No. 16-931

IN THE

Supreme Court of the United States

JEFFREY WOODS, WARDEN,

Petitioner,

v.

CAMERON HOLBROOK,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether AEDPA's one-year limitations period tolls during state collateral review for the time between an adverse decision by a lower state court and the deadline for filing of an appeal when no timely appeal is filed.

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INTRODUCTION

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) imposes a one-year statute of limitations for federal habeas petitions. 28 U.S.C. § 2244(d)(1). It tolls that limitations period while a state postconviction motion is "pending." *Id.* § 2244(d)(2). As this Court has explained, a postconviction motion is "pending" until it "has achieved final resolution through the State's post-conviction procedures." *Carey* v. *Saffold*, 536 U.S. 214, 220 (2002).

It is easy enough to determine when a postconviction motion achieves "final resolution" if the motion winds its way through every level of the state appeals process. If, however, a habeas petitioner

misses a state appellate deadline, the finality analysis becomes (slightly) more complex. In the decision below, a unanimous Sixth Circuit panel held that the state review process becomes final—and a state postconviction motion ceases to be "pending" for tolling purposes—after the time for appealing the lower state court's decision expires. Here, that appeal period was 56 days. *See* Mich. Ct. R. 7.302(C)(2) (2012). Because the AEDPA limitations period was tolled for those 56 days, Respondent's federal habeas petition was timely. *See* Pet. App. 16a.

The State of Michigan, representing Petitioner, asks this Court to review the Sixth Circuit's decision. Its petition for certiorari should be denied, for three reasons.

First, there is no division among the lower courts about the question presented. To the contrary, there is widespread unanimity. The State concedes that the Third, Fourth, Eighth, Tenth, and Eleventh Circuits have held in published opinions that AEDPA tolling applies during the time for filing an appeal in state court, even if no timely appeal is ultimately filed. Pet. 11-14. The First and Second Circuits have indicated that they agree. That means that at least six, and up to eight, courts of appeals have come to the same conclusion—without a single dissent.

Second, the decision below is consistent with this Court's precedents and with AEDPA itself. Although the State attempts to manufacture a conflict with *Evans* v. *Chavis*, 546 U.S. 189 (2006), *Chavis* involved a distinct question. There, the Court held that AEDPA's statute of limitations was not tolled

for the *entire* three-year period between a lower state court decision and an untimely notice of appeal. *Id.* at 197-198. It did not indicate, or need to consider, whether tolling applied to the small *subset* of that period in which the habeas petitioner could have filed a timely notice of appeal.

The State fares no better with the text of the statute. The ordinary meaning of "pending" is "in continuance," which describes a state postconviction motion even when it is not actively "under court consideration." *Saffold*, 536 U.S. at 219 (internal quotation marks omitted). The dispositive question is whether "state avenues for relief remain open," or whether the doors to the state courthouse have been firmly closed. *Lawrence* v. *Florida*, 549 U.S. 327, 332 (2007). That statutory construction also advances AEDPA's goal of promoting the exhaustion of state remedies: It discourages a habeas petitioner from resorting to federal court while recourse in state court remains available.

Third, even if the Court were interested in the splitless question presented, this case would be a poor vehicle for addressing it. The State never bothered to respond to Respondent's counseled brief below; it rested on an earlier response to a short *pro se* filing. As a result, it waived one of the two textual arguments that it now advances in its petition. That waiver would limit this Court's options if it were to grant review.

The petition should be denied.

STATEMENT

A. AEDPA Tolling

AEDPA imposes a one-year limitations period for the filing of a federal habeas petition. 28 U.S.C. § 2244(d)(1). As relevant here, that limitations period runs from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." *Id.* § 2244(d)(1)(A).

If a habeas petitioner files a postconviction motion in state court, however, the AEDPA clock stops running. The one-year limitations period is tolled for "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." *Id.* § 2244(d)(2).

