(ORDER LIST: 590 U.S.)

MONDAY, JUNE 15, 2020

CERTIORARI -- SUMMARY DISPOSITIONS

19-966 EMERSON ELECTRIC CO. V. SIPCO, LLC

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Federal Circuit for further consideration in light of *Thryv, Inc.* v. *Click-to-Call Technologies, LP*, 590 U. S. ___ (2020).

19-7919 KING, DARIUS L. V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Rehaif* v. *United States*, 588 U. S. ___ (2019).

ORDERS IN PENDING CASES

19M141 GUTIERREZ, ARTURO F. S. V. CALIFORNIA

The motion for leave to file a petition for a writ of certiorari with the supplemental appendix under seal is granted.

19M142 MEHDIPOUR, FARAMARZ V. DENWALT-HAMMOND, LISA, ET AL.

The motion to direct the Clerk to file a petition for a writ of certiorari out of time is denied.

153, ORIG. TEXAS V. CALIFORNIA

The Solicitor General is invited to file a brief in this case expressing the views of the United States.

19-7495 BADRUDDOZA, ABU A. V. DEPT. OF HOMELAND SEC., ET AL.

The motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* is denied.

CERTIORARI GRANTED

19-897 ALBENCE, MATTHEW T., ET AL. V. CHAVEZ, MARIA A., ET AL.

19-963 HENRY SCHEIN, INC. V. ARCHER AND WHITE SALES, INC.

The petitions for writs of certiorari are granted.

CERTIORARI DENIED

18-843 PENA, IVAN, ET AL. V. HORAN, MARTIN

18-913) BRENNAN, JOSHUA V. DAWSON, JAMES, ET AL.
)
18-1078) DAWSON, JAMES, ET AL. V. BRENNAN, JOSHUA

18-1272 GOULD, MICHAEL, ET AL. V. LIPSON, ANDREW, ET AL.

19-114 CIOLEK, DOUGLAS F. V. NEW JERSEY

19-404 WORMAN, DAVID S., ET AL. V. HEALEY, ATT'Y GEN. OF MA, ET AL.

19-423 MALPASSO, BRIAN K., ET AL. V. PALLOZZI, WILLIAM M.

19-487 CULP, KEVIN W., ET AL. V. RAOUL, ATT'Y GEN. OF IL, ET AL.

19-656 ANDERSON, WILLIAM V. MINNEAPOLIS, MN, ET AL.

19-676 ZADEH, JOSEPH A., ET AL. V. ROBINSON, MARI, ET AL.

19-679 CORBITT, AMY V. VICKERS, MICHAEL

19-704 WILSON, MATTHEW D., ET AL. V. COOK COUNTY, IL, ET AL.

19-753 HUNTER, MICHAEL, ET AL. V. COLE, RANDY, ET AL.

19-757 AZ LIBERTARIAN PARTY, ET AL. V. HOBBS, AZ SEC. OF STATE

19-839 EASTERN OR MINING ASSN., ET AL. V. OR DEPT. OF ENV. QUALITY, ET AL.

19-899 WEST, SHANIZ V. WINFIELD, DOUG, ET AL.

19-970 RETAIL READY CAREER CENTER V. UNITED STATES

19-1033 CANTU, DANIEL E. V. MOODY, JAMES M., ET AL.

19-1058) HOSPIRA, INC. V. ELI LILLY AND CO.
)
19-1061) DR. REDDY'S LABORATORIES, ET AL. V. ELI LILLY AND CO.

19-1065 JOHNSON, TERESA A. V. ALASKA

19-1080 ARCHER AND WHITE SALES, INC. V. HENRY SCHEIN, INC.

19-1141 ATL. TRADING USA, LLC, ET AL. V. BP P.L.C., ET AL.

19-1206 BOLAND, PAUL, ET AL. V. BOLAND, CHRIS, ET AL.

19-1207 YOUNG, GEOFFREY M. V. CLAYTON, CHIEF JUDGE, ETC.

19-1215 SUSSEX, STEVEN, ET UX. V. TEMPE, AZ

19-1217 BAGI, SCOTTIE A., ET AL. V. PARMA, OH

19-1282 TERRY, AVERY V. UNITED STATES

19-1294 YOUNG, GEOFFREY V. McGRATH, AMY

19-1295 MANDALAPU, RAO S. V. TEMPLE UNIV. HOSPITAL, ET AL.

19-1297 COLLINS, JAMES K., ET UX. V. D.R. HORTON-TEXAS, LTD.

19-6858 LIDDELL, DAVID L. V. UNITED STATES

19-7018 BISHOP, SCOTT R. V. UNITED STATES

19-7188 POWERS, JOHN J. V. STANCIL, M. L.

19-7790 MASON, BRENDA, ET VIR V. FAUL, MARTIN

19-8200 FARLEY, DON V. PARSON, CARL

19-8216 DAVIS, SCOTT W. V. HATCHER, WARDEN

19-8223 CONNORS, TIMOTHY W. V. HOWELL, WARDEN, ET AL.

19-8224 NEUMAN, JAMES W. V. CALLAHAN, NATHAN, ET AL.

19-8230 KATES, ALEXANDER V. NEW YORK

19-8233 CANTU, REYNALDO A. V. TEXAS

19-8234 DAVIS, ERIC J. V. EPPINGER, WARDEN

19-8236 BROOKS, IVA V. FOSTER, AARON

19-8238 THOMPSON, MORRIS K. V. CERATO, JENNIFER L.

19-8241 WORRELL, JOSEPH L. V. EMIGRANT MORTGAGE CO., ET AL.

19-8242 WEATHERSPOON, ADRIAN V. BAGAHPOUR, FATEMAH, ET AL.

19-8243 LeDEUX, JONATHAN M. V. ANTHONY, JEANNETTE L., ET AL.

19-8244 MORGAN, FRANK V. IL DOC

19-8246 THOMAS, GREGORY V. CORBETT, TOM, ET AL.

19-8247 WILSON, JOHN V. FLORIDA

19-8251 TALKINGTON, KEVIN D. V. DAVIS, DIR., TX DCJ

19-8253 CHURCHILL, RUDOLPH V. PENNSYLVANIA

19-8257 MILLER, ERIC C. V. GIBBS, WARDEN

19-8259 HUSSAIN, TALIB V. MARIETTA HALAL MEAT, ET AL.

19-8260 FULTON, ALVIN V. NEW YORK

19-8266 HEARD, JAMES V. ILLINOIS

19-8271 LARSON, LOREN J. V. ALASKA

19-8290 TAYLOR, ROBERT V. PENNSYLVANIA, ET AL.

19-8318 WHITELEY, WILLIAM V. WILLIS, JOHN, ET AL.

19-8389 YARBROUGH, EDWARD V. SULLIVAN, WARDEN

19-8439 CVJETICANIN, MARIJAN V. UNITED STATES

19-8449) HARRIS, GREGORY V. UNITED STATES
)
19-8456) HOPES, THOMAS V. UNITED STATES

19-8466 NIEHOUSE, BRANCH W. V. AMSBERRY, BRIGITTE

19-8470 WALKER, RAYMOND K. V. UNITED STATES

19-8478 KING, JOHN V. UNITED STATES

19-8479 FLEMING, BERNARD J. V. UNITED STATES

19-8485 BELL, MELVIN T. V. UNITED STATES

19-8486 BLOODWORTH, QUINCY T. V. UNITED STATES

19-8494 LUSTIG, MICHAEL V. UNITED STATES

19-8500 GRAY, DAVID F. V. UNITED STATES

The petitions for writs of certiorari are denied.

18-663 MANCE, FREDRIC, R., ET AL. V. BARR, ATT'Y GEN., ET AL.

The motion of The National Shooting Sports Foundation, Inc. for leave to file a brief as *amicus curiae* is granted. The petition for a writ of certiorari is denied.

19-27 CHEESEMAN, MARK V. POLILLO, JOSEPH, ET AL.

The motion of Firearms Policy Coalition, et al. for leave to file a brief as *amici curiae* is granted. The petition for a writ of certiorari is denied.

19-532 UNITED STATES V. CALIFORNIA, ET AL.

The petition for a writ of certiorari is denied. Justice Thomas and Justice Alito would grant the petition for a writ of certiorari.

19-1010 ACTAVIS HOLDCO, INC., ET AL. V. CONNECTICUT, ET AL.

The motion of Twelve Companies, et al. for leave to file a brief as *amici curiae* is granted. The motion of The Chamber of Commerce of The United States of America, et al. for leave to file a brief as *amici curiae* is granted. The petition for a writ of certiorari is denied.

19-1105 SHARP, INTERIM WARDEN V. HARRIS, JIMMY D.

The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is denied.

19-1191 OHIO V. FORD, SHAWN

The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is denied.

19-6593 FORD, DESHAY D. V. WHITE, TIMOTHY P., ET AL.

The motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* is granted. The order entered January 13, 2020, is vacated. The petition for a writ of certiorari is denied.

19-7670 PANAH, HOOMAN A. V. BROOMFIELD, WARDEN

The motion of Embassy of Pakistan, Iranian Interests Section for leave to file a brief as *amicus curiae* out of time is denied. The petition for a writ of certiorari is denied.

19-8489 ABBO, JASON M. V. UNITED STATES

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

HABEAS CORPUS DISMISSED

19-8536 IN RE ROBERT P. RUSSELL

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of habeas corpus is dismissed. See Rule 39.8.

REHEARINGS DENIED

19-1127 NEFF, WHEELER K. V. UNITED STATES

19-6444 HARRIS, JERMAINE D. V. MOYER, STEPHEN T., ET AL.

19-7300 BOOKER, BILLY J. V. DAVIS, DIR., TX DCJ

19-7538 CARLSON, VICTORIA, ET VIR V. HARPSTEAD, JODI, ET AL.

19-7642 KARNOFEL, ANN V. SUPERIOR WATERPROOFING, INC.

19-7669 MATTISON, LAWRENCE E. V. WILLIS, JANIE, ET AL.

19-7732 HANKS, JERAD V. UNITED STATES

19-8010 CHHIM, JOSEPH V. HOUSTON, TX, ET AL.

19-8036 JACKSON, ODIS L. V. UNITED STATES

The petitions for rehearing are denied.

Per Curiam

SUPREME COURT OF THE UNITED STATES

TERENCE TRAMAINE ANDRUS *v.* TEXAS

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 18–9674. Decided June 15, 2020

PER CURIAM.

Death-sentenced petitioner Terence Andrus was six years old when his mother began selling drugs out of the apartment where Andrus and his four siblings lived. To fund a spiraling drug addiction, Andrus' mother also turned to prostitution. By the time Andrus was 12, his mother regularly spent entire weekends, at times weeks, away from her five children to binge on drugs. When she did spend time around her children, she often was high and brought with her a revolving door of drug-addicted, sometimes physically violent, boyfriends. Before he reached adolescence, Andrus took on the role of caretaker for his four siblings.

When Andrus was 16, he allegedly served as a lookout while his friends robbed a woman. He was sent to a juvenile detention facility where, for 18 months, he was steeped in gang culture, dosed on high quantities of psychotropic drugs, and frequently relegated to extended stints of solitary confinement. The ordeal left an already traumatized Andrus all but suicidal. Those suicidal urges resurfaced later in Andrus' adult life.

During Andrus' capital trial, however, nearly none of this mitigating evidence reached the jury. That is because Andrus' defense counsel not only neglected to present it; he failed even to look for it. Indeed, counsel performed virtually no investigation of the relevant evidence. Those failures also fettered the defense's capacity to contextualize or counter the State's evidence of Andrus' alleged incidences of past violence.

Only years later, during an 8-day evidentiary hearing in

Andrus' state habeas proceeding, did the grim facts of Andrus' life history come to light. And when pressed at the hearing to provide his reasons for failing to investigate Andrus' history, Andrus' counsel offered none.

