No. 21-764

IN THE

Supreme Court of the United States

PATRICK HUFF,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Florida District Court of Appeal, Fourth District

BRIEF IN OPPOSITION

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QUESTION PRESENTED

During petitioner's trial for sexual battery, the trial court kept the courtroom open to all members of the public, except during the cross-examination and redirect of the victim. Pursuant to Florida law, the court granted the victim's request to exclude from the courtroom during her testimony one person who was neither a member of the press nor a member of petitioner's immediate family. *See* Fla. Stat. § 918.16(2).

The question presented is whether excluding that person from the courtroom denied petitioner a "public trial." U.S. Const. amend. VI.

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INTRODUCTION

Petitioner contends that the trial court violated his Sixth Amendment right to a public trial by granting the request of his sexual-assault victim to exclude one person from the courtroom during part of the victim's testimony. The trial court did so pursuant to a Florida statute providing for, at the victim's request, a limited exclusion during a sexual-assault victim's testimony about the assault, but not permitting the exclusion of the media or a defendant's immediate family members. *See* Fla. Stat. § 918.16(2).

Florida's Fourth District Court of Appeal affirmed in an unpublished, factbound decision that is correct and does not conflict with any decision of this Court. Petitioner's principal argument is that the Fourth District should have applied *Waller v. Georgia*'s stringent multi-factor test for certain courtroom exclusions. 467 U.S. 39, 45 (1984). But *Waller* has no application where, as here, the court effectuates a limited, partial closure under a carefully delineated statute designed to protect victims of sexual violence.

Petitioner also is mistaken that this case implicates a broad split of authority over the application of *Waller* to courtroom-closure statutes. Most of the decisions on which petitioner relies involved total closures, not partial and limited ones like what occurred below. And the case is a poor vehicle to address the application of *Waller* anyway: Because petitioner did not ask the trial court to apply *Waller*, the Court lacks a record of how that decision might have applied to the exclusion here. And because there are threshold reasons why, on the facts presented, *Waller* is inapplicable to the partial closure

effectuated below, the Court likely would never reach the question the petition purports to present.

The petition should be denied.

STATEMENT OF THE CASE

1. Florida law protects the interests of victims of sexual violence by authorizing partial courtroom closures in limited circumstances. Section 918.16(2), Florida Statutes, provides that

> [i]f the victim of a sex offense is testifying concerning that offense in any civil or criminal court, the court shall clear the courtroom of all persons upon the request of the victim, regardless of the victim's age or mental capacity, except that parties to the cause and their immediate families or guardians, attorneys and their secretaries, officers of the court, jurors, newspaper reporters or broadcasters, court reporters, and, at the request of the victim, victim or witness advocates designated by the state attorney may remain in the courtroom.

Section 918.16(2) therefore authorizes partial courtroom closures—partial in duration (limited to the victim's testimony), in scope (not authorizing exclusion of immediate family, press, or select others), and in application (triggered only if the victim requests it).

For years, Florida courts were split on how to assess the constitutionality of partial closures under Section 918.16(2). *E.g.*, *Clements v. State*, 742 So. 2d 338, 341 (Fla. 5th DCA 1999) (holding that *Waller*

does not apply to partial closures); *Pritchett v. State*, 566 So. 2d 6, 7 (Fla. 2d DCA 1990) (holding that *Waller* applies to partial closures). In 2012, the Florida Supreme Court resolved the question at least in part, concluding that "partial closure of a trial during the testimony of victims at a sex offense trial" under Section 918.16(2) was constitutional. *Kovaleski v. State*, 103 So. 3d 859, 861 (Fla. 2012). In reaching that conclusion, the court explained that "[p]ursuant to the statute, the courtroom is partially closed not automatically but only upon the request of the victim." *Id.* As a result, and "because of the number of people including members of the press who are explicitly allowed to remain in the courtroom, and because the partial closure is only during the victim's testimony," the court held that Section 918.16(2), and partial closures effected thereunder, "acceptably embraces the requirements set forth in *Waller*." *Id.*

2. Petitioner, a massage therapist, was charged with sexual battery on an adult. Before the victim (one of petitioner's clients) began testifying at trial, no one other than the parties, their attorneys, court personnel, and the jury was in the courtroom. Pet. App. 21a. The State conveyed to the trial court the victim's request that the courtroom be cleared for her testimony. *Id.* Petitioner objected, but the court deferred ruling on that request because no spectators were in the courtroom at the time. Pet. App. 21a-22a.

