No. 20-5379

IN THE
Supreme Court of the United States

KEITH ADAIR DAVIS,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Washington

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The State admits that federal and state courts are divided over the "difficult question" whether a court may remove a *pro se* defendant from the courtroom and continue the trial in his absence, with an empty defense table. "Can that simulacrum of a trial be permitted to serve in place of the real thing? [Other courts] think not," including the federal appeals court covering Washington. *United States v. Mack*, 362 F.3d 597, 603 (9th Cir. 2004) (Fernandez, J.). And even as they have disagreed on outcomes, judges have agreed that "this is an area of law in need of further clarification"—from this Court. *E.g.*, *Davis v. Grant*, 532 F.3d 132, 149 (2d Cir. 2008); *State v. Lacey*, 431 P.3d 400, 404 n.3 (Or. 2018). Multiple amici have confirmed the need for review.

The State disputes none of this—not that there is a split; nor that the issue recurs frequently; nor that the lower courts need this Court's guidance. Instead, the State attempts to divert attention from this important and unsettled issue by arguing that this case falls within a separate line of cases involving defendants who *voluntarily* "depart" from trial—to effectuate a strategic political-protest defense, for example. But unlike the cases the State cites, there was no voluntary, informed, and strategic decision to depart here. To the contrary, after an outburst, petitioner was physically removed from the courtroom by court officers, on the court's orders, and the court itself said—in written findings *prepared by the State*—his disruptive behavior was the reason. And even if the State were right, that just compounds the conflict. Courts are divided on whether disruptive outbursts can amount to

a waiver, or whether a defendant must knowingly and voluntarily waive the right to counsel and cross-examination at trial.

In short, the State is trying to mix and match. Petitioner was removed from the courtroom without any of the warnings that accompany an informed and voluntary absence, just like any other disruptive defendant. But the Washington Supreme Court upheld the trial court's decision to proceed with an empty defense table, as if the defendant chose to walk out the door. And the State cannot challenge the impact of this constitutional error on the trial: The prosecution examined two critical witnesses without anyone present for the defense to confront or cross-examine them.

This case presents the recurring question of when, if ever, it is constitutionally permissible to hold trial with an empty defense table. This Court should address that issue now.

I. This Court should finally resolve the conflict over when (if ever) courts may hold trial with an empty defense table.

Decisions opposite Washington's side of the split squarely hold that "[a] defendant does not forfeit his right to representation at trial when he acts out," and that a trial court cannot simply proceed with an empty defense table without a more searching inquiry into the voluntariness of the choice. *Mack*, 362 F.3d at 601; *accord People v. Carroll*, 140 Cal. App. 3d 135 (1983); *see also Davis*, 532 F.3d 132; *Thomas v. Carroll*, 581 F.3d 118 (3d Cir. 2009). The State therefore tries to make this case about *voluntary waiver* of the right. But neither the decision below nor the decisions on Washington's side of the split bear any

resemblance to this Court's established caselaw on voluntariness. Rather, they hold that outbursts and disruptive behavior can *amount to* a waiver of a self-represented defendant's Sixth Amendment rights to counsel and cross-examination at trial—without requiring any colloquy through which the defendant's informed consent to waive these rights has been obtained. *See, e.g.*, *State v. Davis*, 461 P.3d 1204 (Wash. 2020); *Lacey*, 431 P.3d 400; *People v. Brante*, 232 P.3d 204 (Colo. Ct. App. 2009). This Court should make clear that these rights cannot be summarily taken away as a sanction for courtroom behavior.

1. The State's characterization of this case would be unrecognizable to the trial court that proceeded with an empty defense table. To begin with, the trial court provided no warnings and made no finding of voluntary waiver. "Nowhere does the trial court say that it removed Davis pursuant to his request to leave the courtroom—the trial court's findings do not even mention Davis's statement that 'You can hold your trial without me.' The trial court's only stated rationale [was] the severity of the disruptive behavior." *Davis*, 461 P.3d at 1215 (Stephens, C.J., dissenting). This should be no surprise to the State, which prepared the trial court's written findings and titled them "Findings of fact and conclusions of law regarding defendant's voluntarily absenting himself from trial *due to his disruptive behavior*." App. C at 1, 4 (emphasis added).

