

Case No. _____

IN THE
Supreme Court of the United States

ARIF MAJID,

Petitioner,

v.

JEFF NOBLE, Warden,

Respondent,

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a prosecutor's appeals to religious prejudice in closing argument and throughout trial to inflame the passions of the jury embody animus or official hostility that violates due process, where the trial court gives no curative instruction and the evidence that the defendant committed the offense charged is disputed.

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PETITION FOR A WRIT OF CERTIORARI

Arif Majid respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

INTRODUCTION

Every court that has reviewed this case agrees that the prosecutor engaged in misconduct during his examinations of key witnesses and in his closing argument. This misconduct inflamed the passions of the jury by portraying Petitioner Arif Majid as a “dangerous” “Islamic warrior” because of his faith, in a case having nothing to do with religion. Because of the prosecutor’s misconduct, the Sixth Circuit concluded that this case presents “a close call” for habeas relief. Similarly, the district court expressed doubt about denying relief.

A jury convicted Petitioner of murder and other offenses resulting from an exchange of gunfire at a bar. At trial, the central question involved the identity of the person who fired the shots that killed one man and injured two others. Throughout the trial, the prosecutor repeatedly directed the jury’s attention to Mr. Majid’s distinctive tattoos, which evidenced his Islamic faith. On direct appeal, the state defended the prosecutor by arguing that his questioning of various witnesses about the tattoos was related to identification of the shooter. As the state courts noted, however, the record shows that no witness identified the shooter by these tattoos, which provided a pretext for the prosecutor to inflame the passions of the jury to overcome disputed facts and reasonable doubts in the evidence about the fundamental question of who the shooter was.

The prosecutor went so far as to ask the first eyewitness to the shooting who testified (Rayshawn Whitsett), a member of the armed forces, to give his opinion of the meaning of the word “jihad,” which Mr. Majid has tattooed on his back as a mark of his Islamic faith. Later, when the prosecution’s star witness (Milton Franklin, III) testified, the prosecutor went even farther, asking him about the witness’s own adherence to Islam and contrasting this witness’s non-observant religious practice with what the prosecutor portrayed as Mr. Majid’s zealotry and extremism. Then, the night before closing arguments, President Obama announced the death of Osama bin Laden. The next morning, in his rebuttal argument, the prosecutor preyed on the passions of the day by urging the jury to convict because Petitioner was a “dangerous” “Islamic warrior.” As a result of his misconduct, the prosecutor secured a conviction on improper grounds. Indeed, during deliberations the jury asked questions showing that they harbored doubts about the identity of the shooter.

On this record, each court that has reviewed this case has rightly agreed that the prosecutor engaged in misconduct. But each court has reviewed the specific instances of misconduct in isolation and employed a quantitative approach rather than considering the qualitative effect of the prosecutor’s misconduct on the record as a whole. The record shows that these improper lines of questioning and arguments pervaded the entire trial—from voir dire to opening statements, during examination of multiple witnesses examined at key times in the trial, and through the state’s rebuttal. And no court has taken into account the effect of President

Obama's announcement the night before closing arguments. The prosecutor's deliberate and repeated misconduct had a substantial and injurious effect or influence in determining the jury's verdict by inflaming the passions of the jury, misleading the jury by diverting attention from reasonable doubts in the prosecution's proof, and securing a conviction on improper grounds. As a result, Petitioner is now serving a sentence of forty-three years to life.

Allowing Mr. Majid's conviction to stand in the face of the prosecutor's animus toward religion, and Islam in particular, erodes the Constitution's guarantee that no state may deprive a person of liberty in a trial infected with religious prejudice. In particular, the prosecutor's clear and impermissible hostility toward Islam in this case conflicts with this Court's decisions, which ensure a trial in a fair and neutral forum untainted by the sort of misconduct at issue, which strikes at core constitutional values.

Some lower courts believe that hostility to religion receives less scrutiny than a prosecutor's appeals to race or other impermissible factors. This Court should dispel this misconception and clarify that improper religion-based arguments have no place in the administration of justice. Failing to intervene in this case signals that state and federal courts should value finality over religious liberty, no matter how troubling the misconduct of a prosecutor or other state actor. In this way, this case affords this Court the opportunity to expound on its most recent pronouncements on the type of religious hostility that violates the Constitution, and its effect will extend far beyond the specific facts presented.

