(ORDER LIST: 585 U.S.)

THURSDAY, JUNE 28, 2018

APPEAL -- SUMMARY DISPOSITION

16-166 HARRIS, DAVID, ET AL. V. COOPER, GOV. OF NC, ET AL.

The judgment is affirmed.

CERTIORARI -- SUMMARY DISPOSITIONS

16-1146 WOMAN'S FRIEND CLINIC, ET AL. V. BECERRA, ATT'Y GEN. OF CA

16-1153 LIVINGWELL MEDICAL CLINIC, ET AL V. BECERRA, ATT'Y GEN OF CA, ET AL.

The petitions for writs of certiorari are granted. The judgments are vacated, and the cases are remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *National Institute of Family and Life Advocates* v. *Becerra*, 585 U. S. ____ (2018).

16-9187 SOLANO-HERNANDEZ, SANTIAGO V. UNITED STATES

16-9587 VILLARREAL-GARCIA, AURELIANO V. UNITED STATES

The motions of petitioners for leave to proceed *in forma pauperis* and the petitions for writs of certiorari are granted. The judgments are vacated, and the cases are remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Rosales-Mireles* v. *United States*, 585 U. S. ____ (2018), and for consideration of the question whether the cases are moot.

17-166 ZANDERS, MARCUS V. INDIANA

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the Supreme

Court of Indiana for further consideration in light of *Carpenter* v. *United States*, 585 U. S. ____ (2018).

17-211 MOUNTAIN RIGHT TO LIFE, ET AL. V. BECERRA, ATT'Y GEN. OF CA

17-976 CTIA - THE WIRELESS ASSOCIATION V. BERKELEY, CA, ET AL.

The petitions for writs of certiorari are granted. The judgments are vacated, and the cases are remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *National Institute of Family and Life Advocates* v. *Becerra*, 585 U. S. ____ (2018).

17-981 RIFFEY, THERESA, ET AL. V. RAUNER, GOV. OF IL, ET AL.

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of *Janus* v. *State, County, and Municipal Employees*, 585 U. S. ____ (2018).

17-1050 SALDANA CASTILLO, NOEL A. V. SESSIONS, ATT'Y GEN.

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Pereira* v. *Sessions*, 585 U. S. ____ (2018).

17-1194) INT'L REFUGEE ASSISTANCE, ET AL. V. TRUMP, PRESIDENT OF U.S., ET AL.
)
17-1270) TRUMP, PRESIDENT OF U.S., ET AL. V. INT'L REFUGEE ASSISTANCE, ET AL.

The petitions for writs of certiorari are granted. The judgments are vacated, and the cases are remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of *Trump* v. *Hawaii*, 585 U. S. ____ (2018).

17-5402 REED, TOBIAS O. V. VIRGINIA

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the Supreme Court of Virginia for further consideration in light of *Carpenter* v. *United States*, 585 U. S. ____ (2018).

17-5692 CHAMBERS, ANTOINE V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Carpenter* v. *United States*, 585 U. S. ____ (2018).

17-5964 THOMPSON, ANTHONY C. V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Tenth Circuit for further consideration in light of *Carpenter* v. *United States*, 585 U. S. ____ (2018). Justice Gorsuch took no part in the consideration or decision of this motion and this petition.

17-6213 HANKSTON, GAREIC J. V. TEXAS

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the Court of Criminal Appeals of Texas for further consideration in light of *Carpenter* v. *United States*, 585 U. S. ____ (2018).

17-6704 BANKS, ALBERT D. V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Tenth Circuit for further consideration in light of *Carpenter* v. *United States*, 585 U. S. ____ (2018).

CERTIORARI GRANTED

17-532 HERRERA, CLAYVIN V. WYOMING

17-571 FOURTH ESTATE PUB. BENEFIT CORP. V. WALL-STREET.COM, LLC, ET AL.

17-646 GAMBLE, TERANCE M. V. UNITED STATES

17-1174 NIEVES, LUIS A., ET AL. V. BARTLETT, RUSSELL P.

17-1299 CA FRANCHISE TAX BOARD V. HYATT, GILBERT P.

17-1307 OBDUSKEY, DENNIS V. McCARTHY & HOLTHUS LLP, ET AL.

The petitions for writs of certiorari are granted.

17-290 MERCK SHARP & DOHME CORP. V. ALBRECHT, DORIS, ET AL.

The petition for a writ of certiorari is granted. Justice Alito took no part in the consideration or decision of this petition.

CERTIORARI DENIED

16-6308 GRAHAM, AARON V. UNITED STATES

16-6761 CAIRA, FRANK V. UNITED STATES

16-7314 RIOS, ANTONIO V. UNITED STATES

16-9536 ALEXANDER, TYRAN M. V. UNITED STATES

17-243 ABDIRAHMAN, LIBAN H. V. UNITED STATES

17-425 WASS, SHAWN W. V. IDAHO

17-701 RICHARDS, JAMES W. V. UNITED STATES

17-840 CASH, TORIE A. V. UNITED STATES

17-950 ULBRICHT, ROSS W. V. UNITED STATES

17-1002 UNITED STATES V. UNION PACIFIC RAILROAD CO.

17-1087 FIRST RESORT, INC. V. HERRERA, DENNIS J., ET AL.

17-1369 MAYOR AND CITY COUNCIL, ET AL. V. GREATER BALTIMORE CENTER

17-5943 RILEY, MONTAI V. UNITED STATES

17-6256 PATRICK, DAMIAN V. UNITED STATES

17-6892 WILFORD, RICHARD A. V. UNITED STATES

17-7220 BORMUTH, PETER C. V. JACKSON COUNTY, MI

17-7769 GRAY, RONALD V. UNITED STATES

The petitions for writs of certiorari are denied.

16-6694 JORDAN, ERIC V. UNITED STATES

The motion of respondent for leave to file a brief in opposition under seal with redacted copies for the public record is granted. The petition for a writ of certiorari is denied.

17-475 SEC V. BANDIMERE, DAVID F.

The petition for a writ of certiorari is denied. Justice Gorsuch took no part in the consideration or decision of this petition.

Per Curiam

SUPREME COURT OF THE UNITED STATES

MARY ANNE SAUSE *v.* TIMOTHY J. BAUER, ET AL.

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

No. 17–742. Decided June 28, 2018

PER CURIAM.

Petitioner Mary Ann Sause, proceeding *pro se*, filed this action under Rev. Stat. 1979, 42 U. S. C. §1983, and named as defendants past and present members of the Louisburg, Kansas, police department, as well as the current mayor and a former mayor of the town. The centerpiece of her complaint was the allegation that two of the town's police officers visited her apartment in response to a noise complaint, gained admittance to her apartment, and then proceeded to engage in a course of strange and abusive conduct, before citing her for disorderly conduct and interfering with law enforcement. Among other things, she alleged that at one point she knelt and began to pray but one of the officers ordered her to stop. She claimed that a third officer refused to investigate her complaint that she had been assaulted by residents of her apartment complex and had threatened to issue a citation if she reported this to another police department. In addition, she alleged that the police chief failed to follow up on a promise to investigate the officers' conduct and that the present and former mayors were aware of unlawful conduct by the town's police officers.

Petitioner's complaint asserted a violation of her First Amendment right to the free exercise of religion and her Fourth Amendment right to be free of any unreasonable search or seizure. The defendants moved to dismiss the complaint for failure to state a claim on which relief may be granted, arguing that the defendants were entitled to qualified immunity. Petitioner then moved to amend her

complaint, but the District Court denied that motion and granted the motion to dismiss.

