No. _____

In the
Supreme Court of the United States

ISSAC JERMALE FISHER,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

On Petition for a Writ of Certiorari
To the Court of Appeals of the State of Missouri

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When do intentional actions designed to restrict the public's entry to the courtroom constitute a closure of constitutional significance that, unless the trial court follows the standards set out in *Waller v. Georgia*, 467 U.S. 39 (1984), results in structural error?

PARTIES

All parties appear in the caption of the case on the cover page.

RELATED PROCEEDINGS

Sixteenth Circuit Court of Jackson County: *State of Missouri v. Issac J. Fisher*, 1816-CR04939-01; Judgment entered January 26, 2023.

Court of Appeals of Missouri, Western District: *State of Missouri v. Issac J. Fisher*, WD85974; Opinion issued November 26, 2024.

Supreme Court of Missouri: *State of Missouri v. Issac J. Fisher*, SC100913; Application for Transfer denied March 4, 2025.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Issac J. Fisher, respectfully petitions for a writ of certiorari to review the judgment of the Missouri Court of Appeals, Western District.

OPINION BELOW

The opinion of the Missouri Court of Appeals, Western District, is published at 705 S.W.3d 664 (Mo. Ct. App. 2024).

JURISDICTION

The Missouri Court of Appeals, Western District, issued its opinion on November 26, 2024. A copy of that decision appears as Appendix A (A1-A32).

A timely application for transfer to the Missouri Supreme Court was denied on March 4, 2025. A copy of the order denying transfer appears at Appendix C (A38-A39).

This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment provides, in relevant part:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial …."

STATEMENT OF THE CASE

A trial court must "take every reasonable measure to accommodate public attendance at criminal trials." *Presley v. Georgia*, 558 U.S. 209, 215 (2010). If a court intends to exclude the public from a criminal proceeding, it must apply four standards: "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 (1984).

A. Trial

On the first day of Issac Fisher's trial on eighteen felony charges, the court held *voir dire* in a different, larger courtroom than the court's usual location (I. Tr. 332-33). On the second day, with the jury selected, Mr. Fisher's trial resumed in the court's usual location. Taped in the windows of the courtroom doors were red signs telling spectators to "STOP" because a jury trial was in progress (I. Tr. 618-21; A40-A48). The signs instructed spectators that they "may enter/exit only during breaks" and that they "may" be seated in a particular section of the courtroom, while the "rest of the courtroom is reserved for jurors only." (A40-A48). Mr. Fisher objected to the court posting these signs and argued that restricting when the public could come into the courtroom was an unconstitutional closure (I. Tr. 618-21). The trial court

overruled the objection, stating it had "the right to prevent people from coming and going and turning this into a lot of distraction for the jury." (I. Tr. 618-21).

Later that morning, the lead prosecutor told the court she had let their victim advocate "know what the Court's preference is on people coming and going from the courtroom," and had "talked to the family." (I. Tr. 637). She then indicated the only person she anticipated coming and going from the State's side would be a legal assistant, "who is going to be organizing getting witnesses." (I. Tr. 637). During an afternoon break later that day, the court addressed the spectators then present in the courtroom, telling them:

> There is a note on the courtroom door. You are free to come in here and watch the trial but the note on the door says, [i]f you come in, you wait until we take a break. I don't want a lot of moving around, going in, going out. I know in the morning session we had some folks going out and coming back in. If you come in, have a seat, we'll take a break about every hour and a half or so. When we do take breaks, I'm going to have those of you sitting back there stay in your seat until the Court releases you. So just stay put and we will accommodate Mr. Fisher, and then once we get Mr. Fisher accommodated, I'll release you all. Okay? All right.

(I. Tr. 714).

On the third day of Mr. Fisher's trial, the court told counsel they would be taking breaks at different times that day because of the court's afternoon docket (II. Tr. 839-40). Mr. Fisher objected to the signs again, arguing that changing the break times made it even more difficult for members of the public to know when they would be able to enter the courtroom to observe the trial and that the signs block the view of any potential spectator to see if court was in session or not (II. Tr. 840-41). In response, the court stated:

There are, for the appellate record, 12 citizens currently sitting in the courtroom. Yesterday we had approximately 25 citizens sitting in the courtroom during the proceedings. There was a fair amount of talking going on between the citizens.

They clearly had opposing views on how this trial should proceed to the point that in the afternoon we had to have sheriff's deputies up here to monitor things. At the lunch break we had a situation in which we had those 25 citizens trying to get out the door, we had some things going on in the hallway, including Ms. Coleman[1] was in the hallway crying is my understanding.

We were trying to get Ms. Coleman moved, we were holding the jury up from going to lunch, because everybody shares a common hallway.

Mr. Fisher needed to go to restroom [sic]. And we basically had a traffic jam in the hallway. Mr. Fisher ended up relieving himself on the courtroom floor. And we eventually got Ms. Coleman moved, we got Mr. Fisher moved, and we got the jury to lunch.

So though defense counsel may object to the way that the Court attempts to control the traffic in and out of the courtroom with people who are saying things to each other inappropriately, I might say, and the Court is doing its best to make sure that those things are not said that the jury can hear, the Court is doing its best to make sure that people are not getting up and walking out or walking in and distracting the jury from hearing the evidence in the case.

So as long as we're letting the Court of Appeals know what the courtroom looks like, that's what is going on in the courtroom and why the Court is imposing it. And actually yesterday myself, I looked in the courtroom with the signs up, though they cover approximately 90 percent of the window, you can see in the courtroom past the signs.

(II. Tr. 841-42).

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[1] Ms. Coleman is Mr. Fisher's mother. The State called her to testify in Mr. Fisher's trial as the first witness (I. Tr. 677-769).

This exchange followed:

> [DEFENSE COUNSEL]: And I'll point out for the record, you had those signs up before any of this stuff took place.
>
> THE COURT: Absolutely.
>
> [DEFENSE COUNSEL]: Right. And none of that could have been anticipated and none of that has anything to do with our complaint. We understand you have an absolute right to run this courtroom as you see fit. That does not extend to providing and preventing the public from entering at any time they want.
>
> THE COURT: Or changing the times of breaks?
>
> [DEFENSE COUNSEL]: You changing the time of breaks, Judge, when your sign says you can only come in during breaks, there is no way to anticipate when I can come. If I was planning to come at 10:30, because that's the regular break today, I may be out of luck because we're going to take a break at 10:15, which means I can't get into the courtroom because you're not conducting even regular breaks.
>
> There's nothing on the sign that tells people coming in when the breaks are when they should be able to come in. They have to literally line up at the door, each one of them, and peak [sic] in, maybe, to see if anything is going on. And I'll point out, I think it's pretty hard to see the witness stand from that door.
>
> But we'll have evidence at the motion for new trial about that if and when we get there. I just want to preserve my issue so it's clear for the record. And I appreciate that opportunity. Thank you.
>
> THE COURT: All right. Ready for the jury?