OPINIONS BELOW

The opinion of the court of appeals, included in the appendix to this petition at App. 1, is not reported, but appears at *Majid v. Noble*, No. 16-3872, 2018 U.S. App. LEXIS 28996, 2018 WL 5008554 (6th Cir. Oct. 16, 2018), *reh'g and reh'g en banc denied*, 2018 U.S. App. LEXIS 32449 (6th Cir. Nov. 15, 2018), App. 147.

The opinion of the district court, also included in the appendix to this petition at App. 22, is not reported, but appears at *Majid v. Morgan*, No. 1:13-cv-843, 2016 U.S. Dist. LEXIS 82793 (N.D. Ohio June 25, 2016). The district court's opinion overruled objections to the report and recommendation of the magistrate judge, which is included in the appendix to this petition at App. 60 and appears at *Majid v. Morgan*, No. 1:13-cv-843, 2015 U.S. Dist. LEXIS 178924 (N.D. Ohio June 22, 2015).

The opinion of the intermediate appellate court on direct review, which is included in the appendix to this petition at App. 105, is reported at *State v. Majid*, No. 96855, 2012-Ohio-1192 (Ohio Ct. App.), *discretionary appeal denied*, 132 Ohio St. 3d 1464, 2012-Ohio-3054, 969 N.E.2d 1231 (Ohio 2012), App. 148.

JURISDICTION

The court of appeals entered its judgment on October 16, 2018 and denied a petition for rehearing and rehearing en banc on November 15, 2018. *See* App. 147. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. U.S. Const., Amend. XIV, sec. 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. 28 U.S.C. § 2254(d)

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

This case arises from a fight between a group of patrons at a bar and the bar's management. After exhausting his state court remedies, Mr. Majid petitioned for a writ of habeas corpus in the district court, which exercised jurisdiction under 28 U.S.C. § 2254(a).

A. A Dispute at a Bar Escalates into a Fatal Shooting.

Over Labor Day weekend in 2005, Arif Majid (also known as Cedric Parker) was part of a group of four men that went to Milton's Lounge in Euclid, Ohio. Witnesses inside the crowded bar described Mr. Majid and his group as "rowdy." On the bar's dance floor, Mr. Majid removed his shirt twice and bar employees asked him to put it back on. Without his shirt on, Mr. Majid's tattoos were visible: the word "mujahideen" on his chest, an AK-47 on his abdomen, and crossed Islamic sabers on his back beneath the word "jihad" in large letters between his shoulders.

When a member of the group dropped a drink on the dance floor, the bar's management asked the group to leave, which they did. Outside the bar, the group lingered. The bar's owner, Milton Franklin, Jr., asked the men not to loiter, but the men disregarded him. Milton Franklin III, the bar owner's son and an employee of the bar, went outside, and a confrontation ensued. Franklin III stepped back inside. As the bar owner closed and locked the door, Mr. Majid's brother punched and cracked a window in the bar's door.

In response, Franklin III pulled out a gun and fired at Mr. Majid and his brother. A short time later, someone fully knocked out the window in the door of the bar, an arm appeared through the window hole with a gun, and the perpetrator

fired at least two shots. Witnesses testified that, after the perpetrator withdrew his arm from the bar window, they saw Mr. Majid stand outside the bar with a gun, point the gun at the bar where Franklin stood, and begin firing.¹ During this incident, shots struck three patrons of the bar, killing Jerome Thomas and injuring two other men, including Rayshawn Whitsett who was shot in his hip. Franklin III was not injured.

B. At Trial, the Prosecutor Engaged in Misconduct in the Examinations of Key Witnesses and in Closing Argument.

At trial, the central issue was identification of the person responsible for killing Thomas and shooting the other two victims. Throughout the trial, Petitioner maintained his innocence. The evidence presented in the prosecution's case left doubt about who the shooter was. For example, the evidence showed that two men removed their shirts on the dance floor—Mr. Majid and Christopher Core. Like Petitioner, Core is a light-skinned African-American male.

Three other material facts, omitted from the opinions below, support Petitioner's argument that he was not the shooter and demonstrate the need for this Court's intervention.

