No. 16-240

IN THE
Supreme Court of the United States

KENTEL MYRONE WEAVER,
Petitioner,
v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

On Writ of Certiorari to the
Supreme Judicial Court of Massachusetts

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND SOCIETY OF PROFESSIONAL JOURNALISTS IN SUPPORT OF PETITIONER

Bruce W. Sanford
Mark I. Bailen
BAKER & HOSTETLER LLP
1050 Connecticut Ave., NW
Suite 1100
Washington, D.C. 20036
Counsel for Society of Professional Journalists

Bruce D. Brown
Counsel of Record
Gregg P. Leslie
Selina MacLaren
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1250
Washington, D.C. 20005
bbrown@rcfp.org
(202) 795-9300

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Treatises

Other Authorities

STATEMENT OF INTEREST[1]

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit 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 and its attorneys have provided assistance, guidance, and research in First Amendment and freedom of information litigation since 1970. The Reporters Committee frequently represents the interests of the press and the public in cases involving access to judicial proceedings and court records.

Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists, and protects First Amendment guarantees of freedom of speech and press.

Reporters rely on access to court proceedings to report on matters of public concern. As "surrogates

---

[1] Pursuant to Sup. Ct. R. 37, counsel for *amici curiae* state that no party's counsel authored this brief in whole or in part; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; no person other than the *amici curiae*, its members or its counsel made a monetary contribution intended to fund the preparation or submission of this brief; and written consent of all parties to the filing of the brief has been filed with the Clerk of the Court.

for the public," *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980), journalists require access to information that enables them to report accurately on the actions of litigants, criminal defendants, prosecutors, and courts in individual cases, and the functioning of the judicial system as a whole — especially information that is as vital to the integrity of the criminal justice system as the process of selecting a jury in a criminal case.

This case concerns an issue critical to both the news media and the public: whether a court may exclude the public from *voir dire* for the sake of administrative convenience, without considering any alternatives to closure, and without identifying a specific, overriding interest in secrecy that overcomes the constitutional presumption of public access to court proceedings in criminal cases.

SUMMARY OF ARGUMENT

The primary issue before the Court is the requirement that a defendant demonstrate prejudice in order to prevail on a claim of ineffective assistance of counsel arising out of his counsel's failure to object to the closure of *voir dire*. Both parties and the Supreme Court of Massachusetts, below, agree that the closure of *voir dire* constituted a structural error in violation of the Sixth Amendment, and Petitioner argues to this Court that prejudice to the defendant should be presumed because of that structural error. *Amici* write to address a separate concern implicated by this case: the fundamental importance to the press and the public of the First Amendment right of access to *voir dire*. The fundamental nature of this right should inform this Court's consideration of whether prejudice should be presumed when the public is denied access to the jury selection process.

Amici agree with Petitioner that an attempt to show prejudice in an individual case would not be able to capture the "great, though intangible, societal loss that flows" from denial of the public trial right under the First and Sixth Amendments. *See* Br. for Pet'r at 19, 31, *Weaver v. Massachusetts*, No. 16-240 (Feb. 27, 2017) (quoting *Waller v. Georgia*, 467 U.S. 39, 49 n.9 (1984)). As Petitioner argues, open *voir dire* is essential to the fairness of a criminal trial, and to the appearance of justice and integrity in the judicial system. *See id.* at 15–20, 30–32. Jury selection is therefore a matter of importance "not simply to the adversaries but to the criminal justice system." *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505 (1984) (*"Press-Enterprise I"*).

We urge this Court to consider, as it addresses whether there is prejudice to Petitioner for purposes of the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), its prior precedent recognizing the public's strong, presumptive right to attend *voir dire* under the First Amendment and the harm that would be caused by closing a courtroom without applying this Court's careful tests set forth in *Waller*, *Press-Enterprise I*, and *Presley v. Georgia*, 558 U.S. 209 (2010). The First Amendment interests here are significant because "[t]he right to an open public trial is a shared right of the accused and the public, the common concern being the assurance of fairness." *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 7 (1986) ("*Press-Enterprise II*").[2] In addition to "the Sixth Amendment right to a public trial [which is] personal to the accused," the First Amendment "secures the public an *independent* right of access to trial proceedings." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 584–85 (1980) (Brennan, J., concurring in the judgment) (emphasis added). It is undisputed that the First Amendment presumption of public access to criminal court proceedings extends to jury selection, and because this First Amendment right belongs to the public rather than a party, it

