No.

IN THE

SUPREME COURT OF THE UNITED STATES

TAVARIUS D. RADFORD, Petitioner,
-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

On Petition for Writ of Certiorari

to the Supreme Court of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether the "overriding interest" test established by this Court in *Waller v. Georgia*, 467 U.S. 39 (1984), to determine if a defendant's Sixth Amendment right to a public trial has been violated applies to so-called "partial" closures of the courtroom (i.e., situations in which one or more members of the public are allowed to observe trial proceedings that are otherwise closed to the public).

(2) Whether this Court's holding in *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), that a defendant must show prejudice resulting from a public trial violation where he or she raises the issue for the first time in a collateral proceeding as a claim of ineffective assistance of counsel applies to defendants who raise the structural error of a public trial violation for the first time on direct appeal.

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The petitioner, Tavarius D. Radford, respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of Illinois affirming his conviction.

OPINIONS BELOW

The order of the Supreme Court of Illinois denying Tavarius Radford's petition for rehearing is attached as Appendix A. The published opinion of the Supreme Court of Illinois affirming Tavarius Radford's conviction, including a dissenting opinion, is reported at 2020 IL 123975, and is attached as Appendix B. The published opinion of the Appellate Court of Illinois affirming Tavarius Radford's conviction, including a dissenting opinion, is reported at 2018 IL App (3d) 140404, and is attached as Appendix C.

JURISDICTION

On June 18, 2020, the Supreme Court of Illinois issued its opinion affirming Tavarius Radford's conviction. A petition for rehearing was timely filed and denied on September 28, 2020. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a). This petition is being filed in accord with this Court's March 19, 2020, COVID-19 order extending the deadline to file any petition for a writ of certiorari to 150 days from the date of an order denying a timely petition for rehearing.

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment to the U.S. Constitution

> In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial . . . .

Fourteenth Amendment to the U.S. Constitution

> **Section 1.** . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

Tavarius Radford was charged under Kankakee County, Illinois case number 11-CF-662 with murder and felony child endangerment in connection with his daughter's death (C6). The case proceeded to a jury trial.

Jury selection occurred on November 18, 2013, and November 19, 2013 (R613 *et seq.*, R806 *et seq.*). On November 18, 2013, prior the start of jury selection, the trial judge *sua sponte* decided to close the courtroom to all members of the public except for "two individuals from the victim's family and two individuals from the defendant's family" (R637–38). The judge stated:

> What I'm gonna do during jury selection, it's gonna be difficult—it's a public proceeding, jury selection, but here's the problem. There's only so many seats, and I am going to allow during jury selection say two individuals from—I—I take it the—the courtroom appears to be divided, okay, between perhaps people here in support of the defendant and individuals here more or less in—in—not in support of the defendant, and I will allow two individuals from the victim's family and two individuals from the defendant's family to be present during jury selection and there may not even be room for you, but you cannot talk to any particular—any jurors. You'll have to sit at the back of the courtroom . . . . [I]f you are behind the jurors, you are—they are—there's less risk that you might inadvertently—you know, you wouldn't have like some sort of facial expression to something that's said that could potentially influence the jurors. We don't want that to happen. Okay? Certainly, you know, I want to commend everybody in the courtroom for—that's here in the courtroom right now for your patience this morning and your demeanor, and I'm gonna ask that throughout the trial which could involve, obviously, considering the nature of the case emotions running high. I'm gonna appreciate it if you remember that it's inappropriate to display those emotions because that can have an [e]ffect on the jury and it can—and it can have an [e]ffect on whether or not the trial is ultimately able to even take place or whether or not a mistrial would have to occur, and nobody wants to see that happen. Okay?
>
> So at this time we're gonna bring the jurors up. I am going to clear the courtroom with the exception of two people from each side . . . .

(R637–39).

Then, prior to bringing the potential jurors into the courtroom to begin jury selection, the judge implemented this rule by telling certain people inside the

courtroom that they had to leave, stating: "Folks, at this time I'm gonna ask that with the exception—the very limited exception of those who are permitted to remain in the courtroom, I'm gonna ask that everyone else step out and make room for the jurors who are now coming in. Thank you very much" (R648). After bringing the potential jurors into the courtroom, the judge commented, "We're kind of out of space," and told the potential jurors, "If there's not a seat for you, come up into the jury box" (R650).

