No. _____

In the Supreme Court of the United States

GIGI JORDAN,

Petitioner,

v.

AMY LAMANNA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 28 U.S.C. § 2254(d)(1), a state prisoner is entitled to habeas corpus relief when the last reasoned state-court decision was either "contrary to" or "involved an unreasonable application of" this Court's precedents. A state prisoner is entitled to relief under to the "unreasonable application" prong of this disjunctive test if "the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case." *Williams* v. *Taylor*, 529 U.S. 362, 407 (2000).

The lower courts are in disarray over the proper implementation of the unreasonable-application standard. Some have required precisely on-point decisions from this Court, while others have not. This case squarely implicates the split: The Second Circuit reversed a grant of habeas relief with respect to a shocking courtroom closure during a criminal trial, not because the state court's application of this Court's general Sixth Amendment principles was facially reasonable (it was not), but because this Court has not previously held that the Public Trial Clause was violated on identical or nearly identical facts. Other circuits have eschewed any such requirement and would have affirmed the district court's grant of habeas relief.

* * *

The question presented is whether a federal habeas petitioner seeking relief on the basis of a violation of the Public Trial Clause can demonstrate an "unreasonable application of clearly established Federal law" within the meaning of 28 U.S.C. § 2254(d)(1) in the absence of a Supreme Court precedent involving analytically indistinguishable facts.

RELATED CASES

The proceedings identified below are directly related to this case in this Court:

Bail proceedings:

- *People ex rel. Kuby* v. *Merritt*, 96 A.D.3d 607 (N.Y. App. Div. 2012); docket no. 110374/11, 7550; judgment entered June 21, 2012; further appeal denied, 976 N.E.2d 252 (N.Y. 2012)
- *People ex rel. Kuby* v. *Agro*, 111 A.D.3d 516 (N.Y. App. Div. 2013); docket no. 11092 101131/13, 621/10; judgment entered November 19, 2013; further appeal denied, 5 N.E.3d 591 (N.Y. 2014)
- *Jordan* v. *Bailey*, 985 F. Supp. 2d 431 (S.D.N.Y. 2013); docket no. 13-cv-7651; judgment entered December 2, 2013

Criminal judgment and direct appeals:

- *People* v. *Jordan* (N.Y. S. Ct.), docket no. 621-2010, judgment entered November 5, 2014
- *People* v. *Jordan*, 145 A.D.3d 584 (N.Y. App. Div. 2016); docket no. 2524, 621/10; judgment entered December 22, 2016; further appeal denied, 84 N.E.3d 974 (N.Y. 2017)
- *Jordan* v. *New York*, 138 S. Ct. 481 (2017), docket no. 17-487; denial of petition for writ of certiorari entered November 27, 2017

Federal habeas proceedings:

- *Jordan* v. *Lamanna*, 2020 WL 6647282 (S.D.N.Y.); docket no. 18-civ-10868; order granting writ of habeas corpus entered September 25, 2020
- *Jordan* v. *Lamanna*, 33 F.4th 144 (2d Cir. 2022); docket no. 20-3317; judgment entered May 5, 2022

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INTRODUCTION

This case arises from a shocking courtroom closure in the middle of the guilt phase of petitioner Gigi Jordan's closely-watched criminal trial. Addressing a courtroom gallery overflowing with members of the press and public, the trial judge abruptly declared: "We have to close the courtroom without any spectators in the audience ***. If everyone can step out for five minutes, please. Everybody. *** Let's have an officer outside, please. Let's see if we can close this door. *** Let's make sure no one enters the courtroom, please, sergeant. The courtroom is closed to spectators." C.A. App. 18-19. Behind the closed courtroom doors, the judge heard repeated defense objections to the closure, contentious allegations by the prosecutor of misconduct by Jordan and the defense team, a motion for corrective jury instructions, and a motion for clarification on a gag order. For his part, the judge made direct inquiries of the defense team, admonished the defendant (just four days before she was to give testimony in her own defense) for what he believed were "improper" statements published on a website, and instructed the prosecutor to conduct an investigation.

The New York Appellate Division affirmed the trial court's overruling of Jordan's objections to the closure in a scant four sentences of analysis that relied on a miscitation to a nearly 50-year-old First Amendment case. App., *infra*, 64a-65a. The court reasoned, at bottom, that Jordan's public-trial right was not implicated because the hearing was the equivalent of a mere sidebar or chambers conference and was harmless. But no fair-minded jurist could endorse that reasoning—not just because the hearing demonstrably did *not* take place at sidebar or in chambers, but because the subject matter of the hearing never could have been addressed in such a format, and the defendant never could have been present for such a proceeding in any event.

The state-court decision thus involved an objectively unreasonable application of this Court's public-trial precedents. This Court has issued clear instructions on the steps required before a courtroom may be closed in a criminal trial, including express factual findings satisfying strict scrutiny, made on a reviewable record. The state appellate court's refusal to hold the trial court to those requitements was indefensible. So too was its disregard for the structural nature of the error, which this Court has said defies harmless-error review. The district court below was thus right to grant habeas corpus relief.

In reversing nonetheless, the Second Circuit did not meaningfully defend the Appellate Division's reasoning, which is no surprise given that it is objectively indefensible. Instead, the court of appeals concluded that habeas relief is foreclosed because this Court has not previously held that the Sixth Amendment bars a trial court from closing the courtroom for an "ancillary proceeding" in which evidence of guilt or innocence is not taken into the trial record. App., *infra*, 14a. But that reasoning conflicts squarely with decisions of other courts of appeals, which have held that a habeas petitioner need not point to a prior decision of this Court resolving the constitutional issue on an identical or nearly identical fact pattern before being entitled to relief.

