

No. 25-999

IN THE
Supreme Court of the United States

BRANDON Z. MILLER,
Petitioner,

v.

UNITED STATES,
Respondent.

**On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Armed Forces**

REPLY BRIEF

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INTRODUCTION

The brief in opposition confirms that this case warrants review. It does not seriously dispute that there is an entrenched conflict among courts of last resort as to whether the Sixth Amendment's Public Trial Clause requires courts to make case-specific findings before closing rape-shield hearings to the public under *Waller v. Georgia*, 467 U.S. 39 (1984). BIO 5–6. And the decision by the Court of Appeals for the Armed Forces (CAAF) in petitioner's case, which held that M.R.E. 412 does not violate the Sixth Amendment even though it automatically closes such hearings in *all* cases, only deepens that split. *See* Pet. 16–17; Pet. App. 18a–22a (Maggs, J., dissenting).

Instead, the government's main basis for opposing certiorari is an argument it did not make below—that the Sixth Amendment doesn't apply to courts-martial *at all*. BIO 5–7. This argument squarely conflicts with a half-century of CAAF precedent. *See, e.g., United States v. Hershey*, 20 M.J. 433, 435–36 (C.M.A. 1985); *United States v. Grunden*, 2 M.J. 116, 120 (C.M.A. 1977). And in the specific context of the Public Trial Clause, it runs headlong into the deeply rooted historical tradition of public courts-martial. *See* Pet. 7 (citing WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 161–62 (2d ed. 1920)).

In any event, the government's new argument is a reason to *grant* certiorari, not to deny it. The Sixth Amendment's applicability to courts-martial is a cert.-worthy constitutional question all its own, and it would be grossly unfair to allow the government to repeatedly litigate the *scope* of the Sixth Amendment within the military justice system, only to regularly oppose certiorari by denying that it applies at all.

I. THE CAAF’S DECISION DEEPENS THE SPLIT AMONG COURTS OF LAST RESORT

The brief in opposition does not dispute that there is a well-developed (and longstanding) division among courts of last resort over whether the Public Trial Clause applies to rape-shield hearings—such that it requires courts to make case-specific findings before closing them under *Waller* and *Presley v. Georgia*, 558 U.S. 209 (2010) (per curiam). BIO 5–6. Instead, it attempts to minimize the divide by describing the split as a “narrow disagreement” among state courts applying “their individual rape-shield rules.” BIO 5.

Notably, the government does not deny that the CAAF’s decision now aligns the military’s highest court with the short side of that split. BIO 3–5. nor does it identify any differences *among* the state rape-shield laws that the conflicting decisions have construed. BIO 5–6. It’s not alone; none of the (now five) courts of last resort in the middle of this split has identified any material difference among the rape-shield rules at issue, either.

Instead, as the petition demonstrated, the division is both entrenched and outcome-determinative here. *Commonwealth v. Jones*, 37 N.E.3d 589 (Mass. 2015), *State v. Hoff*, 385 P.3d 945 (Mont. 2016), and *State v. Kelly*, 545 A.2d 1048 (Conn. 1988), each held that the Public Trial Clause applies to rape-shield hearings and thus forbids automatic closure. Pet. 13–15. *State v. Macbale*, 305 P.3d 107 (Or. 2013), held the opposite. Pet. 16. The CAAF has now aligned the military’s highest court with the minority view, and the government does not dispute either that the CAAF’s ruling puts it in the middle of this split, or that only this Court can (and should) resolve it.

Rather, the government makes a half-hearted attempt to dismiss the conflict because it arises under “individual rape-shield rules.” BIO 5. That’s beside the point. None of the state high courts (nor the CAAF) distinguished the closure rules at issue in these cases from each other; each addressed the same *federal* constitutional question under functionally identical rules governing the admissibility of comparable testimony relating to a complainant’s sexual history. The brief in opposition thus does nothing to rebut the petition’s central argument for granting certiorari—the need to resolve this split.