The Texas trial court that heard the evidence recommended that Andrus be granted habeas relief and receive a new sentencing proceeding. The court found the abundant mitigating evidence so compelling, and so readily available, that counsel's failure to investigate it was constitutionally deficient performance that prejudiced Andrus during the punishment phase of his trial. The Texas Court of Criminal Appeals disagreed. It concluded without explanation that Andrus had failed to satisfy his burden of showing ineffective assistance under *Strickland* v. *Washington*, 466 U. S. 668 (1984).

We conclude that the record makes clear that Andrus has demonstrated counsel's deficient performance under *Strickland*, but that the Court of Criminal Appeals may have failed properly to engage with the follow-on question whether Andrus has shown that counsel's deficient performance prejudiced him. We thus grant Andrus' petition for a writ of certiorari, vacate the judgment of the Texas Court of Criminal Appeals, and remand the case for further proceedings not inconsistent with this opinion.

I

A

In 2008, 20-year-old Terence Andrus unsuccessfully attempted a carjacking in a grocery-store parking lot while under the influence of PCP-laced marijuana. During the bungled attempt, Andrus fired multiple shots, killing car owner Avelino Diaz and bystander Kim-Phuong Vu Bui. The State charged Andrus with capital murder.

At the guilt phase of trial, Andrus' defense counsel declined to present an opening statement. After the State rested its case, the defense immediately rested as well. In

his closing argument, defense counsel conceded Andrus' guilt and informed the jury that the trial would "boil down to the punishment phase," emphasizing that "that's where we are going to be fighting." 45 Tr. 18. The jury found Andrus guilty of capital murder.

Trial then turned to the punishment phase. Once again, Andrus' counsel presented no opening statement. In its 3-day case in aggravation, the State put forth evidence that Andrus had displayed aggressive and hostile behavior while confined in a juvenile detention center; that Andrus had tattoos indicating gang affiliations; and that Andrus had hit, kicked, and thrown excrement at prison officials while awaiting trial. The State also presented evidence tying Andrus to an aggravated robbery of a dry-cleaning business. Counsel raised no material objections to the State's evidence and cross-examined the State's witnesses only briefly.

When it came to the defense's case in mitigation, counsel first called Andrus' mother to testify. The direct examination focused on Andrus' basic biographical information and did not reveal any difficult circumstances in Andrus' childhood. Andrus' mother testified that Andrus had an "excellent" relationship with his siblings and grandparents. 49 *id.*, at 52, 71. She also insisted that Andrus "didn't have access to" "drugs or pills in [her] household," and that she would have "counsel[ed] him" had she found out that he was using drugs. *Id.*, at 67, 79.

The second witness was Andrus' biological father, Michael Davis, with whom Andrus had lived for about a year when Andrus was around 15 years old. Davis had been in and out of prison for much of Andrus' life and, before he appeared to testify, had not seen Andrus in more than six years. The bulk of Davis' direct examination explored such topics as Davis' criminal history and his relationship with Andrus' mother. Toward the end of the direct examination, counsel elicited testimony that Andrus had been "good

around [Davis]" during the 1-year period he had lived with Davis. 50 *id.*, at 8.

Once Davis stepped down, Andrus' counsel informed the court that the defense rested its case and did not intend to call any more witnesses. After the court questioned counsel about this choice during a sidebar discussion, however, counsel changed his mind and decided to call additional witnesses.

Following a court recess, Andrus' counsel called Dr. John Roache as the defense's only expert witness. Counsel's terse direct examination focused on the general effects of drug use on developing adolescent brains. On cross-examination, the State quizzed Dr. Roache about the relevance and purpose of his testimony, probing pointedly whether Dr. Roache "drove three hours from San Antonio to tell the jury . . . that people change their behavior when they use drugs." 51 *id.*, at 21.

Counsel next called James Martins, a prison counselor who had worked with Andrus. Martins testified that Andrus "started having remorse" in the past two months and was "making progress." *Id.*, at 35. On cross-examination, the State emphasized that Andrus' feelings of remorse had manifested only recently, around the time trial began.

Finally, Andrus himself testified. Contrary to his mother's depiction of his upbringing, he stated that his mother had started selling drugs when he was around six years old, and that he and his siblings were often home alone when they were growing up. He also explained that he first started using drugs regularly around the time he was 15. All told, counsel's questioning about Andrus' childhood comprised four pages of the trial transcript. The State on cross declared, "I have not heard one mitigating circumstance in your life." *Id.*, at 60.

The jury sentenced Andrus to death.

B

After an unsuccessful direct appeal, Andrus filed a state habeas application, principally alleging that his trial counsel was ineffective for failing to investigate or present available mitigation evidence. During an 8-day evidentiary hearing, Andrus presented what the Texas trial court characterized as a "tidal wave of information . . . with regard to mitigation." 7 Habeas Tr. 101.

The evidence revealed a childhood marked by extreme neglect and privation, a family environment filled with violence and abuse. Andrus was born into a neighborhood of Houston, Texas, known for its frequent shootings, gang fights, and drug overdoses. Andrus' mother had Andrus, her second of five children, when she was 17. The children's fathers never stayed as part of the family. One of them raped Andrus' younger half sister when she was a child. The others—some physically abusive toward Andrus' mother, all addicted to drugs and carrying criminal histories—constantly flitted in and out of the picture.

Starting when Andrus was young, his mother sold drugs and engaged in prostitution. She often made her drug sales at home, in view of Andrus and his siblings. She also habitually used drugs in front of them, and was high more often than not. In her frequently disoriented state, she would leave her children to fend for themselves. Many times, there was not enough food to eat.

After her boyfriend was killed in a shooting, Andrus' mother became increasingly dependent on drugs and neglectful of her children. As a close family friend attested, Andrus' mother "would occasionally just take a week or a weekend and binge [on drugs]. She would get a room somewhere and just go at it." 13 Habeas Tr., Def. Exh. 13, p. 2.

With the children often left on their own, Andrus assumed responsibility as the head of the household for his four siblings, including his older brother with special needs. Andrus was around 12 years old at the time. He cleaned

for his siblings, put them to bed, cooked breakfast for them, made sure they got ready for school, helped them with their homework, and made them dinner. According to his siblings, Andrus was "a protective older brother" who "kept on to [them] to stay out of trouble." *Id.*, Def. Exh. 18, p. 1. Andrus, by their account, was "very caring and very loving," "liked to make people laugh," and "never liked to see people cry." *Ibid.*; *id.*, Def. Exh. 9, p. 1. While attempting to care for his siblings, Andrus struggled with mental-health issues: When he was only 10 or 11, he was diagnosed with affective psychosis.

At age 16, Andrus was sentenced to a juvenile detention center run by the Texas Youth Commission (TYC), for allegedly "serv[ing] as the 'lookout'" while he and his friends robbed a woman of her purse. 10 Habeas Tr., State Exh. 16, p. 9; 13 *id.*, Def. Exh. 4, p. 4 ("[R]ecords indicate[d that] Andrus served as the lookout"); 3 *id.*, at 273–274; 5 *id.*, at 206.[1] While in TYC custody, Andrus was prescribed high doses of psychotropic drugs carrying serious adverse side effects. He also spent extended periods in isolation, often for purported infractions like reporting that he had heard voices telling him to do bad things. TYC records on Andrus noted multiple instances of self-harm and threats of suicide. After 18 months in TYC custody, Andrus was transferred to an adult prison facility.

Not long after Andrus' release from prison at age 18, Andrus attempted the fatal carjacking that resulted in his capital convictions. While incarcerated awaiting trial, Andrus tried to commit suicide. He slashed his wrist with a razor

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[1] The dissent states that the victim identified Andrus as the individual holding the gun, *post*, at 5 (opinion of ALITO, J.), but in fact, the victim testified at Andrus' trial that she did not and could not identify faces or individuals, see 4 Tr. 17, 19–20. The dissent also claims that "the victim matched Andrus's clothing to the gunman's," *post*, at 5, n. 1, but neglects to mention that the victim described at least two individuals as wearing such clothing, see 46 Tr. 25–27.

blade and used his blood to smear messages on the walls, beseeching the world to "[j]ust let [him] die." 31 *id.*, Def. Exh. 122–A, ANDRUS–SH 4522.

After considering all the evidence at the hearing, the Texas trial court concluded that Andrus' counsel had been ineffective for "failing to investigate and present mitigating evidence regarding [Andrus'] abusive and neglectful childhood." App. to Pet. for Cert. 36. The court observed that the reason Andrus' jury did not hear "relevant, available, and persuasive mitigating evidence" was that trial counsel had "fail[ed] to investigate and present all other mitigating evidence." *Id.*, at 36–37. The court explained that "there [is] ample mitigating evidence which could have, and should have, been presented at the punishment phase of [Andrus'] trial." *Id.*, at 36. For that reason, the court concluded that counsel had been constitutionally ineffective, and that habeas relief, in the form of a new punishment trial, was warranted. *Id.*, at 37, 42.

C

The Texas Court of Criminal Appeals rejected the trial court's recommendation to grant habeas relief. In an unpublished *per curiam* order, the Court of Criminal Appeals concluded without elaboration that Andrus had "fail[ed] to meet his burden under *Strickland* v. *Washington*, 466 U. S. 668 (1984), to show by a preponderance of the evidence that his counsel's representation fell below an objective standard of reasonableness and that there was a reasonable probability that the result of the proceedings would have been different but for counsel's deficient performance." App. to Pet. for Cert. 7–8. A concurring opinion reasoned that, even if counsel had provided deficient performance under *Strickland*, Andrus could not show that counsel's deficient performance prejudiced him.

Andrus petitioned for a writ of certiorari. We grant the

petition, vacate the judgment of the Texas Court of Criminal Appeals, and remand for further proceedings not inconsistent with this opinion. The evidence makes clear that Andrus' counsel provided constitutionally deficient performance under *Strickland*. But we remand so that the Court of Criminal Appeals may address the prejudice prong of *Strickland* in the first instance.

II

To prevail on a Sixth Amendment claim alleging ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and that his counsel's deficient performance prejudiced him. *Strickland*, 466 U. S., at 688, 694. To show deficiency, a defendant must show that "counsel's representation fell below an objective standard of reasonableness." *Id.*, at 688. And to establish prejudice, a defendant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 694.

A

"It is unquestioned that under prevailing professional norms at the time of [Andrus'] trial, counsel had an 'obligation to conduct a thorough investigation of the defendant's background.'" *Porter* v. *McCollum*, 558 U. S. 30, 39 (2009) (*per curiam*) (quoting *Williams* v. *Taylor*, 529 U. S. 362, 396 (2000)). Counsel in a death-penalty case has "'a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" *Wiggins* v. *Smith*, 539 U. S. 510, 521 (2003) (quoting *Strickland*, 466 U. S., at 691). "'In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.'" *Wiggins*, 539 U. S., at 521–522.

Here, the habeas record reveals that Andrus' counsel fell short of his obligation in multiple ways: First, counsel performed almost no mitigation investigation, overlooking vast tranches of mitigating evidence. Second, due to counsel's failure to investigate compelling mitigating evidence, what little evidence counsel did present backfired by bolstering the State's aggravation case. Third, counsel failed adequately to investigate the State's aggravating evidence, thereby forgoing critical opportunities to rebut the case in aggravation. Taken together, those deficiencies effected an unconstitutional abnegation of prevailing professional norms.

1

To assess whether counsel exercised objectively reasonable judgment under prevailing professional standards, we first ask "whether the investigation supporting counsel's decision not to introduce mitigating evidence of [Andrus'] background was itself reasonable." *Id.*, at 523 (emphasis deleted); see also *id.*, at 528 (considering whether "the *scope* of counsel's investigation into petitioner's background" was reasonable); *Porter*, 558 U. S., at 39. Here, plainly not. Although counsel nominally put on a case in mitigation in that counsel in fact called witnesses to the stand after the prosecution rested, the record leaves no doubt that counsel's investigation to support that case was an empty exercise.