Jury selection began before lunch and resumed at 1:30 p.m. after a lunch recess (R668–70). A number of potential jurors were excused that day with both peremptory and for cause challenges (R749–50, 799–801). *People v. Radford*, 2020 IL 123975, ¶ 65 (Neville, J., dissenting). Since jury selection was not completed that day, it was to continue the next day (R803–04).

At the beginning of proceedings on the morning of November 19, 2013, and prior to bringing in the potential jurors, the judge reminded those in the courtroom about the rule, stating: "Now the rule I had yesterday was that two people from—so I'm gonna limit it to two people for jury selection . . . two individuals from—associated with the defendant's family, two individuals associated with the alleged victim's family can be in the courtroom" (R807). Then the judge brought in potential jurors and resumed jury selection (R808). *Radford*, 2020 IL 123975, ¶ 67 (Neville, J., dissenting).

When jury selection proceedings resumed after that day's lunch recess, the judge informed the potential jurors that "a request for media coverage was granted and you may or may not notice that there is a camera in the courtroom" (R864–65). The judge said that the media was not allowed to photograph or film the potential jurors (R865).

Additional potential jurors were excused with both peremptory and for cause challenges during the second day of jury selection (R885–86). *Radford*, 2020 IL 123975, ¶ 68 (Neville, J., dissenting). Three alternate jurors were selected (R886–88). After jury

selection was completed, the judge ended his limitation on public attendance (R890). The remainder of the afternoon that day was devoted to opening statements and the presentation of evidence (R896, 919).

After hearing all of the evidence presented at trial, the jury acquitted Tavarius of murder and the lesser-included offense of involuntary manslaughter but convicted him of child endangerment (R2097–98; C225, 229). The judge sentenced him to a 42-month prison term (R2184; C264).

Although no party had expressly lodged an objection during the trial court proceedings, Tavarius argued on direct appeal that the courtroom closure violated his right to a public trial under the Sixth Amendment to the U.S. Constitution, applicable to the states through the Fourteenth Amendment to the U.S. Constitution (in addition to arguing that the evidence at trial was insufficient to prove him guilty beyond a reasonable doubt of child endangerment and that his conviction should be reversed due to an improper jury instruction as to the mental state element of that offense). On July 13, 2018, the appellate court, with one justice dissenting, affirmed Tavarius's conviction. *People v. Radford*, 2018 IL App (3d) 140404.

As to the public trial issue, the appellate court majority found that *Waller v. Georgia*, 467 U.S. 39 (1984), did not apply to the closure at issue in this case, that Tavarius could not meet the prejudice standard of *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), and that the closure was "trivial." It went on to find that the trial court did not clearly err in closing the courtroom and therefore that, although Tavarius did not knowingly and intelligently waive his right to a public trial under *Walton v. Briley*, 361 F.3d 431, 434 (7th Cir. 2004), he nevertheless forfeited that right by failing to lodge an objection during the trial court proceedings. *Radford*, 2018 IL App (3d) 140404, ¶¶ 48–63.

The dissenting appellate court justice would have applied *Waller* to the closure in this case and found that the closure constituted a clear public trial violation because it failed to satisfy a single requirement of the four-part *Waller* test. The dissenting justice would have further found that the requirement to demonstrate prejudice created in *Weaver* did not apply to public trial violations raised for the first time on direct appeal, and that the closure that lasted for the entirety of jury selection in this case was not "trivial." Accordingly, citing the applicable precedent of the Supreme Court of Illinois at the time concerning structural errors like public trial violations raised for the first time on direct appeal, the dissenting justice would have found that Tavarius was entitled to automatic reversal of his conviction. *Radford*, 2018 IL App (3d) 140404, ¶¶ 64–77 (McDade, J., dissenting).

