No. 25-726

In the Supreme Court of the United States

ALAN LANE HICKS,
Petitioner,

v.

JONATHAN FRAME,
Respondent.

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

BRIEF IN OPPOSITION FOR JONATHAN FRAME

JOHN B. MCCUSKEY
Attorney General
OFFICE OF THE
WEST VIRGINIA
ATTORNEY GENERAL
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25305
mwilliams@wvago.gov
(304) 558-2021

MICHAEL R. WILLIAMS
Solicitor General
Counsel of Record

CALEB A. SECKMAN
Assistant Solicitor General

Counsel for Respondent Jonathan Frame

QUESTION PRESENTED

A federal court can excuse a petitioner's failure to exhaust his or her post-conviction remedies in state court only in certain circumstances. In particular, the federal court must determine either that "there is an absence of available State corrective process; or circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1)(B).

Here, the Fourth Circuit reviewed the unique circumstances in Hicks's case and determined that West Virginia's state court process was present and effective. Although state proceedings were delayed, more recent activity reassured the unanimous panel that Hicks could still pursue his claims in state court.

The question presented is whether a federal court must excuse exhaustion because of prior delay in a habeas petitioner's case, even if the circumstances that gave rise to that delay have ended and the state process will progress normally.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

INTRODUCTION

Petitioner Alan Lane Hicks's state post-conviction challenge was delayed—but the reasons behind that delay are now being addressed. So after considering all the relevant facts (including more recent state-court activity), the Fourth Circuit concluded that West Virginia's courts would handle his case effectively going forward. The court thus unanimously agreed that Hicks cannot skip the state process and go straight to federal court.

Hicks would prefer an "X-years-and-you're-out" approach to post-conviction exhaustion. Under his vision, once a certain amount of time passes in state court, the state-court process becomes irreversibly ineffective or unavailable. That's an admittedly simple approach akin to a statute of limitations.

But the Antiterrorism and Effective Death Penalty Act demands more. It tells federal courts to consider whether state courts are unavailable or ineffective *today*, not whether they might have been working inefficiently *before*. And this test requires federal courts to analyze all of each case's specific facts, not just how much time has run on the clock.

While every circuit acknowledges that delay might be one relevant fact in evaluating effectiveness, they also recognize that delay alone is not sufficient to declare state courts hopeless. In fact, all the circuits do the same thing: they scrutinize facts and decide, based on their weighing of those facts, whether they believe that sending a case back to state court *right now* would be ineffective. So Hicks's illusory circuit split doesn't reflect any real disagreement about the statute; it just reflects different applications of similar standards to particular facts.

Really, Hicks believes the lower court looked at the facts of his case incorrectly. But this Court is not one of simple error correction. What matters is that all circuits approach the question using AEDPA's legal standard asking whether the circumstances show the state process *is* (not was) ineffective. And the idiosyncratic nature of Hicks's case is even more reason for this Court to decline to take it up—especially considering that the Fourth Circuit made the right decision.

The Court should thus deny the petition.

STATEMENT OF THE CASE

A. Statutory Background.

Since Congress enacted AEDPA in 1996, this Court has "frequent[ly] recogni[zed]" that AEDPA "limited rather than expanded the availability of habeas relief." *Shinn* v. *Ramirez*, 596 U.S. 366, 386 (2022) (citation omitted). The statute ensures that "a federal court may disturb a final state-court-conviction in only narrow circumstances." *Brown* v. *Davenport*, 596 U.S. 118, 125 (2022). Thus, "AEDPA review provides an important but limited safeguard." *Klein* v. *Martin*, No. 25–51, 2026 WL 189976, at *4 (U.S. Jan. 26, 2026).

Exhaustion of claims in state court is one of AEDPA's essential limits—avoiding the "'unseemliness of a federal district court's overturning a state-court conviction without the state courts having had an opportunity to correct the constitutional violation in the first instance." *Woodford* v. *Ngo*, 548 U.S. 81, 92 (2006) (cleaned up). State prisoners must ask for post-conviction relief from state courts first unless "there is an absence of available State corrective process; or circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1)(B). In other words, in

any case where a petitioner seeks to proceed despite non-exhaustion, they must show either unavailability or ineffectiveness "[u]nder the statute's terms." *Brown*, 596 U.S. at 141.

B. Factual Background.

In September 1988, a West Virginia jury convicted Hicks of first-degree murder, conspiracy to commit murder, and grand larceny. Pet.App.3a. The court then sentenced Hicks to life imprisonment. Pet.App.3a. Over a year later, in October 1989, Hicks appealed to the Supreme Court of Appeals of West Virginia. Pet.App.3a. That court refused his appeal. Pet.App.3a.

Between his sentencing and direct appeal, in February 1989, Hicks filed a "Mot[ion] for Reduction of Life Without Mercy Sentence Under [West Virginia] Rule [of Criminal Procedure] 35." Pet.App.23a. Rule 35 has two subsections with differing restrictions and grounds for challenge: subsection (a) corrects an illegally imposed sentence at any time, while subsection (b) reduces a sentence within 120 days of the sentence being handed down. Pet.App.5a. Hicks failed to specify which provision he filed under. Pet.App.5a. He filed this motion 121 days after his sentence was imposed. Pet.App.25a-26a. The state court did not rule on that motion.

Then, in November 1997, Hicks initiated his state habeas and moved for appointment of counsel. Pet.App.5a. What followed was a long chain of repeated judicial reassignments, appointments (and removals) of counsel, and disputes over whether a complete record of Hicks's trial existed. The record also reflects long stretches where Hicks himself took no apparent action as to his case. Contra Pet.5 ("Hicks did what he could to get the state court to make meaningful progress.").

The case was first assigned to Judge O.C. Spaulding, who was previously the prosecutor in Hicks's criminal trial. Pet.App.5a. Neither Judge Spaulding nor Hicks acted on the case until 2012. Pet.App.6a. By then, the case had been reassigned to Judge J. Robert Leslie, and at that time, Hicks sent a letter again asking the court to appoint him counsel. Pet.App.6a.

The state court then appointed attorney Shawn Bayliss to represent Hicks and file an amended petition. Pet.App.6a. Yet Bayliss and Hicks did not work well together, as Hicks said that Bayliss did not communicate with him. Pet.App.6a. Meanwhile, Bayliss spent his time trying to get a copy of Hicks's trial transcript, which the county circuit clerk didn't have in its possession. Pet.App.28a. The missing transcripts forced Bayliss to seek multiple deadline extensions for Hicks's amended petition. Pet.App.6a.

While Bayliss looked for the records, Hicks filed a complaint against Bayliss with the state bar. Pet.App.6a. Around this time, the case was reassigned to Judge Phillip M. Stowers and then to Judge Joseph Reeder. Pet.App.6a. Following the bar complaint, Bayliss moved to be relieved as counsel, which Judge Reeder granted. Pet.App.6a.

