No. _____

In The
Supreme Court of the United States

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

v.

ANTHONY JOSEPH VEACH,

Respondent.

On Petition For A Writ Of Certiorari To The Michigan Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Waller v. Georgia*, 467 U.S. 39, 48 (1984), this Court held that the party seeking to close the hearing (1) must advance an overriding interest that is likely to be prejudiced, (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. Over a vigorous dissent, the Michigan Supreme Court held in this case that the respondent was denied his Sixth Amendment right to a public trial because the trial court failed to articulate alternative reasons and to articulate its reasons on the record when it closed the courtroom during the testimony of the victim who explained that she was raped between the ages of 14 and 16 by her mother's new husband. The court declined to consider the record showing the ample and obvious justifications for the closure in this case or remand to the trial court to articulate its reasons. The states are split on the proper remedy for this type of *Waller* error where a trial court fails to articulate its reasons for a closure. Some ignore the record and immediately grant a new trial while others remand for trial court articulation. The question presented is:

> Does the Sixth Amendment right to a public trial require subjecting the child rape victim to an automatic retrial based on a technicality when there are ample and obvious reasons in the record justifying the closure during her testimony, even if the trial court does not expressly state those reasons on the record?

PARTIES TO THE PROCEEDING

Petitioner, State of Michigan, was appellee in the court below. Respondent, Anthony Joseph Veach, was the appellant in the court below.

RELATED PROCEEDINGS

- *People v. Veach*, Michigan Court of Appeals, Docket Nos. 342394, 342396, 342396, Opinion issued October 15, 2019 (affirming convictions).
- *People v. Veach*, Michigan Supreme Court, Docket Nos. 140469, 140470, 140471, Order issued July 28, 2023 (Reversing Court of Appeals, vacating convictions, and remanding for a new trial).

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JURISDICTION

The judgment of the Michigan Supreme Court was entered on July 28, 2023, App. 1. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ." U.S. Const. amend. VI.

INTRODUCTION

This case is an ideal vehicle to resolve a conflict on a question of national importance concerning the Sixth Amendment right to a public trial. Despite the views of several states, the Michigan Supreme Court has held that the failure to articulate the reasons for a courtroom closure, even when there is ample record evidence supporting the closure, automatically

mandates a new trial. This ruling wrongly extends the letter and the spirit of *Waller v. Georgia*, 467 U.S. 39; 104 S.Ct. 2210; 81 L.Ed.2d 31 (1984).

In *Waller*, this Court declared the following requirements when the courtroom is closed: "The party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." *Id*. at 48.

The Michigan Supreme Court, when addressing the requirements for a courtroom closure, relied heavily on footnote 8 of the *Waller* opinion, stating that "post-hoc assertions by an appellate court cannot satisfy the deficiencies in a trial court's record." App. 4, 6, 7-8. It also relied on *Weaver v. Massachusetts*, 582 U.S. 286, 289; 137 S.Ct. 1899; 198 L.Ed.2d 420 (2017) when it stated, ("[a] public-trial violation can occur, moreover, as it did in *Presley*, simply because the trial court omits to make the proper findings before closing the courtroom, even if those findings might have been fully supported by the evidence." App. 4.

These quotes have been misconstrued by the Michigan Supreme Court. The quote in *Waller* actually states: "The post hoc assertion by the Georgia Supreme Court that the trial court balanced petitioners' right to a public hearing against the privacy rights of others cannot satisfy the deficiencies in the trial court's record. The assertion finds little or no support in the

record, and is itself too broad to meet the Press–Enterprise standard." *Waller*, 467 U.S. at 49 n. 8. Indeed, this Court looked at the *Waller* record to find support for the closure. The record did not have any support.

Additionally, the full *Weaver* quote states: "A public-trial violation can occur, moreover, as it did in Presley, simply because the trial court omits to make the proper findings before closing the courtroom, even if those findings might have been fully supported by the evidence. It would be unconvincing to deem a trial fundamentally unfair just because a judge omitted to announce factual findings before making an otherwise valid decision to order the courtroom temporarily closed. As a result, it would be likewise unconvincing if the Court had said that a public-trial violation always leads to a fundamentally unfair trial." *Weaver*, 582 U.S. at 289 (citations omitted).

Weaver's statement that not every public-trial violation will in fact lead to a fundamentally unfair trial is truer here than anywhere. No one challenges that the protection of the child victim was an overriding interest that was likely to be prejudiced, the closure was no broader than necessary to protect the child victim, there were no reasonable alternatives, and the record was more than adequate to justify the closure even if the trial judge did not articulate the numerous reasons showing the justification.

