No. 19-7487

IN THE
Supreme Court of the United States

JONATHAN BLADES,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
District of Columbia Court of Appeals

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

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae is the Reporters Committee for Freedom of the Press (the "Reporters Committee"), an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

The holding of the District of Columbia Court of Appeals—that the use of a "husher" during *voir dire* does not constitute a partial closure of the courtroom and may be predicated upon generalized concerns about juror privacy—contravenes not only the Sixth Amendment, but also the First Amendment. The holding below violates the First Amendment right of the public, including the news media, to access *voir dire* and undermines the news media's ability to inform the public about the workings of the criminal justice system. As an organization that advocates for the First Amendment rights of the public and the press, the Reporters Committee has an interest in

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus 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, and no person other than the amicus curiae, its members, or its counsel made monetary contributions intended to fund the preparation or submission of this brief. Both parties have provided written consent to the filing of this amicus brief and have been timely notified of the submission of this brief.

ensuring that their First Amendment right of access to *voir dire* is meaningful and fully protected.

SUMMARY OF THE ARGUMENT

The Reporters Committee files this brief in support of Petitioner Jonathan Blades. Despite the fact that the trial court used a "husher" to prevent the public from hearing any of the answers that prospective jurors gave to questions posed during individual *voir dire*, the District of Columbia Court of Appeals held that *voir dire* was not closed to the public because the public was not "precluded from perceiving contemporaneously what [was] transpiring in the courtroom." App. 15a. That decision was wrong.

The question presented in this case is particularly important because it implicates not only the Sixth Amendment's guarantee of a public trial, but also the public's separate and distinct First Amendment right of access to judicial proceedings, including *voir dire*. *See Press-Enter. Co. v. Super. Court*, 464 U.S. 501 (1984) ("*Press-Enterprise I*"). The First Amendment right of access to judicial proceedings, including *voir dire*, ensures that our society's "constitutionally protected discussion of governmental affairs is an informed one." *Globe Newspaper Co. v. Super. Court*, 457 U.S. 596, 604–05 (1982). Members of the news media rely on the First Amendment right of access to act as a surrogate for the public by gathering information and informing the public about the activities of the judicial system. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (plurality opinion).

Contrary to the District of Columbia Court of Appeals' holding below, blanket use of a "husher" partially closes a courtroom to the public, leaving the press unable to fulfill its role as surrogate for the public. For the First Amendment right of access to jury selection be meaningful, the public and the press must be able to see *and* hear what is going on during those proceedings. *See, e.g.*, *Gannett Co. v. DePasquale,* 443 U.S. 368, 429 (1979) (Blackmun, J., concurring) (cautioning that "[a]nything that impairs the open nature of judicial proceedings threatens to undermine this confidence [in our judiciary] and to impede the ability of the courts to function"). The District of Columbia Court of Appeals erred in holding that *voir dire* remained "public" in this case despite the fact that no member of the public could hear what was occurring because the courtroom remained physically open.

Later access to a cold transcript of jury selection does not cure the constitutional violation that occurs when a trial court partially closes *voir dire* by preventing those in attendance from hearing the *voir dire* due to general concerns about juror privacy. Because of the significance of jury selection to a criminal trial, journalists frequently attend *voir dire* in cases of public interest and report to the public what they see and hear, including observations about jurors' tone of voice and demeanor. This information cannot be gleaned from a cold transcript that is accessible only after-the-fact.

Because this case presents a question of significant importance to the public and the press, the Court should grant certiorari to affirm once more to lower courts that *voir dire* can be shielded from the

public's hearing only if the closure is justified by an "overriding interest," "no broader than necessary to protect that interest," superior to any "reasonable alternatives," and supported by adequate findings. *Waller v. Georgia*, 467 U.S. 39, 48 (1984); *see also Press-Enterprise I*, 464 U.S. at 510–11. On these facts, that daunting standard was plainly not satisfied, warranting the granting of certiorari.

ARGUMENT

I. Public access to *voir dire* fosters public understanding of criminal proceedings, bolsters trust in the criminal justice system, and promotes the integrity of jury selection.

"Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account." Jeremy Bentham, Rationale of Judicial Evidence 524 (1827).

The benefit of public scrutiny of judicial proceedings that Jeremy Bentham espoused nearly 200 years ago continues to apply to criminal trials today. As this Court explained in *Richmond Newspapers,* "[a] trial courtroom is a public place where the people generally—and representatives of the media—have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place." 448 U.S. at 576.

The news media play a vital role in the public's access to judicial proceedings because reporters serve as a surrogate for the public when they exercise their First Amendment right to attend and observe judicial

proceedings. *Richmond Newspapers*, 448 U.S. at 573. Transmittal of information about judicial proceedings to the public serves many purposes, including building institutional trust in the judicial system. Indeed, "[t]o work effectively, it is important that society's criminal process 'satisfy the appearance of justice,' which can best be provided by allowing people to observe" criminal trials. *Id*. at 556 (internal citation omitted).