The Second Circuit's error strikes at the heart of the federal habeas scheme. If its approach is allowed to stand, habeas petitioners like Jordan invariably will be required to identify prior decisions of this Court that are precisely on-point factually, calling for something akin to a qualified-immunity analysis and effectively foreclosing relief for unreasonable applications of general legal principles. As one Member of this Court recognized in a dissent from denial of certiorari in a similar (but less extreme) case, that is not the law. *Smith* v. *Titus*, 141 S. Ct. 982 (2020) (Sotomayor, J.). Further review is therefore warranted.

OPINIONS BELOW

The Second Circuit's opinion (App., *infra*, 1a-16a) is reported at 33 F.4th 144. The opinion of the district court (App., *infra*, 17a-62a) is unreported but is reproduced in the Westlaw database at 2020 WL 5743519.

JURISDICTION

The court of appeals entered its judgment on May 5, 2022. On July 20, 2022, Justice Sotomayor extended the time for petitioner to file a petition for a writ of certiorari to and including November 4, 2022. This Court's jurisdiction rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 2254(d)(1) of Title 28 provides in relevant part that a federal court shall not grant habeas corpus relief with respect to a prisoner in state custody "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 the Supreme Court of the United States."

STATEMENT

A. Legal background

1. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) permits federal habeas relief with respect to claims previously "adjudicated on the merits" in state-court proceedings when "the adjudication of the claim *** resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law" according to this Court's precedents. 28 U.S.C. § 2254(d)(1).

The Court has emphasized that the contrary-to and unreasonable-application prongs of Section 2254(d)(1) have "independent meaning." *Williams* v. *Taylor*, 529 U.S. 362, 404 (2000). A federal habeas petitioner is entitled to relief under the first prong if either (i) "the state court arrives at a conclusion opposite to that reached by

this Court on a question of law" or (ii) "[t]he state court decides a case differently than this Court has on a set of materially indistinguishable facts." *Id.* at 405, 413. In contrast, she is entitled to relief under the second prong if "the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case." *Id.* at 407.

To preserve the independent meaning and operation of these two distinct grounds for habeas relief, the Court has said that relief under the unreasonable-application prong does not require courts "to wait for some nearly identical factual pattern before a legal rule must be applied," nor does it "prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts different from those of the case in which the principle was announced." *Panetti* v. *Quarterman*, 551 U.S. 930, 953 (2007) (cleaned up). Rather, "state courts must reasonably apply the rules 'squarely established' by this Court's holdings to the facts of each case," even when the case involves a "new factual permutation[]," so long as "the necessity to apply the earlier rule [is] beyond [fair-minded] doubt." *White* v. *Woodall*, 572 U.S. 415, 427 (2014) (quoting *Knowles* v. *Mirzayance*, 556 U.S. 111, 122 (2009), and *Yarborough* v. *Alvarado*, 541 U.S. 652, 666 (2004)).

2. The Sixth Amendment to the U.S. Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a *** public trial." Violation of the right is among the small number of "structural defects" in trial procedures that "defy analysis by 'harmless-error' standards" and call for automatic reversal on appeal. *Arizona* v. *Fulminante*, 499 U.S. 279, 309 (1991).

Courtroom closures are permissible only when they are narrowly tailored to serve an overriding governmental interest. *Waller* v. *Georgia*, 558 U.S. 39, 45 (1984). The Court accordingly has articulated an exacting set of

"standards for courts to apply *before* excluding the public from *any* stage of a criminal trial." *Presley* v. *Georgia*, 558 U.S. 209, 213 (2010) (per curiam) (emphasis added). First, "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [second] the closure must be no broader than necessary to protect that interest, [third] the trial court must consider reasonable alternatives to closing the proceeding, and [finally] it must make findings adequate to support the closure." *Waller*, 467 U.S. at 48. The findings must be made in open court, on a reviewable record, prior to the closure taking place. *Presley*, 558 U.S. at 213, 215; *Waller*, 467 U.S. at 45, 48.

The right to a public trial is grounded in the Framers' understanding that "judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings." *Waller*, 467 U.S. at 46 n.4. Given these "salutary effects of public scrutiny," the Court has held that the public-trial right extends "beyond the [presentation of] actual proof at trial" to any stage or proceeding where the "aims and interests" of the public-trial right are made "pressing." *Id.* at 44-47. The Court has said that it applies, for example, to pretrial suppression-of-evidence hearings (*id.* at 48) and jury empanelments (*Presley*, 558 U.S. at 212 (affirming that "the right to a public trial in criminal cases extends to the jury selection phase of trial")). Beyond that, the Court has affirmed a "strong interest" in the openness of proceedings that involve allegations of "misconduct" and other contentious matters that implicate the interests of the Public Trial Clause. *Waller*, 467 U.S. at 47.

B. Factual background

Jordan was indicted for causing the death of her severely autistic son. App., *infra*, 3a. Her jury trial "garner[ed] significant media attention." *Ibid.*

1. Around half-way through the trial and four days before Jordan was set to testify in her own defense, the prosecutor asked the judge for permission to approach the bench as court convened. A sidebar discussion ensued off the record. C.A. App. 17-18. Petitioner then entered the courtroom. The judge noted her presence and began, "Counsel, what I'd like to do is," but he was interrupted by the prosecutor, who hastily interjected: "This doesn't count as closed." C.A. App. 18. The judge continued:

> What I'd like to do is, we have to close the courtroom to make a record. We have to close the courtroom without any spectators in the audience for about five minutes, about something that has to be done in private. If everyone can step out for five minutes, please. Everybody.
> *** Let's have an officer outside, please. Let's see if we can close this door. *** Let's make sure no one enters the courtroom, please, sergeant. The courtroom is closed to spectators.