On appeal, petitioner, now represented by counsel, argued only that her free exercise rights were violated by the two officers who entered her home. The Court of Appeals for the Tenth Circuit affirmed the decision of the District Court, concluding that the officers were entitled to qualified immunity. 859 F. 3d 1270 (2017). Chief Judge Tymkovich filed a concurring opinion. While agreeing with the majority regarding petitioner's First Amendment claim, he noted that petitioner's "allegations fit more neatly in the Fourth Amendment context." *Id.,* at 1279. He also observed that if the allegations in the complaint are true, the conduct of the officers "should be condemned," and that if the allegations are untrue, petitioner had "done the officers a grave injustice." *Ibid.*

The petition filed in this Court contends that the Court of Appeals erred in holding that the officers who visited petitioner's home are entitled to qualified immunity. The petition argues that it was clearly established that law enforcement agents violate a person's right to the free exercise of religion if they interfere, without any legitimate law enforcement justification, when a person is at prayer. The petition further maintains that the absence of a prior case involving the unusual situation alleged to have occurred here does not justify qualified immunity.

There can be no doubt that the First Amendment protects the right to pray. Prayer unquestionably constitutes the "exercise" of religion. At the same time, there are clearly circumstances in which a police officer may lawfully prevent a person from praying at a particular time and place. For example, if an officer places a suspect under arrest and orders the suspect to enter a police vehicle for transportation to jail, the suspect does not have a right to delay that trip by insisting on first engaging in conduct that, at another time, would be protected by the First

Amendment. When an officer's order to stop praying is alleged to have occurred during the course of investigative conduct that implicates Fourth Amendment rights, the First and Fourth Amendment issues may be inextricable.

That is the situation here. As the case comes before us, it is unclear whether the police officers were in petitioner's apartment at the time in question based on her consent, whether they had some other ground consistent with the Fourth Amendment for entering and remaining there, or whether their entry or continued presence was unlawful. Petitioner's complaint contains no express allegations on these matters. Nor does her complaint state what, if anything, the officers wanted her to do at the time when she was allegedly told to stop praying. Without knowing the answers to these questions, it is impossible to analyze petitioner's free exercise claim.

In considering the defendants' motion to dismiss, the District Court was required to interpret the *pro se* complaint liberally, and when the complaint is read that way, it may be understood to state Fourth Amendment claims that could not properly be dismissed for failure to state a claim. We appreciate that petitioner elected on appeal to raise only a First Amendment argument and not to pursue an independent Fourth Amendment claim, but under the circumstances, the First Amendment claim demanded consideration of the ground on which the officers were present in the apartment and the nature of any legitimate law enforcement interests that might have justified an order to stop praying at the specific time in question. Without considering these matters, neither the free exercise issue nor the officers' entitlement to qualified immunity can be resolved. Thus, petitioner's choice to abandon her Fourth Amendment claim on appeal did not obviate the need to address these matters.

For these reasons, we grant the petition for a writ of certiorari; we reverse the judgment of the Tenth Circuit;

and we remand the case for further proceedings consistent with this opinion.

It is so ordered.

Per Curiam

SUPREME COURT OF THE UNITED STATES

MICHAEL SEXTON, WARDEN *v.*
NICHOLAS BEAUDREAUX

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

No. 17–1106. Decided June 28, 2018

PER CURIAM.

In this case, the United States Court of Appeals for the Ninth Circuit reversed a denial of federal habeas relief, 28 U. S. C. §2254, on the ground that the state court had unreasonably rejected respondent's claim of ineffective assistance of counsel. The Court of Appeals' decision ignored well-established principles. It did not consider reasonable grounds that could have supported the state court's summary decision, and it analyzed respondent's arguments without any meaningful deference to the state court. Accordingly, the petition for certiorari is granted, and the judgment of the Court of Appeals is reversed.

I

Respondent Nicholas Beaudreaux shot and killed Wayne Drummond during a late-night argument in 2006. Dayo Esho and Brandon Crowder were both witnesses to the shooting. The next day, Crowder told the police that he knew the shooter from middle school, but did not know the shooter's name. Esho described the shooter, but also did not know his name. Seventeen months later, Crowder was arrested for an unrelated crime. While Crowder was in custody, police showed him a middle-school yearbook with Beaudreaux's picture, as well as a photo lineup including Beaudreaux. Crowder identified Beaudreaux as the shooter in the Drummond murder.

Officers interviewed Esho the next day. They first spoke with him during his lunch break. They showed him

a display that included a recent picture of Beaudreaux and pictures of five other men. Esho tentatively identified Beaudreaux as the shooter, saying his picture "was 'closest' to the gunman." App. to Pet. for Cert. 4a. Later that day, one of the officers found another photograph of Beaudreaux that was taken "closer to the date" of the shooting. Record ER 263. Beaudreaux looked different in the two photographs. In the first, "'his face [was] a little wider and his head [was] a little higher.'" *Id.,* at ER 262. Between four and six hours after the first interview, the officers returned to show Esho a second six-man photo lineup, which contained the older picture of Beaudreaux. Beaudreaux's photo was in a different position in the lineup than it had been in the first one. Esho again identified Beaudreaux as the shooter, telling the officers that the second picture was "'very close.'" *Id.,* at ER 263–ER 264. But he again declined to positively state that Beaudreaux was the shooter. Esho was hesitant because there were "a few things" he remembered about the shooter that would require seeing him in person. *Id.,* at ER 283–ER 284. At a preliminary hearing, Esho identified Beaudreaux as the shooter. At trial, Esho explained that it "clicked" when he saw Beaudreaux in person based on "the way that he walked." *Id.,* at ER 285. After seeing him in person, Esho was "sure" that Beaudreaux was the shooter. *Ibid.* At no time did any investigator or prosecutor suggest to Esho that Beaudreaux was the one who shot Drummond. *Ibid.*

Beaudreaux was tried in 2009 for first-degree murder and attempted second-degree robbery. Esho and Crowder both testified against Beaudreaux and both identified him as Drummond's shooter. The jury found Beaudreaux guilty, and the trial court sentenced him to a term of 50 years to life. Beaudreaux's conviction was affirmed on direct appeal, and his first state habeas petition was denied.

In 2013, Beaudreaux filed a second state habeas petition. He claimed, among other things, that his trial attorney was ineffective for failing to file a motion to suppress Esho's identification testimony. The California Court of Appeal summarily denied the petition, and the California Supreme Court denied review. Petitioner then filed a federal habeas petition, which the District Court denied.

A divided panel of the Ninth Circuit reversed. The panel majority spent most of its opinion conducting a *de novo* analysis of the merits of the would-be suppression motion—relying in part on arguments and theories that Beaudreaux had not presented to the state court in his second state habeas petition. See App. to Pet. for Cert. 1a–7a; Record ER 153–ER 154. It first determined that counsel's failure to file the suppression motion constituted deficient performance. See App. to Pet. for Cert. 3a. The circumstances surrounding Esho's pretrial identification were "unduly suggestive," according to the Ninth Circuit, because only Beaudreaux's picture was in both photo lineups. *Id.,* at 4a. And, relying on Ninth Circuit precedent, the panel majority found that the preliminary hearing was unduly suggestive as well. *Ibid.* (quoting *Johnson* v. *Sublett*, 63 F. 3d 926, 929 (CA9 1995)). The panel majority next concluded that, under the totality of the circumstances, Esho's identification was not reliable enough to overcome the suggestiveness of the procedures. App. to Pet. for Cert. 5a. The panel majority then determined that counsel's failure to file the suppression motion prejudiced Beaudreaux, given the weakness of the State's case. *Id.,* at 5a–6a. After conducting this *de novo* analysis of Beaudreaux's ineffectiveness claim, the panel majority asserted that the state court's denial of this claim was not just wrong, but objectively unreasonable under §2254(d). See *id.,* at 6a–7a. Judge Gould dissented. He argued that the state court could have reasonably concluded that Beaudreaux had failed to prove prejudice. *Id.,* at 8a.

Per Curiam

The State of California petitioned for certiorari.