[2] In evaluating a Sixth Amendment claim for public *voir dire* in 2010, this Court first addressed an "initial question": "whether the right to a public trial in criminal cases extends to the jury selection phase of a trial," and answered this question, affirmatively, by looking to the First Amendment issue presented in *Press-Enterprise I*. *See Presley*, 558 U.S. at 212 (citing *Press-Enterprise I*, 464 U.S. at 504). The Court's analysis in *Presley* demonstrates that when a defendant raises a Sixth Amendment claim regarding the closure of *voir dire*, the First Amendment right of access is relevant.

cannot be waived by any party's act or omission. *Press-Enterprise I*, 464 U.S. at 504 (presumption of access applied even when all parties sought closure). Although the Supreme Court of Massachusetts' decision, below, concedes that courtroom closure was a structural error under *Waller*, it ignores the public's First Amendment interest in open jury selection proceedings.

Given the fundamental, structural importance of the First Amendment right of access to *voir dire*, there is a high likelihood of prejudice to the defendant when that right is violated. As Respondent concedes, "this Court has presumed prejudice in the ineffective-assistance context only where the nature of the error creates a high likelihood of prejudice." Br. in Opp'n on Pet. for Writ of Cert. at 13, *Weaver v. Massachusetts*, No. 16-240 (Dec. 2, 2016) (citing *United States v. Cronic*, 466 U.S. 648, 658–66 (1984)). "[This Court] has simply held that, in certain circumstances, an adverse effect is so likely that it may be presumed." *Id.*

ARGUMENT

I. The First Amendment affords a strong presumption of public access to *voir dire*; such access is vital to the fairness of a criminal trial and the integrity of the criminal justice system.

The public *voir dire* right is critically important to safeguarding not only the fairness of individual criminal trials, but the integrity of the criminal justice system as a whole, and the public's confidence in that system. The importance of the right is reflected

in its longstanding history and in the rationale underlying it, as well as in specific, recent examples demonstrating how press coverage and public awareness promote fairness in criminal trials.

A. The history of public access to criminal proceedings demonstrates the public's interest in observing *voir dire*.

Anglo-American court proceedings have been open to the public "from time immemorial." *Richmond Newspapers*, 447 U.S. at 566–67 (quoting E. Jenks, The Book of English Law 73–74 (6th ed. 1967)). Jury selection, in particular, has been public "since the development of trial by jury . . . with exceptions only for good cause shown." *Press-Enterprise I* at 505. One account from the sixteenth century noted that challenges to prospective jurors were conducted "openly, that not only the [jurors], but the Judges, the parties *and as many* [others] *as be present may heare* [sic]." *Id*. at 507 (quoting T. Smith, De Republica Anglorum 96 (Alston ed. 1906)) (emphasis added by the Court).

Based on its "review of the historical evidence," this Court unanimously recognized a First Amendment presumption of access to jury selection more than thirty years ago in *Press-Enterprise I*, a case in which a state court closed most (but not all) of a six-week *voir dire* process in a high-profile murder prosecution. 464 U.S. at 503–04. The closure was sought by both the government and the defense out of concern for juror privacy and the defendant's Sixth Amendment rights. *Id*. Despite the agreement of the parties and partial nature of the closure, this Court found the closure unconstitutional, stating

that "the process of selection of jurors has presumptively been a public process." *Id*. at 505. This 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." *Id*. at 510; *accord Press-Enterprise II*, 478 U.S. at 13–14. In light of the strong presumption of openness, this Court emphasized that closures "must be rare and only for cause shown that outweighs the value of openness." *Id*. at 509.

Although *Press-Enterprise I* addressed the First Amendment right to a public jury selection, this Court has extended the principles in *Press-Enterprise I* to the Sixth Amendment right to a public trial. In *Waller*, the Court adopted the *Press-Enterprise I* test to hold that a defendant's right to a public trial is guaranteed by the Sixth Amendment. 467 U.S. at 46. In *Presley*, the Court again relied on *Press-Enterprise I* along with *Waller* to hold that the Sixth Amendment guarantees a public jury selection process. 558 U.S. at 212–16 (proceeding by summary disposition because "[t]he point is well settled under *Press-Enterprise I* and *Waller*").