(II. Tr. 843-44). There was no discussion about how the signs were tailored to address the court's stated concerns or whether there were any reasonable alternatives to the signs (II Tr. 839-44).

The signs remained up throughout Mr. Fisher's trial—through the opening statements, the testimony of thirty-one witnesses, the introduction of hundreds of exhibits, and closing arguments (I. Tr. 4-21; III. Tr. 1955). Exactly when the court took breaks varied day-by-day. On the first day of trial during *voir dire*, the court announced the general schedule would be to start at 9:00 a.m., then "take a midmorning break, a lunch break, an afternoon break," and then finish as close to 5:00 p.m. as possible (I. Tr. 596-97). The court did not indicate specific times for the breaks. On the second day of trial, prior to calling in the jury, the parties and the court handled preliminary matters, including Mr. Fisher's objection to the signs and evidentiary issues (I. Tr. 604-643). The court took a "five-minute break" and then another recess while discussing the preliminary matters (I. Tr. 636, 638). The timings of those breaks are not indicated on the record. After calling in the jury, the court next took a break for lunch, at 11:50 a.m. (I. Tr. 711-12). The record does not indicate the timing of the afternoon break (I. Tr. 792-93).

On the third day, as mentioned, the court announced its intention to follow a different break schedule: two-fifteen-minute breaks at 10:15 a.m. and 11:30 a.m., with a lunch break at 12:45 p.m. (II. Tr. 839-40). The court then took breaks at 10:05 a.m. and 11:31 a.m., lunch at 12:50 p.m., and an afternoon break at 3:30 p.m. (II. Tr. 894-95, 948, 1003, 1075). At the end of the third day, the court told the jury they would "get back to a normal schedule tomorrow." (II.Tr.1138).

On the fourth day, the court took breaks at 10:30 a.m., 12:20 p.m., and 3:25 p.m. (II. Tr.1210, 1289, 1385-86). On the fifth day, the court took breaks at 10:03 a.m. and 11:50 a.m., then excused the jury for the day at 2:45 p.m. (II. Tr. 1478, 1546, 1626). On the sixth day, the court took a break at 10:35 a.m. but then excused the jury for the day right after that break, when the defense rested (III. Tr. 1715, 1731). On the last day of trial, the court read the instructions to the jury, then took a fifteen-minute break at 10:05 a.m. (III. Tr. 1856). After the break, the State and Mr. Fisher gave their closing arguments, and the jury retired to deliberate at 12:19 a.m. (III. Tr. 1856; 1858-1928).

The jury returned its verdict the next day, at 10:50 a.m. (III. Tr. 1940). Mr. Fisher was convicted of seventeen of the eighteen felony counts, including two counts of first-degree murder, each requiring a sentence of life without the possibility of parole (A33-A37).

Mr. Fisher raised the closure issue in his motion for new trial. At the hearing, Mr. Fisher presented photos of the signs and testimony from the defense investigator who took the photos (III. Tr.1953-58; A40-A48). The investigator testified that she was not able to look through the signs to see what was going on in the courtroom, there were not any signs indicating when the court would be in break, and there was no staff outside the courtroom to direct spectators about when the court was in a break (III. Tr. 1956-57).

Mr. Fisher's family friend also testified that the signs stopped her from entering the courtroom on the first day, and she could not see into the

courtroom to determine if anything was going on (III. Tr. 1958-60). That friend only learned she was missing *voir dire* in another location after an employee came out of the courtroom (III. Tr. 1960-61). The next day, she entered the courtroom because other people were (III. Tr. 1961). She came and went once while the court was in session because she had to go to the bathroom, and did see others going in and out, but assumed they were court staff (III. Tr. 1962). She also testified that she did not violate the rules after the court's admonishment to the spectators (III. Tr. 1964).

The trial court denied Mr. Fisher's motion for new trial, stating:

> All right. Well, I will say just with regard to that, we had multiple, if not virtually every break trying to accommodate both getting the jury down the hallway to the elevators, getting the spectators, which there were many, out of the courtroom and getting Mr. Fisher either downstairs with the custody staff or we started using Division 11 across the hallway.
>
> So there were continuous attempts to keep everyone moving without the jurors -- without the hallway getting blocked and without the jurors seeing Mr. Fisher in custody. The day you mentioned with Ms. Coleman is the day that the hallway got backed up, which led to Mr. Fisher not getting to leave, which led to Mr. Fisher urinating on the courtroom floor as we had people trying to get out of the courtroom.
>
> But as the witness testified, she did observe people coming and going during the trial and I think the record is clear that the Court did not admonish those people.

(III. Tr. 1974-75). After the court's ruling, Mr. Fisher's defense counsel pointed out that the court was "talking about proceedings during breaks, not whether people could come into the courtroom," and that preventing the jurors from

seeing Mr. Fisher in handcuffs "has absolutely nothing to do with signs on a courtroom door saying don't come in." (III. Tr. 1975).

B. Missouri Court of Appeals

Mr. Fisher appealed his convictions to the Missouri Court of Appeals, Western District (A1-A32). On appeal, Mr. Fisher argued the trial court's actions violated his constitutional right to a public trial under the Sixth and Fourteenth Amendments (A6). The Court of Appeals concluded Mr. Fisher's right to a public trial was not violated because the courtroom was not truly closed and, therefore, the trial court was not required to adhere to the standards set by this Court in *Waller v. Georgia*, 467 U.S. 39 (1984), and *Presley v. Georgia*, 558 U.S. 209 (2010) (A11-A12). In doing so, the Court of Appeals recognized "that restrictions on the public may in other circumstances be akin to, or have the effect of, closed proceedings." (A12).

The Court of Appeals also included, in a footnote, "a potential independent ground for denying" Mr. Fisher's point on appeal—that Mr. Fisher had not proven any member of the public had been excluded from the proceedings (A12). For the proposition that a defendant cannot demonstrate prejudice from "closure of a courtroom based on speculation as to whether anyone was actually excluded[,]" the Court of Appeals cited to a decision from another district of the Missouri Court of Appeals, *State v. Salazar*, 414 S.W.3d 606, 614-16 (Mo. App. Ct. 2013) (A12). The Court of Appeals also cited, as contradictory to this proposition, *Waller*'s confirmation that a defendant is not

required to prove specific prejudice when there is a violation of the right to a public trial, presumably questioning whether a defendant should be required to demonstrate a particular person was excluded (A12).