C.A. App. 18-19. All of the spectators in the packed gallery, including many members of the press, were escorted out to the hallway. C.A. App. 18.

Jordan's counsel objected strenuously to the closure, asserting that "before the courtroom can be closed," the court must make "specific findings of fact" on the record. App, *infra*, 20a. The trial judge overruled the objection. App., *infra*, 4a.

During the closed proceeding, the prosecutor handed to the judge printouts of a number of articles he said had been posted on a website. App., *infra*, 21a. The prosecutor explained that "[i]t was brought to my attention last night that there is a website page that someone put up called The Inadmissible Truth. *** In effect, it accuses, among others, your Honor of subverting justice in this case. *** [I]t accuses your Honor of refusing to allow information to come before the jury." C.A. App. 21-23. The prosecutor

continued by describing the contents of the website, characterizing it "as an act of desperation" on Jordan's part. C.A. App. 24.

The trial judge responded, "I never had this happen before. Go on, what are you seeking?" C.A. App. 24-25; App., *infra*, 21a-22a. The prosecutor requested "a new instruction, of course, to the jury to make sure they don't look at any media." C.A. App. 25. Acknowledging that he was "uncomfortable saying this," he added that "I'd [also] like some assurance that nobody on the defense team" is "in violation of your Honor's ruling and the ethical standards" by helping with the website. *Ibid.* The prosecutor then moved the judge to take the exhibits into evidence under seal. App., *infra*, 21a. The judge granted the motion, later marking the materials as exhibits and ordering that they and the minutes be filed under seal. See App., *infra*, 23a; C.A. App. 22.

Following his initial exchange with the prosecutor, the trial judge heard argument concerning the propriety of the closure, again overruling Jordan's objections without making specific findings of fact. App., *infra*, 22a.

From there, the hearing escalated in its inquisitorial character. See App., *infra*, 6a. The judge admonished defense counsel and Jordan that it was "improper to say [the] things" that appeared on the website. C.A. App. 27. The judge asked defense counsel who was responsible for the website and warned it was unethical for the defense team to be involved. C.A. App. 28-30. He made clear his expectation that whoever was responsible for the website "is not going to continue." C.A. App. 34.

During this heated exchange, the judge and defense counsel discussed the rules of ethics and the standards for courtroom closures. C.A. App. 27-38. When the judge indicated that he did not want the lawyers discussing the closed proceeding publicly, defense counsel sought clarification: "[A]re the lawyers prohibited *** prohibited

from speaking to the news media about accurately reporting what took place in this closed courtroom?" C.A. App. 33. The judge responded, "[t]here's no gag order" and clarified that "I'm not ruling that the lawyers can't speak to the media as long as they abide by the rules that they are under and which apply to them and every other lawyer." C.A. App. 33-34.

With respect to the prosecutor's requests, the trial court took two actions. First, it ruled that it would instruct the jury not to look at any online media about the case. C.A. App. 25. Second, the court indicated to defense counsel that it would "like to find out" whether someone hired by the defense team was responsible for the publicity "and, if so, who the person is." C.A. App. 37-38. The judge noted that the prosecutor "can investigate" the matter and warned that "[n]o stone will be left unturned." C.A. App. 38.

After about fifteen minutes, the judge reopened the courtroom to spectators. App., *infra*, 23a. Once the jury entered and was seated, the judge repeated his instructions that they avoid the media coverage of the case altogether and "not research anything or view anything on the internet" regarding the case. *Ibid.* Later in the afternoon, the judge unsealed the minutes of the closed proceeding, stating that "maybe" the decision to hide the hearing from the public "was an erroneous ruling." App., *infra*, 24a. He added: "[I]f the record has any error committed by me, it was committed for maybe five, six hours. *** I don't think—that it will be detrimental to anyone." *Ibid.* But the subject matter of the closed proceeding continued to preoccupy the judge throughout the remainder of the trial; indeed, it was the last thing he mentioned before sentencing Jordan to 18 years' imprisonment. C.A. App. 84.

2. Jordan later moved to set aside the verdict, arguing that her Sixth Amendment right to a public trial had

been violated when the judge closed the courtroom without making the appropriate findings under *Waller*. App., *infra*, 25a-26a. The judge denied the motion. *Ibid.*

Jordan appealed, and the New York Appellate Division affirmed. It discussed and dismissed Jordan's Sixth Amendment claim in just four sentences:

> Defendant's Sixth Amendment right to a public trial was not violated when the court briefly closed the courtroom during a discussion of a legal matter relating to protecting the jury from exposure to publicity about the case. This was the equivalent of a sidebar, robing room or chambers conference. The right to a public trial does not extend to such conferences, and does not restrict judges "in their ability to conduct conferences in chambers, inasmuch as such conferences are distinct from trial proceedings." Moreover, the conference had no impact upon the conduct of the trial other than having the court repeat its previous instructions about trial publicity and minutes and exhibits that had been sealed were unsealed the same day.

App., *infra*, 64a-65a (quoting *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 598 n.23 (1980) (Brennan, J., concurring)). In quoting from *Richmond Newspapers*, the court gave an incorrect citation (volume 488 rather than 448 of the U.S. Reports) and failed to acknowledge that it was quoting from a nonbinding concurrence.[1]

The New York Court of Appeals and this Court both denied further review. App., *infra*, 8a.

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[1] The Westlaw database appears to have corrected the mis-citation, which is accurately reflected in the appendix to this petition and two other publicly-available reporter services, Justia (perma.cc/J2MT-5J59) and Law.com (perma.cc/4EEN-RVDQ).

C. Procedural background

Jordan filed a petition for the writ of habeas corpus under 28 U.S.C. § 2254(d)(1), challenging her conviction on the ground that the closure of the courtroom had violated her federal constitutional right to a public trial. App., *infra*, 8a.