To start, counsel was, by his own admissions at the habeas hearing, barely acquainted with the witnesses who testified during the case in mitigation. Counsel acknowledged that the first time he met Andrus' mother was when she was subpoenaed to testify, and the first time he met Andrus' biological father was when he showed up at the courthouse to take the stand. Counsel also admitted that he did not get in touch with the third witness (Dr. Roache) until just before *voir dire*, and became aware of the final witness (Martins) only partway through trial. Apart from

some brief pretrial discussion with Dr. Roache, who averred that he was "struck by the extent to which [counsel] appeared unfamiliar" with pertinent issues, counsel did not prepare the witnesses or go over their testimony before calling them to the stand. 13 Habeas Tr., Def. Exh. 6, p. 3.

Over and over during the habeas hearing, counsel acknowledged that he did not look into or present the myriad tragic circumstances that marked Andrus' life. For instance, he did not know that Andrus had attempted suicide in prison, or that Andrus' experience in the custody of the TYC left him badly traumatized. Aside from Andrus' mother and biological father, counsel did not meet with any of Andrus' close family members, all of whom had disturbing stories about Andrus' upbringing. As a clinical psychologist testified at the habeas hearing, Andrus suffered "very pronounced trauma" and posttraumatic stress disorder symptoms from, among other things, "severe neglect" and exposure to domestic violence, substance abuse, and death in his childhood. 6 *id.*, at 168–169, 180; 7 *id.*, at 52. Counsel uncovered none of that evidence. Instead, he "abandoned [his] investigation of [Andrus'] background after having acquired only rudimentary knowledge of his history from a narrow set of sources." *Wiggins*, 539 U. S., at 524.

On top of that, counsel "ignored pertinent avenues for investigation of which he should have been aware," and indeed was aware. *Porter*, 558 U. S., at 40. At trial, counsel averred that his review did not reveal that Andrus had any mental-health issues. But materials prepared by a mitigation expert well before trial had pointed out that Andrus had been "diagnosed with affective psychosis," a mental-health condition marked by symptoms such as depression, mood lability, and emotional dysregulation. 3 *id.*, at 70. At the habeas hearing, counsel admitted that he "recall[ed] noting," based on the mitigation expert's materials, that Andrus had been "diagnosed with this seemingly serious

mental health issue." *Id.*, at 71. He also acknowledged that a clinical psychologist briefly retained to examine a limited sample of Andrus' files had informed him that Andrus may have schizophrenia. Clearly, "the known evidence would [have] le[d] a reasonable attorney to investigate further." *Wiggins*, 539 U. S., at 527. Yet counsel disregarded, rather than explored, the multiple red flags.

In short, counsel performed virtually no investigation, either of the few witnesses he called during the case in mitigation, or of the many circumstances in Andrus' life that could have served as powerful mitigating evidence. The untapped body of mitigating evidence was, as the habeas hearing revealed, simply vast.

"[C]ounsel's failure to uncover and present [the] voluminous mitigating evidence," moreover, cannot "be justified as a tactical decision." *Id.*, at 522; see also *Williams*, 529 U. S., at 396. Despite repeated questioning, counsel never offered, and no evidence supports, any tactical rationale for the pervasive oversights and lapses here. Instead, the overwhelming weight of the record shows that counsel's "failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment." *Wiggins*, 539 U. S., at 526. That failure is all the more alarming given that counsel's purported strategy was to concede guilt and focus on mitigation. Indeed, counsel justified his decision to present "basically" "no defense" during the guilt phase by stressing that he intended to train his efforts on the case in mitigation. 3 Habeas Tr. 57. As the habeas hearing laid bare, that representation blinked reality. Simply put, "the scope of counsel's [mitigation] investigation" approached nonexistent. *Wiggins*, 539 U. S., at 528 (emphasis deleted).

2

No doubt due to counsel's failure to investigate the case in mitigation, much of the so-called mitigating evidence he offered unwittingly aided the State's case in aggravation.

Counsel's introduction of seemingly *aggravating* evidence confirms the gaping distance between his performance at trial and objectively reasonable professional judgment.

The testimony elicited from Andrus' mother best illustrates this deficiency. First to testify during the case in mitigation, Andrus' mother sketched a portrait of a tranquil upbringing, during which Andrus got himself into trouble despite his family's best efforts. On her account, Andrus fell into drugs entirely on his own: Drugs were not available at home, Andrus did not use them at home, and she would have intervened had she known about Andrus' drug habits. Andrus, his mother related to the jury, "[k]ind of" "just decided he didn't want to do what [she] told him to do." 49 Tr. 83.

Even though counsel called Andrus' mother as a defense witness, he was ill-prepared for her testimony. Andrus told counsel that his mother was being untruthful on the stand, but counsel made no real attempt to probe the accuracy of her testimony. Later, at the habeas hearing, counsel conceded that Andrus' mother had been a "hostile" witness. 3 Habeas Tr. 94. He further admitted that he "[did not] know if [Andrus' mother] was telling the truth," *id.*, at 96, and could not even say that he had known what Andrus' mother would say on the stand, because he had not "done any independent investigation" of her, *id.*, at 95.

None of that inaction was for want of warning. During the habeas proceedings, a mitigation specialist averred that she had alerted Andrus' counsel to her concerns about Andrus' mother well before trial. In a short interview with the mitigation specialist, Andrus' mother had stated that she "had too many kids," and had taken out a $10,000 life-insurance policy on Andrus on which she would be able to collect were Andrus executed. 13 *id.*, Def. Exh. 28, p. 5. Troubled by these comments, the mitigation specialist "specifically discussed with [Andrus' counsel] the fact that [Andrus' mother] was not being a cooperative witness and

might not have Andrus' best interests motivating her behavior." *Id.*, at 6. But Andrus' counsel did not heed the caution.

Turning a bad situation worse, counsel's uninformed decision to call Andrus' mother ultimately undermined Andrus' own testimony. After Andrus testified that his mother had sold drugs from home when he was a child, counsel promptly pointed out that Andrus "heard [his] mama testify," and that she "didn't say anything about selling drugs." 51 Tr. 48. Whether counsel merely intended to provide Andrus an opportunity to explain the discrepancy (or, far worse, sought to signal that his client was being deceitful) the jury could have understood counsel's statements to insinuate that Andrus was lying. Counsel did nothing to dislodge that suggestion, and the damaging exchange occurred only because defense counsel had called a hostile witness in the first place. Plainly, these offerings of seemingly aggravating evidence further demonstrate counsel's constitutionally deficient performance.

3

Counsel also failed to conduct any independent investigation of the State's case in aggravation, despite ample opportunity to do so. He thus could not, and did not, rebut critical aggravating evidence. This failure, too, reinforces counsel's deficient performance. See *Rompilla* v. *Beard*, 545 U. S. 374, 385 (2005) ("counsel ha[s] a duty to make all reasonable efforts to learn what they c[an] about the offense[s]" the prosecution intends to present as aggravating evidence).

During the case in aggravation, the State's task was to prove to the jury that Andrus presented a future danger to society. Tex. Code Crim. Proc. Ann., Art. 37.071, §2(b)(1) (Vernon 2006). To that end, the State emphasized that Andrus had acted aggressively in TYC facilities and in prison while awaiting trial. This evidence principally comprised

verbal threats, but also included instances of Andrus' kicking, hitting, and throwing excrement at prison officials when they tried to control him. See App. to Pet. for Cert. 10–13. Had counsel genuinely investigated Andrus' experiences in TYC custody, counsel would have learned that Andrus' behavioral problems there were notably mild, and the harms he sustained severe.[2] Or, with sufficient understanding of the violent environments Andrus inhabited his entire life, counsel could have provided a counternarrative of Andrus' later episodes in prison. But instead, counsel left all of that aggravating evidence untouched at trial—even going so far as to inform the jury that the evidence made it "probabl[e]" that Andrus was "a violent kind of guy." 52 Tr. 35.

The State's case in aggravation also highlighted Andrus' alleged commission of a knifepoint robbery at a dry-cleaning business. At the time of the offense, "all [that] the crime victim . . . told the police . . . was that he had been the victim of an assault by a black man." 3 Habeas Tr. 65. Although Andrus stressed to counsel his innocence of the offense, and although the State had not proceeded with charges, Andrus' counsel did not attempt to exclude or rebut the State's evidence. That, too, is because Andrus' counsel concededly had not independently investigated the incident. In fact, at the habeas hearing, counsel did not even recall Andrus' denying responsibility for the offense.

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[2] See, *e.g.*, 5 Habeas Tr. 189 (TYC ombudsman testifying that it was "surpris[ing] how few" citations Andrus received, "particularly in the dorms where [Andrus] was" housed); *ibid.* (TYC ombudsman finding "nothing uncommon" about Andrus' altercations because "sometimes you . . . have to fight to get by" in the "violent atmosphere" and "savage environment"); *id.*, at 169 (TYC ombudsman testifying that Andrus' isolation periods in TCY custody, for 90 days at a time when Andrus was 16 or 17 years old, "would horrify most current professionals in our justice field today"); *id.*, at 246 (TYC ombudsman testifying that Andrus' "experience at TYC" "damaged him" and "further traumatized" him).

Had he looked, counsel would have discovered that the only evidence originally tying Andrus to the incident was a lone witness statement, later recanted by the witness,[3] that led to the inclusion of Andrus' photograph in a belated photo array, which the police admitted gave rise to numerous reliability concerns. The dissent thus reinforces Andrus' claim of deficient performance by recounting and emphasizing the details of the dry-cleaning offense as if Andrus were undoubtedly the perpetrator. See *post*, at 6 (opinion of ALITO, J.). The very problem here is that the jury indeed heard that account, but not any of the significant evidence that would have cast doubt on Andrus' involvement in the offense at all: significant evidence that counsel concededly failed to investigate.[4]

That is hardly the work of reasonable counsel. In Texas, a jury cannot recommend a death sentence without unanimously finding that a defendant presents a future danger to society (*i.e.*, that the State has made a sufficient showing of aggravation). Tex. Code Crim. Proc. Ann., Art. 37.071,

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[3]The dissent maintains that this witness, Andrus' ex-girlfriend, "linked [Andrus] to the robbery," *post*, at 6, n. 4, even though she testified at the habeas hearing that she thought "it was impossible" that Andrus had committed the offense, 8 Habeas Tr. 57.

[4]The dissent does not mention that Andrus' image was conspicuously placed in a central position in the photo array, as the "[o]nly one . . . looking directly up and out." 8 Habeas Tr. 35; see also *id.*, at 32. Nor does the dissent acknowledge that there was an approximately 3-month interval between the incident (after which the victim provided little identifying information about the assailant) and the police's presentation of the photo array to the victim. See *id.*, at 37; 46 Tr. 65. When asked about the delay, the detective who prepared the photo array admitted that memory can "deca[y] within a matter of days after a traumatizing incident like a crime" and that an "eyewitness identificatio[n]" "can be" "more exponentially problematic" "the greater the time interval between the incident and the identification." 8 Habeas Tr. 31; see also *ibid.* (detective confirming that there can be "real problems with reliability" if an "identification [was] made several months" after).

§2(b)(1). Only after a jury makes a finding of future dangerousness can it consider any mitigating evidence. *Ibid.* Thus, by failing to conduct even a marginally adequate investigation, counsel not only "seriously compromis[ed his] opportunity to respond to a case for aggravation," *Rompilla*, 545 U. S., at 385, but also relinquished the first of only two procedural pathways for opposing the State's pursuit of the death penalty. There is no squaring that conduct, certainly when examined alongside counsel's other shortfalls, with objectively reasonable judgment.

