*** CAPITAL CASE ***

No. 24-517

In the Supreme Court of the United States

LANCE SHOCKLEY,

Petitioner,

v.

DAVID VANDERGRIFF,

Respondent.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The State's opposition fails to confront the fundamental problem at the heart of this case: The courts of appeals are treating identical applications to appeal under 28 U.S.C. § 2253(c) differently. The State attempts to downplay this stark disparity by recasting it as merely a difference in administrative procedures. But that characterization cannot be reconciled with the statute's text, this Court's precedent, or basic fairness. *See infra* (I).

The State does not dispute the unfairness of the geographic disparities or that judicial resources are being wasted on this threshold inquiry. The State even agrees that the Question Presented often recurs. BIO 9. Indeed, the Eleventh Circuit denied a COA application over a reasoned dissent just weeks ago, and the Fifth Circuit published an opinion denying a COA over a reasoned dissent the day the petition was filed. *See infra* (II).

And the State's opposition says literally nothing about this Court's interpretation of the COA standard in cases like *Buck* and *Miller–El*. *See* BIO (not even citing these cases). Most telling, the State offers zero response to petitioner's argument that his *Strickland* claims meet the substantive standard entitling him to a COA. *Compare* Pet. 30-34 (arguing petitioner "has made a 'substantial showing of the denial of a constitutional right,' such that he is entitled to appeal" (quoting 28 U.S.C. § 2253(c)(2)) *with* BIO (not disputing this). *See infra* (III).

The split is clear, the issue is cleanly presented, and further percolation will only perpetuate the current unfairness. This Court should grant review.

ARGUMENT

I. The State Confuses Substance For Procedure.

As the Petition explained, the circuits are deeply and intractably divided over how they would answer the Question Presented. The Third, Fourth, Seventh, and Ninth Circuits would answer the question: "Yes." In each, a certificate of appealability must issue when any circuit judge votes to grant one. Pet. 21. Meanwhile, the Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits would answer the Question Presented: "No." Those courts of appeals regularly deny COAs even over the reasoned dissent of one *or more* colleagues who would grant review. *Id.* 21-25.

The State's primary defense of the Eighth Circuit's side of the split confuses a disagreement over the substantive legal standard as merely a matter of differing administrative procedures. The State does not see any issue with the fact that a prisoner on death row was denied an appeal in the Eighth Circuit even though the merits of his claims would have been heard by the Third, Fourth, Seventh, and Ninth Circuits based on the same panel vote.

The State's argument cannot be squared with the statutory text and structure, and it contravenes this Court's precedent.

A. Congress Authorized Any "Circuit Justice Or Judge" To Issue A COA.

The plain text of 28 U.S.C. § 2253(c)(1) is unambiguous: A certificate of appealability may be issued by "a circuit justice or judge." Congress's use of the singular article "a" plainly indicates that any

single circuit judge's determination is sufficient. The State's reading improperly adds requirements to the statute that Congress chose not to include. In the State's view, the statute's reference to "a circuit justice or judge" somehow means "a majority of the circuit judges on a panel" or "the court of appeals collectively." But Congress said no such thing.

Had Congress intended to require multiple judges or a panel majority to issue a COA, it knew how to say so. For instance, Congress requires that in general, only a "majority of the number of judges" authorized to decide a particular case or controversy may decide an appeal. 28 U.S.C. § 46(b)–(d). Congress also requires that en banc review must be "ordered by a majority of the circuit judges of the circuit who are in regular active service." *Id.* § 46(c). "A *court of appeals* shall decide whether to grant a petition for rehearing," *id.* § 2266(c)(1)(B)(i) (emphasis added), and only a "*court of appeals* may ... order a temporary stay or suspension" of agency action, *id.* § 2349(b) (emphasis added). So too, "a majority" of district court judges must decide certain kinds of claims by panel—redistricting and voting rights cases, for example. *Id.* § 2284; 52 U.S.C. § 10304. Congress chose a different path for state prisoners seeking to appeal the denial of their federal habeas claims, providing that any "circuit justice or judge" may grant the application for COA. 28 U.S.C. § 2253(c)(1).