C. Missouri Supreme Court

Mr. Fisher applied for transfer of his case to the Missouri Supreme Court (A38). In his application, Mr. Fisher asked the Missouri Supreme Court to clarify what constituted a constitutionally significant restriction on public access to a trial requiring adherence to the *Waller* framework and whether a defendant is required to prove a particular person was excluded from the courtroom for relief from a violation of the right to a public trial. The Missouri Supreme Court denied Mr. Fisher's application for transfer on March 4, 2025 (A38).

REASONS FOR GRANTING THE WRIT

Especially in comparison to other rights guaranteed by the Sixth Amendment, this Court's jurisprudence on the public trial right is sparse. *See* Erwin Chemerinsky, *Foreword to* Susan N. Herman, *The Right to a Speedy and Public Trial: A Reference Guide to the United States Constitution*, at xii (2006). The lower courts have filled that void with disparate understandings of the parameters of the Sixth Amendment public trial right, as well as dovetailing approaches on how, and when, to enforce that right. Further guidance from this Court is overdue. Without it, lower courts, like the court below, will continue to reason their way out of faithfully applying this Court's

well-founded standards from *Waller v. Georgia*, 467 U.S. 39 (1984) and *Presley v. Georgia*, 558 U.S. 209 (2010).

A. There is well-recognized confusion and conflict in how lower courts are enforcing the Sixth Amendment right to a public trial.

Mr. Fisher's case joins a legal landscape full of confusion and conflict on questions central to protecting the Sixth Amendment public trial right: what counts as a closure and how a court's managerial authority factors into that question; whether there is a triviality or de minimis exception and what the limits of that exception should be; whether the defendant must prove a particular individual was excluded; and how to treat partial closures.

i. Conflict in How Courts Treat Intermission-Only Admission Policies

Two other state appellate courts—Minnesota and New York—have recently addressed court restrictions on public entry times and applied the robust protection of the public trial right that is absent from the decision below. Earlier this year, the Minnesota Court of Appeals determined a defendant's public trial right *had* been violated under a factual scenario strikingly similar to Mr. Fisher's case. *State v. Akubar*, 16 N.W.3d 356 (Minn. Ct. App. 2025). In *Akubar*, the trial court "orally ordered that no one other than trial counsel and testifying witnesses could enter or re-enter the courtroom except in the morning before the proceedings began and during the planned midmorning,

lunch, and midafternoon breaks." *Id.* at 359. Mr. Akubar's trial court imposed this restriction halfway through trial, and after explaining it was doing so to avoid distractions to the jury and court personnel. *Id.* at 359-60. When the defense objected, the court insisted this was not a closure. *Id.* at 360. The court also noted that public spectators were present at the trial. *Id.*

The Minnesota Court of Appeals addressed the same threshold question as the Missouri Court of Appeals: whether the trial court's intermission-only admission policy constituted a courtroom closure implicating Mr. Akubar's public trial right. *Id.* at 361. Unlike Missouri, Minnesota answered that question affirmatively, contrasting it with cases Minnesota courts had found involved "too trivial" of a closure to violate the Sixth Amendment. *Id.* at 361-62. This closure was non-trivial because the "restriction on courtroom access here was not for a discrete segment of the trial proceedings," and instead "included a substantial portion of the state's presentation of evidence" as well as closing arguments, the court's instructions, a hearing, the jury viewing a video exhibit, and the jury's verdict. *Id.* at 361-62. The Minnesota Court also recognized that denying a constitutionally significant closure had occurred in Mr. Akubar's case would "implicitly preauthorize district courts statewide to employ an intermission-only admission policy as a matter of course in every case," giving the sort of "unfettered exclusionary power [that] would necessarily and improperly dilute Minnesota criminal defendants' constitutional right to a public trial." *Id.* at 362.

After determining that it was a constitutionally significant closure, the Minnesota Court of Appeals next determined the trial court's actions did not survive scrutiny under the standards provided in *Waller*. *Id.* at 363-64. Recognizing the trial court might have had a "reasonable concern that the entering and exiting of members of the public might cause some degree of distraction to the jury," the Court held that did not justify the court's restrictions because "risk of some distraction is an inevitable consequence of a courtroom open to the public[,]" and the "level of disturbance sufficient to justify broadly closing the courtroom therefore must exceed the kind of minor distractions that one might reasonably expect in all routine public-trial proceedings." *Id.* at 364. In addition, the Court held the "closure was not sufficiently tailored to address the risk" and "the court failed to consider less restrictive alternatives." *Id.* at 364.

Two years ago, the New York Court of Appeals demonstrated an understanding of the public trial right consistent with Minnesota and inconsistent with Missouri when it dealt with similar entry restrictions and likewise found that the defendant's public trial right had been violated. *People v. Muhammad*, 213 N.E.3d 624 (N.Y. 2023). In *Muhammad*, the trial court employed a policy in every trial that no one could enter or exit while witnesses testified, which it justified as to avoid distractions. *Id.* at 625. Unlike in Mr. Fisher's case, Mr. Muhammad did not object to the policy, raising the issue for the first time on appeal. *Id.* The New York Court of Appeals did not reach the

propriety of the intermission-only admission policy overall, because the court officers' flawed implementation of that policy constituted an unconstitutional closure regardless. *Id.* at 630. The *Muhammad* Court found that "the officers' failure to notify those waiting in the hallway that they could enter—for example, by verbal communication or placing a sign indicating the courtroom was open" meant spectators were "unjustifiably excluded from the courtroom at a time when the courtroom should have been open." *Id.* at 630. Crucially, the *Muhammad* Court rejected the notion that there was no closure because the court officers had not physically prevented anyone from entering the courtroom or because the waiting spectators had not taken it upon themselves to ask the court officers if the courtroom was open. *Id.* at 629-30.

In contrast to *Akubar* and *Muhammad*, Missouri joined other state and federal courts that have determined a trial court's restrictions on ingress and egress is not a closure requiring the application of the *Waller* standards. These courts typically find such policies a reasonable exercise of a trial court's power to maintain order and control over the proceedings. Most recently, in *State v. Sena*, the Nevada Supreme Court authorized the trial court ordering that spectators could not enter or exit during witness testimony because it "protect[ed] the dignity and decency of [the court's] proceedings" in a case with "extremely sensitive" testimony. 510 P.3d 731, 753 (Nev. 2022).

