ADVANCE SHEET HEADNOTE
June 23, 2025

2025 CO 46

No. 23SC571, *Rios v. People*—Constitutional Law—Sixth Amendment—Right to Public Trial—Courtroom Closures—*Waller* Test

The supreme court granted certiorari to answer whether virtual public access to observe a criminal jury trial alone can satisfy a defendant's Sixth Amendment right to a public trial.

The supreme court concludes that virtual access alone is not a substitute for giving the public the opportunity to observe critical proceedings in the physical courtroom. Here, the exclusion of all spectators from the physical courtroom constituted a nontrivial closure of the courtroom that did not violate Rios's right to a public trial because the closure, which was necessitated by the COVID-19 pandemic, satisfied the requirements set forth in *Waller v. Georgia*, 467 U.S. 39, 48 (1984). The court, accordingly, affirms the judgment of the court of appeals.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2025 CO 46

Supreme Court Case No. 23SC571
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 20CA2054

Petitioner:

Isaiah Ismael Rios,

v.

Respondent:

The People of the State of Colorado.

Judgment Affirmed
en banc
June 23, 2025

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JUSTICE BERKENKOTTER delivered the Opinion of the Court, in which **CHIEF JUSTICE MÁRQUEZ**, **JUSTICE HOOD**, and **JUSTICE GABRIEL** joined.

JUSTICE HART, joined by **JUSTICE BOATRIGHT**, and **JUSTICE SAMOUR** concurred in the judgment.

JUSTICE BERKENKOTTER delivered the Opinion of the Court.

¶1 This case requires us to decide a very modern question about a very old right: Can virtual public access to observe a criminal jury trial alone satisfy a defendant's Sixth Amendment right to a public trial?

¶2 Isaiah Ismael Rios's jury trial was held in the midst of the COVID-19 pandemic. The trial court issued an order in advance of trial, over Rios's objection, that excluded all spectators from the physical courtroom throughout the trial. Public access would instead, the court decided, be provided virtually. A division of the court of appeals concluded that this constituted a nontrivial partial courtroom closure. *People v. Rios*, No. 20CA2054, ¶ 25 (June 22, 2023). It further determined, however, that Rios's right to a public trial was not violated because the closure was warranted under the standard set forth by the Supreme Court in *Waller v. Georgia*, 467 U.S. 39, 48 (1984). *Rios*, ¶ 32.

¶3 We now hold that virtual access alone is not a substitute for the public's reasonable opportunity to personally observe critical proceedings in a physical courtroom and that a courtroom closure occurred. However, after determining that the closure was nontrivial, we conclude that the closure did not violate Rios's right to a public trial because the court's decision—which was based on its concerns about the spread of the COVID-19 virus—was justified under the factors

set forth in *Waller*. For these reasons, we affirm the judgment of the court of appeals.

I. Facts and Procedural History

¶4 Rios was charged with sixteen counts ranging from criminal mischief to first degree murder in connection with a series of crimes that occurred over the course of eighteen days. His trial was originally scheduled for July 2020. However, on March 16, 2020, the Chief Justice issued an order ceasing the normal operation of Colorado state courts and suspending jury calls through April 2020 due to the rapid spread of COVID-19. Sup. Ct. of Colo., Off. of the Chief Just., *Order Regarding COVID-19 and Operation of Colorado State Courts* (Mar. 16, 2020), https://www.courts.state.co.us/userfiles/file/Media/Opinion_Docs/COVID-19%20Order%2016Mar2020(1).pdf [https://perma.cc/G599-PJPX]. The order was subsequently expanded and extended in June to preclude individuals from being summoned for jury service until August 2020. Sup. Ct. of Colo., Off. of the Chief Just., *Updated Order Regarding COVID-19 and Operation of Colorado State Courts* (June 15, 2020), https://www.courts.state.co.us/userfiles/file/Media/COVID/Chief%20Justice%20Operations%20Order%20June%2015.pdf [https://perma.cc/B4GW-HH3K]. These orders were predicated on guidance from public health officials and were implemented for the protection of the public's health, safety, and welfare. *People v. Hernandez*, 2021 CO 45, ¶ 4, 488 P.3d 1055, 1058.

