No. 21-764

IN THE

Supreme Court of the United States

PATRICK HUFF,

Petitioner,

v.

FLORIDA,

Respondent.

On Petition for Writ of Certiorari
to the Florida District Court of Appeals,
Fourth District

Brief of *Amici Curiae* Law Professors Justin Murray and Jocelyn Simonson in Support of Petitioner

TASSITY JOHNSON
Counsel of Record
MARY MARSHALL
JENNER & BLOCK LLP
1099 New York Ave NW
Washington, DC 20001
(202) 637-6303
tjohnson@jenner.com

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF THE *AMICI CURIAE*[1]

Professor Justin Murray is an Associate Professor of Law at New York Law School, where he writes and teaches about criminal law, criminal procedure, and constitutional law.

Professor Jocelyn Simonson is a Professor of Law at Brooklyn Law School, and author of *The Criminal Court Audience in a Post-Trial World*, 127 Harv. L. Rev. 2173 (2014).

SUMMARY OF ARGUMENT

"Publicity is the very soul of justice." Jeremy Bentham, *Draught for the Organization of Judicial Establishments, Compared with That of the National Assembly, With a Commentary on the Same* (1790). The Sixth Amendment embraces this longstanding principle by giving the public a right to attend and observe criminal trials. Public trials are critical to the fairness and legitimacy of our criminal justice system. And as this Court has recognized, this "presumption of openness has remained secure" since the founding. *Globe Newspaper Co. v. Super. Ct. for Norfolk Cnty.*, 457 U.S. 596, 605 (1982). *Waller v. Georgia* protects the public trial right by allowing a courtroom to be closed only after individualized,

[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this *amici* brief and received notice of the planned filing at least 10 days before the deadline.

case-by-case review of closure requests on the public record. 467 U.S. 39 (1984).

Blanket closure statues like Florida's section 918.16(2), which exclude all but a handful of people from the courtroom at a testifying victim's request, turn the Sixth Amendment's presumption of openness on its head. Such statutes prevent a trial court from weighing the interests for and against closure against the public's presumptive right to a public trial. Blanket closure statutes also risk excluding members of the public who do doubt the fairness or legitimacy of our criminal justice system. This Court should grant certiorari to clarify that *Waller* and the Sixth Amendment cannot tolerate blanket closure of the courtroom.

ARGUMENT

I. The Public Trial Right Is Essential to the Fairness and Legitimacy of Our Criminal Justice System.

Public trials are vital to the health of our criminal justice system. When the public observes courts proceedings, it serves as a check on judicial abuse and promotes fairness. This, in turn, instills public trust in the judiciary and government institutions more broadly.

Public trials promote fairness through observation. "[T]here is power in the act of observation: audiences affect the behavior of government actors inside the courtroom, helping to define the proceedings through their presence." Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World,* 127 Harv. L. Rev. 2173, 2177 (2014). That is because, as this Court recognized in

Waller, "the presence of interested spectators may keep [the defendant's] triers keenly alive to a sense of their responsibility and to the importance of their functions." *Waller*, 467 U.S. at 46 (quoting *In re Oliver*, 333 U.S. 257, 269 n.25 (1948)). The public's watchful eye thus "serves as a check on governmental and judicial abuse and mistake, guarding against the participants' corruption, overzealousness, compliancy, or bias." Raleigh Hannah Levine, *Toward a New Public Access Doctrine*, 27 Cardozo L. Rev. 1739, 1791 (2006).

Open trials assure that citizens, whether present in the courtroom or not, can trust in their verdicts and the judicial system writ large. Public trials "heighten[] public respect for the judicial process" by giving ordinary people the ability to hold judges and prosecutors accountable by their mere presence in the courtroom. *Globe Newspaper Co.*, 457 U.S. at 606.[2] "[C]ontemporaneous review [of the criminal trial] in the forum of public opinion is an effective restraint on possible abuse of judicial power." *In re Oliver*, 333 U.S. 257, 270 (1948).

---

[2] Although *Globe Newspaper* and *Press Enterprise* consider the public trial right under the First Amendment, these cases also inform the Court's understanding of the Sixth Amendment right. "[R]ather than separate rights, courts increasingly treat[] the First and Sixth Amendment rights to open proceedings hand in hand." Simonson, *Post-Trial World*, *supra*, 2210. "[T]here 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." *Waller*, 467 U.S at 46. *Waller* itself employs the public trial right test from *Press-Enterprise* in its Sixth Amendment analysis. *Id.* Given their close relationship, this brief relies on both the First and Sixth Amendment cases in discussing the public trial right.

Knowing that ordinary people *can* attend, even if few do, gives the public comfort that "standards of fairness are * * * observed." *Press-Enter. Co. v. Super. Ct. of Cal.*, 464 U.S. 501, 508 (1984).