B. State Proceedings

In 2008, Respondent was convicted of first-degree murder and possession of a firearm during the commission of a felony. Pet. App. 37a. On direct appeal, the Michigan Court of Appeals affirmed the conviction. *Id.* The Michigan Supreme Court denied an application for leave to appeal. *Id.* at 35a. Respondent's conviction became final on August 23, 2010, when the time expired for filing a petition for a writ of certiorari. *Id.* at 3a. The AEDPA limitations period began running on that date.

On May 19, 2011—269 days later—Respondent filed a motion for relief from judgment in the Michigan trial court. *Id.* It is undisputed that the motion paused the AEDPA clock. The Michigan trial court denied Respondent's motion, *id.* at 34a, and on November 8, 2012, the Michigan Court of Appeals

denied an application for leave to appeal, *id.* at 27a. The 56-day period for filing an application for leave to appeal with the Michigan Supreme Court expired on January 3, 2013, but Respondent filed his application four days late. *Id.* at 3a; *see* Mich. Ct. R. 7.302(C)(2) (2012). The Michigan Supreme Court rejected the application as untimely. Pet. App. 3a.

C. Federal Habeas Proceedings

On March 18, 2013—74 days after the time for seeking review in the Michigan Supreme Court had expired, and 130 days after the date of the Michigan Court of Appeals' denial—Respondent filed a federal habeas petition in the United States District Court for the Eastern District of Michigan. *Id.* at 3a-4a. The habeas petition raised a variety of claims, including ineffective assistance of trial and appellate counsel. *Id.* at 4a.

The State moved for summary judgment and dismissal. *Id.* It contended that the petition was time-barred because the AEDPA clock had resumed ticking upon the Michigan Court of Appeals' denial of relief, meaning that 399 days (269 plus 130) had passed. *Id.* If the AEDPA clock had started upon expiration of the 56-day period for seeking review in the Michigan Supreme Court, by contrast, Respondent's petition was filed after 343 days (269 plus 74) and was timely. The District Court sided with the State and dismissed Respondent's habeas petition. *Id.* at 25a.

The Sixth Circuit unanimously reversed. *Id.* at 16a. It began by identifying the dispositive question: "When is a State post-conviction motion 'pending' for purposes of tolling the limitations period?" *Id.* at 7a. For the answer, the court looked to a trio of this

Court's decisions, starting with *Saffold*, 536 U.S. 214. *Saffold*, it explained, had "concluded that tolling extended 'until the application has achieved final resolution through the State's post-conviction procedures.'" Pet. App. 8a (quoting *Saffold*, 536 U.S. at 220). Next, the Sixth Circuit analyzed *Chavis*, 546 U.S. 189, observing that *Chavis* had rejected tolling only for "the entire unexplained three-year delay" between an adverse state decision and an untimely state appeal. Pet. App. 9a. Finally, the court found guidance in *Gonzalez* v. *Thaler*, 132 S. Ct. 641 (2012), which had instructed "that a judgment does not become 'final' on direct appeal until the 'time for seeking review with the State's highest court expire[s].'" Pet. App. 12a-13a (brackets in original) (quoting *Gonzalez*, 132 S. Ct. at 653-654).

In light of those precedents, the Sixth Circuit concluded that Respondent's state postconviction motion was "pending" and AEDPA's limitations period was tolled "during the period in which [Respondent] could have, but did not, appeal the Michigan Court of Appeals' denial of his motion for post-conviction relief." *Id.* at 16a. That conclusion was consistent with decisions from the First, Third, and Eighth Circuits, *id.* at 11a-12a, and with Michigan's own finality rules, *id.* at 13a-14a. It would also encourage the exhaustion of remedies and would provide certainty about whether the limitations period was running at any given moment—two important objectives of AEDPA. *See id.* at 13a-15a.

Because it agreed with Respondent on the statutory-tolling question, the Sixth Circuit declined to decide Respondent's equitable-tolling argument. *Id.* at 7a.

The State sought rehearing en banc, but no judge called for a vote. *Id.* at 56a. The Sixth Circuit therefore denied rehearing, without dissent. *Id.* This petition followed.