At the end of the direct examination of the victim, petitioner's ex-wife entered the courtroom. Pet. App. 23a-24a. Consistent with the victim's wishes, the State requested that petitioner's ex-wife be excluded from the courtroom during the remainder of the

victim's testimony, citing Section 918.16(2). *Id.* Petitioner again objected, arguing that "Mr. Huff has the right to an open and public trial under the Sixth Amendment of the United States and analogous provisions of the Florida Constitution." Pet. App. 25a. When asked by the trial court whether he had "[a]ny further argument," petitioner's counsel responded only that "[w]e would object on—on that basis." *Id.*

The trial court concluded, however, that petitioner's ex-wife was not a member of petitioner's "immediate family" under Section 918.16(2). Pet. App. 25a. As a result, the trial court excluded her from the courtroom "while this particular witness [wa]s testifying," but explained to the ex-wife that she was "certainly available to come in for the balance of the trial." *Id.* The trial continued; petitioner was found guilty of sexual battery, Pet. App. 19a, and sentenced to ten years in prison, Pet. App. 13a.

3. Petitioner appealed to Florida's Fourth District Court of Appeal, arguing that the trial court's exclusion of his ex-wife from the courtroom during the victim's testimony violated his Sixth Amendment right to a public trial. Citing the Florida Supreme Court's 2012 *Kovaleski* decision upholding Section 918.16(2), the Fourth District affirmed in a per curiam order without written opinion. Pet. App. 2a. Petitioner then sought review in the Florida Supreme Court, which denied his petition for review. Pet. App. 1a.

Petitioner now seeks this Court's review.

REASONS FOR DENYING THE PETITION

I. THE FOURTH DISTRICT'S DECISION IS CORRECT AND DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT.

Petitioner contends (Pet. 12-19) that the Fourth District Court of Appeal erred in rejecting his claim that his Sixth Amendment right to a public trial was violated when the trial court excluded one person from part of the testimony of the victim petitioner sexually assaulted. But that unpublished, factbound decision is correct and does not conflict with any decision of this Court.

1. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . public trial." U.S. Const. amend. VI. This Court has construed the Sixth Amendment to mean that, in conducting a criminal trial, "courtroom closure is to be avoided, but . . . there are some circumstances when it is justified." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1909 (2017). This Court's precedents thus teach that the "right to an open trial" is not absolute and "may give way in certain cases to other rights or interests." *Waller v. Georgia*, 467 U.S. 39, 45 (1984). As Thomas Cooley noted—in a passage of his treatise on which this Court has repeatedly relied in construing the Sixth Amendment, *see id.* at 46 (quoting *In re Oliver*, 333 U.S. 257, 270 n.25 (1948))—in affording a right to a "public" trial, the Sixth Amendment does not mean

> that every person who sees fit shall in all cases be permitted to attend criminal trials; because there are many cases where, from the character of the charge, the motives to attend the trial on

> the part of the portions of the community would be of the worst character.

Thomas M. Cooley, *A Treatise on the Constitutional Limitations* 379 (6th ed. 1890). And this Court has made clear that one interest that justifies closing a courtroom is "[t]he protection of victims of sex crimes from the trauma and embarrassment of public scrutiny." *Press-Enter. Co. v. Superior Ct.*, 478 U.S. 1, 9 n.2 (1986). For "[t]here is clearly a long history of exclusion of the public from trials involving sexual assaults, particularly those against minors." *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 614 (1982) (Burger, C.J., joined by Rehnquist, J., dissenting) (citing cases).

2. The Fourth District's unpublished opinion is consonant with those principles. It upheld the trial court's decision to exclude not the "public," *id.*, but rather just one person, petitioner's ex-wife, from the cross- and redirect examinations of the victim petitioner had sexually assaulted, which constituted approximately 7 percent of petitioner's two-day trial.[1] The trial court did so not indiscriminately, but pursuant to the carefully delineated requirements of a long-standing Florida statute, which provides for the exclusion of certain persons from the courtroom during the testimony of a sexual-assault victim. *See* Fla. Stat. § 918.16(2). Partial closure under that

[1] The record does not reflect the exact amount of time consumed by the trial and its components. This estimate results from dividing the number of pages of the trial transcript representing the cross- and redirect examination of the victim by the total number of pages of the trial transcript representing the trial proceedings.

statute is triggered only if the victim requests it and applies only during the victim's testimony concerning the assault. *Id.* The statute does not permit exclusion of members of the defendant's immediate family or of the press. *Id.* And if the victim requests it, the statute does not permit exclusion of victim or witness advocates designated by the State. *Id.* The trial court's exclusion of one person from a sliver of the trial, during an especially vulnerable and traumatic moment experienced by a sexual-assault victim, did not deny petitioner a "public trial" under the Sixth Amendment. U.S. Const. amend. VI; *see Kovaleski v. State*, 103 So. 3d 859, 861 (Fla. 2012) (upholding the statute against constitutional challenge).

