No. 19-7487

In The

Supreme Court of the United States

JONATHAN BLADES,

Petitioner,

v.

UNITED STATES,

Respondent.

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

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a trial court violates *Waller v. Georgia* by conducting individual *voir dire* under the cover of a noise device with no specific finding of an overriding interest necessitating closure.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999 and focuses on the scope of substantive criminal liability, the proper role of police in their communities, the protection of constitutional safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement.

This case concerns Cato because it represents yet another assault on the public jury trial as the constitutionally prescribed mechanism for adjudicating criminal charges and further marginalizes the role of ordinary citizens in the administration of criminal justice.

[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. Further, no party's counsel authored this brief in any part and *amicus* alone funded its preparation or submission.

SUMMARY OF ARGUMENT

The Framers wrote the Sixth Amendment to guard the rights of the accused against the government. "In *all* criminal prosecutions, the accused shall enjoy the right to a speedy and *public* trial, by an *impartial jury* . . . ." U.S. CONST. amend. VI. (emphases added). The Framers carefully designed a system with three distinct layers of insulation between the accused and the awesome power of the state: his counsel, an impartial jury of his peers, and the public at large. The trial court below substantially impaired the second and third of those layers by effectively excluding the public from jury selection in direct contravention of this Court's precedent. Although it has been severely undermined by mass plea-bargaining, the right to have criminal charges adjudicated in an open and transparent proceeding before a citizen jury remains just as vital to the political and moral legitimacy of America's criminal justice system today as it was at the Founding. And this jury must be publicly selected.

In *Waller v. Virginia*, 467 U.S. 39 (1984), this Court recognized that wisdom through its test for courtroom disclosure. The "presumption of openness" can only be overcome by specific findings of "an overriding interest that is likely to be prejudiced," and "the closure must be no broader than necessary to protect that interest, [and] the trial court must consider reasonable alternatives to closing the proceeding." *Id.* at 48.

Under *Waller*, the trial court must find a specific interest that is threatened, not a generic potential harm. Only then may the trial court restrict the public trial right. Closure is to be avoided by alternative

means of serving the interest, or if closure is necessary, it must be narrowly tailored. Both options are still a restriction, and this Court should rectify the lower court practice of finding alternative and partial restrictions first and using them to justify reducing the overriding interest standard.

This case is a symptom of the D.C. courts' "longstanding practice" of silencing jury selection. Pet. App. 18a. The Founders thought of the jury as the public component of the judiciary, selected from ordinary citizens in part to serve as a check on state power. For centuries the public has been able to watch the selection of criminal juries. *Press-Enterprise Co. v. Superior Ct. of Cal.*, 464 U.S. 501, 506-07 (1984). The public must hear the selection before the jury is empaneled to be confident they will do their part. And protecting this public section is all the more important today, given the vanishingly small role that juries play in our criminal justice system generally.

ARGUMENT

The Sixth Amendment guarantees the right to a public jury trial. U.S. CONST. amend. VI. Concomitantly, the public is guaranteed the right, under the First Amendment, to witness the trial of anyone their government has seen fit to accuse. *Globe Newspaper Co. v. Superior Ct. for Norfolk Cty.*, 457 U.S. 596 (1982). The right to a public trial extends beyond presentation of evidence and arguments on the merits; it encompasses, but is not limited to, suppression motions and *voir dire*. *See Presley v. Georgia*, 558 U.S. 209 (2010) (per curium) (summarily reversing a conviction where the public was excluded from *voir dire*); *Waller v. Georgia*, 467 U.S. 39 (1984) (recognizing the

right of the accused to challenge the public's exclusion from a suppression hearing); *Press-Enterprise Co. v. Superior Ct. of Cal.*, 464 U.S. 501 (1984) (recognizing the press's right to be present for *voir dire*).

A court may exclude the public from a portion of a trial only in rare circumstances. *Waller*, 467 U.S. at 45. The trial court is bound by a presumption of openness. *Id.* To close any part of a trial, the party seeking closure:

> 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. A constitutional right shall not be stripped away lightly, and reviewing courts should broke no failure in meeting these exacting standards.

I. ANY RESTRICTION ON THE PUBLIC TRIAL RIGHT MUST FIRST BE JUSTIFIED BY AN OVERRIDING INTEREST SPECIFIC TO THE CASE.

A. Generic challenges applicable to every criminal trial cannot serve as an "overriding interest" justifying courtroom closure.

