No. 19-7487

In the Supreme Court of the United States

JONATHAN BLADES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the District of Columbia Court of Appeals

Brief of *Amici Curiae* Law Professors Susan Herman, Raleigh Hannah Levine, Justin Murray, and Jocelyn Simonson in Support of Petitioner

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Interest of the *Amici Curiae*[1]

Professor Susan Herman is Centennial Professor of Law at Brooklyn Law School, President of the American Civil Liberties Union, and author of *The Right to a Speedy and Public Trial* (2006).

Professor Raleigh Hannah Levine is the James E. Kelley Chair in Tort Law at the Mitchell Hamline School of Law, and author of *Toward a New Public Access Doctrine,* 27 Cardozo L. Rev. 1739 (2006).

Professor Justin Murray is an Associate Professor of Law at New York Law School, where he writes and teaches about criminal law and criminal procedure.

Professor Jocelyn Simonson is an Associate Professor of Law at Brooklyn Law School, and author of *The Criminal Court Audience in a Post-Trial World*, 127 Harv. L. Rev. 2173 (2014).

Summary of Argument

"If a public trial doesn't make a sound, is it still a public trial?" *State ex rel. Law Office of Montgomery Cty. Pub. Def.* v. *Rosencrans*, 856 N.E.2d 250, 256 (Ohio 2006) (Pfeifer, J., dissenting). It is not. The Public Trial Clause protects the public's right to participate in the justice system by perceiving how the law is being applied, as it is being applied. This participation

[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this *amici* brief, and had received notice of the planned filing at least 10 days before the deadline.

in turn helps the public ensure judicial proceedings are fair and promotes public confidence in those proceedings. But using a husher—a "trial by mime," *id.* at 257—while prospective jurors answer voir dire questions denies the public its right to hear those responses. Just as locking the public outside glass courtroom doors would constitute a closure because the public could see but not hear the proceedings, so too does a husher.

That closure is not rendered constitutional merely because the proceeding's transcript is available for purchase—reading words, many days after watching the corresponding silent physical acts, is not contemporaneous observation. And a general interest in juror candor and privacy cannot justify abrogating the public trial right; rather, a closure can be justified only if it satisfies the *Waller* test, a test that was not used by the lower court to support the closure in this case. *See Waller* v. *Georgia*, 467 U.S. 39, 48 (1984); *see also Presley* v. *Georgia*, 558 U.S. 209, 214-15 (2010).

Argument

I. The public trial right necessarily protects the right to both see and hear the proceeding.

A public trial right guarantees the public's right to "sit, look, * * * listen," and "react to what they see and hear." Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 Harv. L. Rev. 2173, 2182 (2014); *see also* Susan N. Herman, *The Right to a Speedy and Public Trial* 29 (2006). Citizens serve as "auditors" who "form independent judgments about the quality of government actions." Judith Resnik,

Fairness in Numbers, 125 Harv. L. Rev. 78, 87, 91 (2011).

But this citizen monitoring works only "when there is something substantive to observe," Simonson, *supra*, at 2177, and "observe" here must mean hearing as well as seeing; watching "facial expressions and body language of * * * the participants at the bench," Pet. 19a, is an inadequate substitute for the combination of watching body language and hearing real language. When the audience cannot hear what is said, criminal proceedings may be "technically open to public view [yet be] in practice obscure," Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. Rev. 911, 924 (2006), and that is so for voir dire as much as for other phases of the criminal justice process.

A. Hearing juror responses to voir dire questions is necessary to promote a fair proceeding.

A public audience during voir dire reminds the judge, lawyers, and prospective jurors that they are being monitored. The public "serves as a check on governmental and judicial abuse and mistake, guarding against the participants' corruption, overzealousness, compliancy, or bias." Raleigh Hannah Levine, *Toward a New Public Access Doctrine*, 27 Cardozo L. Rev. 1739, 1791 (2006). Trial participants "will perform their respective functions more responsibly in an open court than in secret proceedings." *Estes* v. *Texas*, 381 U.S. 532, 588 (1965) (Harlan, J., concurring); *see also* Herman, *The Right to a Speedy and Public Trial*, *supra*, at 80. And prospective jurors may be "encourag[ed] * * * to answer questions truthfully" when their responses

are heard by the public. Herman, *The Right to a Speedy and Public Trial*, *supra*, at 80.

That is because "[t]here is power in the act of observation: audiences affect the behavior of government actors inside the courtroom, helping to define the proceedings through their presence." Simonson, *supra*, at 2177. And the public trial right plays an especially vital role during stages of the adjudication process that lack a jury, like voir dire, because listening to the process is the only role that ordinary citizens can play at that stage. *Id.* at 2184, 2205. Listening to voir dire is how the public monitors who is chosen to serve on the jury, a choice that implicates the public's interest in equality, representation, fairness to the defendants, and fairness to the public.