II

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a federal court cannot grant habeas relief "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" this Court, or "a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." §2254(d). When, as here, there is no reasoned state-court decision on the merits, the federal court "must determine what arguments or theories . . . could have supported the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Harrington* v. *Richter*, 562 U. S. 86, 102 (2011). If such disagreement is possible, then the petitioner's claim must be denied. *Ibid.* We have often emphasized that "this standard is difficult to meet" "because it was meant to be." *Ibid.*; *e.g., Burt* v. *Titlow*, 571 U. S. 12, 20 (2013). The Ninth Circuit failed to properly apply this standard.

A

To prove ineffective assistance of counsel, a petitioner must demonstrate both deficient performance and prejudice. *Strickland* v. *Washington*, 466 U. S. 668, 687 (1984). The state court's denial of relief in this case was not an unreasonable application of *Strickland*. A fairminded jurist could conclude that counsel's performance was not deficient because counsel reasonably could have determined that the motion to suppress would have failed. See

Premo v. *Moore*, 562 U. S. 115, 124 (2011).[1]

This Court has previously described "the approach appropriately used to determine whether the Due Process Clause requires suppression of an eyewitness identification tainted by police arrangement." *Perry* v. *New Hampshire*, 565 U. S. 228, 238 (2012). In particular, the Court has said that "due process concerns arise only when law enforcement officers use[d] an identification procedure that is *both* suggestive and unnecessary." *Id.*, at 238–239 (citing *Manson* v. *Braithwaite*, 432 U. S. 98, 107, 109 (1977), and *Neil* v. *Biggers*, 409 U. S. 188, 198 (1972); emphasis added). To be "'impermissibly suggestive,'" the procedure must "'give rise to a very substantial likelihood of irreparable misidentification.'" *Id.*, at 197 (quoting *Simmons* v. *United States*, 390 U. S. 377, 384 (1968)). It is not enough that the procedure "may have in some respects fallen short of the ideal." *Id.,* at 385–386. Even when an unnecessarily suggestive procedure was used, "suppression of the resulting identification is not the inevitable consequence." *Perry*, 565 U. S.*,* at 239. Instead, "the Due Process Clause requires courts to assess, on a case-by-case basis, whether improper police conduct created a 'substantial likelihood of misidentification.'" *Ibid.* (quoting *Biggers*, *supra,* at 201). "[R]eliability [of the eyewitness identification] is the linchpin' of that evaluation." *Perry*, *supra*, at 239 (quoting *Manson*, 432 U. S., at 114; alterations in original). The factors affecting reliability include "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the

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[1] Judge Gould found that the state court could have reasonably concluded that Beaudreaux failed to prove prejudice because the weight of the evidence against him—even without Esho's identification—would have been sufficient to ensure his conviction. See App. to Pet. for Cert. 8a. We need not reach that issue.

time between the crime and the confrontation." *Id.*, at 114. This Court has held that pretrial identification procedures violated the Due Process Clause only once, in *Foster* v. *California*, 394 U. S. 440 (1969). There, the police used two highly suggestive lineups and "a one-to-one confrontation," which "made it all but inevitable that [the witness] would identify [the defendant]." *Id.,* at 443.[2]

In this case, there is at least one theory that could have led a fairminded jurist to conclude that the suppression motion would have failed. See *Richter*, *supra*, at 102.[3] The state court could have reasonably concluded that Beaudreaux failed to prove that, "under the 'totality of the circumstances,'" the identification was not "reliable." *Biggers*, *supra*, at 199. Beaudreaux's claim was facially deficient because his state habeas petition failed to even address this requirement. See Record ER 153–ER 154. And the state court could have reasonably concluded that the totality of the circumstances tipped against Beaudreaux. True, Esho gave a vague initial description of the shooter, see *Manson*, *supra*, at 115 (noting the detailed physical description the witness gave "minutes after"), and there was a 17-month delay between the shooting and the identification, see *Biggers*, *supra*, at 201 (determining that "a lapse of seven months . . . would be a seriously negative factor in most cases"). But, as the

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[2] In the first lineup, the suspect was nearly six inches taller than the other two men in the lineup, and was the only one wearing a leather jacket like the one the witness described the robber as wearing. *Foster*, 394 U. S., at 441, 443. Police then arranged a "one-to-one confrontation" in which the witness sat in the same room as the suspect and spoke to him. *Id.,* at 441. And in the second lineup, the suspect was the only one in the five man lineup who had been in the original lineup. *Id.,* at 441–442.

[3] Because our decision merely applies 28 U. S. C. §2254(d)(1), it takes no position on the underlying merits and does not decide any other issue. See *Kernan* v. *Cuero*, 583 U. S. ___, ___ (2017) (*per curiam*) (slip op., at 7); *Marshall* v. *Rodgers*, 569 U. S. 58, 64 (2013) (*per curiam*).

District Court found, Esho had a good opportunity to view the shooter, having talked to Beaudreaux immediately after the shooting. See App. to Pet. for Cert. 66a. He also was paying attention during the crime and even remembered Beaudreaux's distinctive walk. See *id.,* at 64a, 66a. Esho demonstrated a high overall level of certainty in his identification. He chose Beaudreaux's picture in both photo lineups, and he was "sure" about his identification once he saw Beaudreaux in person. Record ER 285; App. to Pet. for Cert. 63a–64a, 66a. There also was "little pressure" on Esho to make a particular identification. *Manson*, *supra*, at 116. It would not have been "'"objectively unreasonable"'" to weigh the totality of these circumstances against Beaudreaux. *White* v. *Woodall*, 572 U. S. 415, 419 (2014).

B

The Ninth Circuit's opinion was not just wrong. It also committed fundamental errors that this Court has repeatedly admonished courts to avoid.

First, the Ninth Circuit effectively inverted the rule established in *Richter*. Instead of considering the "arguments or theories [that] could have supported" the state court's summary decision, 562 U. S., at 102, the Ninth Circuit considered arguments against the state court's decision that Beaudreaux never even made in his state habeas petition.

Additionally, the Ninth Circuit failed to assess Beaudreaux's ineffectiveness claim with the appropriate amount of deference. The Ninth Circuit essentially evaluated the merits *de novo*, only tacking on a perfunctory statement at the end of its analysis asserting that the state court's decision was unreasonable. But deference to the state court should have been near its apex in this case, which involves a *Strickland* claim based on a motion that turns on general, fact-driven standards such as sugges-

tiveness and reliability. The Ninth Circuit's analysis did not follow this Court's repeated holding that, "'[t]he more general the rule . . . the more leeway [state] courts have.'" *Renico* v. *Lett*, 559 U. S. 766, 776 (2010) (brackets in original). Nor did it follow this Court's precedents stating that, "because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Knowles* v. *Mirzayance*, 556 U. S. 111, 123 (2009). The Ninth Circuit's essentially *de novo* analysis disregarded this deferential standard.

* * *

The petition for a writ of certiorari and respondent's motion to proceed *in forma pauperis* are granted. The judgment of the United States Courts of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BREYER dissents.

Per Curiam

SUPREME COURT OF THE UNITED STATES

NORTH CAROLINA, ET AL., APPELLANTS *v.*
SANDRA LITTLE COVINGTON, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

No. 17–1364. Decided June 28, 2018

PER CURIAM.

This appeal arises from a remedial redistricting order entered by the District Court in a racial gerrymandering case we have seen before. The case concerns the redistricting of state legislative districts by the North Carolina General Assembly in 2011, in response to the 2010 census. A group of plaintiff voters, appellees here, alleged that the General Assembly racially gerrymandered their districts when—in an ostensible effort to comply with the requirements of the Voting Rights Act of 1965—it drew 28 State Senate and State House of Representatives districts comprising majorities of black voters. The District Court granted judgment to the plaintiffs, and we summarily affirmed that judgment. See *Covington* v. *North Carolina*, 316 F. R. D. 117 (MDNC 2016), summarily aff'd, 581 U. S. ___ (2017).

