recommendations). *See, e.g.*, *Johnson v. U.S. Cong.*, Br. for the Resp. 16–19 (U.S. No. 25-735) (Mar. 6, 2026) (acquiescing to review of 2–1 split); *Sripetch v. SEC*, Br. for the Resp. 9 (U.S. No. 25-466) (Dec. 17, 2025) (acquiescing to review "regardless of whether the question presented is the subject of a 1–1 conflict or a 2–1 conflict").

The Court has long followed that practice in criminal and habeas cases as well.[2] And properly so: the happenstance of geography should not determine life and liberty.

2. Although a 2–1 split would suffice even under the government's view, that understates the depth of the split. In a footnote, the government discounts the Third, Sixth, and Tenth Circuits. BIO 11 n.2. But these circuits cannot be ignored.

a. The Sixth Circuit has issued a precedential opinion following the approach taken by the Fifth and Eleventh Circuits. Specifically, that court has denied a COA on the ground that "our precedent [i]s the proper reference point. And that precedent bars Mitchell's claim. . . . It follows that he is not eligible for a certificate of appealability." *Mitchell v. United States*, 43 F.4th 608, 616 (6th Cir. 2022).

The government asserts that *Mitchell* did not address what would happen when there is a contrary decision from another circuit. But *Mitchell*'s rationale

[2] *See, e.g.*, *Hewitt v. United States*, 606 U.S. 419, 426 n.4 (2025) (2–1); *Thompson v. United States*, 604 U.S. 408, 412–13 (2025) (1–1); *Diaz v. United States*, 602 U.S. 526 (2024) (1–1); *Shular v. United States*, 589 U.S. 154, 160 (2020) (1–1); *Dahda v. United States*, 584 U.S. 440, 446 (2018) (2–1); *Wilson v. Sellers*, 584 U.S. 122, 128 (2018) (2–1); *Nichols v. United States*, 578 U.S. 104, 108 (2016) (1–1); *Wood v. Milyard*, 566 U.S. 463, 468 n.2 (2012) (1–1); *Gonzalez v. Thaler*, 565 U.S. 134, 139 n.2 (2012) (2–1); *Holland v. Florida*, 560 U.S. 631, 644–45 (2010) (2–1); *Rhines v. Weber*, 544 U.S. 269, 273 (2005) (2–1); *Stewart v. Martinez-Villareal*, 523 U.S. 637, 641 (1998) (1–1).

forecloses a COA in that scenario: a prisoner's home circuit precedent is "the proper reference point," so he is "not eligible" for a COA where that precedent "bars [his] claim." *Id*. Confirming that rationale, *Mitchell* cited *Hamilton v. Sec'y, Fla. Dep't of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015), where the Eleventh Circuit squarely held that a COA may not issue when there is binding circuit precedent, even if there is a circuit conflict. And, eliminating any doubt, the Sixth Circuit itself has denied a COA in that precise scenario, citing *Mitchell* (and its citation to *Hamilton*) to do so. *Young v. Swaney*, 2024 WL 4751643, at *2 (6th Cir. 2024). That *Young* is unpublished merely confirms that a straightforward application of *Mitchell* bars a COA in that scenario.

b. On the other side of the split, the government discards entirely the Tenth Circuit because its decisions are unpublished. But the government does not mention that the Tenth Circuit has consistently and unanimously held—three times over a twenty-year span—that a COA must issue in the face of binding precedent when another circuit has disagreed. *See* Pet. 15–16. The government does not dispute that district courts have treated those COA holdings as binding. *See* Pet. 16. And the government does not identify any indication that a contrary rule is forthcoming there.

c. As for the Third Circuit, petitioner conservatively stated that *Wilson v. Sec'y, Pa. Dep't of Corrs.*, 782 F.3d 110 (3d Cir. 2015), added to the confusion. Pet. 17. But, in fact, *Wilson* deepens the split. *Wilson* granted a COA because a Sixth Circuit decision "conflicts with the District Court's decision." 782 F.3d at 115. And the district court's decision there applied Third Circuit precedent. *See Wilson v. Beard*, 2012 WL 1382447, at *9 (E.D. Pa. 2012) (citing *Landano v. Rafferty*, 897 F.2d 661, 668 (3d Cir.

