No. 13-____

In the Supreme Court of the United States

NORM ROBINSON, Warden,

Petitioner,

v.

JOHN DRUMMOND,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE—NO EXECUTION DATE SET

QUESTION PRESENTED

This case concerns the intersection of the Sixth Amendment's public-trial right with the demanding standards for relief established by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). In *Waller v. Georgia*, 467 U.S. 39 (1984), the Court established both a generic "balance of interests" rule to determine whether a courtroom closure violates a defendant's public-trial right and a specific four-part test for the *total* courtroom closure that occurred there. Since *Waller*, courts have diverged over how its specific four-part test should apply to *partial* courtroom closures that exclude some, but not all, spectators. This uncertainty has, in turn, led circuit courts applying AEDPA to hold that *Waller*'s specific test is not "clearly established" and cannot be "unreasonably applied" to partial courtroom closures. In this case, by contrast, the Sixth Circuit held that "some form" of the specific *Waller* test was clearly established and that the Ohio Supreme Court had unreasonably applied that form when reviewing a trial court's partial courtroom closure.

The question presented is: Did the Sixth Circuit violate AEDPA by holding that "some form" of *Waller*'s specific four-part test was clearly established for partial courtroom closures and that a state court could unreasonably apply the modified test in the partial-closure context?

LIST OF PARTIES

The Petitioner is Norm Robinson, the Warden of the Chillicothe Correctional Institution. Robinson has been substituted for Marc Houk. *See* Fed. R. Civ. P. 25(d).

The Respondent is John Drummond, an inmate currently imprisoned at the Chillicothe Correctional Institution.

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JURISDICTIONAL STATEMENT

The Sixth Circuit entered its judgment in this case on August 26, 2013. The Warden invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."

Section One of the Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides in relevant part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved

> an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

28 U.S.C. § 2254(d)(1).

INTRODUCTION

It is safe to say that the trial management of this case was challenging. The State's evidence showed that Respondent John Drummond murdered a three-month-old baby when he tried to shoot the baby's father in a gang-motivated (and mistaken) act of retaliation for the death of a fellow gang member. During *voir dire*, the court had to dismiss a potential juror because she had been intimidated by Drummond after he talked to her husband, a deputy sheriff, about her pregnancy. Pet. App. 91a. During trial, spectators were equally disruptive. One claiming to be "family to Drummond" "showed total disrespect to the Court in chambers and gave the deputies a very hard time." Pet. App. 206a-07a. Another ultimately faced charges for assault on a peace officer after getting into a "physical altercation" with a deputy. Pet. App. 206a. In addition, "some of the . . . witnesses [felt] threatened by some of the spectators" at the trial. Pet. App. 205a-06a. Given these incidents, the court decided to partially close the courtroom during the testimony of two individuals from the local neighborhood and a prison informant. Pet. App. 207a-08a. The court allowed the media to remain to "have a record by a disinterested outside source," and the transcripts also became public records. Pet. App. 207a, 211a.

On appeal, the Ohio Supreme Court rejected Drummond's claim that the partial closure violated

his Sixth Amendment public-trial right (as incorporated against the States by the Fourteenth Amendment). Pet. App. 213a; *see In re Oliver*, 333 U.S. 257, 272-73 (1948). The Ohio Supreme Court recognized that the public-trial right is not absolute and in some circumstances yields to other interests. The court explained that *Waller v. Georgia*, 467 U.S. 39 (1984), established a specific four-part test for the *complete* courtroom closure at issue there. Pet. App. 209a-10a. It also reasoned that numerous circuits had relaxed *Waller*'s test for a *partial* closure like the one at issue here, reducing the burden state courts must meet to justify the closure. Pet. App. 210a. And it highlighted the obvious threat of gang retaliation in a case about a tragic act of gang retaliation. Pet. App. 211a. It also cautioned that trial courts in future cases should add more detail to the record about their reasons for a partial closure, but held that the record in this case adequately justified the limited closure that occurred. Pet. App. 212a-13a.

Over Judge Kethledge's dissent, the Sixth Circuit held that the Ohio Supreme Court's reasoning conflicted with *Waller*—even when viewed through AEDPA's deferential lens. Pet. App. 10a-25a. While circuits had split on how *Waller* should apply to partial closures, the Sixth Circuit held that "[t]his distinction between full and partial closures . . . [did] not carry [the Warden's] argument very far" because those circuit cases had applied "some form of *Waller*." Pet. App. 13a. The Sixth Circuit also concluded that the Ohio Supreme Court had unreasonably applied the "some form of" *Waller* that the court of appeals found clearly established. Pet. App. 17a-23a.

This decision is at once both familiar and exceptional. It is familiar in that the Sixth Circuit's analysis contains the same mistakes that have justified a grant of certiorari to reverse in some of this Court's recent cases. The Sixth Circuit's decision, for example, cites circuit precedent to hold that "some form" of *Waller* is clearly established in the partial-closure context. Pet. App. 13a-14a. But, as this Court "explained in correcting an identical error by the Sixth Circuit [a few] Terms ago, . . . circuit precedent does not constitute 'clearly established Federal law . . . .'" *Parker v. Matthews*, 132 S. Ct. 2148, 2155 (2012) (per curiam) (quoting 28 U.S.C. § 2254(d)(1)); *see also, e.g.*, *Renico v. Lett*, 559 U.S. 766, 779 (2010).

Yet the decision is exceptional in that, unlike in these other AEDPA cases, the Sixth Circuit also split with its sister circuits when holding that "some form" of *Waller* is clearly established in the partial-closure context. Unlike the Sixth Circuit, the Eighth Circuit has held that AEDPA bars relief even where a state court violates that court's relaxed form of *Waller* for partial closures, because "[t]he Supreme Court *has not spoken on the partial closure issue*," and because *Waller* is materially distinguishable as involving a complete closure. *Garcia v. Bertsch*, 470 F.3d 748, 754 (8th Cir. 2006) (emphasis added); *see also Angiano v. Scribner*, 366 F. App'x 726, 727 (9th Cir. 2010) (finding no clearly established precedent because "[t]he Circuits are split as to the applicability of the four-part test in *Waller* to 'partial closures,' where only one person is excluded from a trial").