Criminal trials are presumptively open. This is the default assumption any court must start with. The court may not overcome this presumption absent specific findings that an overriding interest justifies treating a particular trial differently than every other. This presumption cannot be overcome be a

mere "conclusory assertion." *Press-Enterprise Co.*, 478 U.S. at 15.

Accordingly, courts may only overcome this presumption by meeting the strict test laid out in *Waller v. Virginia*. In *Waller*, the state sought to close a suppression hearing to prevent "publication" of the contents of a wiretap, which concerned persons not before the court. 467 U.S. at 48. The state was concerned with privacy interests, but its "proffer was not specific as to whose privacy interests might be infringed, how they would be infringed, what portions of the tapes might infringe them, and what portion of the evidence consisted of the tapes." *Id.* "The tapes lasted only 2 1/2 hours of the 7-day hearing," yet the trial court closed the entire hearing based on the "broad and general" findings. *Id.* at 48-49. These findings were insufficient to justify a complete closure. *Id.* at 49.

Waller reaffirms the import of the public's presence at trial. The presence of the public is paramount to a defendant receiving a fair trial, as the "presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." *Id.* at 46. The presence of potential friends and neighbors discourages perjury in witnesses. *Id.* This also applies for prospective jurors who come from the community that makes up the public. Thus, the right to a public trial cannot be ceded to "broad and general" concerns. *Id.* at 49.

But the court below did just that. Citing its general concern over the candor of prospective jurors, but without reference to any individual facts of this case, the trial court decided to cloak the voices of every prospective juror under a noise cancelling device. Pet.

App. 12a. There was no finding *specific* to this case to justify the closure here, and there is nothing to stop the trial court from making the exact same determination in the next case whatever the individual facts.

Even highly compelling generic challenges are insufficient to close courtrooms. This is evident from *Waller*'s foundation in the First Amendment public trial holdings. In *Press Enterprise Co.*, a press organization brought suit challenging the closure of *voir dire* in a rape trial. 464 U.S. at 503. The trial judge, concerned with nothing less than the defendant's right to a fair trial, as well as the privacy of perspective jurors who may have personal experience with the subject matter, closed six weeks of *voir dire* to the press. *Id.* at 510, 513. But this interest was insufficient to override the First Amendment right to a public trial. *Id.* at 510-11. While fairness is a compelling interest, the trial court did not find any *specific* threat to that interest. *Id.*

The specificity requirement even extends to codified generic interests. In Puerto Rico, the rules of criminal procedure previously provided that pre-trial detention hearings were presumptively private. *El Vocero de P.R. v. Puerto Rico*, 508 U.S. 147, 148 (1993) (per curium). The Puerto Rico Supreme Court had determined this rule was constitutional because of the commonwealth's concern with the honor and reputation of its citizenry and the small dense population of the island, which, the court reasoned, necessitated closed pre-trial hearings to ensure a fair trial. *Id.* at 149. This Court summarily reversed that decision. *Id.* at 151. Again, general problems are not an overriding

interest sufficient to override the presumption of openness.

Contrary to this Court's precedent requiring specificity, the trial court here closed *voir dire*, based on a broad and general belief that such a closure would lead to greater candor. If *Waller*'s specificity requirement is not followed, then any sitting judge could reshape the public trial right according to his or her own personal predilections. In this Court's prior historical analysis of the public trial right, one of the benefits of the right is to encourage witness candor—a witness would not want his community to hear him lie under oath. *Press-Enterprise Co.*, 464 U.S. at 506-07. It is counterintuitive to suggest that the presence of the community would have the opposite effect on prospective jurors. Even if such a generic worry existed, this court has rejected similar concerns about candor in *voir dire* without specific findings as to particular prospective jurors or particular lines of questioning. *Id.* at 511-12.

B. *Waller*'s overriding interest burden must be met before either partial closure or alternatives to closure may be used.

Among the lower courts, a practice of "partial closure" has developed to describe situations where a court has tailored the closure to serve the previously identified overriding interest. Courts that adopt this practice first identify whether the courtroom was merely partially closed, then substitute *Waller*'s overriding interest requirement for a lessoned substantial

interest requirement. *See United States v. Deluca*, 137 F.3d 24, 33-34 (1st Cir. 1998).