1990)). Although the Third Circuit in *Wilson* did not reference that precedent, it nonetheless granted a COA because the district court's decision—applying home circuit precedent—conflicted with another circuit's. So it is no surprise that the Tenth Circuit later cited *Wilson* (alongside Ninth Circuit decisions) to support its rule that a COA is required whenever there is a split—regardless of home circuit precedent. *See* Pet. 17 (citing *United States v. Crooks*, 769 F. App'x 569, 572 (10th Cir. 2019)).

* * *

Considering all six circuits, then, the circuit split is best characterized as 3–3 rather than 2–1. That split emerged over a decade ago. It has only deepened since then. And it is not going away on its own. Only this Court can restore uniformity.

II. The government does not defend the decision below.

In this case, the Eleventh Circuit applied the rule from *Hamilton* and denied petitioner a COA based on binding circuit precedent that conflicts with precedent from other circuits. Pet. App. A, 2a–3a; Pet. 27–29. Although the government usually leads with a defense of the decision below, here it offers no defense at all. In fact, the government says nothing about the merits. The government's silence is deafening. There is only one conclusion to draw: the government recognizes that the stringent rule adopted by the Fifth, Sixth, and Eleventh Circuits is legally indefensible. Indeed, as petitioner and his *amici* have explained at length, that rule is irreconcilable with AEDPA's plain text, a common-sense application of the liberal COA standard, and numerous COA precedents of this Court. *See* Pet. 29–36; Br. of Former Federal Judges 3–10. So three circuits are wrongfully denying prisoners their right to appeal.

III. The question presented warrants review.

Although the government cannot dispute the split or defend the decision below, it maintains that the question presented does not warrant review. Quite the contrary.

A. The COA question is recurring and important.

The government does not dispute that the COA question recurs frequently due to the volume of habeas appeals and the prevalence of circuit splits. *See* Pet. 17–20.

The government also fails to explain why geography alone should determine whether habeas petitioners have the right to appeal. As the petition explained, this Court regularly grants review to ensure the uniformity of appellate rights for civil and criminal litigants. *See* Pet. 20–21 (citing recent examples). There is no reason why habeas petitioners should be treated differently given the stakes. Indeed, even capital prisoners must obtain COAs. And the Fifth, Sixth, and Eleventh Circuits—the three circuits wrongfully denying habeas appeals—are home to hundreds of them.

Recognizing these heightened stakes, the Court has regularly superintended the COA process and standard ever since AEDPA's inception. *See* Pet. 21–22 (citing examples). And former federal judges who have actually ruled on COA requests have weighed in here to emphasize that, as a jurisdictional prerequisite applied on a daily basis, the COA standard must be uniform. *See* Br. of Former Federal Judges 2–4.

B. The government's contrary arguments are unsupported.

Ignoring all of the points above, the government urges this Court to allow the circuit split to persist indefinitely. That would forever make the appellate rights of habeas petitioners depend entirely on the happenstance of geography. And that

would forever allow habeas petitioners in three circuits to be wrongfully denied the right to appeal even where another circuit would have ruled in their favor. The government does not come close to justifying that state of affairs or its perpetuation.

1. The government asserts that, where home circuit precedent forecloses a claim, granting a COA "does not appear to have a significant practical effect on the ultimate disposition" because the circuit will simply apply its precedent. BIO 11–12.

But the right to appeal cannot be denied or be made to turn on geography just because the appellant might not prevail. By analogy, this Court often grants review to ensure the uniformity of legal standards in criminal and habeas cases, even where those standards rarely permit relief. *See Kemp v. United States*, 596 U.S. 528 (2022), Cert. Reply 6–8 & n.1 (No. 21-5726) (Dec. 9, 2021) (citing cases clarifying the standard for plain-error review, post-judgment motions, and miscarriage-of-justice exceptions).

Moreover, as a practical matter, a COA enables habeas petitioners to challenge adverse circuit precedent through rehearing and certiorari. The government does not dispute that these avenues for further review are important to all litigants, including habeas petitioners. Indeed, contrary to the government's suggestion, these avenues are far from futile. Habeas cases are a frequent source of en banc proceedings and grants of certiorari by this Court. *See* NACDL Br. 10–11 (citing examples). And that is especially true where there is a circuit split. After all, that is an enumerated ground for both en banc and certiorari. *See* Sup. Ct. R. 10(a); Fed. R. App. P. 40(b)(2)(C).