First, DNA proves Petitioner did not break the window. Morris Sickles, who testified for the state, identified the shooter as the same person who punched out the bar's window. But DNA evidence taken from blood on the glass where the arm

¹ Although some witnesses testified they saw Petitioner fire these shots, such testimony may prove unreliable, particularly in a chaotic, life-threatening situation where people were ducking for cover. *See, e.g., United States v. Wade*, 388 U.S. 218, 228 (1967); *see also Perry v. New Hampshire*, 565 U.S. 228, 243-44 (2012) (identifying various factors casting doubt on the trustworthiness of eyewitness identification).

appeared through the hole in the window of the bar's door established that Mr. Majid did not punch out the window in the bar's door—his brother did.

Second, witness statements given to the police on the night of the shooting identified the shooter as having braided hair. Only one person in the group of “rowdy” men in the bar that night had braids—Christopher Core.

Third, the shooter fled the scene in a red van. Witnesses told the police on the night of the shooting that the shooter fled the scene in a red van. Core, a witness for the prosecution, testified that, when the gunfire started, he got into his car and saw Petitioner already driving away in a car, not a van.

In short, the evidence at trial left doubt about the identity of the shooter. The prosecutor's misconduct had the substantial and injurious effect of inviting the jury to overlook doubts in the prosecution's case and convict on improper grounds.

B.1 In his examination of the first eyewitness to testify, the prosecutor portrayed Petitioner as carrying out an act of jihad.

Whitsett was the first eyewitness to testify at trial. He testified that he and a friend went to the Milton's Lounge over Labor Day weekend to drink and meet women. At one point, he testified, a “rowdy” group of three or four guys caused a commotion, and Whitsett saw that one of the men had removed his shirt. Whitsett testified that the shirtless guy had a tattoo on his back that said “Jihad” across his shoulders and had a cross above it.

After eliciting testimony that Petitioner had a “jihad” tattoo on his back, the prosecutor asked Whitsett whether the term jihad had significance to him based on his military service. (Whitsett was an electrician stationed in North Dakota and did

not serve overseas.) Defense counsel objected, and the trial court largely sustained the objection, foreclosing any editorializing by the prosecutor and limiting questioning to why Whitsett remembered that fact. Defense counsel renewed this objection, and it remained a standing objection through Whitsett's testimony and the trial. Over this objection, and others, the trial court permitted the prosecutor to spend time asking Whitsett to show the jury where on Petitioner's back the tattoo was and to describe the cross, while repeatedly emphasizing the word "jihad."

Whitsett proceeded to describe the shooting. In doing so, he first identified the shooter by reference to the tattoos on his arm, *not* the jihad tattoo on his back—the prosecutor then suggested that the shooter was committing an act of jihad by firing into the bar:

Q. So the person that you saw pass by you without a shirt with Jihad on his shoulder blades is doing what outside the window?

A. Shooting rounds inside the bar.

Whitsett testified that he was struck by a bullet in his rear upper thigh. Then, the prosecutor closed his examination by refreshing Whitsett's recollection about the location of the jihad tattoo. At this point, the examination continues for several pages, emphasizing Mr. Majid's tattoos for the jury and the popular understanding of terms like "jihad." Significantly, this testimony followed the prosecutor's invocation of the events of 9/11 in voir dire.

B.2. When the state's star witness testified, the prosecutor contrasted his non-observant Muslim faith with Petitioner's claimed religious zealotry.

Following Whitsett's testimony, the prosecutor continued to emphasize the tattoos (and their popular meanings) in his examinations of other witnesses throughout the trial. As the last witness of the first week of trial, the prosecutor presented the testimony of the state's star witness, Milton Franklin, III, the son of the bar owner who fired the shots that escalated events on the night of the shooting.

At the outset of Franklin's testimony, the prosecutor noted for the jury that Franklin had a long beard and was wearing a kufi, a short cap, as a symbol of his Islamic faith. After emphasizing for the jury that Franklin converted to Islam and that his father is a Christian, the prosecutor inquired about Franklin's faith. Franklin testified that he was a non-practicing Muslim, who was not strict or devout. The prosecutor inquired whether any of Franklin's tattoos referenced his religion. None do. He went on to ask whether anything on Franklin's body referenced "Military Mind," representing single-minded callousness or indifference to murder. Nothing did. Then, the prosecutor asked Franklin the meaning of various terms relating to his Islamic faith:

Q. There is an Arabic greeting, and I don't know, maybe you can place it in context for me because I don't pretend to be knowledgeable about it, I just know of it. It begins with, I believe, Salam and another word?