Without this public trust, our criminal justice system cannot function. "To work effectively, it is important that society's criminal process 'satisfy the appearance of justice.'" *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571-72 (1980) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)). "Closed trials breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law." *Id.* at 595 (Brennan, J., concurring). "People 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." "A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted." *Id.* at 571-72. Moreover, "[o]nce the audience leaves the courtroom, the experience of observation then serves a host of functions connected to democracy: it furthers public discourse, checks the government through democratic channels, and promotes government legitimacy." Simonson, *Post-Trial World*, *supra*, at 2177. Public confidence in our judicial system can, in turn, shore up the legitimacy of other government institutions, bolstering the health of our democracy and trust in our government as a whole.

Our judicial system inherited the public trial right from the common law. Publicity "was vital to the health of the English common law system. It deterred perjury,

checked judicial abuse of power, and promoted public confidence in the administration of justice. Most fundamentally of all, publicity conferred legitimacy upon court judgments." Stephen Wm. Smith, *Kudzu in the Courthouse: Judgments Made in the Shade*, 3 Fed. Cts. L. Rev. 177, 183 (2009). "Eventually, this habit of publicity came to be regarded, not merely as a venerable tradition, but as the defining characteristic of English justice." *Id.* at 182.

English settlers brought the common law tradition of presumptively open trials to America. In the eighteenth century, colonial trials were run exclusively by lay people, and the public attended both to participate and to observe. Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. Rev. 911, 918-19 (2006). When the Founders drafted the Bill of Rights, "[p]ublic access to trials was * * * regarded as an important aspect of the process itself." *Richmond Newspapers*, 448 U.S. at 575. "[T]he presumption of openness has remained secure" since the founding. *Globe Newspaper Co.*, 457 U.S. at 605. This "tradition of accessibility implies the favorable judgment of experience." *Id.* (quotation marks omitted).

II. *Waller* Makes Individualized Review in a Public Forum Central to the Public Trial Right.

Under *Waller*, a criminal trial cannot be closed unless the court first conducts an individualized review of the given interest in closure, as well as alternatives to closure, on the public record. 467 U.S. at 45, 48. *Waller*'s required "individualized, case-by-case analysis with

specific findings," Pet. at 13, preserves the public trial right's underlying values in two ways.

First, *Waller* advances fairness and public accountability in the courts. By demanding case-by-case review and consideration of alternatives, *Waller* forces those who seek to close the courtroom to do so only when closure is absolutely necessary. And by demanding that courts conduct their review on the public record, *Waller* keeps judges aware that they must justify a decision to limit the public's right to access the courtroom to the public itself. *Cf.* Smith, *Kudzu in the Courthouse*, *supra*, at 184-86.

Second, *Waller* maintains judicial legitimacy even when the courtroom is closed. Justice at times requires excluding the public from the courtroom. *Waller* ensures that, in those rare cases, the public understands why the courtroom must be closed. "[I]t is the public record of judicial decisions that renders those decisions legitimate." *Id.* at 214. The need for judicial transparency is heightened when a court limits the public's presumptive right to observe the administration of criminal justice. Otherwise, the exclusion of the public—already "difficult … to accept"—may become intolerable. *See Press-Enter.*, 464 U.S. at 509 (quotation marks omitted).

III. A Generally Applicable Closure Law Is Not a Substitute for *Waller* Review.

Section 918.16(2) of the Florida Statutes permits closure of a criminal trial at the request of a testifying victim of a sex offense. Fla. Stat. § 918.16(2). The Florida Supreme Court has justified section 918.16(2)'s blanket closure rule by stating that it "acceptably embraces the

requirements set forth in *Waller*," *Kovaleski v. State*, 103 So. 3d 859, 861 (Fla. 2012), for two reasons. First, the courtroom is only closed at the request of the victim. *Id.* Second, several groups—"including members of the press[—]are explicitly allowed to remain in the courtroom." *Id.* Neither reason is persuasive. A general interest in witness privacy does not satisfy *Waller*'s requirement individualized, case-by-case review of a request for courtroom closure. And an exception to section 918.16(2) for some categories of people does not cure the constitutional ills of blanket courtroom closure.

A. A General Interest in Witness Privacy Does Not Satisfy *Waller*.

Blanket closure statutes like section 918.16(2) do not "embrace" *Waller* by overriding the public's presumptive right to an open courtroom only at the request of the testifying victim. *Amici* do not doubt that closing the courtroom at a testifying sexual assault victim's request may, at times, be proper. This Court, however, has made clear that a victim's request cannot alone justify courtroom closure. As *Waller* explains, "[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." 467 U.S. at 45 (quotation marks omitted). By requiring a court to close the courtroom anytime a sexual assault victim requests, blanket closure statues like section 918.16(2) prevent trial courts from assessing the actual interests in closure in a given case, or from determining whether those interests outweigh the public's presumptive right to attend and observe the trial.

In *Globe Newspaper Co.*, the Court held that requiring a closed courtroom whenever a minor sexual assault victim testified violated the public trial right. The Court acknowledged that "safeguarding the physical and psychological well-being of a minor" was a compelling interest. 457 U.S. at 607-08. But it determined that that interest could not justify a blanket closure rule: "[T]he circumstances of a particular case may affect the significance of the interest. A trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of [the victim]." *Id.* at 608. Without this specific analysis, the Court noted, the public could be excluded from the courtroom for no compelling reason at all, an unacceptable outcome. *See id.*; *see also Waller*, 467 U.S. at 49 (noting that the lack of specific analysis of the privacy interests at stake led to a courtroom closure that was "far more extensive than necessary").

