No. 21-___

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596 (1982), this Court held that a state's mandatory courtroom closure rule, triggered by the testimony of a minor victim of certain sex offenses, violated the First Amendment. Two years later, in *Waller v. Georgia*, 467 U.S. 39 (1984), this Court held that before closing a courtroom to members of the public, the Sixth Amendment requires a court to (1) consider whether an overriding interest is likely to be prejudiced absent closure; (2) ensure that the closure be no broader than necessary to protect that interest; (3) consider reasonable alternatives to the requested closure; and (4) make specific factual findings relating to these factors.

The question presented is:

Whether, as the court below and two other states hold, trial courts may close a courtroom pursuant to a closure statute without undertaking the *Waller* analysis; or, as nine states and the federal courts of appeals hold, the Sixth Amendment and *Waller* require an assessment of the specific facts of the case and proposed closure, notwithstanding the existence of a statute governing closure.

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IN THE

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PATRICK HUFF,

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STATE OF FLORIDA,

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

PETITION FOR A WRIT OF CERTIORARI

Patrick Huff petitions for a writ of certiorari to review the Florida District Court of Appeal, Fourth District's judgment in this case.

OPINIONS BELOW

The Florida District Court of Appeal, Fourth District's affirmance of Patrick Huff's criminal judgment and sentence (Pet. App. 2a) is published at 311 So. 3d 880 (Fla. Dist. Ct. App. 2021). The Florida Supreme Court's denial of Mr. Huff's petition for review (Pet. App. 1a) is not published.

JURISDICTION

The Florida Supreme Court denied Mr. Huff's petition for review on June 21, 2021. Pursuant to this Court's March 19, 2020 order, the time to file this petition was extended to 150 days, to November 18,

2021. This Court has jurisdiction under 28 U.S.C. § 1257.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

The Sixth Amendment to the U.S. Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .

Section 918.16(2) of the Florida Statutes provides:

> If the victim of a sex offense is testifying concerning that offense in any civil or criminal trial, 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.

STATEMENT OF THE CASE

1. Petitioner Patrick Huff is a massage therapist from Port St. Lucie, Florida. In November 2019, he stood trial for sexual battery on an adult, Fla. Stat. § 794.011(5)(b), in the Circuit Court for Florida's Nineteenth Judicial Circuit.

The complainant in the case, a woman in her mid-30s, was a client of Mr. Huff's. Pet. App. 22a. Before the complainant's trial testimony, attorneys for the State requested that the courtroom be closed to the public. Pet. App. 21a. At that time, only jurors, court personnel, parties, and their attorneys were present in the courtroom. *Id.* Petitioner objected to the request, claiming that a hearing was necessary prior to any closure. *Id.* The court declined to rule on the issue at that time, but stated that "if somebody walks in," the court would stop the proceedings and convene a bench conference. Pet. App. 22a.

At the end of the direct examination of the complainant by the State, petitioner's ex-wife, and the mother of his son, entered the courtroom. Pet. App. 23a. The jury was excused, and the State renewed its request that the courtroom be closed and asked that petitioner's ex-wife be removed. Pet. App. 23a-24a. To justify the closure, the prosecution referred to § 918.16(2) of the Florida Statutes, which provides that, "[i]f the victim of a sex offense is testifying concerning that offense in any civil or criminal trial, the court shall clear the courtroom of all persons upon the request of the victim, regardless of the victim's age or mental capacity." *See* Pet. App. 24a. The closure statute exempts from its coverage certain groups of people

including, as relevant here, "parties to the cause and their immediate families."[1] Fla. Stat. § 918.16(2).

Petitioner's counsel objected to the closure, explaining 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. The court examined the text of § 918.16(2), concluded that petitioner's ex-wife did not meet the statute's exception for "immediate family," and as a result excluded her from the courtroom. *Id*.

After a brief recess, petitioner's counsel began her cross-examination of the complainant, without members of the public present. Pet. App. 27a.

At the conclusion of the trial, the jury found petitioner guilty, Pet. App. 19a, and petitioner was sentenced to 10 years in prison, Pet. App. 13a.[2]

2. Petitioner timely appealed to the Florida District Court of Appeal, Fourth District, raising a Sixth Amendment challenge to the closure of the courtroom during his trial. The Florida District Court of Appeal

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[1] The statute also exempts "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." Fla. Stat. § 918.16(2).

[2] Petitioner filed a motion to correct his sentence on unrelated grounds, which the trial court granted in part and denied in part. Pet. App. 3a.

affirmed, referring to the Florida Supreme Court's decision in *Kovaleski v. State*, 103 So. 3d 859 (Fla. 2012). Pet. App. 2a.