3. Petitioner errs (Pet. 14) in faulting the Fourth District for failing to analyze that partial exclusion under the stringent four-factor test this Court applied in *Waller*. Contrary to petitioner's submission, that strict test does not apply to all courtroom closures and does not apply here.

In *Waller*, this Court considered whether, based on a prosecutor's generalized concern for protecting the privacy of persons other than the defendants, closing the courtroom to "all persons other than witnesses, court personnel, the parties, and the lawyers" during a suppression hearing that "lasted seven days" violated the defendants' Sixth Amendment rights. 467 U.S. at 42. The Court explained that to close a courtroom in such circumstances, "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." *Id.* at 48; *see also Presley v. Georgia*, 558 U.S. 209, 214-16 (2010) (per curiam) (applying the *Waller* factors to a trial court's decision to close the courtroom completely to the public during the *voir dire* of prospective jurors).

But this Court has never held that *Waller*'s exacting four-factor analysis governs every type of courtroom closure, and the lower courts have rejected the notion. "*Waller* involved a total closure, with only the parties, lawyers, witnesses, and court personnel present, the press and public specifically having been excluded." *Douglas v. Wainwright*, 739 F.2d 531, 532 (11th Cir. 1984) (per curiam). By contrast, a less stringent standard applies where, as here, the closure is merely "partial," such as when "the press and family members of the defendant, witness, and decedent were all allowed to remain." *Id.*; *see United States v. Christie*, 717 F.3d 1156, 1169 (10th Cir. 2013) (Gorsuch, J.) ("*Waller*'s stringent test, however, applies only to the total closure of a trial." (internal quotation marks omitted)). For partial closures, the court need only have "substantial" justification for the exclusion. *See Christie*, 717 F.3d at 1169; *see also Douglas*, 739 F.2d at 533; *United States v. Cervantes*, 706 F.3d 603, 611-12 (5th Cir. 2013); *United States v. Addison*, 708 F.3d 1181, 1187 (10th Cir. 2013).[2] And

[2] Some circuits have held that while partial closures need only be justified by a substantial reason, courts must still apply the remaining *Waller* factors. *E.g.*, *United States v. Simmons*, 797 F.3d 409, 414 (6th Cir. 2015); *United States v. Laureano-Perez*, 797 F.3d 45, 77 (1st Cir. 2015); *United States v. Thompson*, 713 F.3d 388, 395 (8th Cir. 2013); *United States v. Rivera*, 682 F.3d 1223, 1236 (9th Cir. 2012); *Woods v. Kuhlmann*, 977 F.2d

this Court, too, has "alluded to the distinction between total and partial closures by stating that when 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 within a reasonable time.'" *United States v. Sherlock*, 962 F.2d 1349, 1357 (9th Cir. 1989) (quoting *Press-Enter. Co.*, 464 U.S. at 512).

Here, the partial courtroom closure—excluding petitioner's ex-wife but not the press or members of the defendant's immediate family from the courtroom for part of the victim's testimony—was supported by a reason this Court has held is fully sufficient: "[t]he protection of victims of sex crimes." *See Press-Enter. Co.*, 478 U.S. at 10 n.2.

4. Petitioner asserts that the Sixth Amendment required the trial court "to look at the specific circumstances of a case and make findings on the record before closing the courtroom" and thus that a courtroom closure effected pursuant to a statute is always unconstitutional. Pet. 14. But case-specific trial-court findings are not always required to justify a courtroom closure. *See Bowden v. Keane*, 237 F.3d

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74, 77 (2d Cir. 1992). Those cases, however, did not address a partial closure carefully circumscribed pursuant to a state statute such as Section 918.16(2), but instead involved closures effected under either the court's inherent authority or the federal closure statute, 18 U.S.C. § 3509. Other courts have said that a partial closure supported by a "substantial reason" should be documented with "sufficient findings to allow the reviewing court to assess the decision." *Christie*, 717 F.3d at 1168 (Gorsuch, J.) (internal quotation marks omitted). But as discussed below, nothing more than a finding that the statute applied was required to satisfy the Sixth Amendment here. *See infra* at 10.

