No. 15-550

IN THE

Supreme Court of the United States

JAMES ROBERT STACKHOUSE,
Petitioner,
v.

STATE OF COLORADO,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Colorado

BRIEF *AMICUS CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

In its more than 40-year history, the Reporters Committee has participated as *amicus curiae* in dozens of cases before this Court and other state and federal courts involving significant free expression and freedom of information issues.

This case is of particular importance to the Reporters Committee because reporters often rely on access to court proceedings to report on matters of public concern. As "surrogates for the public," *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980), journalists need unfettered access to information that sheds light on the functioning of the courts. This case provides the Court with the opportunity to clarify an issue critical to the media and the public in general: whether trial courts, in

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[1] Pursuant to Sup. Ct. R. 37, counsel for the *amicus curiae* declare that they authored this brief in total with no assistance from the parties; that no individuals or organizations other than the *amicus* made a monetary contribution to the preparation and submission of this brief; that counsel for all parties were given timely notice of the intent to file this brief; and that written consent of all parties to the filing of the brief amicus curiae has been filed with the Clerk.

order to cope with courtroom overcrowding, may exclude the public from a judicial proceeding without independently analyzing whether closure is warranted under the standards dictated in *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984) and *Waller v. Georgia*, 467 U.S. 39 (1984).

SUMMARY OF ARGUMENT

Amicus curiae the Reporters Committee for Freedom of the Press urges this Court to accept review in order to clarify that trial courts cannot exclude the public from judicial proceedings without independently analyzing whether closure is warranted under the standards dictated in *Press-Enterprise Co. v. Superior Court of California ("Press-Enterprise I")*, 464 U.S. 501 (1984) and *Waller v. Georgia*, 467 U.S. 39 (1984), and that overcrowding is not an "overriding interest" sufficient to close a courtroom. The need for this independent analysis makes it clear that in the Sixth Amendment context, the right is not easily waived by a simple failure to object.

As this Court has acknowledged, the right to a public *voir dire* process is well established under both the First and Sixth Amendments. *Presley v. Georgia*, 558 U.S. 209, 212 (2010). Nevertheless, in this case, the trial court excluded members of the public from the courtroom during *voir dire* "because the large jury pool and limited courtroom space created a risk that family members and others would comingle with and potentially bias the jurors." *Stackhouse v. People*, 2015 CO 48, ¶2. The trial court ordered the courtroom closed without

appearing to acknowledge an overriding interest justifying closure, considering alternatives to closure, or making adequate findings in support of closure. Such conduct clearly violates the standards that must be applied when closing a courtroom as dictated in *Press-Enterprise I* and *Waller*.

Amicus curiae urges the Court to accept review to reiterate the principle that trial courts must independently analyze whether courtroom closures are justified.

ARGUMENT

I. The Court should accept review to reiterate that the nearly identical First and Sixth Amendment rights of access to judicial proceedings requires trial courts to independently examine whether closure is warranted and are thus not easily waived.

The trial court in the instant case — without appearing to acknowledge an overriding interest justifying closure, considering alternatives to closure, or making adequate findings in support of closure — "required members of the public to leave the courtroom during jury selection because the large jury pool and limited courtroom space created a risk that family members and others would comingle with and potentially bias the jurors." *Stackhouse v. People*, 2015 CO 48, ¶2. Closing a courtroom to avoid overcrowding can appear innocuous, but a closer look reveals the harm of conducting judicial proceedings in secret and without the presence of the news

media. *See Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976) ("Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability.").

In the seminal case of *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), this Court held that the news media and public have a qualified right under the First Amendment to attend criminal trials. Underlying the Court's decision was its belief "that 'a major purpose of . . . [the First] Amendment was to protect the free discussion of governmental affairs.'" *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) (quoting *Mills* v. *Alabama*, 384 U.S. 214, 218 (1966)). "Thus to the extent that the First Amendment embraces a right of access to criminal trials, it is to ensure that this constitutionally protected 'discussion of governmental affairs' is an informed one." *Id.* at 604-05.

The First Amendment right of access is not absolute. In *Press-Enterprise I*, 464 U.S. 501, 510 (1984), the 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," which "is to be articulated along with findings specific enough that a reviewing court

can determine whether the closure order was properly entered." Under this standard, trial courts must consider whether alternatives to closure are available. *Id.* at 511.

In *Waller v. Georgia*, 467 U.S. 39, 46 (1984), the Court adopted the *Press-Enterprise I* standard for use in defendants' Sixth Amendment claims, writing "there can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public." Thus, in the Sixth Amendment context, to close a courtroom:

> [1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the trial court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure.

Id. at 48.

With regard to access to the voir dire process specifically, this Court in *Presley v. Georgia* found that the Sixth and First Amendment rights to a public trial were so intertwined that precedent applying the First Amendment right to *voir dire* meant that the Sixth Amendment right was clearly established. 558 U.S. 209, 212-213 (2010).