ARGUMENT

The question presented does not merit this Court's review. As the petition freely admits, every court of appeals to have considered the question in a published opinion has arrived at the same conclusion: AEDPA's one-year limitations period is tolled until the time for filing a state appeal expires. That conclusion is consistent with AEDPA's text and with this Court's decisions. There is thus no compelling need for this Court's review—least of all in a case where the State never fully aired its arguments below.

I. THERE IS A BROAD CONSENSUS ON THE QUESTION PRESENTED.

The petition makes no attempt to identify any division among lower courts that merits this Court's review. In fact, the State turns the ordinary criteria for granting review on their head when it asserts that the question presented "is even more important because at least five other circuits" have adopted the Sixth Circuit's approach. Pet. 11. It is true that *every* court of appeals to tackle the question presented has arrived at the same result. But that is the quintessential reason to deny review, not to grant it.

The State concedes that the Third, Fourth, Eighth, Tenth, and Eleventh Circuits—like the Sixth Circuit below—have held that AEDPA tolling applies during the time for filing an appeal in state court, even if no timely appeal is filed. Pet. 11-14; *see, e.g.*, *Swartz* v. *Meyers*, 204 F.3d 417, 424 (3d Cir. 2000); *Taylor* v.

Lee, 186 F.3d 557, 561 (4th Cir. 1999); *Williams* v. *Bruton*, 299 F.3d 981, 983 (8th Cir. 2002); *Gibson* v. *Klinger*, 232 F.3d 799, 804 (10th Cir. 2000); *Cramer* v. *Sec'y, Dep't of Corr.*, 461 F.3d 1380, 1383 (11th Cir. 2006) (per curiam). Every one of those decisions was unanimous.

The Third Circuit's decision in *Swartz* is illustrative. The court began with AEDPA's text, noting that an action is considered "'*pending*' from its inception until the rendition of *final judgment*." 204 F.3d at 421 (quoting Black's Law Dictionary 1134 (6th ed. 1990)). A judgment is considered "final," in turn, after the period for seeking review expires, even if that review is not sought. *Id.* The court further explained that its plain-text conclusion "finds support in the principle of state-remedy exhaustion." *Id.* at 422. If there is time remaining to file an appeal in state court, any federal petition "would automatically be dismissed for failure to exhaust state remedies." *Id.* As a consequence, that period of time is more sensibly categorized as part of the pending state proceedings than as part of the federal limitations period. *Id.* Much of the Sixth Circuit's reasoning in the decision below echoes the Third Circuit's reasoning in *Swartz*. *See* Pet. App. 7a-8a, 14a-15a.

In addition to the courts that the State identifies, the First and Second Circuits have suggested that they agree with their sister circuits' analysis. *See Drew* v. *MacEachern*, 620 F.3d 16, 21 (1st Cir. 2010) (stating that a post-conviction motion is pending until "further appellate review is unavailable under the particular state's procedures") (internal quotation marks omitted); *Bennett* v. *Artuz*, 199 F.3d 116, 120 (2d Cir. 1999) (noting that a "state-court petition

is 'pending' * * * until finally disposed of and further appellate review is unavailable under the particular state's procedures"), *aff'd on other grounds*, 531 U.S. 4 (2000). Those two decisions were also unanimous. Thus, a minimum of six, and up to eight, courts of appeals are in accord—without a single judge writing in dissent.[1]

Nor is this the unusually important decision that, though it does not implicate a circuit split, nevertheless demands this Court's review. The decision below answered a narrow timing question. That answer affects only those habeas petitioners, like Respondent, who (1) file a proper postconviction motion in state court; (2) receive an adverse decision in a lower state court; (3) fail to file a timely appeal to a higher state court; and (4) subsequently file a federal habeas petition in the small window in which the period for filing a state court appeal—here, 56 days—makes the difference between a timely and an untimely federal habeas petition. And even as to that limited class, the timing question does not resolve the merits of their habeas petitions; for

