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

REPLY IN SUPPORT OF CERTIORARI

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

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I. Respondent Does Not And Cannot Argue The Decision Below Is Correct Under *Waller* and *Globe Newspaper Co.*

Although respondent perfunctorily defends the correctness of the decision below—insofar as it says the magic words "the decision is correct"—it doesn't meaningfully address the petition's principal substantive arguments. That is, the brief in opposition doesn't explain how allowing a statute to trump the requirements of *Waller v. Georgia*, 467 U.S. 39 (1984), can somehow be consistent with *Waller*'s mandate for fact-specific on-the-record findings. Nor does it explain how the decision below is consistent with *Globe Newspaper Co. v. Superior Ct. of Norfolk Cty.*, 457 U.S. 596 (1982), which held that a state's mandatory courtroom closure rule strikingly similar to Florida's violated the First Amendment. This silence speaks volumes.

As to *Waller*, rather than defend the indefensible position that somehow the *Waller* test is met by a reflexive, mandatory courtroom closure pursuant to a statute, respondent argues instead that *Waller* doesn't apply to partial closures. BIO 7. That's incorrect.

Putting aside whether the closure here can be accurately characterized as "partial," even the courts that modify *Waller* for partial closures still require trial judges to conduct a fact-specific analysis and put that analysis on the record. As the Sixth Circuit has observed: "All federal courts of appeals that have distinguished between partial closures and total closures modify the *Waller* test so that the 'overriding interest' requirement is replaced by requiring a showing of a 'substantial reason' for a partial closure" at prong 1, "*but the other three factors remain the same*"—including the on-the-record requirement of prong 4. *United States v. Simmons*, 797 F.3d 409, 414 (6th Cir. 2015) (emphasis added). Those courts would conclude that what happened here violated the Sixth Amendment, whether we call it "applying the *Waller* test," or "applying a slightly modified version of the *Waller* test."

As to *Globe Newspaper Co.*, respondent entirely ignores the holding of that decision, noting only that the Court included a footnote taking "no view" on the constitutionality of the then-current version of the Florida statute.[1] BIO 10. Of course, it is this Court's general practice to decide only the questions presented to

[1] At the time of *Globe Newspaper Co.*, the Florida statute was narrower, triggered only by the sexual assault testimony of children under the age of 16. *See* Fla. Stat. § 918.16. Respondent's description of the statute elides this distinction. BIO 10, 13-14.

it, and not opine on other matters. *See, e.g.*, *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 535 (1992) ("[W]e ordinarily do not consider questions outside those presented in the petition for certiorari."). And, putting aside the Court's reservation of the question, respondent does not meaningfully explain how the Florida statute here can stand in light of *Globe Newspaper Co.*'s holding. *See* 457 U.S. at 608 (Massachusetts's "*mandatory* closure rule" violated the Constitution, because "the circumstances of the particular case" are relevant to determining "whether closure is necessary").

As if respondent's failure to engage with the pair of this Court's directly on-point cases is not enough, the affirmative arguments that respondent *does* make are exceedingly weak. For example, respondent asserts that this Court has never held that a court, rather than a legislature, must make case-specific "findings" prior to a courtroom closure. BIO 10. But that is *exactly* what this Court held in *Globe Newspaper Co.*, when it concluded that regardless of how compelling the state interests behind a mandatory closure statute are, a trial court must nonetheless "determine on a case-by-case basis whether closure is necessary." 457 U.S. at 608; *see also Waller*, 467 U.S. at 48 ("[T]he *trial court* must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." (emphasis added)).

Respondent also claims that somehow the closure here was permissible under a line of lower court cases holding that "trivial" courtroom closures do not violate the Sixth Amendment. BIO 11. But the closure here—which lasted for the entirety of the cross-examination