1. The district court granted the petition. App., *infra*, 17a-62a. The court acknowledged that Section 2254's standard is difficult to meet and requires more than mere error on the part of the state court. App., *infra*, 33a-36a. And the district court found that high bar met: "Here, the trial court's closure of the courtroom was deliberate, over the multiple, strenuous objections of Jordan's counsel, and was a closure that the trial court in fact acknowledged after the fact may well have been erroneous." App., *infra*, 60a.

The district court held that it was clearly established federal law that a trial court may not close a courtroom during a criminal trial without meeting the four *Waller* elements. App., *infra*, 37a. It reasoned that the Appellate Division's decision was an unreasonable application of that clearly established federal law for three reasons.

First, the court held that the Sixth Amendment public-trial right, and thus the *Waller* standard, applied to the proceeding at issue. App., *infra*, 40a. The court rejected as unreasonable the Appellate Division's reasoning that the courtroom closure was akin to a "sidebar, robing room, or chambers conference" and thus not clearly covered by the Sixth Amendment, holding instead that this Court's precedent calls for a more careful examination of the type of proceeding at issue. App., *infra*, 41a-42a. After examining the circumstances of the closure, the events that transpired during the hearing, and this Court's instructions concerning closures, the court held "Jordan was not required to find a Supreme Court holding that the public trial right applied to the specific type of

Closed Proceeding that occurred during her trial in order to prevail on her claim." App., *infra*, 41a (cleaned up).

Second, the district court found that the *Waller* standard had not been satisfied. App., *infra*, 45a. The trial court made "no inquiry whatsoever" about the strength of the interest in closing the courtroom. App., *infra*, 47a. It also made "no inquiry" into whether the closure was broader than necessary, "instead ordering a 'blanket exclusion' of the entire gallery." App., *infra*, 48a. There was no attempt to consider alternatives to the closure (App., *infra*, 50a-51a); the trial court not only made no factual findings, but also specifically and expressly refused to make a public record. App., *infra*, 51a-53a.

Third, and finally, the district court held that the closure was not trivial. App., *infra*, 53a-55a. The court noted that the closed proceeding was a "substantive proceeding" and that the "complete emptying of a packed courtroom and the stationing of a court officer outside the closed courtroom door" distinguished this case from others in which only a small subset of individuals were accidentally excluded from the courtroom for a short period of time. App., *infra*, 54a.

2. The Second Circuit reversed. App., *infra*, 1a-16a. The court of appeals first held that the closed proceeding did not qualify for Sixth Amendment protection. App., *infra*, 12a. On this front, the court began by observing that "[t]he Supreme Court has, in [only] two cases, extended [the] public-trial right to specific proceedings beyond the actual proof at trial," namely pretrial suppression hearings and jury voir dire. App., *infra*, 10a (quotation marks omitted). Because the closed proceeding here was not such a proceeding and did not "share the historically open nature of jury selection, nor the functional importance of suppression hearings," the court held that there was "no historical precedent" requiring the hearing to be held open. App., *infra*, 12a.

While acknowledging that the district court had found various aspects of the closed proceeding to be significant enough to require public observation (App., *infra*, 13a-14a), the court rejected the district court's conclusion that the Sixth Amendment applied: "Ultimately, any argument that applies *Waller* and *Presley* to the Closed Proceeding would require extending Supreme Court precedent to this sort of wholly ancillary proceeding." App., *infra*, 14a. Thus, the court of appeals held, habeas relief predicated on a courtroom closure is unavailable unless and until this Court has held that the right attaches to the precise kind of hearing at issue. *Ibid.*

REASONS FOR GRANTING THE PETITION

This case readily meets each traditional requirement for certiorari review.

First, the decision below conflicts with authoritative decisions of several other courts of appeals, which have held that a habeas petitioner need not point to a prior decision of this Court resolving the constitutional questions on an identical or nearly-identical fact pattern.

Second, the question is undeniably important and is cleanly presented. Federal habeas petitions under Section 2254(d)(1) are among the most frequently litigated requests for relief in the federal judicial system, and the question presented here (whether petitioners must show that this Court has previously found a constitutional violation on identical or nearly-identical facts) goes to the heart of how federal habeas review works. Beyond that, violations of the public-trial right are rarely as clear-cut as the one at issue here, and the state courts' reasoning is rarely as indefensible as the Appellate Division's was in this case. Thus, the district court, applying the correct standard under 2254, granted relief. The Second Circuit reversed only because it applied the wrong standard.

Finally, the decision below is manifestly wrong. Section 2254(d)(1) authorizes habeas relief when the last-reasoned state-court decision is *either* "contrary to" *or* "an unreasonable application of" this Court's precedents. If a petitioner had to identify a factually identical decision of this Court to show an unreasonable application within the meaning of 2254(d)(1), the two prongs would collapse into one, and a crucially important backstop against constitutional transgressions in state-court criminal trials would be eliminated. That is not what Congress intended when it guaranteed relief for "unreasonable applications" of this Court's precedents. Further review is in order.

A. The lower courts are divided on the question presented

The lower courts are in disarray on the question presented, and more generally on the proper implementation of Section 2254's "unreasonable application" standard in cases involving novel facts. Although this Court has said that relief under the unreasonable-application prong does not require courts "to wait for some nearly identical factual pattern" (*Panetti* v. *Quarterman*, 551 U.S. 930, 953 (2007)), some courts of appeals have in practice imposed an "identical case" requirement as a precondition to granting habeas relief under the unreasonable-application test. This confusion is perhaps understandable, given that this Court itself has described the unreasonable-application test as "not always clear" (*White*, 572 U.S. at 427) because unreasonableness is "difficult to define" (*Williams*, 529 U.S. at 410).