The Supreme Court of Illinois allowed Tavarius leave to appeal to consider his argument that the trial court violated his right to a public trial (as well as his argument that his conviction should be reversed due to an improper jury instruction as to the mental state requirement for the offense of child endangerment). On June 18, 2020, the court, with one justice dissenting, affirmed the judgment of the appellate court. *People v. Radford*, 2020 IL 123975.

As to the public trial issue, the majority of the Supreme Court of Illinois found that *Waller* did not apply to the closure at issue in this case. *Radford*, 2020 IL 123975, ¶ 36. It also found that Tavarius was unable to meet the *Weaver* prejudice standard. *Radford*, 2020 IL 123975, ¶ 41. It went on to conclude that the trial court did not clearly err in closing the courtroom and that the public trial issue in this case was therefore procedurally defaulted due to the lack of an objection during the trial court proceedings. *Radford*, 2020 IL 123975, ¶¶ 22–23, 42.

The dissenting justice in the Supreme Court of Illinois would have found that the trial court did clearly err because it failed to comply with the second, third, and fourth elements of the *Waller* overriding interest test. *Radford*, 2020 IL 123975, ¶¶ 125, 128–30, 133–42 (Neville, J., dissenting). More specifically, the closure was broader than necessary, the trial court failed to consider reasonable alternatives, and the trial court failed to make findings for the record that were adequate to support the closure. *Radford*, 2020 IL 123975, ¶¶ 138–42 (Neville, J., dissenting). The dissenting justice would have also found that the requirement to demonstrate prejudice created in *Weaver* does not apply to public trial violations raised for the first time on direct appeal, and that Tavarius was therefore entitled to automatic reversal of his conviction. *Radford*, 2020 IL 123975, ¶¶ 164–67, 169, 171–73 (Neville, J., dissenting). The dissenting justice noted that the Supreme Court of Illinois had previously taken the position that clear structural errors, including public trial violations, "excuse[] the failure to make an objection." *Radford*, 2020 IL 123975, ¶¶ 161–62, 169 (Neville, J., dissenting) (citing *People v. Thompson*, 238 Ill. 2d 598, 609, 613–14 (2010); *People v. Glasper*, 234 Ill. 2d 173, 197–98 (2009)). The dissenting justice found it "[s]uprising[]" that the majority took the opposite position in this case due to its "misperceiv[ing] precedent that has established relief when a court violates a defendant's constitutional right to a public trial." *Radford*, 2020 IL 123975, ¶¶ 57, 161 (Neville, J., dissenting).

On September 28, 2020, the Supreme Court of Illinois entered an order denying Tavarius's petition for rehearing.

REASONS FOR GRANTING CERTIORARI

There is a split in authority over whether the "overriding interest" test established by this Court in *Waller v. Georgia*, 467 U.S. 39 (1984), to determine if a defendant's Sixth Amendment right to a public trial has been violated applies to so-called "partial" closures of the courtroom (i.e., situations in which one or more members of the public are allowed to observe trial proceedings that are otherwise closed to the public). A further split in authority has developed over the question of whether this Court's holding in *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), that a defendant must show prejudice resulting from a public trial violation where he or she raises the issue for the first time in a collateral proceeding as a claim of ineffective assistance of counsel applies to defendants who raise the structural error of a public trial violation for the first time on direct appeal.

This case presents an ideal opportunity to resolve these splits in authority over these important constitutional issues, which affect not only a defendant's right to a fair trial but also the rights of members of the public to attend. As the dissenting justice here observed, due to disparities in our criminal justice system, the criminal court audience is more likely than other participants in a case to be composed of people of color, poor people, or both, with a personal interest in the case who have been drawn to the courtroom because they care about a person involved in the case. *People v. Radford*, 2020 IL 123975, ¶¶ 108–14 (Neville, J., dissenting) (citing Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 Harv. L. Rev. 2173 (2014) [hereinafter Simonson]). In addition to the fact that these individuals' silent observation of the proceedings can have a palpable effect on other participants that helps assure the fairness of the proceedings, allowing members of the criminal court