Unlike in most collateral-review cases, moreover, the Sixth Circuit's decision does not simply intrude on the federalism principles at the heart of AEDPA.

It also intrudes on the state courts' ability to ensure public safety and courtroom order. Most courts do not casually close courtrooms. When they take this unusual step, it is often because, in their informed judgment, an open courtroom creates risks to witnesses or jurors. *See, e.g.*, *United States v. Farmer*, 32 F.3d 369, 372 (8th Cir. 1994); *Nieto v. Sullivan*, 879 F.2d 743, 753 (10th Cir. 1989). Even if the Sixth Amendment at times demands these risks, the question how to balance the competing goals of openness and security is a sensitive one. If the Sixth Circuit did not give adequate deference to the state courts on this delicate issue, its analysis could lead those courts to adopt an improper balance out of fear that they will be second-guessed down the road.

In sum, this case presents an important legal issue on which the circuit courts have disagreed, and so it is worthy of the Court's review.

STATEMENT OF THE CASE

The State's trial evidence established that Respondent John Drummond murdered three-month-old Jiyen Dent Jr. in an attempt at gang retribution mistakenly directed at Jiyen's father. Pet. App. 198a-203a.

Drummond was a member of the Lincoln Knolls Crips gang in the Lincoln Knolls neighborhood of Youngstown, Ohio. Pet. App. 197a-98a. In 1998, a former member of that gang, Brett Schroeder, had been shot and killed by an individual now serving time in prison. Pet. App. 198a.

Five years later, on March 20, 2003, Jiyen Dent Sr., his girlfriend, and their baby, Jiyen Jr., moved into the neighborhood. *Id.* Dent did not know

Schroeder or Drummond. *Id.* At a house party a few days later, however, James "Cricket" Rozenblad heard Drummond and others talking about a "guy moving in[to] [their] neighborhood [who] could have had something to do with the death of Brett Schroeder." *Id.* Another witness, Yaraldean Thomas, heard Drummond say "[i]t's on" at the end of this conversation. *Id.* Drummond and an accomplice left the party and returned with an assault rifle. *Id.* They drove to the Dents' new home and fired several shots into it. Pet. App. 198a-99a. Dent picked up Jiyen Jr. and ran toward the bedroom, but discovered on the way that his newborn son had been shot and killed. Pet. App. 199a-200a.

During the ensuing murder investigation, police discovered a large amount of ammunition in Drummond's home matching the ammunition used at the Dent shooting. Pet. App. 201a-02a. They also found a photo album of the Lincoln Knolls Crips containing tributes to Brett Schroeder, the murdered gang member for whom Drummond had mistakenly sought retribution. Pet. App. 202a. In addition, once taken into custody, Drummond confessed to inmates in the jail, noting, among other things, that "he intended to hurt whoever the bullet hit," but "he didn't intend to kill no baby." Pet. App. 203a. Nathaniel Morris, another inmate, overheard him say that "he didn't mean[]to kill the baby; he was trying to get at somebody else . . . ." *Id.*

I. THE STATE PROCEEDINGS

A. The State charged Drummond with, among other crimes, two counts of aggravated murder, both of which made Drummond eligible for the death penalty. Pet. App. 197a. From jury selection through

the penalty phase, the trial took place over the first two months of 2004. Pet. App. 32a, 35a.

Several days before the start of witness testimony, the court faced a possible act of juror intimidation. A prospective juror was expecting a baby with her husband, a local deputy sheriff. While jury selection remained pending, the deputy sheriff crossed paths with Drummond in the course of his job duties. *See* Dist. Ct. R. 35-10, Trial Tr., vol. 11, at 2329. Drummond "approached" the deputy sheriff, "congratulated" him "on the upcoming birth of his child," and told him that Drummond knew "that the deputy sheriff's wife was a potential juror." *Id.* The court struck the prospective juror, who had expressed considerable fear of Drummond over this incident. *Id.* at 2330.

On February 4, 2004, James Rozenblad testified about what he heard Drummond and others discussing just before the murder. Pet. App. 69a. Rozenblad noted that he was nervous during his direct examination. *Id.* By the time of his cross-examination, the trial court had decided to clear the courtroom of spectators but to allow the media to remain. The trial court explained the reasons for this partial closure in the following exchange:

> [The Court]: It's come to the attention of the Court that some of the jurors -- or witnesses feel threatened by some of the spectators in the court. The Court's making a decision that until we get through the next couple of witnesses I'm going to clear the courtroom. That includes the victim's family, the defendant's family and all other spectators. The Court had two incidents yesterday involving one of the

spectators where he showed total disrespect to the Court in chambers and gave the deputies a very hard time. I didn't hold him in contempt of court, but just after that then another individual -- there was a physical altercation between that individual who also came to watch the trial. His name's Damian Williams. . . . Who ultimately got charged with assault on a peace officer. So over the objection of the defendant I'm clearing the courtroom just for today only. . . .

[Defense Counsel]: . . . We would object to the Court's ruling. The defendant is entitled to a public trial under the United States Constitution. I don't disagree that there has been some sort of misconduct here that has been brought to my attention. However, that has not been attributable to the defendant, to Mr. Drummond, and we, therefore, don't think that he should be punished in terms of not having the support, people -- his family, that in the nature of this case, a capital case, that he would require making.

[The Court]: Just to perfect the record, I do believe that the one individual who was not charged with contempt of court yesterday, Michael Peace, is in fact John Drummond's brother.

[Prosecutor]: No. . . . Michael Peace says he's family. Others have said he isn't. He told Deputy Schmuck that he was family to Drummond. He's not a brother though.

> [The Court]: Right. And we go back to when we were seating the jury and John Drummond approached a potential juror's husband in the jail, so. There's been a string of things. . . . We would all agree that the media is permitted in so at least we have a record by a disinterested outside source.