No matter the underlying cause, the lower courts are applying this Court's Section 2254 cases in incompatible ways, resulting in disparate outcomes in analytically similar circumstances. This case proves the point: There is no question that the outcome here would have been different in the First, Sixth, and Eleventh Circuits, any one of which would have held that *Waller* can be applied

in an objectively unreasonable manner even when the hearing is not a suppression hearing, jury voir dire, or witness testimony. There is every reason to believe that the Third, Fourth, and Ninth Circuits would agree, given their adherence to *Panetti* in related circumstances. In diametric contrast, the Eighth Circuit would have reached the same result as the Second Circuit below, holding that habeas relief predicated on a *Waller* violation requires a decision of this Court confronting analytically identical facts. This Court's guidance is needed to restore national uniformity on the question presented.

1. Numerous courts have rejected the Second Circuit's approach to the question presented

a. Many courts of appeals have held that habeas petitioners need not point habeas courts to a factually identical precedent before obtaining relief.

First Circuit. The First Circuit was the first to weigh in on the question presented. In *O'Brien* v. *Dubois*, 145 F.3d 16 (1998), that court explained that "[a] petitioner need not point a habeas court to a factually identical precedent" to obtain relief on unreasonable-application grounds, and that "[o]ftentimes, Supreme Court holdings are 'general' in the sense that they erect a framework specifically intended for application to variant factual situations." *Id.* at 25. The court then noted that "[e]xamples of these types of rules are easily located," citing *Waller* as its first example. *Id.* at 25 n.6. According to the First Circuit, *Waller* "develop[ed a] test applicable to claimed violations of [the] right to [a] public trial" that is applied on habeas review to "variant factual situations," without need for "a factually identical precedent." *Id.* at 25 & n.6. That is the opposite of the conclusion reached by the Second Circuit below.

Although the en banc First Circuit subsequently overruled certain elements of *O'Brien*'s unreasonable-application analysis, it did so only because it concluded that

O'Brien had offered too "stringent [an] interpretation of § 2254." *McCambridge* v. *Hall*, 303 F.3d 24, 37 (2002). The court explained that, to "grant the writ [when] the state court *** decides a case differently than th[e Supreme] Court has on a set of materially indistinguishable facts" is to grant relief "[u]nder the 'contrary to' clause." *Id.* at 36. That is, Section 2254's "contrary to" prong and "unreasonable application" prong operate independently. And what distinguishes them is exactly what the Second Circuit's opinion below elided: the first prong requires an identical or nearly identical precedent of this Court, whereas the second does not.

The Sixth and Eleventh Circuits have since put this reasoning in action:

Sixth Circuit. In *Drummond* v. *Houk*, 797 F.3d 400 (2015), the Sixth Circuit considered the availability of habeas relief for partial courtroom closures, in which some individuals are excluded, but not all. The court noted that "*Waller* concerned a full, rather than partial, closure of the courtroom to the public." *Id.* at 402. But relying on Section 2254(d)(1)'s unreasonable-application test, it recognized that *Waller* "stat[ed] a general rule that applies to *any type* of courtroom closure, to wit: a trial court must balance the interests for and against closure." *Ibid.* (emphasis added). This general principle controlled, according to the Sixth Circuit, notwithstanding that "the factual context" of the case was "meaningfully different" from the facts in *Waller*. *Id.* at 402, 404. To be sure, the court held that, in light of those differences, the state court was not objectively unreasonable for failing to follow "*Waller*'s more specific rules" for complete closures. *Id.* at 404. But the court held that a state court must, pursuant to *Waller*, at least provide "serious reasons for the closure and tailor[] its scope in rough proportion to them," even when faced with "meaningfully different" facts from those presented in *Waller* itself. And the court

reversed the grant of relief in that case *only* because it concluded that the state court had adequately done so. *Ibid*. No such requirement was imposed here.

The Sixth Circuit and district courts within that circuit have continued to hold state courts to the rule announced in *Drummond*, upholding convictions only when the state courts have demonstrably complied with *Waller*. See, *e.g.*, *Boone* v. *Lazaroff*, 2021 WL 1560175, at *2 (6th Cir. 2021); *Hayes* v. *Burt*, 2018 WL 2049403, at *2 (6th Cir. 2018); *Seabrooks* v. *Warren*, 2022 WL 3723292, at *10 (E.D. Mich. 2022). That reasoning is the opposite of the Second Circuit's rationale for reversal in this case: that the trial court did not need to comply with *Waller* in any respect because this Court has not previously applied *Waller* in a comparable factual context.[2]

Eleventh Circuit. The Eleventh Circuit likewise has required compliance with *Waller* on Section 2254 habeas review of courtroom closures involving novel facts.

For example, in *Judd* v. *Haley*, 250 F.3d 1308 (2001), the court addressed a "total clearing of a courtroom during [only] a portion of a criminal trial," namely during the testimony of a single, underage witness. *Id*. at 1315. The court recognized "little precedent" addressing the precise factual context at issue, involving only a brief closure for a limited purpose. *Ibid*. Nonetheless, in light of "the values that the Constitution's public trial guarantee seeks to protect," including "permitting the public to see that a defendant is dealt with fairly," the court held on habeas

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[2] The Sixth Circuit has applied this understanding of *Panetti* in other contexts as well. In *Blackston* v. *Rapelje*, 780 F.3d 340 (6th Cir. 2015), for example, the court expressly rejected the state's argument that the novelty of the factual circumstances placed the case "outside the realm of clearly established law," explaining that "'even a general standard may be applied in an unreasonable manner'" in the absence of a "'nearly identical factual pattern'" in this Court's precedents. *Id*. at 348-350 (quoting *Panetti*, 551 U.S. at 953).

review that the temporary closure "must be *** subjected to the four-pronged test established in *Waller*." *Id.* at 1315-1316. Because the state trial court had not engaged in a *Waller* analysis on a reviewable factual record, the Eleventh Circuit reversed the denial of habeas relief on unreasonable-application grounds. *Id.* at 1318-1320.[3]

b. At least three other courts of appeals have taken approaches aligned with the First, Sixth, and Eleventh Circuits in the context of different legal claims, creating substantial tension with the Second Circuit's approach to Jordan's public-trial claim in this case.