A. Assalamu Alaikum.

Q. Can you slow that down and sound it out please?

A. Assalam U Alaikum.

Q. What does that mean?

A. Peace be onto you.

Q. Can you spell that for us, please?

A. A-S-S-L-A-A-M, U, A-L-A-I-K-U-M.

Q. And for practitioners of Islam, how is it used?

A. As a greeting to other Muslims.

Q. Peace be unto you?

A. Yes.

But the prosecutor did not stop there, he inquired about terms specifically associated with terrorism in the popular imagination:

Q. Are you familiar with the term Mujahid?

A. Yes.

Q. What does it mean to you?

[Defense Counsel]: Objection.

THE COURT: Overruled. He may answer.

A. One who is struggling with things in the world. It could be your addition to, you know, things that you know are outside of Islam. And it can also be interpreted as a soldier, but that's really an incorrect definition.

Q. Are you familiar with the term Jihad, J-I-H-A-D?

A. Yes.

[Defense Counsel]: Objection.

THE COURT: Overruled.

Q. What does it mean to you?

A. Jihad is actually like the root word of Mujahid which means struggle to which you are trying to overcome. It could be strife in your nation, it could be, like I said, your addiction of doing things that you know are contrary to your beliefs of Islam. But it's also a lot of times misconstrued to mean war.

[Defense Counsel]: Objection.

THE COURT: Sustained.

Q. Do you have the word "Jihad" on your body?

A. No.

Q. Do you have the word "Mujahid" on your body?

A. No.

Q. I am referencing when I say on your body, I mean tattoos?

A. No, I don't.

Q. Do you have any swords on your body, sir?

A. No.

Despite the prosecutor's fixation on the religious meaning of various terms and the tattoos, Franklin confirmed that they have no relevance to events at the bar.

After these questions from the prosecutor, Franklin proceeded to testify about events on the night of the shooting. As he did so the prosecutor returned again to the religious meaning of the tattoos. In this way, the prosecutor left the jury to contemplate over the weekend his examination of Franklin and its emphasis on Mr. Majid's tattoos and Islamic faith and their associations with terrorism.

B.3. In closing argument, the prosecutor urged the jury to convict Petitioner because he is a “dangerous” “Islamic warrior.”

In rebuttal, the prosecutor’s argument sought to inflame the jury and turn jurors against Petitioner based on his religion and his tattoos, which made him “dangerous”:

What do you think it takes, from your life experiences, to place this body art on yourself as a person; what statement are you trying to make? Stop and ask yourself that question. Majahid, a rifle, swords, Jihad. Is that a statement of self expression of don’t mess with me. I’m a warrior, I’m dangerous. I’m something that you don’t want to mess with. I think the average person would agree with those statements.

This argument came on the morning after the President of the United States announced the death of Osama bin Laden in a nationally televised addressed.

After appealing to the passions of the day, the prosecutor made matters worse by continuing the theme. For example, when describing Whitsett’s testimony, the prosecutor effectively told jurors that, if they doubted Whitsett’s identification of Petitioner as the shooter, they would be accusing Whitsett or the investigation of harboring anti-Islamic bias:

So when you’ve got Rayshawn [Whitsett] up here looking over here; who was it, who was shooting? Him. Him. Him. Was that a genuine moment? Or was that Islamic prejudice?

Then, the prosecutor maintained that he did not present evidence of Mr. Majid’s tattoos to the jury to portray him “as some sort of Islamic warrior” because “they are not offered for that purpose.” Later, he argued that he only raised the tattoos because the witnesses used them to identify the shooter: “Oh, this is all just focused

on the dude with the Islamic tattoos. Is that what this is, or is that how people described the shooter to be?”

In making his argument on transferred intent, and despite his earlier disclaimer, the prosecutor argued that Mr. Majid was an “Islamic warrior”: “If he’s this Islamic warrior, if he’s got some sort of honor, he should have called Milton Franklin, III out and said, business outside” instead of firing at the bar. Following the jury instructions, which did not include any curative instruction, these were the last words the jury heard before retiring to deliberate.

C. The Courts Below Fail to Discuss Additional Events from Trial Showing That the State Did Not Carry Its Burden of Proving the Harmlessness of the Prosecutor’s Misconduct.