3. Petitioner sought review in the Florida Supreme Court, arguing that his Sixth Amendment rights were violated when the courtroom was closed during his criminal trial, and asking the court to overrule *Kovaleski*. Pet'r Br. on Jurisdiction at 3-6, *Huff v. State*, No. SC21-531 (Fla. Apr. 19, 2021), 2021 WL 1604847. The Florida Supreme Court denied the petition for review on June 21, 2021. Pet. App. 1a.

REASONS FOR GRANTING THE PETITION

This case presents a critically important question of this Court's public-trial right jurisprudence. In *Waller v. Georgia*, 467 U.S. 39 (1984), this Court held that before closing a courtroom to members of the public, the Sixth Amendment requires a case-specific analysis and on-the-record findings relating to the closure. The courts are split on whether the existence of a closure statute—governing when to exclude members of the public, and who to exclude—can take the place of the *Waller* inquiry. The courts that allow a legislative determination regarding closure to supplant the *Waller* analysis have gotten it wrong—*Waller* demands that any closure must be narrowly tailored to the case and interests in question, and that to ensure adherence to these strictures and allow for appellate review, courts must place findings related to closure on the record. This is an issue of exceptional importance, because it implicates the sacred public-trial right enshrined in the First and Sixth Amendments. And this case presents a clean vehicle for addressing the issue. The Court should grant certiorari.

In the alternative, this Court should summarily reverse. *See Presley v. Georgia*, 558 U.S. 209 (2010) (summarily reversing on Sixth Amendment public-trial right issue). The mandatory closure statute in this case, Fla. Statute § 918.16(2), is blatantly unconstitutional under *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. at 596 (1982), in which this Court held that Massachusetts's mandatory courtroom closure rule violated the First Amendment, and given *Waller*'s requirement of a case-specific, on-the-record analysis.

I. The Courts Are Split On Whether A Statute Requiring Courtroom Closure Can Supplant The *Waller* Test.

The openness of criminal proceedings is one of our nation's most fundamental constitutional rights. As this Court has consistently reiterated for decades, "the right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole." *Globe Newspaper Co.*, 457 U.S. at 606. So it is not surprising that the public-trial right is protected by not one, but two, constitutional amendments: the First and the Sixth. *See Presley*, 558 U.S. at 211-12.

The Sixth Amendment courtroom-closure precedent reflects the cherished constitutional values first recognized in the First Amendment context. In *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984), a case arising under the First Amendment, the Court explained that restrictions on public court access "must be rare" and can only be justified by an "overriding interest." *Id.* at 509-10.

Months later, in *Waller*, 467 U.S. 39, the Court incorporated the *Press-Enterprise* test for Sixth Amendment courtroom-closure challenges. The Court held that four requirements must be met before the Constitution permits a courtroom to be closed:

> [1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced [absent closure], [2] the closure must be no broader than necessary to protect that interest, [3] the trial court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure.

Id. at 48.

Notwithstanding these explicit requirements, three States—Florida, Georgia, and Illinois—defy *Waller*, holding that the general application of a courtroom-closure statute can take the place of the case-by-case inquiry demanded by this Court. In contrast, nine States—Alaska, Alabama, Massachusetts, Minnesota, New Hampshire, North Carolina, North Dakota, South Dakota, and Wisconsin—and the federal courts of appeals to have addressed the question, correctly hold that the application of closure statutes does not obviate the need for a *Waller* analysis.

In *Kovaleski v. State*, 103 So. 3d 859 (Fla. 2012), the Florida Supreme Court squarely considered whether a courtroom closure made pursuant to Florida Statute § 918.16(2)—which, when it applies, *requires* courts to close courtrooms—"[ran] afoul of the United States Supreme Court's decision in *Waller*, which sets out requirements that must be satisfied before the presumption of openness may be overcome."

Id. at 860. Flouting this Court's jurisprudence, it answered that question in the negative, concluding that the statute itself "acceptably embraces the requirements set forth in *Waller*." *Id.* at 861. Justice Pariente, writing separately, opined that "the one-size-fits-all approach adopted by the majority, in which the statute negates any need for an individualized inquiry" would "result[] in a constitutional violation" when individuals are excluded without the court conducting the *Waller* analysis. *Id.* at 862 (Pariente, J., concurring).[3] Pursuant to the majority opinion in *Kovaleski*, Florida courts must close courtrooms pursuant to the statute—as occurred in petitioner's case—without actually engaging in the necessary *Waller* analysis and making on-the-record findings.[4]

In *People v. Falaster*, 670 N.E.2d 624 (Ill. 1996), the Supreme Court of Illinois concluded, over a Sixth Amendment challenge based on *Waller*, that trial courts need only satisfy the requirements of the State's closure statute when excluding members of the public. *Id.* at 628.[5] The Illinois high court held that

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[3] Justice Pariente's writing in *Kovaleski* is styled as a concurrence "in result only" because the defendant in that case could not "point to any individuals who were improperly excluded." *Kovaleski*, 103 So. 3d at 862 (Pariente, J., concurring).