- **Third Circuit.** In *Garrus* v. *Secretary of Pennsylvania Department of Corrections*, 694 F.3d 394 (2012), the en banc Third Circuit granted a habeas claim arising under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). The court explained that "[t]he AEDPA standard is not so 'myopic' nor 'constrained' that it requires the full scope of all clearly established laws to be precisely defined" on identical facts. 694 F.3d at 404-405. It thus rejected the state's argument that this Court had not ruled on the precise factual issue at hand.
- **Fourth Circuit.** In *Barnes* v. *Joyner*, 751 F.3d 229 (2014), the Fourth Circuit granted habeas relief in a case involving an unauthorized outside communication with a juror. The court reasoned that "[t]here is no requirement under AEDPA that a habeas petitioner present facts identical to those previously considered by the Supreme Court to be entitled to relief." *Id.* at 246. On the contrary, a "clearly established legal principle can apply to myriad factual circum-

[3] Like the Sixth Circuit, the Eleventh Circuit has utilized this general approach in other contexts. See, *e.g.*, *Daniel* v. *Commissioner, Alabama Department of Corrections*, 822 F.3d 1248, 1258-1282 (11th Cir. 2016) (ineffective assistance of counsel).

stances involving third party communications with jurors." *Ibid.*

- **Ninth Circuit.** In *Deck* v. *Jenkins*, 814 F.3d 954 (2016), the Ninth Circuit addressed this Court's "precedent that a prosecutor's misleading arguments to the jury may rise to the level of a federal constitutional violation." *Id.* at 977-978 (cleaned up). Granting relief, the court stressed that although the operative legal principal was "a very general one, *** even a general standard may be applied in an unreasonable manner," and a "federal court may find an application of a principle unreasonable when it involves a [novel] set of facts." *Id.* at 978 (cleaned up).

These circuits' approach with respect to other kinds of constitutional claims indicates that each almost certainly would have applied the general yet clearly established legal principles announced in *Waller* and *Presley* as a basis to affirm the district court's grant of habeas relief. The Second Circuit below reversed because it took a diametrically different approach to the question presented, ruling that relief was unavailable simply because this Court has not previously addressed a closure claim with respect to an "ancillary proceeding" like the one that took place here. App., *infra*, 14a.

2. The Eighth Circuit has taken an approach similar to the Second Circuit's

The Eighth Circuit stands alone in taking an approach similar to the Second Circuit's on the question presented. In *Smith* v. *Titus*, 958 F.3d 687 (2020), that court affirmed the denial of habeas relief in a case involving a full courtroom closure for a hearing "that was administrative in nature." *Id.* at 690. Behind closed courtroom doors, the judge announced his decision on an evidentiary motion and set the parameters for a witness's testimony. *Ibid.*

The defendant sought but was denied relief on direct appeal and thereafter sought federal habeas relief, which the district court denied. In affirming that decision, the Eighth Circuit reasoned that this Court's precedents have not addressed a public-trial claim in the specific context of ancillary "administrative proceedings," which the state courts had likened to "private bench conferences or conferences in chambers." *Smith*, 958 F.3d at 692 (quotation marks omitted). In the Eighth Circuit's view, like the Second Circuit's below, "fairminded jurists could disagree" as to whether *Waller* and *Presley* "cover the episode in this case and similar proceedings." 958 F.3d at 692-693.

It bears emphasis that the petitioner in *Smith* sought this Court's review, and Justice Sotomayor filed an opinion dissenting from denial. See 141 S. Ct. 982 (2021) (Mem.). "*Waller* and *Presley*," she would have held, "straightforwardly govern the courtroom closure at issue" in that case, just as they do any closure in which a state trial judge "remove[s] all members of the public and media from the courtroom" at any point during a criminal trial. *Id.* at 985. "The Eighth Circuit's cramped view of precedent is untenable," Justice Sotomayor would have held, because it means that a state court "run[s] afoul of any clearly established federal law" only when it closes the courtroom "during jury selection" or "suppression hearings," which is an "absurd[]" notion. *Id.* at 987-988. At bottom, she concluded, "[w]hen this Court announces a legal principle and applies it to a particular factual situation, it is the legal principle itself, not the factual outcome, that becomes clearly established federal law." *Id.* at 987. She therefore would have granted the petition for a writ of certiorari in *Smith* and summarily reversed with instructions to grant relief. *Id.* at 989.

Those same concerns and criticisms are more pressing in this case. Here, unlike in *Smith*, the hearing cannot be brushed aside as merely an administrative announcement of an evidentiary ruling. "[T]he proceedings involved accusations of wrongdoing by Jordan and her counsel," and the trial court "received the [internet postings], which, although not *** presented to the jury, [were] marked as exhibits and read *** into the trial record." App., *infra*, 43a. In addition, "[t]he parties made legal arguments about the propriety of the courtroom closure, the accusations against Jordan and her counsel, and the language of the instructions to the jury that were to follow." *Ibid.* "And, although Jordan did not speak during the Closed Proceeding, she was present and observed the colloquy, which occurred days before she testified as a witness in her own defense." App., *infra*, 43a-44a. Moreover, the closure took place in the middle of the parties' cases-in-chief, during the guilt phase of the trial, when the public-trial interest is at its zenith.