Beyond the evidence presented at trial and omitted from the opinions below showing that the prosecution’s case left doubt about the identity of the shooter, which was the central issue at trial, the courts below fail to account for other events from trial that support the issuance of a writ.

C.1. Discussion of Islam and the tattoos was not so limited or discrete.

After discussing the testimony from Whitsett and Franklin III, the Sixth Circuit states that “[t]here was no further discussion of Islam until closing arguments.” App. 9. Not so. After the testimony of Franklin III, the prosecutor called Morris Sickles to testify on the last day of the trial. The prosecutor examined Sickles about the tattoos, whether he (Sickles) had any, and through his examination repeatedly emphasized Islam and Mr. Majid’s tattoos, including their militant imagery and the word “jihad.”

C.2. Before closing arguments, President Obama announced the death of Osama bin Laden.

The night before closing arguments, President Barack Obama addressed the nation and reported that a U.S. military operation had killed Osama bin Laden.

(See <https://obamawhitehouse.archives.gov/the-press-office/2011/05/02/remarks-president-osama-bin-laden>.) The President's remarks invoked the specter of 9/11 by reminding the nation of images from that day and the human toll it exacted. (*Id.*) After stating that the nation is not at war with Islam, President Obama emphasized that the fight against terrorism goes on and that the country "will never tolerate our security being threatened, nor stand idly by when our people have been killed." (*Id.*) President Obama concluded his remarks by admonishing that "[t]he cause of securing our country is not complete." (*Id.*)

Counsel made closing arguments the next morning.

C.3. In his rebuttal argument, the prosecutor also lamented not being able to use torture to compel testimony.

After arguing for conviction because Mr. Majid is a "dangerous" "Islamic warrior," the prosecutor offered the jury an explanation for the absence of certain witnesses who failed to appear at trial. In doing so, the prosecutor lamented that the law does not allow him to torture or waterboard people into testifying:

Yeah, there is a lot more witnesses to this case. We, unfortunately, you know, this is a court of law not a court of torture. We don't get to water board our witnesses into opening their mouths if they choose to keep them shut. We cannot compel testimony in that sense. . . . I don't have the power into torturing someone into talking about something they are terrified of or afraid of to talk about.

On that note, the trial court instructed the jury, which then retired to deliberate.

C.4. The jury asks to review evidence, which the trial court refused to provide, to answer questions about the shooter's identity.

During its deliberations, the jury requested to review the testimony of Sickles and the statements witnesses gave to the police—none of which identified Mr. Majid by reference to specific tattoos or his religion. In response, the court instructed jurors to rely on their memories of the evidence. In effect, the jurors expressed doubts about the identification of Mr. Majid as the shooter and, when told to rely on their memories, they were left with the prosecutor's improper references to Mr. Majid's tattoos and faith, which pervaded the trial, and with identification of Mr. Majid's dangerousness as a basis for conviction—not the evidence.

D. The Record Shows That Petitioner Has Raised and Preserved His Prosecutorial Misconduct Claim.

The district court *sua sponte* granted a certificate of appealability, which the Sixth Circuit expanded to include the following issues:

- (1) Whether the prosecutor engaged in misconduct by:
 - (a) Questioning Rayshawn Whitsett about the meaning that certain Islamic terms had for him,
 - (b) Examining Milton Franklin, III about his religion and asking him to define various Islamic terms, and
 - (c) Suggesting to the jury during summation that Mr. Majid was an “Islamic warrior” whose tattoos were evidence of dangerousness and guilt; and
- (2) Whether the trial court denied Mr. Majid a fair trial by admitting Franklin’s testimony about the meaning of certain Islamic terms.

As discussed in the rulings below, *see, e.g.*, App. 11, 34, 41 & 47, Petitioner raised and preserved the prosecutorial misconduct claim raised in the certificate of appealability.

REASONS FOR GRANTING THE PETITION

In the decision below, the Sixth Circuit decided an important question of federal constitutional law in a way that conflicts with relevant decisions of this Court. Specifically, the judgment of the court of appeals sanctions the official use of religious argument and prejudice to secure a conviction, contrary to the well-settled command of the Constitution. To the extent the lower courts view the impropriety of religious-based prosecutorial arguments as less well established than appeals to other impermissible considerations, such as race, this Court should resolve such doubts and affirm that such conduct violates a defendant's due process rights. Finally, this Court should intervene to build on its recent rulings vindicating individual rights against official hostility to religion and further explain the circumstances under which the Constitution demands new proceedings in the face of such animus.