At the same time, however, we vacated the District Court's remedial order, which directed the General Assembly to adopt new districting maps, shortened by one year the terms of the legislators currently serving in the gerrymandered districts, called for special elections in those districts, and suspended two provisions of the North Carolina Constitution. See *North Carolina* v. *Covington*, 581 U. S. ___, ___ (2017) (*per curiam*) (slip op., at 1–2). The District Court ordered all of this, we noted, after undertaking only the "most cursory" review of the equitable balance involved in court-ordered special elections. *Id.,* at ___ (slip op., at 3). Having found that the District

Court's discretion "'was barely exercised,'" we remanded the case for further remedial proceedings. *Ibid.* (quoting *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U. S. 7, 27 (2008)).

On remand, the District Court ordered the General Assembly to draw remedial maps for the State House and State Senate within a month, and to file those maps in the District Court for approval. The General Assembly complied after directing its map drawers to, among other things, make "[r]easonable efforts . . . to avoid pairing incumbent members of the House [and] Senate" and not to use "[d]ata identifying the race of individuals or voters" in the drawing of the new districts. 283 F. Supp. 3d 410, 417–418 (MDNC 2018) (*per curiam*). The plaintiffs filed objections to the new maps. They argued that four legislative districts—Senate Districts 21 and 28 and House Districts 21 and 57—still segregated voters on the basis of race. The plaintiffs also objected to the General Assembly's decision to redraw five State House districts situated in Wake and Mecklenburg Counties. They argued that those five districts "did not violate the [U. S.] Constitution, [and] did not abut a district violating the [U. S.] Constitution." *Id.,* at 443. Thus, they contended, the revision of the borders of those districts constituted mid-decade redistricting in violation of the North Carolina Constitution. See Art. II, §5(4); *Granville County Commr's* v. *Ballard*, 69 N. C. 18, 20–21 (1873).

After some consideration of these objections, the District Court appointed a Special Master to redraw the lines of the districts to which the plaintiffs objected, along with any nonadjacent districts to the extent "necessary" to comply with districting criteria specified by the District Court. App. to Juris. Statement 106–107. Those criteria included adherence to the "county groupings" used by the legislature in its remedial plan and to North Carolina's "Whole County Provision as interpreted by the North

Carolina Supreme Court." *Id.,* at 108. The District Court further instructed the Special Master to make "reasonable efforts to adhere to . . . state policy objectives" by creating relatively compact districts and by avoiding split municipalities and precincts. *Id.,* at 108–109. The District Court also permitted the Special Master to "adjust district lines to avoid pairing any incumbents who have not publicly announced their intention not to run in 2018" and to "consider data identifying the race of individuals or voters to the extent necessary to ensure that his plan cures the unconstitutional racial gerrymanders." *Id.,* at 109–111.

Upon receipt of the Special Master's report, the District Court sustained the plaintiffs' objections and adopted the Special Master's recommended reconfiguration of the state legislative maps. See 283 F. Supp. 3d, at 414. With respect to Senate Districts 21 and 28 and House Districts 21 and 57, the District Court found that those districts, as redrawn by the legislature, "retain[ed] the core shape" of districts that it had earlier found to be unconstitutional. *Id.,* at 436; see *id.,* at 439, 440, 441–442. The District Court noted, for instance, that the legislature's remedial plan for Senate District 21 copied the prior plan's "horseshoe-shaped section of the city of Fayetteville," which "include[d] Fayetteville's predominantly black [voting districts] and blocks and exclude[d] Fayetteville's predominantly white [voting districts] and blocks." *Id.,* at 436. Although the defendants explained that the new district was designed to "'preserve the heart of Fayetteville,'" the District Court found that they had "fail[ed] to provide any explanation or evidence as to why 'preserving the heart of Fayetteville' required the exclusion of numerous majority-white precincts in downtown Fayetteville from the remedial district." *Ibid.* (alterations omitted). Likewise, the District Court found that the legislature's remedial version of Senate District 28, though it "encompasse[d] only a portion of [the city of] Greensboro," never-

theless "encompasse[d] *all* of the majority black [voting districts] within Greensboro," while "exclud[ing] predominantly white sections of Greensboro," and "reach[ing] out of Greensboro's city limits to capture predominantly African-American areas in eastern Guilford County." *Id.,* at 438. By choosing to preserve the shape of the district's "'anchor'" in eastern Greensboro, the District Court found, the General Assembly had "ensured that the district would retain a high [black voting age population], thereby perpetuating the effects of the racial gerrymander." *Id.,* at 438–439.

The District Court made similar findings with respect to the legislature's remedial House Districts 21 and 57. House District 21, it found, "(1) preserve[d] the core shape of . . . the previously unconstitutional district, (2) include[d] all but one of the majority-black [voting districts] in the two counties through which it [ran], (3) divide[d] a municipality and precinct along racial lines, [and] (4) ha[d] an irregular shape that corresponde[d] to the racial makeup of the geographic area." *Id.,* at 439–440. In light of this and other evidence, the District Court concluded that House District 21 "continue[d] to be a racial gerrymander." *Id.,* at 440. House District 57, the District Court found, likewise inexplicably "divide[d] the city of Greensboro along racial lines," *id.,* at 442, and otherwise preserved features of the previously invalidated 2011 maps. The District Court thus concluded that the General Assembly's remedial plans as to those districts were unconstitutional. *Ibid.*

The District Court then sustained the plaintiffs' remaining objection that several House districts in Wake and Mecklenburg Counties had been redrawn unnecessarily in violation of the North Carolina Constitution's prohibition on mid-decade redistricting. See *id.,* at 443 (citing Art. II, §5(4)). The court reasoned that the prohibition "preclude[d] the General Assembly from engaging in mid-

decade redistricting" except to the extent "required by federal law or a judicial order." 283 F. Supp. 3d, at 443. It noted further that, "[w]hen a court must draw remedial districts itself, this means that a court may redraw only those districts necessary to remedy the constitutional violation," *ibid.* (citing *Upham* v. *Seamon*, 456 U. S. 37, 40–41 (1982) (*per curiam*)), and that "*Upham* requires that a federal district court's remedial order not unnecessarily interfere with state redistricting choices," 283 F. Supp. 3d, at 443. This remedial principle informed the District Court's conclusion that "the General Assembly [had] exceeded its authority under [the District Court's remedial] order by disregarding the mid-decade redistricting prohibition," since the legislature had failed to "put forward any evidence showing that revising *any* of the five Wake and Mecklenburg County House districts challenged by Plaintiffs was necessary to remedy the racially gerrymandered districts in those two counties." *Id.,* at 444.

Finally, the District Court adopted the Special Master's recommended replacement plans for the districts to which the plaintiffs had objected. In adopting those recommendations, the District Court turned away the defendants' argument that they were built on "specific . . . quota[s]" of black voters in each reconstituted district. *Id.,* at 448–449. The District Court instead credited the Special Master's submission that his "'remedial districts were drawn not with any racial target in mind, but in order to maximize compactness, preserve precinct boundaries, and respect political subdivision lines,'" and that the remedial map was the product of "'explicitly race-neutral criteria.'" *Id.,* at 449. The District Court directed the defendants to implement the Special Master's recommended district lines and to conduct elections accordingly.

The defendants applied to this Court for a stay of the District Court's order pending appeal. We granted a stay with respect to implementation of the Special Master's

remedial districts in Wake and Mecklenburg Counties, but otherwise denied the application. See 583 U. S. ___ (2018). The defendants timely appealed directly to this Court as provided under 28 U. S. C. §1253. We have jurisdiction, and now summarily affirm in part and reverse in part the order of the District Court.

* * *

The defendants first argue that the District Court lacked jurisdiction even to enter a remedial order in this case. In their view, "[w]here, as here, a lawsuit challenges the validity of a statute," the case becomes moot "when the statute is repealed." Juris. Statement 17. Thus, according to the defendants, the plaintiffs' racial gerrymandering claims ceased to exist when the North Carolina General Assembly enacted remedial plans for the State House and State Senate and repealed the old plans.