As a result, COAs are also essential to the development of federal habeas law. COAs do not merely initiate the appellate process, trigger the appointment of counsel,

promote judicial efficiency, and engender a public perception of fairness and integrity. *Shockley v. Vandergriff*, 145 S. Ct. 894, 895–96 (2025) (Sotomayor, J., joined by Jackson, J., dissenting from the denial of certiorari). COAs also facilitate the percolation of legal issues and the refinement of precedent. And COAs generate the vehicles that permit en banc courts and this Court to resolve circuit splits and thereby ensure the uniform application of federal habeas law—an area plagued by confusion. Petitioner and his *amici* have detailed these important structural benefits, including how COAs safeguard this Court's supervisory role. *See* Pet. 23–26; NACDL Br. 4–13.

2. The government's only response is that en banc and certiorari may still "readily be utilized" even when COAs are denied. BIO 12. But the exact opposite is true: COA denials effectively extinguish any realistic prospect of further review. *See* NACDL Br. 14–19. The government's contrary suggestion is entirely unsupported.

a. As for en banc, the government suggests that, where circuit judges wish to reconsider a habeas precedent in their circuit, they could grant a COA and then grant rehearing en banc. BIO 12–13. But that is not correct in the Fifth, Sixth, and Eleventh Circuits. The circuits judges there would remain bound by their circuit precedent barring a COA in that scenario. Indeed (and in what will be a recurring theme), the government cites no example of those circuits ever doing what it suggests.

To reconsider a habeas precedent in those three circuits, the court of appeals would instead need to grant rehearing en banc from a COA denial itself. That is because, absent a COA, the court would lack jurisdiction to consider the merits. It is theoretically possible for the courts of appeals to do that. But, again, the government

does not cite a single case where *any* court of appeals has ever actually granted rehearing en banc from a COA denial in order to reconsider an underlying habeas precedent. And to do so in the Fifth, Sixth, and Eleventh Circuits, the en banc court would *also* first need to overrule their COA precedent blocking merits consideration.

That unprecedented maneuver is especially unlikely to occur in the Eleventh Circuit. Under that court's Rule 22-1(c) (codified in 2010), habeas petitioners cannot even seek rehearing from a COA denial. *See* Pet. 11, 24. The government responds that they could seek to "suspend the operation of that [local] rule." BIO 14. But that suggestion is fanciful. Again, the government cites no case where that has happened.

The government also argues that the local rule does not prohibit *sua sponte* rehearing. BIO 14. Even if true, the Eleventh Circuit has expressed no desire to overrule *Hamilton* (which it would need to do before granting a COA to reconsider a habeas precedent). Meanwhile, the government identifies just one case where that court has *ever* gone en banc off a COA denial. It is 22 years old. It predates *Hamilton* (and Rule 22-1(c)). And the court went en banc there *not* to reconsider precedent but to answer "common questions" (mostly about COAs) in a large "number of cases." *See Gonzalez v. Sec'y, Dep't of Corrs.*, 366 F.3d 1253, 1256 (11th Cir. 2004) (en banc).

b. As for this Court, the government first argues that, where a court of appeals denies a COA, habeas petitioners may still seek a COA from a Justice of this Court. Again, that is technically true but practically illusory. Overstating the odds, the government admits that a Justice would "only rarely" grant a COA. BIO 15. But the government cites not even one example of single-Justice COA grant post-AEDPA.

The government also asserts that habeas petitioners could seek certiorari from a COA denial and present the underlying circuit split for review. BIO 15–16. This option too may be available in theory, but petitioner and his *amici* have explained that seeking certiorari from a COA denial does not provide this Court with a clean vehicle for resolving the underlying circuit split. *See* Pet. 25; NACDL Br. 12–13, 17–19; *Gonzalez v. Crosby*, 545 U.S. 524, 544 n.7 (2005) (Stevens, J., dissenting). The government knows this well: it opposes certiorari on that very basis. *See, e.g.*, *Bell v. United States*, BIO 14 (U.S. No. 17-678) (Feb. 7, 2018) (arguing that the case was an "unsuitable vehicle" because the decision below "addresses only the requirements for a COA"). And while it cites a few outlier cases where this Court reversed a COA denial based in part on a legal error (BIO 16), in none of them did the Court actually purport to resolve a circuit split. The Court simply does not use COA denials to resolve splits.