In *Long v. State*, after finding the defendant had waived the issue by failing to object, the Indiana Court of Appeals nonetheless approved the trial

court preventing entry and exit as a "trial management" issue rather than exclusion issue, pointing out the court had not affirmatively barred or physically prevented anyone from attending. 121 N.E.3d 1085, 1088 (Ind. Ct. App. 2019). Similarly, in *State v. Gomez*, the Washington Supreme Court went beyond what was necessary to decide the case to approve an intermission-only admissions policy: "Just as trial court judges are permitted to exclude distracting individuals, they are permitted to impose reasonable restrictions on the public's manner of entry so as to minimize the risk of distraction or impact on the proceedings." 347 P.3d 876, 880 (Wash. 2015).[2]

Federal courts have likewise recognized a trial court's ability to impose restrictions on when the public can enter the courtroom without implicating the public trial right. In *U.S. v. Lampley*, while it was unclear whether the trial court had actually restricted entry during the proceedings, the Tenth Circuit authorized such a restriction as being within the court's "managerial authority." 127 F.3d 1231, 1239 (10th Cir. 1997). *Lampley* cited to a Fourth Circuit case, *Bell v. Evatt*, which also approved the court preventing entry during witness testimony as "maintaining order in [the] courtroom and

[2] The Washington Supreme Court indicated it was evaluating the public trial issue under Washington's state constitution, however the right to a public trial under the state constitution is equal to, or greater than, the Sixth Amendment public trial right. *State v. Stark*, 334 P.3d 1196, 1200 (Wash. App. Ct. 2014) (citing *State v. Bone–Club*, 906 P.2d 325 (Wash. 1995)). It follows that if the Washington Supreme Court found these actions were permissible under the state constitution, it would also find them permissible under the Sixth Amendment.

ensuring a non-disruptive atmosphere for jury members, the litigants, the members of the press, and any members of the public who chose to attend." 72 F.3d 421, 433 (4th Cir. 1995).

However, at least one federal circuit has recognized that the court's managerial authority is not an excuse to eschew the *Waller* standards. *Tucker v. Superintendent Graterford SCI*, 677 F. App'x 768 (3d Cir. 2017). In *Tucker*, the Third Circuit expressed deep concern with Pennsylvania courts applying a less onerous standard than *Waller* to allow "reasonable restrictions on access to the courtroom" whenever a trial court "perceive[s] a threat to the orderly administration of justice in the courtrooms by an unmanageable public[.]" *Id.* at 775-76.

Courts are not wrong to recognize a trial court's managerial authority. But with all power comes responsibility, and the *Akubar* and *Muhammad* courts recognized the real threat this power poses to the public trial right, when wielded without careful consideration. *Muhammad* demonstrates the practical problem in having an intermission-only admission policy when the trial court should be taking "every reasonable measure to accommodate public attendance at criminal trials." *Presley*, 558 U.S. at 215. If a trial court creates a policy restricting entry to only the breaks in proceedings, the court then needs to make sure potential spectators are aware when those breaks are, lest a restriction that could seem reasonable in theory become an unconstitutional closure in practice.

This problem is apparent in Mr. Fisher's case. Any potential spectators outside the courtroom were met with a red sign that told them to "STOP" and not enter without information that they were unlikely to have, and which would be difficult to get: whether and when there was a break in the proceedings (A40-A48). Take Mr. Fisher's family friend, who arrived at the designated courtroom to observe *voir dire* on the first day of trial but was unaware nothing was happening in that courtroom because the signs prevented her from entering and blocked her view into the courtroom (III. Tr. 1958-60). Just like the waiting spectators in *Muhammad* behaved reasonably and understandably by waiting for further instructions from the court officers, she behaved reasonably and understandably in staying outside of the courtroom in response to seeing the court's "STOP" signs.

As the *Akubar* Court explained, "an inevitable consequence" of a public trial is the "risk of some distraction." 16 N.W.3d at 364. To faithfully protect the right to a public trial, something more than "the kind of minor distractions that one might reasonably expect in all routine public-trial proceedings" must justify a restriction like when the public can enter the courtroom to observe what is going on inside. *Id.*[3] *Akubar*'s language harkens back to this Court's language in *Presley*:

[3] Prior to the COVID-19 pandemic, this Court permitted members of the public to shuffle in and out of the courtroom in three-minute intervals during arguments. The "three-minute line" gave more members of the public the opportunity to see this Court in session, a value seemingly prized above avoiding any potential distraction the extra movement might cause.

> The generic risk of jurors overhearing prejudicial remarks, unsubstantiated by any specific threat or incident, is inherent whenever members of the public are present during the selection of jurors. If broad concerns of this sort 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.

558 U.S. at 215. Yet it's precisely generic risks and broad concerns that a trial court's managerial authority is often aimed at addressing. Care must be taken when that managerial authority is exercised in a way that impacts public attendance; care that is not currently required in jurisdictions like Missouri. When courts narrowly define what counts as "closure" and what actions implicate the Sixth Amendment public trial right to exclude such exercises of managerial authority, they are unnecessarily encumbering public attendance at trial proceedings. This Court needs to intervene to clarify what restrictions trial courts can place on public entry, if any, before those courts must satisfy the *Waller* standards.

ii. Confusion in Application of a Triviality or De Minimis Doctrine

Related to finding that a court's actions did not constitute a closure is the practice of many lower courts deeming a closure "too trivial" or "de minimis" to require relief. *See United States v. Gupta*, 699 F.3d 682, 688 (2d Cir. 2012) (collecting cases applying a triviality standard to infringements of the right to a public trial). Whether the reviewing court declares that no closure occurred, as the Missouri Court of Appeals did in Mr. Fisher's case, or declares

that whatever closure occurred was too trivial or de minimis, it produces the same result: the trial court's actions avoid scrutiny under *Waller*'s standards. In fact, declaring no closure occurred and declaring the closure "too trivial" could be the same thing:

> We need not rule on the metaphysical question whether, in view of the triviality of the incident, it was not a deprivation of a constitutional right, or in contrast, it was a violation of a constitutional right, but, in spite of the inapplicability of the harmless error rule, too trivial to justify vacating the state court's judgment.

Gibbons v. Savage, 555 F.3d 112, 121 (2d Cir. 2009).

While courts may struggle with clarifying where in their analysis the triviality exception provides an off-ramp, that has not stopped its wide acceptance. *See State v. Schierman*, 438 P.3d 1063, 1082 (Wash. 2018) ("[T]here is no jurisdiction we are aware of that has adopted a rule completely rejecting the doctrine of de minimis closures."); *see also People v. Lujan*, 461 P3d 494, 499 (Colo. 2020) (noting the triviality standard "has gained acceptance since the Second Circuit first adopted it over two decades ago"). Whether these jurisdictions are applying the same standard for when a closure is deemed trivial or de minimis is a wholly different question.