Pet. App. 205a-07a. The partial clearing of the courtroom occurred for Drummond's cross-examination of Rozenblad and for the testimony of Nathaniel Morris (the jail informant) and Yaraldean Thomas (another local witness who heard a portion of Drummond's conversation with fellow gang members before the murder). Pet. App. 207a-08a.

The next day, the trial court entered an order indicating that "[d]ue to the behavior of some of the Courtroom spectators and the fear of retaliation expressed by various witnesses, the Court, upon motion of the State, ordered all spectators removed from the Court for the duration of February 4, 2004 beginning at 1:30 p.m." Pet. App. 208a. The order noted, however, that "[t]he media will be permitted access." *Id.* On that day, the trial court again closed the courtroom (except for media members) during the testimony of Leonard Schroeder (the brother of Brett Schroeder), another witness who had expressed concerns for his safety. *Id.* Drummond did not object to this second closure. *Id.*

Ultimately, the jury convicted Drummond on all counts, and the trial court sentenced him to death. Pet. App. 205a.

B. Drummond filed numerous claims of error with the Ohio Supreme Court. Pet. App. 36a-40a.

He failed to raise a public-trial argument, but the Ohio Supreme Court independently asked the parties to brief the issue. Pet. App. 40a. In a divided decision, the court affirmed the conviction and held that the trial court's partial courtroom closure had not violated the Sixth Amendment. Pet. App. 213a, 262a.

The court began by explaining the general importance of the public-trial right and the main Supreme Court case discussing it—*Waller v. Georgia*, 467 U.S. 39 (1984). Pet. App. 208a-10a. In *Waller*, the court explained, this Court set forth "the following four-pronged test that courts must use to determine whether closure of a courtroom is necessary: 'the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.'" Pet. App. 209a-10a (quoting *Waller*, 467 U.S. at 48).

Notably, however, the court found that "*Waller* dealt with [a] suppression hearing during which *all* persons other than witnesses, court personnel, the parties, and their lawyers were excluded for the entire duration." Pet. App. 210a (emphasis added). *Waller* thus differed from this case, which "deals with [the] partial closure of a trial" that allowed the media to remain. *Id.* In this different context, the court explained, several federal circuit courts have applied modified standards. Pet. App. 210a (citing *Woods v. Kuhlmann*, 977 F.2d 74, 76 (2d Cir. 1992); *United States v. Sherlock*, 962 F.2d 1349, 1357 (9th

Cir. 1989); *Nieto v. Sullivan*, 879 F.2d 743, 753 (10th Cir. 1989); *Douglas v. Wainwright*, 739 F.2d 531, 533 (11th Cir. 1984)).

After recognizing these relaxed *Waller* standards, the Ohio Supreme Court applied them to the closure that occurred on February 4. Pet. App. 210a-13a. Beginning with the "interests" supporting the partial closure, the court highlighted the importance "in maintaining courtroom security and protecting witness safety." Pet. App. 210a. It then pointed to the two scuffles that had occurred between spectators and deputies, to the witnesses' retaliation fears, and to the trial's gang-violence overtones. Pet. App. 210a-11a.

The court next found the closure tailored to these interests. Pet. App. 211a-12a. The closure encompassed only spectators, not the media, and lasted for only three witnesses, not the full hearing. Pet. App. 211a. The trial transcript also became a public record. *Id.* Importantly, allowing the media to remain eliminated "the secrecy prohibited by the Sixth Amendment." *Id.* And "the witnesses' awareness of the media minimize[d] the risk that they would alter their testimony when the proceeding was partially closed." *Id.* (citing *Sherlock*, 962 F.2d at 1358). Drummond's family members were also excluded only "for a limited time, after considering the defendant's rights and the need to protect witnesses." Pet. App. 212a (citing *Sherlock*, 962 F.2d at 1357).

Turning to the third *Waller* factor, the court conceded that the record did "not show that the trial court considered alternatives to closure." Pet. App. 212a. Yet it found that the partial closure was *itself* a narrower alternative to a complete closure. *Id.*

And it supported this holding with federal circuit cases. *See id.* (citing *Brown v. Kuhlmann*, 142 F.3d 529, 538 (2d Cir. 1998)).

As for the specific reasons proffered by the trial court, the Ohio Supreme Court explained that "the strength of the judge's actual findings must be evaluated in reference to the limited scope of the closure." Pet. App. 212a. Given that it was a partial closure, the trial court met this requirement by referring to the prior physical altercations, the witnesses' fears of retaliation, and the individuals involved in the earlier incidents. *Id.* The court supported this holding with federal case law that had found this factor met, despite the lack of specific findings, where the "'information gleaned'" from the record was "'sufficient to support the partial, temporary closure of [the] trial.'" Pet. App. 212a-13a (quoting *Woods*, 977 F.2d at 77-78).

Finally, because Drummond did not object to the partial closure on the following day, the Ohio Supreme Court found he had waived his right to challenge that closure. Pet. App. 213a.

The dissent, by contrast, found that the trial court's limited closure on February 4 violated Drummond's public-trial rights. Pet. App. 262a. It emphasized that the physical altercations had occurred on the previous day and that the trial court failed to identify specific witnesses who feared retaliation. Pet. App. 264a. It also noted the importance of having family members present. Pet. App. 265a. And it posited potential alternatives to the closure, such as using enhanced security. Pet. App. 266a-67a.

II. THE FEDERAL PROCEEDINGS

After the state courts rejected Drummond's state habeas claims, he filed a petition under 28 U.S.C. § 2254 in the District Court for the Northern District of Ohio. Pet. App. 31a. The district court rejected all of Drummond's claims except for his public-trial claim. With respect to that one, the district court granted a conditional writ of habeas corpus and required the State to release Drummond or retry him within 180 days. Pet. App. 195a.