There is also a split among the states on whether a remand for post-hoc articulation of the *Waller* factors is an appropriate remedy. Compare *State v. McRae*, 494

N.W.2d 252, 260 (Minn. 1992) (recognizing remand as an appropriate remedy when violation of *Waller* is claimed), and *United States v. Galloway*, 937 F.2d 542, 547 (10th Cir. 1991) (same), *State v. Rolfe*, 851 N.W.2d 897 (South Dakota 2014) (same) with *State v. Cox*, 297 Kan. 648; 304 P.3d 327, 335 (2013) (rejecting remand for further findings as an appropriate remedy). Michigan has joined Kansas in rejecting remand as a remedy. Even the Michigan Supreme Court's concurrence questioned "whether reversal in cases such as this is the result the United States Supreme Court intended when it required courts to consider alternatives to closure and to make findings adequate to support the closure in order to close a courtroom constitutionally." App. 9. The answer should be no, and this Honorable Court should address whether this is the result *Waller* truly intended.

STATEMENT OF THE CASE

A. Anthony Veach repeatedly sexually assaulted his daughter

Respondent was convicted of sexually abusing his daughter in 2015 and 2016, when she was 14 and 15 years old. The abuse began after respondent and his then-wife, Christine Pecorilli, had separated. The victim eventually disclosed the abuse to Pecorilli, her stepmother, who then contacted the police. The victim testified that there were multiple episodes of sexual abuse, but she could not recall specific details of each

incident. The charges were based on separate incidents that occurred in different homes where respondent lived in Sterling Heights, Eastpointe, and Warren. The victim also testified regarding other uncharged incidents of sexual abuse. App. at 65.

Veach was charged under Michigan law with a total of seven counts of first-degree criminal sexual conduct (CSC-I), and two counts of second-degree criminal sexual conduct (CSC-II), arising from charges in three separate cases that were consolidated for trial. App. at 64.

B. State court proceedings

The victim in this case came from a difficult background. App. 12. Her parents divorced when she was young, she had developmental problems, and she was raised in a tension-filled and unwelcoming atmosphere. *Id*. At the age of four, she lived with respondent, her biological father. *Id.* Respondent began dating Christina Pecorilli in 2004, and soon thereafter the two married. *Id.* They had several children, and the victim lived primarily in their household. *Id.* In 2013, respondent and Pecorilli separated and eventually filed for divorce. *Id.* The victim initially lived with Pecorilli and her children. *Id.* Due to respondent's inability to find housing, Pecorilli allowed respondent to live with his new girlfriend in Pecorilli's house. *Id.* This situation did not last long, as by 2014, Pecorilli and respondent moved and entered separate housing arrangements. *Id.* Pecorilli's children stayed with her,

and the victim moved in with respondent and several other members of his family, including respondent's mother, sister, niece, and girlfriend. *Id.* Respondent was arrested on unrelated charges, and Pecorilli was given power of attorney over the victim, who was then 14 years old. *Id.* The victim lived with respondent after his release from jail until the spring of 2015. *Id.* At that point, the victim lived with Pecorilli due to increased problems the victim had with respondent. *Id.* The victim thereafter split time between her primary residence with Pecorilli and with respondent, who continued to live with several family members. *Id.* at 12-13.

In July 2016, the victim and Pecorilli began to have a private conversation about her relationship with respondent's family. *Id*. at 13. Pecorilli initiated the conversation after hearing secondhand that respondent's mother had instructed the victim and her siblings to lie to Pecorilli about conditions at the residence of respondent's family. *Id*. The victim on a park bench began to break down, hyperventilate, and sob. *Id*. The victim later testified that she was "terrified" and told Pecorilli that she "didn't know if she should [talk] because it was going to hurt a lot of people and it was going to ruin her family." *Id*. Specifically, the victim was worried about her dad and that she "didn't keep the secret like my dad wanted me to." *Id*. After much insistence from Pecorilli, the victim recounted to Pecorilli a series of horrific sexual assaults that respondent had inflicted on her, including rape and forced oral sex at multiple locations at multiple times.

Id. Pecorilli reported respondent to the authorities, and respondent was arrested soon thereafter. *Id*.

In August 2016, the prosecution filed a criminal complaint against respondent, and by May 2017, respondent was charged with extensive acts of criminal sexual conduct against the victim. *Id.* He was charged in three separate cases, signifying the three different municipalities in which he sexually abused the victim from March 2015 to July 2016. *Id.* During that period, the victim was between 14 and 16 years old. *Id.*

In February and May 2017, respondent received a preliminary examination in each of his three criminal cases. App. 14. In all three the victim was called to testify. *Id.* And in all three the prosecution requested that the court close the courtroom out of concern of the sensitive nature of the testimony and the difficulty for the victim in recounting the events in court. *Id.* In addition, the victim was allowed to testify with a victim's support person at her side to help her provide clear and cogent answers. *Id.* Respondent did not object to these measures, and for good reason. *Id.* The victim encountered extraordinary difficulties in delivering her testimony. *Id*.