[1] There is some division among lower courts on the distinct question whether a state postconviction motion is "pending" during the time for filing a motion for reconsideration in state court. *Compare, e.g.*, *Serrano* v. *Williams*, 383 F.3d 1181, 1185 (10th Cir. 2004) (tolling the statute of limitations during the period in which rehearing could have been sought), *with Saunders* v. *Senkowski*, 587 F.3d 543, 548 (2d Cir. 2009) (per curiam) (no tolling during that period). This Court recently denied a petition for certiorari raising that issue. *See Scarber* v. *Palmer*, 808 F.3d 1093 (6th Cir. 2015), *cert. denied*, 137 S. Ct. 37 (2016). That issue is not encompassed within the question presented here.

Respondent, that issue remains before the District Court.

II. THE DECISION BELOW DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT.

The main theme of the State's petition is that the unanimous courts of appeals are "failing to follow this Court's holdings." Pet. 11. But those holdings address only whether the AEDPA limitations period is tolled for the entire "interval between a lower court's adverse decision and the *filing* of an appeal." Pet. 8 (emphasis added). They do not address the question presented here: whether tolling applies to the interval between a lower state court decision and the "*deadline for filing* of an appeal." Pet. i (emphasis added). On that question, the courts of appeals have faithfully applied this Court's decisions. Their unanimous conclusion is also consistent with AEDPA's text and with the policies that it embodies.

1. The State focuses on two decisions: *Saffold*, 536 U.S. 214, and *Chavis*, 546 U.S. 189. *See* Pet. 8, 10. Neither decision addressed the question presented here, the resolution of which would not have affected the outcome in either case.

In *Saffold*, the Court considered whether Section 2244(d)(2)'s "pending" language covers the period between a lower state court decision and the filing of a timely notice of appeal in a higher state court. 536 U.S. at 218. The Court held that it indeed did: "[U]ntil the application has achieved final resolution through the State's post-conviction procedures, by definition it remains 'pending.'" *Id.* at 220. That holding was somewhat complicated by California's unusual appeals system, in which the timing of an

appeal is subject to a "reasonableness" standard. *Id.* at 221. But so long as the appeal was timely under state law, the full period from the lower state court decision through the filing of an appeal was exempt from AEDPA's limitations period. *See id.* at 219-221, 226.

A few years later, *Chavis* presented the opposite scenario. In that case, the habeas petitioner had filed an appeal in state court more than three years after an adverse lower court decision. 546 U.S. at 195. The Court concluded that such a delay was "unjustified." *Id.* at 201. Thus, the habeas petitioner was not entitled to tolling for those three years: "[O]nly a timely appeal tolls AEDPA's 1-year limitations period for the time between the lower court's adverse decision and the filing of a notice of appeal in the higher court." *Id.* at 197 (emphasis omitted). And because "Chavis need[ed] all but two days of the lengthy (three year and one month) delay to survive the federal 1-year habeas filing period," his habeas petition was time-barred. *Id.* at 201. The Court did not need to determine what small subset of time would have represented a reasonable time for filing an appeal, or whether Chavis would have been entitled to tolling for that number of days.

The petition strains to read into *Saffold* and *Chavis* a holding about tolling during the period available for filing a timely appeal. *See* Pet. 10-11. There is none. *Saffold* teaches that a state application is "pending" during the *entire* period of time before the filing of a timely notice of appeal; *Chavis* teaches that it is not "pending" during the *entire* period of time before the filing of an untimely notice of appeal. Neither decision addressed the specific period after a lower state court's decision in which a timely notice

of appeal could be filed, even if it is not. That question was not before the Court and would not have affected the outcome, as the Sixth Circuit recognized. *See* Pet. App. 10a ("The Court's holding [in *Chavis*] was not premised on a finding that the clock continued to run for the entire three-year period, including the reasonable time for appeal."). Like the Sixth Circuit, other courts have distinguished the "Appeal Period," or "the interval between the lower court decision and the deadline for seeking review," from the "Post Deadline Period," or "the interval between this deadline and the filing of an appellate petition." *Allen* v. *Mitchell*, 276 F.3d 183, 185 (4th Cir. 2001).