[4] Following *Kovaleski*, the Florida appellate court affirmed petitioner's conviction over his Sixth Amendment objection here, Pet. App. 2a, and the Florida Supreme Court denied review, despite petitioner raising the issue (and only the issue), Pet. App 1a.

[5] The Illinois statute provides:

> In a prosecution for a criminal offense . . . where the alleged victim of the offense is a minor under 18 years of age, the court may exclude from the proceedings while the victim is

the "strict limitations prescribed by the United States Supreme Court for instances in which the press and public are barred from judicial proceedings are not applicable" when using the State statute. *Id.*

And appellate courts in Georgia have similarly (and consistently) held that a court need not engage in *Waller*'s four-prong inquiry whenever a statute authorizes closure like the one that occurred in petitioner's trial.[6] For example, in *Goldstein v. State*, 640 S.E.2d 599 (Ga. Ct. App. 2006), the Court of Appeals of Georgia held that a closure made pursuant to the state's statute "[did] not violate a defendant's Sixth Amendment right to a public trial" because it was "based upon a legislative determination that there is a compelling state interest in protecting children while they are testifying concerning a sex offense." *Id.* at 602. *See also*, *e.g.*, *Spires v. State*, 850 S.E.2d 854, 859 (Ga. Ct. App. 2020) (holding that using the statute to close the courtroom did not violate the criminal defendant's constitutional right to a public trial); *Chamberlain v. State*, 819 S.E.2d 303, 309 (Ga. Ct. App.

> testifying, all persons, who, in the opinion of the court, do not have a direct interest in the case, except the media.

725 Ill. Comp. Stat. Ann. § 5/115-11.

[6] Although the Georgia Supreme Court has yet to weigh in, the position of the Georgia Courts of Appeal has been criticized by at least one of the State's Supreme Court justices. *See Scott v. State*, 832 S.E.2d 426, 430, 432 (Ga. 2019) (Peterson, J., concurring) (suggesting that the appeals court may not have "analyzed the issue correctly in light of the considerable relevant case law," and that "the United States Supreme Court has not told us that courts may disregard the *Waller* standard where fewer than all spectators are excluded from the courtroom").

2018) (same); *Tolbert v. State*, 742 S.E.2d 152, 154 (Ga. Ct. App. 2013) (same).[7]

On the other side of the ledger, the federal courts of appeals to have addressed the issue, and at least nine States, follow this Court's directive and have concluded the opposite: that courts faced with closure statutes must still apply the four prongs of *Waller*.

Take the federal system. A courtroom closure statute, 18 U.S.C. § 3509(e), provides that a court may close a courtroom in a criminal trial when a child is testifying "if the court determines on the record that requiring the child to testify in open court would cause substantial psychological harm to the child or would result in the child's inability to effectively communicate." Yet the circuit courts that have reached the issue unanimously hold that § 3509(e) does not supplant the *Waller* analysis, which is still mandatory notwithstanding the fact that Congress set forth a clear standard incorporating particularized findings, and would allow for closure in certain circumstances. *See United States v. Ledee*, 762 F.3d 224, 229 (2d Cir. 2014); *United States v. Thunder*, 438 F.3d 866, 867-68 (8th Cir. 2006); *United States v. Yazzie*, 743 F.3d 1278,

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[7] The current text of the Georgia statute provides:

> In the trial of any criminal case, when any person under the age of 16 is testifying concerning any sexual offense, the court shall clear the courtroom of all persons except parties to the cause and their immediate families or guardians, attorneys and their secretaries, officers of the court, victim assistance coordinators, victims' advocates, and such other victim assistance personnel as provided for by Code Section 15-18-14.2, jurors, newspaper reporters or broadcasters, and court reporters.

Ga. Code Ann. § 17-8-54.

1288 (9th Cir. 2014). The United States Department of Justice, for its part, acknowledges that even when it invokes § 3509(e) to close a courtroom, the district court must analyze the specific questions—and make the on-the-record findings—required by *Waller*. *See, e.g.,* Br. of United States, *Ledee*, 762 F.3d 224 (No. 13-2363), 2014 WL 571160, at *30 (arguing, in case where district court closed courtroom pursuant to § 3509(e), it "properly applied *Waller* and its progeny").