In a divided decision, a Sixth Circuit panel affirmed. Pet. App. 2a-3a. The majority opinion, written by Judge Cole and joined by Judge Griffin, initially noted that *Waller* constituted the relevant Supreme Court precedent for AEDPA purposes. Pet. App. 10a. The majority rejected the Warden's argument that the four-part test for the full courtroom closure at issue in *Waller* was not "clearly established" for the partial courtroom closure at issue here. Pet. App. 12a-13a. The majority conceded that *Presley v. Georgia*, 558 U.S. 209 (2010) (per curiam)—which the majority said extended *Waller*'s four-part test to partial closures—came three years *after* the Ohio Supreme Court's decision and so could not be considered under AEDPA. Pet. App. 12a. The majority also conceded that many circuits had interpreted *Waller* to "dr[a]w a distinction between 'full' and 'partial' courtroom closures." *Id.* But those cases did not "carry [the Warden's] argument very far," the majority reasoned, because "*some form* of *Waller* was applied" in these cases, which "extend[ed] *some form* of Sixth Amendment protection to defendants facing partial closures." Pet. App. 13a-14a (emphases added).

The majority next held that the Ohio Supreme Court had unreasonably applied the "some form of" *Waller* applicable in partial-closure cases. *See* Pet. App. 17a-25a. The majority interpreted the circuit cases as modifying only the first *Waller* factor—requiring a "substantial reason" for the closure rather than *Waller*'s "overriding interest." Pet. App. 17a. It applied an unmodified form of *Waller* for the remaining factors. The majority then ticked through the Ohio Supreme Court's analysis of these four factors.

Beginning with the first, the majority held that the "trial court demonstrated neither an overriding interest nor a substantial reason to close the courtroom, and it was unreasonable for the Supreme Court of Ohio to find otherwise." Pet. App. 18a. That was so, according to the majority, because the trial court failed to identify the witnesses who had felt threatened or to determine whether they had a "substantial" reason for their fear. Pet. App. 18a-19a. As for the "physical altercations" between spectators and court personnel, they had occurred on a different day and there was an insufficient link between them and the closure. *Id.* Further, the only identified juror who had complained of any fear of retaliation had been excused for cause before the closure. Pet. App. 19a.

The majority next rejected the Ohio Supreme Court's analysis on the second unmodified *Waller* factor. It disagreed that the closure was no more extensive than necessary because it "was for a limited duration, the media were allowed to remain, and the trial transcript became public record." *Id.* The majority again relied on the trial court's failure to make

specific findings that any witnesses felt threatened or that Drummond's family posed a threat. Because it was "entirely unclear why this particular closure was necessary in the first place," the majority held, "the timing and breadth of the closure appear[ed] completely arbitrary and without any justification." Pet. App. 20a.

Moving to the third unmodified *Waller* factor (the consideration of alternatives), the majority rejected the Ohio Supreme Court's conclusion that the partial nature of the closure was itself a sufficiently reasoned alternative to a full closure. Pet. App. 21a-22a. The majority also identified the narrower alternative of allowing Drummond's family to remain in the courtroom. *Id.*

On the fourth factor, the majority disagreed with the Ohio Supreme Court that the trial court's findings were specific enough. Pet. App. 23a. The majority reiterated that "[t]he physical altercation and incident in chambers referred to by the Supreme Court of Ohio did not occur on the day of the closure and there is no apparent connection between those incidents or the instigators and the witnesses testifying on February 4th." *Id.* In addition, "[t]he sole juror whose husband had received threats had previously been dismissed from the jury pool." *Id.* And a "[r]eview of the record provides no indication as to which witness felt threatened—not even an oblique reference to some characteristic of a threatened witness." *Id.*

As a final matter, the majority sought to distinguish *Garcia v. Bertsch*, 470 F.3d 748 (8th Cir. 2006), which had "held that the North Dakota Supreme Court's application of the modified *Waller* test to the

facts of the case was not objectively unreasonable given that '[t]he Supreme Court ha[d] not spoken on the partial closure issue.'" Pet. App. 23a-24a (quoting 470 F.3d at 754). *Garcia* was distinguishable, the majority reasoned, because the North Dakota Supreme Court offered "some findings and reasoning" whereas the trial court here had not. Pet. App. 24a.

Judge Kethledge dissented. Pet. App. 26a-29a. The dissent began by distinguishing two aspects of *Waller*, one that applied across the board and the other that applied more narrowly. It noted that *Waller* established the *general* principle that any type of closure "requires some balancing of the interests for and against closure." Pet. App. 26a (citing 467 U.S. at 45). Significantly, however, *Waller* also established a "cluster of more *specific* rules" applicable to the *full* closure at issue in the case. Pet. App. 27a (emphasis added). The dissent pointed to the uncertainty surrounding how these specific rules for full closures applied to other types of closures. *Id.* As for the first factor, for example, it was unclear whether a partial closure must serve an "overriding" interest or simply a "substantial" one. As for the second, it was unclear whether a partial closure must be "narrowly tailored" or simply reasonably related to the relevant interest. *Id.*

Turning to the facts of this case, the dissent held that the trial court had engaged in the general balancing that *Waller* requires. It "offered serious reasons for the closure and tailored its scope in rough proportion to them." Pet. App. 28a. And the Ohio Supreme Court's decision was "reasoned and coherent in its application of *Waller*'s general rule" of bal-

ancing. *Id.* The dissent suggested that the majority relied instead on "the fine print" to find an unreasonable application of *Waller*: "that the closure was broader than strictly necessary, that the court's findings in support of the closure were not as careful and detailed as they should have been, that the court did not make clear the extent to which it considered other alternatives." *Id.* While not unfair criticisms, the dissent concluded, the state courts could reasonably take a different view, "precisely because the showings necessary to remove some but not all spectators from the courtroom were not clearly established at the time of [Drummond's] trial." *Id.*

After the Sixth Circuit issued its decision, it granted the Warden's request to stay the mandate so that he could file a petition for a writ of certiorari. This petition followed.

