No. 19-1214

In the Supreme Court of the United States

MARTY FRIEND,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

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

PETITIONER'S REPLY BRIEF

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REPLY

Respondent may nominally oppose certiorari review, but it actually makes a great case for a grant. Respondent utters not a word to undermine the nationwide scope and critical importance of the Question Presented—which as Amicus recognizes, concerns issues striking at the "heart of our adversarial system," and that are "of great practical importance to criminal defendants, especially in child abuse cases." *Br. of Amicus Curie Nat'l Ass'n of Crim. Defense Lawyers* 2, 3. Instead, Respondent raises the stakes still higher, emphasizing the "'transcendent importance'" of statutory privileges like Indiana's in protecting the privacy of those seeking mental health treatment, making it all the more critical to ensure the constitutional standards governing access to records of that treatment are properly calibrated. Opp. 1 (quoting *Jaffee* v. *Redmond*, 518 U.S. 1, 11 (1996)).

Respondent also devotes no space to defending the merits of Indiana's position that the accused's constitutional right of access to privileged records can be conditioned upon an unjustified, atextual, and unprecedented balancing "framework," Opp. 2, that courts recognize to make "mental health privileges virtually impenetrable," *State* v. *Fay*, 167 A.3d 897, 907 (Conn. 2017)—properly conceding that position to be indefensible. Respondent then digs deeper by calling it a "straightforward application" of that "framework," Opp. 2, to hold that Friend has *no* constitutional right to records in private hands, even when they are covered under privileges that are far less than "absolute"—although that pushes Indiana headlong into direct conflict with *Pennsylvania* v. *Ritchie*, 480 U.S. 39 (1987) and the overwhelming majority of other courts, Pet. 17-24. And Respondent's half-hearted attempt to

shave off even *one* of the 33 jurisdictions caught up in that intractable divide falls completely flat. Basically, Respondent is not even trying to challenge whether the criterion of certworthiness are met here.

Yet Respondent still says it is "premature" for the Court to address the conflicts that have festered in the three decades since *Ritchie* was decided, grasping for complaints about the breadth of the Question Presented, Friend's "litigation choices," and his ability to meet the threshold standard for obtaining *in camera* review, simply to have things to complain about. Opp. 3.

But even these makeweight arguments ultimately cut *in favor* of review. The Question Presented is broad because it must be broad and concerns constitutional problems that should be addressed broadly. Friend has done everything necessary to preserve the issue for this Court's resolution. And Friend makes as strong a case as can be made that A.F.'s counseling records contain evidence that could exonerate him: He *knows* those records contain an assessment that she suffered a mental-health condition that would impact her ability to accurately relate the circumstances of her alleged abuse. He just does not know how that assessment came out—and circumstances suggest it came out positive. Accordingly, if this case cannot serve as an appropriate vehicle to address the intractable conflicts on the Question Presented, then no case can, and the Question must go unresolved forever. It is likely for these very reasons that the U.S. Justice Department declined to file its own challenge to the Eighth Circuit's decision in *United States* v. *Arias*, 936 F.3d 793 (8th Cir. 2019), content to have this case be the vehicle to resolve the split it too has identified, Pet. 29-30. The Court

should take up the Government's invitation. The petition should be granted.

A. The Question Presented is appropriately defined and its resolution is straightforward.

1. Respondent complains about the breadth of the Question Presented, Opp. 7, even as it inexplicably narrows it by stripping out *two* of the three constitutional rights in play, *id.* at 3, 11 (wrongfully claiming the case implicates only "due process"). Yet despite what Respondent insists, the Question is appropriately defined and straightforwardly resolved.

The Question's boundaries are readily identifiable. It pertains only to certain kinds of privileged records—those of "doctors, psychotherapists, or counselors"—and only those held or generated by "private" persons, not governmental agencies. Pet. i. And the only "circumstances" referenced in the Question are legal: the impact, if any, of a privilege's features on the right of access, and the threshold showing necessary for obtaining *in camera* review. Those are the only variables. And while the Court's resolution of these subsidiary issues will inevitably be applied in innumerable "factual scenarios," that hardly makes resolving them a hopeless task. After all, any request for privileged materials in private hands must pass through the two gates mentioned above. Accordingly, the Court will face no special difficulty in formulating a "universal rule" to govern all those factual scenarios, and there is not the least bit of confusion about "which issue the Court would be addressing." Opp. 7.