That decision makes sense. The State offers no reason why Congress would have intended to allow different circuits to adopt different standards for the denial of COAs, guaranteeing that identically situated defendants (even capital defendants) would have dramatically different appeal rights depending on the

accident of geography. And the State cites no other instance in which Congress has authorized such disparities regarding even remotely similar matters.

B. The State's Contrary Argument Contravenes This Court's Precedent.

As just explained, Congress intended the COA requirement to function as a threshold screening device, not a merits determination. Thus, this Court has held that the COA standard poses a very limited threshold question: Could any reasonable jurist disagree about whether the district court's ruling is worthy of appellate consideration? *Buck v. Davis*, 580 U.S. 100, 115-16 (2017). A claim "can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Miller–El v. Cockrell*, 537 U.S. 322, 338 (2003).

This Court has consistently warned against collapsing this threshold question with the merits. In *Miller–El*, the Court emphasized that "[t]his threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it." 537 U.S. at 336. In *Buck*, the Court explained yet again that "when a reviewing court ... first decides the merits of an appeal, then justifies its denial of a COA based on its adjudication of the actual merits, it has placed too heavy a burden on the prisoner *at the COA stage*." 580 U.S. at 116-17 (cleaned up).

Johnson v. Vandergriff illustrates how the Eighth Circuit's approach contravenes this precedent. *See* Pet. 22-23, 26. In that case, the en banc Eighth Circuit vacated a panel decision that had granted a COA

application, then conducted an extended merits analysis to explain why *three* dissenting judges were, in the majority's view, being unreasonable. 2023 WL 4851623, at *1-3 (8th Cir. July 29, 2023) (Gruender, J., joined by Colloton, Benton, Shepherd, Grasz, Stras, and Kobes, JJ., concurring "in the *en banc* court's decision to deny the application," and "writ[ing] separately" to argue the "[t]hree judges" in dissent who "believe[d] that Johnson's application for a certificate of appealability should have been granted" were wrong because "the Supreme Court of Missouri's decision was [not] contrary to clearly established federal law," "an unreasonable application of federal law," or "an unreasonable determination of the facts" under AEDPA), *cert. denied*, 143 S. Ct. 2551 (2023).

In *Jordan v. Fisher*, the Fifth Circuit panel engaged in a similarly detailed merits analysis to explain why Judge James L. Dennis was unreasonable for believing that the COA applicant's case warranted full appellate review. *See* 576 U.S. 1071, 1076 (2015) (Sotomayor, J., joined by Ginsburg and Kagan, JJ., dissenting from the denial of certiorari). As Justice Sotomayor observed in both instances, when judges actually "debate the merits of [a] habeas petition," that "'alone might be thought to indicate that reasonable minds could differ—*had differed*—on the resolution'" of the claim. *Johnson v. Vandergriff*, 143 S. Ct. at 2553 (Sotomayor, J., joined by Kagan and Jackson, JJ., dissenting from the denial of application for stay and denial of certiorari) (quoting *Jordan*, 576 U.S. at 1076) (cleaned up).

Remarkably, the State does not dispute any of this. The State neither cites nor otherwise addresses the views of multiple current members of this Court,

as expressed in *Johnson v. Vandergriff* and *Jordan v. Fisher*. The State doesn't even acknowledge, much less address, *Buck* or *Miller–El*. Nor does the State mention this Court's description of the substantive standard required for "a circuit justice or judge" to grant a COA.

The cases the State relies on are not to the contrary. *See* BIO 7-8 (relying on *In re Burwell*, 350 U.S. 521 (1956), and *Hohn v. United States*, 524 U.S. 236 (1998)). The question isn't how many judges review a COA application (*Burwell*) or whether this Court has jurisdiction over a "case" when a court of appeals denies such application (*Hohn*). Instead, the Question Presented concerns what *substantive* standard applies, regardless of the number of judges the circuit appoints to consider COA applications. In neither case was that question presented or briefed, and neither decision purports to answer it.