B

Having found deficient performance, the question remains whether counsel's deficient performance prejudiced Andrus. See *Strickland*, 466 U. S., at 692. Here, prejudice exists if there is a reasonable probability that, but for his counsel's ineffectiveness, the jury would have made a different judgment about whether Andrus deserved the death penalty as opposed to a lesser sentence. See *Wiggins*, 539 U. S., at 536; see also Tex. Code Crim. Proc. Ann., Art. 37.071, §2(e)(1). In assessing whether Andrus has made that showing, the reviewing court must consider "the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding"—and "reweig[h] it against the evidence in aggravation." *Williams*, 529 U. S., at 397–398; see also *Sears* v. *Upton*, 561 U. S. 945, 956 (2010) (*per curiam*) ("A proper analysis of prejudice under *Strickland* would have taken into account the newly uncovered [mitigation] evidence . . . , along with the mitigation evidence introduced during [the defendant's] penalty phase trial, to assess whether there is a reasonable probability that [the defendant] would have received a different sentence after a constitutionally sufficient mitigation investigation" (citing cases)). And because Andrus' death sentence required a unanimous jury recom-

mendation, Tex. Code Crim. Proc. Ann., Art. 37.071, prejudice here requires only "a reasonable probability that at least one juror would have struck a different balance" regarding Andrus' "moral culpability," *Wiggins*, 539 U. S., at 537–538; see also Tex. Code Crim. Proc. Ann., Art. 37.071, §2(e)(1).

According to Andrus, effective counsel would have painted a vividly different tableau of aggravating and mitigating evidence than that presented at trial. See Pet. for Cert. 18. But despite powerful and readily available mitigating evidence, Andrus argues, the Texas Court of Criminal Appeals failed to engage in any meaningful prejudice inquiry. See *ibid.*

It is unclear whether the Court of Criminal Appeals considered *Strickland* prejudice at all. Its one-sentence denial of Andrus' *Strickland* claim, see *supra*, at 7, does not conclusively reveal whether it determined that Andrus had failed to demonstrate deficient performance under *Strickland*'s first prong, that Andrus had failed to demonstrate prejudice under *Strickland*'s second prong, or that Andrus had failed to satisfy both prongs of *Strickland*.

Unlike the concurring opinion, however, the brief order of the Court of Criminal Appeals did not analyze *Strickland* prejudice or engage with the effect the additional mitigating evidence highlighted by Andrus would have had on the jury.[5] What little is evident from the proceeding below is

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[5]The Court of Criminal Appeals did briefly observe that the trial court's order recommending relief had omitted the "'reasonable probability'" language when reciting the *Strickland* prejudice standard. App. to Pet. for Cert. 8, n. 2; cf. *Strickland*, 466 U. S., at 694 (a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"). Even were there reason to set aside that "[t]rial judges are presumed to know the law," *Lambrix* v. *Singletary*, 520 U. S. 518, 532, n. 4 (1997) (internal quotation marks omitted), the trial court's omission of the "reasonable probability" language would at most suggest that it held Andrus

that the concurring opinion's analysis of or conclusion regarding prejudice did not garner a majority of the Court of Criminal Appeals.[6] Given that, the court may have concluded simply that Andrus failed to demonstrate deficient performance under the first prong of *Strickland* (without even reaching the second prong). For the reasons explained above, any such conclusion is erroneous as a matter of law. See *supra*, at 8–16.

The record before us raises a significant question whether the apparent "tidal wave," 7 Habeas Tr. 101, of "available mitigating evidence taken as a whole" might have sufficiently "'influenced the jury's appraisal' of [Andrus'] moral culpability" as to establish *Strickland* prejudice, *Wiggins*, 539 U. S., at 538 (quoting *Williams*, 529 U. S., at 398). (That is, at the very least, whether there is a reasonable probability that "at least one juror would have struck a different balance." *Wiggins*, 539 U. S., at 537.) That prejudice inquiry "necessarily require[s] a court to 'speculate' as to the effect of the new evidence" on the trial evidence, "regardless of how much or little mitigation evidence was presented during the initial penalty phase." *Sears*, 561 U. S., at 956; see also *id.*, at 954 ("We have never limited the prejudice inquiry under *Strickland* to cases in which there was

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to (and found that Andrus had satisfied) a stricter standard of prejudice than that set forth in *Strickland*.

[6]The concurring opinion, moreover, seemed to assume that the prejudice inquiry here turns principally on how the facts of this case compare to the facts in *Wiggins*. We note that we have never before equated what was sufficient in *Wiggins* with what is necessary to establish prejudice. Cf. *Wiggins*, 539 U. S., at 537–538 ("[T]he mitigating evidence in this case is stronger, and the State's evidence in support of the death penalty far weaker, than in *Williams*, where we found prejudice as the result of counsel's failure to investigate and present mitigating evidence"); *Williams*, 529 U. S., at 399 (finding such prejudice after applying AEDPA deference).

'little or no mitigation evidence' presented").[7] Given the uncertainty as to whether the Texas Court of Criminal Appeals adequately conducted that weighty and record-intensive analysis in the first instance, we remand for the Court of Criminal Appeals to address *Strickland* prejudice in light of the correct legal principles articulated above. See *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7 (2005).

* * *

We conclude that Andrus has shown deficient performance under the first prong of *Strickland*, and that there is a significant question whether the Court of Criminal Appeals properly considered prejudice under the second prong of *Strickland*. We thus grant Andrus' petition for a writ of certiorari and his motion for leave to proceed *in forma pauperis*, vacate the judgment of the Texas Court of Criminal Appeals, and remand the case for the court to address the prejudice prong of *Strickland* in a manner not inconsistent with this opinion.

It is so ordered.

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[7] The dissent trains its attention on the aggravating evidence actually presented at trial. *Post*, at 4–7; but see *Sears*, 561 U. S., at 956 (*Strickland* prejudice inquiry "will necessarily require a court to 'speculate' as to the effect of the new evidence" on the trial evidence); 561 U. S., at 956 ("A proper analysis of prejudice under *Strickland* would have taken into account the newly uncovered evidence . . . , along with the mitigation evidence introduced during [the] penalty phase trial").

SUPREME COURT OF THE UNITED STATES

TERENCE TRAMAINE ANDRUS *v.* TEXAS

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 18–9674. Decided June 15, 2020

JUSTICE ALITO, with whom JUSTICE THOMAS and JUSTICE GORSUCH join, dissenting.

The Court clears this case off the docket, but it does so on a ground that is hard to take seriously. According to the Court, "[i]t is unclear whether the Court of Criminal Appeals considered *Strickland* prejudice at all." *Ante*, at 17; see *Strickland* v. *Washington*, 466 U. S. 668 (1984). But that reading is squarely contradicted by the opinion of the Court of Criminal Appeals (CCA), which said explicitly that Andrus failed to show prejudice:

> "[Andrus] fails to meet his burden under *Strickland* v. *Washington*, 466 U. S. 668 (1984), to show by a preponderance of the evidence that his counsel's representation fell below an objective standard of reasonableness *and that there was a reasonable probability that the result of the proceedings would have been different*, *but for counsel's deficient performance*." App. to Pet. for Cert. 7–8 (emphasis added).

Not only does the CCA opinion contain this express statement, but it adds that the trial court did not heed *Strickland*'s test for prejudice. See App. to Pet. for Cert. 8, n. 2 ("[T]hroughout its findings, the trial court misstates the *Strickland* prejudice standard by omitting the standard's 'reasonable probability' language"). And the record clearly shows that the trial court did not apply that test to Andrus's claim. See App. to Pet. for Cert. 36–37. A majority of this Court cannot seriously think that the CCA pointed this out and then declined to reach the issue of prejudice.

How, then, can the Court get around the unmistakable evidence that the CCA decided the issue of prejudice? It begins by expressing doubt about the meaning of the critical sentence reproduced above. According to the Court, that sentence "does not conclusively reveal whether [the CCA] determined . . . that Andrus had failed to demonstrate prejudice under *Strickland*'s second prong." *Ante*, at 17. It is hard to write a more conclusive sentence than "[Andrus] fails to meet his burden under *Strickland* v. *Washington*, 466 U. S. 668 (1984), to show by a preponderance of the evidence . . . that there was a reasonable probability that the result of the proceedings would have been different, but for counsel's deficient performance." App. to Pet. for Cert. 7–8. Perhaps the Court thinks the CCA should have used CAPITAL LETTERS or **bold type**. Or maybe it should have added: "And we really mean it!!!"

Not only does the Court express doubt that the CCA reached the prejudice prong of *Strickland*, but the Court is not sure that the CCA decided even the performance prong. See *ante*, at 17 ("Its one-sentence denial of Andrus' *Strickland* claim . . . does not conclusively reveal whether it determined that Andrus had failed to demonstrate deficient performance under *Strickland*'s first prong"). The Court may feel it necessary to make that statement because the CCA disposed of both prongs in the sentence quoted above. So if that sentence is not sufficient to show that the CCA reached the prejudice prong, there is no better reason for thinking that it decided the performance prong. But if the Court really thinks that the CCA did not decide the performance issue, why does it treat that issue differently from the prejudice issue? Why does it decide the performance question in the first instance? Are we now a court of "first view" and not, as we have often stressed, a "court of review"? See, *e.g.*, *McLane Co., Inc.* v. *EEOC*, 581 U. S. ___, ___ (2017) (slip op., at 11). The Court's disparate treatment of the two parts of the CCA's dispositive sentence shows

that the Court is only selectively skeptical.

The Court gives two reasons for doubting that the CCA reached the issue of prejudice, but both are patent make-weights. First, the Court notes that the CCA's *per curiam* opinion, unlike the concurring opinion, did not provide reasons for finding that prejudice had not been shown. But the failure to explain is not the same as failure to decide. Today's "tutelary remand" is a misuse of our supervisory authority and a waste of our and the CCA's time. *Lawrence* v. *Chater*, 516 U. S. 163, 185 (1996) (Scalia, J., dissenting).

Second, the Court observes that the concurring opinion, which discussed the question of prejudice at some length, was joined by only four of the CCA's nine judges. See App. to Pet. for Cert. 9–21 (opinion of Richardson, J., joined by Keller, P. J., and Hervey and Slaughter, JJ.). But that does not show that the other five declined to decide the question of prejudice. The most that one might possibly infer is that these judges might not have agreed with everything in the concurrence, but even that is by no means a certainty. So the Court's reading of the decision below is contrary to the plain language of the decision and is not supported by any reason worth mentioning.

If that were not enough, the Court's reading is belied by Andrus's interpretation of the CCA decision. Andrus nowhere claims that the CCA failed to decide the issue of prejudice. On the contrary, the petition faults the CCA for providing "a *truncated* 'no prejudice' analysis," not for failing to decide the prejudice issue at all. Pet. for Cert. ii (emphasis added). Indeed, the main argument in the petition is that we should modify *Strickland* because courts are too often rejecting ineffective-assistance claims for lack of prejudice. That argument would make no sense if the CCA had not decided the prejudice issue, something that is never even implied by Andrus's counsel in either the 40-page petition or the 11-page reply.

Not only did the CCA clearly hold that Andrus failed to

show prejudice, but there was strong support for that holding in the record. To establish prejudice, Andrus must show "a substantial, not just conceivable, likelihood" that one of the jurors who unanimously agreed on his sentence would not have done so if his trial counsel had presented more mitigation evidence. *Cullen* v. *Pinholster*, 563 U. S. 170, 189 (2011) (internal quotation marks omitted). This inquiry focuses not just on the newly offered mitigation evidence, but on the likelihood that this evidence would have overcome the State's aggravation evidence. See, *e.g.*, *Sears* v. *Upton*, 561 U. S. 945, 955–956 (2010) (*per curiam*). While providing a lengthy (and one-sided) discussion of Andrus's mitigation evidence, the Court never acknowledges the volume of evidence that Andrus is prone to brutal and senseless violence and presents a serious danger to those he encounters whether in or out of prison. Instead, the Court says as little as possible about Andrus's violent record.

For example, here is what the Court says about the crimes for which he was sentenced to death: "Not long after Andrus' release from prison at age 18, Andrus attempted the fatal carjacking that resulted in his capital convictions." *Ante*, at 6.