In 2013, Hicks petitioned the state supreme court for a writ of mandamus, seeking a ruling on his original Rule 35 motion, a "competent" attorney, prepaid phone services, and grand jury materials from his criminal case. Pet.App.34a. The court denied Hicks's request. Pet.App.34a.

Judge Reeder then assigned C. Dascoli, Jr., as Hicks's counsel. Pet.App.6a. Dascoli didn't file anything, and it's unclear whether Hicks ever communicated with him.

Instead, Hicks did nothing until 2016, when he moved for a status conference. Pet.App.6a. In response, the court appointed Duane Rosenlieb as Hicks's counsel, replacing Dascoli. Pet.App.6a.

Despite Rosenlieb's appointment, in January 2017, Hicks filed a pro se amended habeas petition. Pet.App.29a. Hicks also moved to relieve Rosenlieb. Pet.App.7a. The court held a hearing on the motion at which Rosenlieb explained that he couldn't get the trial record and that Hicks had been uncooperative; Hicks had also rejected Rosenlieb's suggestion that Hicks could seek to have his case dismissed due to the lack of record. Pet.App.30a. Hicks claimed he had the complete record, but he had thus far not shared it with his attorneys. Pet.App.30a-31a. Rosenlieb concluded by telling the court that he didn't believe Hicks would be able to represent himself even with co-counsel, while Hicks agreed he would provide copies of the record in his possession if the court waived copying fees. Pet.App.31a. In July 2017, Hicks moved for the court to prepare transcripts of this hearing. Pet.App.31a.

In 2018, Hicks again petitioned for a writ of mandamus on his Rule 35 motion. Pet.App.24a. The state supreme court this time issued a rule to show cause against the circuit court unless the writ was mooted by a decision on the motion. Pet.App.24a. The circuit court responded and explained that Hicks's motion was made under Rule 35(b) because it sought a reduction of his sentence. Pet.App.24a-25a. As a result, it was "untimely" and thus beyond the court's jurisdiction, which explained why the court hadn't previously addressed the motion. Pet.App.25a. It therefore denied the motion and mooted the pending writ of mandamus. Pet.App.25a.

Hicks filed a notice of appeal regarding the court's Rule 35(b) decision. Pet.App.25a. In it, he argued for the first time that his sentence was illegally imposed. Pet.App.25a. Recognizing this, the state supreme court issued a scheduling order instructing that the appeal "must relate only to the circuit court's decision not to reduce [Hicks's] sentence" rather than the legality of the sentence itself. Pet.App.25a. Still, Hicks filed a brief arguing his sentence was illegal, so the state supreme court affirmed the circuit court's denial. Pet.App.25a.

At the habeas level, the case again went silent until January 2019, when the transcripts of the hearing involving Rosenlieb were filed. Pet.App.31a. Also around that time, the court appointed Carl Hostler as Hicks's attorney. Pet.App.8a. The court then set various scheduling dates. Pet.App.8a.

The new timeline again proved ineffective, as Hicks was once more unable to work with his counsel. Hicks allegedly sent a draft motion to Hostler seeking to remove Mark Sorsaia as prosecutor on the case because Sorsaia had been involved in the trial of Hicks's co-defendant, but Hostler never filed that motion. Pet.App.32a. Hostler did visit Hicks in prison, where he requested Hicks's records for use in the case. Pet.App.32a. Hicks refused, which he said made Hostler "extremely upset." Pet.App.32a. So Hostler filed for an extension, noting his difficulty getting the record. Pet.App.32a.

In 2021, Hicks filed his federal habeas petition. Pet.App.2a. The State first responded that the habeas was untimely because Hicks missed his Rule 35(b) deadline in state court (such that the Rule 35 motion did not toll the deadline for filing his federal petition). Pet.App.15a n.7. The district court rejected this initial argument, so the case continued. Pet.App.15a n.7.

Meanwhile, without the record, nothing happened in the state case. Hicks stopped filing anything until September 2022, when the court held a status hearing. Pet.App.8a. At that hearing, the court informed Hicks that Hostler was no longer in private practice, and it appointed Jason T. Gain in his stead. Pet.App.8a. Hicks then moved to recuse Sorsaia. Pet.App.33a.

Gain encountered the same trouble as the attorneys before him. He was unable to get a copy of the record, so he told Hicks that, based on Hicks's desired course of action, he would not be able to represent him without it. Pet.App.33a.

Back in the federal case, the State had again moved to dismiss, this time because Hicks had failed to exhaust. Pet.App.4a. Hicks conceded this failure but said that exhaustion should be excused under Section 2254(b)(1)(B). Pet.App.4a. In 2023, the district court granted the State's motion, but the court also granted Hicks a certificate of appealability. Pet.App.4a.

Hicks then appealed the district court's dismissal to the Fourth Circuit. Pet.App.4a.

Hicks's state case progressed pending the federal appeal. In early 2025, the State moved to dismiss Hicks's state habeas because of the transcript problem identified by his counsel. Pet.App.9a. The state court then reassigned Hicks's case to now-Judge Sorsaia. Pet.App.9a. Judge Sorsaia was conflicted, so the State filed a motion to reassign the case, which the court granted, putting Judge Stowers back on the case. Pet.App.9a.

After the Fourth Circuit heard argument on the federal habeas appeal, state proceedings continued to move forward. In particular, after allowing Hicks time to

respond (and hearing nothing), Judge Stowers granted the State's motion to dismiss. Pet.App.9a.

These actions in state court convinced a unanimous Fourth Circuit panel that Hicks's case was now progressing at a normal rate. So although the court decried the delay, it believed that the state court was not unavailable or ineffective under Section 2254(b)(1)(B). Pet.App.19a. At the same time, the Fourth Circuit emphasized that Hicks would not have necessarily been entitled to relief even if the state court had not taken more recent action; in that counterfactual, "many hard questions would [still] abound." Pet.App.18a. n.8. But those questions could be left "unresolved." Pet.App.18a.n.8. It therefore affirmed the dismissal, and the Fourth Circuit later denied rehearing en banc. Hicks now petitions for certiorari.

REASONS FOR DENYING THE PETITION

The Fourth Circuit found that West Virginia's post-conviction process is not presently ineffective. Because the court believed that state-court remedies would not be futile, it did not excuse Hicks's failure to exhaust them. Under AEDPA's plain text, the Fourth Circuit was right to focus on what would happen in the state courts *right now*.