audience to observe firsthand local criminal justice policies and practices facilitates political participation through voting for local officials or joining movements for reform. Their ability to attend is therefore essential to ensure equal justice, for a vibrant participatory democracy, and to maintain public confidence in our criminal justice system. Unfortunately, failing to recognize the importance of the criminal court audience, trial courts across the nation have engaged in the practices of excluding members of the criminal court audience based on inadequate and suspect rationalizations, similar to those the trial court relied on here to force all but four audience members who had come to the courthouse to give up their seats for the entirety of jury selection so that the court could fill nearly every single seat in the courtroom with potential jurors. *Radford*, 2020 IL 123975, ¶¶ 108–14, 212 (Neville, J., dissenting) (citing Simonson). This Court should grant certiorari in order to address the splits of authority as to the issues presented in this case and, in so doing, clarify the circumstances under which such closures should be allowed and the potential remedies when erroneous closures occur.

There is a split in authority over whether the *Waller v. Georgia* "overriding interest" test applies to "partial" closures of the courtroom.

In *Waller*, 467 U.S. at 46, this Court explained that a defendant's Sixth Amendment right to a public trial is, at minimum, no less protective than the First Amendment right of the press and members of the public to attend criminal trials. Accordingly, applying its First Amendment rule to the Sixth Amendment right to a public trial, this Court held that "'[t]he *presumption of openness* may be overcome only by an *overriding interest* based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" *Waller*, 467 U.S. at 45 (quoting *Press-Enterprise Co. v. Superior Court of California, Riverside Cty.*, 464 U.S. 501, 510

(1984), emphasis added). Under this "overriding interest" test, trial proceedings may be closed to members of the public only if (1) the party seeking to close the proceedings advances an overriding interest that is likely to be prejudiced, (2) the closure is no broader than necessary to protect that interest, (3) the trial court considers reasonable alternatives to closing the proceeding, and (4) the trial court makes findings adequate to support the closure. *Waller*, 467 U.S. at 48.

Despite this Court's clear indication that only an "overriding interest" can overcome the "presumption of openness," many lower courts—including the Supreme Court of Illinois in the case at bar—have held that this Court's overriding interest test does not apply to so-called "partial" closures, defined as situations in which one or more members of the public are allowed to observe trial proceedings that are otherwise closed to the public. *Radford*, 2020 IL 123975, ¶ 36; *see also, e.g.*, *United States v. Simmons*, 797 F.3d 409, 413 (6th Cir. 2015). Most of those courts have applied what they refer to as the "substantial reason" test to "partial" closures. *Simmons*, 797 F.3d at 413–14; *see also State v. Uhre*, 922 N.W.2d 789, 796 (S.D. 2019); *United States v. Laureano-Pérez*, 797 F.3d 45, 77–78 (1st Cir. 2015); *United States v. Flanders*, 752 F.3d 1317, 1337 (11th Cir. 2014); *United States v. Yazzie*, 743 F.3d 1278, 1288 n.4 (9th Cir. 2014); *United States v. Thompson*, 713 F.3d 388, 395 (8th Cir. 2013); *United States v. Addison*, 708 F.3d 1181, 1187–88 & n.6 (10th Cir. 2013); *United States v. Cervantes*, 706 F.3d 603, 611–12 (5th Cir. 2013); *Commonwealth v. Cohen*, 921 N.E.2d 906, 921–26 (Mass. 2010); *United States v. Smith*, 426 F.3d 567, 572 (2d Cir. 2005). The vast majority of courts that apply that test, including the courts in nearly all of the above cited cases, view it as a modified version of the four-part *Waller* test in which "the 'overriding interest' requirement is replaced by requiring a showing of a

'substantial reason' for a partial closure, but the other three factors remain the same." *Simmons*, 797 F.3d at 413–14 (compiling cases); *see also In Interest of G.B.*, 433 P.3d 138, 143–44 (Colo. Ct. App. 2018). However, a minority view that is consistent with the position of the Supreme Court of Illinois in this case further diminishes the standard and takes the position that "a court need merely find a 'substantial' reason for [a] partial closure, and need not satisfy the elements of the more rigorous *Waller* test." *Judd v. Haley*, 250 F.3d 1308, 1315 (11th Cir. 2001), *cited with approval in Flanders*, 752 F.3d at 1337; *Radford*, 2020 IL 123975, ¶¶ 36, 39–40.