For a start, courts disagree on the limits of the doctrine. In adopting the doctrine of de minimis closures in *Schierman*, the Washington Supreme Court carefully "limited" that exception after recognizing that "certain de minimis analyses from other jurisdictions exemplify" the risk of procedural rights becoming "entirely unenforceable" when you excuse them as harmless after the

fact. 438 P.3d at 1081. As examples of abuse of the de minimis doctrine, *Schierman* cited to *Gibbons*, 555 F.3d at 114, which involved a "closed proceeding in which potential jurors were questioned about the impartiality[,]" and *United States v. Al-Smadi*, 15 F.3d 153, 154-55 (10th Cir. 1994), which held that a "20-minute closure of trial was de minimis solely because it was inadvertent." The Second Circuit, for its part, has insisted that it has "repeatedly emphasized" the "narrow application" of the triviality doctrine, citing to *Gibbons* as an example of a case that fits within that narrow application. *Gupta*, 699 F.3d at 688.

Courts also disagree on the importance of whether the closure was inadvertent, as opposed to intentional, in the triviality analysis. On one end of the spectrum (in a case that the Washington Supreme Court thought went too far), the Tenth Circuit seemingly excludes all inadvertent closures from Sixth Amendment analysis. *Al-Smadi*, 15 F.3d at 154. The Eleventh Circuit has also adopted this approach. *Capshaw v. United States*, 618 F. App'x 618, 623 (11th Cir. 2015).

In the middle of the spectrum, some courts have looked at inadvertence as one factor pointing toward triviality as part of a multifactor inquiry. *See, e.g., Commonwealth v. Cohen*, 921 N.E.2d 906, 919 (Mass. 2010) ("Some courts have determined that a court room closure may be so limited in scope or duration that it must be deemed 'de minimis' or trivial, and not in contravention of the Sixth or First Amendment public trial guarantees;

whether the closure was 'inadvertent' on the part of the judge is sometimes mentioned as one factor relevant to the analysis."); *see also Peterson v. Williams*, 85 F.3d 39, 44 (2d Cir. 1996).

At the other end of the spectrum, the Seventh Circuit has declared "[w]hether the closure was intentional or inadvertent is constitutionally irrelevant." *Walton v. Briley*, 361 F.3d 431, 433 (7th Cir. 2004). Wisconsin agrees. *State v. Vanness*, 738 N.W.2d 154, 158 (Wis. Ct. App. 2007). This Court needs to intervene to clarify whether there is a triviality or de minimis exception, and, if so, how that doctrine fits in with determining whether a closure has occurred and what relief is warranted from that closure.

iii. Conflict on Whether Defendants Must Prove a Spectator was Excluded

Mr. Fisher's case presents another lower-court split in public trial analysis: whether the defendant must prove a particular spectator was excluded to establish a public trial violation. The Missouri Court of Appeals offered Mr. Fisher's failure to do so as a potential alternative justification for denying his claim, consistent with another Missouri case that imposed that requirement, *State v. Salazar*, 414 S.W.3d 606, 614-16 (Mo. Ct. App. 2013), *cert. denied*, 573 U.S. 947 (2014). In doing so, however, the Court also cited to *Waller* as contrary to that proposition, seemingly acknowledging such a requirement might not be consistent with this Court's precedents. Back in

2014, this Court denied Mr. Salazar's petition for certiorari, which had invited this Court to address the split about this requirement. A split remains.

Before Mr. Fisher's case, Missouri Courts reaffirmed *Salazar*'s requirement that the defendant prove a member of the public was excluded in *State v. Jones*, 530 S.W.3d 525, 531 (Mo. Ct. App. 2017), and *State v. Russell*, 656 S.W.3d 265, 277 (Mo. Ct. App. 2022). Rhode Island, Massachusetts, and New Jersey have also faulted defendants for lack of such proof. See *State v. Barkmeyer,* 949 A.2d 984, 1003 (R.I. 2008) ("Absent a showing that a member of the public was prevented from attending the trial, we are unable to conclude that defendant's Sixth Amendment right was violated."); *Commonwealth v. Curran*, 178 N.E.3d 399, 406 (Mass. 2021) ("[T]he defendant has the burden of proving that the public was excluded from his trial"); *State v. Venable*, 986 A.2d 743, 746 (N.J. Sup. Ct. App. Div. 2010) ("[T]here is no basis for a finding that any specific person was excluded from the jury selection stage of the trial.").

Minnesota has potentially softened its position on this issue with *Akubar*. In *State v. Silvernail*, the Minnesota Supreme Court found a closure "too trivial" to violate the right to a public trial, in part "because the record included no evidence that any member of the public was actually denied access." 831 N.W.2d 594, 600-01 (Minn. 2013). But in *Akubar*, the Minnesota Court of Appeals does not identify any particular person being excluded at any point by the court's intermission-only admissions policy, even though the Court distinguished Mr. Akubar's closure from the one in *Silvernail*. 16 N.W.3d at

361-63. Because there was no explicit denouncement of the requirement, however, it is not clear whether *Akubar* represents a true change or simply another example of the inconsistent ways the public trial right is being analyzed overall.

Assuming Minnesota is moving away from the requirement, it joins Texas, Washington, the Second Circuit, and the Third Circuit on the other side of the split. In *Lilly v. State*, the Texas Court of Criminal Appeals rejected the lower court's determination no closure occurred because there was no evidence that any particular person had been dissuaded or prohibited from attending:

> When determining whether a defendant has proved that his trial was closed to the public, the focus is not on whether the defendant can show that someone was actually excluded. Rather, a reviewing court must look to the totality of the evidence and determine whether the trial court fulfilled its obligation "to take every reasonable measure to accommodate public attendance at criminal trials." *Presley*, 130 S. Ct. at 725.

365 S.W.3d 321, 331 (Tex. Crim. App. 2012). The Washington Supreme Court also rejected the suggestion that the defendant must identify a member of the public who had been excluded, holding that if "the plain language of the trial court's ruling imposes a closure," then the defendant "is not required to prove that the trial court's order has been carried out." *State v. Brightman*, 122 P.3d 150, 156 (Wash. 2005).

In the Second Circuit, even when it rejected a closure as "too trivial" to violate the Sixth Amendment, the court found that the fact no spectators had knocked on the closed and locked door "of no significance[,]" because

"[s]pectators do not have the burden of banging on closed courtroom doors during trial." *Peterson v. Williams*, 85 F.3d 39, 44 n. 7 (2d Cir. 1996). As early as 1969, the Third Circuit recognized that requiring the defendant to prove the court's actions excluded a particular person would be senseless and incompatible with not requiring the defendant to show prejudice:

> But a defendant who invokes the constitutional guarantee of a public trial need not prove actual prejudice. Such a requirement would in most cases deprive him of the guarantee, for it would be difficult to envisage a case in which he would have evidence available of specific injury. Indeed, the barring of spectators would make it impossible for the unknown individual to stray into the courtroom and reveal his information bearing on the case. To require proof of this by the defendant would be ironically to enforce against him the necessity to prove what the disregard of his constitutional right has made it impossible for him to learn.