Hicks mistakenly tries to put the Fourth Circuit's decision on one side of an imaginary split. He thinks some courts look to the number of years of delay in deciding whether state courts are ineffective. He thinks other courts focus on whether recent activity happened below. But truth is, no court has ever tied itself to one or the other factor. Instead, like the Fourth Circuit did here, the courts approach the question holistically. By looking to all

relevant factors, federal courts ensure that a state court is truly ineffective before excusing exhaustion.

The Court need not intervene here. The facts are unusual. But the case doesn't reflect any lurking problem in how lower courts approach AEDPA's strict ineffectiveness standard.

I. No Circuit Split Exists, As All Courts Apply A Holistic Approach.

A. In trying to fashion a circuit split, Hicks runs into at least three threshold problems.

For one, many of Hicks's cases were decided pre-AEDPA. Yet "[t]he enactment of AEDPA in 1996 dramatically altered the landscape of federal habeas corpus petitions," emphasizing exhaustion's necessity alongside new restrictions on federal habeas petitioners. *Rhines* v. *Weber*, 544 U.S. 269, 274 (2005). This increasingly restricted structure means the "narrow technical definition of exhaustion," *Woodford*, 548 U.S. at 101-02, is more important than ever. After all, "[a] diminution of statutory incentives to proceed first in state court would also increase the risk of the very piecemeal litigation that the exhaustion requirement is designed to reduce." *Duncan* v. *Walker*, 533 U.S. 167, 180 (2001). So when considering post-AEDPA exhaustion questions, courts must "account sufficiently for AEDPA's clear purpose to encourage litigants to pursue claims in state court prior to seeking federal collateral review." *Id.* at 181. And "[i]t is wrong for [courts] to reshape" AEDPA "on the very lathe of judge-made habeas jurisprudence it was designed to repair." *Stewart* v. *Martinez-Villareal*, 523 U.S. 637, 647 (1998) (Scalia, J., dissenting).

For another, Hicks misreads comity's role. See, *e.g.*, Pet.7. It's true that "AEDPA's purpose [is] to further the principles of comity, finality, and federalism." *Williams* v. *Taylor*, 529 U.S. 420, 436 (2000). Yet while "comity interests underly[] the exhaustion doctrine," *O'Sullivan* v. *Boerckel*, 526 U.S. 838, 847 (1999), Congress didn't instruct courts to weigh the strength of the comity interests in a given case in some undefined way. The test remains whether "circumstances exist that render [state] process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1)(B)(ii). So Hicks is free to recognize comity's value and place in federal habeas' history (as circuit courts frequently do as well). But that recognition does not transform AEDPA's clear standard into an amorphous statement that "courts should excuse exhaustion when there's no comity interest"; again, pre-AEDPA concepts should not "alter AEDPA's plain meaning." *Greene* v. *Fisher*, 565 U.S. 38, 39 (2011).

Lastly, Hicks looks to many cases from the direct appeal context—but those cases are useful only in a limited way. In 2016, this Court explained that, unlike in a direct appeal, "the Constitution's presumption-of-innocence-protective speedy trial right is not engaged" in habeas proceedings. *Betterman* v. *Montana*, 578 U.S. 437, 447 (2016). And compared to pre-trial defendants, habeas petitioners possess "diminished" rights under the Due Process Clause. *Id.* at 448. Thus, delays in direct appeals can amount to a constitutional violation that a federal court can vindicate. On the other hand, the "protection[s] against undue delay at [the habeas] stage" primarily "come[] from statutes and rules." *Id.* at 447. So to the extent Hicks's cases rely on constitutional protections rather than statutory safeguards, those considerations don't apply here.

B. Especially when the cases are read against these background principles, the circuits are not split on the relevant legal test. In the face of a delay, every circuit court looks at whether a state court is ineffective within the meaning of Section 2254(b)(1)(B)(ii) using an "an inquiry into what procedures are 'available' under state law." *O'Sullivan*, 526 U.S. at 847. To find that answer, the circuits holistically analyze each case to determine whether, given the circumstances, the state court is ineffective. Often, this analysis examines the length of the delay, the reasons for it, who's responsible, whether (and how) the state courts have reactivated, and similar considerations. Always, the analysis seeks to answer the same question: if we send this back to state court, do we expect the case to be resolved effectively?

These cases are fact-intensive and entail a degree of discretionary judgment about facts. The supposed split that Hicks describes stems from this reality. He points to different cases from different circuits that looked at different facts and came to different conclusions. But none deployed inconsistent, hardline legal rules. And no circuit has ever said that unjustified delay alone wipes out any possibility for reversal of the situation. At most, the cases just show that courts—and even the individual judges within those courts—might have different opinions about the significance of certain facts.

In other words, no circuit employs either of the two mechanical approaches that Hicks says characterize the split. The circuits he cites in support of his position, for instance, aren't just checking a box in the petitioner's favor after an inordinate delay. And neither do the circuits on the other side just look at whether there's *any* recent activity whatsoever.

1. Start with the First Circuit. Even before AEDPA, the court explained that "bright line rules are not the answer" when it comes to exhaustion. *Layne* v. *Guntner*, 559 F.2d 850, 852 (1st Cir. 1977). What matters is whether "the state court appellate processes were presently available." *Id.* at 851. That rule is not one "of exoneration by state expedition initiated only after a federal court has blown the due process whistle." *Id.* That approach "would be unwise." *Id.* "Equally unwise, however, would be a rule that ignored any attempts by a state to remedy its procedural oversight once a petition for habeas corpus was filed." *Id.* So the First Circuit looks at everything in a case, and no one factor is dispositive. Applying that rule, *Layne* found the petitioner needed to exhaust. Pre-habeas, "nothing was happening in the state system." *Layne*, 559 F.2d at 852. But by the time the habeas had progressed, "the [state court] appeal was ready for processing" and was stalled only at petitioner's request. *Id.* The state case could move forward.

Other First Circuit cases follow this pattern. In *Johnson* v. *Moran*, 812 F.2d 23, 23 (1st Cir. 1987), the court found that exhaustion should still be required where, despite a delay, the "state [lower] court had acted" on petitioner's state habeas, and there was evidence that the state supreme court "w[ould] soon act on the appeal in that state proceeding." And in *Wells* v. *Marshall*, No. 95-1741, 1996 WL 141788, at *1 (1st Cir. Mar. 29, 1996), the court likewise required exhaustion where the state judge recently "stated that he was ready to hear petitioner's claims." Neither of Hicks's two other unpublished, unprecedential First Circuit cases say anything different. See *L'Heureux* v. *Pine*, No. 98-1333, 1998 WL 1085784, at *1 (1st Cir. Nov. 10, 1998); *Branco* v. *Massachusetts*, No. 21-1310, 2021 WL 8692680 (1st Cir. Nov. 22, 2021).