The majority of states to have addressed the interaction of *Waller* and state closures statutes recognize that courts must still "apply *Waller* as an overlay to any requirements in statute." *State v. Rogers*, 919 N.W.2d 193, 203 (N.D. 2018); *see also Ex parte Judd*, 694 So. 2d 1294, 1297 (Ala. 1997) (adopting the *Waller* test for courtroom closures made pursuant to Alabama's closure statute); *Renkel v. State*, 807 P.2d 1087, 1093 (Alaska Ct. App. 1991) (holding that prior to all closures, even those based on statutes, a court must evaluate the *Waller* factors); *Commonwealth v. Martin*, 629 N.E.2d 297, 302 (Mass. 1995) (holding that courts may only close courtrooms pursuant to the state closure statute after satisfying the *Waller* factors); *State v. Fageroos*, 531 N.W.2d 199, 201-02 (Minn. 1995) (holding that "closure is . . . ultimately a constitutional issue, not a statutory issue," analyzing closure pursuant to statute under *Waller*, and concluding "a case-by-case determination must be made by the trial court"); *State v. Guajardo*, 605 A.2d 217, 219-20 (N.H. 1992) (holding that all closure statutes must still be "construed in light of the sixth amendment," and analyzing closure pursuant to statute in light of *Waller* factors); *State v. Jenkins*, 445 S.E.2d

622, 625 (N.C. Ct. App. 1994) (holding that courts applying North Carolina's closure statute must still abide by *Waller*), *appeal denied* 449 S.E.2d 752, 752 (N.C. 1994); *State v. Uhre*, 922 N.W.2d 789, 796 (S.D. 2019) (holding that the application of South Dakota's closure statute must be "guided by what have become known as the '*Waller* factors' "); *State ex rel. Stevens v. Cir. Ct. for Manitowoc Cnty.*, 414 N.W.2d 832, 838 (Wis. 1987) (holding that courts using Wisconsin's closure statute must still complete each step of the *Waller* analysis); *see generally* Daniel Levitas, *Scaling* Waller*: How Courts Have Eroded the Sixth Amendment Public Trial Right*, 59 EMORY L.J. 493, 536-39 (2009) (discussing issue and collecting cases).

This split in authority is not going anywhere. Indeed, most of the decisions on both sides of the split are decades old. The courts have had plenty of time in the thirty-seven years since *Waller* to figure out what that decision means in the context of courtroom closure statutes. Indeed, the Florida Supreme Court declined petitioner's request to reconsider *Kovaleski*, even though Justice Pariente had correctly observed in that case that "section 918.16 cannot obviate the need for an individualized inquiry" required by *Waller* before a courtroom may be closed. *Kovaleski*, 103 So.3d at 862 (Pariente, J., concurring). This Court needs to intervene.

II. The Minority View is Wrong: A Statute Cannot Trump the Constitutional Requirements for Courtroom Closures.

The approach of Florida and the minority of states that allow trial courts to close courtrooms pursuant to statute without analyzing the factors required under

Waller is both seriously wrong and a serious constitutional problem.

Under the public-trial right of the First and Sixth Amendments, all criminal proceedings carry a heavy "presumption of openness." *Press-Enterprise*, 464 U.S. at 510. This presumption can only be overcome in exceedingly "rare" circumstances, and even then, only where the "balance of interests [is] struck with special care." *Waller*, 467 U.S. at 45.

Enter *Waller*, which requires (1) "an overriding interest"; (2) narrow tailoring of the closure to that interest; and (3) a consideration of "reasonable alternatives" to closure, all (4) reflected in on-the-record "findings" that are "articulated" with specificity. *Waller*, 467 U.S. at 45, 48.

Waller thus demands something that *no* generally-applicable statute can provide: an individualized, case-by-case analysis with specific findings. *See Waller*, 467 U.S. at 49 n.8 (stating that a "post hoc assertion" that closure was justified "cannot satisfy the deficiencies in the trial court's record"); *id.* at 48 (holding trial court's "broad and general" findings insufficient to justify closure).

Globe Newspaper Co.—where this Court struck down on First Amendment grounds a mandatory closure statute very similar to Florida's—makes this all the more clear. There, Massachusetts's high court had construed a statute as requiring trial judges "to exclude the press and general public from the courtroom during the testimony" of a minor victim of certain sex offenses. 457 U.S. at 598. This Court held that the mandatory closure rule violated the First Amendment because "the circumstances of the particular case may

affect the significance of the interest" supporting closure, and the Massachusetts rule prohibited such case-specific considerations. *Id.* at 602, 608.

Waller and *Globe* thus require trial courts to look at the specific circumstances of a case and make findings on the record before closing the courtroom. Florida and its ilk say "don't bother."