The defendants misunderstand the nature of the plaintiffs' claims. Those claims, like other racial gerrymandering claims, arise from the plaintiffs' allegations that they have been "separate[d] . . . into different districts on the basis of race." *Shaw* v. *Reno*, 509 U. S. 630, 649 (1993). Resolution of such claims will usually turn upon "circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing" the lines of legislative districts. *Miller* v. *Johnson*, 515 U. S. 900, 913 (1995). But it is the segregation of the plaintiffs—not the legislature's line-drawing as such—that gives rise to their claims. It is for this reason, among others, that the plaintiffs have standing to challenge racial gerrymanders only with respect to those legislative districts in which they reside. See *Alabama Legislative Black Caucus* v. *Alabama*, 575 U. S. ___, ___ (2015) (slip op., at 6). Here, in the remedial posture in which this case is presented, the plaintiffs' claims that they were organized into legislative

districts on the basis of their race did not become moot simply because the General Assembly drew new district lines around them. To the contrary, they argued in the District Court that some of the new districts were mere continuations of the old, gerrymandered districts. Because the plaintiffs asserted that they remained segregated on the basis of race, their claims remained the subject of a live dispute, and the District Court properly retained jurisdiction.

Second, the defendants argue that the District Court erred when it "conclu[ded] that the General Assembly engaged in racial gerrymandering by declining to consider race." Juris. Statement 20. They assert that "there is no dispute that the General Assembly did *not* consider race *at all* when designing the 2017 [remedial plans]—not as a predominant motive, a secondary motive, or otherwise," and that such "undisputed fact should have been the end of the plaintiffs' racial gerrymandering challenges." *Id.,* at 21–22.

This argument suffers from the same conceptual flaws as the first. While it may be undisputed that the 2017 legislature instructed its map drawers not to look at race when crafting a remedial map, what is also undisputed—because the defendants do not attempt to rebut it in their jurisdictional statement or in their brief opposing the plaintiffs' motion to affirm—is the District Court's detailed, district-by-district factfinding respecting the legislature's remedial Senate Districts 21 and 28 and House Districts 21 and 57.

That factfinding, as discussed above, turned up sufficient circumstantial evidence that race was the predominant factor governing the shape of those four districts. See, *e.g.,* 283 F. Supp. 3d, at 436. As this Court has previously explained, a plaintiff can rely upon either "circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose" in prov-

ing a racial gerrymandering claim. *Miller*, *supra,* at 916. The defendants' insistence that the 2017 legislature did not look at racial data in drawing remedial districts does little to undermine the District Court's conclusion—based on evidence concerning the shape and demographics of those districts—that the districts unconstitutionally sort voters on the basis of race. 283 F. Supp. 3d, at 442.

Third, the defendants argue that the District Court abused its discretion by arranging for the Special Master to draw up an alternative remedial map instead of giving the General Assembly—which "stood ready and willing to promptly carry out its sovereign duty"—another chance at a remedial map. Juris. Statement 33. Yet the District Court had its own duty to cure illegally gerrymandered districts through an orderly process in advance of elections. See *Purcell* v. *Gonzalez*, 549 U. S. 1, 4–5 (2006) (*per curiam*). Here the District Court determined that "providing the General Assembly with a second bite at the apple" risked "further draw[ing] out these proceedings and potentially interfer[ing] with the 2018 election cycle." 283 F. Supp. 3d, at 448, n. 10. We conclude that the District Court's appointment of a Special Master in this case was not an abuse of discretion.

Neither was the District Court's decision to adopt the Special Master's recommended remedy for the racially gerrymandered districts. The defendants argue briefly that the District Court's adoption of that recommendation was error because the Special Master's remedial plan was "expressly race-conscious" and succeeded in "compel[ling] the State to employ racial quotas of plaintiffs' choosing." Juris. Statement 34–35. Yet this Court has long recognized "[t]he distinction between being aware of racial considerations and being motivated by them." *Miller*, *supra*, at 916. The District Court's allowance that the Special Master could "consider data identifying the race of individuals or voters to the extent necessary to ensure

that his plan cures the unconstitutional racial gerrymanders," App. to Juris. Statement 111, does not amount to a warrant for "racial quotas." In any event, the defendants' assertions on this question make no real attempt to counter the District Court's agreement with the Special Master that "'no racial targets were sought or achieved'" in drawing the remedial districts. 283 F. Supp. 3d, at 449.

All of the foregoing is enough to convince us that the District Court's order should be affirmed insofar as it provided a court-drawn remedy for Senate Districts 21 and 28 and House Districts 21 and 57. The same cannot be said, however, of the District Court's actions concerning the legislature's redrawing of House districts in Wake and Mecklenburg Counties. There the District Court proceeded from a mistaken view of its adjudicative role and its relationship to the North Carolina General Assembly.

The only injuries the plaintiffs established in this case were that they had been placed in their legislative districts on the basis of race. The District Court's remedial authority was accordingly limited to ensuring that the plaintiffs were relieved of the burden of voting in racially gerrymandered legislative districts. See *DaimlerChrysler Corp.* v. *Cuno*, 547 U. S. 332, 353 (2006). But the District Court's revision of the House districts in Wake and Mecklenburg Counties had nothing to do with that. Instead, the District Court redrew those districts because it found that the legislature's revision of them violated the North Carolina Constitution's ban on mid-decade redistricting, not federal law. Indeed, the District Court understood that ban to apply unless such redistricting was "required by federal law or judicial order." 283 F. Supp. 3d, at 443. The District Court's enforcement of the ban was thus premised on the conclusion that the General Assembly's action was not "required" by federal law.

The District Court's decision to override the legislature's remedial map on that basis was clear error. "[S]tate legis-

latures have primary jurisdiction over legislative reapportionment," *White* v. *Weiser*, 412 U. S. 783, 795 (1973) (internal quotation marks omitted), and a legislature's "freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part, should not be restricted beyond the clear commands" of federal law, *Burns* v. *Richardson*, 384 U. S. 73, 85 (1966). A district court is "not free . . . to disregard the political program of" a state legislature on other bases. *Upham*, 456 U. S., at 43. Once the District Court had ensured that the racial gerrymanders at issue in this case were remedied, its proper role in North Carolina's legislative districting process was at an end.

The order of the District Court is affirmed in part and reversed in part.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

NORTH CAROLINA, ET AL. *v.* SANDRA LITTLE COVINGTON, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

No. 17–1364. Decided June 28, 2018

JUSTICE THOMAS, dissenting.

I do not think the complicated factual and legal issues in this case should be disposed of summarily. I would have set this case for briefing and oral argument. I respectfully dissent.

SUPREME COURT OF THE UNITED STATES

E. I. DU PONT DE NEMOURS & CO., ET AL. *v.*
BOBBI-JO SMILEY, ET AL.

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

No. 16–1189. Decided June 28, 2018

The motion of the Cato Institute for leave to file a brief as *amicus curiae* is granted. The motion of Pacific Legal Foundation, et al. for leave to file a brief as *amici curiae* is granted. The petition for a writ of certiorari is denied. JUSTICE ALITO took no part in the consideration or decision of these motions and this petition.

Statement of JUSTICE GORSUCH, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, respecting the denial of certiorari.