Other courts have applied this Court's overriding interest test to "partial" closures, as the dissenting justice in this case would have. *Radford*, 2020 IL 123975, ¶¶ 124–25 (Neville, J., dissenting); *State v. Turrietta*, 308 P.3d 964, 970–71 (N.M. 2013); *State v. Mahkuk*, 736 N.W.2d 675, 685 (Minn. 2007); *People v. Jones*, 750 N.E.2d 524, 529–30 (N.Y. 2001). Among the points noted in favor of this view are this Court's indication that only an overriding interest may overcome the presumption of openness, *Radford*, 2020 IL 123975, ¶¶ 119, 124 (Neville, J., dissenting); *Jones*, 750 N.E.2d at 529–30, and that a "'partial closure' distinction . . . finds no support in" this Court's precedent. *Bell v. Jarvis*, 236 F.3d 149, 185 (4th Cir. 2000) (Motz, J., dissenting).

Thus, there is a split in authority as to whether this Court's overriding interest test applies to "partial" closures. And if it does not, a further question that would need to be addressed is what standard should apply.

There is a split in authority over whether the requirement to demonstrate prejudice created in *Weaver v. Massachusetts* applies to public trial violations raised for the first time on direct appeal.

In *Presley v. Georgia,* 558 U.S. 209, 213–15 (2010), this Court held that, under the Sixth Amendment, a trial court is required to comply with the third requirement

of *Waller* of considering reasonable alternatives to a closure "even when they are not offered by the parties." This Court found that that conclusion necessarily arose from its holding in *Waller* that a defendant's Sixth Amendment right to a public trial is at least as protective as the First Amendment right of the public to attend. In other words, because "[t]he public has a right to be present [during jury selection] whether or not any party has asserted the right," a defendant's Sixth Amendment right to an "open courtroom" is not limited by a defendant's failure to offer alternatives to closure. *Presley,* 558 U.S. at 214–15. Instead, a trial court has an independent "obligat[ion]" to *sua sponte* "take every reasonable measure to accommodate public attendance at [a] criminal trial[]," and to make a record showing it has done so pursuant to the fourth *Waller* requirement, in order to protect both the rights of the defendant and members of the public. *Presley,* 558 U.S. at 215. Consequently, this Court found that the trial court in that case clearly erred where, due to the trial court's failure to make a record adequate to show that there were no reasonable alternatives to closing the courtroom during jury selection, "[n]othing in the record show[ed] that the trial court could not have accommodated the public at Presley's trial." *Presley,* 558 U.S. at 215. This Court noted that "[w]ithout knowing the precise circumstances" faced by the trial court, it could conceive of "possib[le]" reasonable alternatives. *Presley,* 558 U.S. at 215. Finding that the result it reached was clearly "settle[d]" by its decades-old precedent in *Waller*, this Court entered a summary disposition granting the defendant relief. *Presley,* 558 U.S. at 214, 216.

In *Weaver*, 137 S. Ct. 1899, a case in which no party had lodged an objection during the trial court proceedings to the courtroom closure at issue, this Court reaffirmed its holding in *Presley* that "[a] public-trial violation can occur . . . 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." *Weaver*, 137 S. Ct. at 1907, 1909 (citing *Presley*, 558 U.S. at 215). This Court also reaffirmed that a public trial violation is a structural error—a type of error that generally requires automatic reversal without a requirement that the defendant demonstrate prejudice. *Weaver*, 137 S. Ct. at 1905, 1908, 1910 ("In the direct review context, [a public trial violation is] a structural error . . . entitling the defendant to automatic reversal without any inquiry into prejudice"). However, this Court held that a defendant who raises a public trial violation for the first time in a petition for collateral relief as a claim of ineffective assistance of counsel is required under *Strickland v. Washington*, 466 U.S. 668 (1984), to demonstrate prejudice. *Weaver*, 137 S. Ct. at 1906–07, 1910–13. This Court reasoned that "finality concerns are far more pronounced" in cases where the issue is raised for the first time in a collateral proceeding which "justif[ies] a different standard for evaluating a structural error depending on whether it is raised on direct review or raised instead in a claim alleging ineffective assistance of counsel [in a collateral proceeding]." *Weaver*, 137 S. Ct. at 1912–13.