Here is what the record shows. According to Andrus's confession, he left his apartment one evening, " 'amped up' on embalming fluid [PCP] mixed with marijuana, cocaine, and beer," and looked for a car to "go joy-riding." No. AP–76,936, p. 5 (CCA, Mar. 23, 2016) (Reh'g Op.); see also 54 Tr., Pl. Exh. 147 (Andrus's confession). In the parking lot of a supermarket, he saw Avelino Diaz drop off his wife, Patty, in front of the store. By his own admission, Andrus approached Diaz's car with a gun drawn, but he abandoned the carjacking attempt when he saw that the car had a stick shift, which he could not drive. Alerted by a store employee, Patty Diaz ran out of the store and found her husband lying by the side of the car with a bullet wound in the back of his head. He was subsequently pronounced dead.

After killing Avelino Diaz, Andrus approached a car with two occupants, whom Andrus described as an "old man and old wom[a]n." *Id.*, at 2. Andrus fired three shots into the car. The first went through the open driver's side window and hit the passenger, Kim-Phuong Vu Bui, in the head. As the car sped away, Andrus fired a second shot, which entered the back driver's side window, and a third shot, which "entered at an angle indicating that the shot originated from a farther distance." Reh'g Op. 3. One of these bullets hit the driver, Steve Bui, in the back. Seeing that blood was coming out of his wife's mouth, Steve drove her to a hospital and carried her inside, where she died.

These senseless murders in October 2008 were not Andrus's first crimes. In 2004, he was placed on probation for a drug offense, but just two weeks later, he committed an armed robbery. Andrus and two others followed a woman to her parents' home, where they held her at gunpoint and took her purse and gym bag. The woman identified Andrus as the perpetrator who held the gun. *Id.*, at 7.[1]

For this offense, Andrus was sent to a juvenile facility where he showed such " 'significant assaultive behavior' toward other youths and staff " that he was eventually transferred to an adult facility. App. to Pet. for Cert. 11.[2] Shortly

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[1] The Court credits Andrus's version of the event and repeats his allegation that he merely served as a "lookout." *Ante*, at 1, 6. As the CCA explained on direct review, however, the victim matched Andrus's clothing to the gunman's. See Reh'g Op. 7; see also 46 Tr. 23–25 (arresting officer explaining that only Andrus's clothing matched the suspect description).

[2] Just as the Court provides a one-sided summary of Andrus's mitigation evidence, it quibbles at every possible turn with the aggravation evidence. Thus, the Court states that Andrus's behavioral problems at this facility "were notably mild." *Ante*, at 14. But the witness on whose testimony the Court relies admitted that Andrus's record included multiple threats and assaults against staff and other youths. 4 Habeas Tr. 202–204. And the record shows that Andrus had needed to be removed from general population 77 times. 10 *id.*, Pl. Exh. 28. The responsible correc-

after his release, he again violated his supervisory conditions and was returned to the adult facility. *Ibid.*

When he was released again, he committed an armed robbery of a dry-cleaning establishment. Around 7 a.m. one morning, he entered the business and chased the owner, Tuan Tran, to the back. He beat Tran and threatened him with a knife until Tran gave him money. Reh'g Op. 7–8. Andrus's ex-girlfriend told the police that he confessed to this robbery. 8 Habeas Tr. 14.[3] In addition, Tran picked Andrus out of a photo array, 46 Tr. 66, 69–70,[4] and testified at trial that the robber was in the courtroom, *id.*, at 59–60, but he was too afraid to point at Andrus, *ibid.* Less than two months after this crime, Andrus murdered Avelino Diaz and Kim-Phuong Vu Bui. App. to Pet. for Cert. 11.

While awaiting trial for those murders, Andrus carried out a reign of terror in jail. He assaulted another detainee, attacked and injured corrections officers, threw urine in an officer's face, repeatedly made explicit threats to kill officers and staff, flooded his cell and threw excrement on the

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tions officials obviously did not think this record was "notably mild," because it prompted them to transfer him to an adult facility.

[3] Although Andrus's ex-girlfriend later signed an affidavit contradicting herself, 41 *id.*, Def. Exh. 139, pp. 1–2, she admitted at the habeas hearing—after learning that she had been recorded—that she indeed relayed this information, 8 *id.*, at 48–49. Andrus's counsel tried to withdraw her affidavit from evidence, having "learned information that caused [them] to doubt [her] reliability." *Id.*, at 5.

[4] The Court again credits Andrus's allegation that he did not commit this robbery. See *ante*, at 14–15. In support, the Court points to what Tran told police shortly after being beaten and to supposed problems with the photo array from which Tran first identified Andrus. But the Court cannot dispute that Andrus's ex-girlfriend linked him to the robbery or that Tran identified him twice. Nor did the detective to whom the Court refers in fact testify that "the inclusion of Andrus' photograph in a belated photo array . . . gave rise to numerous reliability concerns." *Ante*, at 15; see 8 Habeas Tr. 31 (testifying, in response to habeas counsel's repeated questions whether delays affect the reliability of identifications, only that they "can"); *id.*, at 42–44 (affirming the bases for Andrus's inclusion).

walls, and engaged in other disruptive acts. *Id.*, at 11–13. Also while awaiting trial for murder, he had the words "murder weapon" tattooed on his hands and a smoking gun tattooed on his forearm. 51 Tr. 65–66, 68.

In sum, the CCA assessed the issue of prejudice in light of more than the potentially mitigating evidence that the Court marshals for Andrus. The CCA had before it strong aggravating evidence that Andrus wantonly killed two innocent victims and shot a third; that he committed other violent crimes; that he has a violent, dangerous, and unstable character; and that he is a threat to those he encounters.

The CCA has already held once that Andrus failed to establish prejudice. I see no good reason why it should be required to revisit the issue.

SUPREME COURT OF THE UNITED STATES

THOMAS ROGERS, ET AL. *v.* GURBIR GREWAL, ATTORNEY GENERAL OF NEW JERSEY, ET AL.

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

No. 18–824. Decided June 15, 2020

The petition for a writ of certiorari is denied.

JUSTICE THOMAS, with whom JUSTICE KAVANAUGH joins as to all but Part II, dissenting from the denial of certiorari.

The text of the Second Amendment protects "the right of the people to keep and bear Arms." We have stated that this "fundamental righ[t]" is "necessary to our system of ordered liberty." *McDonald* v. *Chicago*, 561 U. S. 742, 778 (2010). Yet, in several jurisdictions throughout the country, law-abiding citizens have been barred from exercising the fundamental right to bear arms because they cannot show that they have a "justifiable need" or "good reason" for doing so. One would think that such an onerous burden on a fundamental right would warrant this Court's review. This Court would almost certainly review the constitutionality of a law requiring citizens to establish a justifiable need before exercising their free speech rights. And it seems highly unlikely that the Court would allow a State to enforce a law requiring a woman to provide a justifiable need before seeking an abortion. But today, faced with a petition challenging just such a restriction on citizens' Second Amendment rights, the Court simply looks the other way.

Petitioner Rogers is a law-abiding citizen who runs a business that requires him to service automated teller machines in high-crime areas. He applied for a permit to carry his handgun for self-defense. But, to obtain a carry permit in New Jersey, an applicant must, among other things,

demonstrate "that he has a justifiable need to carry a handgun." N. J. Stat. Ann. §2C:58–4(c) (West 2019 Cum. Supp.). For a "private citizen" to satisfy this "justifiable need" requirement, he must "specify in detail the urgent necessity for self-protection, as evidenced by specific threats or previous attacks which demonstrate a special danger to the applicant's life that cannot be avoided by means other than by issuance of a permit to carry a handgun." *Ibid.*; see also N. J. Admin. Code §13:54–2.4 (2020). "Generalized fears for personal safety are inadequate." *In re Preis*, 118 N. J. 564, 571, 573 A. 2d 148, 152 (1990). Petitioner could not satisfy this standard and, as a result, his permit application was denied. With no ability to obtain a permit, petitioner is forced to operate his business in high-risk neighborhoods with no firearm for self-defense.

Petitioner asks this Court to grant certiorari to determine whether New Jersey's near-total prohibition on carrying a firearm in public violates his Second Amendment right to bear arms, made applicable to the States through the Fourteenth Amendment. See *McDonald*, 561 U. S., at 750; see *id.*, at 806 (THOMAS, J., concurring in part and concurring in judgment). This case gives us the opportunity to provide guidance on the proper approach for evaluating Second Amendment claims; acknowledge that the Second Amendment protects the right to carry in public; and resolve a square Circuit split on the constitutionality of justifiable-need restrictions on that right. I would grant the petition for a writ of certiorari.

I

It has been more than a decade since this Court's decisions in *McDonald* v. *Chicago*, *supra*, and *District of Columbia* v. *Heller*, 554 U. S. 570 (2008). In the years since those decisions, lower courts have struggled to determine the proper approach for analyzing Second Amendment challenges.

Although our decision in *Heller* did not provide a precise standard for evaluating all Second Amendment claims, it did provide a general framework to guide lower courts. In *Heller*, we recognized that "the Second Amendment . . . codified a *pre-existing* right." *Id.*, at 592. This right was "enshrined with the scope [it was] understood to have when the people adopted" it. *Id.*, at 634. To determine that scope, we analyzed the original meaning of the Second Amendment's text as well as the historical understanding of the right. We noted that "limitation[s]" on the right may be supported by "historical tradition," but we declined to "undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment." *Id.*, at 626–627. Instead, we indicated that courts could conduct historical analyses for restrictions in the future as challenges arose. *Id.*, at 635.

Consistent with this guidance, many jurists have concluded that text, history, and tradition are dispositive in determining whether a challenged law violates the right to keep and bear arms. See, *e.g.*, *Mance* v. *Sessions*, 896 F. 3d 390, 394 (CA5 2018) (Elrod, J., joined by Jones, Smith, Willett, Ho, Duncan, and Engelhardt, JJ., dissenting from denial of reh'g en banc); *Tyler* v. *Hillsdale Cty. Sheriff's Dept.*, 837 F. 3d 678, 702–703 (CA6 2016) (Batchelder, J., concurring in most of judgment); *Gowder* v. *Chicago*, 923 F. Supp. 2d 1110, 1123 (ND Ill. 2012); *Heller* v. *District of Columbia*, 670 F. 3d 1244, 1285 (CADC 2011) (*Heller II*) (Kavanaugh, J., dissenting).

But, as I have noted before, many courts have resisted our decisions in *Heller* and *McDonald*. See *Silvester* v. *Becerra*, 583 U. S. ___, ___ (2018) (opinion dissenting from denial of certiorari) (slip op., at 11). Instead of following the guidance provided in *Heller*, these courts minimized that decision's framework. See, *e.g.*, *Gould* v. *Morgan*, 907 F. 3d 659, 667 (CA1 2018) (concluding that our decisions "did not provide much clarity as to how Second Amendment claims should be analyzed in future cases"). They then "filled" the

self-created "analytical vacuum" with a "two-step inquiry" that incorporates tiers of scrutiny on a sliding scale. *National Rifle Assn. of Am., Inc.* v. *Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F. 3d 185, 194 (CA5 2012); *Powell* v. *Tompkins*, 783 F. 3d 332, 347, n. 9 (CA1 2015) (compiling Circuit opinions adopting some form of the sliding-scale framework).

Under this test, courts first ask "whether the challenged law burdens conduct protected by the Second Amendment." *United States* v. *Chovan*, 735 F. 3d 1127, 1136 (CA9 2013). If so, courts proceed to the second step—determining the appropriate level of scrutiny. *Ibid.* To do so, courts generally consider "how close the law comes to the core of the Second Amendment right" and "the severity of the law's burden on the right." *Id.*, at 1138 (internal quotation marks omitted); see also, *e.g.*, *Gould*, *supra,* at 670–671. Depending on their analysis of those two factors, courts then apply what purports to be either intermediate or strict scrutiny—at least recognizing that *Heller* barred the application of rational basis review. *Chovan*, *supra*, at 1137.

