

No. 17-565

**In The
Supreme Court of the United States**

ROWAN COUNTY, NORTH CAROLINA,

Petitioner,

v.

NANCY LUND, LIESA MONTAG-SIEGEL,
and ROBERT VOELKER,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

PETITION FOR REHEARING

KELLY J. SHACKELFORD
HIRAM S. SASSER, III
KENNETH A. KLUKOWSKI
FIRST LIBERTY INSTITUTE
2001 West Plano Parkway
Suite 1600
Plano, Texas 75075

DAVID C. GIBBS, III
THE NATIONAL CENTER
FOR LIFE AND LIBERTY
P.O. Box 270548
Flower Mound, Texas 75027

DAVID A. CORTMAN
BRETT B. HARVEY
ALLIANCE DEFENDING FREEDOM
15100 North 90th Street
Scottsdale, Arizona 85260

ALLYSON N. HO
Counsel of Record
GIBSON, DUNN &
CRUTCHER LLP
2100 McKinney Avenue
Dallas, Texas 75201
T. 214.698.3233
AHo@gibsondunn.com

James D. Nelson
MORGAN, LEWIS &
BOCKIUS LLP
1111 Pennsylvania
Avenue NW
Washington, DC 20004

Counsel for Petitioner

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
PETITION FOR REHEARING.....	1
I. Deferring Consideration Of Rowan County’s Rehearing Petition Pending This Court’s Consideration Of <i>American Legion</i> Comports With This Court’s Practice	2
II. This Court’s Disposition Of The Petition For Certiorari In <i>American Legion</i> Could Potentially Be Controlling In This Case...	4
CONCLUSION.....	5
CERTIFICATE OF COUNSEL.....	7

TABLE OF AUTHORITIES

	Page
CASES	
<i>Boumediene v. Bush</i> , 551 U.S. 1160 (2007)	2
<i>Epps v. United States</i> , 543 U.S. 1116 (2005)	3
<i>Florida v. Rodriguez</i> , 461 U.S. 940 (1983).....	3
<i>Florida v. Royer</i> , 460 U.S. 491 (1983)	3
<i>Hawkins v. United States</i> , 543 U.S. 1097 (2005).....	3
<i>Lauersen v. United States</i> , 543 U.S. 1097 (2005)	3
<i>Leverson v. Conway</i> , 472 U.S. 1014 (1985)	3
<i>Marsh v. Chambers</i> , 463 U.S. 783 (1983)	4
<i>Rideout v. United States</i> , 543 U.S. 1116 (2005).....	3
<i>Rowan Cty. v. Lund</i> , 138 S. Ct. 2564 (2018).....	1, 4, 5
<i>Simmons v. Sea-Land Services, Inc.</i> , 462 U.S. 1114 (1983)	3
<i>The American Legion v. American Humanist Ass’n</i> , No. 17-1717	1, 2, 4
<i>Town of Greece v. Galloway</i> , 134 S. Ct. 1811 (2014).....	4
<i>United States v. Booker</i> , 543 U.S. 220 (2005)	2, 3
<i>United States v. Ohio Power Co.</i> , 353 U.S. 98 (1957).....	5
RULE	
Sup. Ct. R. 44.2	1, 2

PETITION FOR REHEARING

Petitioner Rowan County understands that this Court grants Rule 44.2 rehearing petitions exceedingly rarely. But this petition presents one of those very rare situations. Rowan County respectfully requests that this Court, as it has done before, defer consideration of this rehearing petition pending disposition of another case raising similar issues, and then either GVR or grant plenary review here consistent with its disposition of that case.

As the dissent from the denial of Rowan County’s petition for certiorari explains, “as long as this country has had legislative prayer, legislators have led it”—yet “State and local lawmakers can lead prayers in Tennessee, Kentucky, Ohio, and Michigan, but not in South Carolina, North Carolina, Virginia, and West Virginia.” *Rowan Cty. v. Lund*, 138 S. Ct. 2564, 2566 (2018) (Thomas, J., dissenting from denial of certiorari). A petition docketed one day before the denial of Rowan County’s petition for certiorari—and likewise arising from the Fourth Circuit—provides the Court an opportunity to address more broadly the “disarray,” *ibid.*, in Establishment Clause jurisprudence. That petition—in *The American Legion v. American Humanist Ass’n*, No. 17-1717—squarely addresses the “confused state of this Court’s Establishment Clause jurisprudence” and asks this Court for much-needed clarification.

This Court’s disposition of the *American Legion* petition is an “intervening circumstance[] of a substantial or controlling effect,” and a “substantial

grounds not previously presented,” R. 44.2, that justifies rehearing because this Court’s resolution of that case may clarify Establishment Clause jurisprudence in a manner that controls this case. Deferring consideration of Rowan County’s petition for rehearing would therefore protect this Court’s jurisdiction either to GVR in light of *American Legion*, or to grant plenary review. See, e.g., *Boumediene v. Bush*, 551 U.S. 1160 (2007) (granting petition for rehearing of denial of certiorari and setting case for merits briefing and argument).

Particularly given the importance of an issue that has divided two *en banc* courts and resulted in disparate legal regimes across nine States, Rowan County’s petition for rehearing is the very rare one that warrants granting.

I. Deferring Consideration Of Rowan County’s Rehearing Petition Pending This Court’s Consideration Of *American Legion* Comports With This Court’s Practice.