This Court has made clear that trial courts cannot treat the obligation to hold public, open trials

lightly. In *Press-Enterprise I*, 464 U.S. at 503-04, the Court evaluated whether a trial court violated the First Amendment when it closed all but three days of a six-week *voir dire* proceeding and then subsequently refused to release a transcript of the proceeding. In support of closure, the trial court cited (1) the defendant's right to a fair trial and (2) juror privacy, as some of the questions in *voir dire* elicited responses that, according to the court, did "not appear to be appropriate for public discussion." *Id.* at 504. In spite of its acknowledgment that a defendant's right to a fair trial and the privacy interests of prospective jurors could be sufficient reasons for overcoming the right of access, *see id.* at 510-11, the Court held that the trial court erred. Referencing the trial court's failure to adhere to the standard for closing a courtroom, the Court wrote:

> [T]he California court's conclusion that Sixth Amendment and privacy interests were sufficient to warrant prolonged closure was unsupported by findings showing that an open proceeding in fact threatened those interests; hence it is not possible to conclude that closure was warranted. Even with findings adequate to support closure, the trial court's orders denying access to *voir dire* testimony failed to consider whether alternatives were available to protect the interests of the prospective jurors that the trial court's orders sought to guard. Absent consideration of alternatives to closure, the trial court could not constitutionally close the *voir dire*.

Id. at 510-11. The Court reached this conclusion even though "neither the defendant nor the prosecution requested an open courtroom during juror *voir dire* proceedings" and that "both [in fact] specifically argued in favor of keeping the transcript of the proceedings confidential." *Presley*, 558 U.S. at 214-215 (2010) (citing *Press-Enterprise I*, 464 U.S. at 503-04).

Lower courts routinely articulate the requirement that trial courts must independently analyze whether closure is warranted under the standards set out in *Press-Enterprise I* and *Waller*. *See, e.g.*, *United States v. Gupta*, 699 F.3d 682, 687 (2d Cir. 2011) ("[I]f a court intends to exclude the public from a criminal proceeding, it must first analyze the *Waller* factors and make specific findings with regard to those factors."); *Tinsley v. United States*, 868 A.2d 867, 879 (D.C. 2005) (a trial court should not "be absolved from considering even the most obvious reasonable alternatives to exclusion of the public that may be available merely because the parties have failed to propose them."); *Walton v. Briley*, 361 F.3d 431, 433 (7th Cir. 2004) ("The record of this case fails to show that the court even considered the four-part test [from *Waller*]."); *Rapid City Journal v. Delaney*, 2011 SD 55, ¶11, 804 N.W.2d 388, 393 ("[C]losing a criminal trial to the public requires more than just an agreement between the parties and the trial judge.").

Despite this strong precedent, judges routinely close courtrooms without acknowledging an over-riding interest in support of closure, considering alternatives to closure, or making findings in support of closure. *See, e.g.*, *United States v. Negrón-Sostre*,

790 F.3d 295, 302, 306 (1st Cir. 2015) (describing the regular practice of a U.S. District court of excluding family members from the courtroom during *voir dire* notwithstanding precedent making clear that such a practice is unacceptable); *State v. Pinno*, 2014 WI 74, ¶114, 356 Wis. 2d 106, 164-165, 850 N.W.2d 207, 236-237 ("The record demonstrates that closing courtrooms in Fond du Lac County during voir dire without a compelling justification is a repeated practice.") (Abrahamson, C.J., dissenting); *State v. Silvernail*, 831 N.W.2d 594, 609 (Minn. 2013) (Anderson, J., dissenting) ("The closure of courtrooms during trial is a practice that has unquestionably begun to creep its way into the routine of many of Minnesota's criminal courts."); Wendi J. Berkowitz et al., *"If You Want a Guarantee, Buy a Toaster": When do Judges Close Courtrooms in Civil Cases?*, ABA 2015 SECTION ANNUAL CONFERENCE, Apr. 15-17, 2015, archived at https://perma.cc/TS3Q-UK92 ("[J]udges frequently close courtroom doors, even when the threat of harmful (or prejudicial) publicity seems remote.").

This common failure of compliance with a fundamental issue of openness alone warrants this Court's grant of review. A well-established right of access is of little use if it is not implemented by the courts themselves.

II. The Court should accept review to make clear that overcrowding is not an "overriding interest" sufficient for closing a courtroom under the First or Sixth Amendment.