In *Kovaleski*—which the lower courts relied upon in ruling against petitioner—the Florida Supreme Court erroneously held that the state statute "acceptably embraces the requirements set forth in *Waller*" and thus served as a proxy for the *Waller* test. 103 So. 3d at 861.[8] Recall, that statute provides that if the victim of a sex offense is testifying about that offense and so requests, the court "*shall* clear the courtroom of all persons" with only a few exceptions for certain groups of people. Fla. Stat. § 918.16(2) (emphasis added). This one-size-fits-all approach ignores each prong of the *Waller* test.

Prong 1: An "Overriding Interest." The Florida Supreme Court observed that a § 918.16 closure "occurs only at the request of the testifying victim" and that "protecting the victim upon his or her request is a compelling interest of the State." *Kovaleski*, 103 So.3d at 861. Certainly, that may be an interest in many cases involving a testifying victim of a sex offense. But even if the interest exists in a particular case, it may not be

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[8] In support of its conclusion that the statute subs in for *Waller*, the Florida Supreme Court observed that the Florida Senate Judiciary Committee "contemplat[ed] the requirements of *Waller* in analyzing the bill." *Kovaleski*, 103 So.3d at 861 n.3. This fact is simply irrelevant.

enough to justify a courtroom closure. *See Press-Enterprise*, 464 U.S. at 508-09 (describing, in a rape and murder case, the "community therapeutic value" in having trials open to the public, especially in cases that "provoke public concern, even outrage and hostility," where the community may have a "desire to have justice done"). That is exactly why a court must consider the individual circumstances of each case.

As this Court explained in *Presley*, "[t]here are no doubt circumstances where a judge could conclude that" the interests in protecting a victim of sexual assault "are concrete enough to warrant closing" the courtroom. 558 U.S. at 215. "But in those cases, the particular interest, and the threat to that interest, must 'be articulated along with findings specific enough that a reviewing court can determine whether the closure was properly entered.' " *Id.* (quoting *Press-Enterprise*, 464 U.S. at 510).

That is why in *Globe Newspaper Co.*, this Court held unconstitutional a mandatory courtroom closure rule strikingly similar to the one at issue here.[9] The Court explained: "it is clear that the circumstances of the particular case may affect the significance of the interest" and must be considered. *Globe Newspaper Co.*, 457 U.S. at 607-08. "[F]actors to be weighed" include the "victim's age, psychological maturity and understanding, [and] the nature of the crime." *Id.* at

[9] The Massachusetts statute applied when minor victims of sexual assault testified; the Florida statute at issue in petitioner's case applies to adult victims. If anything, the State interests are *stronger* with a minor victim, and yet the Court in *Globe Newspaper Co.* still held that a case-by-case analysis was constitutionally required.

608. Other relevant considerations may include the witness's ability to effectively communicate, *Yazzie*, 743 F.3d at 1290, the victim's susceptibility to harm, *United States v. Galloway*, 963 F.2d 1388, 1390 (10th Cir. 1992), the forecasted testimony, *Bell v. Jarvis*, 236 F.3d 149, 170 (4th Cir. 2000), and the relationship between the witness and the defendant, *id.*

Yet despite all this, the Florida Supreme Court expressly prohibits case-specific considerations when the statute is triggered, directing that "the court *shall* clear the courtroom" at the victim's request, "*regardless* of the victim's age or mental capacity" and regardless of the circumstances of the case. Fla. Stat. § 918.16(2) (emphases added).

As courts on the other side of the split have appropriately understood, this is a constitutional problem. *See State v. Rolfe*, 825 N.W.2d 901, 909 (S.D. 2013) (holding that a closure statute would be unconstitutional if it did not "allow[] trial courts to weigh competing interests" or "make specific findings to follow *Waller*"); *cf. State v. Martinez*, 956 N.W.2d 772, 792 (N.D. 2021) (holding a courtroom can be closed during testimony, "provided there is individual analysis and not simply a blanket rule or statute closing all such testimony"); *see also Kovaleski*, 103 So.3d at 863 (Pariente, J., concurring) ("[T]here must be an individualized determination.").

Prong 2: "No Broader Than Necessary" To Protect The Interest. The Florida Supreme Court perceived this prong of *Waller* was met by the statute because a "number of people . . . are explicitly allowed to remain in the courtroom." *Kovaleski*, 103 So.3d at 861. That

some people remain in the courtroom *may* mean a closure is narrowly tailored, but that inquiry necessarily depends on the interest and its application in a particular case. "Broad and general" assertions cannot "purport to justify closure." *Waller*, 467 U.S. at 48. As this Court held in *Globe Newspaper Co.*, "requiring the trial court to determine on a case-by-case basis whether" the interests asserted "necessitates closure . . . ensures that the constitutional right of the press and public to gain access to criminal trials" will not be unnecessarily restricted. 457 U.S. at 609; *see also id.* (holding mandatory closure rule "cannot be viewed as a narrowly tailored means of accommodating the State's asserted interest"); *Kovaleski*, 103 So.3d at 863 (Pariente, J., concurring) ("[T]he application of section 918.16 without conducting a *Waller* inquiry and making individualized findings can result in the unjustified exclusion of individuals or an overly broad closure of the courtroom."). An all-purpose deference to the legislature's choices regarding who gets to stay and who has to leave—and when—is the antithesis of tailoring a closure to the particular case, the touchstone of *Waller* and *Globe Newspaper Co.*

