No. 09-5270

IN THE
Supreme Court of the United States

ERIC PRESLEY,
PETITIONER,

v.

STATE OF GEORGIA,
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE GEORGIA SUPREME COURT

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.

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 function of the courts – especially information as vital to the integrity of the criminal justice system as the process of picking a criminal jury. This case concerns an issue critical to the media specifically and the public in general: whether a court may exclude the public from voir dire for the sake of administrative convenience, without considering any alternatives and without identifying a specific, overriding interest in secrecy that overcomes the presumption of public access to the courts.

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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.

SUMMARY OF ARGUMENT

Amicus curiae The Reporters Committee for Freedom of the Press ("*Amicus*") urges this Court to accept review in order to clarify two things: that a trial court may not exclude the public from criminal court proceedings simply because exclusion is deemed the most convenient way to address generalized concerns about jury taint; and that judges have an independent responsibility to safeguard the right of access to court proceedings by considering less restrictive alternatives to closure.

In this case, the trial court excluded the Petitioner's uncle from the whole of voir dire – indeed from the entire floor of the courthouse on which proceedings were being held – despite objections from defense counsel. Pet. App. F62-F63. It took this drastic action in what Chief Justice Sears, dissenting below, called "a garden variety drug trafficking case no different than hundreds or perhaps even thousands of similar cases pending on the dockets of trial courts throughout this state." *Id.* at A7. Indeed, the trial court regularly excluded the public from jury selection because it "believed – erroneously – that the constitutional commands to keep criminal trials open to the public do not apply to voir dire." *Id.* at A5. The Georgia Supreme Court approved this practice in an opinion so broad that it permits exclusion of the public from voir dire "whenever the trial judge decides, for whatever reason, that he or she would prefer to fill the courtroom with potential jurors rather than spectators." *Id.*

The Petitioner has ably argued that excluding the public over the objections of a criminal defendant is a violation of the Sixth Amendment right to a public trial. *Amicus* writes to emphasize a second point that the petition discusses in less detail – the trial court's actions also violated public's right of access under the First Amendment. Pet. 11 n.7.

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*, 448 U.S. at 584-85 (Brennan, J., concurring in the judgment) (emphasis added). The "unbroken, uncontradicted history" of public proceedings, "supported by reasons as valid today as in centuries past," has given rise to a First Amendment presumption of public access to criminal court proceedings. *Id.* at 573. The First and Sixth Amendments each independently require a trial court considering closure to identify a specific "overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Waller v. Georgia*, 467 U.S. 39, 45 (1984) (quoting *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501, 510 (1984)). Because the First Amendment right belongs to the public rather than a party, it cannot be waived by either party's act or omission. *Press-Enterprise I,* 464 U.S. at 504 (presumption of access applied even when all parties sought closure).

The decision below ignores the unanimous judgments of *Press-Enterprise I* and *Waller*. *Amicus* urges the Court to accept review and reiterate that it meant what it said in both cases; criminal courtrooms may not be closed simply because it is easier to try cases in private, and judges have an independent responsibility to consider less restrictive alternatives to closure.[2]

ARGUMENT

I. The First Amendment protects public access to voir dire because it is vital to ensure "the basic fairness of the criminal trial."

Anglo-American court proceedings have been open to the public "from time immemorial." *Richmond Newspapers*, 448 U.S. at 566-67 (quoting E. Jenks, *The Book of English Law* 73-74 (6th ed. 1967)). Public access was inherent in the structure of early court proceedings, because the "moots" that later evolved into juries consisted of all the freemen in a particular community. *Press-Enterprise I*, 464 U.S. at 505 & n.1 (citing Pollock, *English Law Before the Norman Conquest*, 1 *Select Essays in Anglo-American Legal History* 88, 89 (1907); Radin, *The*

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[2] Certiorari is appropriate where "a state court … has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Because the decision below conflicts with rules that the Court identified in *Press-Enterprise I* and *Waller*, the Court may prefer to dispose of the case summarily. *See, e.g., Duchesne City v. Summum*, 129 S. Ct. 1523 (2009) (summarily vacating and remanding for further consideration in light of previous decision); *University of Notre Dame v. Laskowski*, 551 U.S. 1160 (2007) (same).

Right to a Public Trial, 6 Temp. L. Q. 381, 388 (1932); 3 W. Blackstone, *Commentaries* *349). Voir dire, in particular, has been public "since the development of trial by jury … with exceptions only for good cause shown." *Id.* 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 Court).

