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Using *Waller* to Uphold First and Sixth Amendment Rights Throughout the COVID-19 Pandemic

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Abstract

In The Right to a Public Trial in the Time of COVID-19*, Professor Stephen Smith argued that the COVID-19 pandemic justified an almost categorical suspension of the right to a public trial. Judges have relied on Smith's Article to justify closure decisions made without the constitutionally required specific findings. These are part of a larger pattern of improper closure determinations, many made without fully considering alternatives to closure, since the beginning of the pandemic that threatens the rights of individuals with criminal cases and the collective rights of the public. But the Constitution has no pandemic exception, and it is time to address this unconstitutional pattern of closures as courts grapple with their obligation to protect criminal procedural rights within a potentially long-term public health situation. This Response explains that following the* Waller *test as it was contemplated by the Supreme Court can and will vindicate defendants' Sixth Amendment rights and the public's First Amendment rights while protecting public health during the COVID-19 pandemic.*

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I. INTRODUCTION

The past two years have been marked by fundamental questions about how courts uphold constitutional rights during a pandemic while simultaneously working to protect public health. One of the most critical sites for that tension is in courtrooms themselves, which were crowded places before the COVID-19 pandemic. Since the first closures in March 2020, courthouses across the country have remained shuttered to varying degrees, ranging from returning to mostly in-person operations to remaining entirely remote to cancelling settings wholesale for extended periods of time. These practices raise the important question of whether judges have been properly applying Supreme Court precedent when considering these closures, especially given that the U.S. Constitution is implicated each time a criminal court proceeding is closed.

In *The Right to a Public Trial in the Time of COVID-19*, Professor Stephen Smith argued that the urgent onset of the COVID-19 pandemic justified an almost categorical suspension of the right to a public trial.[1] Since its publication, federal judges have relied on Smith's Article to justify closure decisions made without the constitutionally required specific findings.[2] These are part of a larger pattern of improper closure determinations, many made without fully considering alternatives to closure, that threatens the rights of individuals with criminal cases and the collective rights of the public. While this may have been attractive in the face of the sudden challenge of judicial administration at the pandemic's outset, neither Smith nor any judge has proposed a limiting principle to this approach. The Constitution, however, has no pandemic exception, and it is time to address this unconstitutional pattern of closures as we grapple with our obligation to protect criminal procedural rights within a potentially long-term public health situation.

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1. Stephen E. Smith, *The Right to a Public Trial in the Time of COVID-19*, 77 WASH. & LEE L. REV. ONLINE 1 *passim* (2020).

2. *See, e.g.*, United States v. Babichenko, 508 F. Supp. 3d 774, 779 (D. Idaho 2020); United States v. Huling, 542 F. Supp. 3d 144, 147 (D.R.I. June 4, 2021).

This Response first lays out the *Waller* test,[3] which courts are required to perform before closing a proceeding that implicates the First and Sixth Amendments. It then responds to Smith's arguments in two parts; first to the categorical findings and then to the suggestion that there are no reasonable alternatives to closure. Upon examination, it is clear that adhering to the *Waller* test[4] as it was contemplated by the Supreme Court can and will vindicate defendants' Sixth Amendment rights and the public's First Amendment rights while protecting public health during the COVID-19 pandemic.

II. THE *WALLER* TEST

In a criminal case, the defendant enjoys the right to a public trial under the Sixth Amendment and the general public has a right of access under the First Amendment.[5] For reasons fundamental to American democracy, courtrooms are—and long have been—presumptively open.[6] And when it is necessary to close them in part or in total, it must be done with care. The Supreme Court articulated a four-part test for courtroom

3. Waller v. Georgia, 467 U.S. 39, 48 (1984) (articulating a four-part test for courtroom closure).

4. *Id.*

5. Though the U.S. Supreme Court has chosen to leave it as an open question whether the rights under the First and Sixth Amendments are "coextensive," the *Waller* test that follows is applied consistently under both Amendments. Presley v. Georgia, 558 U.S. 209, 213 (2010). *But see* Rovinsky v. McKaskle, 722 F.2d 197, 199 (5th Cir. 1984) ("Because the public's first amendment right and the defendant's sixth amendment right serve common interests, however, the legal principles appropriate for enforcing one are usually applicable to the other."); *see also* United States v. Alcantara, 396 F.3d 189, 193, 203 (2d Cir. 2005) (conducting access and closure analyses under the First and Sixth Amendments as if the rights are co-extensive).

6. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 587 (1980) (plurality) (describing how the First Amendment protects forms of communication "necessary for a democracy to survive" including public access to courtrooms); Detroit Free Press v. Ashcroft, 303 F.3d 681, 683 (6th Cir. 2002) ("Democracies die behind closed doors."); Globe Newspaper Co. v. Super. Ct. for Norfolk Cnty., 457 U.S. 596, 605–06 (1982) (explaining the long history of openness to the extent that the Court had previously been unable to find an historical example of a closed trial and the importance of public scrutiny in "the functioning of the judicial process and the government as a whole," including permitting "the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government.").

closure in *Waller v. Georgia*: "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure."[7] The information provided to support the interest must be specific.[8] That means specific to the case at hand, turning on the circumstances of the case and often the setup of the courthouse or the courtroom. Only a "small universe of cases [] will satisfy *Waller*."[9]

III. THE FINDINGS REQUIRED UNDER *WALLER*

The final step of the *Waller* test,[10] making findings with respect to the first three steps, is perhaps the most important step because even if each of the first three steps would have been satisfied, the court of review can still find error if the findings are insufficient, including if they are too general or broadly applicable.

A. The Repudiation of General—or Categorical—Findings

Supreme Court precedent requires a case-by-case analysis with specific findings before closure, making categorical findings under the *Waller* test[11] not only a stark departure from

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7. *Waller*, 467 U.S. at 48 (1984).

8. *Id.*

9. United States v. Abuhamra, 389 F.3d 309, 330 (2d Cir. 2004). Courts often recognize that not every situation calls for a full closure. Though the Supreme Court has never addressed partial closures, several federal courts of appeals have modified the *Waller* test for situations implicating partial closures, replacing the overriding interest requirement with a substantial interest requirement. United States v. Osborne, 68 F.3d 94, 98–99 (5th Cir. 1995) (collecting cases). The analysis remains as rigorous in the modified test, with the only distinction being a lower interest required in the first step. *See id.* Since the start of the COVID-19 pandemic, federal district courts have made findings as part of the *Waller* analysis that excluding members of the public from the physical courtroom and providing remote video access constituted a partial closure. *See* United States v. Babichenko, 508 F. Supp. 3d 774, 778–79 (D. Idaho 2020) ("Courts have viewed proceedings conducted over virtual platforms like Zoom as partial closures.").

10. *See* Waller v. Georgia, 467 U.S. 39, 48 (1984) (outlining the *Waller* test).

11. *Id.*

prior practice, but unconstitutional. In the Supreme Court's most recent case involving the *Waller* test,[12] it specifically repudiated a generic analysis that would allow for closure "almost as a matter of course."[13] Appellate courts regularly overturn analyses that could apply to criminal cases in general.[14] As such, the categorical findings that Smith advances are clearly unconstitutional. Smith's approach might be the most convenient one, but it turns an individualized constitutional inquiry into a broad decision of general application solely because it is related to public health and does so without constitutional justification.

The application of categorical findings has led to unnecessary closures and, even in cases of necessary closures, the denaturing of individual and collective constitutional procedural rights. For example, the District Court of Rhode Island found COVID-19 necessitated the total or partial closure of a criminal trial in June 2021.[15] The court considered that mask recommendations continued to be in effect, as they had been since nearly the beginning of the pandemic, but not state or local infection rates or any other local public health information that might have been relevant to the risk of infection. In fact, the entire state of Rhode Island had an average number of COVID-19 cases under fifty throughout the month of June 2021 and more than half of the state population was fully vaccinated with the COVID-19 vaccine at the beginning of the month.[16] Instead of courtroom access, there was

12. *Id.*

13. Presley v. Georgia, 558 U.S. 209, 725 (2010).

14. *See, e.g.*, Steadman v. State, 360 S.W.3d 499, 506 (Tex. Crim. App. 2012) ("The Supreme Court in *Presley* took pains to emphasize that 'broad' or 'generic' concerns will not serve to justify closure; otherwise, they could become talismans for exclusion of the public in any and every case."); State v. Decker, 907 N.W.2d 378, 384 (N.D. 2018) ("[A] generic, broad rationale would permit courtroom closure nearly any time."); Bright v. State, 875 P.2d 100, 110 (Alaska Ct. App. 1994) (finding a judge abused discretion in part because "the trial judge's findings hinge[d] primarily on factors that [were] not specific to [defendant's] case").