125, 132 (2d Cir. 2001); *United States v. Osborne*, 68 F.3d 94, 99 (5th Cir. 1995); *United States v. Farmer*, 32 F.3d 369, 371 (8th Cir. 1994). Where a state legislature has enacted a carefully tailored partial-closure statute, the only "findings" needed to ensure that the closure was proper are that the statute applies, findings which the trial court here made. This Court has never held that a court, rather than a legislature, is the only arm of government that is constitutionally competent to fashion a carefully limited partial-closure rule to protect the victims of sexual violence, and that proposition makes no sense.

Petitioner stresses (Pet. 15-16) this Court's decision in *Globe Newspaper*, which invalidated a Massachusetts statute that provided for an automatic, total courtroom closure during the testimony of a victim of a sex offense, because the statute did not provide for a case-by-case judicial inquiry. *See* 457 U.S. at 602-03, 607-08. But in doing so, this Court was careful to "intimate no view regarding the constitutionality" of Florida's mandatory courtroom-closure statute, which, then as now, provided for a partial, mandatory closure of the courtroom during the testimony of a victim of sexual violence. *Id.* at 608 n.22. As this Court observed, unlike the statute invalidated in *Globe Newspaper*, Florida's statute provides "for mandatory exclusion of *general public* but not *press* during testimony of minor victims." *Id.* The provision at issue here is also different in that it applies only if the victim requests closure. *See id.* at 608 (criticizing the Massachusetts mandatory-closure statute for requiring "closure even if the victim does not seek the exclusion"). *Globe Newspaper* does not support that an additional layer of fact-specific

judicial findings is required in applying a carefully tailored partial-closure statute like Florida's.

In any event, petitioner failed to request that the trial court hold a separate hearing or make specific findings beyond that the statute applied. He argued only that "Mr. Huff has the right to an open and public trial under the Sixth Amendment of the United States and analogous provisions of the Florida Constitution." Pet. App. 25a. When asked by the trial court whether he had "[a]ny further argument," Petitioner's counsel responded only that "[w]e would object on—on that basis." Pet. App. 25a. Any claim based on the failure to make any determination more fact-specific than that is thus beside the point. *See Douglas*, 739 F.2d at 533 n.2; *Jones v. State*, 883 So. 2d 369, 371 (Fla. 3d DCA 2004); *People v. Manning*, 78 A.D.3d 585, 585-86 (N.Y. App. Div. 2010).

5. Petitioner's arguments are also inconsistent with a long line of cases upholding courtroom closures that are "too trivial to amount to a violation of" the Sixth Amendment without regard to the exacting *Waller* framework. *Peterson v. Williams*, 85 F.3d 39, 42 (2d Cir. 1996) (Calabresi, J.). Under this test, a courtroom closure that is minimal is permissible if it does not undermine the values advanced by the public trial guarantee, which include (1) ensuring a fair trial; (2) reminding the government and the judge of their responsibility to the accused and the importance of their functions; (3) encouraging witnesses to come forward; and (4) discouraging perjury. *Id.* at 43. Many courts have adopted Judge Calabresi's analysis in

Peterson.[3] In *Christie*, for example, the Tenth Circuit, per then-Judge Gorsuch, concluded that the exclusion of a single person during the brief testimony of a sexual-assault victim was permissible because there was no indication that any of the values underlying the Sixth Amendment right to a public trial had been undermined by that exclusion. *See Christie*, 717 F.3d at 1169.

Here, the trial court excluded a single spectator from the courtroom during the testimony of a single witness—the victim of petitioner's sex crime—and even then, for only the cross- and redirect examination of that witness, which was approximately 7 percent of the trial. No immediate family members were excluded, no victim or witness advocates were excluded, and no members of the press were excluded. That exclusion did not undermine the interests advanced by the public-trial right: "that the public may see [the accused] is fairly dealt with and not unjustly condemned"; "that the presence of interested spectators may keep his triers keenly alive to a sense

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[3] *See United States v. Anderson*, 881 F.3d 568, 573 (7th Cir. 2018); *United States v. Perry*, 479 F.3d 885, 889-90 (D.C. Cir. 2007); *United States v. Ivester*, 316 F.3d 955, 960 (9th Cir. 2003); *Braun v. Powell*, 227 F.3d 908, 918-19 (7th Cir. 2000); *United States v. Arellano-Garcia*, 503 F. App'x 300, 305 (6th Cir. 2012).