REASONS FOR GRANTING THE WRIT

For several reasons, the Court should grant the petition for certiorari to review the Sixth Circuit's decision in this case. *First*, the Sixth Circuit's decision conflicts with other circuit decisions reviewing partial courtroom closures under AEDPA's standards, and it even rests uncomfortably with partial-closure cases outside the AEDPA context. *Second*, the Sixth Circuit's decision conflicts with this Court's own precedents interpreting and applying AEDPA's deferential standards. *Third*, this petition raises a recurring issue that implicates important public-safety concerns.

I. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF OTHER CIRCUIT COURTS

The Court should grant the petition for a writ of certiorari initially because the Sixth Circuit's decision departs from the decisions of its sister circuits. The Sixth Circuit recognized that, at the time of the Ohio Supreme Court's decision, this Court had not considered how *Waller* applied to partial courtroom closures that allow members of the media or other members of the public to remain. Pet. App. 12a. At that time, as the district court acknowledged, "circuit courts disagreed whether *Waller* strictly extended to partial closure cases like the one at issue here, and many opted to apply a modified *Waller* test." Pet. App. 82a. Despite this lack of clarity, the Sixth Circuit still found it "clearly established" under AEDPA that "some form" of *Waller*'s four-part test should apply in the partial-closure context, such that a state court could unreasonably apply the chosen "form" of *Waller*. Pet. App. 13a-14a. Other circuits disagree.

A. To begin with, the Sixth Circuit's decision conflicts with circuit cases holding that *Waller*'s standards are not "clearly established" in the partial-closure context. Of most note is *Garcia v. Bertsch*, 470 F.3d 748 (8th Cir. 2006). There, a fifteen-year-old potential accomplice to a murder refused to testify at the defendant's trial because of extensive media presence. *Id.* at 750. The State sought to clear the courtroom, and the trial court ordered everyone out but the immediate families of the defendant and victim. *Id.* at 750-51. The North Dakota Supreme Court rejected the defendant's public-trial claim. *Id.*

at 751. The Eighth Circuit held that AEDPA barred the defendant's request for federal relief.

The Eighth Circuit began its analysis by noting that "[m]any courts, including this one, have distinguished the complete closure in *Waller* from partial closures." *Id.* at 752. In partial-closure cases, for example, the courts have applied a "substantial reason" test, not an "overriding interest" test. *Id.* at 752-53. The Eighth Circuit thus held that the state court had "properly distinguished" *Waller* by applying the circuits' relaxed standards rather than *Waller*'s strict four-part test. *Id.* at 753.

Yet, even under those relaxed standards, the Eighth Circuit expressed concerns about the trial court's closure decision, noting that the partial closure likely did not satisfy that circuit's more lenient test. *Id.* at 753-54. Nevertheless, the court reasoned that "conflicting interpretations of circuit precedent" do not permit relief under AEDPA, and it thus concluded that it could not grant relief based on a misapplication of its modified *Waller* test. *Id.* at 754. In other words, relief was barred because "[t]he Supreme Court *ha[d] not spoken on the partial closure issue*, and the Court's closest case, *Waller*, [was] distinguishable on its facts." *Id.* (emphasis added). This conclusion—that AEDPA bars relief in the partial-closure context even where the state courts do not satisfy applicable circuit standards that are more lenient than *Waller*'s—conflicts with the Sixth Circuit's decision here.

For its part, the Sixth Circuit strained to reconcile the Eighth Circuit's *Garcia* decision. In particular, the Sixth Circuit relied on factual distinctions that played no part in the Eighth Circuit's holding,

noting that *Garcia* involved a juvenile witness, that the trial court allowed the defendant's family to remain, and that the trial court explained its reasoning. Pet. App. 24a-25a. But these facts did not lead the Eighth Circuit to find *Waller* satisfied; rather, it found that the facts likely did not satisfy even the circuit's relaxed standards for partial closures. *See* 470 F.3d at 753. Thus, the Eighth Circuit in *Garcia* and the Sixth Circuit in this case both found likely violations of the Sixth Amendment. Yet the Eighth Circuit denied relief because this Court had "not spoken on the partial closure issue," *id.* at 754, whereas the Sixth Circuit granted relief because the "distinction between full and partial closures . . . [did] not carry [the Warden] very far," Pet. App. 13a. These legal conclusions are incompatible with each other.

A panel of the Ninth Circuit has since agreed with the Eighth—apparently believing the outcome so obvious under AEDPA that the panel could resolve the issue in an unpublished decision. *See Angiano v. Scribner*, 366 F. App'x 726, 727 (9th Cir. 2010). In *Angiano*, the trial court excluded the defendant's wife from the trial. *Id.* at 726. The Ninth Circuit noted that "[t]he Circuits are split as to the applicability of the four-part test in *Waller* to 'partial closures,' where only one person is excluded from a trial." *Id.* at 727. Based on this conflicting precedent alone, the Ninth Circuit could not "conclude that the state court's exclusion of [the defendant's] wife was 'contrary to, or involved an unreasonable application of, clearly established Federal law . . . .'" *Id.*

The Court need not take the Warden's word for this split. District courts have also interpreted *Gar-*

cia and *Angiano* categorically to bar AEDPA relief in partial-closure cases. *See, e.g.*, *Young v. Dickhaut*, No. 10-10820-DPW, 2012 WL 3638824, at *9 (D. Mass. Aug. 22, 2012) (relying on *Garcia* and *Angiano* to hold that "[b]ecause there is no clearly established federal law with respect to partial closures, I cannot find that the state court's ruling warrants habeas relief under AEDPA"); *Wells v. Hartley*, No. CV 07-1406 CAS (FMO), 2011 WL 7111822, at *12 (C.D. Cal. Dec. 19, 2011), *adopted by* 2012 WL 261171 (C.D. Cal. Jan. 26, 2012) (rejecting claim under AEDPA because "the Supreme Court has never addressed the situation that occurred here, i.e., a partial closure . . . ."); *Alarcia v. Remington*, No. SA CV 10-447-PSG (SH), 2010 WL 3766337, at *8 (C.D. Cal. Sept. 10, 2010), *adopted by* 2010 WL 3724552 (C.D. Cal. Sept. 14, 2010) (same).