This approach raises numerous concerns. For one, the courts of appeals' test appears to be entirely made up. The Second Amendment provides no hierarchy of "core" and peripheral rights. And "[t]he Constitution does not prescribe tiers of scrutiny." *Whole Woman's Health* v. *Hellerstedt*, 579 U. S. ___, ___ (2016) (THOMAS, J., dissenting) (slip op., at 12); see also *Heller II*, *supra*, at 1283 (Kavanaugh, J., dissenting) (listing constitutional rights that are not subject to means-ends scrutiny). Moreover, there is nothing in our Second Amendment precedents that supports the application of what has been described as "a tripartite binary test with a sliding scale and a reasonable fit." *Duncan* v. *Becerra*, 265 F. Supp. 3d 1106, 1117 (SD Cal. 2017), aff'd, 742 Fed. Appx. 218 (CA9 2018).

Even accepting this test on its terms, its application has yielded analyses that are entirely inconsistent with *Heller*.

There, we cautioned that "[a] constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all," stating that our constitutional rights must be protected "whether or not future legislatures or (yes) even future judges think that scope too broad." 554 U. S., at 634–635. On that basis, we explicitly rejected the invitation to evaluate Second Amendment challenges under an "interest-balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other." *Id.*, at 689 (BREYER, J., dissenting). But the application of the test adopted by the courts of appeals has devolved into just that.[1] In fact, at least one scholar has contended that this interest-balancing approach has ultimately carried the day, as the lower courts systematically ignore the Court's actual holding in *Heller*. See Rostron, Justice Breyer's Triumph in the Third Battle Over the Second Amendment, 80 Geo. Wash. L. Rev. 703 (2012). With what other constitutional right would this Court allow such blatant defiance of its precedent?

Whatever one may think about the proper approach to analyzing Second Amendment challenges, it is clearly time

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[1]See, *e.g.*, *Kachalsky* v. *County of Westchester*, 701 F. 3d 81, 100 (CA2 2012) (deferring to the legislature's conclusion that "public safety . . . outweighs the need to have a handgun for an unexpected confrontation"); *New York State Rifle & Pistol Assn., Inc.* v. *New York*, 883 F. 3d 45, 64 (CA2 2018) (stating that a "review of state and local gun control" involves a "balancing of the individual's constitutional right to keep and bear arms against the states' obligation to 'prevent armed mayhem'" (quoting *Kachalsky*, *supra,* at 96)), vacated and remanded, *ante,* p. ___; *Gould* v. *Morgan*, 907 F. 3d 659, 676 (CA1 2018) (stating that "courts must defer to a legislature's choices among reasonable alternatives" when the legislature has "take[n] account of the heightened needs of some individuals to carry firearms for self-defense and balance[d] those needs against the demands of public safety"); *Drake* v. *Filko*, 724 F. 3d 426, 440 (CA3 2013) ("refus[ing] . . . to intrude upon the sound judgment and discretion of the State of New Jersey" that only "those citizens who can demonstrate a 'justifiable need' to do so" may carry handguns outside the home).

for us to resolve the issue.

II

This case also presents the Court with an opportunity to clarify that the Second Amendment protects a right to public carry. While some Circuits have recognized that the Second Amendment extends outside the home, see *Wrenn* v. *District of Columbia*, 864 F. 3d 650, 665 (CADC 2017); *Moore* v. *Madigan*, 702 F. 3d 933, 937 (CA7 2012), many have declined to define the scope of the right, simply assuming that the right to public carry exists for purposes of applying a scrutiny-based analysis, see *Woollard* v. *Gallagher*, 712 F. 3d 865, 876 (CA4 2013); *Drake* v. *Filko*, 724 F. 3d 426, 431 (CA3 2013); *Kachalsky* v. *County of Westchester*, 701 F. 3d 81, 89 (CA2 2012).[2] Other courts have specifically indicated that they would not interpret the Second Amendment to apply outside the home without further instruction from this Court. *United States* v. *Masciandaro*, 638 F. 3d 458, 475 (CA4 2011) ("On the question of *Heller*'s applicability outside the home environment, we think it prudent to await direction from the Court itself"); *Williams* v. *State*, 417 Md. 479, 496, 10 A. 3d 1167, 1177 (2011) ("If the Supreme Court . . . meant its holding [in *Heller*] to extend beyond home possession, it will need to say so more plainly"). We should provide the requested instruction.

A

The text of the Second Amendment guarantees that "the

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[2] It is not clear how these courts can apply the made-up sliding scale test without determining the scope of the right. See *Peruta* v. *County of San Diego*, 742 F. 3d 1144, 1166 (CA9 2014) (noting that courts "must fully understand the historical scope of the right before [they] can determine whether and to what extent the [challenged law] burdens the right or whether it goes even further and amounts to a destruction of the right altogether" (internal quotation marks omitted)), vacated and reh'g en banc granted, 781 F. 3d 1106 (CA9 2015).

right of the people to keep and bear Arms, shall not be infringed." As this Court explained in *Heller*, "[a]t the time of the founding, as now, to 'bear' meant to 'carry.'" 554 U. S., at 584. "When used with 'arms,' . . . the term has a meaning that refers to carrying for a particular purpose—confrontation." *Ibid.* Thus, the right to "bear arms" refers to the right to "'wear, bear, or carry upon the person or in the clothing or in a pocket, for the purpose of being armed and ready for offensive or defensive action in a case of conflict with another person.'" *Ibid.* (quoting *Muscarello* v. *United States*, 524 U. S. 125, 143 (1998) (GINSBURG, J., dissenting); alterations and some internal quotation marks omitted).

"The most natural reading of this definition encompasses public carry." *Peruta* v. *California*, 582 U. S. ___, ___ (2017) (THOMAS, J., dissenting from denial of certiorari) (slip op., at 5). Confrontations, of course, often occur outside the home. See, *e.g.*, *Moore*, *supra*, at 937 (noting that "most murders occur outside the home" in Chicago). Thus, the right to carry arms for self-defense inherently includes the right to carry in public. This conclusion not only flows from the definition of "bear Arms" but also from the natural use of the language in the text. As I have stated before, it is "extremely improbable that the Framers understood the Second Amendment to protect little more than carrying a gun from the bedroom to the kitchen." *Peruta*, *supra*, at ___ (opinion dissenting from denial of certiorari) (slip op., at 5).

The meaning of the term "bear Arms" is even more evident when read in the context of the phrase "right . . . to keep and bear Arms." U. S. Const., Amdt. 2. "To speak of 'bearing' arms solely within one's home . . . would conflate 'bearing' with 'keeping,' in derogation of [*Heller*'s] holding that the verbs codified distinct rights." *Drake*, *supra*, at 444 (Hardiman, J., dissenting); see also *Moore*, *supra*, at 936. In short, it would take serious linguistic gymnastics—and a repudiation of this Court's decision in *Heller*—to claim

that the phrase "bear Arms" does not extend the Second Amendment beyond the home.

B

Cases and treatises from England, the founding era, and the antebellum period confirm that the right to bear arms includes the right to carry in public.

1

"[T]he Second Amendment . . . codified a *pre-existing* right." *Heller*, *supra*, at 592. So, as in *Heller*, my analysis of the scope of that right begins with our country's English roots.

In 1328, during a time of political transition, the English Parliament enacted the Statute of Northampton. The Statute provided that no man was permitted to "bring . . . force in affray of the peace, nor to go nor ride armed by night nor by day, in Fairs, Markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere." Statute of Northampton 1328, 2 Edw. 3, ch. 3. On its face, the statute could be read as a sweeping ban on the carrying of arms. However, both the history and enforcement of the statute reveal that it created a far more limited restriction.

From the beginning, the scope of the Statute of Northampton was unclear. Some officers were ordered to arrest all persons that "go armed," regardless of whether the bearer was carrying arms peacefully. See Letter to Mayor and Bailiffs of York (Jan. 30, 1334), in Calendar of the Close Rolls, Edward III, 1333–1337, p. 294 (H. Maxwell-Lyte ed. 1898). Other officers, however, were ordered to arrest only "persons riding or going armed *to disturb the peace*." Letter to Keeper and Justices of Northumberland (Oct. 28, 1332), in Calendar of the Close Rolls, Edward III, 1330–1333, p. 610 (H. Maxwell-Lyte ed. 1898) (emphasis added).

Whatever the initial breadth of the statute, it is clear that it was not strictly enforced in the ensuing centuries. To the

contrary, "[d]uring most of England's history, maintenance of an armed citizenry was neither merely permissive nor cosmetic but essential" because "[u]ntil late in the seventeenth century England had no standing army, and until the nineteenth century no regular police force." Malcom, The Right of the People To Keep and Bear Arms: The Common Law Tradition, 10 Hastings Const. L. Q. 285, 290 (1983). Citizens were not only expected to possess arms, they were encouraged to maintain skills in the use of those arms, which, of course, required carrying arms in public. See, *e.g., id.*, at 292 (describing King Henry VIII's order requiring villages to maintain targets at which local men were to practice shooting).

The religious and political turmoil in England during the 17th century thrust the scope of the Statute of Northampton to the forefront. See J. Malcom, To Keep and Bear Arms 104–105 (1994) (hereinafter Malcolm). King James II, a Catholic monarch, sought to revive the Statute of Northampton as a weapon to disarm his Protestant opponents. *Id.*, at 104. To this point, "[a]lthough men were occasionally indicted for carrying arms to terrorize their neighbours, the strict prohibition [of the Statute of Northampton] had never been enforced." *Ibid.* But, in November 1686, the Attorney General brought Sir John Knight—an opponent of James II—to trial before the King's Bench. The information alleged that Knight violated the Statute of Northampton by "walk[ing] about the streets armed with guns, and [entering] into the church of St. Michael, in Bristol, in the time of divine service, with a gun, to terrify the King's subjects." *Sir John Knight's Case*, 3 Mod. 117, 87 Eng. Rep. 75, 76. At trial, the Chief Justice of the King's Bench stated that the Statute of Northampton only "punish[ed] people who go armed *to terrify the King's subjects*." *Id.,* at 118, 87 Eng. Rep., at 76 (emphasis added). He explained that the Statute of Northampton was "almost gone in desuetudinem" for "now there be a general connivance to gentlemen to ride

armed for their security." *Rex* v. *Sir John Knight*, 1 Comb. 38, 39, 90 Eng. Rep. 330 (1686). The Chief Justice also noted that only "where the crime shall appear to be malo animo [*i.e.,* with a wrongful intent,] it will come within the Act." *Ibid.* In other words, the Statute of Northampton was almost obsolete from disuse and prohibited only the carrying arms to terrify. Knight was ultimately acquitted.[3]

James II's attempts to disarm his opponents continued. Only two weeks after Knight's acquittal, James II ordered general disarmaments of regions inhabited by his Protestant enemies under the auspices of the Game Act of 1671. See Malcom 105–106. As we explained in *Heller*, "[t]hese experiences caused Englishmen to be extremely wary of concentrated military forces run by the state and to be jealous of their arms." 554 U. S., at 593.

In 1688, James II was deposed in an uprising which came to be known as The Glorious Revolution. Soon thereafter, the English compiled the Declaration of Rights, which contained a list of grievances against James II and sought assurances from William and Mary that Protestants would not be disarmed. See Malcom 115. William and Mary accepted the Declaration of Rights, which was later codified as the English Bill of Rights, agreeing that "the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions, and as allowed by Law." 1 Wm. & Mary, ch. 2, § 7, in 3 Eng. Stat. at Large 441 (1689).

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[3] At least one scholar has asserted that Sir John Knight was acquitted because he fell within the Statute of Northampton's exception for the "King's Officers and Ministers." Charles, The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review, 60 Clev. St. L. Rev. 1, 28, 30 (2012) (internal quotation marks omitted). This assertion has been repudiated by subsequent scholarship. See Kopel, The First Century of Right to Arms Litigation, 14 Geo. J. L. & Pub. Pol'y 127, 135, n. 46 (2016); see also *Young* v. *Hawaii*, 896 F. 3d 1044, 1064, n. 17 (CA9 2018), reh'g en banc granted, 915 F. 3d 681 (CA9 2019). Moreover, regardless of the ground for acquittal, the Chief Justice's pronouncement of law remains.