Can an agency advance an interpretation of a statute for the first time in litigation and then demand deference for its view? There is a well-defined circuit split on the question. The Court of Appeals in this case said yes, joining several other circuits who share that view. 839 F. 3d 325, 329, 333–334 (CA3 2016) (case below); *SEC* v. *Rosenthal*, 650 F. 3d 156, 160 (CA2 2011); *TVA* v. *Whitman*, 336 F. 3d 1236, 1250 (CA11 2003); *Dania Beach* v. *FAA*, 628 F. 3d 581, 586–587 (CADC 2010). But "[t]wo circuits, the Sixth and Ninth, expressly deny *Skidmore* deference to agency litigation interpretations, and the Seventh does so implicitly." Hubbard, Comment, Deference to Agency Statutory Interpretations First Advanced in Litigation? The *Chevron* Two-Step and the *Skidmore* Shuffle, 80 U. Chi. L. Rev. 447, 462 (2013) (footnotes omitted); *Smith* v. *Aegon Companies Pension Plan*, 769 F. 3d 922, 929 (CA6 2014); *Alaska* v. *Federal Subsistence Bd.*, 544 F. 3d 1089, 1095 (CA9 2008); *In re UAL Corp. (Pilots' Pension Plan Termination)*,

468 F. 3d 444, 449–450 (CA7 2006).

The issue surely qualifies as an important one. After all, *Skidmore* deference only makes a difference when the court would not otherwise reach the same interpretation as the agency. And a number of scholars and *amici* have raised thoughtful questions about the propriety of affording that kind of deference to agency litigation positions. For example, how are people to know if their conduct is permissible when they act if the agency will only tell them later during litigation? Don't serious equal protection concerns arise when an agency advances an interpretation only in litigation with full view of who would benefit and who would be harmed? Might the practice undermine the Administrative Procedure Act's structure by incentivizing agencies to regulate by *amicus* brief, rather than by rule? Should we be concerned that some agencies (including the one before us) have apparently become particularly aggressive in "attempt[ing] to mold statutory interpretation and establish policy by filing 'friend of the court' briefs in private litigation"? Eisenberg, Regulation by *Amicus*: The Department of Labor's Policy Making in the Courts, 65 Fla. L. Rev. 1223, 1223 (2013); see also, *e.g.,* Hickman & Krueger, In Search of the Modern *Skidmore* Standard, 107 Colum. L. Rev. 1235, 1303 (2007); Pierce, Democratizing the Administrative State, 48 Wm. & Mary L. Rev. 559, 606–607 (2006); Merrill, Judicial Deference to Executive Precedent, 101 Yale L. J. 969, 1010–1011 (1992).

Respectfully, I believe this circuit split and these questions warrant this Court's attention. If not in this case then, hopefully, soon.

SUPREME COURT OF THE UNITED STATES

ROWAN COUNTY, NORTH CAROLINA

v.

NANCY LUND, ET AL.

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

No. 17–565. Decided June 28, 2018

The petition for a writ of certiorari is denied.

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, dissenting from the denial of certiorari.

This Court's Establishment Clause jurisprudence is in disarray. Sometimes our precedents focus on whether a "reasonable observer" would think that a government practice endorses religion; other times our precedents focus on whether a government practice is supported by this country's history and tradition. See *Utah Highway Patrol Assn.* v. *American Atheists, Inc.*, 565 U. S. 994, 997–1001 (2011) (THOMAS, J., dissenting from denial of certiorari); *Van Orden* v. *Perry*, 545 U. S. 677, 694–697 (2005) (THOMAS, J., concurring). Happily, our precedents on legislative prayer tend to fall in the latter camp. See, *e.g., Town of Greece* v. *Galloway*, 572 U. S. ___ (2014); *Marsh* v. *Chambers*, 463 U. S. 783 (1983).

Yet the decision below did not adhere to this historical approach. In ruling that Rowan County must change the prayers it uses to open its board meetings, the Court of Appeals for the Fourth Circuit emphasized that the county's prayers are led by the legislators themselves, not by paid chaplains or guest ministers. This analysis failed to appreciate the long history of legislator-led prayer in this country, and it squarely contradicted a recent decision of the Sixth Circuit. I would have granted Rowan County's petition for certiorari.

I

Rowan County, North Carolina, is governed by a five-member Board of Commissioners (Board). The Board convenes twice a month, in meetings that are open to the public. Each meeting begins with a prayer, which the commissioners take turns leading. Prayers usually begin with an invitation ("Let us pray," "Let's pray together," "Please pray with me") and end with a communal "Amen." Because the current commissioners are all Christians, their prayers tend to reference "Jesus," "Christ," or the "Savior." But the Board does not require the commissioners to profess any particular religion, or require the prayers to have any particular content. The content of the prayer is entirely up to the commissioner giving it.

Three residents of Rowan County, who were offended by the Board's prayers, sued the county, alleging violations of the Establishment Clause. The District Court entered summary judgment in the residents' favor, 103 F. Supp. 3d 712, 713 (MDNC 2015), but a divided panel of the Fourth Circuit reversed, 837 F. 3d 407, 411 (2016). On rehearing en banc, the full Fourth Circuit affirmed the District Court's initial decision. 863 F. 3d 268, 275 (2017).

Disagreeing with the earlier panel, the en banc court began by distinguishing this Court's decision in *Town of Greece*, which upheld the prayer policy of the town of Greece in New York. The prayers in Greece were given by "guest ministers," the Fourth Circuit explained, while the prayers in Rowan County are given by the commissioners. See 863 F. 3d, at 277–278. The Fourth Circuit deemed legislator-led prayer more suspect under the Establishment Clause because it "identifies the government with religion more strongly" and "heightens the constitutional risks posed by requests to participate and by sectarian prayers." *Id.,* at 278. Since the prayers in Rowan County are legislator led, the Fourth Circuit concluded that *Town of Greece* does not apply and, thus, it "must decide whether

[Rowan] [C]ounty's prayer practice, taken as a whole," is constitutional. 863 F. 3d, at 280.

The Fourth Circuit held that it was not, for a "combination" of four reasons. *Id.,* at 281. First, the prayers in Rowan County are given exclusively by the commissioners. *Id.,* at 281–282. Second, of the 143 prayers that the Fourth Circuit analyzed, 139 "invoked" Christianity, only four were nonsectarian, and at least 11 "'promote[d]'" Christianity. *Id.,* at 283–286. Third, the commissioners "told attendees to rise and often invited them to pray." *Id.,* at 286. Fourth, and finally, the prayers took place in "the intimate setting of a municipal board meeting," where the Board often exercises "quasi-adjudicatory power over such granular issues as zoning petitions, permit applications, and contract awards." *Id.,* at 287–288.

For these four reasons, the Fourth Circuit held that Rowan County's prayer practice violated the Establishment Clause. Five judges dissented, contending that the Fourth Circuit's decision was inconsistent with this Court's precedents and this country's "long and varied tradition of lawmaker-led prayer." See *id.,* at 301–323 (opinion of Agee, J.).

II

I would have granted certiorari in this case. The Fourth Circuit's decision is both unfaithful to our precedents and ahistorical. It also conflicts with a recent en banc decision of the Sixth Circuit.

While the Fourth Circuit stated that a "combination" of factors made the Board's prayers unconstitutional, *id.,* at 281, virtually all of the factors it identified were present in *Town of Greece*. The Fourth Circuit noted that the Board's prayers were typically Christian and occasionally promoted Christianity at the expense of other religions. But so did the prayers in *Town of Greece*. See 572 U. S., at ___–___ (slip op., at 10–18). The Fourth Circuit stressed that

the commissioners often asked attendees to rise and invited them to pray. But the prayergivers in *Town of Greece* made the same invitations. See *id.,* at ___–___ (plurality opinion) (slip op., at 20–21). The Fourth Circuit thought that audience members would be pressured to participate in the prayers, given the intimate setting of Board meetings and its adjudicatory authority. But these same pressures were present in *Town of Greece*. See *id.,* at ___ (slip op., at 18); *id.,* at ___–___ (THOMAS, J., concurring in part and concurring in judgment) (slip op., at 7–8).

The only real difference between this case and *Town of Greece* is the person leading the prayer. Prayers in Rowan County are led by the commissioners, while prayers in Greece are led by guest ministers. The Fourth Circuit leaned heavily on this distinction to justify conducting its own free-floating evaluation of Rowan County's prayers. See 863 F. 3d, at 280. But what it should have done, under our precedents, is examine whether "history shows that the specific practice [of legislator-led prayer] is permitted." *Town of Greece*, *supra*, at ___ (slip op., at 8). If the Fourth Circuit had conducted that inquiry, it would have found a rich historical tradition of legislator-led prayer.