An inaudible voir dire forecloses the audience from serving as that check. The criminal justice system presumes that lies and prejudice, for example, often cannot be detected by watching silent physical acts. Hints of those dangers may be conveyed in words, tones, and pauses. So long as the actors pantomime justice, no audience member will be the wiser.

Rather, to monitor the voir dire participants, the audience must be able to hear the answers as they are given. *Id.* at 2182, 2228. Prospective jurors' responses to voir dire questions may alert the public to potential prejudices, just as a prosecutor's questions and statements during voir dire "may support or refute an inference of discriminatory purpose" in the use of peremptory challenges. *Batson* v. *Kentucky*, 476 U.S. 79, 97 (1986). Indeed, the public interest in observing voir dire is especially important given the importance of the jury selection process as a safeguard for both equal

protection and due process, as illustrated in this Court's post-*Batson* holdings:

> [T]he importance of the selection of the jury in open court is further highlighted by *Batson* and its progeny * * *. Such prohibition [on biased peremptory challenges] has been held not only to "safeguard[] a person accused of crime against the arbitrary exercise of power by prosecutor[s] or judge[s,]" but to advance "public confidence in the integrity of the criminal justice system." It is because "[t]he petit jury has occupied a central position in our system of justice" that the above safeguards are in place, and the public, including members of an accused family, ensure the preservation of these safeguards through the ability to openly observe court proceedings.

Campbell v. *State*, 205 A.3d 76, 92 (Md. Ct. Spec. App. 2019) (citing *Batson* and later cases, as well *In re Oliver*, *supra*, a Public Trial Clause case); *see also* Susan N. Herman, *Why the Court Loves Batson: Representation-Reinforcement, Colorblindness, and the Jury*, 67 Tul. L. Rev. 1807, 1843 (1993).

B. Hearing juror responses to voir dire questions is necessary to ensure public confidence in the justice system.

Public trials also "heighten[] public respect for the judicial process" because even citizens who do not attend the trial know that it is open to the public and that other citizens may attend and hold actors accountable. *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 606 (1982). Because others are present, the public can better trust that "standards of fairness are

* * * observed," *Press-Enter. Co.* v. *Superior Court of California, Riverside Cty.*, 464 U.S. 501, 508 (1984), and that the "truth * * * prevail[s]," Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 112-14 (1998).

But with inaudible voir dire, the non-attending citizen cannot presume that the audience has performed its auditor function or that the jury has been fairly selected. "The jury trial cannot truly serve the function of legitimating the verdict and the proceedings if the public does not know what has happened or believes that important events have occurred behind the scenes." Herman, *The Right to a Speedy and Public Trial*, *supra*, at 29.

In this role, public trials serve a "'community therapeutic value'" by "vindicat[ing] the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct by jurors fairly and openly selected." *Press-Enter. Co.*, 464 U.S. at 508, 509 (quoting *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 570 (1980) (plurality opinion)). But when proceedings are held in secret, "an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted," decreasing public confidence in the justice system. *Richmond Newspapers*, 448 U.S. at 571 (plurality opinion). For example, if a jury empaneled by inaudible voir dire acquits when the public expects a conviction—or vice versa—the public's inability to hear the voir dire responses may engender suspicions of jury bias or corruption.

A partially inaudible criminal justice process cannot "satisfy the public desire for justice" or serve as a

"cathartic outlet for community outrage and concern." Levine, *supra*, at 1740-41. Because "experiences with * * * procedural fairness and trustworthy motives spill over into broader attitudes about the criminal justice system's legitimacy," Bibas, *supra*, at 949, inaudible voir dire may lead the public to suspect that the jurors' unheard responses were significant and resulted in injustice.

And the jury and public audience serve as complementary representations of the community—including people with different backgrounds, experiences, and interests. Attendees may be members of groups otherwise excluded from juries, such as people who are friends and relatives of the accused and victims; noncitizens; and, in federal courts and more than half of states, people with felony convictions, a group that is skewed along other demographic dimensions as well. *See* Simonson, *supra*, at 2173, 2178, 2185, 2189; James M. Binnall, *The Exclusion of Convicted Felons from Jury Service: What Do We Know?*, 31 Court Manager 26 (2016); Sarah K. S. Shannon et. al., *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948-2010*, 54 Demography 1795, 1807 (2017) (estimating that about 33% of adult African-American males, compared to 13% of all adult males, have felony convictions).

II. Delayed access to a transcript is not a substitute for contemporaneously watching and hearing voir dire.

Attendees at a hushed voir dire can pay to read a transcript some time after the inaudible scene has ended. But that does not restore their power to engage in "contemporaneous review"—a fundamental feature

of the public trial right. *See In re Oliver*, 333 U.S. 257, 270 (1948).