Public access to jury selection—a critical part of the criminal trial—serves multiple interests. It contributes to public understanding of how the jury system works; allows the public to monitor and serve as a check on judges, attorneys, and prospective jurors; and helps ensures fairer trials. All of these interests are mutually reinforcing. *See, e.g.*, *Press-Enterprise I*, 464 U.S. at 505 ("The process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system" as a whole.).

As Justice Stevens once explained: "[P]ublic access cannot help but improve public understanding of the *voir dire* process, thereby enabling critical examination of its workings to take place." *Press-Enterprise I*, 464 U.S. at 518 (Stevens, J., concurring). Just as with access to other parts of a criminal trial, access to *voir dire* educates the public about how jury selection and the criminal justice system work.

Public access to jury selection also allows the public to "serve[] as a check on governmental and judicial abuse and mistake, guarding against the participants' corruption, overzealousness . . . or bias." Raleigh Hannah Levine, *Toward A New Public Access*

Doctrine, 27 Cardozo L. Rev. 1739, 1791 (2006). When the public can observe *voir dire*, errors or abuses by attorneys, judges, and prospective jurors can become known to the public and corrected. Thus, public scrutiny of *voir dire* benefits "both the defendant and to society as a whole." *Globe Newspaper Co.*, 457 U.S. at 606.

Finally, public access to *voir dire* helps ensure fair trials. Public scrutiny discourages perjury by prospective jurors and encourages jurors to take their role seriously. *See* Levine, *supra* (noting that "publicity about a trial . . . will discourage perjury"). For example, James Matsumoto, the jury foreman in the first corruption trial of former Illinois Governor Rod Blagojevich, has described how the public nature of jury selection impacted his perception of his role as a juror. Mr. Matsumoto remembered that many journalists were present in the courtroom when he was questioned as a potential juror. Helier Cheung, *Harvey Weinstein trial: Potential juror speaks of 'disgust,'* BBC News (Jan. 15, 2020), https://perma.cc/XJ2Q-89Y8. He explained that the presence of journalists at the trial helped "focus the minds on the jury, because it made them aware of how important the case was." *Id.* Mr. Matsumoto's experience confirms this Court's hypothesis that "the presence of interested spectators may keep [a defendant's] triers keenly alive to a sense of their responsibility and to the importance of their functions." *Gannett Co. v. DePasquale*, 443 U.S. 368, 380 (1979) (quoting *In re Oliver*, 333 U.S. 257, 270 n.25 (1948)).

II. The ability to hear judicial proceedings is a necessary component of the First Amendment right of access.

In *Richmond Newspapers*, this Court stated: "Free speech carries with it some freedom to listen." 448 U.S. at 576 (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972)). That is unquestionably true with respect to the public's constitutional right to attend and observe criminal trials, including jury selection.

The right to observe a judicial proceeding necessarily includes the right to listen to what is being said. The public's right of access to judicial proceedings would be hollow if all it guaranteed was a right to be physically present in the courtroom. *See, e.g.*, *ABC, Inc. v. Stewart*, 360 F.3d 90, 99 (2d Cir. 2004) ("The ability to see *and to hear* a proceeding as it unfolds is a vital component of the First Amendment right of access.") (emphasis added). Indeed, if the press and public were allowed to be present in the courtroom during a criminal trial but barred from contemporaneously hearing what is transpiring, none of the benefits that this Court has held the First Amendment right of access provides could be realized. *See* Section I, *supra*. After all, the public cannot "participate in and serve as a check upon the judicial process," *Globe Newspaper Co.*, 457 U.S. at 606, if it cannot hear what is occurring.

The use of a "husher" makes what is transpiring in the courtroom incomprehensible to those present. Any "access" that is afforded by the public's mere presence in the courtroom, without the ability to hear what is transpiring, is meaningless.

Accordingly, contrary to the District of Columbia Court of Appeals' holding in this case, the blanket use of a husher during jury selection, which prevents the public from hearing and understanding what is occurring in the courtroom, amounts to partial closure of *voir dire*.

There may be instances where court closures are necessary and constitutional. But, "closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness." *Richmond Newspapers*, 448 U.S. 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." *Press-Enterprise I*, 464 U.S. at 510. In addition, "[t]he interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Id.*

Because the District of Columbia Court of Appeals held that the use of the husher did not constitute a closure of the courtroom, even in part, it did not require the proponent of use of the husher to meet this constitutional standard. The Court should grant Petitioner's petition for a writ of certiorari to correct this error and protect the public's ability to understand and monitor jury selection.

III. A cold transcript is an inadequate substitute to contemporaneously seeing and hearing *voir dire.*

The District of Columbia Court of Appeals held that the blanket use of a husher was not a court closure, but rather an *alternative* to closure, in part because a transcript of *voir dire* was made available after-the-fact. App. 19a. However, the later availability of a transcript of jury selection does not cure the unconstitutional partial closure in this case.