At the February 2017 preliminary examination hearing, the victim began her testimony by explaining that respondent had come back home after his incarceration "to punish" her for alleged misbehavior while he was gone. *Id.* According to the victim, respondent told her that she could choose one of three "punishments," which respondent labeled "A, B, or C," although

he did not identify what the punishments were. *Id.* The next morning, the victim testified that respondent isolated her in her brother's room while the other children were in another room. *Id.* Respondent made the victim strip and then told the victim that she had to go to another room so that the door could be locked. *Id.* According to the victim, respondent then commanded her to hit him while he forced her to the bed and molested her. *Id.* The incident stopped when the victim fell off the bed and "cried that [she] wanted [her] dad" to stop "whatever he was doing." App. 14-15. The victim recounted another incident in which respondent entered her room and raped her while the other children and members of the household were asleep in other rooms. App. 15. Asked to explain why she did not report the abuse earlier, the victim began to speak in broken and halting phrases when the prosecutor ended questioning. *Id.* The victim testified: "I had—my depression was getting really, really bad; I had been having really bad nightmares. And all the support I was using to hold it in was going away, so—" At that point, the prosecution ended the questioning. *Id.* Defense counsel engaged in vigorous cross-examination of the victim, and the court held that probable cause existed to take the case to trial. *Id*.

The victim's emotional state and ability to provide testimony only got worse at the next preliminary examinations in May 2017. *Id*. At the second preliminary examination, before a second judge, the court again closed the courtroom to allow the victim to provide testimony audibly and effectively. *Id*. When the victim

was called and provided her name, the trial court immediately interjected and warned the victim that she needed to speak up for the court reporter to pick up her testimony. *Id*. The victim provided testimony that she had tried to tell Pecorilli about the sexual abuse but Pecorilli did not fully understand what the victim was saying; word got back to respondent that the victim had attempted to report him. *Id*. As the victim explained, "I just said [to Pecorilli] that he had punished me in a not comfortable way. I didn't say it was sexual. I just pretty much said that he kind of attacked me." *Id*. Therefore, according to the victim, respondent made the victim go to a room isolated from the rest of her family to "punish" her. App. 15-16. At that point, the victim interrupted her testimony for a need to catch her breath. App. 16. She paused in her answer, stopped talking, and told the prosecutor she was "taking a breather." *Id*. The prosecutor assuaged the victim, reassuring her that "[i]t's okay." *Id*. When the victim began again, she abruptly explained that respondent had "shoved my mouth onto his privates." *Id*. The prosecutor pulled back, "Let's back up just a little bit, okay?" and the questions continued. *Id*.

After a few short answers, the victim failed to provide audible testimony:

Q. Did his underwear stay on, did they come off, partially off, or something else?

A. I cant remember.

Q. Okay. You said that, um, he forced you on his privates; is that right?

A. (no audible response given)

Q. Okay. What—

The Court: Okay. Hold on. *Id.*

The trial judge then intervened. *Id.* The judge stopped the questioning and talked directly to the victim. *Id.* He reiterated, as he did when the victim began her testimony, that she had "to speak every answer" and that he knew it was "going to be tough." *Id.* Observing the victim in person, he emphasized to her that she could take as much time as she needed. *Id.*

The victim continued to provide testimony and occasionally stopped speaking in favor of hand movements to answer questions. App. 17. She recounted another episode of respondent raping her. *Id.* When explaining why she did not tell her siblings or grandmother who were also in the house, the victim stated that she was "scared." *Id.* When she finished direct examination, the prosecutor again reiterated to the victim that she "need[ed] to make sure you keep your voice up[.]" *Id.* Defense counsel again cross-examined the victim. *Id.* When recounting the abuse, the victim's testimony again vacillated between direct language, pauses, and stutters. *Id.* The following exchange occurred during cross-examination:

Q. Okay. And then what happened?

A. Then he had shoved his privates into my mouth.

Q. Did he say anything to you before he did that, [the victim's name]?

A. I can't remember what he said, but he did say something—something. *Id*.

On cross, the victim was again asked why she did not report the abuse, and again the victim became distressed and stopped answering questions. *Id*. The court intervened and stopped the questioning. *Id*. The judge asked if the victim needed a break; the victim explained that she "just felt sick for a second." *Id*. After a short break, the victim continued and finished her testimony. *Id*. At the end of the hearing, the trial court was "more than satisfied that [respondent] is in fact an abuser of his child" and bound respondent over for trial. *Id*.