B. Further illustrating its novelty, the Sixth Circuit's decision is even in significant tension with circuit cases applying *Waller* to partial closures *without* AEDPA's constraints. These courts have reasoned that a "'partial closing of court proceedings does not raise the same constitutional concerns as a total closure because an audience remains to ensure the fairness of the proceedings.'" *United States v. Cervantes*, 706 F.3d 603, 611 (5th Cir. 2013) (quoting *United States v. Osborne*, 68 F.3d 94, 98 (5th Cir. 1995)); *see also, e.g.*, *United States v. Christie*, 717 F.3d 1156, 1168 (10th Cir. 2013); *United States v. Farmer*, 32 F.3d 369, 371 (8th Cir. 1994); *Woods v. Kuhlmann*, 977 F.2d 74, 76 (2d Cir. 1992); *United States v. Sherlock*, 962 F.2d 1349, 1357 (9th Cir. 1989). While the Ohio Supreme Court relied on many of these decisions to support its holding, Pet. App. 210a-13a, the Sixth Circuit largely ignored them.

First, many decisions have found the interests identified by the state courts in this case—e.g., the safety of witnesses, the need for courtroom order, and the threat of gang retaliation, *see* Pet. App. 210a-11a—to be "substantial" under the relaxed test applicable to partial closures. *See, e.g.*, *Woods*, 977 F.2d at 77 (noting safety concerns); *United States v. Thompson*, 713 F.3d 388, 396 (8th Cir. 2013) (noting that the defendant was "an alleged gang member involved in a drive-by shooting"); *Sherlock*, 962 F.2d at 1357 (noting that "[t]he right to a public trial has always been interpreted as being subject to the trial judge's power to keep order in the courtroom" (internal quotation marks omitted)). The Sixth Circuit, by contrast, found that these interests did not suffice under the substantial-interest test. Pet. App. 18a.

Second, some circuits have not required narrow tailoring in the partial-closure context, "explain[ing] that to support a partial closure of a trial, the district court need only identify a substantial interest . . . and document it with sufficient findings to allow the reviewing court to assess the decision." *Christie*, 717 F.3d at 1168 (internal quotation marks omitted); *see Cervantes*, 706 F.3d at 611. Still others have found a trial court's partial closure sufficiently tailored even when it excluded the defendant's family, if the media could remain. *See, e.g.*, *Sherlock*, 962 F.2d at 1358 (finding partial closure sufficiently tailored because the trial judge "provided expressly that other members of the public, especially the press, could remain in the courtroom"); *Woods*, 977 F.2d at 77 (same). Here, by contrast, the Sixth Circuit both required narrow tailoring and rejected the conclusion that the closure was sufficiently tailored given that it exempted the media. Pet. App. 19a-21a.

Third, courts have held that trial courts adequately considered "reasonable alternatives" when the partial closure *itself* was a reasonable alternative to the government's request for a complete closure. *See Brown v. Kuhlmann*, 142 F.3d 529, 538 (2d Cir. 1998) (holding that a trial court generally need not "'consider alternatives to the alternative'" (citation omitted)); *Osborne*, 68 F.3d at 99 (relying on the fact that "[t]he court refused the government's request for total closure of the proceedings"); *see also Commonwealth v. Martin*, 653 N.E.2d 603, 606 (Mass. App. Ct. 1995) (holding that "by opting to exclude all family members but not 'the press' as an alternative to full closure, the judge appears to have given adequate consideration to" alternatives). The Sixth Circuit, by contrast, held that the Ohio Supreme Court's similar logic—that the partial closure was itself a reasoned alternative to a full closure—unreasonably applied this *Waller* factor. Pet. App. 21a-22a.

Fourth, courts have rejected public-trial claims when they could infer reasons for a partial closure, notwithstanding a trial court's failure to make specific findings. The Eighth Circuit, for example, has held that "specific findings by the district court are *not necessary* if [it] can glean sufficient support for a partial temporary closure from the record." *Farmer*, 32 F.3d at 371 (emphasis added); *see also, e.g.*, *Osborne*, 68 F.3d at 99 ("Although the district court did not create a detailed record on this issue, we infer that it eventually ordered the partial closure on this basis."); *Woods*, 977 F.2d at 77-78 (holding that "the record is sufficient to support the partial, temporary closure" "[i]n light of the information gleaned" from it). The Sixth Circuit, by contrast, repeatedly criticized the Ohio Supreme Court for engaging in pre-

cisely this record-based review. The state court, for example, recognized "the dangerous nature of gang violence and the genuine need to protect witnesses testifying against gang members from the deadly threat of retaliation." Pet. App. 211a. Yet the Sixth Circuit discounted these gang overtones because the trial court did not expressly mention them. Pet. App. 18a.

In sum, the Sixth Circuit's decision not only departs from circuit cases applying AEDPA but also rests uncomfortably with non-AEDPA cases. If those cases correctly identified *Waller*'s relaxed application to partial closures as a *de novo* matter, the Sixth Circuit necessarily erred here. *See Berghuis v. Thompkins*, 130 S. Ct. 2250, 2264 (2010) (holding that the state court's decision was "correct under *de novo* review and therefore necessarily reasonable under the more deferential AEDPA standard of review").

II. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S CASES

The existence of a split between the Sixth Circuit and other courts should not be surprising, because the Sixth Circuit's decision departs from this Court's own rules governing AEDPA cases. That departure, too, shows that the Court should grant the Warden's petition for certiorari.

A. The Sixth Circuit initially erred when determining the legal rules that were "clearly established" within the meaning of AEDPA. The Court has repeatedly indicated that "clearly established" law for AEDPA purposes "'refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision.'" *Carey v. Mus-*

ladin, 549 U.S. 70, 74 (2006) (citation omitted). Conversely, "circuit precedent does not constitute 'clearly established Federal law, as determined by the Supreme Court.'" *Parker v. Matthews*, 132 S. Ct. 2148, 2155 (2012) (per curiam) (quoting 28 U.S.C. § 2254(d)(1)).