Put more concretely, *Chavis* teaches that Respondent was not entitled to tolling for the full 60 days between the Michigan Court of Appeals' denial and his untimely application for leave to appeal to the Michigan Supreme Court. But that is not what is at issue here. What is at issue is the 56-day period after the Michigan Court of Appeals' denial—the period in which Respondent could have filed a timely application under Michigan rules. The State's petition perceives a conflict with *Chavis* only by lumping together those distinct periods of time.

2. The State also contends that the decision below conflicts with a third decision of this Court: *Pace* v. *DiGuglielmo*, 544 U.S. 408 (2005). Pet. 9. But *Pace* is inapposite. That decision did not assess when a state postconviction motion remains "pending" but rather when a postconviction motion has been "properly filed" in the first place. In *Pace*, the state court rejected as untimely a state postconviction motion filed long after direct review had concluded. 544 U.S. at 410-411. This Court held that when a state court determines that a postconviction motion

is untimely under state law, that motion has never been "properly filed" in state court. *Id.* at 412-413. If it were otherwise, "a state prisoner could toll the [AEDPA] statute of limitations at will simply by filing untimely state postconviction petitions." *Id.* at 413.

That holding is not relevant here. There is no dispute that Respondent "properly filed" a timely motion for relief from judgment in the Michigan trial court. *See* Pet. App. 5a. Indeed, by acknowledging that the AEDPA limitations period was tolled "when [Respondent] filed a motion for relief from judgment," the State effectively concedes that the motion was "properly filed." Pet. 5. That is consistent with its position before the Sixth Circuit, where it contested only whether Respondent's application was "pending." *See infra* pp. 17-18.

Now, the State offers a new theory that an appeal of a timely-filed postconviction motion qualifies as its own "application for State post-conviction or other collateral review." Pet. 9 (quoting 28 U.S.C. § 2244(d)(2)). The State provides no support for that novel reading of the statute. It points only to this Court's passing description of a petition to the California Supreme Court as "a review application." *Saffold*, 536 U.S. at 223. That is quite a leap. An application to a higher state court is an application for *review*, not for *relief*.[2] In any event, the State's

[2] The State appears to confuse the dual-use term "application," which can refer both to the postconviction motion itself—that is, the "application for State post-conviction or other collateral review"—and, in some States, to the process for seeking discretionary review. Using the

creative statutory construction is beside the point. Even assuming that Respondent's application for leave to appeal in the Michigan Supreme Court was not "properly filed," his application for leave to appeal in the Michigan Court of Appeals was. It is that earlier application that remained "pending" during the time for seeking further review.

3. Contrary to the State's assertion of widespread defiance, *see* Pet. 15, the unanimous courts of appeals have diligently applied this Court's guidance about the text and purpose of AEDPA.

As discussed above, the key statutory term is "pending." This Court explained in *Saffold* that the ordinary meaning of "pending" is "'in continuance' or 'not yet decided'"—even when the motion is not actively "under court consideration." 536 U.S. at 219 (quoting Webster's Third New International Dictionary 1669 (1993)). A postconviction motion therefore remains pending "until [it] has achieved final resolution through the State's post-conviction procedures." *Id.* at 220. In the direct-review context, the Court has held that "final" resolution occurs "when [the] time for seeking review with the State's highest court expire[s]." *Gonzalez*, 132 S. Ct. at 654. It has used similar language in the collateral-review context, explaining that a state decision is final when "no other state avenues for relief *remain open*." *Lawrence*, 549 U.S. at 332 (emphasis added). Thus,

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synonym "postconviction motion" resolves the confusion. Nobody would say that a state applicant for collateral relief files a "postconviction motion" in the state trial court, a new "postconviction motion" in the state court of appeals, and yet another "postconviction motion" in the state supreme court.