¶5 In June, Rios moved for a mistrial and to vacate his trial date under Crim. P. 24(c)(4), which allows courts to declare a mistrial on the grounds that a jury pool cannot safely assemble due to a public health crisis. The trial court granted the motion and reset the trial for October 7, 2020. In late July, the Chief Justice amended his previous order to allow jury trials to resume after August 3, 2020, on a case-by-case basis, subject to the authorization of the chief judge in each judicial district, following their determination that a jury pool could not safely assemble, consistent with applicable executive orders and health directives. Sup. Ct. of Colo. Off. of the Chief Just., *Updated Order Regarding COVID-19 and Operation of Colorado State Courts* (July 24, 2020), https://www.courts.state.co.us/userfiles/file/Media/COVID/Chief%20Justice%20Operations%20Order%20July%2024.pdf [https://perma.cc/TF87-UBZ9]. Following this reauthorization of jury trials, each judicial district prepared its own guidelines for safely managing court operations, including jury trials.

¶6 In the Twentieth Judicial District, where Rios was charged, the Chief Judge provided this guidance by issuing Administrative Order 20-110 ("Order 20-110") and adopting a Plan for Resuming Jury Trials Safely During COVID-19 Health Emergency (the "Resumption Plan"). Twentieth Jud. Dist. of Colo., *Administrative Order 20-110: Resumption of Jury Trials* (July 30, 2020), https://

www.courts.state.co.us/userfiles/file/Court_Probation/20th_Judicial_District/Admin%20Order%2020-110%20-%20Resumption%20of%20Jury%20Trials.pdf [https://perma.cc/SQS2-DBA5]. The Resumption Plan, which was developed with input from key stakeholders, incorporated guidance from the Centers for Disease Control and Prevention ("CDC"); the Colorado Department of Public Health and Environment; the Boulder County Public Health Department; and executive orders issued by Colorado Governor Jared Polis. *Id.* at 1–2. It outlined the procedures required to safely hold jury trials based on that guidance. *Id.* at 4–12.

¶7 Among other things, the Resumption Plan mandated that courthouses in the Twentieth Judicial District adhere to CDC guidelines pertaining to indoor business operations. *Id.* at 2. These guidelines permitted operations in buildings "as long as the number of individuals inside of the business do[es] not exceed 50% of fire code occupancy capacity . . . [and] as long as individuals maintain at least six feet of distance between one another and are wearing facial coverings." *Id.* Additionally, the Resumption Plan provided that only one county court trial and one district court trial could occur each week, beginning on different days, to "control people traffic in the building." *Id.* at 6. Felony trials would be held in a specifically designated courtroom to "permit[] cleaning staff to thoroughly sanitize the courtroom as per CDC guidelines each day and minimize[] retrofitting

efforts, such as relocating tables, microphones, etc." *Id.* at 8. Jurors, under the Resumption Plan, were required to remain in the courtroom gallery during the trial to meet social distancing requirements. *Id.* at 9. Further, the Resumption Plan required that public access to trial proceedings be made available via Webex, a virtual video conferencing platform. *Id.*

¶8 After his trial date was reset to October 7, Rios moved for a continuance. He argued that he could not receive a fair trial because courts could not safely convene due to the pandemic. The trial court was not persuaded. It denied the motion to continue, holding that Rios's arguments regarding safety were speculative and that judges in the Twentieth Judicial District had successfully resumed smaller, six-person jury trials in misdemeanor and dependency and neglect cases with "high public confidence and mixed verdicts" and without COVID-19 outbreaks. The court also noted that many other districts statewide had successfully resumed jury trials, including felony trials.

¶9 Rios then filed a motion objecting to the court providing virtual-only access to the trial, arguing that barring the public from the courtroom, even if the proceedings could be viewed virtually, violated his Sixth Amendment right to a public trial. The court denied the motion, stating that "[t]he constitutional grounds for the motion are denied based upon procedures required by the health emergency." Rios also filed a motion to conduct his trial outdoors, which the court

denied as well, stating that the motion "lack[ed] any legal basis" and noting the "impossibility" of doing so.

¶10 In October 2020, Rios's trial was the first felony trial held in the Twentieth Judicial District after the reinstatement of jury trials. When the trial began, the court explained that all public access to the physical courtroom would be restricted because of the COVID-19 health emergency but that public access would be available over Webex and via live video and audio streaming in an auxiliary courtroom. Rios renewed his objection regarding public access to the trial. The court overruled the objection based on its prior rulings.