The upshot is that, while en banc and certiorari review of COA denials may be available in theory, they are exceedingly rare in practice and virtually non-existent for resolving splits. The COA-denying rule adopted by the Fifth, Sixth, and Eleventh Circuits thus stymies the development of federal habeas law and prevents the resolution of circuit splits—including by this Court on certiorari. Granting COAs has the opposite effect. And it imposes only a minor burden; the three circuits on the other side of the split have reported no problems managing habeas appeals, and courts may adopt streamlined procedures to do so. *Barefoot v. Estelle*, 463 U.S. 880, 889 (1983).

Put simply, the COA question here has major structural implications for the development of federal habeas law and the ability of this Court to ensure uniformity.

3. Unable to refute the structural implications of the COA question here, the government seeks to distract by discussing the underlying split in this particular case. But that effort backfires because it concretely illustrates some of the obstacles created by the erroneous COA rule adopted by the Fifth, Sixth, and Eleventh Circuits.

In this case, the Eleventh Circuit denied a COA based on its underlying burden-of-proof precedents in *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017) and *Fernandez v. United States*, 114 F.4th 1170 (11th Cir. 2024). Pet. App. 2a–3a. Although other circuits have disagreed with those precedents, the Eleventh Circuit's local rule precluded petitioner from seeking rehearing en banc on either the COA denial or on the underlying burden-of-proof split. And, although the government criticizes petitioner for not seeking certiorari on that underlying split (BIO 17), the COA denial rendered this case a poor vehicle for doing so. *See* Pet. 25. As petitioner's *amici* have attested, criminal defense lawyers understand that dynamic. *See* NACDL Br. 17–19. Thus, this case illustrates how the Eleventh Circuit's stringent COA rule impedes the development of the law and the Judiciary's ability to restore uniformity.

Under that COA regime, further review would need to occur in the precedent-setting case itself. Once the precedent is set, COAs will be denied moving forward; and COA denials will make further review all but impossible. But there are good reasons why an en banc court or this Court may not wish to grant review right away: the issue may need time to percolate; a conflict with other circuits may not emerge or deepen until later; the court may not yet appreciate the important or recurring nature of the issue; and the precedent-setting case may be a poor vehicle. For these reasons,

this Court regularly grants review over a respondent's cert-stage objection that the Court has declined to review the same issue in the past.[3] As explained, however, COA denials will effectively prevent further review even where there is an underlying split.

The government speculates that petitioner would be unlikely to obtain further review on the underlying split here even if a COA issues in this case. It observes that the Eleventh Circuit denied rehearing, and this Court denied certiorari, a year ago in *Fernandez*. BIO 14–15, 17–18. But that example proves petitioner's point. *Fernandez* set a new precedent by extending *Beeman* to the section 924(c) context. And Judges Rosenbaum and Newsom wrote separately to criticize circuit precedent and support its reconsideration. Nonetheless, and as the government emphasized when opposing certiorari, *Fernandez* had a fatal vehicle problem: the petitioner was serving a life sentence for an unrelated crime. *See Fernandez*, BIO 4, 11, 19–20 (U.S. No. 24-7420) (Sept. 10, 2025). So the split had no practical impact in that precedent-setting case. Yet the Eleventh Circuit's COA rule denies future opportunities for further review.

* * *

In the end, whether or not this particular petitioner will ultimately succeed in obtaining further review of this particular underlying split has no bearing on whether the threshold COA question warrants this Court's review. The national landscape remains untenable: the COA question has divided the circuits for over a decade; three

[3] *E.g.*, *Feliciano v. Dep't of Transp.*, 605 U.S. 38 (2025), BIO 6 (No. 23-861) (May 13, 2024); *Loper Bright Enter. v. Raimondo*, 603 U.S. 369 (2024), BIO 13–14 (No. 22-451) (Feb. 16, 2023); *Axon Enter., Inc. v. FTC*, 598 U.S. 175 (2023), BIO 7 (No. 21-86) (Sept. 22, 2021); *Groff v. DeJoy*, 600 U.S. 447 (2003), BIO 8 (No. 22-174) (Nov. 28, 2022).

circuits have adopted a legal rule that flouts this Court's COA precedents; the COA question will continue to recur frequently and indefinitely; and that question has important implications for the development of the law and this Court's supervisory function. The government disputes only the last point, and still it musters no support.