Prong 3: Consideration of "Reasonable Alternatives." Similar to its reasoning on prong 2, the Florida Supreme Court concluded that allowing some people to remain in the courtroom during the victim's testimony "provides for the most reasonable alternative to closing the courtroom during trial." *Kovaleski*, 103 So.3d at 861. This reasoning is dizzyingly circular. It is also wrong under this Court's precedent.

Courts must consider alternatives *to the closure in question*. *See, e.g.*, *Globe Newspaper Co.*, 457 U.S. at 609 (holding mandatory-closure rule unconstitutional

because "[i]f the trial court had been permitted to exercise its discretion, closure might well have been deemed unnecessary"); *Waller*, 467 U.S. at 48 ("[T]he trial court must consider reasonable alternatives to closing the proceeding."); *Press-Enterprise*, 464 U.S. at 511 (holding public-trial right violated where the court "failed to consider whether alternatives were available to protect the interests of the prospective jurors"). Courts must consider alternatives even in the face of a statute allowing for closure, *Globe Newspaper Co.*, 457 U.S. at 610-611 & n.27, even with interests that may counsel in favor of *some form* of closure, *Press-Enterprise*, 464 U.S. at 511, and even "absent an opposing party's proffer of . . . alternatives," *Presley*, 558 U.S. at 214. "Simply put, the statute cannot satisfy the requirement[] for the trial court to consider reasonable alternatives . . . in each case." *Kovaleski*, 103 So.3d at 863 (Pariente, J., concurring).

Prong 4: "Adequate Findings." Waller requires courts to put findings with regard to prongs one through three on the record. The Florida Supreme Court believed this requirement met as long as trial courts "ensure that the statute is in fact applicable to the case before them and is properly applied," and makes those determinations on the record. *Kovaleski*, 103 So.3d at 861. Under this interpretation, the "findings" trial courts make, then, relate to the applicability of the statute, not the substantive prongs of the *Waller* test. But these are not the "findings" the constitution demands, which must be entered to allow "a reviewing court [to] determine whether the closure was properly entered," consistent with the First and Sixth Amendments. *Waller*, 467 U.S. at 45 (quoting *Press-Enterprise*, 464 U.S. at 510).

In petitioner's case, the only "findings" entered related to the applicability of the statute, not the *Waller* test. The complaining witness asked that the courtroom be closed, Pet. App. 21a, and the State referred the court to § 918.16(2), Pet. App. 23a-25a. After the court concluded that petitioner's ex-wife wasn't excepted from application of the statute, the court excluded her from the courtroom. Pet. App. 25a-26a. The court undertook no consideration of the *Waller* factors, and made no on-the-record findings beyond that the closure statute applied.

III. The Public-Trial Right, Enshrined In The First And Sixth Amendments, Is A Structural Right Of Paramount Importance.

1. The public-trial right is one of the most fundamental and inviolable rights afforded by the Constitution. *In re Oliver*, 333 U.S. 257, 266-67 (1948); *Globe Newspaper Co.*, 457 U.S. at 605. It was born out of the "traditional Anglo-American distrust for secret trials" ascribed to "practice[s] by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the lettre de cachet." *In re Oliver*, 333 U.S. at 268-69 (footnotes omitted); *see also Press-Enterprise*, 464 U.S. at 505 ("The roots of open trials reach back to the days before the Norman Conquest.").

The presumption of courtroom openness has been "so solidly grounded" that—when this Court first applied the public-trial right to State criminal proceedings in *In re Oliver*, 333 U.S. 257 (1948)—there were no identifiable instances of closed criminal trials "in any federal, state, or municipal court during the history of this country." *Globe Newspaper Co.*, 457 U.S.

at 605. Yet decisions like those of the Florida Supreme Court threaten the core of this right, which exists to prevent government overreach and protect public confidence in the criminal justice system.

2. The sanctity of the right owes itself to the critical role it plays in ensuring fair criminal prosecutions, and instilling public confidence in the judicial process. At its core, the public-trial right is an accountability mechanism and "has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution." *In re Oliver*, 333 U.S. at 270. A defendant has the right to keep trials open so "that the public may see he is fairly dealt with and not unjustly condemned" and "keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." *Id.* at 270 n.25.