15. United States v. Huling, 542 F.Supp.3d 144, 147 (D.R.I. June 4, 2021). The court wrote that "[p]ublic access to the trial in this matter will be equal to, or even greater than, public access in non-pandemic times" while simultaneously closing the courtroom doors. *Id.*

16. *Tracking Coronavirus in Rhode Island: Latest Map and Case Count*, N.Y. TIMES (last updated Jan. 10, 2022), https://perma.cc/7ACV-YJA7; *Rhode*

public access to closed circuit television in an overflow room of the courthouse,[17] which did nothing to reduce the public's risk of infection. There was no consideration of the defendant's right to have family or friends present, a right which cannot be fulfilled through remote access.[18] Nor was there mention of those who had been targets of the alleged crime, members of the public who often exercise their right to observe trials and find it to be an important part of achieving justice.[19] Given that communities will likely face at least a low risk of COVID-19 for years, or perhaps decades, it could amount to an effectively indefinite suspension of constitutional rights if this pattern of categorical findings continues unabated.

B. Specific Findings Are Still Required During the COVID-19 Pandemic

The *Waller* test can be applied as it was intended by the Supreme Court while achieving the simultaneous goals of protecting public health and the First and Sixth Amendment rights of access, and this has been true for the entirety of the pandemic.

It is appropriate to consider whether public health concerns constitute an overriding or substantial interest justifying total or partial closure. Certainly, there have been historical instances of court closures during pandemics.[20] These examples predated the *Waller* test but demonstrated that certain public

Island COVID-19 Vaccine Tracker, RENO GAZETTE J., https://perma.cc/DU3Z-8J24 (last visited Feb. 6, 2022).

17. *Huling*, 542 F. Supp. 3d at 147 ("To best comply with the Constitution and Fed. R. Crim. P. 53, the Court will reserve a separate viewing room in the courthouse for the public and the press to watch a closed-circuit, live video and audio feed of the trial."). Members of the press have reported that being relegated to overflow rooms throughout the pandemic has limited their ability to observe the "full context of what's occurring" in the case. *See, e.g.*, David A. Lieb, AP NEWS (Oct. 26, 2021), https://perma.cc/K7AY-GQ7U.

18. *See In re* Oliver, 333 U.S. 257, 271–72; *see also* United States v. Rivera, 682 F.3d 1223, 1230 (9th Cir. 2012).

19. *See* NAT'L CRIM. JUST. REFERENCE SERV., THE CRIME VICTIM'S RIGHT TO BE PRESENT, LEGAL SERIES BULLETIN #3, https://perma.cc/U3T9-W39J.

20. Alicia A. Bannon & Douglas Keith, *Remote Court: Principles for Virtual Proceedings During the COVID-19 Pandemic and Beyond*, 115 NW. U. L. REV. 1875, 1908 (2021); Jenia I. Turner, *Remote Criminal Justice*, 53 TEX. TECH L. REV. 197, 223 (2021).

health crises would merit closure. In fact, court systems anticipated total or partial closures in the case of epidemics leading up to the current pandemic.[21] And courts are regularly forced to consider other local public health issues.[22]

But in determining whether a public health issue is a constitutional basis for a closure, courts must still make specific findings with respect to each of the *Waller* factors. Those specific findings should be based on the risk of infection to the people who will actually attend the proceeding rather than the mere declaration of the ongoing global COVID-19 pandemic.[23] This is possible because local public health data have been available throughout the COVID-19 pandemic.[24] There are other factors to consider beyond the rate of community spread.[25] It is particularly urgent to do so going forward as many public health officials predict the pandemic could last years and particular regions will reach endemicity before the nation does.[26]

IV. MANDATORY CONSIDERATION OF ALTERNATIVES

The court's consideration of alternatives to closure is a critical step because it often leads to avoiding or minimizing closure.