In similar circumstances, this Court has held petitions for rehearing until subsequent cases involving similar issues are decided, and then granted rehearing and GVR’d after final resolution of the subsequent cases.

For example, after certiorari was initially denied in several cases challenging criminal sentences, petitions for rehearing were filed while this Court considered the certiorari petition in *United States v. Booker*,

543 U.S. 220 (2005) (certiorari granted Aug. 2, 2004). After this Court granted certiorari in *Booker* and resolved the case on the merits, this Court then granted the rehearing petitions and GVR'd in light of *Booker*. See, e.g., *Hawkins v. United States*, 543 U.S. 1097 (2005) (“Petition for rehearing granted. Order * * * denying the petition for writ of certiorari vacated. * * * Petition for writ of certiorari granted. Judgment vacated, and case remanded * * * in light of *United States v. Booker*[.]”); *Lauersen v. United States*, 543 U.S. 1097 (2005) (same); *Epps v. United States*, 543 U.S. 1116 (2005) (same); *Rideout v. United States*, 543 U.S. 1116 (2005) (same). As Rowan County requests in this case, the Court in those cases deferred consideration of the rehearing petitions while it considered and ultimately disposed of a petition for certiorari in a potentially controlling case.

This Court did the same in *Leverson v. Conway*, 472 U.S. 1014 (1985), *Simmons v. Sea-Land Services, Inc.*, 462 U.S. 1114 (1983), and *Florida v. Rodriguez*, 461 U.S. 940 (1983). *Rodriguez* is illustrative. After this Court denied certiorari in that case, Florida filed a petition for rehearing noting the intervening circumstance of a certiorari petition in a related case—*Florida v. Royer*, 460 U.S. 491 (1983). After holding the *Rodriguez* rehearing petition for nearly two years, this Court requested a response, granted rehearing, and GVR'd in light of its decision in *Royer*. See *Rodriguez*, 461 U.S. 940.

Rowan County asks the Court to do the same here, and defer consideration of the rehearing petition

pending the Court’s disposition of the petition for certiorari in *American Legion*, which, as explained next, could control the result in this case.

II. This Court’s Disposition Of The Petition For Certiorari In *American Legion* Could Potentially Be Controlling In This Case.

In holding that prayers delivered by Rowan County commissioners violate the Establishment Clause, the *en banc* Fourth Circuit relied on several Establishment Clause tests (including the *Lemon* test), App. 5, 20—rather than “the historical approach” taken by this Court’s legislative prayer precedents, “which focus on whether a government practice is supported by this country’s history and tradition.” *Rowan Cty.*, 138 S. Ct. at 2566 (Thomas, J., dissenting from denial of certiorari) (citing *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) and *Marsh v. Chambers*, 463 U.S. 783 (1983)).

As the petition for certiorari in *American Legion* explains, the circuits disagree over the test(s) that should apply in a variety of Establishment Clause challenges—to passive displays (like the veterans memorial at issue in *American Legion*), school prayer practices, and the like. See *Am. Legion Pet.* at i, 4, 20-25. To dispel the confusion, the *American Legion* petition asks this Court to articulate a rule that focuses on history and the Nation’s traditions. See *Am. Legion Pet.* at 34-35. Whether this Court ultimately adopts the American Legion’s rule or not, this Court’s

disposition of that case could clarify Establishment Clause jurisprudence in a manner inconsistent with the Fourth Circuit's decision in *Rowan County* or present other substantial grounds for review not previously presented here. Granting rehearing and then GVR'ing in these circumstances would further "uniformity in the application of" this Court's precedents. See *United States v. Ohio Power Co.*, 353 U.S. 98, 98-99 (1957) (granting rehearing petition and GVR'ing in interest of uniformity).

◆

CONCLUSION

This Court should defer consideration of the rehearing petition pending disposition of the petition for certiorari in *American Legion*, and then grant the petition or GVR in light of *American Legion*.

Respectfully submitted,

ALLYSON N. HO

Counsel of Record

GIBSON, DUNN & CRUTCHER LLP

2100 McKinney Avenue

Dallas, Texas 75201

T. 214.698.3233

AHo@gibsondunn.com

JAMES D. NELSON

MORGAN, LEWIS & BOCKIUS LLP

1111 Pennsylvania Avenue NW

Washington, DC 20004

T. 202.739.3000

DAVID C. GIBBS, III
THE NATIONAL CENTER
FOR LIFE AND LIBERTY
P.O. Box 270548
Flower Mound, Texas 75027
T. 888.233.6255

DAVID A. CORTMAN
BRETT B. HARVEY
ALLIANCE DEFENDING FREEDOM
15100 North 90th Street
Scottsdale, Arizona 85260
T. 480.444.0020

KELLY J. SHACKELFORD
HIRAM S. SASSER, III
KENNETH A. KLUKOWSKI
FIRST LIBERTY INSTITUTE
2001 West Plano Parkway
Suite 1600
Plano, Texas 75075
T. 972.941.4447

Counsel for Petitioner

CERTIFICATE OF COUNSEL

As counsel of record for the petitioner, I hereby certify that this petition for rehearing is restricted to the grounds specified in Rule 44.2 and is presented in good faith and not for delay.

ALLYSON N. HO
Counsel for Petitioner

JULY 23, 2018