The next day, the victim testified for a third time at a preliminary examination. App. 18. For the third time before a third trial judge, the courtroom was again closed so that the victim could effectively recount testimony with her support personnel. *Id*. The prosecution felt the need to reiterate to the victim the need to audibly speak and verbalize her answers instead of resorting to body motions. *Id*. The victim recounted yet another case of abuse where respondent isolated the victim in a room to "be away" from other family members who might observe. *Id*. At that point, the victim testified that respondent raped her. *Id*. The victim also explained that, in yet another incident, respondent told her to go into a separate room to be away from other family members. *Id*. According to the victim,

respondent then raped her again. *Id*. For a third time, respondent was bound over for trial following preliminary examination. *Id*.

The three cases were consolidated, and the prosecution moved to close the courtroom to allow the victim to provide testimony and do so in an understandable manner. *Id*. The trial court noted the prosecution's arguments, which included the fact that the victim was recounting serial sexual abuse by her biological father while at a young age. *Id*. The victim testified that respondent had repeatedly pressured and commanded her to hide the abuse from others in her family. *Id*. In response, defense counsel noted the strength and merits of the closure motion, indicated in addition that several members of the victim's family planned to testify as defense witnesses, and argued that some other small number of family members should be allowed to enter. App. 18-19. The trial court cited the prior closures at the preliminary examination hearing and granted the prosecution's motion. App. 19.

Before the courtroom was closed, it was accepted that the victim's brother, aunt, cousin, and grandmother would all be called as defense witnesses, along with respondent's ex-girlfriend with whom the victim had spent significant amounts of time. *Id*. Their intended testimony, in line with the victim's description of respondent isolating the victim and working intentionally to keep the abuse secret, was that the family members were not aware of any abuse to the victim. *Id*. As shown in the preliminary-examination testimony, the lack of disclosure and the family's ignorance

of the victim's trauma were triggering issues for the victim that caused pressure, anxiety, and difficulty in recounting her story. *Id*. From the family, only Pecorilli and the victim testified for the prosecution. *Id*. And before the victim testified, Pecorilli described in detail the difficult and disruptive home life from which the victim came. *Id*. Pecorilli testified about the victim's highly unstable home life, including the separation of the victim's biological parents at an early age; the victim's biological mother leaving her with respondent despite having custody; respondent's sister leaving the victim with Pecorilli after respondent was arrested on unrelated charges; respondent's divorce from Pecorilli and the splitting of the family; personal tensions with respondent and the victim leaving respondent's house due to conflict; and the fact that the victim had lived in at least four different houses during a two-year period. App. 19-20. Along the lines of her appearance at the preliminary examinations, Pecorilli also testified that the victim broke down crying, and was unable to speak or properly communicate when she recounted the abuse to Pecorilli. App. 20.

At trial, the victim testified with a closed courtroom, and the result tracked the victim's testimony at the preliminary examination. *Id*. The victim had difficulty recounting the testimony at times, and her voice drifted to the inaudible. *Id*. For example the victim testified: "He (indiscernible) the door. And the kids were waking up. So they are coming out. He is moving them in here and my little sister Gabby, she knows how to get breakfast for everybody. (Indiscernible) breakfast.

I was moved into mom room [sic] because mom was (indiscernible)." *Id*. The court had to again intervene and ask the victim to not rely upon hand motions and to provide clear testimony given that her sound "levels [were] way down." *Id*. The court reporter repeatedly had difficulties picking up the direct examination, and the court reiterated that the victim's voice was "barely getting picked up at all." *Id*. The victim's inability to effectively articulate her story was discussed at multiple points, and the court stopped questioning after a point and asked if the victim needed a break. *Id*. Similar problems continued through cross-examination. *Id*. Eventually, the jury heard testimony from the victim's aunt, brother, cousin, and grandmother, with the latter three assertively denying the existence of sexual abuse by respondent. *Id*.

The jury found respondent guilty on all counts: seven counts of first-degree criminal sexual conduct (CSC-I), and two counts of second-degree criminal sexual conduct (CSC-II). App. 20-21. The trial court sentenced respondent to 20 to 60 years' imprisonment for each CSC-I conviction and 10 to 15 years of imprisonment for each CSC-II conviction. App. 21 & 65.

C. Michigan Court of Appeals proceedings

The Court of Appeals found that because of the sensitive nature of the victim's testimony, her fear of retaliation from respondent, and the family discord caused by her allegations, the trial court had valid reasons for believing that the victim would be subject to

embarrassment or harassment if the courtroom remained open during her testimony. App. 68. The Court reasoned that the trial court did not rule that respondent had forfeited or waived the right to a public trial by previously stipulating to the courtroom closures at the preliminary examinations. *Id*. Rather, the Court found that the trial court merely observed that the circumstances that justified the closures for the victim's testimony at the preliminary examinations had not changed in the six or seven months since then. *Id*.