¶11 Trial proceeded as scheduled. Consistent with Order 20-110 and the Resumption Plan, the court required jurors to sit no less than six feet apart, spread across the entire gallery. All trial participants were required to wear masks. Members of the public who wished to view the proceedings could do so virtually, consistent with the court's previous order. And before each witness testified, the court confirmed that the witnesses had not seen any of the proceedings on the computer to comply with its sequestration order. The jury convicted Rios of first degree murder and various counts of assault, burglary, menacing, theft, and trespass.

¶12 On appeal, Rios claimed that the court's refusal to provide the public with physical seats in the courtroom violated his right to a public trial. Making the trial

proceedings available to the public virtually, he argued, did not ameliorate the violation of his public trial right. A division of the court of appeals concluded that a partial closure occurred but was justified under the four factors set forth in *Waller*. *Rios*, ¶¶ 25–32. Specifically, the division determined that the record demonstrated an overriding interest that justified the closure—the protection of all trial participants from contracting or spreading COVID-19. *Id.* at ¶ 26. In its view, the closure was no broader than necessary to protect that interest because the court provided live video and audio streaming of the trial to accommodate the public since social distancing requirements greatly reduced the number of people permitted in the courtroom. *Id.* at ¶ 27.

¶13 The division also concluded that the trial court considered reasonable alternatives to closing the courtroom and agreed that a continuance was not a reasonable alternative due to the limited number of trials that could occur under the Resumption Plan. *Id.* at ¶¶ 28, 30. Last, the division acknowledged that the trial court did not cite *Waller* explicitly in its rulings but concluded nonetheless that its findings were sufficient and therefore that the closure was justified under *Waller*. *Id.* at ¶ 31. And because the COVID-19 closure satisfied *Waller*, the division discerned no abuse of discretion in the court's ruling restricting access to the courtroom. *Id.* at ¶ 32.

¶14 Rios petitioned this court for certiorari review, which we granted.[1]

II. Analysis

¶15 We begin by setting out the appropriate standard of review. We then outline the relevant law pertaining to a defendant's constitutional right to a public trial. Next, we address the People's contention that the opportunity to virtually observe a jury trial can *alone* meet that right when there is *no* opportunity for the public to observe the proceedings in the physical courtroom. We hold that it does not, and thus we conclude that a courtroom closure occurred.

¶16 We then proceed to apply the triviality standard set forth in *People v. Lujan*, 2020 CO 26, 461 P.3d 494, and conclude that the closure was nontrivial. Last, we conclude that the total courtroom closure, necessitated by public health restrictions related to the COVID-19 pandemic, was justified under *Waller*; therefore, the court did not violate Rios's right to a public trial. Accordingly, we affirm the judgment of the court of appeals.

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[1] We granted certiorari to review the following issue:

> Whether the trial court violated Mr. Rios's right to a public trial by excluding all spectators from the physical courtroom during the COVID-19 pandemic, where proceedings remained accessible to the public on Webex and via video streaming in an overflow courtroom.

A. Standard of Review

¶17 "A trial court's decision to close the courtroom presents a mixed question of law and fact." *People v. Hassen*, 2015 CO 49, ¶ 5, 351 P.3d 418, 420. This means that we "accept the trial court's findings of fact absent an abuse of discretion, but we review the court's legal conclusions de novo." *Id.* (quoting *Pena-Rodriguez v. People*, 2015 CO 31, ¶ 8, 350 P.3d 287, 289, *rev'd on other grounds*, 580 U.S. 206 (2017)).

B. Sixth Amendment Right to a Public Trial

¶18 Criminal defendants are guaranteed the right to a public trial under both the U.S. and Colorado Constitutions. U.S. Const. amends. VI, XIV; Colo. Const. art. II, § 16. "This nation's accepted practice of guaranteeing a public trial to an accused has its roots in our English common law heritage." *In re Oliver*, 333 U.S. 257, 266 (1948). After the ratification of the Sixth Amendment in 1791, which commands that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial," every state eventually adopted similar constitutional provisions. *See id.* at 267.

¶19 The right to a public trial serves multiple purposes. One purpose is to ensure the presence of interested spectators "for the benefit of the accused." *Waller*, 467 U.S. at 46 (quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 380 (1979)). The presence of such spectators serves, among other things, to keep an accused's

"triers keenly alive to a sense of their responsibility and to the importance of their functions." *Id.* (quoting *Gannett Co.*, 443 U.S. at 380). This, in turn, provides a safeguard against any attempt to employ our courts as instruments of persecution. *In re Oliver*, 333 U.S. at 270.