U.S. ex rel. Bennett v. Rundle, 419 F.2d 599, 608 (3d Cir. 1969).

That some courts are still requiring a defendant to prove a particular person was excluded by the court's closure actions continues to undermine the Sixth Amendment public trial right. As Texas recognizes, it is difficult to square that requirement with this Court's directive in *Presley* that the trial court must "take every reasonable measure to accommodate public attendance at criminal trials" generally. As the Third Circuit recognizes, the court's closure actions themselves could make it impossible for the defendant to learn of the excluded spectator that would be needed to challenge those same closure actions. The inevitable outcome from jurisdictions like Missouri imposing this requirement is to render the public trial right one without a remedy in many cases, even where the defendant timely and vigorously objects.

iv. Conflict on How to Evaluate "Partial Closures"

Mr. Fisher's case could raise another area of disagreement in the lower courts—how to handle a partial closure, where some members of the public still are, or can be, present to observe. Reasoning that partial closures have less of an impact on the defendant's right to a public trial, all federal circuits "that have distinguished between partial closures and total closures modify the *Waller* test so that 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." *United States v. Simmons*, 797 F.3d 409, 413-414 (6th Cir. 2015) (citing *Bucci v. United States*, 662 F.3d 18, 23 (1st Cir. 2011); *United States v. Osborne*, 68 F.3d 94, 98-99 & n. 12 (5th Cir. 1995)). Some state courts have joined the federal courts in applying this modified *Waller* test to partial closures. *See, e.g., State v. Drummond*, 854 N.E.2d 1038 (Ohio 2006); *Feazall v. State*, 906 P.2d 727 (Nev. 1995); *State v. Garcia*, 561 N.W.2d 599 (N.D. 1997); *Commonwealth v. Cohen*, 921 N.E.2d 906, 921-22 (Mass. 2010).

Rather than modifying the *Waller* test, the Washington Supreme Court takes a different approach: seemingly rejecting partial closures altogether by defining "closure" to mean "the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave." *State v. Lormor*, 257 P.3d 624, 629 (Wash. 2011); *see also State v. Love*, 354 P.3d 841, 845 (Wash. 2015) (explaining Washington recognizes two types of closures:

where the public is totally excluded or where the proceedings occur somewhere "inaccessible" to spectators).

Some state courts recognizing partial closures, however, have applied the unmodified *Waller* standards requiring an "overriding interest," reasoning that *Waller* already sufficiently accounts for the reduced burden on the defendant's rights from partial closures because the "breadth of the closure request … will always be measured against the risk of prejudice to the asserted overriding interest." *People v. Jones*, 750 N.E.2d 524, 529-30 (N.Y. 2001). The District of Columbia Court of Appeals has also rejected a modification of the *Waller* test, identifying that some partial closures "might approach a total closure in practical effect[,]" and arguing the "overriding interest" requirement is nuanced enough to deal with partial closures. *Tinsley v. United States*, 868 A.2d 867, 874 (D.C. 2005). New Mexico, Minnesota, and Arizona likewise still require an "overriding interest" for partial closures. *State v. Turrietta*, 308 P.3d 964 (N.M. 2013) ("We adopt the 'overriding interest' standard as discussed by the Supreme Court in *Waller* for any type of courtroom closure."); *State v. Taylor*, 869 N.W.2d 1, 11 (Minn. 2015) ("For both full and partial closures, we apply the *Waller* test."); *State v. Tucker*, 290 P.3d 1248, 1255 (Ariz. Ct. App. 2012) ("[W]hether closure was partial or total is not a threshold question for determining whether the [*Waller*] test applies, but rather a component of the test itself, used to determine whether the closure was no broader than necessary and, thus, constitutional under the circumstances.").

v. Recognition of the Conflict and Confusion

These issues have not gone unnoticed. *See* Stephen E. Smith, *The Right to a Public Trial, Conditional Courtroom Entry and Tiers of Constitutional Scrutiny*, 57 Ind. L. Rev. 421 (2023); Luke Cass, *Closed Courtrooms: Sixth Amendment and Public Trial Right Implications*, 22 J. App. Prac. & Process 81 (2022); Kristin Saetveit, *Close Calls: Defining Courtroom Closures under the Sixth Amendment*, 68 Stan. L. Rev. 897 (2016); Daniel Levitas, Comment, *Scaling* Waller: *How Courts Have Eroded the Sixth Amendment Public Trial Right*, 59 Emory L.J. 493 (2009). While making rich material for legal commentary, the conflict and confusion creates a patchwork approach to what should be a fundamental right that is universally recognized and enforced coherently across all state and federal courts. This patchwork has real implications for individual criminal defendants and the public that wishes to attend their trials.

B. This is an important federal constitutional issue, and Mr. Fisher's case is an ideal vehicle for resolving it.

The right to a public trial is too important to leave it to inconsistent enforcement in the lower courts. While the Sixth Amendment public trial right is for the benefit of the defendant, it undoubtedly impacts the public's perception of, and confidence in, our criminal court system. *See Estes v. Texas*, 381 U.S. 532, 538-39 (1965); *Gannet Co., Inc. v. DePasquale*, 443 U.S. 368, 383

(1979). Mr. Fisher's case presents an ideal vehicle for this Court to protect this indispensable right.

i. Importance of the Sixth Amendment Right to a Public Trial

Openness is rightly recognized as a fundamental attribute of criminal trials, one that predates our country's founding. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569, 573 (1980). "While the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance," *Waller*, 467 U.S. at 49 n.9, public trials are not simply a historical holdover addressing long-forgotten harms. *Richmond Newspapers*, 448 U.S. at 573 ("From this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, we are bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice."). Openness remains an essential feature of enhancing "both the basic fairness of the criminal trial and the appearance of fairness." *Press-Enterprise Co. v. Superior Court of California, Riverside County*, 464 U.S. 501, 508 (1984) (citing *Richmond Newspapers*, 448 U.S. at 569-71).