2. The Second Circuit also looks at the totality of circumstances to determine if state courts are ineffective. For instance, the petitioner in *Brooks* v. *Jones*, 875 F.2d 30, 31 (2d Cir. 1989), experienced an almost-eight-year delay in his direct appeal caused by "inexcusable neglect by a succession of assigned counsel" and for which the State lacked "a legitimate reason." But the court also looked at what the State had done to rectify the situation, noting that "[i]t now appears that [the petitioner's] appeal will be heard by the [state court] in the near future." *Id.* Despite the delay, the court cautiously explained that "if the state is about to do so and thus accord [petitioner] the relief he seeks," exhaustion was still required. *Id.*; see also *Roberites* v. *Colly*, 546 F. App'x 17, 20 (2d Cir. 2013) (excusing exhaustion following a "lengthy delay" because the case was "on track for a merits assessment by the [state] courts").

Like every circuit, the Second Circuit doesn't automatically excuse exhaustion because of *any* state movement. In *Simmons* v. *Reynolds*, 898 F.2d 865, 867 (2d Cir. 1990) (citation omitted), the court said that petitioner's attempts to push forward his significantly delayed appeal were "to no avail." Thus, the court excused exhaustion in his federal habeas even after the state court decided the direct appeal because the federal habeas claims were "based on a claimed denial of due process." *Id.* After all, the court explained, the state court's delay was the basis for the habeas in the first place, so the court believed it would be "futile" to force petitioner to bring those claims in state court. *Id.* at 868. Even still, *Simmons* noted that "the most appropriate remedy" in cases complaining of inordinate delay in direct appeal isn't to decide the issues themselves. *Id.* at 869-70. Rather, the federal court should issue "a conditional order requiring a state court to hear the appeal within a specific period of

time." *Id.* at 869. The equivalent outcome in the habeas context would be an order directing the State to act (and thereby demonstrate its effectiveness) or permit the federal habeas to go forward after a failure to comply.

3. The Third Circuit, too, excuses exhaustion when a delay "render[s] the state remedy effectively unavailable." *Lee* v. *Stickman*, 357 F.3d 338, 341 (3d Cir. 2004) (citation omitted). As with the other circuits, this test considers all the facts of a case: "The existence of an inordinate delay does not automatically excuse the exhaustion requirement." *Id.* Rather, the State must show that its processes are still effective. As part of that showing, the Third Circuit "consider[s] the degree of progress made in state court." *Id.* at 342.

Hicks relies heavily on Third Circuit cases like *Lee* to claim the circuit believes lengthy state delays are "incurable." Pet.13. But the court said no such thing. Instead, *Lee* turned on the facts "[i]n th[at] case," which the court "d[id] not believe" showed "any real progress" in state court. *Lee*, 357 F.3d at 342. And while the court believed the delay was so egregious that "it [was] difficult to envision any amount of progress justifying" it, that statement isn't the court quietly announcing a new brightline rule. *Id.* Rather, the statement left open the possibility that some level of progress would be enough while expressing the court's frustration at the situation. It emphasized its belief that requiring exhaustion would "return [petitioner's] petition to legal purgatory" in part because the recent action in state court wasn't meaningful, but "painful and aimless." *Id.* at 341, 342.

So Hicks is wrong to suggest that the Third Circuit cuts off the exhaustion requirement after some pre-defined period of unjustified delay. To the contrary, "as a general matter, district courts are expected to stay their

consideration of habeas petitions when previously stalled proceedings resume." *Morton* v. *Dir. V.I. Bureau of Corr.*, 110 F.4th 595, 601 (3d Cir. 2024) (cleaned up). The court looks for "reliable evidence that the state action has been reactivated." *Walker* v. *Vaughn*, 53 F.3d 609, 615 (3d Cir. 1995). This evidence of "[o]ngoing progress may counsel against exhaustion, even where there has been substantial delay." *Morton*, 110 F.4th at 601. Exhaustion should be excused only if there's "no indication that proceedings will resume anytime soon." *Id.* at 602.

Even earlier Third Circuit cases say much the same. *Hankins* v. *Fulcomer*, 941 F.2d 246 (3d Cir. 1991), said courts should excuse exhaustion when "the state process is a procedural morass offering no hope of relief," *id.* at 250 (cleaned up). But an appropriate amount of progress could show exhaustion is still required. *Id.* at 252. Likewise, *Burkett* v. *Cunningham*, 826 F.2d 1208, 1218 (3d Cir. 1987), thought petitioner's claims could have "become unexhausted if state proceedings ha[d] progressed to a sufficient degree." To be sure, the court considered the specific circumstances of that case and found "insufficient change … to find that [petitioner's] claims have since become unexhausted." *Id.* "[B]ecause of the *continued* delay," then, the court "f[ound] that [petitioner] ha[d] exhausted his state remedies." *Id.* (emphasis added). At the same time, *Burkett* (which involved multiple habeas petitions) required exhaustion on another habeas where the appeal "now appear[ed] to be proceeding normally." *Id.*

Finally, Hicks's bare recital of cases leaves out critical context. None of the cases laid down hard rules. *Story* v. *Kindt*, 26 F.3d 402, 406 (3d Cir. 1994), did not "consider recent progress" in state court "sufficient," but largely because of the still-years-away outlook of the case.

Codispoti v. *Howard*, 589 F.2d 135, 142 (3d Cir. 1978), said recent progress is sometimes not enough, but only if it fails to remove whatever obstacle has left a petitioner "unable to pursue" his case. And *United States ex rel. Geisler* v. *Walters*, 510 F.2d 887, 892 (3d Cir. 1975), a "certainly sui generis" case, excused exhaustion, but only where the petitioner had already presented the issue to the state court, meaning "it [was] not necessary that he again" do so.

4. Before Hicks's case, the Fourth Circuit had limited precedent on exhaustion. But Hicks's two unpublished opinions don't make the Fourth Circuit an outlier.

First, *Ward* v. *Freeman*, No. 94-6424, 1995 WL 48002, at *1 (4th Cir. Feb. 8, 1995), involved a direct appeal delay. That posture prompted the court to analyze "whether the delay amounts to a due process violation." *Id.* That analysis would look different in the context of a habeas proceeding. See *Betterman*, 578 U.S. at 447. The case's direct-appeal posture also explains why the "grant of a belated appeal to the [state court]" didn't moot the petition or require exhaustion. *Ward*, 1995 WL 48002, at *2. The petitioner in *Ward* was challenging the delay itself, which the Fourth Circuit said violated his due process rights, so the court found that the state courts "are ineffective" to hear that delay challenge. *Id.* at *1; cf. *Simmons*, 898 F.2d at 867-68. *Ward* says nothing about past delay alone being enough to push aside an otherwise competent proceeding.