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21. *See, e.g.*, SUP. CT. OF VA.'S PANDEMIC FLU PREPAREDNESS COMM'N, PANDEMIC INFLUENZA BENCH BOOK FOR VIRGINIA'S COURT SYSTEM (2017), https://perma.cc/BLN8-MHQK (PDF).

22. *See, e.g.*, *Dodge Co. Courthouse Closed Due to Pigeon Poop*, 13WMAZ (Feb. 11, 2019, 11:54 AM), https://perma.cc/4YH3-9E8C; Aristos Georgiou, *Courthouse Closed Due to Bed Bugs Falling from Lawyer's Suit*, NEWSWEEK (Feb. 6, 2019, 11:39 AM), https://perma.cc/9BAX-PQ23.

23. Press-Enterprise Co. v. Super. Ct. of Cal. for Cnty. of Riverside, 478 U.S. 1, 15 (1986) (concluding that a "conclusory assertion" of the overriding interest is insufficient to overcome the First Amendment right).

24. *COVID-19 Integrated County View*, CTRS. FOR DISEASE CONTROL AND PREVENTION https://perma.cc/A2X7-V26F.

25. The judge might take into account the size of the courtroom, the ventilation system, the community's vaccination rate, local population density, whether any parties mandated to be present are high risk, or other factors that local public health officials are considering when deciding the level of risk that coronavirus transmission poses to the community at the time of the proceeding.

26. *See* Sigal Samuel, *How You'll Know when Covid-19 Has Gone from "Pandemic" to "Endemic"*, VOX (Oct. 22, 2021, 12:10 PM), https://perma.cc/4NR5-287K.

A. Failure to Consider Alternatives to Closure is Inadequate

Another way in which Smith's approach to the *Waller* test encourages deviation from precedent is in the conclusion that "there are no reasonable alternatives to closure."[27] But even if a closure is partially or totally justified, the court must consider all alternatives,[28] and that consideration should form a substantial part of the analysis. Yet Smith essentially gives up before he has even begun. He provides and immediately dismisses examples—requiring hazmat suits and antibody or other medical testing—that would be cost prohibitive for courts to implement before concluding that in-person access is unreasonable.[29]

Smith suggests that transcripts or recordings are suitable replacements for a public trial, without considering how the Sixth Amendment right to a public trial is rooted in *contemporaneous* observation.[30] Judges and practitioners are particularly well-positioned to understand that reviewing a transcript or recording is not a comparable experience to contemporaneous observation. District courts do consider transcripts and recordings, often finding them an inadequate substitute.[31]

B. The COVID-19 Pandemic Allows for Reasonable Alternatives to Total Closure

Some judges have taken up the reasonable alternatives mantle and come up with fairly creative alternatives. This past summer, courts began holding trials in locations ranging from

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27. Smith, *supra* note 1, at 10.

28. *See* Presley v. Georgia, 558 U.S. 209, 214 (2010) (emphasizing that trial courts "are required to consider alternatives to closure").

29. *See* Smith, *supra* note 1, at 10. In fact, courts have devised and implemented a number of reasonable alternatives to closure, some as early as summer 2020. *See* sources cited *infra* note 35.

30. *In re* Oliver, 333 U.S. 257, 270 (1948) ("The knowledge that every criminal trial is subject to *contemporaneous* review in the forum of public opinion is an effective restraint on possible abuse of judicial power." (emphasis added)).

31. *See, e.g.*, United States v. Antar, 38 F.3d 1348 (3d Cir. 1994); Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1072 (3d Cir.1984); Soc'y of Pro. Journalists v. U.S. Sec'y of Labor, 616 F. Supp. 569, 578 (D. Utah 1985) (explaining why "a transcript cannot replace the right to an open hearing").

ballrooms to county fairgrounds.[32] In another case in which a judge found members of the public could not be physically present, the judge ensured that remote spectators would be visible in the courtroom.[33]

Community spread of COVID-19 has fluctuated greatly over the past two years. There have been times when local conditions have made it appropriate to allow a limited number of members of the public to be physically present. When the risk was low or moderate, but there were still substantial concerns related to infectious spread in the courtroom, judges should have considered restrictions on access akin to constitutionally permissible security restrictions, such as requiring those entering the courthouse to comply with some form of public health restrictions.[34]

None of this is to say that if courts find some form of physical access appropriate, they should remove remote access. Providing the two in tandem allows social distancing in accordance with public health regulations while fully protecting constitutional rights. Further, courts are required to provide remote access when members of the public seeking to access court proceedings have pre-existing conditions or other health concerns such that in-person attendance would burden their First Amendment rights.[35] A tandem approach is the best way

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32. Laura Kusisto, *Ballrooms Become Courtrooms to Get Jury Trials Moving*, WALL ST. J. (May 21, 2021, 11:59 AM), https://perma.cc/TGL9-D7EC.