This Court's recognition of the importance of the public trial right manifests in the requirement imposed on trial courts to start with a "presumption of openness," which cannot be overcome absent "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise*, 464 U.S. at

510. Faithfully following this directive serves to remind trial courts that, while the Sixth Amendment right to a public trial belongs to the defendant, it's enforcement also benefits the public, who "has a right to be present whether or not any party has asserted that right." *Presley*, 558 U.S. at 214.

ii. The Public Trial Right and Public Perception of the Courts

Resolution of the confusion and conflict in the ways courts are recognizing and enforcing the Sixth Amendment public trial right is also crucial to public perception of, and participation in, our courts. The public trial right does not just protect the defendant, it also protects the rights of the public and enhances our criminal legal system overall. *See Weaver v. Massachusetts*, 582 U.S. 286, 298-99 (2017); *United States v. DeLuca*, 137 F.3d 24, 33 (1st Cir 1998) ("The Sixth Amendment right to a public trial enures to the benefit of the criminal justice system itself as well as the defendant, by enhancing due process, encouraging witnesses to come forward, and enabling the public at large to confirm that the accused are dealt with fairly and that the trial participants properly perform their respective functions." (citing *Waller*, 467 U.S. at 46; *Woods v. Kuhlmann*, 977 F.2d 74, 76 (2d Cir. 1992))).

In the face of a disconcerting decline in public confidence in our courts, steadfastly safeguarding the presumption of openness for courtrooms is critical. In a 2024 Gallup poll, only 35% of Americans indicated they trust the judicial system, a number that has dropped 24 percentage points since 2020,

and mirrors patterns seen in nations in crisis or with authoritarian regimes like Venezuela, Myanmar, or Syria. *See* Benedict Vigers & Lydia Saad, *Americans Pass Judgment on Their Courts*, Gallup, December 17, 2024.[4] During the same period, public confidence in the courts in other western counties have remained stable. *Id.* This decline in public confidence of our courts seemingly crosses political lines. *Id.* "The net result is that for the first time on record, many more Americans trust the honesty of their elections (51%) than trust their judicial system (35%)." *Id.*

The Annenberg Public Policy Center similarly found a disturbing trend in reviewing nearly 20 years of survey data about public perception of our courts. Shawn Patterson Jr., Matt Levendusky, Ken Winneg & Kathleen Hall Jamison, *The Withering of Public Confidence in the Courts*, 108 Judicature 22 (2024).[5] In 2023, only 14% of those surveyed believed our courts treat both the wealthy and poor equally, and only 43% either "somewhat" or "strongly" agreed that our judges give fair and impartial rulings. *Id.* at 27. Further, younger adults are less likely to trust our courts than older adults, suggesting this decline in public confidence in our courts will only get worse over time. *Id.* at 26.

[4] Available at: https://news.gallup.com/poll/653897/americans-pass-judgment-courts.aspx.
[5] Available at: https://judicature.duke.edu/articles/the-withering-of-public-confidence-in-the-courts/

Fiercely guarding the requirement that trial courts are taking "every reasonable measure to accommodate public attendance at criminal trials[,]" *Presley*, 558 U.S. at 215, does not just affect individual views on the legitimacy and trustworthiness of our courts, but also impacts the ability of the public to participate in organized court watching programs, another way the public can engage with our criminal legal system. *See* Courtwatch, https://courtwatch.org/ (last visited June 1, 2025). These programs benefit our system overall, by identifying systemic changes needed for improvement, as well as highlighting when courts are working well. *See* Court Watch NOLA, *About Us*, https://www.courtwatchnola.org/about-us/; Washington Post Live, *Transcript: Protecting Public Safety: Inside the Courts with Fiona Apple and Carmen Johnson*, February 17, 2023 (recognizing accountability letters from court watchers "aren't just to point out when things are going wrong, but also to highlight when people are doing the right thing").[6]

When trial courts impose policies, such as placing red "STOP" signs to cover the courtroom windows and instructing spectators they can only enter or exit when the court happens to take a break, they are not conveying the message that the public is welcome to come observe the proceedings and that courts have nothing to hide. They are treating public observers as a nuisance

[6] Available at: https://www.washingtonpost.com/washington-post-live/2023/02/17/transcript-protecting-public-safety-inside-courts-with-fiona-apple-carmen-johnson/

to court proceedings, a problem to be dealt with, rather than a welcome contributor to the fairness of the system. As this Court recognized in *Presley*, the right balance to strike in accommodating public attendance while dealing with the inevitable consequences of openness is one that requires trial courts to first cautiously consider the impact of their actions and any reasonable, less restrictive, alternatives.

iii. Mr. Fisher's Case is the Ideal Vehicle

Mr. Fisher's case presents an ideal vehicle for this Court to clear up the conflict and confusion that has been produced in the 41 years since *Waller* and 15 years since *Presley*. Mr. Fisher's case is on direct appeal, rather than federal habeas review. Mr. Fisher timely objected to the closure, creating a record of the court's actions and the court's reasoning for those actions. That record presents multiple questions that have produced inconsistent answers in the lower courts: whether and when restrictions on entry into the courtroom constitutes a constitutionally significant closure, whether and how a defendant must demonstrate that a person was actually excluded to receive relief from a public trial violation, and whether partial closures should be treated differently than total closures.

Mr. Fisher's case also presents a type of restriction that will impact general members of the public, who, unlike family and friends of the defendant or victim, are unlikely to have access to the attorneys in the case to inform them about when they can enter the courtroom, as well as those who otherwise

would not be able to observe at all because they have limited time to commit or want to spend their limited time going to multiple courtrooms. But these types of restrictions also impact those connected to the defendant and the victims, who might be unable to sit through all of the testimony involving people they know and love. *See State v. Walbert*, 956 N.W.2d 384, 385-87 (N.D. 2021) (approving trial court's order, which defendant did not object to, prohibiting anyone coming in the courtroom during the victim's testimony, while allowing people to leave if they decide part-way through the testimony that they cannot hear more). Often, like in Mr. Fisher's case, the victims and defendant will be related, and observing trial could prove to be especially emotionally difficult. Restrictions on their movement impede those spectators to do what they can to show up for their loved ones—whether it be the defendant, the victims, or both.

C. The decision below is wrong.

This Court should also grant certiorari because the court below erred in holding that Mr. Fisher's Sixth Amendment right to a public trial was not violated.

i. The Decision that No Closure Occurred Is Contrary to This Court's Precedents

First, the Missouri Court of Appeals' determination that the court's actions did not constitute a closure that implicated Mr. Fisher's public trial right is inconsistent with this Court's directive in *Presley* for trial courts to

"take every reasonable measure to accommodate public attendance at criminal trials." 558 U.S. at 215. Covering the courtroom's windows with red signs directing spectators to "STOP" and not enter unless it is a break in proceedings, which is something it would be difficult for those spectators to ascertain, is not accommodating public attendance. It is creating unnecessary and unreasonable barriers to entry intolerable by this Court's recognition that the public trial right is more important than avoiding the typical issues, such as minor distractions, that might come with keeping the courtroom open to the public. *See Presley*, 558 U.S. at 215; *Akubar*, 16 N.W.3d at 361-62;

This is especially true because the signs were placed up, and remained up, throughout the entire trial. They were not in response to any specific concern of distraction during a particular witness or portion of the trial and were not in response to complaints made about movement in and out of the courtroom by the jury or other trial participants. Taking every reasonable measure to accommodate the public inherently requires any actions that hinder public attendance to be carefully considered first, something trial courts in Missouri will not be required to do because the Missouri Court of Appeals wrongly determined that the actions here should not be scrutinized as a closure.

ii. The Suggestion that Mr. Fisher Had to Prove a Spectator was Excluded is Contrary to This Court's Precedents.