Nor, for that matter, is there any confusion about Petitioner's position on those issues. It is entirely consistent for Petitioner to claim that Indiana has "fail[ed] to follow"

Ritchie in certain ways—at least insofar as its actual *holdings* are concerned—and to criticize it for following "the plurality opinion in *Ritchie*" on other issues. *Ibid.* One is the law. The other is not.

2. The only complexity in this case arises from the fact that it implicates three distinct constitutional rights. But there is nothing "hodge-podge" about considering those rights together in a single case. *Ibid.* Each is plainly implicated on this case's facts, and they are intrinsically intertwined—collectively representing *all* of the constitutional rights governing the accused's access to information in aid of the defense, each with its distinctive contours and scope. Any complete answer to the question of whether a defendant can access privileged treatment records must account for *all* of them. And in addressing the applicability of these rights, the Court has the benefit of lower court decisions that have fully fleshed out their application along lines already drawn in *Ritchie*—the benefit of a mature, fully percolated split. Accordingly, resolving these issues will hardly prove an insurmountable task, and addressing them together actually *increases*, not decreases, the likelihood that this case will "result in * * * significant clarification of the law." Opp. 7. The Question's breadth is therefore a virtue, not a vice.

B. This is the perfect vehicle to address the Question Presented.

1. Respondent's opposition also illustrates why this case is the perfect vehicle to tackle the Question Presented. Respondent concedes the only evidence supporting Friend's conviction (on *one* count of molestation, Pet. App. 8a, not two, Opp. 2) came from A.F., *id.* 4, 5., making her credibility the case's core issue. And before this Court,

Respondent rehashes the same perverse strategy it pursued at trial: using A.F.'s "angry and difficult" behavior to bolster her credibility and corroborate the abuse allegations, while hiding behind the privilege to prevent Friend from challenging that credibility—by showing those behaviors were symptoms of RAD. *Id.* 4. Accordingly, Respondent only highlights how the unconstitutional imposition of the "client-counselor" privilege in this case led to injustice that only this Court can correct.

2. Having thus conceded that Friend's case is an attractive vehicle, Respondent can only raise new, never-before-identified procedural objections to Friend's constitutional claims in its exhaustive search for vehicle problems. None have merit. For instance, despite Friend's *four* requests for the privileged records, Pet. App. 32a-49a, Respondent claims for the first time that Friend's constitutional challenge is forfeited because he did not make a *fifth* during trial, Opp. 8. But nothing required Friend to make a gesture that the trial court had already indicated it would reject. Even Respondent admits that the court invited *in camera* review only of "*specifically offered evidence*," *ibid.* (emphasis added)—and having been denied access to A.F.'s counseling records, Friend had no evidence to "offer." In fact, the trial court gave Friend two—and only two—options for addressing RAD at trial in its final order addressing Friend's "repetitive" requests, Pet. App. 33a: elicit testimony "from A.F." or "testify [himself] as to those behaviors of A.F. which [he] has personal knowledge," Pet. 13 (citing Pet. App. 47a). Re-urging requests for A.F.'s counseling records was not among them. Nor, for that matter, were questioning A.F.'s counselor Creason, or her "adoptive mother K.F." regarding "any diagnosis," the "behaviors" they "observed" or

"statements A.F. made" during counseling sessions, Opp. 8—and much of that material would have been privileged in any event. Finally, there is *no way* the trial court would have allowed A.F. *herself* to be questioned about those privileged counseling sessions (*ibid.*) when it refused Friend's attempts to develop evidence of her RAD symptoms with evidence from *outside* those counseling sessions. Respondent's hypotheticals are thus unavailing—as is its speculation about how the Indiana Supreme Court might have handled them, especially when Respondent itself insists Indiana treats all requests for mental health treatment records under the same, defendant-fatal test.