Amicus agrees with Petitioner that "after-the-fact availability" of transcripts is a constitutionally inadequate substitute for contemporaneous access to *voir dire*. Pet. for Writ of Cert. at 17–19, 8. In addition, amicus emphasizes that barriers to accessing transcripts such as prohibitive costs,[2] delays, and the inability of a transcript to capture the "inflection, tone, cadence, demeanor" of those speaking in the courtroom make transcripts an insufficient replacement for contemporaneous observation and hearing of courtroom proceedings.

Reporting based upon firsthand observation of jury selection, including hearing jurors' answers,

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[2] Even news organizations and journalists may struggle to afford the high costs of transcripts. *See* Pet. for Writ of Cert. at 18. Given the financial contractions in the news industry and the decline in local news in particular, *see, e.g.*, Alexis C. Madrigal, *Local News is Dying, and Americans Have No Idea*, The Atlantic (March 26, 2019), https://perma.cc/54GD-C6Q8 (discussing the "financial crisis" of the news industry, increasing layoffs in newsrooms, and the transition of news media to a subscriber-based method to bring in income), the inability to pay for transcripts is a significant concern for members of the news media.

reveals details that a transcript alone could not provide. For example, the *Chicago Tribune*'s news story on jury selection in the trial of Jason Van Dyke, the police officer who shot and killed teenager Laquan McDonald, relied on the reporter's ability to hear *voir dire* to report information that could not have been gleaned from a transcript. *See* Megan Crepau et al., *Five people picked in first day of jury selection at Jason Van Dyke's murder trial*, Chi. Tribune (Sept. 11, 2018), https://perma.cc/67C8-NFFV. The *Tribune* described, for example, how one of the prospective jurors "*hesitated at length* when asked if he could be fair to both sides, ultimately answering that he would do his best." *Id.* (emphasis added). Another prospective juror, "who appeared nervous and *rarely spoke above a whisper*, said he believes everyone, including police officers, 'must abide by the law,'" according to the *Tribune*. *Id.* (emphasis added).

Details in news reports on *voir dire* in Bill Cosby's 2018 trial for sexual assault were also based on reporters' ability to hear prospective jurors and observe their demeanor contemporaneously with their answers. *See, e.g.*, Michael B. Sisak, *Jury selection wraps up in Bill Cosby's sexual assault trial*, Associated Press (Apr. 5, 2018), https://perma.cc/6KKH-6ARC. The Associated Press, for example, described how one alternate selected for the jury "said he could set aside what he's heard about the Cosby case *but hesitated* and couldn't guarantee it when pressed by the judge." *Id.* (emphasis added).

In addition, this Court's very own description of the nuances and complexities of *voir dire* and how they manifest themselves in the courtroom demonstrates why a transcript is insufficient to

capture jurors' answers during jury selection. For example, the Court has noted the "vocal hesitations or tones of voice" that would warrant excusing a juror for cause in a capital murder case. *Uttecht v. Brown*, 551 U.S. 1, 45 (2007) (Breyer, J. dissenting). *Uttecht* was principally concerned with when jurors may be excused in relation to their opinions about the death penalty, and concluded, in part, that juror demeanor must be taken into account when assessing jurors' statements as to their ability to impose the death penalty. 551 U.S. at 9. While, of course, it is the domain of the parties' counsel and of the judge in a given case to assess the suitability of jurors, members of the press play no small role in observing and evaluating jury selection.

Amicus also agrees with Petitioner that the pace of the modern news cycle renders transcripts, which are not available immediately to reporters and can be delayed by days or weeks, entirely inadequate to the task of informing the public about court proceedings. *See* Pet. for Writ of Cert. at 18. To fulfill its role as a surrogate for the public, the press often reports about jury selection in high profile cases on the same day that *voir dire* occurs. *The Washington Post*, for example, provided same-day coverage of jury selection in the Washington, D.C. trial of Ingmar Guandique for the murder of Chandra Levy, even hosting a live chat with readers during one of the days of jury selection to answer questions about *voir dire* and other aspects of the trial in real time. *See Chandra Levy trial: Jury selection begins today,* Wash. Post (Oct. 18, 2010), https://perma.cc/ZV8K-S2V6. The online media outlet Vulture similarly provided same-day updates to its readers during

recent jury selection in Harvey Weinstein's trial for sexual assault. *See* Victoria Bekiempis, *If You're Reading This, You're Not on the Weinstein Trial Jury*, Vulture (last updated Jan. 17, 2020), https://perma.cc/8BH9-ZF2V. When news outlets cannot report on jury selection on the same day it occurs because they must wait to obtain a transcript of the proceedings, it is the public that loses valuable, timely information.

CONCLUSION

For the foregoing reasons, amicus curiae respectfully urges the Court to grant Petitioner's writ of certiorari.

Respectfully submitted,

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