IV. The government's vehicle objection is illusory.

As explained in the petition, this case squarely presents the COA question dividing the circuits. The government does not dispute that petitioner thoroughly argued below that the COA standard was satisfied because the circuits had divided on the underlying burden-of-proof issue. *See* Pet. 27–28; Pet. App. B. The government conceded in *Fernandez* that the circuits are indeed divided on that underlying issue. *Fernandez*, BIO 18–19; *see* Pet. 28–29. And the government does not dispute that the Eleventh Circuit here issued a reasoned decision expressly denying a COA based exclusively on that issue, rendering this case an unusually clean vehicle (given that numerous COA denials are unreasoned or conclusory). *See* Pet. 27; Pet. App. 2a–3a.

Unable to dispute any of those points, the government lodges the following objection: petitioner's underlying claim is defaulted and untimely. *See* BIO 18–20.

1. There is a simple response to that: those issues are not before this Court.

It is settled that this a "court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Here, the Eleventh Circuit denied a COA based solely on its burden-of-proof precedents. The court of appeals did not address any issue about procedural default or timeliness, let alone deny a COA on those grounds. The district court did not address them either. Pet. App. 51a n.4. Because those issues are

not properly presented here, they could not obstruct the Court from resolving the COA question that *is* presented. Any other objection to the issuance of a COA would be addressed in the first instance on remand were petitioner to prevail on the legal issue here. *See Tharpe v. Sellers*, 583 U.S. 33, 34–35 (2018); *Jimenez v. Quarterman*, 555 U.S. 113, 118 n.3, 121 (2009); *Slack v. McDaniel*, 529 U.S. 473, 489–90 (2000).

2. Because the issues are not presented, the Court should stop there. Still, it's notable that the government's arguments could not even be *considered* on remand.

a. The government concedes that it "did not assert a timeliness defense below." BIO 19. And courts may not *sua sponte* consider that defense where it is waived. *Wood*, 566 U.S. at 466, 472–73. Here, petitioner's section 2255 motion laid out the key dates and alleged that it was "timely." (Dist. Ct. ECF No. 1 at 4, 10). By failing to assert a timeliness defense at any time, and by "steer[ing]" the court "away from th[at] question and towards the merits," the government waived the defense. *Wood*, 566 U.S. at 474. In any event, in light of the "principle of party presentation," even a forfeited defense may be considered *sua sponte* only in "exceptional cases." *Id.* at 472–73. And the government does not even allege exceptional circumstances here.

b. As for procedural default, the government recently assured this Court in *Fernandez* that its "usual practice" is to "waive any applicable procedural defenses" where the petitioner's section 924(c) offense is invalid. *Fernandez*, BIO 16. And the government accordingly waived procedural default in *Fernandez* itself. 114 F.4th at 1174 n.4. Yet the government fails to explain why it is not following that "usual practice" here. After all, this case is no different than *Fernandez*; just as in that case,

the government in this case expressly conceded below that petitioner's section 924(c) offense is not predicated on a valid "crime of violence." (Dist. Ct. ECF No. 23 at 2).

In any event, petitioner's reply in support of his section 2255 motion argued that the government waived default by failing to invoke it, and that any default would be excused for three independent reasons: the jurisdictional nature of his claim; cause and prejudice; and actual innocence. (Dist. Ct. ECF No. 17 at 11–19). The government subsequently referenced procedural default following the magistrate judge's report, but it addressed only actual innocence. (Dist. Ct. ECF No. 23 at 6–7). The government inexplicably failed to dispute petitioner's arguments on waiver, jurisdiction, or cause and prejudice, even though each would be dispositive. And the government fails to do so again in this Court. These unexcused failures would preclude the lower courts from even considering a default defense. *See Amadeo v. Zant*, 486 U.S. 214, 228 n.6 (1988).[4]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[4] As petitioner explained below, the circuits have also divided on the actual innocence issue. (Dist. Ct. ECF No. 17 at 16–17). So even if that issue were dispositive, he would at least be entitled to a COA on it were he to prevail on the legal issue presented here.