In *Burwell*, the Court was explicit about its limited holding in its curt opinion. Addressing a question the Ninth Circuit certified to this Court, the Court held that it was "for the Court of Appeals to determine whether [a certificate of probable cause] application to the court is to be considered by a panel of the Court of Appeals, by one of its judges, or in some other way deemed appropriate by the Court of Appeals within the scope of its powers." 350 U.S. at 522. The Court expressly distinguished the "*procedure* for the Court of Appeals to follow for the entertainment of such applications" from "their *merits*." *Ibid.* (emphasis added). Thus, the Court held that it was for the Ninth Circuit to determine such procedures so long as the court stayed "within the scope of its powers," without saying anything at all

about what the scope of those powers are. *Ibid.*; *see also ibid.* (holding that court of appeals' procedural decision "is not reviewable," so "long as that court keeps within the bounds of judicial discretion," without saying anything about what the bounds of that discretion are). Certainly, the Court did not authorize circuits to substitute their own standard for the one prescribed by Congress.[1]

And in *Hohn*, this Court addressed only whether it has jurisdiction to review COA *denials*. Just "three months" after Congress enacted the current COA statute as part of the Antiterrorism and Effective Death Penalty Act of 1996, a panel of the Eighth Circuit denied Hohn's application for COA. 524 U.S. at 240. "Hohn petitioned this Court for a writ of certiorari to review the denial of the certificate," and the United States acquiesced, asking the Court "to vacate the judgment and remand so the Court of Appeals could reconsider in light of [its] concession" of error. *Ibid.* But the Court could not do so, "of course," without "jurisdiction over the case." *Id.* at 240-41. The Court ultimately held that it has "jurisdiction under [28 U.S.C.] § 1254(1) to review denials of applications for certificates of appealability by a circuit judge or a panel of a court of appeals," vacated the Eighth Circuit's judgment denying a COA, and "remanded for further consideration." *Id.* at 253.

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[1] The State notes that the federal rules authorize courts "to promulgate rules about certificates of appealability," BIO 7-8 (citing Fed. R. App. P. 22(b)(2)), but the federal rules cannot override Congress's text. *See Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438, 445-46 (1946).

Hohn said nothing about what *standard* should govern whether a COA should issue. According to the State, *Hohn* provides that "the decision to *issue* a certificate made by an individual judge is an 'action of the court itself,' and remains subject to correction by the entire court." BIO 8 (quoting *Hohn*, 524 U.S. at 245) (emphasis added). Even if that were right, it does not resolve the standard to be applied by the reviewing panel. For example, a single judge might wrongly deny a COA and a panel reverse because the application meets the legal standard. Or a panel might deny an application over dissent and the en banc court could reverse for failing to apply the proper any-circuit-judge rule.

In any event, the State's reading of *Hohn* is wrong. Again, *Hohn* did not involve a COA that had been granted, *contra* BIO 8; the petition was from the *denial* of a COA.[2] So resolving the Question Presented in petitioner's favor would be entirely consistent with *Hohn*. There, as here, the COA was denied by an Eighth Circuit panel over dissent. *See Hohn*, 524 U.S. at 240. And there, as here, en banc review was denied over the votes of multiple judges. *See ibid.* ("four judges noted they would have granted the suggestion" for rehearing en banc). On remand, the Eighth Circuit did not reassess whether a COA should issue; it went straight to the merits of Hohn's claim. *See Hohn v.*

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[2] The State notes that in *Anderson v. Collins*, 495 U.S. 943 (1990) (mem.), this Court denied a certificate of probable cause even though Justices Brennan and Marshall would have granted the application. *See* BIO 8. The question here was not presented in that case and the Court's one-sentence order does not resolve it. *Cf. Hopfmann v. Connolly*, 471 U.S. 459, 461 (1985) (denial of certiorari has no precedential effect).

United States, 193 F.3d 921, 923 (8th Cir. 1999). This Court thus did not have the opportunity in that case to say anything about the COA standard at a later stage, let alone anything that would resolve the Question Presented here. Had the court of appeals denied the COA on remand in *Hohn*, rather than jumping straight into the merits, this Court very well might have granted a subsequent petition and held that the Eighth Circuit was applying "too demanding a standard." *See, e.g.*, *Miller–El*, 537 U.S. at 341; *see also, e.g.*, *Buck*, 580 U.S. at 122-26; *Johnson*, 143 S. Ct. at 2553 (Sotomayor, J., joined by Kagan and Jackson, JJ., dissenting) ("To start, the Eighth Circuit was too demanding in assessing whether reasonable jurists could debate the merits of Johnson's habeas petition.").