The Court also rejected the idea that the use of a support person was a reasonable alternative to the closure. App. 68-69. The Court of Appeals disagreed and found that given the victim's expressed fear of respondent retaliating against her, as he had done in the past, and given the family discord stemming from the victim's allegations, allowing respondent's friends and family members to remain in the courtroom during the victim's testimony, even with a support person present, would have still exposed the victim to potential harassment or embarrassment from having to testify about intimate matters before respondent's family and friends. App. 69. The Court was not persuaded that the presence of a support person was a less restrictive means to adequately and effectively protect the victim from harassment and embarrassment than closing the courtroom during her testimony. *Id*. The Court found that the trial court narrowly tailored the closure to accommodate the specific interest to be protected by limiting the closure to the victim's testimony only and

that, under the circumstances, the trial court's closure of the courtroom while the victim testified did not violate respondent's right to a public trial. *Id*.

In a unanimous decision, the Court of Appeals affirmed respondent's conviction, but vacated the sentence due to an error in calculating the advisory guidelines range. App. 21 & 101.

D. Michigan Supreme Court proceedings

In an eight-page order, the Supreme Court, relying on *Waller v. Georgia, Presley v. Georgia*, and *Weaver v. Massachusetts*, found that the trial court violated the respondent's right to a public trial because the trial court did not consider alternative reasons for the closure or by making findings adequate to support the closure. App. 8. The concurrence believed the closure was very likely justified insofar as there was an overriding interest that was likely to be prejudiced and the closure was no broader than necessary; the error here consists only of a failure by the trial court to make an adequate record by considering reasonable alternatives to closure and by making findings adequate to support the closure. App. 9. The concurrence did not relish the idea of a new trial in this instance and questioned whether reversal in cases such as this is the result the United States Supreme Court intended when it required courts to consider alternatives to closure and to make findings adequate to support the closure in order to close a courtroom constitutionally. App. 8-9.

Justice Zahra vigorously dissented. He began by recognizing that "the right to a public trial is not inflexible, running roughshod over reasonable and well-accepted public interests. One of those foundational interests is the protection of child victims of sexual abuse." App. 23. He further noted that "while other less direct and tangible state interests may not sufficiently justify government actions, protection of abused children lays at the heart of the public's interest and can serve as significant justification upon which the state can respond and provide services." App. 25. Justice Zahra recounted the record of the victim's pain and abuse in explaining that the first *Waller* factor was met. App. 26-28. Justice Zahra, using the entire record, also found that the second and third *Waller* factors were met. App. 30-38.

As to the fourth *Waller* factor, Justice Zhara noted that federal courts have repeatedly held that a courtroom closure will be affirmed if the court can "glean sufficient support" for the decision "from the record" separately from the trial court's reasoning, which is well in line with established standards of appellate review, which allows a court to "affirm on any ground supported by the record." App. 41-42. Justice Zahra found that even if the majority holds that the trial court findings were not exhaustive and did not thoroughly refute less restrictive possibilities, there is a substantial record before the Court justifying the trial court's decision. App. 46. He even admitted that while the trial court could have provided more reasoning, it was the only court on the ground with direct and full

oversight of the case, that closure was warranted, and that decision should be affirmed. *Id*. As stated by Justice Zahra – "This case resembles nothing close to the unfounded and perplexing closure of voir dire done in *Presley*, made without adequate explanation or justification. Nor does this case implicate the broad, categorical, and inadequately tailored closures the Supreme Court has rejected." App. 52.

Finally, Justice Zahra reasoned that if the majority required a more exhaustive record by the trial court, the remedy is to remand to allow the trial court to more fully explain its reasons. App. 53-54. He noted that the "Supreme Court of the United States has never held that reversal of criminal convictions and remand for new trial is *mandated* when the appellate court solely wishes to have more thorough lower court reasoning and the courtroom closure is otherwise justified under the Sixth Amendment." App. 60. He would either have affirmed the conviction or, alternatively, remanded to the trial court to provide more exhaustive reasoning. App. 63.

REASONS FOR GRANTING THE PETITION

I. The decision below wrongly reverses the convictions of an otherwise fundamentally fair trial when the only error is the failure of the trial court to articulate its reasoning for the courtroom closure.

A. The majority ignored the totality of the record, which was replete with justifications for the courtroom closure, instead finding that the merest of technicalities justified reversal.

The right to a public trial is guaranteed by the Sixth Amendment of the United States Constitution. The right is not absolute, however. This Court observed that "[a] defendant's Sixth Amendment right to a public trial is limited, and there are circumstances that allow the closure of a courtroom during any stage of a criminal proceeding even over a defendant's objection." *Presley v. Georgia*, 558 U.S. 209, 214; 130 S.Ct. 721; 175 L.Ed.2d 675 (2010). This Court declared the following requirements when the courtroom is closed:

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

Waller v. Georgia, 467 U.S. 39, 48; 104 S.Ct. 2210; 81 L.Ed.2d 31 (1984).