¶20 However, the Supreme Court has emphasized that the purpose of the right to a public trial extends beyond the accused. "[I]n the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government." *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 606 (1982). For example, the right to a public trial maintains public faith and confidence in the justice system by allowing the public to see that the accused is fairly dealt with, ensuring that judges and prosecutors discharge their duties responsibly, encouraging witnesses to come forward, and discouraging perjury. *Waller*, 467 U.S. at 46. The right also "vindicate[s] the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct by jurors fairly and openly selected." *Press-Enter. Co. v. Super. Ct.*, 464 U.S. 501, 509 (1984). It comes as no surprise, then, that the right to a public

trial encompasses not only the trial itself but also other critical proceedings, including jury voir dire.[2] *Stackhouse v. People*, 2015 CO 48, ¶ 13, 386 P.3d 440, 444.

¶21 Unfortunately, holding jury trials became impossible beginning in March 2020 as the COVID-19 virus spread and public health restrictions were imposed across the state. Notwithstanding this barrier, "defendants continue[d] to have a statutory right to speedy trial under section 18-1-405(1)[, C.R.S. (2024)]," which "unfairly placed our trial courts in a catch-22." *People v. Lucy*, 2020 CO 68, ¶ 34, 467 P.3d 332, 339. The COVID-19 pandemic required courts to carefully and thoughtfully consider "how best to protect the many and varied users of our courts—litigants, attorneys, jurors, defendants, witnesses, victims . . . and many others— from the spread of COVID-19, while continuing to hear as many cases as possible in a manner that safeguards defendants' constitutional rights." *Hernandez*, ¶ 44, 488 P.3d at 1065.

¶22 That month, judicial districts across Colorado began utilizing Webex to hold court proceedings virtually. Webex is a video conferencing platform that allows spectators to see and hear what is happening in a physical courtroom virtually via a computer or phone. Depending on the placement of the camera or cameras

[2] This opinion is limited to those critical proceedings that are subject to the right to a public trial. For ease of reading, we refer to these simply as "critical proceedings."

providing the live feed, spectators may be able to see the entire courtroom or only a small part of it. In addition to allowing for virtual courtroom observation, Webex can also be configured with two-way video and audio to allow virtual courtroom participation. It is not ordinarily configured this way during jury trials given the very real risk of disruption and mistrials. This means that jurors cannot see when there are virtual spectators.[3] It is unclear from the record how Webex was configured during Rios's trial. District courts continued to use Webex's virtual courtroom observation and virtual courtroom participation features throughout the pandemic to maintain court operations. In fact, virtual court proceedings over Webex continue in many case types across the state today.

¶23 The closure of a physical courtroom may violate a defendant's right to a public trial. *People v. Jones*, 2020 CO 45, ¶ 27, 464 P.3d 735, 741. But "the Sixth Amendment is not necessarily violated 'every time the public is excluded from the courtroom.'" *Lujan*, ¶ 16, 461 P.3d at 498 (quoting *Peterson v. Williams*, 85 F.3d 39, 40 (2d Cir. 1996)). "[S]ome closures are simply so trivial that they do not rise to the level of a constitutional violation." *Id.* In determining whether a closure was

[3] Livestreaming is a term used to describe the real-time broadcasting of video and audio content over the internet. Livestreaming allows a spectator to remotely watch a court proceeding in real time, but the video and audio are not two-way. That is, the people in the courtroom, including the jurors and the judge, cannot see that they are being watched.

trivial, "courts look to the totality of the circumstances surrounding the closure." *Id.* at ¶ 19, 461 P.3d at 498.