B. Public jury selection is an indispensable component of a fair criminal justice system and necessary to ensure public confidence in the judiciary.

The First Amendment's guarantee of openness "is no quirk of history; rather, it has long been recog-

nized as an indispensable attribute" of a criminal trial. *Richmond Newspapers*, 448 U.S. at 569. Jury selection is conducted in public because transparency leads to confidence: citizens in an open society "do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Id.* at 572.

Secrecy in jury selection undermines the public's confidence in the criminal justice system. Without the press acting as a public watchdog over the jury selection process, "suspicions might arise in a particular trial (or in a series of trials) that jurors were selected from only a narrow social group, or from persons with certain political affiliations, or from persons associated with organized crime groups." *In re Globe Newspaper Co.*, 920 F.2d 88, 94 (1st Cir. 1990). Indeed, as this Court recognized in *Press-Enterprise I*, "[t]he value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known." 464 U.S. at 508 (citing *Richmond Newspapers*, 448 U.S. at 569–71).

Openness in jury selection promotes not just the appearance of fairness of criminal proceedings, but actual fairness. As a "general rule," "judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings." *Waller*, 467 U.S. at 46 n.4 (quoting *Estes v. Texas*, 381 U.S. 532, 588 (1965) (Harlan, J., concurring)). And this Court has repeatedly recognized that public access ensures a fairer trial by,

inter alia, promoting honest testimony, allowing unknown witnesses to come forward, and encouraging proper performance by all participants in the trial, *Gannett Co. v. DePasquale*, 443 U.S. 368, 383 (1979); by "ensuring that proceedings are conducted fairly" and "discouraging perjury, misconduct of participants, and biased decisions," *Richmond Newspapers*, 448 U.S. at 569; and by keeping triers "keenly alive to a sense of responsibility and to the importance of their functions," *In re Oliver*, 333 U.S. 257, 270 n. 25 (1948) (citation omitted).

Thus, the First Amendment right of access is critical even when it is not obvious that public attendance will make a tangible difference in the outcome of an individual trial. Underscoring the importance of the public trial right, federal courts of appeals have reversed convictions on appeal or granted post-conviction relief when a courtroom was only closed for the announcement of a verdict, *United States v. Canady*, 126 F.3d 352, 364 (2d Cir. 1997), and where a portion of the trial was conducted after the courthouse had closed and the public could not attend. *Walton v. Briley*, 361 F.3d 431, 433 (7th Cir. 2004). Even when jury selection proceedings are "uncontroversial," as they often are, courts recognize that closure threatens the public trial right. *United States v. Gupta*, 699 F.3d 682, 689 (2d Cir. 2011) (relying on *Presley*, *Waller*, and the "exceptional importance of the right to a public trial" to find that *voir dire* closure was not "trivial," even without a showing that closure affected the outcome of the trial). "Indeed, to conclude otherwise would eviscerate the right [to a public trial] entirely." *Id*.

C. *Voir dire* is often newsworthy and news media coverage of *voir dire* promotes fairness in criminal trials.

Recent examples demonstrate that press and public access to jury selection promotes public understanding of the judicial process as well as fairness. Jury selection is often a subject of intense public interest, especially in high-profile criminal cases. *See, e.g.,* Kenneth B. Noble, *A Jury is Chosen to Hear The Simpson Murder Case*, N.Y. Times (Nov. 4, 1994), *at* http://nyti.ms/2l4Pp5z; Masha Gessen, *Jury Selected in Boston Marathon Bombing Trial*, Wash. Post (Mar. 3, 2015), *at* https://perma.cc/8Y6D-SRJP; Scott Malone, *Jury Selection Starts in Boston Murder Trial of 'Whitey' Bulger*, Reuters (Jun. 4 2013), *at* https://perma.cc/M3VN-PP6J; Bernard Vaughan, *Trial of Madoff Employees in New York Begins with Jury Selection*, Reuters (Oct. 8, 2013), *at* https://perma.cc/2Q4P-WGLN; Rob Shaw, *Case Questions Drag Out Casey Anthony Jury Selection*, Tampa Bay Times (May 12, 2011), *at* http://bit.ly/2kRoAGI; Stephen Young, *Jury Picked as Legal Strategies Emerge on Day One of the John Wiley Price Trial*, Dallas Observer (Feb. 22, 2017), *at* https://perma.cc/LZG2-4T5Z.