There is no dispute that there was an overriding interest in this case – the protection of the child victim. This Court has repeatedly found that protection for a child victim is a compelling state interest. See *Maryland v. Craig*, 497 U.S. 836, 849; 110 S.Ct. 3157; 111 L.Ed.2d 666 (1990).

This is a case of substantial and repeated instances of sexual abuse and rape of a young girl by her biological father. App. 26. The record, as established through hours of testimony by the victim at three different preliminary examinations, demonstrates the victim's recounting of respondent repeatedly isolating her and moving her away from family. *Id*. Then, according to the victim, respondent would engage in extraordinarily violative acts, against her will and over her complaints to stop, and tell her to "clean up" before anyone else in the family could notice. *Id*. The victim also testified under oath that respondent would repeatedly "punish" her by means of sexual violence. *Id*. When the victim attempted to tell Pecorilli about the abuse but was not sufficiently precise to describe the true nature of the atrocities, word got back to respondent and he "punished" the victim again, by means of rape. *Id*. Under the victim's account, respondent was clearly manipulating the victim, removing her from the rest of the family, and pressuring or forcing her to remain quiet about the abuse. *Id*. This all while the victim was experiencing an unstable home life, transiting between multiple homes with different supervising authority figures, and experiencing separation from her siblings. App. 26-27. Despite the victim's repeated objections

and physical resistance, the victim testified that the abuse continued until she one day decided to tell her full story to Pecorilli, at which point the victim broke down and became despondent. App. 27.

These emotional problems persisted. *Id*. The victim experienced serious and conspicuous difficulties in recounting her testimony at all three preliminary examinations. *Id*. Her voice would repeatedly drift, she experienced difficulty breathing when describing the gruesome nature of the abuse, she often resorted to body movements instead of expressing herself in words, and she had a clear triggering point that especially caused the victim stress: her inability to report the abuse before she did. *Id*. The lack of prior reporting was intensified and made an even greater point of focus given that many of the victim's own family members, with whom the victim had lived for years, planned to testify in favor of respondent. *Id*. Specifically, the victim's aunt, grandmother, and cousin reported assertively and unambiguously that they had observed no evidence of abuse against the victim by respondent. *Id*. This lack of contemporaneous awareness is unsurprising if the victim is a young girl being abused by her father, especially when the father is intentionally acting to intimidate the child and suppress disclosure. *Id*. The victim was not only required to testify against her biological father for heinous crimes inflicted on her, but also required her to testify against the word of several close family members with whom she resided for years. *Id*.

This Court has emphatically stated that protection of child sex-abuse victims, and their ability to recount testimony, is a compelling interest justifying often extraordinary actions otherwise not permitted. *Globe Newspaper Co. v. Superior Court for Norfolk Co.*, 457 U.S. 596, 607; 102 S.Ct. 2613; 73 L.Ed.2d 248 (1982) (explaining that "the physical and psychological well-being of a minor [sex-crime victim]" is a "compelling" interest that can justify closure); *Press-Enterprise Co. v. Superior Court of California*, 478 U.S. 1, 9 n. 2; 106 S.Ct. 2735; 92 L.Ed.2d 1 (1986) (*Press-Enterprise II*) ("The protection of victims of sex crimes from the trauma and embarrassment of public scrutiny may justify closing certain aspects of a criminal proceeding."). The first factor is met.

The second and third factors, requiring that the closure be no greater than necessary and that no reasonable alternatives be available, support the trial court's decision in this case. As was done in each of the three preliminary examinations, the courtroom was closed solely while the victim was providing in-court testimony. App. 32. Prior to the victim's testimony and immediately thereafter, the courtroom was open for access to the public. *Id*. An impartial judge oversaw the proceedings; respondent was present with the assistance of counsel; the bailiff and court security remained in the room; a certified court reporter was present and actively recorded the victim's testimony; and a victim support person and the jury were present for the entire proceeding. *Id*. The victim confronted respondent in person and face-to-face, was subject to

substantial cross-examination, and was subject to direct juror observation. App. 32-33. There is no dispute that the record and trial transcript are correct, properly compiled, and were subject to public review after the victim testified. App. 33. The trial was conducted using all standard and accepted methods of due process. *Id*. The closure simply allowed the victim to testify with substantially reduced agony and embarrassment, while still affording respondent the full panoply of constitutional rights. *Id*. The integrity and validity of the proceedings, and the evidence supporting respondent's guilt, were readily confirmable by the public at large. *Id*. Thus, the temporary closure at issue here was no broader than necessary.