Some lower courts have recognized, as the dissenting justice in this case did, that *Waller* and *Presley* made it clear that, even where no party lodges an objection at any time during trial court proceedings to a closure, a trial court's failure to *sua sponte* make findings adequate to support a closure itself constitutes a violation of a defendant's right to a public trial that may be raised for the first time on direct appeal. *Radford*, 2020 IL 123975, ¶¶ 124, 140–42 (Neville, J., dissenting); *State v. Morales*, 932 N.W.2d 106, 113, 116–19 (N.D. 2019); *State v. Wise*, 288 P.3d 1113, 1118–21 (Wash. 2012). As the dissenting justice in this case did, those courts have also recognized that

automatic reversal should be the remedy when the structural error of a public trial violation is raised on direct appeal, and that *Weaver* did not change that. *Radford*, 2020 IL 123975, ¶¶ 164–67, 171–73 (Neville, J., dissenting); *Morales*, 932 N.W.2d at 113, 115–17; *Wise*, 288 P.3d at 1120–22; *see also State v. Franklin*, 585 S.W.3d 431, 476 (Tenn. Ct. Crim. App. 2019) (*Weaver* "is limited to post-conviction proceedings").

However, other courts, including the Supreme Court of Illinois in this case, have applied the requirement to demonstrate prejudice created in *Weaver* to situations where a defendant raises a public trial violation for the first time on direct appeal. *Radford*, 2020 IL 123975, ¶¶ 31–33, 36, 41; *Jeremias v. State*, 412 P.3d 43, 49 & n.3 (Nev. 2018). Thus, there is a split in authority over whether *Weaver* applies to public trial violations raised for the first time on direct appeal. The majority opinion in this case also creates a split over whether it is clear error for a trial court to fail to make findings adequate to support a closure in cases where no party lodges a contemporaneous objection. *Radford*, 2020 IL 123975, ¶¶ 36–37.

This case presents an ideal opportunity for this Court to resolve these splits in authority.

This case presents an ideal opportunity to resolve the splits in authority over (1) whether the *Waller* overriding interest test applies to "partial" closures, and (2) whether the requirement to demonstrate prejudice created in *Weaver* applies to public trial violations raised for the first time on direct appeal. Here, citing the need to make "room" for potential jurors (R637, 648), the trial court *sua sponte* ordered the exclusion of nearly all spectators present in the courtroom for the entirety of the two-day jury selection portion of Tavarius Radford's trial. After allowing a total of only four of the audience members to remain, only two of which could be Tavarius's supporters, the trial court then filled every remaining seat in the courtroom with potential jurors

(R637–39, 648, 650). As a result of the trial court's order, the excluded spectators' seats were first taken by potential jurors and then left empty as potential jurors were excused. *Radford*, 2020 IL 123975, ¶¶ 134, 138 (Neville, J., dissenting).

Although no party had expressly lodged an objection during the trial court proceedings, Tavarius argued on direct appeal that the closure violated his right to a public trial. As the dissenting justice noted, in the Supreme Court of Illinois the State did not argue, and the majority did not find, that this closure complied with the *Waller* overriding interest test. Instead, the State argued that a lesser standard should apply to cases involving "partial" closures. *Radford*, 2020 IL 123975, ¶¶ 124, 127 (Neville, J., dissenting). The majority agreed with the State and found that the *Waller* overriding interest test did not apply. *Radford*, 2020 IL 123975, ¶ 36. The majority also found that Tavarius was unable meet the *Weaver* prejudice standard. *Radford*, 2020 IL 123975, ¶ 41. The majority went on to conclude that the trial court did not clearly err in closing the courtroom. *Radford*, 2020 IL 123975, ¶¶ 22–23, 42.