a state postconviction motion is no longer "pending" once the time for further appeal expires and "the state court's postconviction review is complete." *Id.*

On top of that, the statute tolls the limitations period while a state application "*is* pending." 28 U.S.C. § 2244(d)(2) (emphasis added). Congress's use of the present tense indicates that, at any given moment, it must be possible to determine whether the limitations period is or is not tolled. That is indeed possible under the Sixth Circuit's holding: When state law establishes a definite appeal period, the state application *is* pending during that period. Under the State's theory, by contrast, the tolling analysis must often be conducted ex post. Consider an ordinary 30-day deadline for an appeal. *See, e.g.*, *Saffold*, 536 U.S. at 215 (describing typical deadlines of 30 or 45 days after entry of the trial court's judgment). According to the State, if a prisoner files a timely notice of appeal after 30 days, then his application *was* pending during the filing period. If, however, the prisoner does not file an appeal, or files an appeal on the 31st day, then his application *was not* pending on days 1 through 30. A theory that depends on such ex post contingences conflicts with the statute's use of the present tense.

The State's primary textual response is that Section 2244(d)(2), which addresses state postconviction proceedings, must cover different ground than Section 2244(d)(1), which addresses direct review. *See* Pet. 15. And Section 2244(d)(1) provides that the AEDPA limitations period begins when a "judgment bec[omes] final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1). In the State's view, interpreting the term "pending" in (d)(2) to cover an appeal

period would "disregard[] th[e] distinct language" in (d)(1). Pet. 15. Not so. First, as this Court has previously explained, the *Russello* canon has minimal force because (d)(2) uses neither of the two finality formulations in (d)(1). *See Clay* v. *United States*, 537 U.S. 522, 528-529 (2003). Second, (d)(1) and (d)(2) indeed cover different ground. The former includes the period for filing a certiorari petition with this Court, *see Lawrence*, 549 U.S. at 333-334; the latter applies only until "no other *state* avenues for relief remain open," *id.* at 332 (emphasis added). Third, there is no textual indication that, within the specific context of the *state review process*, Congress prescribed a different finality rule for direct and collateral challenges. *See Clay*, 537 U.S. at 527-528 (presuming that Congress relies on the Court's "unvarying understanding of finality for collateral review purposes").

Finally, the decision below advances the statutory objectives that this Court has repeatedly emphasized: "comity, finality, and federalism." *Williams* v. *Taylor*, 529 U.S. 420, 436 (2000). AEDPA pursues those objectives by requiring the exhaustion of state court remedies. *See* 28 U.S.C. § 2254(b)(1)(A); *see also Murray* v. *Carrier*, 477 U.S. 478, 489 (1986) (noting "[t]he principle of comity that underlies the exhaustion doctrine"). Tolling the limitations period to allow for that exhaustion achieves the same goal. *See Lawrence*, 549 U.S. at 332 (noting that "AEDPA's exhaustion provision and tolling provision work together"); *Saffold*, 536 U.S. at 223 (explaining that "it is the State's interests that the tolling provision seeks to protect"). Yet the State's proposed tolling rule would have the opposite effect. It would encourage applicants like Respondent—who mistakenly

filed his appeal to the Michigan Supreme Court after 60 days rather than 56—to file protective federal habeas petitions, rather than first exhausting state procedures. *See Saffold*, 536 U.S. at 220 (rejecting tolling rule that would "encourag[e] state prisoners to file federal habeas petitions *before* the State completes a full round of collateral review"); *see also, e.g.*, *Williams*, 299 F.3d at 983-984; *Swartz*, 204 F.3d at 420.

Nor are there countervailing federalism concerns, as the petition suggests. The decision below never questioned "whether federal courts will respect state filing deadlines or ignore them." Pet. 17. Rather, the Sixth Circuit looked to *state procedural rules* to determine the time for filing an appeal in Michigan. *See* Pet. App. 3a. It tolled the AEDPA limitations period for 56 days, per the Michigan Court Rules, and not a day longer. *See* Pet. App. 16a. Contrary to the State's contention, then, the unanimous courts of appeals do not "ignore" state filing deadlines, Pet. 17; they apply them.