Second, *Plymail* v. *Mirandy*, 671 F. App'x 869, 870 (4th Cir. 2016), involved a "significantly constrained" record. That limitation proved dispositive: the Fourth Circuit merely held that the "district court's procedural ruling [requiring exhaustion] is debatable." *Id.* *Plymail* only said that "the current state of the record" in that case was "insufficient to establish as a matter of law that [the]

petition should be dismissed for failure to exhaust." *Id.* at 871.

Farmer v. *Circuit Court of Maryland for Baltimore County*, 31 F.3d 219 (4th Cir. 1994), provides a clearer example of the Fourth Circuit's exhaustion analysis. In *Farmer*, the Fourth Circuit declined to excuse exhaustion even though the petitioner, a federal prisoner, had made "unavailing[] efforts to exhaust" because the state court had "refus[ed] to entertain" the habeas until she was personally present in the State. *Id.* at 223. Given that this situation made those courts ineffective to the petitioner, the Fourth Circuit ruled that "if [petitioner] were formally to waive her right[s]" regarding the State's procedures, "she [would be] entitled to an immediate indication from the state whether it is prepared to entertain her petition … and to a prompt proceeding under any procedure agreed to." *Id.* Then, "[i]f the state decline[d] unreasonably to proceed," the petitioner would be "entitled to be excused from the federal exhaustion requirement." *Id.* at 223-24.

So *Farmer* evinces the Fourth Circuit's longstanding practice of requiring exhaustion where it appears that state courts are presently able to resolve a case under current (or ordered) circumstances. And Hicks's case reiterates the Fourth Circuit's commitment to that approach. See Pet.App.19a (citing *Farmer*, 31 F.3d at 223).

5. Hicks says the Fifth Circuit's standard is "elusive." Pet.19a. But it eludes Hicks only because he's looking for absolute deadlines where none exist. The Fifth Circuit has long stressed that these cases turn on their facts, and the court looks for existing "circumstances rendering [state] process ineffective." *Reynold* v. *Wainright*, 460 F.2d 1026, 1027 (5th Cir. 1972) (citation omitted). Thus,

"in an appropriate case," it's possible that an "inordinate delay" could "render the state remedy ineffective." *Id.* But where a delay has ended and state courts are "now available," exhaustion should be required. *Id.*

Take *Reynolds*. There, the court required exhaustion but warned that "unless [the State] allows and thereafter promptly disposes of" petitioner's case, he "will be deemed to have exhausted his effective State remedies." 460 F.2d at 1028. Likewise, the court in *Dixon* v. *Florida*, 388 F.2d 424, 425 (5th Cir. 1968), took issue with the ongoing "sterile silence" from the state proceedings. The court said that the petitioner wasn't required to keep waiting with nothing happening. See *id.* at 426. Even then, *Dixon* noted that delay alone wasn't enough: it remanded for the district court to hold a hearing to "determine whether or not the delay … is justifiable." *Id.*

And like in the other circuits, the Fifth Circuit cases excusing exhaustion in the direct appeal context must be taken with a grain of salt. Those cases implicate greater constitutional protections, so "delay may geld state procedures" and "render the exhaustion requirement meaningless." *Shelton* v. *Heard*, 696 F.2d 1127, 1128 (5th Cir. 1983). As the Fifth Circuit described it, when a defendant whose guilt is not final has to wait years for a direct appeal verdict before they can even begin to bring a state habeas, "[d]elay is truly the deadliest form of denial." *Id.* at 1129.

In any event, the Fifth Circuit's cases confirm its fact-focused exhaustion inquiry. For example, where a habeas petition was "completely dormant," the court wondered why that delay was ongoing. *Breazeale* v. *Bradley*, 582 F.2d 5, 6 (5th Cir. 1978). Yet "the state [] offered no reason for its torpor." *Id.* So "[u]nder the[] circumstances, the

unexplained delay" led the court to find "the state remedy [wa]s ineffective" due to its "prolonged sleep." *Id.*

In *Deters* v. *Collins*, 985 F.2d 789, 795 (5th Cir. 1993), the court similarly said that "the exhaustion doctrine assumes that state remedies are adequate and available" based on the facts at hand. Yet in *Deters*, petitioner "ha[d] scotched the wheels of justice" by "refus[ing] to exercise the options available to him" while "[t]he State … ha[d] provided sufficient procedural tools." *Id.* at 796. Despite a 14-year delay, then, "the mere passage of time" was insufficient to excuse exhaustion in "ongoing state process[es]." *Id.* Delays like this one—those that are attributable to a petitioner or otherwise show that the State processes are not ineffective—don't warrant excusing exhaustion, even if they're lengthy. See *Taylor* v. *Stephens*, 577 F. App'x 285, 287 (5th Cir. 2024) (three-year delay didn't excuse exhaustion where case's complicated issues "take[] time to develop," and there was "evidence that petitioner's pending state habeas is under active processing and consideration" (cleaned up)).

6. The Sixth Circuit follows suit, adhering to AEDPA's "legislative command" that "failure to exhaust may be excused only if the state court process is 'ineffective.'" *Johnson* v. *Bauman*, 27 F.4th 384, 388, 393 (6th Cir. 2022). The court expressly rejects the idea that "inordinate delay" alone can excuse exhaustion by itself; "if taken at face value," a delay-only standard "could exceed the statutory 'ineffective' standard." *Id.* at 394.

Hicks tries to obfuscate the Sixth Circuit's current-effectiveness test by claiming that *Johnson* creates an "incongruity" in the circuit's case law. Pet.13. It doesn't. *Turner* v. *Bagley*, 401 F.3d 718 (6th Cir. 2005), didn't allow exhaustion to be excused on delay alone. *Turner* involved an eleven-year delay in the direct appeal context, not

habeas. Still, it mattered in *Turner* that the State was responsible for the delay, while petitioner had made "frequent [and] unavailing" efforts rendering future efforts "futile." *Id.* at 725-26. And because it was a direct appeal, the state court's intervening decision was "too late" and didn't "render the speedy appeal or effective assistance of appellate counsel issues" moot. *Id.* at 725.

Johnson itself explained that its holding aligned with cases like *Turner*. In those cases, the court had "in practice applied" the standard's "two guideposts—requiring, one, a showing beyond delay itself and, two, that the delay be attributable to the state—in a manner that aligns with the statute's original meaning." *Johnson*, 27 F.4th at 394. *Turner* and the like aren't cases that excused exhaustion merely because of delay; they are cases in which, "consistent with the text of § 2254," the court found "exceptional circumstances of peculiar urgency that rendered the state court process incapable of affording relief for the petitioners' alleged constitutional violations." *Id.* at 396 (cleaned up) (citing *Turner*, 401 F.3d 718; *Phillips* v. *White*, 851 F.3d 567, 574 (6th Cir. 2017) (excusing exhaustion following delay "because [the state court judge] was indicted for several offenses … and sentenced to imprisonment himself" so was unavailable to resolve petitioner's case); and *Workman* v. *Tate*, 957 F.2d 1339, 1343 (6th Cir. 1992) (excusing exhaustion following an unexplained delay with no movement in three years, coupled with the State's failure to raise exhaustion until "just prior to the [merits] hearing").