For example, to accommodate a larger-than-usual *venire*, a trial court excluded all members of the public except the defendant's family from *voir dire*. *Bucci v. United States*, 662 F.3d 18, 24 (1st Cir. 2011). This exclusion continued despite seats opening as prospective jurors were dismissed. *Id.* at 25. The reviewing court held that this partial closure did not serve "substantial" interests and thus violated the Sixth Amendment. *Id.* at 26. This is a lower standard than the overriding interest required in *Waller*. *Id.* In an earlier case, the trial court issued an order requiring members of the public to show identification before entering the courtroom. *Deluca*, 137 F.3d at 32. The trial court found credible fears of juror intimidation. *Id.* at 33. The court first determined this was a partial closure (though this was arguably a reasonable *alternative* to closure), then applied the less stringent substantial interest test to determine the closure was justified. *Id.* But the court should have first found that preventing juror intimidation was an overriding interest, and *then* used the identification order as an alternative to closure.

The First Circuit cases above are an example of the partial closure practice which has lowered the burden of closing courtrooms in many circuits, *see id.* (listing cases), and which was contemplated below. Pet. App. 11a n.5. But the practice of partial closure

approaches *Waller* incorrectly and in doing so weakens the rigorous standards for protecting the right to a public trial.

To consider whether partial closure occurred before finding an overriding interest demonstrates a problem in *Waller*'s application. *See* Pet. App. 15a-16a (considering whether partial closure occurred without finding an overriding interest). *Waller* set an order of operations. First, the trial court identifies an overriding interest specific to the particular case; then, the court may device a closure that is no broader than necessary to preserve this interest. 467 U.S. at 45. It is unlikely that a court would ever declare a complete closure, and so a narrowly tailored closure would almost always be "partial." Consequently, the practice of partial closure is meaningless as a distinction from the *Waller* test. A trial court cannot offer a partial closure and use the lesser infringement to evade the question of overriding interest, yet this is how the partial closure practice is developing.

Some circuits have gone so far as to declare that, by starting with a limitation on the extent of the closure, a trial court can reduce the overriding interest burden. *See Bucci*, 662 F.3d at 23 ("[T]his court and several of our sister circuits have held that a 'substantial' interest, rather than a 'compelling' one, will justify partial closure."). This reasoning is circular. The Constitution cannot abide a partial stripping of the accused's rights, only to then use the partialness to reduce the burden the court should have applied.

Waller also commands the trial court to consider reasonable alternatives to closure. 467 U.S. at 47. A

court following *Waller* may devise measures that conceal some small but sensitive piece of information—for example blocking the public's view of a confidential witness they may hear. *See*, *e.g.*, *Pearson v. James*, 105 F.3d 828, 830 (2d Cir. 1997) (screen blocking view of undercover officer).[2] As evidenced here, it is unclear how courts must approach narrowly tailored closures. *Waller*'s narrow tailoring element specifically contemplates "partial" closure and alternative means, but it does little to instruct lower courts. This Court should make clear that in all closures, not just full closures, *Waller* applies.

Just as it would be incongruous for a partial closure to lower the burden on the trial court, *Waller*'s alternative-means test is not a convenient sidestep around the overriding-interest requirement. The court below suggests that there is no closure, and thus no *Waller* problem, unless "some or all members of the public are precluded from perceiving contemporaneously what is transpiring in the courtroom, because they can neither see nor hear what is going on." Pet. App. 15. As the dissent below notes, the majority uses

[2] The court below considered these types of visual obstructions and concluded that they were comparable to the audio obstruction at issue in this case. Pet. App. 17a-18a. But of course, the nature of the information that is closed off is different when substantive answers to questions rather than the appearance of the answerer is blocked. To illustrate, ask any member of this Court's press corps whether they would rather have the unaccompanied audio of oral argument, or a muted video of that argument. One is the meat of the matter, telling the public what arguments were made, while the other would suggest merely that the motions of an argument occurred.

the alternative means analysis to escape *Waller*. Pet. App. at 41a (Beckwith, J., dissenting).

This Court should clarify and reaffirm that *Waller* requires multiple steps. First, the party seeking the closure or obstruction must offer an overriding interest that the trial court finds satisfactory. Second, the trial court may consider means of serving the compelling interest that are narrowly tailored to the interest at stake—such as closing the courtroom no longer than necessary to hear sensitive testimony or blocking individual troublesome members of the public. Third, the trial court must consider reasonable alternatives to closure—such as a visual obstruction between a sensitive witness and those who may harm said witness. Neither the second nor third step may abrogate the burden of the first. Additionally, these determinations must be supported be clearly articulated findings sufficient for higher courts to review.

As discussed above, the trial court did not identify a specific overriding interest necessitating closure, but merely expressed a general opinion on candor during *voir dire*. The absence of a specific finding should nullify any closure or alternative-means imposition, but it is worth noting exactly why the husher procedure specifically went beyond either narrow tailoring or reasonable alternatives to closure.