and redirect of *the* complaining witness, and constituted nearly half of the victim's testimony and over 20 percent of all trial testimony—was anything but trivial.[2] Closures held to be "trivial" have typically been "brief and inadvertent," *see, e.g.*, *United States v. Al-Smadi*, 15 F.3d 153, 154 (10th Cir. 1994); *see also Peterson v. Williams*, 85 F.3d 39, 43 (2d. Cir. 1996) (finding a closure trivial due to its "brevity and inadvertence"), have occurred outside of formal trial proceedings, *see, e.g.*, *United States v. Ivester*, 316 F.3d 955, 960 (9th Cir. 2003) (finding trivial a closure during which the Court asked the jury whether they were concerned about their safety), or did not actually involve a court-ordered closure at all*, see United States v. Arellano-Garcia*, 503 F. App'x 300, 305 (6th Cir. 2012) (finding no Sixth Amendment violation when the judge said to a spectator: "I would prefer that she not stay. I'm not going to order her to leave. I prefer she not stay"). At any rate, even courts that recognize a triviality exception do not absolve trial courts of their responsibility to "document [the closure] with sufficient findings to allow the reviewing court to assess the decision." *United States v. Christie*, 717 F.3d 1156, 1168 (10th Cir. 2013) (Gorsuch, J.) (quotation marks omitted).

Further, contrary to respondent's contention, there is no import to the fact that "just" one person was excluded. BIO 6. In *Presley*, this Court held that the trial court violated *Waller* and the defendant's

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[2] The 7 percent figure cited by respondent, BIO 6 n.1, encompasses the entire transcript, which includes, among other things, jury selection, adjudications of motions *in limine*, jury instructions, and post-trial proceedings.

right to a public trial by excluding a "lone courtroom observer." *See Presley v. Georgia*, 558 U.S. 209, 210, 215-16 (2010). Indeed, the point of the public trial is that "*anyone* is free to attend." *Press-Enter. Co. v. Superior Ct. of California*, 464 U.S. 501, 508 (1984). That was not true here, which means that the *Waller* analysis was required.

Finally, respondent claims that "case-specific trial-court findings are not always required to justify a courtroom closure," where a legislature has "enacted a carefully tailored partial-closure statute." BIO 9-10. But none of the three cases cited by respondent actually support this claim. First, none involved a *mandatory* closure statute, as present here. Second, and relatedly, in each of the cases cited by respondent, the court could see from the record that the judge had case-specific justifications for the closure. For example, in *Bowden v. Keane*, 237 F.3d 125 (2d Cir. 2001)—where the trial court held a hearing on the prosecution's motion to close the courtroom, and heard testimony from a narcotics agent discussing ongoing undercover operations and outstanding death threats—the court of appeals agreed with the district court that "the record . . . does substantiate closure." *Id.* at 128, 132; *see also United States v. Osborne*, 68 F.3d 94, 99 (5th Cir. 1995) (affirming closure where district court heard argument from prosecution "that forcing the twelve year old Jane to testify in front of the public would traumatize or intimidate her, perhaps causing psychological harm or making her unable to communicate"); *United States v. Farmer*, 32 F.3d 369, 372 (8th Cir. 1994) (affirming closure because the record showed that the defendant had threatened the complaining witness and that the witness held a "well-

reasoned fear" that the defendant's family would retaliate against her). In contrast, there was no evidence or argument on why closure was necessary here; the trial court determined that § 918.16(2) applied, and that was the end of the story. Respondent offers no real arguments on how that—and the law in three of the most populous states in the Union—is consistent with *Waller* and *Globe Newspaper Co.*

II. Respondent Concedes A Split.

Respondent admits there is a longstanding split of authority on whether a closure statute can trump the *Waller* inquiry. BIO 17-18. This Court should grant certiorari to resolve this conflict.

Respondent tries to slice and dice the caselaw to carve out particular cases from the conflict, based on meaningless factual differences. BIO 14-16. Respondent first claims that somehow cases involving "broader" closure statutes are not part of the split. BIO 14, 16. This is the epitome of a meaningless distinction. Certainly, each state—and Congress—chose to draft a slightly different closure statute. But that doesn't detract from the decisions of those state courts and the (unanimous) federal courts of appeals that hold that a fact-specific inquiry is required by *Waller*, regardless of the existence—and particulars—of a statute. Pet. 10-12.

Respondent would also distinguish some cases as involving a "total closure." BIO 14, 17. But as explained above, regardless of whether a closure is "total" or "partial," the courts on the other side of the split require a fact-specific inquiry before closing a courtroom. *See supra* at 2. So "total" versus "partial" is irrelevant for head-counting purposes.