The District of Columbia, for example, does not generally release transcripts for public purchase until trial has ended (long after voir dire), and there are typically processing delays. Transcripts, which can be hundreds of pages long, must be bought for several dollars per page. Pet. 17-18. In this case, after paying $854.10 and waiting thirty days after the end of trial, attendees would have received the 234-page transcript of a single day of voir dire. Pet. 18. Or for faster processing, they could have paid $1,418.04 and still waited four days, assuming they had received special permission to get the transcript before the end of trial. *Id*. at 17-18. Perhaps a few media outlets might be able to afford to pay such amounts—but not the rest of the public, both the public generally and the particular public that watches the live proceedings for free in the courtroom.

But even if attendees overcome the financial barrier and delay, they still may not remember which physical actions match which words in the transcript. The criminal justice system is premised on the assumption that lies and prejudice are better perceived through contemporaneous observation of words and actions. Mere words on a page "cannot reflect facial expressions, gestures, voice tones, pregnant pauses, and body language that may be highly revealing and even belie a speaker's words." Levine, *supra*, at 1769 (footnote omitted).

A delayed transcript also prevents contemporaneous news reporting. Many people rely on journalists to report what happened in the courtroom because they

are unable to attend trials. In this role, journalists "contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system." *Richmond Newspapers*, 448 U.S. at 573 (plurality opinion) (quoting *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring in the judgment)). "[T]here can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public." *Waller*, 467 U.S. at 46.

But if journalists' reports concerning voir dire are not published until after they get the transcript—perhaps thirty days after the end of trial—the reports become much less relevant. "[T]he element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly," *Nebraska Press*, 427 U.S. at 561; "[l]ater events may crowd news of yesterday's proceeding out of the public view," *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 442 n.17 (1979) (Blackmun, J., concurring in part and dissenting in part). News about voir dire is no longer news when the trial has ended, a verdict has been reached, and the empaneled jury has been dismissed. When news of voir dire is delayed, the public's discussion of the criminal justice system will thus often be incomplete, and the right of access to criminal trials will no longer "ensure[] that th[e] constitutionally protected discussion of governmental affairs is an informed one." *Globe Newspaper*, 457 U.S. at 604-05.

III. A general interest in juror candor and juror privacy cannot justify a violation of the public trial right to hear voir dire.

Closing portions of proceedings, including using hushers, may be permissible in some cases as long as the closures satisfy the *Waller* v. *Georgia* requirements. But such closures cannot be justified by a general interest in juror candor and privacy; relying on such a generalized interest would equally support "an array of mandatory closures" that this Court has already held violate the right to a public trial. *Globe Newspaper*, 457 U.S. at 609-10; *see also United States* v. *Simone*, 14 F.3d 833, 841 (3d Cir. 1994). "If broad concerns of this sort [juror privacy and candor] were sufficient to override a defendant's constitutional right to a public trial, a court could exclude the public from jury selection almost as a matter of course." *Presley*, 558 U.S. at 215. Indeed, one premise of the Public Trial Clause is that "a public trial * * * discourages [witness] perjury," *Waller*, 467 U.S. at 46; it follows that public voir dire usually discourages juror dishonesty as well.

Thus, though courts may allow jurors to answer certain particular questions in private, there must be a specific reason for doing so. But here, there was no "controversial issue to be probed in voir dire that might have impaired the candor of prospective jurors," nor did "a prospective juror * * * state[] that his or her candor would be impaired by public questioning," *ABC, Inc.* v. *Stewart*, 360 F.3d 90, 101, 105 n.5 (2d Cir. 2004).

Nor is a husher sufficient to protect juror privacy and candor interests in those specific situations where

confidentiality is justified, because it does not allay prospective jurors' concerns that their voir dire responses will be made public. For example, using a husher but releasing a transcript of potential jurors' responses without their names redacted, as in this case, still publicizes their answers and affects their willingness to answer questions truthfully just as if the public had heard the responses as they were given in court. *Globe Newspaper*, 457 U.S. at 609-10 (likewise holding that automatic closure of the courtroom during the testimony of minor sex crime victims "hardly advances that interest [in encouraging minor victims to come forward] in an effective manner," because "the press is not denied access to the transcript" and is therefore free to "publiciz[e] the substance of a minor victim's testimony, as well as his or her identity"); *cf. ABC, Inc.*, 360 F.3d at 104 (concluding that closure of voir dire was improper, even with a transcript being released, because "we do not see why simply concealing the identities of the prospective jurors would not have been sufficient to ensure juror candor").

Conclusion

Inaudible voir dire prevents the public from participating in the justice system—thus sapping public trust and depriving the system of the other benefits of public supervision. And a delayed and costly transcript cannot substitute for listening to voir dire as it happens. Routine use of hushers should therefore be recognized as violating the right to a truly public trial.

Respectfully submitted,

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