For as long as this country has had legislative prayer, legislators have led it. Prior to Independence, the South Carolina Provincial Congress appointed one of its members to lead the body in prayer. See Brief for State of West Virginia et al. as *Amici Curiae* 9 (States Brief). Several States, including West Virginia and Illinois, opened their constitutional conventions with prayers led by convention members instead of chaplains. See Brief for Members of Congress as *Amici Curiae* 10 (Congress Brief). The historical evidence shows that Congress and state legislatures have opened legislative sessions with legislator-led prayer for more than a century. See States Brief 8–19; Congress Brief 8–9. In short, the Founders simply "did not intend to

prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators." S. Rep. No. 376, 32d Cong., 2d Sess., 4 (1853).*

The Sixth Circuit, also sitting en banc, recently surveyed this history and upheld a municipal prayer policy virtually identical to Rowan County's. See *Bormuth* v. *County of Jackson*, 870 F. 3d 494 (2017). The Sixth Circuit acknowledged that its decision was "in conflict with the Fourth Circuit's" but found the latter "unpersuasive," *id.,* at 509, n. 5—not least because the Fourth Circuit "apparently did not consider the numerous examples of [legislator-led] prayers" in our Nation's history, *id.,* at 510. Thus, the Sixth and Fourth Circuits are now split on the legality of legislator-led prayer. State and local lawmakers can lead prayers in Tennessee, Kentucky, Ohio, and Michigan, but not in South Carolina, North Carolina, Virginia, Maryland, or West Virginia. This Court should have stepped in to resolve this conflict.

I respectfully dissent.

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*In addition to having little basis in history, the Fourth Circuit's decision has little basis in logic. It is hard to see how prayers led by sectarian chaplains whose salaries are paid by taxpayers—a practice this Court has upheld, see *Marsh* v. *Chambers*, 463 U. S. 783 (1983)—could be *less* of a government establishment than prayers voluntarily given by legislators. See *Bormuth* v. *County of Jackson*, 870 F. 3d 494, 523 (CA6 2017) (en banc) (Sutton, J., concurring).

SUPREME COURT OF THE UNITED STATES

UMESH KAUSHAL *v.* INDIANA

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA, FOURTH DISTRICT

No. 17–1356. Decided June 28, 2018

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the Court of Appeals of Indiana, Fourth District, for further consideration in light of *Jae Lee* v. *United States*, 582 U. S. ___ (2017).

JUSTICE ALITO, with whom JUSTICE THOMAS joins, dissenting.

The Court grants, vacates, and remands this case in light of *Jae Lee* v. *United States*, 582 U. S. ___ (2017). But *Lee* was handed down on June 23, 2017—almost a month before the Indiana Court of Appeals issued its decision in this case. Moreover, petitioner admits that he cited and advanced arguments based on *Lee* in both his petition for rehearing before the Indiana Court of Appeals and his petition for transfer to the Indiana Supreme Court. Reply Brief 3. I would accordingly deny the petition for the reasons stated in Justice Scalia's dissenting opinion in *Webster* v. *Cooper*, 558 U. S. 1039, 1040 (2009).

SUPREME COURT OF THE UNITED STATES

RICHARD GERALD JORDAN
17–7153 *v.*
MISSISSIPPI

TIMOTHY NELSON EVANS, AKA TIMOTHY N. EVANS, AKA TIMOTHY EVANS, AKA TIM EVANS
17–7245 *v.*
MISSISSIPPI

ON PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

Nos. 17–7153 and 17–7245. Decided June 28, 2018

The petitions for writs of certiorari are denied.

JUSTICE BREYER, dissenting from the denial of certiorari.

In my dissenting opinion in *Glossip* v. *Gross,* 576 U. S. ___ (2015), I described how the death penalty, as currently administered, suffers from unconscionably long delays, arbitrary application, and serious unreliability. *Id.,* at ___ (slip op., at 2). I write to underline the ways in which the two cases currently before us illustrate the first two of these problems and to highlight additional evidence that has accumulated over the past three years suggesting that the death penalty today lacks "requisite reliability." *Id.*, at ___ (slip op., at 3).

I

The petitioner in the first case, Richard Gerald Jordan, was sentenced to death nearly 42 years ago. He argues that his execution after such a lengthy delay violates the Eighth Amendment's prohibition on "cruel and unusual punishments." I continue to believe this question merits the Court's attention. See *id.*, at ___–___ (slip op., at 17–33); *Boyer* v. *Davis*, 578 U. S. ___ (2016) (BREYER, J.,

dissenting from denial of certiorari) (slip op., at 1) ("Richard Boyer was initially sentenced to death 32 years ago"); *Ruiz* v. *Texas*, 580 U. S. ___ (2017) (BREYER, J., dissenting) (slip op., at 1) ("Petitioner Rolando Ruiz has been on death row for 22 years, most of which he has spent in solitary confinement"); *Lackey* v. *Texas*, 514 U. S. 1045, 1046 (1995) (Stevens, J., memorandum respecting denial of certiorari) (discussing petitioner's "17 years under a sentence of death").

More than a century ago, the Court described a prisoner's 4-*week* wait prior to execution as "one of the most horrible feelings to which [a person] can be subjected." *In re Medley*, 134 U. S. 160, 172 (1890). What explains the more than 4-*decade* wait in this case? Between 1976 and 1986, each of Jordan's first three death sentences was vacated on constitutional grounds, including by this Court. See *Jordan* v. *Mississippi*, 476 U. S. 1101 (1986) (vacating death sentence and remanding case in light of *Skipper* v. *South Carolina*, 476 U. S. 1 (1986)); see also Brief in Opposition in No. 17–7153, p. 4–5 ("Jordan was originally convicted and *automatically* sentenced to death" in July 1976—the same month that this Court held mandatory death sentences unconstitutional in *Woodson* v. *North Carolina*, 428 U. S. 280 (1976) (emphasis added)). In 1998, Jordan was sentenced to death for the fourth time. (He had entered into a plea agreement providing for a sentence of life without parole, but the Mississippi Supreme Court invalidated that agreement and the prosecutor refused to reinstate it. See *Jordan* v. *Fisher*, 576 U. S. ___ (2015) (SOTOMAYOR, J., dissenting from denial of certiorari).)

Jordan has lived more than half of his life on death row. He has been under a death sentence "longer than any other Mississippi inmate." 224 So. 3d 1252, 1253 (Miss. 2017). The petition states that since 1977, Jordan has been incarcerated in the Mississippi State Penitentiary

and spent "most of that time on death row living in isolated, squalid conditions." Pet. for Cert. in No. 17–7153, p. 11; see also *ibid.* (citing *Gates* v. *Cook*, 376 F. 3d 323, 332–335 (CA5 2004) (holding that the conditions of confinement on Mississippi State Penitentiary's death row violate the Eighth Amendment)); Robles, The Marshall Project, Condemned to Death—and Solitary Confinement (July 23, 2017), (reporting based upon a nationwide survey of state corrections officials that Mississippi is 1 among 20 States that permit death row inmates "less than four hours of out-of-cell recreation time each day"), https://www.themarshallproject.org/2017/07/23/condemned-to-death-and-solitary-confinement (all Internet materials as last visited June 27, 2018); cf. *Davis* v. *Ayala*, 576 U. S. ___, ___ (2015) (KENNEDY, J., concurring) (slip op., at 1) (noting that "the usual pattern" of solitary confinement involves "a windowless cell no larger than a typical parking spot" for up to "23 hours a day"). This Court has repeated that such conditions bear "'a further terror and peculiar mark of infamy' [that is] added to the punishment of death." *In re Medley*, *supra,* at 170. Such "additional punishment," the Court has said, is "of the most important and painful character." *Id.*, at 171. In my view, the conditions in which Jordan appears to have been confined over the past four decades reinforce the Eighth Amendment concern raised in his petition.