II. THE GOVERNMENT’S LATE-BREAKING SIXTH AMENDMENT ARGUMENT ONLY ENHANCES THE NEED FOR THIS COURT’S REVIEW

The government tries to deflect from the split by conjuring a vehicle objection—arguing that the Court should deny review because the Sixth Amendment “does not extend to courts-martial.” BIO 5. The government declined to press this argument below—and the CAAF has rejected it for decades. *See, e.g., Hershey*, 20 M.J. at 435–36; *Grunden*, 2 M.J. at 120. And the brief in opposition itself necessarily concedes that the government sandbagged the lower courts here—noting only that this Court’s “ability to consider that issue does not depend on the government objecting to the CAAF’s longstanding precedent.” BIO 7 (citations omitted). But the real problem with the government’s brand-new argument isn’t forfeiture; it’s that, both procedurally and substantively, the government’s claim only underscores why this Court’s plenary consideration is all the more *necessary*.

Taking the procedural point first, allowing the government to engage in this kind of bait-and-switch

creates deep unfairness not only to military defendants, but to the military justice system as a whole. If the government can litigate the scope of the Sixth Amendment in military courts and then successfully evade this Court's review by denying the Amendment's applicability in the first place, the result would be a perverse, one-way ratchet that insulates the military justice system from this Court's oversight on a range of recurring constitutional questions. No matter how much the CAAF misinterprets the Sixth Amendment (as Judge Maggs argued that it did here), those misinterpretations would be effectively insulated from this Court's review until and unless they were adverse to the government.

Equally important, the government's position would unsettle a half-century of precedent from the CAAF and provoke a genuine disagreement about the Constitution's reach in courts-martial—the kind of disagreement that only this Court can resolve. The opposition's hand-waving suggestion that, even if the Sixth Amendment applies, it might apply “only to a limited extent,” BIO 8, simply confirms the need for this Court's resolution: Unlike in *Rostker v. Goldberg*, 453 U.S. 57 (1981), the CAAF did not (and does not) interpret the Public Trial Clause to mean anything different in the military context than it does elsewhere—and it won't until and unless this Court holds otherwise.

To allow the government to successfully oppose certiorari on the ground that the Sixth Amendment does not apply to courts-martial is thus to endorse a “heads-we-win, tails-you-lose” scenario for the government on *all* Sixth Amendment claims arising out of military prosecutions. At the very least, this

Court shouldn't allow such blatant manipulation of its discretionary review power.

On the merits, the government's argument that the Sixth Amendment doesn't apply to courts-martial at all makes this case *more* important, not less. That's true not just because of the conflict it creates, but because the government's position is both wildly under-defended and substantively incorrect.

As the petition explained in detail, the CAAF and its predecessor have recognized a constitutional right to a public trial in courts-martial since 1956, *see United States v. Brown*, 22 C.M.R. 41 (C.M.A. 1956), and have expressly applied the Sixth Amendment's Public Trial Clause to courts-martial since 1977. *See Grunden*, 2 M.J. at 120. *Hershey* reaffirmed in 1985 that "without question, the sixth-amendment right to a public trial is applicable to courts-martial." 20 M.J. at 435–36. And *ABC, Inc. v. Powell* extended the right to Article 32 hearings—looking to this Court's civilian Sixth Amendment cases not merely as informative but as controlling. *See* 47 M.J. 363, 365 (C.A.A.F. 1997).

The decision below acknowledged this baseline, stating that there was "no dispute that the public trial right applies generally to courts-martial." Pet. App. 6a. And the brief in opposition expressly acknowledges that "the CAAF and its predecessor court have held that the Sixth Amendment's public-trial right generally applies to courts-martial." BIO 7 (citing *Hershey*, 20 M.J. at 435–36). Yet the government urges this Court not only to disregard that long-settled understanding, but to do so by *denying* certiorari—which would do nothing to resolve the conflict between these settled military precedents and the government's position.

What's more, one would search the brief in opposition in vain for any substantive argument for *why* the Sixth Amendment is wholly inapplicable to courts-martial; all the government offers are citations to authorities that don't even *address* that question—let alone settle it. See BIO 6–7. *Ex parte Quirin*, 317 U.S. 1 (1942), for example, dealt only with whether military commission defendants are protected by the Jury Trial Clause. See *id.* at 40–41. The same be said about *Whelchel v. McDonald*, 340 U.S. 122 (1950), which only confirmed that *Quirin's* Jury Trial Clause holding applies to courts-martial. *Id.* at 127.