Apparently wishing otherwise, the State points to the state supreme court as having found voluntary waiver of Mr. Davis's Sixth Amendment rights, citing *Clark v. Perez*, 510 F.3d 382 (2d Cir. 2008), *Torres v. United States*, 140 F.3d 392 (2d Cir. 1998), and *State*

v. Eddy, 68 A.3d 1089 (R.I. 2013), as similar cases. Opp. 14.[1] Those cases all involved defendants who adopted a conscious trial strategy of not being present, and trial courts that took steps to ensure the voluntariness of the defendants' waivers and that made clear the defendants could return anytime. *Clark*, 510 F.3d at 396 (defendant's decision was "a conscious strategic choice … as part of a *de facto* political protest defense"); *Torres*, 140 F.3d at 397, 402-403 (defendant's decision was a "fully informed, politically motivated choice"); *Eddy*, 68 A.3d at 1104 (defendant's decision was made after "the trial justice cautiously engaged in an extensive colloquy" and ensured that his "waiver of his right to be present at trial was made of his own free will").[2]

The State's reliance on those cases—none of which was mentioned by the majority—is simply an attempt to rewrite the majority's decision. The majority did not focus on this Court's ordinary standards for waiver of constitutional rights at trial; it characterized the trial court's ruling as a "trial management decision[]" falling within the discretion of a trial judge to

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[1] The State includes *State v. DeWeese* in its list of cases in which "a defendant voluntarily departs from his trial." Opp. 14. But in *DeWeese*, the Washington Supreme Court upheld a trial court's decision to "remov[e] [a self-represented criminal defendant] from the courtroom follow[ing] a series of outbursts." 816 P.2d 1, 6 (Wash. 1991).

[2] At least one judge has suggested that *even in those circumstances*, the trial may not proceed in the defendant's absence. *Thomas*, 581 F.3d at 127 (Pollak, J., concurring). But petitioner did not dispute below that a defendant can, in theory, make an informed "tactical choice" to leave the defense table empty. The State wrongly portrays that as a blanket concession that any determination that the defendant's behavior amounted to a waiver would be sufficient. Opp. 6-8.

"maintain[] order in the courtroom." *Davis*, 461 P.3d at 1210-1211. And it distinguished this case from ones in which a defendant "fails to appear" at trial, because this case involved "a severely disruptive defendant." *Id.* at 1209. If the State were correct and this were a "voluntary-departure" case, there would have been no need for the majority to spend pages discussing disruptive-behavior cases. *See id.* at 1208-1211. Nor would the majority have summed up its ruling by saying that the "totality of the circumstances," including the behavior of "a contumacious and stubbornly defiant defendant," "*amounted to a waiver*." *Id.* at 1211 (emphasis added).

2. Indeed, if this case were akin to voluntary-waiver cases like *Clark*, *Torres*, and *Eddy*, the State would have been required to demonstrate—and the majority would have had to determine—that petitioner made a knowing, intelligent, and *constitutionally* voluntary waiver of the rights to counsel and cross-examination at trial. This Court has established a heightened standard of "voluntariness in the constitutional sense" distinct from its everyday meaning. *Henderson v. Morgan*, 426 U.S. 637, 644-645 & n.13 (1976). These cases require that a criminal defendant's waiver of constitutional protections be not just voluntary in the ordinary sense—meaning volitional—but also "knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970). But the trial court made no findings to support a constitutionally voluntary choice, and the majority made no determination that petitioner made a knowing, intelligent decision with awareness of the circumstances and consequences.

The Washington Supreme Court and the courts on its side of the split allow a criminal defendants to *lose* their rights to counsel and cross-examination at trial based on misbehavior and statements made during disruptive outbursts that are deemed to "amount[] to waiver." *Davis*, 461 P.3d at 1211; *see also Lacey*, 437 P.3d at 407-408; *Brante*, 232 P.3d at 206. That approach is irreconcilable with this Court's instruction that courts must "indulge every reasonable presumption against waiver … and not presume acquiescence in the loss of fundamental rights." *Barker v. Wingo*, 407 U.S. 514, 525-526 (1972) (citations and internal quotation marks omitted); *see also Miranda v. Arizona*, 384 U.S. 436, 475 (1966) (requiring the "high standards of proof for the waiver of constitutional rights").