Under these principles, this case is straightforward. The Court's *Waller* decision did not concern—and thus did not adopt a legal holding with respect to—*partially* closing a courtroom. Instead, the case addressed a suppression hearing that the trial court had *completely* "closed to all persons other than witnesses, court personnel, the parties, and the lawyers" because a few hours of the seven-day hearing needed to remain confidential. 467 U.S. at 42.

This legal distinction makes good sense in light of the purposes the public-trial right serves. A public trial fosters responsible behavior by judges and prosecutors, *id.* at 46; "encourages witnesses to come forward and discourages perjury," *id.*; promotes "public respect for the judicial process," *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982); and allows an outlet for community outrage, thus preventing "vengeful 'self-help,'" *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980) (plurality opinion). While total closures put all of these interests at risk, "a partial closure does not 'implicate the same secrecy and fairness concerns that a total closure does.'" *Farmer*, 32 F.3d at 371 (quoting *Woods*, 977 F.2d at 76). Media attendance promotes the public-trial right's purposes, which explains why courts have relaxed *Waller*'s requirements in the partial-closure context.

Indeed, *Waller* itself relied on an earlier decision (*Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984)), that had "alluded to the distinction between total and partial closures." *Sherlock*, 962 F.2d at 1356; *see Press-Enterprise*, 464 U.S. at 512 (stating that, "[w]hen limited closure is ordered, the constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceedings available . . ."). All of these factors show that, at the time of the Ohio Supreme Court's decision, this Court had "never addressed a situation like this." *Schriro v. Landrigan*, 550 U.S. 465, 478 (2007); *see Garcia*, 470 F.3d at 754 (noting that this "Court has not spoken on the partial closure issue"). Accordingly, *Waller*'s four-part test cannot be considered a "clearly established" holding for a partial closure.

To reach a contrary result, the Sixth Circuit noted that "some form" of *Waller* and "some form" of Sixth Amendment protection applies to partial closures. Pet. App. 13a-14a. But the Sixth Circuit relied on circuit precedent—not this Court's post-*Waller* decisions—for this conclusion. *Id.* That was error. As this Court has noted, circuit precedent may not "be used to refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that this Court has not announced." *Marshall v. Rodgers*, 133 S. Ct. 1446, 1450 (2013) (per curiam). Neither *Waller* nor any other Supreme Court precedent has announced how *Waller*'s four-part test should be modified for partial closures—or whether all four parts should apply at all. As a result, "[t]he modified *Waller* test applied by certain circuits to partial closures is not clearly established law because it constitutes the holdings of various circuits

and not of the Supreme Court." *Young*, 2012 WL 3638824, at *11; *see also Garcia*, 470 F.3d at 754.

B. Even assuming wrongly that "some form" of *Waller* was "clearly established" within the meaning of AEDPA, the Sixth Circuit compounded its error by holding that the Ohio Supreme Court had unreasonably applied the modified test. Pet. App. 17a-25a. The Court has "said time and again that 'an *unreasonable* application of federal law is different from an *incorrect* application of federal law.'" *Cullen v. Pinholster*, 131 S. Ct. 1388, 1411 (2011) (citation omitted). "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly.'" *Renico v. Lett*, 559 U.S. 766, 773 (2010) (citation omitted). Rather, "[r]elief is available under § 2254(d)(1) only if the state court's decision is objectively unreasonable." *Yarborough v. Alvarado*, 541 U.S. 652, 665 (2004). AEDPA thus imposes a "highly deferential standard for evaluating state-court rulings," *Lindh v. Murphy*, 521 U.S. 320, 333, n.7 (1997), one that requires federal courts to deny relief whenever "'fairminded jurists could disagree' on the correctness of the state court's decision," *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011) (citation omitted).

Whether right or wrong, the Ohio Supreme Court's effort to weigh the relevant factors was at least an objectively reasonable application of them. Indeed, as already noted, the Ohio Supreme Court relied on numerous circuit decisions to support its holding with respect to each of the modified factors. Pet. App. 210a-13a. In other words, the court's ap-

plication of the modified *Waller* test fit comfortably within the then-existing body of precedent. It cannot be viewed as objectively unreasonable in those circumstances. *See Musladin*, 549 U.S. at 76-77.

The Sixth Circuit's decision, by contrast, overlooked this Court's precedents regarding the deference due to state decisions and the circuit precedents regarding *Waller*'s application to partial closures. Take, for example, *Waller*'s narrow-tailoring factor. The Sixth Circuit held that the media's presence did not justify the closure, in part, because the record was unclear whether "the press *did* attend the trial." Pet. App. 20a. To the extent the ambiguity matters at all, it counts against Drummond, not the Warden. The burden of proving relief under § 2254(d) rests with habeas petitioners. *See Pinholster*, 131 S. Ct. at 1398; *see also* 28 U.S.C. § 2254(e)(1) (noting that habeas petitioners bear the burden of rebutting state factual findings).

What is more, the record suggests the press *did* witness the relevant testimony. After the court swore in the jury on February 2, it noted "that some of the media [are] present." Dist. Ct. R. 35-11, Trial Tr., vol. 12, at 2422. On the same day, the court asked a witness "whether or not [she] want[ed] to be photographed." *Id.* at 2544. Three days later (during the second closure), the prosecutor noted that "news people" were moving around in the back. Dist. Ct. R. 35-14, Trial Tr., vol. 15, at 3267. Drummond offers no evidence that the press missed other days. A press account indicates they were there: In an article published the day after Rozenblad, Thomas, and Morris testified, a courthouse reporter described that testimony. Bob Jackson, *Youngstown Murder Trial:*

Friend of Accused Recounts Hearing Gunshots, Youngstown Vindicator, Feb. 5, 2004, *available at* http://www.vindy.com/news/2004/feb/05/youngstown-murder-trial-friend-of-accused-recounts (last visited Oct. 6, 2013). On this record, the Ohio Supreme Court did not unreasonably apply the narrow-tailoring requirement by finding that the "media presence helped safeguard Drummond's right to a public trial." Pet. App. 211a.