At least eight state supreme courts have adopted the *Peterson* framework. *Vazquez Diaz v. Commonwealth*, 167 N.E.3d 822, 838-39 (Mass. 2021); *People v. Lujan*, 461 P.3d 494, 499 (Colo. 2020); *State v. Turcotte*, 239 A.3d 909, 918 (N.H. 2020); *State v. Decker*, 907 N.W.2d 378, 385 (N.D. 2018); *Schnarr v. State*, 2017 Ark. 10, 14 (2017); *State v. Torres*, 844 A.2d 155, 162 (R.I. 2004); *State v. Cassano*, 772 N.E.2d 81, 95-96 (Ohio 2002); *State v. Lindsey*, 632 N.W.2d 652, 660 (Minn. 2001).

of their responsibility and to the importance of their functions"; and to "encourag[e] witnesses to come forward and discourag[e] perjury." *Waller*, 467 U.S. at 46.[4] As a consequence, petitioner's Sixth Amendment rights were not implicated by the exclusion of a single person during part of the victim's testimony.[5]

6. Petitioner goes so far as to request that the Court summarily reverse the Fourth District. Pet. 26. But at a minimum, this case does not call for the "extraordinary remedy" of summary reversal. *Brosseau v. Haugen*, 543 U.S. 194, 207 (2004) (Stevens, J., dissenting); *see Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting) (explaining that summary reversal is "usually reserved by this Court for situations in which the law is well settled and stable, the facts are not in dispute, and the decision below is clearly in error"). That is especially true given that, as noted earlier, *Globe Newspaper* explicitly reserved the constitutionality of an earlier version of Section 918.16, which, like the

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[4] In *Presley*, this Court invalidated under *Waller* a trial court's decision to close the courtroom to all spectators during the entirety of the *voir dire* of prospective jurors, even though only one spectator (the defendant's uncle) was actually excluded. *See* 558 U.S. at 210. But that total closure stands in contrast to what happened here and this Court's summary disposition in *Presley* did not discuss whether the exclusion was trivial.

[5] Even if petitioner could establish some error in the analysis the Fourth District applied, the remedy would at most be a remand to the trial court for a hearing to determine whether the facts known to the trial court would have justified the partial closure. *See*, *e.g.*, *United States v. Galloway*, 937 F.2d 542, 547 (10th Cir. 1991); *cf. Waller*, 467 U.S. at 49 (explaining that reversal for a new trial would constitute a "windfall," and instead remanding for a new suppression hearing).

version in effect today, required trial judges to effect partial closures during the testimony of the victims of sex crimes.

II. THIS CASE LARGELY DOES NOT IMPLICATE THE PURPORTED SPLIT OF AUTHORITY.

1. Petitioner contends that the decision below conflicts with the decisions of nine states by holding that "the general application of a courtroom-closure statute can take the place of the case-by-case inquiry demanded by this court." Pet. 7. The trial court here, pursuant to Florida's statute, partially closed the courtroom only during the sex-crime victim's testimony, and only to persons who were not parties, immediate family members, court personnel, attorneys, victim or witness advocates, or members of the press. By contrast, virtually all the decisions petitioner identifies involved either (1) a total closure of the courtroom to the public or (2) a much broader closure than that here, pursuant to a statute that permitted total closure. *See* Pet. 11-12. Those decisions do not conflict with the Fourth District's decision.

- *State v. Guajardo*: The applicable statute provided that "the victim's testimony shall be heard in camera," NH RSA 632-A:8; pursuant to that statute, the trial court effected a total closure. 605 A.2d 217, 219 (N.H. 1992).[6]

[6] In addition, because the court in *Guajardo* held that the trial court satisfied the requirements of *Waller*, the court had no occasion to address the legal standard applicable to a court that had not. *See* 605 A.2d at 219-20.

- *State v. Rogers*: "The courtroom was closed for the competency hearing" at the *defendant's* request, pursuant to a statute providing that "[u]pon request by the defendant, the application and the proceedings on the application must be ex parte and in camera." 919 N.W.2d 193, 198, 202, 203 (N.D. 2018) (quoting N.D.C.C. § 12.1-04.1-02).