The husher device masks all sound coming from the bench where jurors were questioned. This is not a "partial" closure. Had the trial court determined that prospective jurors may ask for privacy and only hushed those persons, then that would have closed part of the process. That partial closure could, in prin-

ciple, have been weighed against a sufficient overriding interest. Here, however, the trial court did not partially close this process, but rather made a general determination applicable to all interviews and closed off the entire process.

Nor should the husher device be considered an "alternative" to closure. The practice of using alternatives to closure generally involves items obscuring characteristics of witnesses. *See* Pet. App. 17a–18a (listing examples). When a physical barrier obstructs the public's view, or a voice box obstructs the cadence of a witness's voice, the public still has access to the pertinent *information* the witness provides. Alternatives are alternatives because they conceal only the information that needs concealing. But here, the husher blocks the relevant information completely. In effect, the husher raises a wall between the court and the public, a glass wall, but no less closed because of its translucency. Without the *voir dire* answers, all the public knows is that the court is going through the motions of justice.

II. PROTECTING THE RIGHT TO A PUBLIC JURY TRIAL IS ESPECIALLY IMPORTANT TODAY, IN LIGHT OF THE VANISHINGLY SMALL ROLES THAT JURIES PLAY IN CRIMINAL ADJUCATION.

The confusion and division among lower courts on how to understand and apply this Court's decision in *Waller* is reason enough to grant the petition. But it is all the more important that the Court resolve this issue now, in light of its connection to an even more fundamental threat to our criminal justice system—the erosion of the jury trial itself.

The jury trial is foundational to the notion of American criminal justice, and it is discussed more extensively in the Constitution than nearly any other subject. Article III states, in mandatory, structural language, that "[t]he Trial of all Crimes . . . shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed." U.S. CONST. art. III, § 2 (emphases added). And the Sixth Amendment not only guarantees the right to a jury trial generally, but lays out in specific detail the form such a trial shall take. *See Faretta v. California*, 422 U.S. 806, 818 (1975) ("The rights to notice, confrontation, and compulsory process, when taken together, guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice . . . .").

Yet despite their intended centrality as the bedrock of our criminal justice system, jury trials are being pushed to the brink of extinction. The proliferation of plea bargaining, which was completely unknown to the Founders, has transformed the country's robust "system of trials" into a "system of pleas." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012); *see also* George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 859 (2000) (observing that plea bargaining "has swept across the penal landscape and driven our vanquished jury into small pockets of resistance").

The Framers understood that "the jury right [may] be lost not only by gross denial, but by erosion." *Jones*, 526 U.S. at 248. That erosion is nearly complete, as plea bargains now comprise all but a tiny fraction of convictions. *See Lafler*, 566 U.S. at 170 (in 2012, pleas made up "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions"); Suja A.

Thomas, *What Happened to the American Jury?*, LITIGATION, Spring 2017, at 25 ("[J]uries today decide only 1-4 percent of criminal cases filed in federal and state court.").

Most troubling, there is ample reason to believe that many criminal defendants—regardless of factual guilt—are effectively *coerced* into taking pleas, simply because the risk of going to trial is too great. *See* Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. OF BOOKS, Nov. 20, 2014. In a recent report, the NACDL has extensively documented this "trial penalty"—that is, the "discrepancy between the sentence the prosecutor is willing to offer in exchange for a guilty plea and the sentence that would be imposed after a trial." NAT'L ASS'N OF CRIM. DEF. LAWYERS, THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 6 (2018).

In short, criminal juries have been dramatically marginalized. The result is not only that criminal prosecutions are rarely subjected to the adversarial testing of evidence that our Constitution envisions, but also that citizens are deprived of their prerogative to act as an independent check on the state in the administration of criminal justice. We have, in effect, traded the transparency, accountability, and legitimacy that arises from public jury trials for the simplicity and efficiency of a plea-driven process that would have been both unrecognizable and profoundly objectionable to the Founders.

There is no panacea for the jury's diminishing role in our criminal justice system; it is a deep, structural problem that far exceeds the bounds of any one case

or doctrine. But the least we can do to avoid further discouraging defendants from exercising their right to a jury trial is to ensure that the *public* component of that right is vigorously protected. Defendants must be assured that if they choose to exercise their Sixth Amendment rights, then the selection of their jurors will itself occur in the public eye.

CONCLUSION

For the foregoing reasons, and those stated by the Petitioner, the petition should be granted.

Respectfully submitted,

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