No. 22-6190

IN THE

Supreme Court of the United States

KEVIN PATRICK MALLORY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

REPLY BRIEF OF PETITIONER

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INTRODUCTION

Without applying the four-part constitutional test set forth in *Waller v. Georgia*, the district court excluded a "binder" of public-source defense evidence from public view and precluded verbal testimony or argument about the contents of that evidence at trial. Yet the *Waller* test applies to "any closure," 467 U.S. 39, 47 (1984), and distinct closures require "individualized determinations" which are "*always* required before the right of access may be denied." *Globe Newspaper Co. v. Superior Ct. for Norfolk Cnty.*, 457 U.S. 596, 609 n.20 (1982) (emphasis in original); *accord Blades v. United States*, 200 A.3d 230, 249-250 (D.C. 2019) (Beckwith, J., dissenting).

The government's principal argument against certiorari—that "the lower courts determined that petitioner could not prevail even under 'the more stringent *Waller* test,'" Br. in Opp. 14-15—misstates the record. True, the trial court issued a pretrial ruling applying the four-part *Waller* test with respect to *other* evidence, namely a "limited number of classified documents." *United States v. Mallory*, 572 F. Supp. 3d 225, 236-237 (E.D. Va. 2020). That ruling shielded those documents from public view but also authorized the "public to see redacted copies," and explicitly stated that Petitioner in open court would "be given latitude to cross-examine witnesses using *items in the public record* to show that the information contained in the [classified] documents is widely known and not a closely-held government secret." *Id.* at 236-237 (emphasis added); *see also* C.A.C.J.A. 109-110 (rejecting government's motion to reconsider ruling that the defense's publicly available evidence would be admitted publicly in open court).

But the trial court reversed itself at trial in a sealed side-bar[1] with respect to Petitioner's public-source evidence on a single ground: that introduction of the "public-source documents 'in open court … would allow people to connect the dots' and would thus be likely to 'disclose [the] classified information' that the court had previously determined had to be protected" from disclosure. Pet. App. 12a, 40 F.4th 166, 177 (4th Cir. 2022). The Fourth Circuit then affirmed the trial court's ruling in what it characterized as at most a "partial closure" based upon the "government's compelling interest in preventing the disclosure of classified information." *Id.*

If excluding admitted evidence from public view at a trial in which the courtroom remains open constitutes a closure subject to the four-part test set forth in *Waller v. Georgia*, this Court's precedents make clear that identifying an overriding interest by itself is not sufficient to justify the closure. "[E]ven assuming, arguendo, that the trial court ha[s] an overriding interest in [a closure], it [is] still incumbent upon it to consider all reasonable alternatives to closure." *Presley v. Georgia*, 558 U.S. 209, 216 (2010) (per curiam). If it does not consider alternatives, closure isn't permitted. *Id.*; *Press-Enter. Co. v. Superior Ct. of California, Riverside Cnty.*, 464 U.S. 501, 511 (1984) ("Absent consideration of alternatives to closure, the trial court could not constitutionally close [the court]").

Distinct closures, in other words, require an individualized assessment under the *Waller* test. Just as a closure may be necessary during court testimony by some

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[1] *Cf.* "[F]or a case-by-case approach to be meaningful, representatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion.'" *Globe Newspaper Co. v. Superior Ct. for Norfolk Cnty.*, 457 U.S. 596, 609 n.25 (1982).

minors, but unnecessary for a minor victim whose name is "already in the public record" and who is "willing to testify despite the presence of the press," *Globe Newspaper Co.*, 457 U.S. at 609, barring public disclosure of trial evidence that is *already* in the public record due to *government publication* cannot be justified without applying the four-part constitutional test. *See Press-Enter. Co.*, 464 U.S. at 511. Accordingly, if this Court were to hold that the four-part *Waller* test applies to closures in which the court materially obstructs the public's ability to see or understand evidence or a proceeding, Petitioner's conviction would have to be vacated.

The government does not otherwise deny the existence of an enduring split among lower courts regarding the proper legal standard required to partially limit public access to trial testimony and evidence. And its primary argument against granting certiorari—that this case does not involve the question about what constitutional standard applies to partial closures—is false. Just the opposite, this case is an ideal vehicle to resolve the important and recurring question presented. This Court should grant the petition.

I. The Fourth Circuit Applied a Single-Factor Test to Affirm the District Court's Exclusion of Defense Evidence From Public View.

The Fourth Circuit affirmed the exclusion of admitted defense evidence from public view on a single ground: that introduction of the "public-source documents 'in open court … would allow people to connect the dots' and would thus be likely to 'disclose [the] classified information' that the court had previously determined had to be protected" from disclosure. Pet. App. 12a, 40 F.4th at 177. Specifically, the Fourth

Circuit held that "the district court's pretrial findings regarding the need to limit the public's access to the classified exhibits were adequate to support the extension of [the closure] to the defendant's open-source exhibits" in light of the "compelling interest in preventing the disclosure of the classified information at issue." Pet. App. 12a, 40 F.4th at 177.