Second, the Missouri Court of Appeals' suggestion that an alternative reason for denying Mr. Fisher claim was that he failed to prove anyone was excluded by the court's actions is contrary to this Court's understanding of the public trial right and what responsibilities it imposes on trial courts. Mr. Fisher contends he did demonstrate that his family friend was improperly excluded from proceedings by the court's actions because she missed part of *voir dire* due to the court's signs (III. Tr. 1958-61). Even if this Court disagrees, however, that should not be fatal to Mr. Fisher's argument.

The Sixth Amendment right to a public trial belongs to the defendant, Mr. Fisher. *See Estes*, 381 U.S. at 538-39; *Gannet*, 443 U.S. at 383. While the vindication of Mr. Fisher's Sixth Amendment public trial right has positive repercussions for the public's ability to attend and monitor court proceedings, it is *his* right that is violated by the court restricting public attendance at his trial, not any particular member of the public's. *Id.* If the court is permitted to take actions impeding public attendance, his right has been infringed regardless of whether there is a member of the public also complaining. Evidence from a member of the public could be relevant to a court's determination of what actions were taken and whether they constituted a "closure," but it cannot be necessary. *See Cameron v. State*, 535 S.W.3d 574, 579–80 (Tex. App. 2017) ("While the focus of the *Lilly* test for closure is not on

whether a defendant can show the exclusion of any particular person, such evidence is still relevant to show the courtroom was closed." (citing *Lilly*, 365 S.W.3d at 331)).

Requiring the defendant to prove someone else was impacted by the court's actions turns the "presumption of openness" on its head. *Richmond Newspapers*, 448 U.S. at 573. If that is required, then the presumption becomes that the courtroom can be closed unless and until a particular member of the public shows up, is unable to enter, and then complains to the defense or the court. This weaponizes the "presumption of openness" against the very party the right is supposed to be protecting, by instead treating the presumption as being that the courtroom *was* always completely open, regardless of any evidence the trial court took actions to close it. It also undermines this Court's holdings in *Waller* and *Presley*, which require the Court to advance and overriding interest and consider reasonable alternatives prior to taking any closure actions, not just when a particular member of the public is excluded.

iii. The Trial Court's Actions Fail *Waller* Scrutiny.

By excluding the court's actions from the definition of a constitutionally significant closure, the Missouri Court of Appeals did not have to reach the question of whether those actions survived scrutiny under *Waller*. The record is clear that they do not. The court's actions are not narrowly tailored, the court did not consider reasonable alternatives, and the court did not make adequate findings to support the actions. *See Akubar*, 16 N.W.3d at 363-64.

The only justification the trial court gave for the signs initially was that it had "the right to prevent people from coming and going and turning this into a lot of distraction for the jury." (I. Tr. 618-21). At the time the signs were taped into the courtroom windows, however, there was nothing to support the suggestion that Mr. Fisher's trial would produce anything more than the "minor distractions that one might reasonably expect in all routine public-trial proceedings." *Akubar*, 16 N.W.3d at 364. Simply put, there was no "overriding interest that [wa]s likely to be prejudiced" if the court did not put up the signs when they did, or when the defense objected to them. *Waller*, 467 U.S. at 48.

After Mr. Fisher's second objection, the trial judge listed concerns he had: (1) "a fair amount of talking" among spectators in the courtroom; (2) Ms. Coleman's crying in the shared hallway during the lunch break created a traffic jam with the spectators and jury also trying to leave; (3) ensuring the jury isn't hearing spectators say anything inappropriate, and (4) ensuring the jury would not be distracted from people walking in or out (II. Tr. 841-42).

Of those stated concerns, the court's intermission-only admission policy only addresses the concern that the jury might get distracted by people coming in and out. Restricting access to only breaks in the proceeding would not address the court's other concerns, and instead potentially would make things worse. If spectators are talking in the courtroom, they could be doing that whether they came in during a break (as permitted by the court's policy) or during the middle of the proceedings. Restricting their ability to come and go

from the courtroom also would cause them to stay in the courtroom, instead of stepping out to have conversations in the hallway or to deal with the emotions that might cause them to make inappropriate comments. Similarly, the court's restriction of movement to breaks doesn't cure any problem with someone crying in the hallway during a break. Again, the restriction of movement only means that more people could be trying to leave during the break because they were told not to leave during the proceedings.

Even for the concern that coming in and out of the courtroom during the presentation of evidence could distract the jury, the trial court failed to establish that was an overriding interest and then narrowly tailor its actions to that and consider reasonable alternatives. Notably, while the court had admonished the spectators about them "moving around, going in, going out," the trial court never admonished the spectators about talking inappropriately or otherwise making too much noise (I. Tr. 714). Rather, the admonishment focused on keeping the spectators seated when the court took a break, until the court could accommodate Mr. Fisher, and, presumably, the jury (I. Tr. 714). This contradicts any suggestion the court was particularly troubled by spectators talking or distracting the jury, while also demonstrating that the court had not taken reasonable alternative measures to address the problem first, contrary to *Waller* and *Presley*.

Less restrictive, reasonable alternatives existed. The court's sign could have reminded people to enter the courtroom quietly instead of telling them

not to enter unless it was a break. The court could have left one window clear so a spectator outside the courtroom would be able to see what was going on inside. If entry and exit noise was a genuine concern—beyond that expected for any public court proceeding—the court also could have provided a live video feed in another courtroom, allowing spectators to remotely view the proceedings until a break occurred. The spectators would then have the choice of entering the courtroom once they knew there was a break, or remaining in the remote courtroom where they would have more freedom to leave during the proceedings. Finally, if particular spectators were causing issues, the court could have done something to address those individuals.

The trial court's actions and implementation of a general policy limiting entry and exit amounted to an unconstitutional closure. Mr. Fisher's case provides this Court with the perfect opportunity to shore up the Sixth Amendment right to a public trial from the erosion caused by ongoing confusion and conflict in the lower courts. Otherwise, a right vital to "both the basic fairness of the criminal trial and the appearance of fairness" remains vulnerable. *Press-Enterprise Co.*, 464 U.S. at 508 (citing *Richmond Newspapers*, 448 U.S. at 569-71).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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