District courts in the Sixth Circuit have understood these cases in the same way. Contra Pet.13. Hicks points to a solitary case in arguing otherwise. *Peyton* v. *Akers*, No. 23-cv-64-CHB, 2024 WL 1530804 (E.D. Ky. Apr. 9,

2024). But *Peyton* merely reiterates what *Johnson* itself made clear: *Johnson* did not change the "governing principles in the Sixth Circuit." 2024 WL 1530804, at *11. And *Peyton* didn't excuse exhaustion where "delay is all [petitioner] point[ed] to." *Id.* Like other recent cases in the Sixth Circuit, *Peyton* aligns with *Johnson*'s requirement of present ineffectiveness. See *Smith* v. *King*, No. 22-1747, 2022 WL 18803788, at *2 (6th Cir. Dec. 21, 2022); *Wilson* v. *McKee*, No. 15-11383, 2023 WL 3646056, at *1 (E.D. Mich. May 25, 2023); *Smith* v. *Artis*, No. 1:22-cv-162, 2022 WL 794848, at *3 (W.D. Mich. Mar. 16, 2022).

7. Likewise, the Seventh Circuit looks at inordinate delay as one factor among many to determine if a state process is currently ineffective. The circuit requires both an "inordinate" delay that is "attributable to the state" and that the delay "render[s] a state law-remedy ineffective or unavailable." *Lindsey* v. *Neal*, 138 F.4th 1039, 1043 (7th Cir. 2025) (citation omitted); accord *Johnson*, 27 F.4th at 394. Thus, in the face of delay, the Seventh Circuit "does not demand perfection," but just looks for "steady movement that shows [a State's] judicial processes *are* effective[]." *Lindsey*, 138 F.4th at 1043 (emphasis added).

Lindsey didn't say that recent action by the state court is universally meaningless after a certain amount of delay. Contra Pet.10. Rather, the court emphasized that it matters *what* that action is. The state movement in *Lindsey* wasn't a decision that moved the case along; it was a hearing on a motion, "which would be the first hearing the state court ha[d] held since the postconviction petition was filed [six years prior]." 138 F.4th at 1045. That kind of activity, when considered "with [the State's] prior conduct," (including numerous "false starts" leading

to further delay) led the court to conclude that "the State remain[ed] intent on dodging review rather than confronting the merits of" the petition. *Id.* at 1044-45. On top of that, the court was concerned by the state court's "selective attention to the parties' filings" as it had "ruled on each of the prosecution's motions within two weeks" and "ignored every motion [petitioner] filed pro se." *Id.* at 1043. This pattern was so egregious the court admonished the "two-tiered" process for its poor treatment of the pro se litigant. *Id.* at 1044.

Evans v. *Wills*, 66 F.4th 681 (7th Cir. 2023), demonstrates that the focus remains firmly on today in the Seventh Circuit. There, the court found that the circumstances following a 20-year delay revealed "a breakdown in the state's postconviction process" that made state remedies ineffective and excused exhaustion. *Id.* at 685. This excusal wasn't "just because twenty years ha[d] now passed," though: the court found "the state court docket show[ed] a general lack of action or urgency by all involved." *Id.* It observed that "the prosecutors seem[ed] intent on allowing the case to linger indefinitely" with no efforts "to move things along" from the state court. *Id.* Further, the court was "alarm[ed]" by how "the state trial court and the prosecutor's office apparently lacked a mechanism to break up the impasse or otherwise manage" the petition. *Id.* at 686. Altogether, the court's "focus [was] on why the standstill remains twenty years after [petitioner] began his pursuit of relief." *Id.* at 687.

Hicks's own cases considered recent progress and current circumstances in analyzing when delay makes state process ineffective. See *Dozie* v. *Cady*, 430 F.2d 637, 638 (7th Cir. 1970) (remanding to district court to determine reason for delay and further instructing that if there's movement in the state court proceeding, "the court

should dismiss the case"); *Lowe* v. *Duckworth*, 663 F.2d 42, 43-44 (7th Cir. 1981) (finding error where district court failed to analyze circumstances of delay before requiring exhaustion, but also dismissing as moot because the state court had acted on the petition following district court's decision); *Carter* v. *Buesgen*, 10 F.4th 715, 721 (7th Cir. 2021) (excusing exhaustion where "remedies are … inaccessible" and going back to state court is "guaranteed to fail" because there is "no indication that [the State] w[ould] take up [petitioner's] postconviction motion at any time in the foreseeable future").

8. At least in recent years, the Eighth Circuit appears to have rarely confronted the question here. Still, the few available precedents bear the same current-situation-focused hallmarks as the other circuits. The Eighth Circuit excuses exhaustion only "if resort to the state courts would be futile." *Armstrong* v. *Iowa*, 418 F.3d 924, 926 (8th Cir. 2005). Delay alone isn't "sufficient to merit federal intervention" absent "some additional factor" that demonstrates "highly exceptional circumstances" which render state remedies "ineffective." *Jones* v. *Solem*, 739 F.2d 329, 330-31 (8th Cir. 1984).

Rowing against this read, Hicks relies on *Mucie* v. *Missouri State Department of Corrections*, 543 F.2d 633 (8th Cir. 1976), for the notion that delay can excuse exhaustion even in light of "state-court movement." Pet.15. Yet Hicks reads too much into *Mucie*. *Mucie* involved a doctor convicted of manslaughter-abortion who sought to vacate his conviction after the Supreme Court's decision in *Roe*. 543 F.2d at 634-35. In his direct appeal, the state court had already held that petitioner "lacked standing to challenge the constitutionality of the statute" he was convicted under. *Id.* at 635. The court found "there [was] nothing which indicates that this unusual application

of [state] law on standing ha[d] changed." *Id.* at 636. This "unusual posture" created a situation where "further exhaustion was unnecessary" given that the state court already had "one full and fair opportunity to decide [the] question." *Id.* Thus, *Mucie* is a case tightly constrained by its facts. It didn't say that delays alone can wipe out any hope of state action becoming effective again.