Even where the case is not high-profile, *voir dire* proceedings may be newsworthy. For example, information about who appears for jury selection can shed light on the fairness of a trial and larger concerns that implicate the fairness of the criminal justice system as a whole. *See* Tom Jackman, *30 Potential Jurors Didn't Show Up for Va. Murder Trial, So the Judge…Shrugged and Let It Go*, Wash. Post (Feb. 26, 2016), *at* https://perma.cc/GNA6-

DLVM (quoting a jury consultant who claimed that flaws in jury summonses can result in juries that do not reflect the demographics of the community). The news media reports not only on specific jury selection proceedings, but also on general trends in jury selection. *See* Stephanie Clifford, *TV Habits? Medical History? Tests for Jury Duty Get Personal*, N.Y. Times (Aug. 20, 2014), *at* https://nyti.ms/2jE3vNX. Such reporting is even used to teach *voir dire* strategy to law students. *See Voir Dire: Voir Dire in the News*, University of Missouri School of Law Library Guides (updated May 27, 2016), *at* http://bit.ly/2ldYY33.

II. The First Amendment presumption of public access to *voir dire* can be overcome only by compelling interests not present here.

Under the First and the Sixth Amendments, "individualized determinations are *always* required before the right of access may be denied: 'Absent an overriding interest *articulated in findings*, the trial of a criminal case must be open to the public.'" *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 608 n.20 (1982) (quoting *Richmond Newspapers*, 448 U.S. at 581).

Here, the "sole reason" the trial court denied the right of access was the "crowded condition" of the courtroom. *Com. v. Weaver*, 474 Mass. 787, 814 (2016). But "[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 (2009) (Sears, C.J., dissenting), *judgment rev'd,* 558 U.S. 209 (2010) (favorably citing the dissenting opinion of Chief Jus-

tice Sears). Another judge noted that attempting to use "insufficient courtroom capacity" as an "excuse" for closure "do[es] not withstand even the most casual scrutiny." *United States v. Gupta*, 650 F.3d 863, 872 (2d Cir. 2011) (B.D. Parker, Jr., C.J., dissenting), *opinion vacated and superseded,* 699 F.3d 682 (2d Cir. 2012) (finding that closure of *voir dire* without making *Waller* findings was not trivial); *see also Gibbons v. Savage*, 555 F.3d 112, 117 (2d Cir. 2009) ("Even if the number of prospective jurors equaled or exceeded the number of seats in the spectator section of the courtroom, that was not sufficient justification to eject the only spectator from the courtroom.").

But even when other concerns are asserted as a basis for closure, courts must be demanding where the public's First Amendment right of access applies. "The First Amendment right of access cannot be overcome by the conclusory assertion that [open proceedings] might deprive the defendant" of the right to a fair trial. *Press-Enterprise II*, 478 U.S. at 15. Closure requires a showing of a "compelling" need under the First Amendment, supported by "specific, individualized findings articulated on the record before closure." *United States v. Antar*, 38 F.3d 1348, 1359 (3rd Cir. 1994) (citations omitted). For example, the Seventh Circuit, examining the First Amendment right, found that a trial court "failed to establish a 'threat' to the interest in an impartial jury" because it "failed to question potential jurors as to their awareness of the media coverage of the *voir dire*, or engage in any other inquiry to support its conclusion that the 'integrity of the process' was infected." *United States v. Peters*, 754 F.2d 753, 761 (7th Cir. 1985). Similarly, the generalized, specula-

tive finding that jurors "might be less candid if questioned in public" is insufficient to justify closure because "if this general theory of potential prejudice were accepted . . . all testimony could be taken in secret." *United States v. Brooklier*, 685 F.2d 1162, 1169 (9th Cir. 1982).