Such openness "is no quirk of history; rather, it has long been recognized as an indispensable attribute of an Anglo-American trial." *Richmond Newspapers*, 448 U.S. at 569. Voir dire is conducted in public, despite the administrative burdens inherent in open court proceedings, because "[t]he process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system." *Press-Enterprise I*, 464 U.S. at 505. Secrecy in jury selection poses a clear risk to the integrity of the criminal justice system. Without the press and public to act as watchdogs on the jury system, "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). And this Court has observed that 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)).

Mindful both of centuries of history and the need for continued openness, this Court unanimously recognized a First Amendment presumption of access to voir dire 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, the Supreme Court found the closure unconstitutional, noting that the "selection of jurors has presumptively been a public process" throughout Anglo-American history. *Id.* at 505. The Court reasoned that "[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." *Id.* at 508 (citing *Richmond Newspapers*, 448 U.S. at 569-571).

Press-Enterprise I noted that closures "must be rare and only for cause shown that outweighs the value of openness." *Id.* at 509. The 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 Co. v. Superior Court* (*Press-Enterprise II*), 478 U.S. 1, 13-14 (1986); *El Vocero de Puerto Rico (Caribbean*

Intern. News Corp.) v. Puerto Rico, 508 U.S. 147, 151 (1993).

In *Waller v. Georgia*, the Court adopted the *Press-Enterprise I* test for use in defendants' Sixth Amendment claims, reasoning "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." *Waller*, 467 U.S. 39 at 46. It recognized the importance of the idea "that the public may see [a defendant] is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." *Id.* (quotations omitted). *Waller* noted that "the right to an open trial may give way in certain cases to other rights or interests," but added that "[s]uch circumstances will be rare, however, and the balance of interests must be struck with special care." *Id.* at 45.

Excluding the public from a criminal proceeding without meeting the *Press-Enterprise* test, then, does violence to more than the defendant's Sixth Amendment rights. It also violates the public's First Amendment right to attend proceedings. And even where the Sixth Amendment right is explicitly waived – for example, when the defendant seeks closure – the trial court is responsible for ensuring that the "independent public interest in an open courtroom" is protected. *Tinsley v. U.S.*, 868 A.2d 867, 879 (D.C. 2005).

II. The Court should accept review to reiterate that generalized, speculative concerns are insufficient to overcome the presumption of access to court proceedings.

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) (emphasis in original) (quoting *Richmond Newspapers*, 448 U.S. at 581); *see also Waller*, 467 U.S. at 48 (ordering new hearing where "the trial court's findings were broad and general").

The only interest cited by the court below, avoiding contamination of the jury, "is largely absent when a defendant makes an informed decision to object to the closing of the proceeding." *Waller*, 467 U.S. at 47 n.6. But even when this concern applies in full force, "[t]he 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 instead requires a specific showing of a particularly acute risk of prejudice, supported by "specific, individualized findings articulated on the record before closure." *U.S. v. Antar*, 38 F.3d 1348, 1359 (3rd Cir. 1994) (citations omitted). For example, the Seventh Circuit 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 media coverage of the voir dire, or engage in any other inquiry to support its conclusion that the 'integrity of the process' was infected."

U.S. v. Peters, 754 F.2d 753, 761 (7th Cir. 1985). Similarly, the generic finding that jurors "might be less candid if questioned in public" is not enough, because "if this general theory of potential prejudice were accepted as sufficient justification for closure without the necessity for finding potential prejudice based upon the circumstances of the particular case, all testimony could be taken in secret." *U.S. v. Brooklier*, 685 F.2d 1162, 1169 (9th Cir. 1982). Thus, the Second Circuit allowed voir dire to be closed in a racially-charged criminal trial where "potential jurors were unlikely to admit openly to harboring racist views." *ABC, Inc. v. Stewart*, 360 F.3d 90, 101 (2nd Cir. 2004). But it rejected closure in a subsequent case, because without "similarly sensitive or contentious lines of questioning," a generic interest in avoiding jury taint was insufficient to support closure. *Id.*

Courts have been equally demanding where other interests are asserted. For example, *Press-Enterprise I* found that the presumption of openness in voir dire could be overcome where "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. But vaguely-asserted "concern[s] for the privacy rights of prospective jurors and the defendant's right to a fair trial" are "speculative and [are] an insufficient basis on which to conclude that a limited closure [is] necessary." *Providence Journal Co. v. Superior Court*, 593 A.2d 446, 449 (R.I. 1991); *see also In re Dallas Morning News Co.*, 916 F.2d 205, 206 (5th Cir. 1990) (insufficient to find that "the individual questioning of potential jurors predictably will raise questions that may infringe upon the venire members' privacy and

that their responses may be more candid if provided in private"); *CNN, Inc. v. U.S.*, 824 F.2d 1046, 1048-49 (D.C. Cir. 1987) (reversing court that "believed that no objective standard was available to guide [its] determination as to whether a juror's request for private questioning about a particular matter was appropriate").