There were also no reasonable alternatives. The jury was present, the judge presided over the examination of the victim, and defendant and his counsel could cross-examine the victim face-to-face for the jury to observe and assess credibility. In order to continue with the prosecution, the victim needed to testify, and she had shown substantial difficulties recounting her experiences with a fully closed courtroom at several preliminary examinations, prior to the actual trial on the merits and without the presence of a jury drawn from the public. A screen to cover the victim's face or having the testify via closed circuit TV would run into obvious Confrontation Clause issues as well as interfere with the jury's ability to judge the credibility of the witnesses.

The true issue is the fourth factor's articulation requirement. While the trial court did not lay out all

the record evidence justifying the closure, it was aware of it. The trial court expressly indicated that it had reviewed arguments from the prosecution, which emphasized the brutal and intimate nature of the abuse, the victim's testimony about intimidation at the preliminary examination, the fact that respondent was the victim's biological father, and the reality that the victim would be subject to embarrassment and trauma in conveying the testimony. App. 43. Defense counsel emphasized to the trial court that most of the victim's family were testifying; the witness list filed by respondent confirmed that those family members were defense witnesses. App. 43-44. Finally, the court cited the prior preliminary examinations, which were available on the record. App. 44. The preliminary examinations gave substantial and direct evidence of trauma and the difficulties presented to the victim in recounting her version of events in court, in the presence of her father, whom the victim identified as the perpetrator of the crimes against her. App. 45. Thus, in three different preliminary examinations before three different judges, the courts unanimously concluded that closure was justified. *Id*. The trial court also responded to respondent's arguments, which were minimal, and rejected the alternative of allowing respondent's family to attend, noting correctly that "the other family members may be called as witnesses and be sequestered anyways." *Id*. Where there is such ample justification for the closure, even absent specific articulation, the trial court's decision should be affirmed.

Indeed, federal courts have repeatedly held that a courtroom closure will be affirmed if the court can "glean sufficient support" for the decision "from the record" separately from the trial court's reasoning. See *Charboneau v. United States*, 702 F.3d 1132, 1137 (8th Cir. 2013) (noting that even if defense counsel had objected to the trial court's lack of reasoning for complete closure, such an objection would have been futile; applying well established public-trial rights caselaw and coming to its conclusion, despite that the trial court "did not articulate more explicit findings regarding [the victim's] psychological well-being . . . or explicitly consider other alternatives"), quoting *United States v. Farmer*, 32 F.3d 369 (8th Cir. 1994) (affirming a closure to assist a child rape victim and explaining that, even without detailed statements from the trial court, there was "evidence in the record" of abuse, threats, and victim vulnerability that were "more than enough to justify the decision"); *United States v. Yazzie*, 743 F.3d 1278, 1289-1290 (9th Cir. 2014) (refusing to reverse the trial court's decision to order closure for child sex victim, rejecting the trial court's need to expressly address and reject more imposing alternatives or state why closure was necessary to facilitate the child's testimony, relying upon "context" and the record to conclude that closure was justified; citing *Farmer*, 32 F.3d 369, even in a case of complete closure); *Bell v. Jarvis*, 236 F.3d 149, 170-173 (4th Cir. 2000) (noting the extensive record supporting the closure before the court including serious abuse and intimidation and the emotional effect on the victim, rejecting the argument that an appellate court must "ignore facts of record

which fully support the decision and belie a claim that [the defendant's] right to a public trial was actually violated," and concluding that no public-trial violation occurred simply due to the "absence of more detailed findings," including detailed description of insufficient alternatives); *United States v. Osborne*, 68 F.3d 94, 99 (5th Cir. 1995) (affirming closure of a courtroom for a child sexual assault victim despite the lack of clear findings as to what the compelling reason was, let alone alternatives because the appellate court could "infer" from the record that the closure was justified to protect the child from increased trauma and embarrassment); *United States v. Simmons*, 797 F.3d 409, 415 (6th Cir. 2015) (restating the same standard and explaining that a broad and generalized concern that acquaintances of the adult witness may make the witness uncomfortable was insufficient to justify closure under the available record); *Bowers v. Michigan*, unpublished order of the United States Court of Appeals for the Sixth Circuit, entered April 28, 2017, 2017 WL 1531958 (Case No. 16-2325) (concluding that no reasonable jurist would dispute that the protection of a child witness subject to sexual abuse warranted closure of the courtroom, and the lack of express additional findings on inadequate alternative did not warrant reversal); *Woods v. Kuhlmann*, 977 F.2d 74, 77-78 (2nd Cir. 1992) (similarly reviewing the record and party arguments and concluding that closure was justified).

Given the specific facts of this case, the record more than satisfies the authority of the trial court to

close the courtroom. This is unlike *Waller*, *Presley*, and *Weaver* where there was little to no justification for the closure. However, the majority ignored the record and merely adhered to the lack of articulation as justification for their ruling. *Waller* is not so rigid in its application that this is result this Honorable Court intended.

B. When the record establishes each of the *Waller* factors, the remedy should not be reversal but remand for rearticulation.