III. THIS CASE IS A POOR VEHICLE IN ANY EVENT.

There is no compelling need for this Court to review a splitless decision that comports with its precedents. But even if there were, the State's petition is a poor vehicle for deciding the question presented.

1. Most importantly, the State has not preserved all of the arguments that it now attempts to raise. In particular, the petition repeatedly suggests that this Court should consider not only whether Respondent's application was "pending" but also whether it was "properly filed." *See, e.g.*, Pet. 3, 5, 7, 9, 14. Yet the

State mentioned *Pace* precisely once to the Sixth Circuit—in a footnote introduced by an "*Accord*" signal. *See* Pet. C.A. Br. 19 n.2 (Feb. 17, 2015), ECF No. 13. Its argument about whether Respondent's appeal was "properly filed" has therefore been waived. *See Calvert* v. *Wilson*, 288 F.3d 823, 836 (6th Cir. 2002) ("[A]n argument is not raised where it is simply noted in a footnote absent any recitation of legal standards or legal authority."). And not surprisingly, the Sixth Circuit never passed upon that argument in its decision below. Pet. App. 7a (describing question as whether Respondent's postconviction motion remained "pending"); *see Clark* v. *Arizona*, 548 U.S. 735, 765 (2006) (noting that this Court does not consider arguments "neither pressed nor passed upon" below).

That waiver illustrates the way that the State chose to litigate this case. When Respondent originally appealed the District Court's decision, he filed a three-page *pro se* brief, along with a request for counsel. *See* Resp't Pro Se C.A. Br. (Jan. 20, 2015), ECF No. 10. The State filed a brief in response. *See* Pet. C.A. Br. The Sixth Circuit thereafter appointed counsel for Respondent and set a new briefing schedule. *See* Letter from Laura A. Jones to Counsel (Oct. 27, 2015), ECF No. 18. Then, Respondent filed a new opening brief that discussed at length the arguments that the Sixth Circuit later adopted in its opinion. *See* Resp't C.A. Br. (Dec. 9, 2015), ECF No. 20. But the State never filed a response brief, relying only on two letters submitted under Federal Rule of Appellate Procedure 28(j).

That was the State's prerogative, to be sure. But in failing to respond to Respondent's counseled brief, the State waived at least one of the arguments that

it advances here. If this Court wishes to consider the question presented, it should do so in a case that both parties have vigorously litigated from the start.

2. In addition, the statutory-tolling issue in this case is not outcome-determinative. That is because Respondent was also entitled to equitable tolling for the same period of time. AEDPA's limitations period can be equitably tolled where a habeas petitioner "shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland* v. *Florida*, 560 U.S. 631, 649 (2010) (internal quotation marks omitted). In the Sixth Circuit, one such extraordinary circumstance is confusion in the law regarding the timeliness of a habeas petition. *See Griffin* v. *Rogers*, 399 F.3d 626, 637 (6th Cir. 2005) ("Griffin's ignorance of the filing deadline given the unstable and unsettled nature of AEDPA at the crucial time of mistake was reasonable and supports her argument for tolling."); *see also Lawrence*, 549 U.S. at 336 (treating "legal confusion" as a ground for equitable tolling).

When he filed his federal habeas petition, Respondent had a sound basis under Sixth Circuit precedent for believing that he was entitled to statutory tolling. *See Whitcomb* v. *Smith*, 23 F. App'x 271, 273 (6th Cir. 2001). The state of circuit law, combined with Respondent's diligence in pursuing his rights, thus would have entitled him to equitable tolling in the Sixth Circuit even if his statutory-tolling argument had failed. Although the Sixth Circuit did not need to address the equitable-tolling ground, *see* Pet. App. 7a, it undermines the importance of the question presented in this particular case.

CONCLUSION

The petition for a writ of certiorari should be denied.

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