I. The Judgment Below Conflicts with This Court's Jurisprudence, Holding That Prosecutorial Misconduct of the Sort at Issue Renders a Trial Fundamentally Unfair.

Under this Court's decisions, prosecutorial misconduct that "so infected the trial with unfairness as to make the resulting conviction a denial of due process" merits habeas relief. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). "[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*,

455 U.S. 209, 219 (1982). “Religious arguments have been condemned by virtually every federal and state court to consider their challenge.” *Sandoval v. Calderon*, 241 F.3d 765, 777 (9th Cir. 2000) (collecting authorities). Indeed, every court that has reviewed this case agrees that the prosecutor engaged in misconduct during his examinations of key witnesses and his closing argument, which inflamed the passions of the jury by portraying Mr. Majid as a “dangerous” “Islamic warrior.”

I.A. The Ruling Below Endorses a New Legal Standard for Prosecutorial Misconduct, Focusing on Its Quantity Over Its Qualitative Effect on the Fairness of the Trial as a Whole.

Determining whether prosecutorial misconduct so infected the trial as to render a conviction fundamentally unfair requires consideration of the record as a whole. *Donnelly*, 416 U.S. at 643. But no court has considered the effect of the prosecutor’s improper portrayal of Mr. Majid as a dangerous Islamic warrior, which pervaded the trial from voir dire to opening statements, during examination of multiple witnesses examined at key times in the trial, and through the state’s rebuttal. Instead, the courts below focused on individual instances of misconduct to the exclusion of their effect on the trial as a whole. Effectively, the lower courts departed from this Court’s longstanding prosecutorial misconduct jurisprudence by applying a new standard that limits its reach to specific instances of misconduct without considering their effect on the fairness of the trial as a whole. For this reason, this Court’s failure to intervene will acquiesce in and encourage modification of the substantive law, which also carries significant collateral consequences for how habeas petitioners and state courts think about and approach preservation of the issue.

Moreover, the Sixth Circuit endorses a novel quantitative approach to determining the effect of prosecutorial misconduct. The court dismissed the substantial and injurious effect of the prosecutor's misconduct as isolated instances here and there in a lengthy transcript. (*See, e.g.*, App. 14, 15, 16 & 20.) But the proper inquiry turns on the effect of the misconduct on the record as a whole, not on the quantitative approach adopted below. If allowed to stand, that approach re-writes the meaning of due process, ignoring the context in which the examinations of Whitsett and Franklin and the rebuttal occurred, after the prosecutor focused on Mr. Majid's jihad tattoo and Islam through the entire trial as part of a deliberate strategy to overcome gaps in the evidence and doubts about the identity of the shooter. For this reason, this Court's intervention is also necessary to articulate the proper standard under the Constitution for evaluation of prosecutorial misconduct—something this Court has not done in at least a decade.

I.B. This Case Presents the Opportunity for This Court to Identify When an Error Is Not Harmless and to Correct the Decision Below, Which Improperly Flips the Burden of Proof.

In a habeas case, *Brech* *v. Abrahamson*, 507 U.S. 619 (1993), provides the proper standard for analyzing harmless error. *See, e.g.*, *Fry v. Pliler*, 551 U.S. 112, 117 (2007). Under the *Brech* standard, a court must determine whether the error "had substantial and injurious effect or influence in determining the jury's verdict." 507 U.S. at 637; *see also Calderon v. Coleman*, 525 U.S. 141, 145 (1998). *Brech* "subsumes the limitations imposed by AEDPA." *Davis v. Ayala*, 135 S. Ct. 2187, 2199 (2015). Respondent must prove that an error is harmless. *Id.* at 2197; *O'Neal v. McAninch*, 513 U.S. 432, 435-36 (1995). The Sixth Circuit scarcely addresses this

standard. Nor does it explain how the state carried its burden here. App. 20-21. As a result, the ruling conflicts with this Court’s harmless error jurisprudence, which has an effect far beyond the facts of this case, and effectively relieves Respondent of the burden of proof.