In any event, Friend's constitutional rights to access privileged records extend to pretrial access *regardless* of whether access is requested at trial—that much is clear from *Ritchie* itself. And despite what Respondent suggests, the divide among 33 circuits and states is not over whether requests must be made "at trial" versus "pretrial." *Ibid.* (emphasis and quotations omitted). The true division is between those allowing the defendant "*some* form of pretrial discovery" of a "witness's mental health treatment records" and those that do not—or condition such access based on the nature of the privilege or the person holding the records. *Commonwealth* v. *Barroso*, 122 S.W.3d 554, 561 (Ky. 2003) (emphasis added). In contending otherwise, Respondent is forced to cherry pick among the 33 cases Petitioner has advanced to focus on the way a single court framed the split. Opp. 8 (citing *State* v. *Johnson*, 102 A.3d 295 (Md. 2014)). But that framing is incomplete, which is why Respondent can only muster a single decision making the pretrial/trial distinction: *Goldsmith* v. *State*, 651 A.2d 866 (Md. 1995). See Opp. 8. Even *Barroso*, which Respondent also cites (*ibid.*), involves "pretrial

access." 122 S.W.3d at 569-561. And Respondent's lone supporting authority, *Goldsmith*, is dead wrong: as Petitioner has explained, and Respondent cannot refute, honoring only requests made during trial is jurisprudentially wrongheaded and unfairly requires the accused to formulate defense strategy, and start trial, without knowing whether he will have the evidence that could exonerate him—or knowing what it will say. Pet. 26. Accordingly, Respondent cannot cut out even a small sliver of the split—or suggest Friend's case somehow lies outside it. Respondent simply makes it even more imperative for the Court to grant review and sweep away *Goldsmith*'s flawed outlier approach along with the rest of the decisions in the minority.

3. Nor is the Court's ability to address the constitutional merits of this case at all hampered by Respondent's second new-found objection—about the breadth of Friend's records requests. While it is true that Friend first requested "A.F.'s entire counseling file," Opp. 9, Respondent admits that the only information he seeks within that file is "exculpatory" information associated with A.F.'s RAD assessment, *id.* at 12; App. Vol. II. p. 109, 132. While it is true Friend continued to request the whole file in order to obtain this information, this was only because Friend did have enough information to request less—not having access to the file, he could not say where within it exculpatory material might be found. Friend reasonably expected *in camera* review to do that work. The breadth of Friend's request is therefore no obstacle to this Court's review.

4. Respondent's last attempt to identify a vehicle problem is its most desperate. Respondent blames Friend for not offering a narrowing construction that might have

saved the constitutional operation of Indiana's "counselor-client" privilege, Ind. Code § 25-23.6-6-1. It now insists—once again for the first time—that Friend should have argued that "the alleged diagnosis" of RAD fell outside the privilege, even if the remainder of the file did not. Opp. 10. But even if Friend's request was limited to the results of the assessment and did not encompass *all* of the exculpatory information in the file relating to it, Friend was not required to offer the court an opportunity to avoid a constitutional ruling—especially when one of the court's members seized that opportunity on his own. Justice Crone himself flagged the idea that the court should distinguish between "matters that A.F. communicated to Creason," which would be "specifically privileged," and "Creason's diagnosis of A.F." which he believed "is not." See Pet. App. 22a-23a. But the majority rejected that argument, insisting that *all* "the documents compiled during the course of A.F.'s one-on-one sessions with Creason are privileged." *Id.* 11a. Respondent fails to explain how this argument would have landed better coming from a convicted criminal rather than a colleague, just as it fails to explain why Friend was obliged to save the statute's constitutionality when Respondent itself declined to do so: It has consistently argued that *all* of A.F.'s "counseling records are privileged and not discoverable" as matters communicated to Creason in her official capacity as counselor." C.A. Br. 17, 18. Respondent's newly minted saving construction therefore cannot create a vehicle problem where none exists.