Consider, for example, if the issue under review were whether Mr. Davis had, midtrial, voluntarily waived his right to proceed with the assistance of counsel. In that case, this Court's mandate would be clear: "Warnings of the pitfalls of proceeding to trial without counsel … must be 'rigorous[ly]' conveyed." *Iowa v. Tovar*, 541 U.S. 77, 89 (2004) (quoting *Patterson v. Illinois*, 487 U.S. 285, 298 (1988)). Thus, lower courts require a substantive colloquy with the defendant to "ensure that the defendant chooses with knowledge of his entitlements and his eyes open to the dangers of self-representation." *Speights v. Frank*, 361 F.3d 962, 964-965 (7th Cir. 2004) (citing *Tovar*).

Or consider if Mr. Davis had blurted out that he wanted to drop his defense ("You can call off the trial") rather than leave the room ("You can hold your trial without me"). Under this Court's voluntariness cases, that plainly would not be enough to plead guilty and

waive the right to confrontation. *E.g.*, *Boykin v. Alabama*, 395 U.S. 238, 242-243 (1969). It was not enough here either.

In short, the majority did not base its holding on the trial court's "cautiously engag[ing] in an extensive colloquy with [the *pro se*] defendant .... instruct[ing] him of all the rights that he was giving up by not being present at trial, [after which] defendant indicated that he was insisting that he absent himself 'knowingly, willingly and voluntarily.'" *Eddy*, 68 A.3d at 1104. Instead, the majority held that petitioner's unruly conduct and heated exclamations "amounted to a waiver," 461 P.3d at 1211, just as the other cases on Washington's side of the split have permitted self-represented defendants to forfeit their right to counsel and cross-examination at trial through misconduct, *see Lacey*, 431 P.3d 400; *Brante*, 232 P.2d 204. But even if the State were right, that would be all the *more* reason to grant certiorari—to correct the misguided approach to the "waiver" of Sixth Amendment protections adopted by courts on Washington's side of the split and establish uniform legal standards governing when (if ever) trial courts can hold trial with an empty defense table.

II. The question presented is important, widespread, and frequently recurring.

The State (at 11) attempts to minimize this case as "fact bound." Not so. The petition raises a *legal* issue about the scope of Sixth Amendment protections. And state and federal appellate courts agree that this Court's guidance is needed to resolve that legal issue. *Davis*, 532 F.3d at 149; *Lacey*, 431 P.3d at 404 n.3. The existence of case-specific facts—which necessarily crop up in *every* case this Court decides in this area—

does not undermine the need for this Court's intervention.

1. The petition (at 11-26) explains that numerous state and federal appellate courts have issued irreconcilable opinions on this question over the past two decades. Washington has clearly adopted the minority approach—it has twice now concluded that an empty defense table is constitutionally acceptable where a self-represented defendant behaves contumaciously, the first time by holding that a misbehaving defendant's involuntary "removal … from the courtroom due to disruptive behavior" was appropriate, *State v. DeWeese*, 816 P.2d 1, 7 (Wash. 1991), and here by holding that Mr. Davis's outbursts "amounted to a waiver," 461 P.3d at 1211.

Indeed, the conflict exists even between the state high courts and federal appellate court located within a regional circuit—both Washington (here and in *DeWeese*) and Oregon (in *Lacey*) permit an empty defense table when a self-represented defendant behaves obstreperously, which the Ninth Circuit has held is, "beyond doubt," a constitutional violation, *Mack*, 362 F.3d at 602. That makes this Court's intervention all the more urgent—without it, state criminal defendants in these States will face potentially insurmountable barriers to seeking meaningful review of the constitutional violation through a habeas petition despite clear circuit precedent adopting a contrary position.

Courts on both sides of the issue have acknowledged that the conflict exists and expressly called for this Court's guidance. *See Davis*, 532 F.3d at 140; *Lacey*, 431 P.3d at 404 & n.3. Organizations on both sides of the ideological spectrum have too. The Cato Institute

asks this Court to recognize the "critical difference between a considered, strategic decision—even if thought to be foolish or self-defeating—and a rash outburst, whether prompted by the stress of a trial or contrarian resistance to authority." Cato Br. 10. The NACDL asks this Court to clarify that "[m]isbehavior on the part of the accused during trial does not meet the exceedingly high bar this Court has set for an exception to the bedrock guarantee that an accused may cross-examine her accuser." NACDL Br. 2.