¶24 Even if a reviewing court determines that a closure was nontrivial, it does not necessarily follow that a party's right to a public trial was violated because the right is not absolute and, at times, must yield to competing interests. *Waller*, 467 U.S. at 45. In *Waller*, the Supreme Court set forth a four-part test for trial courts to apply to determine whether a courtroom closure complies with the Sixth Amendment. *Id.* at 48. The test requires that (1) "the party seeking to close the [proceeding] must advance an overriding interest that is likely to be prejudiced," (2) "the closure must be no broader than necessary to protect that interest," (3) "the trial court must consider reasonable alternatives to closing the proceeding," and (4) "[the trial court] must make findings adequate to support the closure." *Id.* A nontrivial closure that does not meet this test is an unconstitutional deprivation of a defendant's right to a public trial that constitutes structural error. *Id.*

C. Whether a Closure Occurred

1. Closure Generally

¶25 This case requires us to consider whether the opportunity for free, contemporaneous virtual access to observe court proceedings can alone—when there is no opportunity to observe the proceedings in the physical courtroom—satisfy a defendant's right to a public trial. Does the right require the

court, as Rios argues, to provide the public with unfettered access to physical seats in the courtroom or an alternative venue? Or does it, as the prosecution contends, simply require the free and contemporaneous virtual opportunity to observe those proceedings subject to the public trial right? Rios maintains that access to the physical courtroom is key because virtual observation lacks the same impact as in-person observation and cannot meet the purposes of the right. By contrast, the People claim that the physical courtroom need not be open to the public at all if this type of virtual access to the courtroom is available. The Sixth Amendment does not require, they add, that jurors be able to see spectators at all. This is because an accused's right to a public trial, in their view, is rooted in the Framers' concerns regarding secret trials, and the technology used here safeguards against those concerns.

¶26 We are mindful as we consider this issue that virtual courtroom technology can be a great convenience to litigants, lawyers, the court, and the public. It can also advance the important goal of increasing access to justice. We recognize as well that this technology can present challenges—from bandwidth issues that undermine reliable connectivity, to individuals attempting to disrupt virtual court proceedings. But the legal question we face is not whether the use of this technology is a good idea, but rather what the Sixth Amendment right to a public trial encompasses.

¶27 To answer this question, we look to the purposes that the right serves. As we explained, the Supreme Court's decision in *Waller* illustrates that there are many purposes. Preventing secret trials is, indeed, one of these purposes. The right to a public trial allows the public to see that the defendant "is fairly dealt with and not unjustly condemned." *Waller*, 467 U.S. at 46 (quoting *Gannett Co.*, 443 U.S. at 380). But that is not the only purpose. Additionally, as we explained above, "*the presence of interested spectators*" keeps the jury "keenly alive" to the importance of its function and to a sense of its responsibility and ensures that judges and prosecutors carry out their duties responsibly, encourages witnesses to come forward, and discourages perjury. *Id.* (emphasis added) (quoting *Gannett Co.*, 443 U.S. at 380).

¶28 We conclude, in light of these purposes, that the Sixth Amendment right to a *public* trial is best understood as a trial that is open to the public, meaning that the public has a reasonable opportunity to be *physically present* to observe the proceedings. We reach this conclusion for three reasons.

¶29 First, this understanding hews most closely to the purposes of the right to a public trial. The connection is particularly striking as it pertains to the public's role in keeping the jury "keenly alive to a sense of their responsibility" and to the importance of their function by virtue of the public's *presence*. *Id.* (quoting *Gannett Co.*, 443 U.S. at 380). Screens in a courtroom, no matter their number or the nature

of their display, are an inadequate substitute for the physical presence of real spectators in the gallery and the powerful reminder that those spectators provide to jurors regarding the gravity of their role. Plus, this virtual technology is not ordinarily configured to allow jurors to see spectators due to the risk of disruption and potential mistrial.

¶30 Second, this reading comports with the ordinary understanding of the term "public," which is defined as "exposed to general view: open." *Public*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/public [https://perma.cc/9KAV-94U6]. The term "presence" is defined as "the fact or condition of being present." *Presence*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/presence [https://perma.cc/3KKL-LJ59]. The term "present" is defined as "constituting the one actually involved, at hand, or being considered." *Present*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/present [https://perma.cc/7VRZ-JQ9H]. Read in tandem, these definitions support the understanding that a public trial involves the opportunity for spectators to be *physically* present to observe the proceedings.

¶31 Third, and finally, the Framers saw great value in the benefits associated with a public trial. *Waller*, 467 U.S. at 49 n.9. The Framers, of course, could not have imagined a public trial that involved spectators who were not somehow

physically present. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 577 (1980); *see also United States v. Haymond*, 588 U.S. 634, 642 (2019) ("[T]he Constitution's guarantees cannot mean less today than they did the day they were adopted."). And the Framers could not have imagined the bandwidth and connectivity issues that district courts around the state face from time to time. More importantly, changes in technology do not lessen constitutional protections.