As Chief Justice Sears noted in her dissent below, the case at bar involves neither "testimony by an undercover officer" nor "matters of national security." Pet. App. A7.[3] The trial court offered *no* particularized findings to support the putative interest in closure. Rather, it closed voir dire as a general practice because of a vague, speculative concern that venirepersons might speak with members of the public while sitting in the courtroom. *Id.* at A2. And the Georgia Supreme Court's decision, allowing such closure without any individualized determinations, is so broad that it "permits the closure of voir dire 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." *Id.* at A7 (emphasis in original). For this reason alone, the decision below should be overturned.

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[3] By contrast, the *Press-Enterprise I* Court refused to presume a risk of prejudice to the jury even in a trial where "the most serious and emotional of issues were presented – the rape and strangulation killing of a fifteen year old white schoolgirl on her way to school, by a black man twenty-six years of age, with a prior conviction of forcible rape on an adolescent caucasian girl." *Press-Enterprise I*, 464 U.S. at 521 n.1 (Marshall, J., concurring in the judgment).

III. The Court should accept review to vindicate the "independent public interest in an open courtroom."

In addition to relying on a speculative interest in closure, the trial court erred in failing to consider *any* alternatives. Defense counsel repeatedly objected to closure and asked the court to consider alternatives, only to be cut off. Still, the Georgia Supreme Court considered his objections too "nebulous" to preserve the issue. Pet. App. A4.[4]

Press-Enterprise I and Waller held that "the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." *Waller*, 467 U.S. at 48 (*citing Press-Enterprise I*, 464 U.S. 501). And "a trial court should be obliged to show that the order in question constitutes *the least restrictive means available* for protecting compelling state interests." *Press-Enterprise I*, 464 U.S. at 520 (Marshall, J. concurring) (emphasis in original). The *Waller* Court ordered Georgia to provide a new hearing in part because "[t]he court did not consider alternatives to immediate closure of the entire hearing" and "[t]he post hoc assertion by the Georgia Supreme Court

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[4] Defense counsel did everything within his power to avoid the exclusion of the public. The record shows he objected to the exclusion of the public from the courtroom, was cut off by the court as he attempted to discuss alternatives to closure, and noted an exception to the trial court's order. Pet. App. F62-F63. It is difficult to imagine how an attorney, reporter, or member of the public could be any more persistent in objecting to court closure without risking sanctions.

that the trial court balanced petitioners' right to a public hearing against the privacy rights of others cannot satisfy the deficiencies in the trial court's record." *Waller*, 467 U.S. at 48-49 n.8. Neither *Waller* nor *Press-Enterprise I* contains *any* indication that the opponents of closure suggested alternatives. *Ayala v. Speckard*, 131 F.3d 62, 76-77 (2nd Cir.1997) (*en banc*) (Parker, J., dissenting). Both place the responsibility for considering alternatives to closures squarely on the trial court.[5]

This requirement to independently consider alternatives applies to both the *Press-Enterprise I* First Amendment analysis and the *Waller* Sixth Amendment analysis. But it takes on added force in the First Amendment context because judges are the guardians of the "independent public interest in an open courtroom." *Tinsley*, 868 A.2d at 879. 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." *Id.*

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[5] The trial court below acted on its own motion in excluding the public. Pet. App. A2. The Georgia Supreme Court found that a *court* ordering closure sua sponte should be subject to fewer restraints than a *party* moving for closure. *Id.* at A5 n.5. But, as Chief Justice Sears noted, "[t]he constitutional right to a public trial is designed primarily to police the conduct of the judges who preside over them by exposing their actions to public scrutiny. Thus, it would seem even more important to require specific consideration, on the record, of alternatives when a trial court closes a portion of a trial to the public without any prompting by the parties." *Id.* at A6-A7 (*citing In re Oliver*, 333 U.S. 257, 270 (1948)).

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*, 131 F.3d at 74 (Walker, J., concurring).[6]

The court below identified a longstanding split of authority regarding whether a court must "sua sponte, advance its own alternatives to" closure. Pet. App. A4. Many courts have looked to the language of *Press-Enterprise I* and concluded that the First Amendment requires judges to independently consider alternatives to closure. *See, e.g., Peters*, 754 F.2d at 761-63 (closure violated First Amendment where neither trial court nor party seeking closure "explain[ed] why other alternatives to closure were unavailable"); *CNN*, 824 F.2d at 1049 ("the District Court failed to abide by the standards set forth in *Press-Enterprise* for closing voir dire proceedings in