2. The scenario encountered here, where a contumacious self-represented defendant leaves or is ejected from the courtroom, recurs frequently. In King County alone, where Mr. Davis was tried, some 564 criminal cases are commenced every month. King County Superior Court, *Criminal Department Statistical Report*, at 2 (Feb. 2020), https://www.kingcounty.gov/~/media/courts/Clerk/docs/Statistics/CRIMRPT2019-10.ashx?la=en. And Washington courts disfavor standby counsel. *State v. Davis*, 429 P.3d 534, 540 (Wash. App. Ct. 2018). So any defendant who proceeds *pro se* in Washington, or in any other jurisdiction with a similar presumption, risks a "complete breakdown of the adversarial process," *Thomas*, 581 F.3d at 126, if a court deems the defendant's misbehavior a "voluntary" waiver.

Indeed, this issue is so commonplace (and serious) that the ABA has included a rule in its Standards for Criminal Justice to address it—advising courts to appoint counsel to stand in when a *pro se* defendant is removed from the courtroom due to disruptive behavior. Standard 6-3.9, ABA Standards for Criminal Justice: Special Functions of the Trial Judge, 3d ed. (2000).

3. The importance of the issue is only heightened given the special concerns this Court has expressed about the effect of mental disability on a criminal defendant's capacity to knowingly and intelligently waive constitutional protections. *See, e.g.*, *Indiana v. Edwards*, 554 U.S. 164, 177-178 (2008). A rule that permits courts to deem unreasonable behavior a voluntary waiver fails to address these concerns—if anything, it exacerbates them.

These concerns are not theoretical—some 20 percent of self-represented federal criminal defendants face competency issues. *Edwards*, 554 U.S. at 178. This data mirrors problems in the criminal justice system more generally. According to the Department of Justice, about 30 percent of inmates nationwide have a cognitive disability, and ambulatory disabilities (like multiple sclerosis, from which petitioner suffers) are common too. Jennifer Bronson et al., U.S. Dep't of Justice, Bureau of Justice Statistics, *Special Report: Disabilities Among Prison and Jail Inmates, 2011–12*, at 3 (2015), https://www.bjs.gov/content/pub/pdf/dpji1112.pdf.

Given the systemic prevalence of disabilities in our criminal-justice system, courts will continue to encounter defendants who insist on proceeding *pro se* and then misbehave in a manner that courts on Washington's side of the split deem a "waiver" of the Sixth Amendment's guarantees of representation and cross-examination.

The issue is widespread, frequently recurring, and of exceptional constitutional significance. The Court should grant certiorari to address it now.

III. This case is an excellent vehicle to resolve the question presented.

The State's only argument as to why this case is not a good vehicle to resolve the question presented is its contention that petitioner here "voluntarily departed" trial. Opp. 1, 2, 6, 12, 13, 16. That revisionist history is easily dispensed with above: It is irreconcilable with the majority's extensive discussion of disruptive-conduct caselaw and determination that Mr. Davis's words and conduct "amounted to a waiver," 461 P.3d at 1221, and with the trial court's findings of fact, which were *prepared by the State* and expressly state that the defendant was deemed to have "voluntarily absent[ed]" himself "due to his disruptive behavior," App. C at 1, 4.

Moreover, this case is a particularly good vehicle because it comes before the Court on direct review. It therefore allows the Court to provide clear guidance on the constitutional question presented without the procedural barriers that have prevented some federal courts from finding a constitutional violation when they have confronted this question on habeas review. *See, e.g.*, *Thomas*, 581 F.3d 118; *Davis*, 532 F.3d 132.

Furthermore, the question presented comes to this Court on a particularly well-developed record. Mr. Davis has maintained throughout his appeal that the trial court's decision to leave the defense table empty violated the Sixth Amendment. *Davis*, 429 P.3d at 540; *Davis*, 461 P.3d at 1210. And because there are reasoned appellate opinions coming to opposite conclusions on the constitutional question—the Washington Court of Appeals holding that Mr. Davis's removal violated the Sixth Amendment, and a divided Washington Supreme Court holding that it did not—the

Court can be confident that the application of relevant law to the case's facts was fully rehearsed below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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