The dissenting justice, however, would have held that the trial court did clearly err because it failed to comply with the second, third, and fourth elements of the *Waller* overriding interest test, and therefore also failed to even satisfy the version of the "substantial reason" test applied by most courts that utilize that test. *Radford*, 2020 IL 123975, ¶¶ 125, 128–30, 133–42 (Neville, J., dissenting). More specifically, the closure was broader than necessary because attendance was limited to only four audience members for the entirety of the two-day jury selection, even though seating became available as potential jurors were excused. The trial court also failed to consider reasonable alternatives such as bringing potential jurors into the courtroom in smaller groups so that they did not fill up nearly every seat in the courtroom. Finally, the trial court failed to make findings for the record that were adequate to

support the closure. *Radford*, 2020 IL 123975, ¶¶ 138–42 (Neville, J., dissenting) (citing *Morales*, 932 N.W.2d at 116, for the proposition that a reviewing court's *post hoc* rationalization for a closure cannot substitute for the *Waller* requirement that a trial court make findings adequate to support the closure); *see also Presley*, 558 U.S. at 215 ("generic risk" of jury contamination "unsubstantiated by any specific threat or incident" cannot justify excluding members of the public from jury selection). The dissenting justice would have also held that the requirement to demonstrate prejudice created in *Weaver* does not apply to public trial violations raised for the first time on direct appeal, and that Tavarius was therefore entitled to automatic reversal of his conviction. *Radford*, 2020 IL 123975, ¶¶ 164–67, 169, 171–73 (Neville, J., dissenting).

Thus, the outcome of this case hinges on (1) whether the *Waller* overriding interest test applies to "partial" closures, and if not, whether the more stringent version of the "substantial reason" test adopted by most courts or the less stringent version of it employed by some courts should apply, and (2) whether the requirement to demonstrate prejudice created in *Weaver* applies to public trial violations raised for the first time on direct appeal. This case therefore presents an ideal opportunity for this Court to address those issues and to make it clear for lower courts across the nation that unnecessarily excluding nearly all members of the criminal court audience for the entirety of jury selection without complying with *Waller*, as the trial court did here, is a public trial violation that will be enforced by automatic reversal when the issue is raised on direct appeal.

Although the Supreme Court of Illinois found the public trial issue in this case to be procedurally defaulted, this case nevertheless presents a matter of federal law that this Court can address upon finding that (1) the right to a public trial cannot be forfeited merely by a defendant's failure to expressly lodge an objection, or (2) the opinion of the Supreme Court of Illinois in this case did not rest upon an "adequate and independent" state law ground that was "firmly established and regularly followed."

Although the Supreme Court of Illinois ultimately found the public trial issue in this case to be procedurally defaulted under Illinois law due to the lack of an objection during the trial court proceedings, *Radford*, 2020 IL 123975, ¶¶ 22–23, 42, this case nevertheless, for two reasons, presents federal constitutional issues that this Court may review. First, this Court could find, as the court in *Walton v. Briley*, 361 F.3d 431, 434 (7th Cir. 2004), did, that, as a matter of federal constitutional law, the Sixth Amendment right to a public trial cannot be forfeited merely by the failure to lodge an objection. The *Walton* court reasoned that the right to a public trial is a fundamental right on par with the right to a jury trial and therefore, as with the right to a jury trial, it cannot be relinquished unless the record indicates that the defendant knowingly and voluntarily waived that right. *Walton*, 361 F.3d at 434. *But see, e.g.*, *Jeremias*, 412 P.3d at 48 n.2 (disagreeing with *Walton* and holding that the right to a public trial could be forfeited by the mere failure to object). The *Walton* court's position is consistent with this Court's indication in *Presley* and *Weaver* that a trial court has an independent obligation to comply with *Waller* regardless of whether any party expressly lodges an objection to a closure, and that it is error for a trial court to simply omit to make the findings that are required to show that the right to a public trial was honored. *Weaver*, 137 S. Ct. at 1907, 1909 (citing *Presley*, 558 U.S. at 215). This Court should therefore find that Tavarius did not procedurally default his federal constitutional claim because the Sixth Amendment right to a public trial cannot be forfeited by the mere failure to lodge an objection.