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[6] The court below suggests that requiring sua sponte consideration of alternatives "would place an impractical – if not impossible – burden on trial courts" because "a defendant on appeal could likely always" identify an alternative that was not considered. Pet. App. A4 (citation omitted). But the issue here is not that the court failed to exhaust every conceivable alternative to closure. Rather, it failed completely to consider alternatives because it was not aware that it was required to do so. *Id.* at A5. At the very least, a trial court should sua sponte consider the most common alternatives to closure before settling on total exclusion of the public. *See CNN*, 824 F.2d at 1049 (reversing where court failed to consider an alternative "expressly contemplate[d]" in *Press-Enterprise I*).

criminal cases" in part because it "acted apparently without considering alternatives that might minimize the degree of closure"); *In re The Herald Co.*, 734 F.2d 93, 100 (2nd Cir. 1984) ("the trial judge must consider alternatives and reach a reasoned conclusion that closure is a preferable course to follow to safeguard the interests at issue"). Others have emphasized that under *Press-Enterprise I*, it "is the burden of the party seeking closure … to present facts supporting closure and to demonstrate that available alternatives will not protect his rights." *Oregonian Pub. v. District Court*, 920 F.2d 1462, 1467 (9th Cir. 1990) (*citing Brooklier*, 685 F.2d at 1167, 1169); *see also Peters*, 754 F.2d at 761 (party seeking closure "carried the burden of persuasion"); *Associated Press v. District Court*, 705 F.2d 1143, 1145 (9th Cir. 1983) (proponent of closure must show closure is "strictly and inescapably necessary"). Though they sometimes differ in how they allocate the burden between proponents of closure and the court – here, one and the same – these decisions make clear that the *opponents* of closure are not responsible for proposing alternatives.[7]

Other courts, relying on Justice Powell's concurrence in *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), have found that opponents of closure must

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[7] The Petitioner likewise has cited Sixth Amendment cases from several circuits and state high courts placing the burden of exploring alternatives to closure on the proponent of closure, the court, or both. *See*, *e.g.*, Pet. at 19 n.15 (*citing*, *inter alia*, *Guzman v. Scully*, 80 F.3d 772, 774, 776 (2nd Cir. 1996); *U.S. v. Powers*, 622 F.2d 317, 325 (8th Cir. 1980); *Judd v. Haley*, 250 F.3d 1308, 1317 (11th Cir. 2001)).

suggest alternatives. *See NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 980 P.2d 337, 365 n.40 (Cal. 1999). The Second Circuit thus relied on the concurrence in finding that "once a trial judge has determined that limited closure is warranted as an alternative to complete closure, the judge [need not] sua sponte consider further alternatives to the alternative deemed appropriate." *Ayala*, 131 F.3d at 71, 75. But as the dissenting judges in that case pointed out, *Waller* "was also authored by Justice Powell, was decided several years after *Gannett* and is controlling." *Id.* at 77 n.8 (Parker, J., dissenting).[8]

This split among multiple federal appellate courts and state courts of last resort on an important federal question is reason alone to accept review. Sup. Ct. R. 10(a),(b). The Court should reiterate that no party can waive the public's independent First Amendment right of access to proceedings. The First Amendment, perhaps even more than the Sixth, imposes on a trial court the independent obligation to safeguard the public interest by considering less restrictive alternatives to closure. Nor can the public interest in openness apply only when a member of the press or public jumps up and offers alternatives

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[8] The court below relied on *Ayala*, concluding that the closure was a limited one because "exclusion of observers was only for the duration of jury voir dire." Pet. App. A3. But the closure authorized in that case was far more limited, including just "the testimony of one witness" who feared for his life because of his undercover work. *Ayala*, 131 F.3d at 64. *Ayala* explicitly declined to decide whether *Waller* requires judges to consider alternatives sua sponte when faced with more extensive closures, such as the one here. *See Id.* at 71.

to court closure. Such a requirement would eviscerate the guarantee of public access.

CONCLUSION

Before a trial court excludes the public from criminal court proceedings, both the First and the Sixth Amendments require it to cite a particularized concern mandating closure and consider whether alternatives would alleviate the concern. Failing to observe these procedural safeguards irreparably harms the rights of the defendant, the public, and the press.

The trial court below excluded the public from jury selection because of a mistaken belief that voir dire was not a public proceeding. But rather than correct this error, the Georgia Supreme Court compounded it. The decision below rewrote the *Press-Enterprise* test, replacing compelling interests with administrative convenience and shifting the evidentiary burden from the party seeking closure to the party opposing it. The Court should accept review and reiterate that judges may not exclude the public any time convenience dictates, and that they may not do so without considering alternatives more in line with the centuries-old practice of conducting criminal trials in public view.

Respectfully submitted,

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