Waller and *Presley* dealt with situations where the closures were overboard, unparticularized, and would justify closure as a matter of course. This is inapposite to the instant case. As indicated above, the child victim's specific mental trauma and disabilities indicated that closure was required for this specific case. The ruling by the trial court would not justify courtroom closures in all sexual assault cases involving a minor. The majority simply rejected the record out of hand, instead relying on the statement that post-hoc rationalizations are forbidden. The majority's citation to *Waller* and *Weaver* for this statement grossly mischaracterizes the statements this Court made in those cases regarding post-hoc rationalization.

The quote in *Waller* actually states: "The post hoc assertion by the Georgia Supreme Court that the trial court balanced petitioners' right to a public hearing against the privacy rights of others cannot satisfy the

deficiencies in the trial court's record. The assertion finds little or no support in the record, and is itself too broad to meet the *Press–Enterprise* standard." *Waller*, 467 U.S. at 49 n. 8. Indeed, this Court looked at the *Waller* record to find support for the closure. The record did not have any support.

Additionally, the full *Weaver* quote states: "A public-trial violation can occur, moreover, as it did in *Presley*, simply because the trial court omits to make the proper findings before closing the courtroom, even if those findings might have been fully supported by the evidence. It would be unconvincing to deem a trial fundamentally unfair just because a judge omitted to announce factual findings before making an otherwise valid decision to order the courtroom temporarily closed. As a result, it would be likewise unconvincing if the Court had said that a public-trial violation always leads to a fundamentally unfair trial." *Weaver*, 582 U.S. at 289 (citations omitted).

More importantly, *Waller* held that the remedy should be appropriate to the violation. *Waller*, 467 U.S. at 50. The "violation" is an alleged lack of reasoning, and to remove it, the Michigan Supreme Court should have remanded to afford the trial court an opportunity to more fully explain its actions before ordering a new trial. Wholesale reversing nine criminal convictions supported by substantial evidence of guilt, after an in-court jury determination of credibility and traumatic testimony from a child victim, based solely on the closure demonstrated in this record, provides respondent

a massive windfall. This cannot be what the *Waller* Court intended in its ruling.

II. The decision below perpetuates a split between the states on an important issue.

The question of an appropriate remedy of a *Waller* violation has led to a split among states regarding that remedy. Indeed, there is a split in authority on whether a remand for post-hoc articulation of the *Waller* factors is an appropriate remedy. Rolfe also recognizes this split in authority in his briefs. Compare *State v. McRae*, 494 N.W.2d 252, 260 (Minn. 1992) (recognizing remand as an appropriate remedy when violation of *Waller* is claimed), *State v. Rolfe* (*Rolfe II*), 2014 S.D. 47, ¶ 12, 851 N.W.2d 897, 902 (same) and *United States v. Galloway*, 937 F.2d 542, 547 (10th Cir. 1991) (same), with *State v. Cox*, 297 Kan. 648, 304 P.3d 327, 335 (2013) (rejecting remand for further findings as an appropriate remedy). The Michigan Supreme Court's order in this case joins Kansas. Thus, the decision below widens this uncertainty and creates a split on this important issue. Moreover, this is not a situation involving the State's constitution as the decision of the Michigan Supreme Court rested entirely on *Waller*, *Presley*, and the Sixth Amendment.[1]

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[1] The Supreme Court order also relied on *People v. Vaughn*, 491 Mich. 642; 821 N.W.2d 288 (2012). *Vaughn* not only relied on *Waller* and *Presley*, the Court also rejected any contention that the Michigan Constitution provided any greater protection than the Sixth Amendment. *Vaughn*, 491 Mich. at 650 n. 25.

III. This case presents a recurring question of national importance.

This issue is an important one. The question of the remedy for a *Waller* violation has created uncertainty among the states, including the 10th Circuit, and has created disparate treatment among Defendant's from different states. Even the Michigan Supreme Court's concurrence questioned whether this is what This Honorable Court truly intended. App. 9. Indeed, as Justice Zahra stated:

> The Founders' concern in crafting the right to a public trial, based on centuries of abuse and tyrannical government, was to prevent persecution and capricious adjudications of guilt. Those who ratified the Constitution understood that governments without public oversight and scrutiny would have the ability to punish disfavored individuals without legal justification, due process, or sufficient evidence. The right to a public trial was neither ratified nor subsequently interpreted by the Supreme Court to provide a windfall for those convicted of heinous crimes, after a legally based, publicly accountable, and fair trial. It was not written to ignore challenges presented to child sex-abuse victims who wish to relay their story in a court of law.

This Court should grant certiorari so as to give states guidance as to the appropriate in such instances. *Waller* needs to be understood in the proper

context. Without such context, the split among courts will continue to grow. App. 62-63.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: October 26, 2023