Whatever reasons the other Members of this Court may have had to hesitate granting review in *Smith*, those reasons should be dispelled here.

B. The question presented is important, and this is a suitable vehicle

1. Review is furthermore warranted because the question presented is extraordinarily important. To begin with, the question presented is frequently recurring. Post-conviction habeas corpus cases are a fixture of the federal docket. Thousands of criminal defendants seek federal habeas relief every year. In 2021 alone, 11,334 prisoners in state custody sought noncapital postconviction relief under Section 2254. See *U.S. District Courts-Civil Cases Commenced, by Nature of Suit and District, During the 12-Month Period Ending December 31, 2021*, U.S. Courts (Dec. 31, 2021). The numbers were even higher in pre-

vious years—there were 12,991 petitions in 2020; 14,186 in 2019; and 14,271 in 2018.[4]

Whether federal courts can grant habeas relief in the absence of a Supreme Court decision with materially indistinguishable facts will determine the fate of untold numbers of these petitions. One indication is the sheer frequency with which *Panetti* itself is cited—a simple Westlaw search indicates that nearly 3,000 federal-court decisions have relied upon its holding since it was decided in 2007. And even if the question presented drives the outcome in only a small proportion of those cases, there is no doubting that many, many cases will be impacted by the question presented.

The question presented is also crucial because federal habeas corpus relief has a unique place in our constitutional history as a safeguard of liberty. It is "the only common-law writ *** explicitly mentioned" in the Constitution." *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 558 (2004) (Scalia, J., dissenting). Exalted as the Great Writ, it lies at the core of our traditional notions of liberty and the rule of law. The Framers viewed habeas corpus as a crucial bulwark against unconstitutional detention and hence against the abuse of power. In fact, "Hamilton lauded 'the establishment of the writ of habeas corpus' *** as a means to protect against 'the practice of arbitrary imprisonments.'" *Ibid.* (citing The Federalist No. 84, at 444 (Alexander Hamilton)).

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[4] See *U.S. District Courts-Civil Cases Commenced, by Nature of Suit and District, During the 12-Month Period Ending December 31, 2020,* U.S. Courts (Dec. 31, 2020); *U.S. District Courts-Civil Cases Commenced, by Nature of Suit and District, During the 12-Month Period Ending December 31, 2019,* U.S. Courts (Dec. 31, 2019); *U.S. District Courts-Civil Cases Commenced, by Nature of Suit and District, During the 12-Month Period Ending December 31, 2018,* U.S. Courts (Dec. 31, 2018).

This view of habeas has deep roots in the English common-law tradition, where it developed as a mechanism to "compel the crown to explain its actions *** [and] ensure adequate process" in the face of summary and indefinite imprisonment by the King. *Brown* v. *Davenport*, 142 S. Ct. 1510, 1520 (2022). Thus, the writ of habeas corpus entered our Constitution as "no less than 'the instrument by which due process could be insisted upon.'" *Ibid.* (citing *Hamdi*, 542 U.S. at 555 (Scalia, J., dissenting)). The Framers conceived of habeas relief as an essential tool for securing release from illegal custody and for checking governmental excesses. But it will remain so only if the lower courts do not overly constrain its application, as the Second Circuit did here.

2. This case presents an unvarnished opportunity for addressing the question presented. For starters, there is no question regarding the preservation of constitutional claims and no procedural hurdles to reaching the question presented.

What's more, the district court granted relief because it expressly resolved the question presented in Jordan's favor: "Jordan was not required to find a Supreme Court opinion holding that the public trial right applied to the specific type of Closed Proceeding that occurred during her trial in order to prevail on [her] claim." App., *infra*, 41a (quotation marks omitted). For its part, the Second Circuit reversed only because it saw the question presented differently: "Neither *Waller* nor *Presley* clearly establishes whether the Sixth Amendment extends to the Closed Proceeding" (App., *infra,* 12a), and "it was not unreasonable for the Appellate Division to deny Jordan's claim" given the absence of Supreme Court precedent addressing "this sort of wholly ancillary proceeding." App., *infra*, 14a-15a. Thus, the two courts' disparate resolutions of the question presented manifestly drove the different outcomes.

C. The decision below is wrong

The clean presentation of a question of substantial practical importance dividing the lower courts is more than sufficient to support a grant of certiorari. But this Court's review is all the more warranted because the decision below is troublingly wrong.

Reduced to its essence, the question here is whether a state court decision can have "involved an unreasonable application [of] clearly established Federal law, as determined by the Supreme Court of the United States" within the meaning of 28 U.S.C. § 2254(d)(1) in the absence of a materially indistinguishable precedent of this Court. The Second Circuit answered that question with a *no*. But that is assuredly wrong.

a. As in "every case involving construction of a statute, the starting point is the language itself." *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 197 (1976) (cleaned up). And construing the text, the Court must look to "the structure and language of the statute as a whole" (*National Railroad Passenger Corp.* v. *Boston & Maine Corp.*, 503 U.S. 407, 417 (1992)), being sure to adopt a reading that, "upon the whole," ensures that "no clause, sentence, or word shall be superfluous, void, or insignificant" (*TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001))).

As the Court recognized in *Williams*, the language at issue here defines "two categories of cases in which a state prisoner may obtain federal habeas relief." 529 U.S. at 404. In the first category are cases where the state-court decision is "contrary to *** clearly established Federal law." *Ibid.* In the second category are those cases in which the state court decision "involve[s] an unreasonable application" of such law. *Ibid.*

Congress having adopted these two categories in the disjunctive, each must be given "independent meaning"

and effect. *Williams*, 529 U.S. at 407. To that end, the Court has held that a state-court decision is "contrary to" this Court's precedents when it "decides a case differently than this Court has *on a set of materially indistinguishable facts*." *Id.* at 413 (emphasis added). That requirement makes sense—to "conflict" means to be "contradictory" to. Conflict, *Merriam-Webster*, perma.cc/C3QW-7QM3. That kind of hard clash between two cases is possible only if they implicate both a common legal question and also an analytically identical set of facts.