- *State v. Fageroos*: The applicable statute allowed the exclusion of every person who did not "have a direct interest in the case." 531 N.W.2d 199, 201 (Minn. 1995) (quoting Minn. Stat. § 631.045 (1994)). The courtroom was "cleared of spectators" during the victims' testimony. *Id.*

- *State v. Jenkins*: The statute at issue permitted what amounts to total closure, allowing exclusion of "all persons except officers of the court, the defendant and those engaged in the trial during the testimony of the prosecutrix." 445 S.E.2d 622, 625 (N.C. Ct. App. 1994). The trial court excluded a narrower set of people during a witness's testimony than permitted under the statute—permitting "counsel, defendant, court personnel, and members of the press" to remain, but it did not permit immediate family members to remain. *Id.*

- *Commonwealth v. Martin*: The applicable statute required the court to exclude from the courtroom every person who did not "have a direct interest in the case." 629 N.E.2d 297, 301 (Mass. 1994) (quoting M.G.L.A. 278 § 16A). The courtroom was closed to all those who were not witnesses, family members, or court personnel. *Id.* at 300 n.4.

- *Ex parte Judd*: The trial court cleared the courtroom during the testimony of a minor child pursuant to a statute that gave the trial court discretion to exclude "all persons, except such as may be necessary in the conduct of the trial." 694 So. 2d 1294, 1297 (Ala. 1997) (per curiam). The court declined to grant the defendant relief because the defendant had failed to preserve the objection to the failure of the trial court to make the *Waller* findings. *See id.*

- *Renkel v. State*: The trial court effected a total closure pursuant to a statute that provided for a total closure, which the State conceded was unconstitutional in view of *Globe Newspaper*. 807 P.2d 1087, 1088, 1092-93 (Alaska Ct. App. 1991).

None of the cases in those seven states is at odds with the decision below, because none involved a partial closure like the one effected below pursuant to Florida's statute.

2. Petitioner is also incorrect that the judgment below conflicts with decisions from the Second, Eighth, and Ninth Circuits. Pet. 10-11. Petitioner asserts that "the circuit courts that have reached the issue unanimously hold that [18 U.S.C.] § 3509(e) [a federal courtroom-closure statute] does not supplant the *Waller* analysis." Pet. 10. That statute, however, allows for a much broader closure of the courtroom than Florida's statute: "When a child testifies the court may order the exclusion from the courtroom of *all persons*, including members of the press, who do not have a direct interest in the case." *Id.* (emphasis added).

In any event, the federal court of appeals cases on which petitioner relies (Pet. 10-11) are distinguishable. Petitioner cites *United States v. Thunder*, but there the Eighth Circuit invalidated a "total closure" effectuated pursuant to § 3509(e). 438 F.3d 866, 868 (8th Cir. 2006). In *United States v. Yazzie*, 743 F.3d 1278 (9th Cir. 2014), the court upheld a closure by assuming that the stringent *Waller* test was applicable, and pointedly did not address how the case might come out under the legal standard applicable to partial closures. *See id.* at 1289-90 & n.4. And in *United States v. Ledee*, 762 F.3d 224, 229 (2d Cir. 2014), the court applied a modified version of the *Waller* test—asking whether there was "substantial reason" for the partial closure, *see id.* at 229—which conflicts with the legal standard petitioner urges the Court to adopt. *See* Pet. 14-16. Those cases do not contribute to the clean division of authority the petition describes.

3. The cases petitioner cites that come closest to conflicting with the decision below are decisions from Wisconsin and South Dakota holding that, in applying those States' closure statutes applicable to the testimony of a sexual-assault victim, courts must apply the *Waller* test before even partially closing the courtroom. *See State v. Rolfe*, 825 N.W.2d 901, 906-09 (S.D. 2013); *State ex rel. Stevens v. Cir. Ct.*, 414 N.W.2d 832, 838 (Wis. 1987). But petitioner sets against those decisions only two decisions from state courts of last resort: *Kovaleski* (the Florida Supreme Court decision relied upon by the court below), and

People v. Falaster, 670 N.E.2d 624, 626 (Ill. 1996).[7] This Court's intervention is not warranted to resolve what is at best a shallow and tenuous conflict. Indeed, even on petitioner's own account, "most of the decisions on both sides of the split are decades old." Pet. 12.