Equally mistaken was the Sixth Circuit's conclusion that the Ohio Supreme Court unreasonably applied the fourth *Waller* factor. Pet. App. 22a-23a. Under that factor, a trial court's findings must be "adequate to support the closure." *Waller*, 467 U.S. at 48. This requirement for "adequate" findings—like the requirement for "effective" assistance or for "sufficient" evidence—is an indefinite target. Such a "general" standard gives state courts "more leeway" "in reaching outcomes in case-by-case determinations." *Alvarado*, 541 U.S. at 664; *see Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). Given that this Court's "cases give no clear answer to the question" of what findings a court must make to support a partial closure, the state court did not unreasonably apply clearly established law. *Wright v. Van Patten*, 552 U.S. 120, 126 (2008) (per curiam).

At day's end, this case's similarity to *Musladin* is striking. In both cases, the Court had previously established legal principles for one context (*government* courtroom practices in *Musladin*; *complete* courtroom closures here), and the circuit decisions under review held that state courts unreasonably applied these principles in a different context (*spectator* courtroom practices in *Musladin*; *partial* courtroom closures

here). *See Musladin*, 549 U.S. at 75-77; Pet. App. 10a-25a. In both cases, moreover, appellate decisions had struggled over how to extend the relevant legal principles to the new context. *See Musladin*, 549 U.S. at 76 (noting that "lower courts . . . diverged widely" on claims about spectator practices); *Angiano*, 366 F. App'x at 727 (noting that "[t]he Circuits are split as to the applicability of the four-part test in *Waller* to 'partial closures' . . ."). In *Musladin*, the Court held that "[g]iven the lack of holdings from this Court regarding the potentially prejudicial effect of spectators' courtroom conduct of the kind involved here, it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law.'" 549 U.S. at 77 (quoting 28 U.S.C. § 2254(d)(1)). The Court's logic in that case compels the same conclusion on this case's facts.

III. THE SIXTH CIRCUIT'S DECISION RAISES AN IMPORTANT AND RECURRING ISSUE

The Court should grant the Warden's petition for a writ of certiorari, lastly, because it raises an important and recurring issue. Most notably, cases about the public-trial right's scope often implicate matters of life and limb. In particular, courts routinely balance a defendant's public-trial right against the "government's interest in protecting its witness[es]" and their "concern for [their] *own safety*." *Thompson*, 713 F.3d at 396 (emphasis added); *see United States v. Addison*, 708 F.3d 1181, 1187 (10th Cir. 2013) ("Numerous courts . . . have upheld closure to protect testifying witnesses." (citing cases)). This Court thus has a greater interest in ensuring that circuit courts follow AEDPA in this context than

in other contexts that do not raise such sensitive safety concerns.

In addition, the question presented implicates our country's federalist system. As the Court has indicated, "Congress intended AEDPA to advance" "the principles of comity, finality, and federalism." *Williams v. Taylor*, 529 U.S. 420, 436 (2000). For this reason, the Court has repeatedly granted certiorari to ensure that circuit courts heed AEDPA's command to respect reasonable state decisions. *See, e.g.*, *Metrish v. Lancaster*, 133 S. Ct. 1781, 1786-87, 1792 (2013); *Harrington*, 131 S. Ct. at 785-86. Indeed, these concerns have led the Court summarily to reverse decisions that overlooked its instructions about AEDPA's demanding standards—even where, unlike here, the decisions raised fact-bound issues without any circuit conflicts. *See, e.g.*, *Matthews*, 132 S. Ct. at 2156; *Cavazos v. Smith*, 132 S. Ct. 2, 4 (2011) (per curiam); *Thaler v. Haynes*, 559 U.S. 43, 44 (2010) (per curiam); *Van Patten*, 552 U.S. at 121.

If anything, the concerns for comity and federalism that animate AEDPA are heightened in the public-trial context. For one thing, federal courts should exercise caution before micromanaging how state courts respond to disruptions and safety risks in their courtrooms. For another, public-trial errors count among the "very limited class of cases" unsuited for harmless-error analysis. *Johnson v. United States*, 520 U.S. 461, 468-69 (1997). Given the severe consequence of finding a structural error—the grant of relief without any inquiry into whether the error actually affected the defendant in any way—policing the boundaries of "clearly established law" is more important in this context than in others.

Finally, the issue arises frequently. Federal and state reporters are filled with challenges to trial-court decisions partially closing proceedings. *See, e.g.*, *Young*, 2012 WL 3638824, at *11 (citing many cases for the proposition that "[t]he Second, Fifth, Eighth, Ninth, Tenth, and Eleventh Circuits have all modified the *Waller* test in the context of partial closures"). If the Sixth Circuit's decision remains on the books, it could call into question other state decisions that, like the Ohio Supreme Court's decision here, have opted for relaxed standards for partial closures. *See, e.g.*, *Michigan v. Atkins*, No. 282697, 2009 WL 1607578, at *2-3 (Mich. Ct. App. June 9, 2009) (per curiam). And since *Waller* dates back many years, it would not qualify as a "new rule" under *Teague v. Lane*, 489 U.S. 288 (1989), for most of the cases now pending on collateral review. The Sixth Circuit's holding thus risks upsetting even more final judgments than a new rule by this Court on direct review extending *Waller*, without any change, to the partial-closure context.

Nor is this recurring issue going away anytime soon. In that regard, the Sixth Circuit was incorrect to suggest that this Court's later decision in *Presley v. Georgia*, 558 U.S. 209 (2010) (per curiam), "held that *Waller* applies equally to full and partial courtroom closures." Pet. App. 12a. *Presley* simply held that *Waller* applied to the total closure of *voir dire*, *see* 558 U.S. at 209-10, as numerous courts have recognized. *See Young*, 2012 WL 3638824, at *9 n.2 (noting that "*Presley* addressed a total, and not partial, closure of a courtroom"); *see also Angiano*, 366 F. App'x at 727. Because this Court has not addressed the partial-closure issue, the question this case presents has continuing importance.

CONCLUSION

The Court should grant the petition for certiorari.

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