¶32 That is all to say that it is difficult to square the People's vision of the right as nothing more than the opportunity for the public to watch something akin to live television (over a platform that usually, but does not always, work) with the value that the Framers placed on the physical presence of spectators to ensure that a defendant receives a fair trial. As a division of the courts of appeals noted in *People v. Roper*, 2024 COA 9, ¶ 15, 547 P.3d 1154, 1159, if the public trial right can be satisfied by virtual public access alone, "all future trials could be conducted in this fashion for any reason—or, indeed, for no reason whatsoever." We do not believe that this is what the Framers intended. Thus, we reject the People's argument that the Sixth Amendment requires nothing more than the free and contemporaneous opportunity to virtually observe proceedings subject to the public trial right.

¶33 We also, however, reject Rios's contention that the Sixth Amendment requires courts to provide the public with physical seats in the courtroom or an

alternative venue in all proceedings. This is because the right to a public trial is not without limits. It requires a *reasonable opportunity* to be physically present to observe those court proceedings that fall within the public trial right. *Waller*, 467 U.S. at 48. Thus, a total closure occurs when state action prevents the public from having any reasonable opportunity to observe proceedings contemporaneously in the physical courtroom. And a partial closure occurs when the state action excludes one or more individuals from the reasonable opportunity to observe the physical courtroom. *E.g., People v. Turner*, 2022 CO 50, ¶ 26, 519 P.3d 353, 360 (holding that the exclusion of a disruptive spectator was a nontrivial, partial closure).

¶34 Judges have no obligation to provide unlimited seating because they have no ability to do so. Courtrooms come in all shapes and sizes, and they all have physical capacity limitations as well as limitations imposed by local fire codes. Just because, for instance, one hundred people want to personally observe a high-profile criminal case, it does not follow that some of them are excluded by the court if there is only room for sixty spectators in the gallery due to the size and configuration of the courtroom or the requirements of the local fire code. It also does not mean that the courtroom is closed to the forty spectators who will not be able to sit in the gallery; it means only that the courtroom's seating capacity is limited to sixty people. These are not courtroom closures.

¶35 The same reasoning applies to the CDC public health restrictions that limited courtroom seating capacity during the pandemic. Social distancing requirements meant that courtrooms often had very limited seating. In our view, these limitations are no different than other types of courtroom capacity constraints. That is, the inability of *some* members of the public to be physically present in a courtroom to observe the proceedings due to public health restrictions, like social distancing, is not a closure. Rather, it is a limitation on courtroom capacity. So even if seventy people wanted to observe a criminal jury trial during the height of the pandemic, and public health restrictions limited a courtroom's capacity to twelve, that was not a courtroom closure. Relatedly, the fifty-eight members of the public who could not access a physical seat in the gallery were not excluded by state action from the courtroom.

¶36 But what about hybrid proceedings? That is, what about those situations in which a courtroom is not closed and the court also provides virtual access via Webex or a similar platform. In our view, the virtual platform in that circumstance is not a substitute for public access, rather it affords the public an *additional* means of access. And, importantly, while that additional access promotes transparency, it is not constitutionally required. That means that if a spectator observing virtually loses connectivity or is kicked off the platform by the court or court staff

for engaging in disruptive behavior during a critical proceeding in a criminal case, no defendant's Sixth Amendment right to a public trial is violated.

2. This Trial

¶37 When a court *entirely* closes a courtroom so *no* member of the public has the opportunity to observe proceedings in the physical courtroom, the court has engaged in state action that constitutes a closure. *See Turner*, ¶ 18, 519 P.3d at 359. And, because the public trial right requires that spectators have the opportunity to view the proceedings in the physical courtroom, free contemporaneous virtual public access to the proceedings does not replace public access to the physical courtroom.

¶38 Thus, the court's decision here to close the physical courtroom throughout the trial to everyone but the trial participants constituted a total closure. Our analysis, however, does not stop there. To implicate a defendant's right to a public trial, the courtroom closure must be nontrivial. *Lujan*, ¶ 19, 461 P.3d at 498.