Other cases contemporaneous to *Mucie* demonstrate the Eighth Circuit's approach in more "ordinary" cases. *Seemiller* v. *Wyrick*, 663 F.2d 805, 806 (8th Cir. 1981), for example, asked "whether delay in the state court proceedings should excuse the exhaustion requirement." Although the court noted "the slowness of the state court proceedings," it didn't excuse exhaustion because, "[a]fter the district court entered its decision," there was "real progress … in the state proceedings." *Id.* at 807. And looking at the current circumstances, the court explained that "although there has been delay," it "ha[d] no reason to believe that the state court will continue to delay." *Id.*; see also *Thompson* v. *White*, 591 F.2d 441, 443 (8th Cir. 1979) (excusing exhaustion despite "extreme and unexplained" delay because the "exhaustion barrier has now been removed," and the court has "no reason to believe that the state courts will delay" again).

9. The Ninth Circuit applies the same now-familiar test. After a delay, if "a meritorious claim will continue to go unaddressed," the court will excuse exhaustion based on an ongoing "inability to obtain timely resolution." *Alfaro* v. *Johnson*, 862 F.3d 1176, 1182 (9th Cir. 2017). Whether there's a present inability is a fact-centric analysis, leading to "narrow" decisions. *Phillips* v. *Vasquez*, 56 F.3d 1030, 1037 (9th Cir. 1995). Indeed, the court has at times cautioned that, beyond the facts of a given case, it cannot "intimate any view as to what other

circumstances, if any," might excuse exhaustion. *Id.* *Phillips* serves a good example though of when present circumstances should excuse exhaustion. The court there excused exhaustion after a fifteen-year delay "with no end in sight." *Id.* at 1038; contrast with *Jackson* v. *Jackson*, No. 24-6266, 2025 WL 2741643, at *1 (9th Cir. Sept. 26, 2025) (requiring exhaustion despite petition having been pending for 13 months because any delay was not "undue," and "the available record reflect[ed] that the state court was addressing pending motions in a regular and timely fashion").

10. Recognizing how circumstance-specific these cases are, the Tenth Circuit has declared that it "cannot, of course, announce a bright line rule." *Harris* v. *Champion*, 15 F.3d 1538, 1555 (10th Cir. 1994). After all, "it is necessary to know the facts and circumstances surrounding the delay in order to determine whether the State is providing the petitioner an effective appeal." *Id.* So while "an obvious and massive breakdown in the procedural development of [an] appeal" might excuse exhaustion in one case, "circumstances may warrant refusing to excuse exhaustion even after a delay" in another. *Id.* at 1546. At bottom, the analysis asks whether "state procedural snarls or obstacles preclude an effective state remedy." *Id.* at 1555 (citation omitted); see also *Jones* v. *Crouse*, 360 F.2d 157, 158 (10th Cir. 1966); *Smith* v. *Kansas*, 356 F.2d 654, 657 (10th Cir. 1966).

Hicks claims the Tenth Circuit's approach is "idiosyncratic," Pet.18, but his objection reinforces how exhaustion cases often feature extraordinary facts and offer little comparative value. Indeed, Hicks's barrage of unpublished Tenth Circuit decisions demonstrates how the court takes a fact-focused approach that asks whether state courts are currently effective. See *White* v.

McKinna, No. 97-1370, 1998 WL 396561, at *2 (10th Cir. July 16, 1998) (requiring exhaustion and finding that petitioner was responsible for delay and had "an available avenue for relief in state court"); *Body* v. *Watkins*, 51 F. App'x 807, 811-12 (10th Cir. 2002) (requiring exhaustion and finding that state courts had not "in any way precluded" petitioner's case from proceeding and that "additional state remedies" existed); *Coleman* v. *Watkins*, 52 F. App'x 442, 444 (10th Cir. 2002) (requiring exhaustion and finding that "delay … did not render th[e] process ineffective" because the delay didn't reflect any shortcoming in state process); *Vreeland* v. *Davis*, 543 F. App'x 739, 742 (10th Cir. 2013) (noting that exhaustion shouldn't be excused "[w]here the delay has come to a close" and the court believes the state process will now "run its course").

11. Finally, turn to the Eleventh Circuit. That circuit has "adopted as precedent" the Fifth Circuit's jurisprudence prior to October 1, 1981. *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1211 (11th Cir. 1981). So the analysis starts with that circuit's precedent, which, as discussed, involves a circumstance-driven approach asking whether return to state courts would be effective.

The Eleventh Circuit has stayed faithful to the Fifth Circuit's approach. Faced with delay, the Eleventh Circuit reviews the "peculiar circumstances" of a case to determine if exhaustion should be excused. *Cook* v. *Fla. Parole and Probation Comm'n*, 749 F.2d 678, 680 (11th Cir. 1985). And delay alone won't excuse exhaustion. *Id.* *Cook* demonstrates this idea in action: there, a long delay didn't excuse exhaustion where the state wasn't "merely dragging its feet, but [was] trying to hold a fair hearing" in the case. *Id.* The holdup was that petitioner was "incarcerated" in another State and thus "unavailable for

a hearing." *Id.* The court would excuse exhaustion only if the State failed to act within 60 days of waiving his physical presence of the hearing. *Id.*

The Eleventh Circuit thus follows the usual pattern and determines on a case-by-case basis if "returning to state court would be futile." *Hollis* v. *Davis*, 941 F.2d 1471, 1475 (11th Cir. 1991). All of a case's "particular circumstances" go into this analysis, and exhaustion is required if the court believes a petitioner will "receive an expeditious handling of" their claims. *Keinz* v. *Crosby*, No. 05-12162, 2006 WL 408686, at *2 (11th Cir. Feb. 23, 2006). Yet if the circumstances of a delay show that "state avenues towards relief are absent or ineffective," "exhaustion should be excused." *Thomas* v. *Macon SP Warden*, No. 22,-13358, 2024 WL 1092510, at *2 (11th Cir. Mar. 13, 2024); see also *Slater* v. *Chatman*, 147 F. App'x 959, 960 (11th Cir. 2005) ("caution[ing] against such long delays" but requiring exhaustion because "state courts are now moving forward," and there are no "circumstances … that render" state processes "ineffective" (citation omitted)) .

* * *

So no time limit emerges, and no circuit wields a temporal sword to cut off state involvement. Instead, all the circuits look to *all relevant* facts, recent action in the state courts included.

II. This Case Is A Poor Vehicle.

Hicks's case would also be a poor vehicle to resolve the question presented. The facts here are complex and often underdeveloped. Likewise, the district court's orders contain legal errors that complicate the case. And Hicks's case is ongoing. If this Court were to act, it would interrupt ongoing state proceedings—and could even

create a situation in which state proceedings are unwound by retroactive federal intervention. The Court shouldn't take up such a thorny case. Even more when the best Hicks can muster when it comes to importance are broad statements about the importance of habeas in *general*. Pet.24-25.

Beyond these essentials, three broad reasons make this case a uniquely poor vehicle.