The right also carries significant benefits for the criminal justice system writ large. Keeping the courtroom open "encourages witnesses to come forward," regardless of which side they support, thus helping judges and juries ascertain the truth of disputed charges. *Waller*, 467 U.S. at 46. It also "discourages perjury" by adding an additional layer of accountability to judicial proceedings. *Id.* "Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise*, 464 U.S. at 508. In sum, "[p]ublic scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole." *Globe Newspaper Co.*, 457 U.S. at 606.

3. It is for these reasons that violations of the public-trial right are deemed structural errors, and cannot be subjected to harmless error review. *See Waller*, 467 U.S. at 49 n.9; *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). Consistent with the centrality of the public-trial right, this Court has also taken the step of summarily reversing a state court's decision to allow a courtroom to be closed without conducting the *Waller* analysis. *Presley*, 558 U.S. 209.

In short, the "central aim of a criminal proceeding must be to try the accused fairly," and this Court's cases "have uniformly recognized the public-trial guarantee" as a key mechanism serving that purpose. *Waller*, 467 U.S. at 46 (citing *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 380 (1979)).

IV. This Case Is The Ideal Vehicle To Address This Issue.

This case presents a clean vehicle for this Court to decide whether a State's closure statute can override the Constitution's procedural protections outlined in *Waller* and reflected in *Globe Newspaper Co.*

1. The Sixth Amendment public-trial issue was asserted by petitioner's counsel at every level of this case.

Unlike in other petitions this Court has denied raising public-trial right issues, petitioner's trial counsel objected to the courtroom closure immediately (and repeatedly), and on Sixth Amendment grounds, preserving the issue for future review. Pet. App. 21a,

24a-25a.[10] The trial court addressed the closure question directly, and the singular basis for its determination that the courtroom should be closed—essentially, just the existence of Florida's courtroom closure statute—was also made on the record that is now before this Court. Pet. App. 24a-25a. Petitioner then appealed the issue to the intermediate appellate State court, which affirmed petitioner's conviction on the basis of *Kovaleski*. And although petitioner asked the Florida Supreme Court to reconsider *Kovaleski*, it declined to exercise jurisdiction over his petition. Pet. App. 1a.

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[10] *See, e.g.*, Brief in Opposition, *Cruz v. United States*, No. 20-1523 (U.S. July 2021), 2021 WL 3371292, at *6 ("On appeal, petitioners asserted for the first time that the district court's order closing the courtroom during jury selection violated their right to a public trial."); Petition for Certiorari, *Hawkins v. Inch*, 139 S. Ct. 1305 (2019) (No. 18-1021), 2019 WL 461555, at *6 (petitioner failed to object to courtroom closure at trial); Brief in Opposition, *Stackhouse v. Colorado*, 136 S. Ct. 1513 (2016) (No. 15-550), 2016 WL 324292, at *i ("When a trial court announces during jury selection that anyone not in the jury pool must leave the courtroom, does a criminal defendant waive his Sixth Amendment right to a public trial by not objecting to the closure, where state law clearly required an objection to preserve the argument for appeal?"); Petition for Certiorari, *LaChance v. Massachusetts*, 136 S. Ct. 317 (2015) (14-1153), 2015 WL 1303222, at *3 ("Petitioner's trial counsel stated that he failed to object to the courtroom closure . . . . Petitioner's appellate counsel also failed to raise the courtroom closure issue on the direct appeal of his conviction."); Petition for Certiorari, *Boshears v. Massachusetts*, 135 S. Ct. 2390 (2015) (14-1282), 2015 WL 1870362, at *8 (petitioner failed to raise public-trial claim at trial or on direct appeal); Brief in Opposition, *Momah v. Washington*, 562 U.S. 837 (2010) (No. 09-1500), 2010 WL 3427703, at *6 (petitioner "affirmatively assented to the closure").

This Court has found the preservation of public-trial right issues to be of great significance to its analysis. In *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), for example, the Court explained that "when a defendant objects to a courtroom closure, the trial court can either order the courtroom opened or explain the reasons for keeping it closed." *Id.* at 1912; *see also id.* at 1909 (distinguishing facts in *Weaver* from those in *Presley v. Georgia*, writing that "[u]nlike [in *Weaver*], however, there was a trial objection to the closure"). In other words, the objection to the courtroom closure at trial and the discussion on the record perfectly position this case for review because those procedural necessities established a record that goes directly to the resolution of the public-trial-violation question presented.