A blanket closure statute like section 918.16(2), which categorically excludes the public from the courtroom at the request of an *adult* testifying victim of sexual assault, violates the public trial right for nearly identical reasons: Although safeguarding the physical and psychological well being of a sexual assault victim can be a compelling interest, the circumstances of a particular case may affect whether that interest is compelling enough to outweigh the public's presumptive right to an open trial. A trial court can and should determine on a case-by-case basis whether closure is necessary to protect a testifying sexual assault victim's welfare. Without such individualized review, the public may be needlessly, and thus unconstitutionally, denied its right to an open courtroom.

B. Excluding Only Some Categories of the Public from the Courtroom Does Not Satisfy *Waller*.

Keeping the courtroom open to only some categories of people does not make blanket closure statutes like section 918.16(2) constitutional. Section 918.16(2) allows certain limited groups of people to remain in the courtroom when it is closed at a testifying victim's request—namely "th[e] parties to the cause and their immediate families or guardians, attorneys and their secretaries, officers of the court, jurors, newspaper reporters or broadcasters, court reporters, and, at the request of the victim, victim or witness advocates designated by the state attorney may remain in the courtroom." Fla. Stat. § 918.16(2). Thus, under section 917.16(2), any other member of the public is categorically denied their right to an open courtroom.

Allowing certain segments of the press, or people directly connected to the parties, to access the courtroom cannot satisfy the Sixth Amendment's demands, as set forth in *Waller*. To begin, the courtroom is not truly open to the press if only state-approved segments of the media are allowed to remain the courtroom. *See* Brief of the Floyd Abrams Institute for Freedom of Expression as *Amicus Curiae* in Support of Petitioner at 13-14. Even if this limitation on press attendance did not exist, the Sixth Amendment protects the right of the *public* to open trials, not just the press. As this Court has observed, "the sure knowledge that *anyone* is free to attend [a trial] gives assurance that established procedures are being followed and that deviations will become known." *Press-Enter. Co.*, 464 U.S. at 508. And as

explained, the public trial right developed through the participation of the layman, not the press, in trials. *See* I.A, *supra*. It is the "presence of the local audience [that] assures the defendant and the community that the government will be kept in check." Simonson, *Post-Trial World*, *supra*, 2198 (citing *In re Oliver*, 333 U.S. at 270). Moreover, the public's right to an open trial exists independently of the right a defendant may have in openness. *Press-Enter. Co.*, 464 U.S. at 508; *Globe Newspaper Co.*, 457 U.S. at 609. And the public may choose to exercise that right by advancing interests beyond support of an individual defendant's right to a fair trial. "[C]ommunity groups participate in efforts at courtwatching, not to support an individual defendant but rather to voice opposition to larger prosecutorial policies and practices, or to collect information so as to hold prosecutors accountable." Jocelyn Simonson, *The Place of "the People" in Criminal Procedure*, 119 Colum. L. Rev. 249, 269 (2019) (citing *In re Oliver*, 333 U.S. at 270). Blanket closure statutes exclude all but a few members of this critical audience from the courtroom, without any specific, public rationale for doing so.

Worse still, by excluding most of the public, blanket closure statues like section 918.16(2) may exclude people who have doubts about the fairness or legitimacy of our criminal justice system. Those excluded may include people otherwise excluded from juries, such as friends and relatives of the accused and victims; noncitizens; and, in federal courts and more than half of states, people with felony convictions, a racially-skewed group. *See* Simonson, *Post-Trial World*, *supra*, at 2178, 2185, 2189; Brian C. Kalt, *The Exclusion of Felons from Jury*

Service, 53 Am. U. L. Rev. 65, 150-57 (2003); Sarah K. S. Shannon et al., *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948-2010*, 54 Demography 1795, 1807 (2017) (estimating that about 33% of adult African-American males, compared to 13% of all adult males, have felony convictions).

People who are more likely to have personal contact with the justice system are the people who most need to trust that system; yet they remain the least likely to have that trust. *See* Marsha Weissman, *Aspiring to the Impractical: Alternatives to Incarceration in the Era of Mass Incarceration*, 33 N.Y.U. Rev. L. & Soc. Change 235, 253-54 (2009) (noting that racial minorities are far more likely to have contact with the criminal justice system and far more likely to believe that system is unfair). Blanket closure statutes that exclude the public only exacerbate their distrust. *See Richmond Newspapers*, 448 U.S. at 572.

CONCLUSION

Blanket closure laws vitiate *Waller*'s demands, and thus deny the public its right to observe that justice is fairly and properly administered in criminal trials. This Court should grant certiorari and instruct that blanket closure statutes like section 918.16(2) violate the public's right to an open courtroom.

Respectfully submitted,

TASSITY JOHNSON
Counsel of Record
MARY MARSHALL
JENNER & BLOCK LLP
1099 New York Ave NW
Washington, DC 20001
(202) 637-6303
tjohnson@jenner.com

DECEMBER 23, 2021