Second, the opinion of the Supreme Court of Illinois in this case did not rest on an "adequate and independent" state law ground that was "firmly established and regularly followed" at the time of Tavarius's appeal. *See Ford v. Georgia*, 498 U.S. 411,

423–24 (1991). As the dissenting justice noted, prior to the decision in this case, the Supreme Court of Illinois had taken the position that clear structural errors, including the right to a public trial, "excuse[] the failure to make an objection." *Radford*, 2020 IL 123975, ¶¶ 161–62, 169 (Neville, J., dissenting) (citing *People v. Thompson*, 238 Ill. 2d 598, 609, 613–14 (2010), and *People v. Glasper*, 234 Ill. 2d 173, 197–98 (2009)); *see also Sebby*, 2017 IL 119445, ¶¶ 70–72 (even as to a non-structural error, the Supreme Court of Illinois, in what it termed "little more than a straightforward application of [its] precedent," rejected the State's argument that the defendant in that case was not entitled to relief due to failure to object in the trial court). Indeed, the Supreme Court of Illinois had specifically stated in both *Thompson* and *Glasper* that "automatic reversal is *required* . . . when an error is deemed 'structural.'" *Thompson*, 238 Ill. 2d at 608 (emphasis added); *Glasper*, 234 Ill. 2d at 197–98. The dissenting justice in this case even found it "[s]uprising[]" that the majority took the opposite position in this case due to its "misperceiv[ing] precedent that has established relief when a court violates a defendant's constitutional right to a public trial." *Radford*, 2020 IL 123975, ¶¶ 57, 161 (Neville, J., dissenting).

Absent the new, not "firmly established and regularly followed" approach taken toward the structural error of a public trial violation in this case, the remaining grounds for the opinion of the Supreme Court of Illinois in this case were its answers to the questions presented in this petition: (1) whether the *Waller* overriding interest test applies to "partial" closures such that it is clear that a public trial violation occurred in this case, and (2) whether the *Weaver* requirement to demonstrate prejudice applies to public trial violations raised for the first time on direct appeal. These questions, which the majority and the dissenting justice in this case disagreed upon, are federal issues that this Court can and should address. *See Salem v. Yukins*,

414 F. Supp. 2d 687, 696–97 (E.D. Mich. 2006) ("[a] rule of exception which itself depends on the perceived merits of the federal claim cannot fairly be considered adequate and independent of federal law," internal quotation marks and citations omitted).

Conclusion

There is a split in authority as to the issues presented in this case: (1) whether the *Waller* overriding interest test applies to "partial" closures, and (2) whether the *Weaver* requirement to demonstrate prejudice applies to public trial violations raised for the first time on direct appeal. These are important constitutional questions that affect not only defendants' rights to fair trials but also the rights of members of the public to observe trial proceedings. This Court should therefore grant certiorari to resolve these splits in authority. It should go on to restore uniform application throughout the nation of its precedent indicating that the *Waller* overriding interest test applies to all courtroom closures and that the *Weaver* prejudice requirement does not apply to public trial violations clearly revealed by the record and raised on direct appeal. Doing so would not only protect defendants' rights to fair trials, but also help ensure equal justice and a vibrant participatory democracy, and avoid the erosion of public confidence in our criminal justice system that results from the unnecessary exclusion of the distinct demographic represented by members of the criminal court audience, people who are often drawn to the courtroom because they care about or support someone involved in the case. In the event that this Court concludes that the answers to the questions at issue in this case are already settled by its prior precedent, Tavarius respectfully requests, in the alternative, that this Court enter a summary disposition reversing the judgment of the Supreme Court of Illinois. *See Presley,* 558 U.S. at 214–16 (granting that remedy).

CONCLUSION

For the foregoing reasons, the petitioner, Tavarius D. Radford, respectfully requests that this Court grant certiorari or, in the alternative, enter a summary disposition reversing the judgment of the Supreme Court of Illinois.

Respectfully submitted,

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