In short, just stating that these "decisions do not conflict with" the Florida courts' rule, BIO 14, does not make it so. There remains a clear and entrenched split among federal circuits and state courts. On one side are three states—Florida, Georgia, and Illinois—that flout this Court's jurisprudence, holding that a statute can eliminate courts' obligation to apply the *Waller* factors on a case-by-case basis. Pet. 7-10. On the other side are nine states and all federal courts of appeal to have considered the question which recognize that a statute cannot obviate the need for a case-specific on-the-record *Waller* analysis, regardless of the breadth of the mandated closure. *See* Pet. 7, 10-12. The split is deep, intractable, and warrants review.[3]

III. Respondent's Vehicle Arguments Are Meritless.

This case is a good vehicle for resolving the question presented. The brief in opposition makes clear that the facts aren't in dispute. And those facts are quite simple: petitioner objected, on Sixth Amendment grounds, to the reflexive, mandatory closure of the courtroom based on the Florida statute. Pet. App. 21a. The prosecution referred the court to the statute, Pet. App. 24a, and the court held that petitioner's ex-wife didn't meet § 918.16(2)'s exemption for "immediate family," and asked her to leave the courtroom, Pet.

[3] To that last point—respondent has no rejoinder to the entire third section of the petition, about the importance and structural nature of the public-trial right. Pet. 19-21.

App. 25a. The complaining witness was then cross-examined and presented redirect testimony without the public present. Pet. App. 27a.

Petitioner timely appealed, raising a Sixth Amendment challenge to the closure of the courtroom during his trial. In over a dozen pages of briefing on the issue, petitioner explained the constitutional problem with the closure, relying on this Court's opinions in *Waller*, *Presley*, and *Globe Newspaper Co.*, highlighting the Wisconsin Supreme Court decision on the other side of the split, and criticizing *Kovaleski* as contrary to each of *Waller*'s four prongs. Pet'r Br. 9-22, *Huff v. State*, No. 4D19-3750 (Fla. Dist. Ct. App. 2020). Respondent argued to the contrary. Resp't Br. 8-12, *id.* The court of appeal affirmed on the merits, citing *Kovaleski* as the reason petitioner's claim was doomed.[4] Pet. App. 2a. Petitioner sought review of the Sixth Amendment issue in the Florida Supreme Court, arguing that it should overrule *Kovaleski*, because that decision is contrary to this Court's precedent. *See* Pet'r Br. on Jurisdiction, *Huff v. State*, No. SC21-531 (Fla. Apr. 19, 2021), 2021 WL 1604847. The Florida Supreme Court declined to do so, denying the petition for review. Pet. App. 1a.

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[4] Respondent's characterization of the court of appeal's decision in this case as "factbound" is inaccurate. BIO 1, 5, 6. The court rejected petitioner's Sixth Amendment argument because the Florida Supreme Court's *Kovaleski* decision was squarely on point. If respondent's suggestion is that the decision below tersely adhering to existing precedent is a vehicle problem, that is incorrect. *See, e.g., Thompson v. Clark*, No. 20-659, 2022 WL 994329 (U.S. Apr. 4, 2022) (deciding issue in lopsided circuit split, where lower court "adhered to its precedent" and affirmed in unpublished opinion).

In the face of this history, respondent cannot dispute that "[t]he Sixth Amendment public-trial issue was asserted by petitioner's counsel at every level of this case," Pet. 21, so it instead suggests that somehow the trial objection should have been more specific, BIO 18. But, no. The appellate court decided the case on the merits, as respondent admits (at 18), and so the court of appeal did not perceive there to be a preservation problem. Neither, apparently, did respondent: Respondent did not argue lack of preservation below but, rather, briefed the merits of the Sixth Amendment issue.[5] The Sixth Amendment issue was preserved, there exists a robust (and undisputed) record in this case, and the basis for the court of appeal's decision—"*Affirmed. See Kovaleski*," Pet. App. 2a—was singularly clear.