II. The Circuit Split Is Uncontested And Intolerable.

The State has no response to the unfairness of the circuit split. Merely because he is a Missouri prisoner, petitioner must remain on death row without any federal appellate review of substantial constitutional claims, even though he would have been guaranteed an appeal if he were imprisoned just one state over in Illinois, given Judge Kelly's vote. *See* Pet. 20. This fundamentally unfair circuit disparity calls for this Court's intervention. *See* Sup. Ct. R. 10(a).

Nor does the State respond to the fact that the Eighth Circuit's approach to the Question Presented results in an utter waste of judicial resources. *See* NAPD *Amicus* Br. 7. In the Eighth Circuit alone, COA denials regularly generate multiple rounds of litigation: initial panel decisions, followed by petitions

for panel rehearing and rehearing en banc, often with multiple dissents that must be written and responded to. *See* Pet. 22-23; *see also*, *e.g.*, *Hohn*, 524 U.S. at 240 (Eighth Circuit denied COA over reasoned panel dissent, then denied en banc review over four judges dissenting votes, and then ultimately had to consider the merits anyway); *Johnson*, 143 S. Ct. at 2553 n.2 (Sotomayor, J., joined by Kagan and Jackson, JJ., dissenting) ("It is more than unusual that an en banc Eighth Circuit concluded that a *grant* of a COA by a panel met [the] high standard" for en banc review (emphasis added)). Answering the Question Presented in petitioner's favor would not only be more consistent with the statutory text and the Court's precedent; it also would eliminate this inefficiency.

The State even agrees this issue frequently recurs. *See* BIO 9. Indeed, the Eleventh Circuit denied a COA over the reasoned dissent of Judge Adalberto Jordan just a few weeks ago. *Sneed v. Warden, Holman Corr. Facility*, No. 22-13328, slip op. 1-9 (11th Cir. Nov. 26, 2024), *available at* 2024 U.S. App. LEXIS 30185. And the same day the petition was filed, the Fifth Circuit denied a COA application over the reasoned dissent of Judge Stephen Higginson—in a published opinion spanning several pages of the federal reporter. *Ricks v. Lumpkin*, 120 F.4th 1287, 1289-93 (5th Cir. 2024). Clearly, this is a persistent issue calling for this Court's intervention.

III. This Case Presents An Ideal Vehicle To Decide An Important Issue.

The State half-heartedly suggests this case isn't the right vehicle because it "is a capital case that should be decided expeditiously." BIO 9. This Court

takes the opposite view. The public has a particularly strong interest in ensuring that death sentences are constitutionally imposed. *See Buck*, 580 U.S. at 123-26 ("the State's interest in finality deserves little weight" when "a capital sentence [is] obtained" unconstitutionally); *see also id.* at 125 ("Especially in light of the capital nature of this case," among other reasons, "Buck has presented issues that 'deserve encouragement to proceed further.'") (quoting *Buck v. Thaler*, 565 U.S. 1022, 1030 (2011) (Sotomayor, J., joined by Kagan, J., dissenting from denial of certiorari)); *Pippin v. Dretke*, 434 F.3d 782, 787 (5th Cir. 2005) ("[A]ny doubt as to whether a COA should issue in a death-penalty case must be resolved in favor of the petitioner.").

In fact, this case presents an ideal vehicle. The State does not dispute that the question is outcome determinative of petitioner's right to an appeal. And unlike oppositions to prior petitions raising this question, the State makes no effort to defend the denial of petitioner's COA application on the merits. *Compare Gordon v. May*, No. 23-629, BIO 13-15 (U.S. Feb. 29, 2024) (arguing Gordon's case was a poor vehicle to decide the Question Presented because "Gordon's claim for habeas relief is meritless") *with* BIO 6-9 (not even contesting that petitioner's claims meet the substantive COA standard) *and* Pet. 30-34 (arguing that petitioner "has made a 'substantial showing of the denial of a constitutional right,' such that he is entitled to appeal" his *Strickland* claims (quoting 28 U.S.C. § 2253(c)(2)).

CONCLUSION

This Court should grant the petition or enter an order granting petitioner a certificate of appealability.

Respectfully submitted,

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