Although "the district court *did* apply the more stringent *Waller* test" before trial to "a limited number of classified documents," *id.*; *Mallory*, 572 F. Supp. 3d at 236-237, that pretrial ruling not only distinguished the classified documents at issue from the defense's publicly available evidence, it *explicitly authorized* the defense to "cross-examine witnesses using items in the public record" for the purpose of demonstrating that the classified information was not closely-held and its disclosure therefore would not violate the Espionage Act. *Mallory*, 572 F. Supp. 3d at 236-237.

There was certainly no "specific" explanation as to how the compelling interest "would be infringed" by disclosure of *publicly available* documents at trial, or "what portions" of the public source documents "might infringe" that interest, *Waller*, 467 U.S. at 48, and no "individualized determination" as to potential alternatives or how to narrowly tailor the ruling as to the defense evidence. *Globe Newspaper Co.*, 457 U.S. at 609 n.20. The public was permitted to view *redacted* copies of the classified evidence at trial, but the publicly available defense evidence remains locked in a SCIF[2] and entirely excluded from public view to this day.

[2] Sensitive Compartmented Information Facility.

Just as findings authorizing a closure during testimony by some minors may not justify closure as to other minors, *Globe Newspaper Co.*, 457 U.S. at 609, and limiting the public's ability to observe testimony by an undercover officer would not necessarily justify a closure during testimony by *non*-undercover officers, *cf. United States v. Lucas*, 932 F.2d 1210, 1217 (8th Cir. 1991), the trial court's application of the four-part *Waller* test to a "limited number of classified documents" is not the same as applying that four-part test to publicly available documents admitted at trial. The Fourth Circuit thus affirmed the exclusion of the defense evidence from public view based upon a single factor: a "compelling interest" in shielding other information from disclosure, without considering whether any option other than complete exclusion of the defense exhibits from public view would adequately serve that interest.

At bottom, the Fourth Circuit's opinion does not cite to any specific findings applying the four-part *Waller* test to the binder of defense evidence; nor could it have, because the district court neither reviewed the defense evidence before excluding it from public view nor made such findings. "As a result, the trial court's findings were broad and general, and did not purport to justify closure of the entire [binder of evidence]. The court did not consider alternatives to immediate closure of the entire [binder]" such as "directing the government to provide more detail about its need for closure, in camera if necessary, and closing only those parts of the [binder] that jeopardized the interests advanced." *Waller*, 467 U.S. at 48-49. As such, "[a] public-trial violation [] occur[ed] … simply because the trial court omit[ted] to make the proper findings before closing the courtroom, even if those findings might have been

fully supported by the evidence." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1909 (2017).

II. This Case Presents an Important Question Over Which Lower Courts Are Split Regarding a Fundamental Constitutional Right.

The Fourth Circuit's ruling is both an example and a reflection of the confusion among lower courts as to what test is required in cases involving "partial" closures. Indeed, the Fourth Circuit stated that the district court's ruling as to the defense evidence was "much more analogous to a partial closure, rather than a full one, suggesting that a 'less demanding test' than the one announced in *Waller* for total courtroom closures should apply." Pet. App. 12a, 40 F.4th at 177 (*quoting United States v. Osborne*, 68 F.3d 94, 98 (5th Cir. 1995)). As noted in the petition, the Fifth and the Eleventh Circuits authorize "partial closures" based on a "substantial reason" alone. Pet. 16-17. Moreover, the Fourth Circuit affirmed the exclusion of defense evidence from public view in this case based upon a single *Waller* factor: the government's "compelling interest in preventing the disclosure of classified information." Pet. App. 12a, 40 F.4th at 177.

Other courts, now including the Supreme Court of Wyoming, apply the four-part *Waller* test to "partial closures." Pet. 14-18 (collecting cases); *Tarpey v. State*, 523 P.3d 916, 929-930 (Wyo. 2023) (affirming trial court's application of four-part *Waller* test to permit audio-only broadcast of trial during pandemic). The Fourth Circuit's determination that an individualized application of the four-part *Waller* test was not required to exclude defense evidence from public view is a reason to grant certiorari, to resolve the disagreement among the lower courts in the context of

partial closures; it is not, as the government contends, a "case-specific application of the *Waller* standard." Br. in Opp. 15.