33. United States v. Babichenko, 508 F. Supp. 3d 774, 780 (D. Idaho 2020) ("The two-way video feed honors the special importance community and family participation have in our judicial system.").

34. *See, e.g.*, United States v. Trimarco, No. 17-CR-583 (JMA), 2020 WL 5211051, at *2–*3 (E.D.N.Y. Sept. 1, 2020) (describing courthouse entry requirements established for all of the Eastern District of New York, including the requirement that attendees pass a temperature test, answer a questionnaire, and wear a mask, as a partial closure that advanced an overriding interest and finding the partial closure was no broader than necessary); *see also Calvert County Circuit Courthouse Reverts to Phase III Effective Now Through Feb. 8*, BAY NET (Jan. 6, 2022), https://perma.cc/69KF-WY6Y; David Brand & Rob Abruzzese, *No Fevers Allowed: Temperature Checks Begin at NYC Courthouses*, BROOKLYN DAILY EAGLE (July 7, 2020), https://perma.cc/2W8S-J9B3.

35. *See* Paula Reed Ward, *As Allegheny County Judge Offers Remote Court Access, Lawsuit Could Be Dismissed*, TRIB LIVE (Mar. 29, 2021, 2:57 PM), https://perma.cc/5GRH-DX62; *see also* Complaint at 14, Abolitionist Law Ctr. v. Judge Anthony M. Mariani, No. 2:21-CV-00285-CV (W.D. Pa. Mar. 3, 2021) (describing a lawsuit alleging First Amendment claims that resulted in remote

to vindicate constitutional rights while protecting public health when it is appropriate to allow some form of in-person access.

V. CONCLUSION

There is no constitutional basis for categorical court closures or for failing to consider alternatives to closure because of the pandemic. Judges have long been equipped to make closure determinations based on local public health information and have had access to reliable, local public health data throughout the COVID-19 pandemic. There was no need for near categorical approval of COVID-19 closures at the onset of the COVID-19 pandemic and there certainly is no basis for one going forward. Courts have and will continue to provide examples of alternatives to closure, reflecting creativity and flexibility. Applying the *Waller* test in a manner contrary to that consistently endorsed by the Supreme Court is a violation of the First and Sixth Amendments that should concern all parties involved, as well as anyone concerned with our courts' commitment to transparency and democratic values.

Every actor in the criminal legal system has a role in ensuring public access to the courts and upholding the constitution,[36] and that obligation is especially urgent as we begin to enter the third year of the pandemic. Smith argues that there is "little danger of wrongdoing . . . that requires the watchful eye of the public to stamp out,"[37] but in fact there is a grave danger in using a pandemic with no end in sight to create an exception to fundamental constitutional rights. It is at a moment like this, when government at all levels is claiming

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access granted to members of the public attempting to observe court who had pre-existing conditions).

36. This is especially true of the judge. *See* Binh Hoa Le v. Exeter Fin. Corp., 990 F.3d 410, 421 (5th Cir. 2021) ("When it comes to protecting the right of access, the judge is the public interest's principal champion."). Prosecutors also have a specific role in ensuring *Waller* is correctly applied and that judges are aware of their role in upholding *Waller*. *See* Luke Cass, *In Open Court: Courtroom Closures and the Sixth Amendment Right to a Public Trial*, 67 DEP'T JUST. J. FED. L. & PRAC. 31, 51 (2019) (explaining "prosecutors should ordinarily oppose courtroom closures . . . [and] have *Waller* and a handful of other cases in their trial box at the ready to edify the court about these issues and the fact that the trial judge will bear ultimate responsibility for public access to her courtroom").

37. Smith, *supra* note 1, at 7.

extraordinary powers for the public good, that rights protecting the public's ability to serve as a check on the criminal legal system and the arbitrary exercise of government authority are the most tested and the most essential.