In contrast, a petitioner is entitled to relief under the second prong if "the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case." *Williams*, 529 U.S. at 407. Again, this Court has said that a state court must "apply the rules 'squarely established' by this Court's holdings" even when the case involves "new factual permutations" not previously addressed by this Court. *White*, 572 U.S. at 427 (quoting *Yarborough* v. *Alvarado*, 541 U.S. 652, 666 (2004)). That is to say, "even a general standard may be applied in an unreasonable manner" notwithstanding the presence of "facts 'different from those of the case in which the principle was announced.'" *Panetti*, 551 U.S. at 953 (quoting *Lockyer* v. *Andrade*, 538 U.S. 63, 76 (2003)).

According to the Second (and Eighth) Circuit's contrary position, however, a state court cannot unreasonably apply this Court's Sixth Amendment precedents unless and until this Court itself has expressly applied those precedents to "the sort of nonpublic proceeding at issue here." App. *infra*, 14a (quoting *Smith*, 958 F.3d at 692). But that is just to say that there can be no unreasonable application this Court's Sixth Amendment precedents unless and until this Court applies them in a case with "materially indistinguishable facts." *Williams*, 529 U.S. at 413. The lower court's position thus "would

collapse [Section 2254(d)(1)'s] disjunctive list into the same test." *Smith*, 141 S. Ct. at 988 (Sotomayor, J., dissenting from denial of certiorari). It would, in other words, "sap[] the 'unreasonable application' clause of any meaning," and foreclose a crucial avenue of relief in violation of this Court's precedent and congressional intent. *Williams*, 529 U.S. at 407.

b. The lower court defended its approach reasoning that "[t]he Supreme Court has, in [only] two cases, extended [the] public-trial right to specific proceedings beyond the actual proof at trial," and thus that, to apply "*Waller* and *Presley* to the Closed Proceeding would require *extending* Supreme Court precedent to this sort of wholly ancillary proceeding." App., *infra*, 10a, 14a (quotation marks omitted, emphasis added). Because Section 2254(d)(1) "does not require state courts to extend [this Court's] precedent or license federal courts to treat the failure to do so as" a ground for granting habeas relief, (*White*, 572 U.S. at 426), the Second Circuit concluded that the state court's failure to extend *Waller* and *Presley* could not support the district court's judgment.

As an initial matter, that reasoning leads to a facially absurd result: "so long as the courtroom remained open during" witness testimony, along with "jury selection (as required by *Presley*) and any suppression hearings (as required by *Waller*), the state court would not have run afoul of any clearly established federal law." *Smith*, 141 S. Ct. at 988 (Sotomayor, J., dissenting from denial of certiorari). That would reduce successful habeas cases in courtroom closure cases almost to a null set—a judge could close the courtroom for a huge variety of hearings with the defendant present, without fear that a later federal habeas court would call him on it.

But more fundamentally, the Second Circuit misunderstood this Court's meaning in *White*. When *White* said that state courts cannot be faulted on habeas review for

failing to "extend" this Court's precedents, it meant that state courts are not required to extend this Court's holdings in some *legally* novel way.[5] *White* did not say (and could not have meant) that state courts are not required to apply a settled legal principle to a case that squarely implicates that principle, albeit on "facts different from those of the case in which the principle was announced." *Panetti*, 551 U.S. at 953.

This case did not require the New York Appellate Division to extend *Waller*'s general legal principles in some novel legal context, as the Second Circuit suggested. On the contrary, the state court here was asked simply to apply clearly established federal law in the precise circumstance for which that law was developed: a criminal case involving a complete courtroom closure in the middle of the defendant's case-in-chief. *Waller* and *Presley* clearly establish the ground rules for the expulsion of the public from a courtroom gallery in the midst of

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[5] For example, this Court held in *Beck* v. *Alabama*, 447 U.S. 625 (1980), that a capital-murder defendant has an Eighth Amendment right to have the jury instructed on a lesser-included offense in certain situations. But the Court has never said that the Due Process Clause similarly requires a lesser-included-offense instruction in a *non*-capital case. Thus, a state court does not commit an objectively unreasonable error by failing "to extend the rule of *Beck* to noncapital cases" under the Due Process Clause. *Robertson* v. *Hanks*, 140 F.3d 707, 710 (7th Cir. 1998) (collecting cases).

Similarly, this Court has established in a long line of cases "the general proposition that the Establishment Clause mandates government neutrality in religious practice." *Varner* v. *Stovall*, 500 F.3d 491, 498 (6th Cir. 2007). But the Court has never applied that proposition in a criminal case to determine the scope of any testimonial privileges. Thus, a state court does not commit an objectively unreasonable error by "declining to extend" the general principle favoring neutrality in religious practice to invalidate "the clergy-penitent privilege" in a criminal case. *Id.* at 499.

a criminal trial like this—ground rules that the state trial court plainly did not follow.

"To the Framers, secret trials 'obviously symbolized a menace to liberty,' and the public-trial right provided a necessary 'safeguard against any attempt to employ our courts as instruments of persecution.'" *Smith*, 141 S. Ct. at 984 (quoting *In re Oliver*, 333 U.S. 257, 269-270 (1948)). The rules forbidding the closure in this case were clearly established as a matter of this Court's precedents at the time that the state court acted. The district court was therefore right to grant relief, and the court of appeals was wrong to reverse.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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