The government's argument that other cases involve interests other than national security to support a closure is immaterial. As the government notes, a national security interest in protecting against the disclosure of classified information can constitute an "overriding interest" for purposes of the *Waller* test. Br. in Opp. 13. But an overriding interest of whatever variety, without more, is not enough to justify a closure. For example, "safeguarding the physical and psychological well-being of a minor," as the Court held in *Globe Newspaper Co.*, "is a compelling [basis to support a closure]." 457 U.S. at 607. Yes courts are still required to apply the other *Waller* factors before authorizing a closure during testimony by a minor. *Id.* In other words, "even assuming, arguendo, that the trial court ha[s] an overriding interest in [a closure], it [is] still incumbent upon it to consider all reasonable alternatives to closure." *Presley v. Georgia*, 558 U.S. 209, 216 (2010) (per curiam).

Nor does it necessarily matter *how* courts materially restrict the public's ability to observe and understand court proceedings, either through use of a white noise machine, *In re Petitions of Memphis Pub. Co.*, 887 F.2d 646, 648 (6th Cir. 1989), by barring counsel "from eliciting *verbal testimony* on the contents" of admitted evidence and preventing the public from seeing such evidence, Pet. App. 13a, 40 F.4th at 178 (emphasis in original), or limiting the public to audio-only access to court proceedings, *United States v. Allen*, 34 F.4th 789 (9th Cir. 2022); *Tarpey*, 523 P.3d at 929-930. As explained in the petition and ignored by the government, in the absence of application of the four-part *Waller* test, such measures infringe upon the centuries-

old structural right to a public trial guaranteed by the Sixth Amendment. Pet. 9-11. The effect of such distinctions on the constitutional inquiry, if any, is a question for the merits stage, not a reason to deny review.

Finally, the government wrongly asserts that Petitioner's Sixth Amendment claim depends upon the "fact-bound dispute" over whether "his defense was [] valid," such that the lower courts "impeded the public itself from judging whether the documents that petitioner sent to the Chinese government" contained national defense information. Br. in Opp. 18. Violations of the public trial right are structural, so whether Petitioner could show harm from the exclusion of defense evidence from public view is irrelevant to the validity of his claim. *See Waller*, 467 U.S. at 49 & n.9.

That said, the lower courts' rationale for excluding the defense evidence from public view—that it contains information very similar to that contained in the classified documents at issue—*also* supports Petitioner's defense that there was no possible harm from disclosure of the two classified documents sent to a Chinese agent because the United States has already publicly revealed that information. *See Gorin v. United States*, 312 U.S. 19, 28 (1941). It likewise undercuts the conclusion that a compelling interest supported closure as to those classified documents, given the public availability of the same information. But again, that's neither here nor there with respect to the question presented in the petition as to what constitutional standard is required to materially restrict the public's ability to perceive trial evidence or proceedings.

III. This Case Is an Exemplary Vehicle to Resolve Whether *Waller's* Four-Part Test Applies to Partial Closures.

The legal question presented in this case is straight-forward, and the following facts are clear: Petitioner argued before the district court and the Fourth Circuit that the Sixth Amendment requires application of *Waller*'s four-part test before the district court may restrict the public's ability to see or understand evidence admitted at trial, even when the courtroom doors remain open.

Agreeing that *Waller* applied to partial restrictions on the public's ability to understand admitted evidence, the district court applied *Waller*'s four-part test to "a limited number of classified documents" while expressly guaranteeing Petitioner's ability to use publicly available government-published documents in his defense. But at trial, without applying *Waller's* four-part test, the court nonetheless precluded the public from being able to see or understand Petitioner's evidence. The Fourth Circuit then affirmed the district court's ruling on the ground that the government's interest in preventing disclosure of classified information was sufficient to exclude Petitioner's evidence from public view even without consideration of alternatives short of fully shielding evidence from the public.

This is not a case in which Petitioner failed to object to the closure at issue. *See, e.g., Tarpey*, 523 P.3d at 930-931 (holding in the alternative that defendant forfeited public trial claim by failing to object). Nor is this a case on collateral review in which Petitioner might be required to make a showing of prejudice. *See Weaver*, 137 S. Ct. at 1910-1913 (requiring on collateral review claim of ineffective assistance based on denial of structural right to public trial to make showing of prejudice). Nor

is this a case involving an ancillary hearing at which the Sixth Amendment public trial right might not apply.

If material limitations on the public's ability to see or understand trial evidence constitutes a closure, and the Sixth Amendment requires application of *Waller*'s four-part test to justify such a closure, structural error occurred in this case. Alternatively, if judicially-imposed restrictions on the public's ability to perceive evidence or proceedings does not constitute a closure, or such restrictions are justifiable based solely upon a compelling reason, no such error likely occurred. This case squarely presents the question of what constitutional standard applies to "partial closures," and thereby permits this Court to resolve these important questions on a recurring issue dividing the lower courts.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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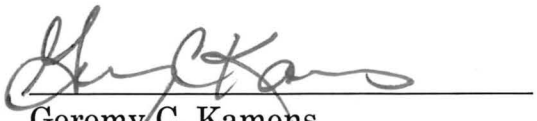

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