Moreover, *Brecht* itself recognized that “a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury’s verdict.” 507 U.S. at 638 n.9 (citing *Greer v. Miller*, 483 U.S. 756, 769 (1987) (Stevens, J., concurring)); *see also Fry*, 551 U.S. at 117. Although the record demonstrates that the prosecutor’s misconduct substantially influenced the jury’s verdict, this case presents deliberate and particularly egregious errors warranting relief under this exception to the *Brecht* harmless error framework. Particularly given the extraordinary announcement of Osama bin Laden’s death the night before closing arguments, this Court’s decisions that exposure of the jury to unfavorable publicity is structural error, for which harmless error analysis is not appropriate, reinforces this conclusion. *See, e.g., Vasquez v. Hillery*, 474 U.S. 254, 263 (1986). Although the Sixth Circuit failed to address the applicability of this aspect of *Brecht*, though presented to the court, this case affords this Court a rare opportunity to identify the circumstances in which it applies.

II. This Court Should Confirm That the Constitution Does Not Countenance a Prosecutor's Improper Argument Based on Religion.

Without question, the Constitution proscribes prosecutorial arguments based on racial bias or similarly improper factors. *See, e.g., McCleskey v. Kemp*, 481 U.S. 279, 309 n.30 (1987) (“[T]he Constitution prohibits racially biased prosecutorial arguments.”). Such arguments invite the jury to base decisions about guilt or innocence on considerations other than the evidence and relevant law. *See, e.g., Chandler v. Florida*, 449 U.S. 560, 574 (1981); *United States v. Heller*, 785 F.2d 1524, 1527 (11th Cir. 1986).

But some lower courts afford a defendant or habeas petitioner *less* protection under the Due Process Clause against a prosecutor's improper religion-based arguments. *See, e.g., Bains v. Cambra*, 204 F.3d 964, 974 n.5 (9th Cir. 2000) (“[A]lthough perhaps to a lesser extent, religion-based prosecutorial arguments also are prohibited under clearly established federal law.”). Such a standard providing less constitutional protection based on a person's religion finds no support in the Constitution or this Court's jurisprudence. *See, e.g., Board of Educ. v. Grumet*, 512 U.S. 687, 703 (1994). To the contrary, in some contexts at least, this Court recognizes religion as a constitutionally impermissible and irrelevant consideration. *See, e.g., Zant v. Stephens*, 462 U.S. 862, 885 (1983) (impermissible factors at capital sentencing phase include “the race, religion, or political affiliation of the defendant”).

In this case, the prosecutor engaged in misconduct by intentionally injecting religion and targeting the defendant's religion for emphasis to appeal the jury's

passions and prejudices. This Court should dispel any notion that such prosecutorial argument based on religion receives less scrutiny than any other improper consideration. Accordingly, this case presents this Court with the opportunity to speak to the standard for prosecutorial misconduct in a case involving improper appeals to religion intended to inflame the passions of the jury against the defendant.

III. Like This Court’s Recent Decisions on Religious Liberty, This Case Raises Important Questions of Federal Constitutional Law About the Remedies for Proceedings Tainted by Hostility to Religion.

In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 584 U.S. ___, 138 S. Ct. 1719, 1729, 1732 (2018), this Court reaffirmed the fundamental proposition that the Constitution prohibits a state from depriving a person of liberty or property through a process that manifests “clear and impermissible hostility” toward religion. Although *Masterpiece Cakeshop* obviously arose in a different context, the sort of hostility to religion embodied in the state action there does not differ materially for constitutional purposes from the prosecutorial misconduct that resulted in the deprivation of liberty here. Put another way, a similar hostility to religion that deprived Jack Phillips and his business of the fair and impartial adjudication of his case also deprived Mr. Majid of the fair trial the Constitution guarantees. The Constitution protects the religious liberty of a habeas petitioner in a state court criminal trial no less than a business in a civil administrative proceeding, and it would be anomalous for this Court to vindicate the constitutional rights of the latter, but not the former. For this reason, this case also presents a suitable vehicle for this Court to give further consideration to the protections due

process affords a party's sincere and deeply held religious beliefs in an adjudicatory process.

CONCLUSION

For all these reasons, Petitioner Arif Majid respectfully requests that this Court grant this petition for a writ of certiorari.

Respectfully submitted,

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