2. Relatedly, this case is also a clean vehicle because the Sixth Amendment public-trial right question at issue here comes to the Court on direct review rather than via post-conviction proceedings—the posture of most public-trial right petitions. Unlike in *Weaver*, for instance, there is no need to measure the courtroom closure against the *Strickland* factors. 137 S. Ct. at 1911. And unlike in other, recently-denied petitions seeking to invalidate a conviction on habeas review,[11] this Court need not evaluate whether the de-

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[11] *See, e.g.*, Petition for Certiorari, *Robinson v. Drummond*, 134 S. Ct. 1934 (2014) (No. 13-496), 2013 WL 5666609, at *i ("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')."); Petition for Certiorari, *Sherry v. Johnson*, 131 S.

cision below was "contrary to, or involved an unreasonable application of, clearly established federal law," 28 U.S.C. § 2254(d), under the "highly deferential" AEDPA standard. *Smith v. Titus*, 141 S. Ct. 982, 984 n.3 (2021) (Sotomayor, J., dissenting from denial of certiorari) (quoting *Smith v. Smith*, No. 17-cv-673, 2018 WL 3696601, *10 (D. Minn. Aug. 3, 2018)).

3. Unlike other petitions to this Court raising public-trial right issues, the practical effect of the closure in this case is not speculative. One recent petition taking up a courtroom-closure question urged this Court to decide the issue in a case "where reversal *would* have been required if the defendant had been able to identify a particular spectator who was excluded." Petition for Certiorari, *Salazar v. Missouri*, 134 S. Ct. 2875 (2014) (No. 13-1166), 2014 WL 1230974, at *14; *see also* Petition for Certiorari, *Barkmeyer v. Rhode Island*, 129 S. Ct. 740 (2008) (No. 08-572), 2008 WL 4757429, at *i (asking whether a defendant "bear[s] the burden of demonstrating prejudice by establishing on the record who was actually prevented from attending the trial to establish a Sixth Amendment violation of the right to a public trial"). No such guesswork would be necessary in this case because someone—petitioner's ex-wife—was *actually* singled out and excluded from the courtroom during the complaining witness's testimony. *See also Presley*, 558

Ct. 87 (2010) (No. 09-1342), 2010 WL 1789705, at *i (habeas petition); Petition for Certiorari, *Gibbons v. Savage*, 130 S. Ct. 61 (2009) (No. 08-1310), 2009 WL 1114636, at *2-3 (same); Petition for Certiorari, *LaChance*, 136 S. Ct. 317, 2015 WL 1303222 (state habeas).

U.S. at 210 (noting exclusion of "lone courtroom observer," who turned out to be the defendant's uncle).

Nor need the Court speculate as to how this would have played out in a different jurisdiction. Because petitioner's criminal trial occurred in Florida, the mandatory courtroom closure statute was allowed to trump petitioner's Sixth Amendment rights under *Waller*. Had he lived across the border in neighboring Alabama, on the other hand, he would be entitled to a *Waller* hearing and on-the-record findings before a courtroom closure, notwithstanding a state closure statute. *See supra* at 11.

4. That the closure at issue occurred during the testimony of the key witness during petitioner's criminal trial makes this case a suitable vehicle to address *Waller*'s requirements. Unlike some other recent petitions on the Sixth Amendment public-trial right, *see, e.g.*, *Smith*, 141 S. Ct. at 984-85 (Sotomayor, J., dissenting from denial of certiorari) (closure during pretrial evidentiary hearing); Petition for Certiorari, *Jordan v. New York*, 138 S. Ct. 481 (2017) (No. 17-487), 2017 WL 4404972, at 2 (closure for discussions between counsel and the court), this Court would not need to extend the reach of this Court's courtroom-closure jurisprudence to decide this case, because the Court's existing decisions clearly contemplate the public-trial right applying during a key witness's testimony at trial. *Presley*, 558 U.S. at 212-13 (outlining Court's prior public-trial decisions).

5. Finally, it bears mentioning that this is an easy case. There is no question that "*Waller* and [*Globe Newspaper Co.*] straightforwardly govern the court-

room closure at issue." *Smith*, 141 S. Ct. at 985 (Sotomayor, J., dissenting from denial of certiorari). The *Waller* factors demand that trial courts consider whether the facts and circumstances of a particular case support a courtroom closure, and put related findings on the record. And in *Globe Newspaper Co.*, this Court held unconstitutional a mandatory courtroom closure rule very similar to the one here. Those decisions resolve this case, in which the Florida statute was the sole and dispositive basis for the closure in question.

* * *

For the foregoing reasons, this case presents the ideal vehicle for this Court to resolve this important question, on which there exists a live split of authority. In the alternative, because the decisions below are so blatantly wrong under *Waller* and *Globe Newspaper Co.*, this Court should summarily reverse. *See Presley*, 558 U.S. 209.

In either case, the decision below cannot stand. If *Kovaleski* remains the law, *Waller* will be a dead letter anytime the defendant's accuser takes the stand in a case involving a sex offense in the third most populous state in the Nation.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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