And looking behind those citations, one of the key reasons *why Quirin* held that the Sixth Amendment Jury Trial Clause doesn't apply to military commissions is because the Fifth Amendment's Grand Jury Indictment Clause exempts "cases arising in the land or naval forces." U.S. CONST. amend. V. These overlapping provisions reflected the Founders' view that courts-martial were exempted from all facets of the jury-trial right, not a broader conclusion about the Sixth Amendment *en toto*. See, e.g., *Quirin*, 317 U.S. at 39 ("The Fifth and Sixth Amendments . . . did not enlarge the right to jury trial as it had been established by that Article.").

Moreover, as the government's own parenthetical makes clear (BIO 6–7), Justice Scalia's concurring opinion in *Davis v. United States*, 512 U.S. 452 (1994), was only *describing* the government's position that courts-martial fall entirely outside the Sixth Amendment; he wasn't endorsing it. *Id.* at 453 n.*. It is more than a little revealing when the government's best authority in support of its argument is an earlier

government brief making the same (never-adopted) argument.¹

The government’s Sixth Amendment argument is not just wanting for doctrinal support; it is also flatly inconsistent with a mountain of historical evidence. As the petition explained, public proceedings in courts-martial are not a modern judicial invention—they are an ancient norm. *See* Pet. 7–8. William Winthrop’s treatise records that, under the Carolingian kings, courts-martial “were held in the open air,” and that the Code of Gustavus Adolphus required criminal cases in courts-martial to be tried “under the blue skies,” a tradition of publicity that “[t]he modern practice has inherited.” WINTHROP, *supra*, at 161.

Even in the United States, public courts-martial under British law predate the founding. *See, e.g.*, Eugene M. Van Loan III, *The Jury, the Court-Martial, and the Constitution*, 57 CORNELL L. REV. 363, 380 (1972). And the English legal tradition of public courts-martial, from which the United States borrowed, dates back to at least 1643. *See* John M. Collins, *Hidden in Plain Sight: Martial Law and the Making of the High Courts of Justice, 1642–60*, 53 J. BRIT. STUD. 859, 868–69 (2014). The brief in

1. A similar flaw dooms the government’s invocation (BIO 5) of this Court’s denial of certiorari in *Hasan v. United States*, 145 S. Ct. 1470 (2025) (mem.). There, the question presented concerned the *remedy* for a violation of the Public Trial Clause—not whether the Clause applied in the first place. *See United States v. Hasan*, 84 M.J. 181, 202–07 (C.A.A.F. 2024). That petition did not implicate the split among courts of last resort that this one does. Nor did any of the other cert. denials the government string-cites at the end of its brief (BIO 12–13).

opposition makes no attempt to address—much less contest—this historical evidence.

Nor does the brief in opposition grapple with the dramatic evolution of courts-martial in the latter half of the twentieth century—away from executive branch disciplinary proceedings and toward the fully self-contained judicial system that this Court identified and endorsed in *Ortiz v. United States*, 585 U.S. 427, 431–32 (2018). Courts-martial today closely resemble civilian criminal trials in virtually every procedural and substantive respect—right down to the rape-shield hearings at the heart of this specific case.

The upshot is that, whatever else might be said about the government’s Sixth Amendment argument, it is *not* a reason to deny certiorari. It is either a red herring or it is a constitutional question worthy of this Court’s immediate, plenary consideration.

III. THIS CASE IS AN EXCELLENT VEHICLE FOR RESOLVING BOTH THE QUESTION PRESENTED AND THE GOVERNMENT’S NEW ARGUMENT

Finally, and contra the brief in opposition, this case is an excellent vehicle not only for resolving the government’s new Sixth Amendment claim, but also for resolving the question the petition actually presents. As the petition explained, the CAAF majority’s holding that M.R.E. 412 hearings don’t implicate the Public Trial Clause cannot be reconciled with this Court’s precedents. Pet. 21–23 (discussing *State v. Smith*, 876 N.W.2d 310, 343 (Minn. 2016) (Stras, J., concurring)).

Waller held that the Sixth Amendment’s public-trial right “extends beyond the actual proof at trial,” including to pretrial proceedings—such as

suppression hearings—that can carry trial-like significance. 467 U.S. at 44–47. *Presley* reinforced that openness is the rule and closure the exception—and that any closure requires case-specific findings, narrow tailoring, and consideration of reasonable alternatives. 558 U.S. at 213–14.