The Statute of Northampton remained in force following the codification of the English Bill of Rights, but the narrow interpretation of the statute adopted in *Sir John Knight's Case* became blackletter law in England. Writing in 1716, Serjeant William Hawkins, author of an influential English treatise, explained that "no wearing of Arms is within the meaning of [the Statute of Northampton], unless it be accompanied with such Circumstances as are apt to terrify the People; from whence it seems clearly to follow, That Persons of Quality are in no Danger of Offending against this Statute by wearing common Weapons." 1 Pleas of the Crown 136 (1716). Theodore Barlow, another legal commentator, also explained that "Wearing Arms, if not accompanied with Circumstances of Terror, is not within this Statute; therefore People of Rank and Distinction do not offend by wearing common Weapons." The Justice of Peace: A Treatise Containing the Power and Duty of That Magistrate 12 (1745). Sir William Blackstone concluded the Statute of Northampton banned only the carrying of "dangerous and unusual weapons." *Heller*, *supra*, at 627 (internal quotation marks omitted). He explained that the right to arms protected by the 1689 English Bill of Rights preserved "the natural right of resistance and self-preservation" and "the right of having and using arms for self-preservation and defence." 1 Commentaries on the Laws of England 139–140 (1765); see also 2 *id.*, at 412, n. 2 (E. Christian ed. 1794) ("[E]veryone is at liberty to keep or carry a gun, if he does not use it for the [illegal] destruction of game" (editor's note)).

In short, although England may have limited the right to carry in the 14th century, by the time of the founding, the English right was "an individual right protecting against both *public* and private violence." *Heller*, *supra*, at 594 (emphasis added). And for purposes of discerning the original meaning of the Second Amendment, it is this founding era understanding that is most pertinent.

Founding era legal commentators in America also understood the Second Amendment right to "bear Arms" to encompass the right to carry in public.

St. George Tucker, in his 1803 American edition of Blackstone's Commentaries, explained that the right to armed self-defense is the "first law of nature." 1 Blackstone's Commentaries, App. 300. He described "the right of the people to keep and bear arms" as "the true palladium of liberty." *Ibid.* Tucker makes clear that bearing arms in public was common practice at the founding: "In many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than a European fine gentleman without his sword by his side." 5 *id.*, at 19.

Similarly, William Rawle, a member of the Pennsylvania Assembly that ratified the Bill of Rights, acknowledged the right to carry arms in public. A View of the Constitution of the United States of America 125–126 (1825). Rawle noted that the right should not "be abused to the disturbance of the public peace" and explained that if a man carried arms "attended with circumstances giving just reason to fear that he purposes to make an unlawful use of them," he may be required "to give surety of the peace." *Id.*, at 126.[4] But his general understanding appeared to mirror Hawkins' articulation of the English right—public carry was permitted so long as it was not done to terrify.

Other commentators took a similar view. James Wilson, a prominent Framer and one of the six original Justices of the Supreme Court, understood founding era law to prohibit only the carrying of "dangerous and unusual weapons,

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[4] Lower courts looking to historical practice have concluded that, even in these circumstances, if a surety was provided or the accused was exempt from providing a surety, he could continue to bear arms in public. *Wrenn* v. *District of Columbia,* 864 F. 3d 650, 661 (CADC 2017) (explaining the application of surety laws); *Young,* 896 F. 3d, at 1061–1062.

in such a manner, as will naturally diffuse a terrour among the people." 2 Lectures on Law, in Collected Works of James Wilson 1138 (K. Hall & M. Hall eds. 2007). Charles Humphreys, a law professor, reiterated "that in this country the constitution guarranties to all persons the right to bear arms" and that "it can only be a crime to exercise this right in such a manner, as to terrify the people unnecessarily." A Compendium of the Common Law in Force in Kentucky 482 (1822).

3

This view persisted in the early years of the Republic. The majority of the relevant cases during the antebellum period—many of which *Heller* relied on—support the understanding that the phrase "bear Arms" includes the right to carry in public.

In *Bliss* v. *Commonwealth*, 12 Ky. 90 (1822), the Kentucky Court of Appeals held that its state constitutional right to "bear arms" invalidated a concealed carry restriction. *Id.*, at 91–92. The court stated that "whatever restrains the full and complete exercise of [the right to bear arms], though not an entire destruction of it, is forbidden by the explicit language of the constitution." *Ibid.*

Eleven years after *Bliss*, Tennessee's highest court interpreted its State Second Amendment analog in a similar manner in *Simpson* v. *State*, 13 Tenn. 356 (1833). In that case, a jury convicted Simpson of carrying arms "in a warlike manner . . . and to the great terror and disturbance of . . . good citizens." *Id.*, at 357. Simpson challenged the conviction, arguing that the State merely proved that he carried arms, not that he did so in a manner to provoke violence. *Id.*, at 358. The State asserted that violence was not "essential" to support the conviction, pointing to a statement of Serjeant Hawkins regarding the English Statute of Northampton. *Ibid.* The court rejected the State's argument. First, it noted that the State had selectively quoted

Hawkins' statement about "'dangerous and unusual weapons,'" and that Hawkins actually explained that "persons of quality are in no danger of offending [the Statute of Northampton] by wearing their common weapons . . . in such places and upon occasions in which it is the common fashion to make use of them without causing the least suspicion of an intention to commit any act of violence or disturbance of the peace." *Id.*, at 358–359. Second, the court held that even assuming "that our ancestors adopted and brought over with them [the Statute of Northampton], or [a] portion of the common law," the state-law "right to keep and to bear arms" "completely abrogated it." *Id.*, at 359–360 (internal quotation marks omitted).

In 1840, the Supreme Court of Alabama concluded that, while the legislature could impose limitations on "the manner in which arms shall be borne," it could not bar the right to bear arms in public for self-defense. *State* v. *Reid*, 1 Ala. 612, 616–619. The court upheld a prohibition on the "practice of carrying weapons secretly." *Id.*, at 616 (internal quotation marks omitted). In doing so, however, the court recognized that there were limits to the State's ability to restrict the right to carry in public: "A statute which, under the pretence of regulating, amounts to a destruction of the right [to bear arms], or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional." *Id.*, at 616–617. In the court's view, "it is only when carried openly, that [arms] can be efficiently used for defence." *Id.*, at 619. Thus, the court allowed some regulation of the form of carrying arms in public, but it firmly concluded that the right to carry in public for self-defense could not be eliminated altogether.

Other state courts adopted a similar view. In *Nunn* v. *State*, 1 Ga. 243 (1846), the Supreme Court of Georgia held that "seek[ing] to suppress the practice of carrying certain weapons *secretly* . . . is valid" but that "a prohibition against bearing arms *openly* is in conflict with the Constitution, and

void." *Id.*, at 251. And, in *State* v. *Chandler*, 5 La. 489 (1850), the Supreme Court of Louisiana held that the State could ban concealed carry but that the "right to carry arms . . . in full open view" was "guaranteed by the Constitution of the United States." *Id.*, at 489–490 (internal quotation marks omitted).

These cases show that, with few exceptions,[5] courts in the antebellum period understood the right to bear arms as including the right to carry in public for self-defense.

C

Finally, in the wake of the Civil War, "there was an outpouring of discussion of the Second Amendment in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly free slaves." *Heller*, 554 U. S., at 614. These discussions confirm that the Second Amendment right to bear arms was understood to protect public carry at the time the Fourteenth Amendment was ratified.[6]

As I have previously explained, "Southern anxiety about an uprising among the newly freed slaves peaked" after the Civil War. *McDonald*, 561 U. S., at 846 (opinion concurring in part and concurring in judgment). Acting on this fear, States of the "old Confederacy" engaged in "systematic efforts" to disarm recently freed slaves and many of the 180,000 blacks who served in the Union Army. *Id.*, at 847

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[5] In *State* v. *Buzzard*, 4 Ark. 18 (1842), the Supreme Court of Arkansas upheld a law that prohibited concealed carry. *Id.,* at 27 (opinion of Ringo, C. J.); *id.*, at 32 (opinion of Dickinson, J.); but see *id.*, at 34–35 (Lacy, J., dissenting).

[6] Although these discussions occurred well after the ratification of the Bill of Rights, *Heller* treated them as "instructive" in determining the meaning of the Second Amendment. 554 U. S., at 614. The discussions also inform our understanding of the right to keep and bear arms guaranteed by the Fourteenth Amendment as a privilege of American citizenship. See *McDonald* v. *Chicago*, 561 U. S. 742, 837 (2010) (THOMAS, J., concurring in part and concurring in judgment).

(internal quotation marks omitted). "Throughout the South, armed parties, often consisting of ex-Confederate soldiers serving in the state militias, forcibly took firearms from newly freed slaves." *Id.*, at 772 (majority opinion). In addition, some States passed laws that explicitly prohibited blacks from carrying arms without a license (a requirement not imposed on white citizens) or barred blacks from possessing arms altogether. See Cottrol & Diamond, The Second Amendment: Toward an Afro–Americanist Reconsideration, 80 Geo. L. J. 309, 344–345 (1991) (compiling laws from Alabama, Louisiana, and Mississippi).

The Federal Government acknowledged that these abuses violated blacks' fundamental right to carry arms in public. In 1866, a report of the Commissioner of the Freedmen's Bureau recognized that "[t]he civil law [of Kentucky] prohibits the colored man from bearing arms" and concluded that such a restriction infringed "the right of the people to keep and bear arms as provided in the Constitution." H. R. Exec. Doc. No. 70, 39th Cong., 1st Sess., 233, 236. Similarly, a circular in a congressional Report acknowledged that "in some parts of [South Carolina,] armed parties are, without proper authority, engaged in seizing all fire-arms found in the hands of the freedmen . . . in plain and direct violation of their personal rights [to keep and bear arms] as guaranteed by the Constitution of the United States." Joint Comm. on Reconstruction, H. R. Rep. No. 30, 39th Cong., 1st Sess., 229 (1866) (Proposed Circular of Brigadier Gen. R. Saxton). The circular noted the "peaceful and orderly conduct" of freed slaves when carrying arms, as well as their need "to kill game for subsistence, and to protect their crops from destruction by birds and animals," clearly indicating that the bearing of arms occurs in public. *Ibid.* Finally, numerous Congressmen expressed dismay at the denial of blacks' rights to bear arms when discussing the Civil Rights Act of 1866, the Freedmen's Bureau Act of 1866, and the Fourteenth Amendment. See Halbrook, The

Jurisprudence of the Second and Fourteenth Amendments, 4 Geo. Mason L. Rev. 1, 21–25 (1981).

The importance of the right to carry arms in public during Reconstruction and thereafter cannot be overstated. "The use of firearms for self-defense was often the only way black citizens could protect themselves from mob violence." *McDonald*, 561 U. S., at 857 (opinion of THOMAS, J.). And, unfortunately, "[w]ithout federal enforcement of the inalienable right to keep and bear arms, . . . militias and mobs were tragically successful in waging a campaign of terror" against Southern blacks. *Id.*, at 856. On this record, it is clear that "the Framers of the Privileges or Immunities Clause and the ratifying-era public understood—just as the Framers of the Second Amendment did—that the right to keep and bear arms" encompassed the right to carry arms in public for self-defense. *Id.*, at 858.

In short, the text of the Second Amendment and the history from England, the founding era, the antebellum period, and Reconstruction leave no doubt that the right to "bear Arms" includes the individual right to carry in public in some manner.