Jordan, now 72 years old, is one among an aging population of death row inmates who remain on death row for ever longer periods of time. Over the past decade, the percentage of death row prisoners aged 60 or older has increased more than twofold from around 7% in 2008 to more than 16% of the death row population by the most recent estimate. Compare Dept. of Justice, Bureau of Justice Statistics, T. Snell, Capital Punishment, 2008—Statistical Tables (rev. Jan. 2010) (Table 7), with Dept. of Justice, Bureau of Justice Statistics, E. Davis & T. Snell,

Capital Punishment, 2016, p. 7 (Apr. 2018) (Table 4) (Davis & Snell). Meanwhile, the average period of imprisonment between death sentence and execution has risen from a little over 6 years in 1988 to more than 11 years in 2008 to more than 19 years over the past year. See Dept. of Justice, Bureau of Justice Statistics, T. Snell, Capital Punishment, 2013—Statistical Tables, p. 14 (rev. Dec. 19, 2014) (Table 10); Death Penalty Information Center (DPIC), Execution List 2018, https://deathpenaltyinfo.org/execution-list-2018; DPIC, Execution List 2017, https://deathpenaltyinfo.org/execution-list-2017; see also F. Baumgartner et al., Deadly Justice: A Statistical Portrait of the Death Penalty 161, 168, Fig. 8.1 (2018) (analyzing recent data showing that "nationally, each passing year is associated with approximately 125 additional days of delay from crime to execution").

II

In addition, both Richard Jordan's case and that of Timothy Nelson Evans, the second petitioner here, illustrate the problem of arbitrariness. To begin with, both were sentenced to death in the Second Circuit Court District of Mississippi. Evans says that district accounts for "the largest number of death sentences" of any of the State's 22 districts since 1976. Pet. for Cert. in No. 17–7245, pp. 5–6; see also App. D to Pet. for Cert. (citing death sentencing data maintained by Mississippi's Office of the State Public Defender).

This geographic concentration reflects a nationwide trend. Death sentences, while declining in number, have become increasingly concentrated in an ever-smaller number of counties. In the mid-1990's, more than 300 people were sentenced to death in roughly 200 counties each year. B. Garett, End of Its Rope: How Killing the Death Penalty Can Revive Criminal Justice 138–140 (2017). By comparison, these numbers have declined

dramatically over the past three years. A recent study finds, for example, that in 2015, *all* of those who were sentenced to death nationwide (51 people in total) were sentenced in 38 of this Nation's more than 3,000 counties; in 2016, *all* death sentences (31 in total) were imposed in just 28 counties nationwide (fewer than 1% of counties). *Id.,* at 139–140, Fig. 6.2; see also Garrett, Jakubow, & Desai, The American Death Penalty Decline, 107 J. Crim. L. & C. 561, 564, 584 (2017); Fair Punishment Project, Too Broken To Fix: Part I: An In-Depth Look at America's Outlier Death Penalty Counties 2 (2016) (citing data indicating there were 16 counties, or 0.5% of all counties nationwide, in which five or more death sentences were imposed from 2010 to 2015); cf. M. Radelet, The History of the Death Penalty in Colorado 168 (2017) (explaining that Colorado's three death row inmates "[a]ll were prosecuted in the same judicial district, all the cases came from Aurora, all are young black men, and indeed all attended the same high school"); Joint State Government Commission, Capital Punishment in Pennsylvania: The Report of the Task Force and Advisory Committee 90 (June 2018) ("[D]ifferences among counties in death penalty outcomes . . . were the largest and most prominent differences found in the study. In a very real sense, a given defendant's chance of having the death penalty sought, retracted, or imposed depends upon where that defendant is prosecuted and tried") (internal quotations omitted); *Glossip,* 576 U. S., at ___ (slip op., at 12) (BREYER, J., dissenting).

This geographic arbitrariness is aggravated by the fact that definitions of death eligibility vary depending on the State. This Court has repeated that "[c]apital punishment must be limited to those offenders who commit a narrow category of the most serious crimes," *Roper* v. *Simmons*, 543 U. S. 551, 568 (2005) (internal quotation marks omitted), since "the culpability of the average murderer is insufficient to justify the most extreme sanction available

to the State." *Atkins* v. *Virginia*, 536 U. S. 304, 319 (2002). But the statutory criteria States enact to distinguish a non-death-eligible murder from a particularly heinous death-eligible murder and thus attempt to use to identify the "worst of the worst" murderers are far from uniform. See Baumgartner, *supra,* at 90–115 (reviewing data collected in a "host" of empirical studies showing "that nearly *all* homicides in a given state are death-eligible").

For instance, as Evans argues, Mississippi is one of a small number of States in which defendants may be (and, in Mississippi's Second Circuit Court District, routinely are) sentenced to death for, among other things, felony robbery murder without any finding or proof of intent to kill. Pet. for Cert. in No. 17–7245, at 4–5, and nn. 3–4; see also *id.,* at 8, n. 10; Miss. Code Ann. §§97–3–19(2)(e), (f), 99–19–101(5)(d) (2017); McCord & Harmon, Lethal Rejection: An Empirical Analysis of the Astonishing Plunge in Death Sentences in the United States From Their Post-*Furman* Peak, 81 Albany L. Rev. 1, 32–33, and n. 155, Table 10 (2018) (citing data indicating the general decline in robbery as an aggravating factor and research arguing that relying upon robbery as a sole aggravator is generally insufficient to identify the "worst of the worst"). And the Court recently considered a petition presenting "unrebutted" evidence that "about 98% of first-degree murder defendants in Arizona were eligible for the death penalty" under Arizona's death penalty statute, which allows for imposition of the death penalty for "felony murder based on 22 possible predicate felony offenses . . . including, for example, transporting marijuana for sale." *Hidalgo* v. *Arizona*, 583 U. S. ___, ___, ___ (2018) (BREYER, J., statement respecting denial of certiorari) (slip op., at 4, 7).

I recognize that only a small fraction of the roughly 8,000 death sentences imposed since 1976 have resulted in executions. Executions continue to decline from the mod-

ern peak of 98 executions occurring across 72 counties and 20 States in 1999 to 28 executions in 22 counties across 6 States in 2015. Baumgartner, *supra,* at 328. In 2016, 20 people were executed. That number remains the fewest executions in more than a century, just below the 23 executions that took place in 2017. See Davis & Snell 8, 15. More than 700 people await execution on California's death row but the State, which has executed 13 people since 1976, has not carried out an execution since 2006. *Id.,* at 3; DPIC, State by State Database: California, https://deathpenaltyinfo.org/state_by_state. The State of Mississippi, which has executed a total of 21 people since 1976, has not carried out an execution in more than six years. DPIC, State by State Database: Mississippi, https://deathpenaltyinfo.org/state_by_state. This data suggests that the death penalty may eventually disappear. But it also shows that capital punishment is "unusual" (as well as "cruel").

III

Finally, I note that in the past three years, further evidence has accumulated suggesting that the death penalty as it is applied today lacks "requisite reliability." *Glossip,* 576 U. S., at ___ (BREYER, J., dissenting) (slip op., at 3). Four hours before Willie Manning was slated to die by lethal injection, the Mississippi Supreme Court stayed his execution and on April 21, 2015, he became the fourth person on Mississippi's death row to be exonerated. *Id.,* at ___ (slip op., at 21); National Registry of Exonerations (June 25, 2018), https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx. Since January 2017, six death row inmates have been exonerated. See DPIC, Description of Innocence, https://deathpenaltyinfo.org/innocence-cases#157. Among them are Rodricus Crawford, Rickey Dale Newman, Gabriel Solache, and Vicente Benavides Figueroa, whose exonerations were based upon

evidence of actual innocence. See National Registry of Exonerations (June 25, 2018), https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx.

* * *

In my view, many of the capital cases that come before this Court, often in the form of petitions for certiorari, involve, like the cases of Richard Jordan and Timothy Evans, special problems of cruelty or arbitrariness. Hence, I remain of the view that the Court should grant the petitions now before us to consider whether the death penalty as currently administered violates the Constitution's Eighth Amendment.