First, this case is factually an "outlier." Pet.App.17a; see also Pet.31 (describing how Hicks is "uniquely position[ed]"). It has gone through multiple phases starting with a long stretch of silence. Then, once the case started moving again, Hicks stalled and went through numerous attorneys. Each of those attorneys was unable to represent Hicks in the way that he wanted, and he refused to cooperate with them. He insists he needs a complete record of his trial to secure relief, but he has resisted efforts to obtain that record. Blame, then, will be hard to assign—and Hicks concedes blame is relevant. See Pet.28. Perhaps because of these concededly odd facts, Hicks is not even clear about what questions he intends his petition to present. See Pet.31 (suggesting the petition would "also allow" the Court to "delve into [a] broader issue" about delay). And the unique context here might explain why, as best the State can tell, no petition for certiorari has ever raised a question like the one Hicks means to present here.

Second, the Fourth Circuit spotted significant procedural problems with the petition.

For one, Hicks's "habeas petition was … untimely when filed in the district court" because his Rule 35(b) motion was untimely and thus did not toll AEDPA's limitations window. Pet.App.14a n.7. By refusing to

dismiss despite the State's motion raising this issue, the district court "ignor[ed] an express decision from the West Virginia Supreme Court issued in this case, on this question, and on a matter of state law." Pet.App.15a n.7. As the Fourth Circuit said, "[t]hat is not how federal courts typically operate." Pet.App.15a n.7. The Fourth Circuit decided not to consider that alternative basis to affirm, but the problem remains front and center. See *Schering Corp.* v. *Ill. Antibiotics Co.*, 89 F.3d 357, 358 (7th Cir. 1996) ("[T]he failure of an appellee to have raised all possible alternative grounds for affirming the district court's original decision, unlike an appellant's failure to raise all possible grounds for reversal, should not operate as a waiver.").

For another, the district court's certificate of appealability was "defective" because it failed to identify "a possible denial of a constitutional right" as required by Section 2253(c)(3). Pet.App.13a. And for the last issue, the certificate mentioned only one of the two issues Hicks argued on appeal (delay, not bias). Pet.App.11a. This issue remains alive, too. *Schering Corp.*, 89 F.3d at 358.

Finally, the Fourth Circuit also noted that there was a "question of whether a district court judge may grant a [certificate of appealability]" in the first place. Pet.App.10a. But a properly issued certificate of appealability is a jurisdictional requirement, *Gonzalez* v. *Thaler*, 565 U.S. 134, 142 (2012)—and no "circuit justice or judge" has issued one here, 28 U.S.C. § 2253(c)(1); but see *Thaler*, 565 U.S. at 143 n.5 (noting lower courts have construed the provision to extend to district-court judges). So the statute suggests that appellate jurisdiction never attached to Hicks's challenge at all.

Third, Hicks's state case is ongoing. Following the circuit court's dismissal, Hicks appealed to the state

supreme court on the grounds that the dismissal lacked the requisite findings of fact and conclusions of law. See Pet. Br., *Hicks* v. *Frame*, No. 25-351 (W. Va. Sept. 12, 2025). The State responded and agreed that the circuit court's order was insufficient. See Resp. Br., *id.* (Oct. 27, 2025). So the State requested the appellate court reverse and remand with directions that the circuit court enter a sufficient order within 30 days. *Id.* Further, the State proposed using an alleged copy of the transcript in its possession, assuming that Hicks agrees it can serve in place of the official one he possesses. *Id.* With its response, the State filed a motion requesting the state supreme court give the case expedited consideration. Mot. for Expedited Consideration, *id.* (Oct. 27, 2025). Briefing then closed on November 14, 2025. *See* Reply Br., *id.* (Nov. 14, 2025). Then, on February 24, 2026, the state supreme court granted the State's motion and informed the parties that the appeal would "be considered on an expedited basis." *See* Order, *id.* (Feb. 24, 2026). The case is awaiting a decision.

Any one of these reasons alone should give the Court pause. Together, they demonstrate that Hicks's case is wholly unsuitable for addressing the question presented.

III. The Fourth Circuit Correctly Applied AEDPA.

Finally, the Court should deny certiorari because the Fourth Circuit got this case right. Section 2254(b)(1)(B)(ii) requires a court to determine whether "circumstances exist that render [state] process ineffective." So while "past ineffectiveness" can certainly inform the way that a court weighs the present circumstances, the question ultimately is whether the state courts are "*presently* ineffective." Pet.App.17a.

Here, the Fourth Circuit found that recent attempts by the state processes showed West Virginia's courts are now "addressing Hicks's case." Pet.App.17a. The Fourth Circuit said this wasn't just docket trickery, either. It believed the movement was meaningful and showed that the "underlying causes of West Virginia's delay" no longer exist. Pet.App.17a. In light of those circumstances, the court found "no reason to think that such a delay will happen again." Pet.App.17a. Hicks is wrong to suggest that the Fourth Circuit was swayed by any movement whatsoever. It wasn't. The Fourth Circuit based its decision on its finding that the movement was significant enough to make the court "confident and hopeful that [the State] will not continue to fail [Hicks] moving forward." Pet.App.18a.

The Fourth Circuit was right to consider all the circumstances. As it explained, "past delay alone is insufficient to excuse exhaustion." Pet.App.18a. That conclusion is in line with the other circuits, as "no federal court … [has] ever excused a state prisoner's failure to exhaust merely due to delay." Pet.App.18a-19a (quoting *Johnson*, 27 F.4th at 391). The "hard questions" the court left for another day—questions regarding length of delay, blame, and diligence—represent the complex factual nature of Hicks's case. See Pet.App.18a n.8. The court's point on these aspects of the case was simply that, absent compelling and recent state court action, the court would face the much more difficult task of determining whether the state court process was still ineffective based on its weighing of the other difficult facts here. That's why it cited a series of cases that involved such fact-bound determinations. See Pet.App.18a n. 8 (citing *Morton*, 110 F.4th at 601; *Johnson*, 27 F.4th at 391; *Evans*, 66 F.4th at 682; and *Welch* v. *Lund*, 616 F.3d 756, 760 (8th Cir. 2010)).

At the end of the day, AEDPA's text requires a court to find that a state's processes *are* ineffective—not *were* ineffective—before it can excuse exhaustion. The Fourth Circuit did not find that standard met, so it rightly said Hicks must continue on in state court.

CONCLUSION

For these reasons, the Court should deny the petition.

Respectfully submitted.

JOHN B. MCCUSKEY
Attorney General

MICHAEL R. WILLIAMS
Solicitor General
Counsel of Record

OFFICE OF THE
WEST VIRGINIA
ATTORNEY GENERAL
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25305
mwilliams@wvago.gov
(304) 558-2021

CALEB A. SECKMAN
Assistant Solicitor General

Counsel for Respondent Jonathan Frame