As the trial court proceedings in *Stackhouse v. People* demonstrate, it has become common practice in courtrooms nationwide to exclude the public from *voir dire* and other aspects of criminal trials in order to deal with issues related to overcrowding. *See generally* Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2192 (2014) (writing how the trend of excluding the public from courtrooms "is repeated around the nation, usually accompanied by official statements regarding concerns with overcrowding and safety."); Brian Mosley, *"Dangerous Overcrowding" at County Courthouse*, TIMES-GAZETTE, Dec. 2, 2011, archived at http://perma.cc/EM8E-W4SR (writing that "[a] total of 123 defendants were on Wednesday's criminal court docket, which was held in the small courtroom on the first floor," which caused court personnel to usher people from the courtroom and into the lobby); *Courthouse Facing Overcrowding, Handicap Facility Issues*, GUTHRIE NEWS PAGE, May 21, 2012, archived at http://perma.cc/G6PL-UDAF (describing how "[c]itizens were forced to wait outside of the courthouse" because 201 misdemeanor cases were scheduled to be heard "in a courtroom that may hold up to 25 people."). These practices exist despite precedent suggesting that overcrowding does not constitute an "overriding interest" sufficient to close a courtroom.

In its decisions addressing the First Amendment right of access and the accused's Sixth Amendment right to a public trial, the Court has identified a number of overriding interests potentially sufficient to close a courtroom. Those interests include (1) the defendant's right to a fair trial, *see Waller v. Georgia*, 467 U.S. 39, 45 (1984), (2) "the government's interest in inhibiting disclosure of sensitive information," *id.*, (3) "safeguarding the physical and psychological well-being of a minor," *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982), and (4) the privacy interests of prospective jurors, *Press-Enterprise I*, 464 U.S. 501, 510-12 (1984). Although the Court has never claimed to put forth an exhaustive list, it has said the circumstances justifying closure "will be rare . . . ." *Waller*, 467 U.S. at 45. Importantly, the Court has never listed overcrowding as an adequate reason for closing a courtroom.

In *Presley v. Georgia*, 558 U.S. 209, 210 (2010), a Georgia trial court excluded a lone observer, the defendant's uncle, from the courtroom during *voir dire*. Citing concerns related to overcrowding, the trial court explained: "Well, the uncle can certainly come back in once the trial starts . . . . [W]e have 42 jurors coming up. Each of those rows will be occupied by jurors. And his uncle cannot sit and intermingle with members of the jury panel." *Id.* In finding the defendant's Sixth Amendment right to a public trial was violated, the Court cited the trial court's failure "to consider alternatives to closure." *Id.* at 214. It wrote:

> Trial courts are obligated to take every reasonable measure to accommodate

> public attendance at criminal trials. Nothing in the record shows that the trial court could not have accommodated the public at Presley's trial. Without knowing the precise circumstances, some possibilities include reserving one or more rows for the public; dividing the jury venire panel to reduce courtroom congestion; or instructing prospective jurors not to engage or interact with audience members.

Id. at 215. Thus, although the Court had the opportunity to, it did not conclude that overcrowding, on its own, constitutes an "overriding interest" sufficient to close a courtroom.

The lower courts are likewise in agreement. *See, e.g.*, *United States v. Agosto-Vega*, 617 F.3d 541, 547-549 (1st Cir. 2010) (holding the trial court erred by excluding the public from a courtroom after citing concerns related to overcrowding); *People v. Floyd*, 21 N.Y.3d 892, 893-894, 988 N.E.2d 505, 507, 965 N.Y.S.2d 770, 771 (2013) (internal citations omitted) ("Mere courtroom overcrowding is not an overriding interest justifying courtroom closure . . . . This violation is per se prejudicial and requires a new trial."); *Cameron v. State*, No. PD-1427-13, 2014 WL 4996290, at *5 (Tex. Crim. App. Oct. 8, 2014) ("While concerns over space and overcrowding may be legitimate concerns of a trial court, they must not outweigh a defendant's Sixth Amendment rights. In part, this is because there are readily available alternatives to fix these problems. Both this Court and the Supreme Court have suggested that, in such situations, a trial court should move to a bigger

courtroom or split the panel in half. It is no valid argument that these alternatives are inconvenient or would cause delay.").

Overcrowding, on its own, does not constitute an "overriding interest" sufficient for excluding the public from a courtroom because, as the cases cited above display, problems related to overcrowding can always be rectified. When overcrowding is at issue, alternatives to closure always exist. Whether it be by splitting a jury panel, relocating to a larger courtroom, or by simply having better administrative practices, courts can always strike a balance between the needs of the court system and the public. As put best by Chief Justice Leah Ward Sears of the Supreme Court of Georgia in her dissent in *Presley*, "A room that is so small that it cannot accommodate the public is a room that is too small to accommodate a constitutional criminal trial." *Presley v. State*, 285 Ga. 270, 274, 674 S.E.2d 909, 912 (2009) (Sears, C.J., dissenting).

CONCLUSION

For the foregoing reasons, the Reporters Committee respectfully urges this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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