In another attempt to manufacture a vehicle issue, respondent argues that there was no "detailed record" regarding "whether closure was justified under the circumstances." BIO 19. But there was no meaningful record on this issue precisely because the Florida statute directed the court that it "*shall* clear the courtroom" if a victim of a sexual assault so requests, Fla. Stat. § 918.16(2) (emphasis added), and the Florida Supreme Court concluded in *Kovaleski* that this wasn't a *Waller* problem. *Kovaleski v. State*, 103 So. 3d 859, 861 (Fla. 2012).[6] In other words, this lack of a

[5] Thus, what is not preserved, ironically, is respondent's preservation argument.

[6] Despite the statute and binding state high court precedent that told the trial court that it didn't need to conduct a *Waller* analysis, respondent fantasizes about a world in which petitioner might have received an on-the-merits determination regarding

record, which the parties apparently agree on, is the *cause* of the constitutional problems in this case, not a barrier to resolving them. And, notably, this lack of a record will necessarily exist in *every* case on this side of the split, where the state high courts decline to require an individualized hearing because a closure statute applies. This Court should reject respondent's topsy-turvy view that the worst constitutional violations are somehow the most insulated from this Court's review.

Further, contrary to respondent's argument (at 19-20), resolution of the question presented *will* impact this case. Petitioner does not contend, contrary to respondent's suggestion, that under no circumstances would exclusion of his ex-wife be appropriate. Indeed, it may sometimes be necessary for a court to close its courtroom at the request of a testifying sexual assault victim. BIO 5-6. But *Waller* demands a hearing on this question, with on-the-record findings; that was the relief ordered in that case. 467 U.S. at 50 ("We remand to the state courts to decide what portions, if any, may be closed."); *see also Globe Newspaper Co.*, 457 U.S. at 609 ("[T]he constitutional right of the press and public to gain access to criminal trials will not be restricted

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the closure anyway: "*Had* petitioner . . . requested further findings, the trial court *may well have* created a record," and "*might have concluded*" that, "even in the face of Section 918.16(2)"—and apparently notwithstanding *Kovaleski*—it would have a had a hearing, which "*could have resulted*" in individualized findings, "thus curing any perceived error." BIO 19 (emphases added). This butterfly effect-style thought experiment cannot, by any measure, count as a vehicle issue, and petitioner cannot be penalized for not pressing futile requests. *See, e.g.*, *Hunt v. State*, 613 So. 2d 893, 898 n.4 (Fla. 1992).

except where necessary to protect the State's interest." (emphasis added)).

Not only is respondent wrong as to these alleged vehicle problems, but it does not even bother disputing the features of this case that make it an *ideal* vehicle for review. Pet. 21-26. This case comes on direct review, Pet. 23, involves the actual exclusion of an identified member of the public, Pet. 24, and the closure occurred during the heart of the trial, Pet. 25.

Finally, as respondent does not meaningfully dispute, this is an easy case. Pet. 25-26. *Waller* requires courts to conduct a case-specific on-the-record analysis prior to *any* courtroom closure. 467 U.S. at 48. And *Globe Newspaper Co.* held unconstitutional a mandatory courtroom closure rule strikingly similar to the one employed here. 457 U.S. at 608-11. Nevertheless, Florida, Georgia, and Illinois allow statutes to override this obligation, undermining the "potent disinfectant" that is "[a] public trial." *Christie*, 717 F.3d at 1169 (Gorsuch, J.).

* * *

Whether through a merits grant or summary reversal, this Court cannot allow this blatant disregard for this Court's precedents to stand.[7] Courts must run the *Waller* factors before closing a courtroom—end of story.

[7] Certainly, as respondent points out, summary reversal is an "extraordinary remedy." BIO 13. But it is appropriate here where, extraordinarily, the decision below is irreconcilable with two different opinions of this Court. *See, e.g.*, *Tolan v. Cotton*, 572 U.S. 650, 659 (2014) (summarily reversing because the "the opinion below reflect[ed] a clear misapprehension of summary judgment standards in light of [this Court's] precedents"); *Erickson v. Pardus*, 551 U.S. 89, 90 (2007) (summarily reversing because the lower court "depart[ed] in so stark a manner from the pleading standard mandated by the Federal Rules of Civil Procedure"). This Court has summarily reversed in the context of a courtroom closure, *see Presley v. Georgia*, 558 U.S. 209 (2010), and can do so again here.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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