And as the petition noted (at 18), this Court reaffirmed the significance of case-specific judicial analysis in the Sixth Amendment context earlier this Term—summarily invalidating a categorical witness-screening rule in *Pitts v. Mississippi*, 607 U.S. 1 (2025) (per curiam), *because* it didn’t turn on any case-specific considerations. The brief in opposition has nothing to say about *Pitts*; it doesn’t even cite it.

M.R.E. 412 hearings squarely fit within that framework. They are adversarial proceedings before a judge in which sworn witnesses are called and counsel litigate the admissibility of evidence that may be central to the defense’s theory of the case. *See* Pet. 9–11. As Judge Maggs explained, the outcome of a rape-shield hearing, like that of a suppression hearing, often determines whether key evidence will reach the factfinder, Pet. App. 21a–22a (Maggs, J., dissenting). That’s why Massachusetts, Montana, and Connecticut have all concluded that the Public Trial Clause applies. *See Jones*, 37 N.E.3d at 604; *Hoff*, 385 P.3d at 949; *Kelly*, 545 A.2d at 1051–53.

The point is not, as the government claims, “to force a public hearing about the exact same victim-sexual-history information that [M.R.E. 412] is designed to protect,” BIO 8; it is to ensure that, before significant pre-trial proceedings are closed to the public, a neutral arbiter has concluded that such closure is both necessary and narrowly tailored. As the

government concedes (BIO 10), those conclusions may be the norm in cases implicating M.R.E. 412; the point is that they mustn't be *automatic*.

The narrow remedy Judge Maggs proposed further illustrates the innate workability of the constitutional standard even in the court-martial system: remand for a hearing under *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967), at which the military judge can perform the case-specific analysis *Waller* requires. If closure was justified, any error in petitioner's case would have been harmless. And if not, a new public M.R.E. 412 hearing would (and should) follow, with downstream consequences dependent upon the outcome. Pet. App. 24a–25a (Maggs, J., dissenting).

Nor are there any other obstacles to this Court's review. As the petition explained, not only does this Court have jurisdiction under 28 U.S.C. § 1259(3), but Congress has only *expanded* this Court's ability to review courts-martial since this Court reaffirmed the constitutionality of such jurisdiction in *Ortiz*. See Pet. 24–25 (citing National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, § 533, 137 Stat. 136, 261–62 (2023)).

And the government agrees that petitioner has no alternative path to vindicate his structural Sixth Amendment claim. See BIO 5–13. Collateral review in civilian courts is foreclosed unless the military courts failed to give “full and fair consideration” to the constitutional argument. *Burns v. Wilson*, 346 U.S. 137, 142 (1953) (plurality opinion). That carve-out plainly does not apply where the CAAF granted review and resolved the claim after full briefing, argument, and a reasoned dissent. Direct review is not just the only means for this Court to resolve the

underlying split; it is also petitioner's only meaningful avenue for constitutional correction.

Finally, the systemic importance of the question presented is indisputable. M.R.E. 412 mirrors Federal Rule of Evidence 412, *see* Pet. 8–9, and both operate against a constitutional backdrop that this Court has repeatedly insisted must be enforced through case-specific analysis rather than categorical rules. Thus, although the government claims that a “military-specific ruling” might not “necessarily resolve the conflict in the state courts,” BIO 12, the brief in opposition never explains *what* would be “military-specific” about a decision holding that the CAAF was on the wrong (or even the *right*) side of the split. Resolving whether rape-shield hearings fall within the Public Trial Clause would provide authoritative guidance to military and civilian federal and state prosecutions alike.

* * *

The Sixth Amendment either applies to courts-martial or it doesn't. If it does, then the CAAF's ruling merits this Court's review because of the extent to which it deepens an existing split among courts of last resort on a significant and recurring question of constitutional law. If it doesn't, then the CAAF's ruling merits this Court's review because of the extent to which decades of CAAF precedent would be wrong, and a substantial volume of annual litigation within courts-martial would be unnecessary. Either way, certiorari should be granted.

To deny certiorari, in contrast, would let the government shape Sixth Amendment doctrine inside the military justice system—affecting thousands of prosecutions every year—while shielding the

resulting conclusions from this Court's review. That is a recipe for asymmetric law and diminished oversight, and it cannot be squared, in any event, with the historical tradition of public courts-martial that the brief in opposition nowhere actually disputes.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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