C. The resolution of the Question Presented will be dispositive.

1. Finally, the resolution of the Question Presented will be case-dispositive, and in suggesting otherwise,

Respondent is forced to set the bar so high that no criminal defendant could meet it. Respondent insists that Friend cannot obtain even *in camera* review of A.F.'s counseling records without evidence from which a court could "infer[] that A.F. had in fact received a RAD diagnosis," Opp. 11—thereby forcing Friend to prove what records he has never seen *will say* in order to obtain any chance to access them. But a majority of courts squarely reject that notion, as it "would effectively render [*in camera*] review superfluous, as the defendant essentially would have to obtain the information itself in order to meet his burden." *State* v. *Graham*, 702 A.2d 322, 326 (N.H. 1997). A majority instead requires only that the defendant demonstrate a "reasonable belief that the records contain exculpatory evidence." Opp. 11 (quoting *Barroso*, 122 S.W.3d 563-564). The standard is a subjective one—requiring only that the defendant be able to articulate reasonable reasons why *he believes* the records contain exculpatory evidence, not prove what the records will say.

2. That standard is certainly met here: Friend knows that the file contains the results of Creason's assessment of A.F. for RAD. He simply does not know, and cannot know, the results. Yet it is certainly reasonable for him to believe they contain an RAD diagnosis. After all, Creason's decision to assess A.F. for RAD is itself highly suggestive. Despite what Respondent insists, nothing suggests that the test was given as part of a "routine battery," which would make little sense for a diagnosis that should be made "with caution" and is one clinicians are "very reluctant" to make. Opp. 13 (internal quotation omitted). The only information about the testing came from A.F.'s mother K.F., who testified only that Creason "did a lot of different things to figure out what direction to take her

therapy * * * and RAD [testing] was one of them." Tr. Vol. III, p. 90. She did not opine—and could not opine—about whether this testing was "routine." Accordingly, all we know is Creason made a conscious decision to assess A.F. for RAD. And "[h]ealth care providers do not test for disorders they have no reason to think exist." Pet. App. 25a (Crone, J., dissenting) (internal quotation omitted).

There is other evidence aside from the assessment itself to support Friend's reasonable belief that the assessment would have come back positive—evidence Respondent completely overlooks: A.F.'s pattern of deceit, manipulation, physical and psychological abuse, and disturbed behavior at home and at school, which, together with the testimony offered by Friend's expert, Dr. Wingard, suggested A.F. had symptoms of RAD. Pet. 10-12. Friend's belief that A.F. has RAD is therefore far more than "speculation" offered as a pretext for a "fishing expedition." Opp. 2, 12.

3. Certainly, Friend was not required to obtain the other information Respondent would demand. It would be illogical, for example, to insist that Friend obtain testimony from Creason, *id.* 12, when Creason refused to testify and refused to provide Friend with *any* information about her RAD assessment. And what information Respondent demands would add little. Why, for example, would Friend have to provide evidence that "Creason had expressed concerns that AF *might* have RAD," *ibid.*—when the counselor was obviously concerned enough to assess her for the condition? Why must Friend determine whether Creason "referred A.F. to a psychiatrist or psychologist" when Creason felt confident conducting an assessment herself? *Ibid.* And why should Friend have to show what specialized "treatment" Creason provided A.F.

for RAD, when Respondent cannot explain what form that treatment would take aside from therapy? *Ibid.* Respondent cannot explain.

Friend also need not have demanded that Dr. Wingard opine on whether he thought A.F. had RAD. *id.* 12-13, which Dr. Wingard insisted he could not responsibly do without a personal examination that could not be required under Indiana law. Pet. 15 (citing *Easterday* v. *State*, 256 N.E.2d 901 (Ind. 1970)). Nor was Dr. Wingard required to opine on the conditions of a Russian orphanage he had never visited, based on records that were nearly a decade old, in order to demonstrate that the orphanage's conditions made A.F.'s a "high risk" adoption. Opp. 13. Yet there is nonetheless evidence that A.F.'s experience in the orphanage was harrowing, including that it was a chaotic place, that she was bullied, and that she experienced such food insecurity that she continued to hoard food even after the adoption. Tr. Vol II, p. 39; Vol. IV, p. 53, 56, 121. None of the information Respondent would demand is therefore necessary to make Friend's request reasonable.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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