III

Recognizing that the Constitution protects the right to carry arms in public does not mean that there is a "right to . . . carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U. S., at 626. "The protections enumerated in the Second Amendment . . . are not absolute prohibitions against government regulation." *Voisine* v. *United States*, 579 U. S. ___, ___ (2016) (THOMAS, J., dissenting) (slip op., at 17). States can impose restrictions on an individual's right to bear arms that are consistent with historical limitations. "Some laws, however, broadly divest an individual of his Second Amendment rights" altogether. *Ibid.* This case gives us the ideal opportunity to at least begin analyzing which restrictions

are consistent with the historical scope of the right to bear arms.

It appears that a handful of States throughout the country prohibit citizens from carrying arms in public unless they can establish "good cause" or a "justifiable need" for doing so. The majority of States, while regulating the carrying of arms to varying degrees, have not imposed such a restriction, which amounts to a "[b]a[n] on the ability of most citizens to exercise an enumerated right." *Wrenn*, 864 F. 3d, at 666. The Courts of Appeals are squarely divided on the constitutionality of these onerous "justifiable need" or "good cause" restrictions. The D. C. Circuit has held that a law limiting public carry to those with a "good reason to fear injury to [their] person or property" violates the Second Amendment. *Wrenn*, 864 F. 3d, at 655 (internal quotation marks omitted).[7] By contrast, the First, Second, Third, and Fourth Circuits have upheld the constitutionality of licensing schemes with "justifiable need" or "good reason" requirements, applying what purported to be an intermediate scrutiny standard. See *Gould*, 907 F. 3d, at 677; *Kachalsky*, 701 F. 3d, at 101; *Drake*, 724 F. 3d, at 440; *Masciandaro*, 638 F. 3d, at 460.

"One of this Court's primary functions is to resolve 'important matter[s]' on which the courts of appeals are 'in conflict.'" *Gee* v. *Planned Parenthood of Gulf Coast, Inc.*, 586 U. S. ___, ___ (2018) (THOMAS, J., dissenting from denial of certiorari) (slip op., at 1) (quoting this Court's Rule 10(a)). The question whether a State can effectively ban most citizens from exercising their fundamental right to bear arms

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[7] A panel of the Ninth Circuit, in an exhaustive and scholarly opinion, also held that a law violated the Second Amendment by limiting public carry to those with "'urgency,'" "'need,'" or a "'reason to fear injury.'" *Young*, 896 F. 3d, at 1048. That decision, however, was vacated when a majority of the active judges on the Ninth Circuit voted to grant en banc review. See 915 F. 3d 681.

surely qualifies as such a matter. We should settle the conflict among the lower courts so that the fundamental protections set forth in our Constitution are applied equally to all citizens.

* * *

This case gives us an opportunity to provide lower courts with much-needed guidance, ensure adherence to our precedents, and resolve a Circuit split. Each of these reasons is independently sufficient to grant certiorari. In combination, they unequivocally demonstrate that this case warrants our review. Rather than prolonging our decade-long failure to protect the Second Amendment, I would grant this petition.

SUPREME COURT OF THE UNITED STATES

ALEXANDER L. BAXTER *v.* BRAD BRACEY, ET AL.

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

No. 18–1287. Decided June 15, 2020

The petition for a writ of certiorari is denied.

JUSTICE THOMAS, dissenting from the denial of certiorari.

Petitioner Alexander Baxter was caught in the act of burgling a house. It is undisputed that police officers released a dog to apprehend him and that the dog bit him. Petitioner alleged that he had already surrendered when the dog was released. He sought damages from two officers under Rev. Stat. §1979, 42 U. S. C. §1983, alleging excessive force and failure to intervene, in violation of the Fourth Amendment. Applying our qualified immunity precedents, the Sixth Circuit held that even if the officers' conduct violated the Constitution, they were not liable because their conduct did not violate a clearly established right. Petitioner asked this Court to reconsider the precedents that the Sixth Circuit applied.

I have previously expressed my doubts about our qualified immunity jurisprudence. See *Ziglar* v. *Abbasi*, 582 U. S. ___, ___–___ (2017) (THOMAS, J., concurring in part and concurring in judgment) (slip op., at 2–6). Because our §1983 qualified immunity doctrine appears to stray from the statutory text, I would grant this petition.

I

A

In the wake of the Civil War, Republicans set out to secure certain individual rights against abuse by the States. Between 1865 and 1870, Congress proposed, and the States ratified, the Thirteenth, Fourteenth, and Fifteenth Amendments. These Amendments protect certain rights and gave

Congress the power to enforce those rights against the States.

Armed with its new enforcement powers, Congress sought to respond to "the reign of terror imposed by the Klan upon black citizens and their white sympathizers in the Southern States." *Briscoe* v. *LaHue*, 460 U. S. 325, 337 (1983). Congress passed a statute variously known as the Ku Klux Act of 1871, the Civil Rights Act of 1871, and the Enforcement Act of 1871. Section 1, now codified, as amended, at 42 U. S. C. §1983, provided that

> "any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall . . . be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress . . . ." Act of Apr. 20, 1871, §1, 17 Stat. 13.

Put in simpler terms, §1 gave individuals a right to sue state officers for damages to remedy certain violations of their constitutional rights.

B

The text of §1983 "ma[kes] no mention of defenses or immunities." *Ziglar*, *supra*, at ___ (opinion of THOMAS, J.) (slip op., at 2). Instead, it applies categorically to the deprivation of constitutional rights under color of state law.

For the first century of the law's existence, the Court did not recognize an immunity under §1983 for good-faith official conduct. Although the Court did not squarely deny the availability of a good-faith defense, it did reject an argument that plaintiffs must prove malice to recover. *Myers* v. *Anderson*, 238 U. S. 368, 378–379 (1915) (imposing liability); *id.,* at 371 (argument by counsel that malice was an

essential element). No other case appears to have established a good-faith immunity.

In the 1950s, this Court began to "as[k] whether the common law in 1871 would have accorded immunity to an officer for a tort analogous to the plaintiff's claim under §1983." *Ziglar*, *supra*, at ___ (opinion of THOMAS, J.) (slip op., at 4). The Court, for example, recognized absolute immunity for legislators because it concluded Congress had not "impinge[d] on a tradition [of legislative immunity] so well grounded in history and reason by covert inclusion in the general language" of §1983. *Tenney* v. *Brandhove*, 341 U. S. 367, 376 (1951). The Court also extended a qualified defense of good faith and probable cause to police officers sued for unconstitutional arrest and detention. *Pierson* v. *Ray*, 386 U. S. 547, 557 (1967). The Court derived this defense from "the background of tort liabilit[y] in the case of police officers making an arrest." *Id.,* at 556–557. These decisions were confined to certain circumstances based on specific analogies to the common law.

Almost immediately, the Court abandoned this approach. In *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974), without considering the common law, the Court remanded for the application of qualified immunity doctrine to state executive officials, National Guard members, and a university president, *id.,* at 234–235. It based the availability of immunity on practical considerations about "the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based," *id.,* at 247, rather than the liability of officers for analogous common-law torts in 1871. The Court soon dispensed entirely with context-specific analysis, extending qualified immunity to a hospital superintendent sued for deprivation of the right to liberty. *O'Connor* v. *Donaldson*, 422 U. S. 563, 577 (1975); see also *Procunier* v. *Navarette*, 434 U. S. 555, 561 (1978) (prison officials and officers).

Then, in *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982), the Court eliminated from the qualified immunity inquiry any subjective analysis of good faith to facilitate summary judgment and avoid the "substantial costs [that] attend the litigation of" subjective intent, *id.,* at 816. Although *Harlow* involved an implied constitutional cause of action against federal officials, not a §1983 action, the Court extended its holding to §1983 without pausing to consider the statute's text because "it would be 'untenable to draw a distinction for purposes of immunity law.'" *Id.,* at 818, n. 30 (quoting *Butz* v. *Economou*, 438 U. S. 478, 504 (1978)). The Court has subsequently applied this objective test in §1983 cases. See, *e.g., Ziglar*, 582 U. S., at ___ (majority opinion) (slip op., at 28).[1]

II

In several different respects, it appears that "our analysis is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act." *Id.*, at ___ (opinion of THOMAS, J.) (slip op., at 5).

There likely is no basis for the objective inquiry into clearly established law that our modern cases prescribe. Leading treatises from the second half of the 19th century and case law until the 1980s contain no support for this "clearly established law" test. Indeed, the Court adopted the test not because of "'general principles of tort immunities and defenses,'" *Malley* v. *Briggs*, 475 U. S. 335, 339 (1986), but because of a "balancing of competing values" about litigation costs and efficiency, *Harlow*, *supra*, at 816.

There also may be no justification for a one-size-fits-all, subjective immunity based on good faith. Nineteenth-century officials sometimes avoided liability because they exercised their discretion in good faith. See, *e.g., Wilkes* v.

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[1]I express no opinion on qualified immunity in the context of implied constitutional causes of action against federal officials. See, *e.g., Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971).

Dinsman, 7 How. 89, 130–131 (1849); see also Nielson & Walker, A Qualified Defense of Qualified Immunity, 93 Notre Dame L. Rev. 1853, 1864–1868 (2018); Baude, Is Qualified Immunity Unlawful? 106 Cal. L. Rev. 45, 57 (2018); Engdahl, Immunity and Accountability for Positive Governmental Wrongs, 44 U. Colo. L. Rev. 1, 48–55 (1972). But officials were not *always* immune from liability for their good-faith conduct. See, *e.g., Little* v. *Barreme*, 2 Cranch 170, 179 (1804) (Marshall, C. J.); *Miller* v. *Horton*, 152 Mass. 540, 548, 26 N. E. 100, 103 (1891) (Holmes, J.); see also Baude, *supra,* at 55–58; Woolhandler, Patterns of Official Immunity and Accountability, 37 Case W. Res. L. Rev. 396, 414–422 (1986); Engdahl, *supra*, at 14–21.

Although I express no definitive view on this question, the defense for good-faith official conduct appears to have been limited to authorized actions within the officer's jurisdiction. See, *e.g., Wilkes*, *supra*, at 130; T. Cooley, Law of Torts 688–689 (1880); J. Bishop, Commentaries on Non-Contract Law §773, p. 360 (1889). An officer who acts unconstitutionally might therefore fall within the exception to a common-law good-faith defense.

Regardless of what the outcome would be, we at least ought to return to the approach of asking whether immunity "was 'historically accorded the relevant official' in an analogous situation 'at common law.'" *Ziglar*, *supra*, at ___ (opinion of THOMAS, J.) (slip op., at 3) (quoting *Imbler* v. *Pachtman*, 424 U. S. 409, 421 (1976)). The Court has continued to conduct this inquiry in absolute immunity cases, even after the sea change in qualified immunity doctrine. See *Burns* v. *Reed*, 500 U. S. 478, 489–492 (1991). We should do so in qualified immunity cases as well.[2]

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[2] Qualified immunity is not the only doctrine that affects the scope of relief under §1983. In *Monroe* v. *Pape*, 365 U. S. 167 (1961), the Court held that an officer acts "'under color of any statute, ordinance, regulation, custom, or usage of any State'" even when state law did not authorize his action, *id.*, at 183. Scholars have debated whether this holding is

* * *

I continue to have strong doubts about our §1983 qualified immunity doctrine. Given the importance of this question, I would grant the petition for certiorari.

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correct. Compare Zagrans, "Under Color of" *What* Law: A Reconstructed Model of Section 1983 Liability, 71 Va. L. Rev. 499, 559 (1985), with Winter, The Meaning of "Under Color of" Law, 91 Mich. L. Rev. 323, 341–361 (1992), and Achtenberg, A "Milder Measure of Villainy": The Unknown History of 42 U. S. C. §1983 and the Meaning of "Under Color of" Law, 1999 Utah L. Rev. 1, 56–60. Although concern about revisiting one doctrine but not the other is understandable, see *Crawford-El* v. *Britton*, 523 U. S. 574, 611 (1998) (Scalia, J., joined by THOMAS, J., dissenting), respondents—like many defendants in §1983 actions—have not challenged *Monroe*.