Because of this high standard, the presumption of public access to *voir dire* will be overcome only in extreme cases, such as when the "interrogation touches on deeply personal matters that [a] person has legitimate reasons for keeping out of the public domain." *Press-Enterprise I*, 464 U.S. at 511; *compare In re Dallas Morning News Co.*, 916 F.2d 205, 206 (5th Cir. 1990) (finding the possibility that *voir dire* would "infringe upon the venire members' privacy" insufficient). In those rare cases, "the particular interest, and threat to that interest, must 'be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.'" *Presley*, 558 U.S. at 215 (quoting *Press-Enterprise I*, 464 U.S. at 510). The decision below, however, permits closure without any individualized determination made on the facts of the case, creating a rule so broad that, as the Georgia Supreme Court Chief Justice pointed out in that court's *Presley* decision, a court could close jury selection "in *every criminal case* conducted in this courtroom whenever the trial judge decides, for whatever reason, that he or she would prefer to fill the courtroom with potential jurors rather than spectators." *Presley*, 285 Ga. at 276 (Sears, C.J., dissenting).

III. Parties cannot waive the public's First Amendment right of access; courts must safeguard the independent interests of the public in open criminal proceedings.

The structural error here is unique because it implicates the public's constitutional right of access to *voir dire*. The public cannot practically assert the right in each and every criminal case, and its interests will not be protected if the parties choose not to object. Accordingly, this Court has established that it is incumbent on trial courts themselves to protect the public's right.

Here, in addition to relying on an insufficient ground to justify closure, the trial court erred in failing to consider alternatives to closure of *voir dire*. Although defense counsel did not timely object to closure, "it was still incumbent upon [the court] to consider all reasonable alternatives to closure." *Presley*, 558 U.S. at 216. Indeed, this Court has made clear that trial courts must "consider alternatives to closure even when they are not offered by the parties." *Id*. at 214; *see also Waller*, 467 U.S. at 48; *Press-Enterprise I*, 464 U.S. at 513.

The trial court below would not have needed to look far for reasonable alternatives to closure as this Court has already provided a number of them. Noting that "courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials," this Court has suggested "reserving one or more rows for the public; [or] dividing the jury venire panel to reduce courtroom congestion . . ." *Presley*, 558 U.S. at 215. The trial court does not have to exhaust every conceivable alternative to clo-

sure, but it must consider reasonable alternatives, including those expressly suggested by this Court. *See Cable News Network, Inc. v. United States*, 824 F.2d 1046, 1049 (D.C. Cir. 1987) (reversing closure of *voir dire* where court failed to consider an alternative "expressly contemplate[d]" in *Press-Enterprise I*).

This requirement to independently consider alternatives applies to both First Amendment analysis under *Press-Enterprise I* and Sixth Amendment analysis under *Waller*. But it takes on added importance in the First Amendment context because judges are the guardians of the "independent public interest in an open courtroom." *Tinsley v. United States*, 868 A.2d 867, 879 (D.C. 2005); *see also Richmond Newspapers*, 448 U.S. at 585 (Brennan, J., concurring in the judgment) (recognizing that the First Amendment "secures the public an independent right of access"). Thus, trial courts 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." *Tinsley*, 868 A.2d at 879. In the First Amendment context, "there is a risk that the only parties present—the prosecutor and the defendant—may agree that closure is proper, leaving the public's interest unrepresented unless the trial court assumes the responsibility of protecting that interest." *Ayala v. Speckard*, 131 F.3d 62, 74 (2d Cir. 1997) (Walker, J., concurring).

No party can waive the public's independent First Amendment right of access to a criminal proceeding. Nor can the public interest in openness apply only when a member of the press or the public is in attendance and rises to object and offer alternatives to

closure of the courtroom. Where the trial court fails to fulfill its independent obligation to safeguard the public interest, a fundamental, structural error has occurred. This results in a high likelihood of prejudice to the defendant, and eviscerates the guarantee of public access to *voir dire*.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that this Court reverse and remand this case.

Respectfully submitted,

Bruce D. Brown
Counsel of Record
Gregg P. Leslie
Selina MacLaren
THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1250
Washington, DC 20005
bbrown@rcfp.org
(202) 795-9300

March 6, 2017