III. THIS CASE IS A POOR VEHICLE TO ADDRESS THE QUESTION PRESENTED.

Petitioner asserts that the Court should grant review to address how "the *Waller* analysis" applies to "a statute governing closure." Pet. i. But far from being an "ideal vehicle" (Pet. 21, 26) to consider that question, it is a poor one.

1. To begin with, as noted above, petitioner did not ask the trial court to apply "the *Waller* analysis"—petitioner made only the bare-bones objection that excluding one person from the courtroom violated his Sixth Amendment rights, and even declined the trial court's invitation to provide any "further argument" on the point. *See supra* at 4. Although the Fourth District did not decide the case based on lack of preservation, it likely would have viewed that sparse objection as insufficient to preserve a *Waller* error. *See Jones*, 883 So. 2d at 371 (holding that to preserve a claim under *Waller*, the defendant must "inform the trial court of the legal theory now being advanced,

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[7] Petitioner also cites a Georgia intermediate appellate court decision, but as the concurrence from a Georgia Supreme Court justice relied on by petitioner explains, those "decisions of the Court of Appeals . . . cannot properly be understood to have decided the constitutionality of" Georgia's closure statute. *Scott v. State*, 832 S.E.2d 426, 432 (Ga. 2019) (Peterson, J., concurring).

namely, that in order to have a partial closure of the courtroom, it would be necessary to make findings under *Waller*"); *see also Douglas*, 739 F.2d at 533 n.2; *Manning*, 78 A.D.3d at 585-86 ("Even though defendant preserved his general claim that the courtroom should not have been closed, he did not preserve his specific complaint that the court failed to set forth adequate findings of fact to justify closure.").

Moreover, petitioner's failure means that no detailed record exists concerning whether closure was justified under the circumstances. *Cf. Presley*, 558 U.S. at 210-11 (addressing a public trial right where the defendant had moved for a new trial based on the claim and the district court held an evidentiary hearing concerning the factual circumstances justifying the closure). Had petitioner cited *Waller* or requested further findings, the trial court may well have created a record to support the courtroom closure with greater specificity. It might have concluded, for example, that even in the face of Section 918.16(2) it would hear testimony from the victim regarding the need for a partial closure. That could have resulted in the sorts of individualized findings that petitioner claims were warranted, thus curing any perceived error. Or the trial court might have made clear that it applied the statute in circumstances where, under *Waller*, it could not have effected the partial closure that it did. But because petitioner objected only generally that the partial closure violated his Sixth Amendment rights, the record as to the partial closure here is sparse. And petitioner has pointed to no concrete reason why the courtroom closure would have been unjustified had the trial court made such findings.

Resolution of the question presented is therefore unlikely to determine the outcome of this case. And it would be best resolved in a case with a fully developed record.

2. This case is also a poor vehicle for addressing the question presented because the Court may well never reach how the *Waller* test applies to Florida's statute. As noted above, *Waller* is inapplicable because, on the specific facts here, the court effectuated a partial courtroom closure that only minimally implicated the interests protected by the Sixth Amendment right to a public trial. *See supra* at 11-13. The Court should await a vehicle that involves a more substantial courtroom closure before accepting review to decide how to apply *Waller* to a closure statute such as Florida's.

3. Nor is this case an appropriate vehicle to address the concerns expressed by the amici supporting petitioner. This case does not implicate "the public's right to an open courtroom," Br. for Amicus Curiae Law Profs., at 11, or "the public's First Amendment right to access government proceedings," Br. for Amicus Curiae Floyd Abrams Institute, at 1. Instead, this case involves petitioner's Sixth Amendment right to a public trial, the only issue petitioner properly raised below. *See* Pet. i (presenting a question under "the Sixth Amendment and *Waller*"); Pet. App. 25a (objecting at trial based only on the "Sixth Amendment" and "analogous provisions of the Florida Constitution"). And this Court has made clear that the "public-trial guarantee" is "one created for the benefit of the defendant.'" *Waller*, 467 U.S. at 46 (quoting *Gannett Co., Inc. v. DePasquale*, 443 U.S.

368, 380 (1979)). It is not for the benefit of the news media. To the extent Florida's partial-closure statute implicates the public's First Amendment rights, as amici contend, cases arising out of First Amendment objections, rather than this case—narrowly focused on petitioner's Sixth Amendment rights—would be the proper forum for addressing those matters.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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