¶39 To determine whether a closure is trivial, we "consider whether it implicate[s] the protections and values of the public trial right." *Id.* at ¶ 28, 461 P.3d at 500. Factors to consider include (1) the duration of the closure, (2) the substance of the proceedings that occurred during the closure, (3) whether the proceedings were later memorialized in open court or placed on the record, (4) whether the closure was intentional, and (5) whether the closure was total or

partial. *Id.* at ¶ 19, 461 P.3d at 498–99. This list of factors is nonexhaustive, and no single factor is dispositive. *Id.*, 461 P.3d at 499.

¶40 In our view, the closure here was nontrivial. Although the public was able to view the entirety of the proceedings remotely, the closure of the physical courtroom was intentional, and it lasted the entire duration of the trial. True, the closure was necessary given the many public health restrictions imposed during this time due to the COVID-19 pandemic and the trial court's stated concerns about the spread of the virus. These circumstances weigh heavily in our consideration of whether the closure was warranted under *Waller*. But at this stage of the analysis, the question before us is whether the closure was intentional, not whether it was necessary. *See Jones*, ¶ 40, 464 P.3d at 744 ("[I]ntentional closures during more significant, and less fleeting, testimony are generally considered not trivial because of their potential to affect the fairness of the proceedings."). Therefore, we conclude this was a nontrivial closure.

D. Whether the Closure was Constitutional

¶41 We next apply the four *Waller* factors to determine whether this nontrivial closure violated Rios's constitutional right to a public trial.

¶42 The first *Waller* factor is whether an overriding interest justified the closure. 467 U.S. at 48.[4] Here, there is no real question that the public health restrictions regarding COVID-19 justified the closure. The record reflects that the court was concerned about the health of the jurors and the other trial participants. It outlined specific precautions to ensure their physical safety, including limiting the number of people in the courtroom in accordance with CDC guidelines. And it found that these restrictions were "due to the health emergency and the fact that the jury will be sitting in all of the benches, maintaining [six]-foot spacing pursuant to health directives and the chief judge's order."

¶43 We see no support for Rios's assertion that the court's decision to close the courtroom was motivated by a desire to get the case tried quickly rather than by public health guidelines and concern over the spread of COVID-19. The court repeatedly addressed its concern about the risk to the trial participants' health due to COVID-19. These are concerns Rios himself raised in his motion to continue. The court's focus was on complying with public health guidelines; the restrictions outlined in Order 20-110 and the Resumption Plan; and reducing the spread of

[4] Many jurisdictions have considered whether the "overriding interest" standard is necessary in partial closure cases or whether a lesser standard—"substantial reason"—is more appropriate. *See Jones*, ¶¶ 24–26, 464 P.3d at 741 (collecting cases and explaining the competing views on this issue). This is an issue we need not resolve today.

COVID-19. Alone or together, these overriding interests unquestionably meet the first *Waller* factor. *See Turner*, ¶ 41 n.4, 519 P.3d at 363 n.4 (stating that an exclusion of the public to ensure "the safety of trial participants" satisfied the first *Waller* factor).

¶44 The second *Waller* factor—whether the closure was no broader than necessary—was also satisfied. 467 U.S. at 48. The closure occurred in the midst of a global pandemic. Although the closure physically excluded the public entirely, the closure was not overbroad because the physical space in the courtroom was necessarily limited by the CDC's social distancing requirements and other public health restrictions imposed due to the public health crisis. We consequently conclude that the scope of the closure was no broader than necessary to comply with the public health restrictions and to protect trial participants from contracting or spreading COVID-19. Therefore, the second *Waller* factor was satisfied.

¶45 The third *Waller* factor is whether the court considered reasonable alternatives. *Id.* The record shows that the court considered the use of reasonable alternatives, here the use of Webex and video and audio streaming in the auxiliary courtroom, and that there simply weren't—in the midst of a global pandemic—any other reasonable alternatives. We are unmoved by Rios's claims to the contrary. The alternative venues that Rios mentions now, like convention centers, arenas, and performing arts venues, were not raised as alternatives before

the trial court. But in any event, these were not reasonable alternatives as the record contains no indication that these types of venues were available or that, even if they were, the Twentieth Judicial District had the financial resources to pay for them. What's more, there is no evidence in the record indicating that a criminal jury trial could be safely held in an arena or a convention center or that the Boulder County Sheriff's Department could provide the resources needed to securely conduct a criminal jury trial in one of these types of venues.

¶46 Rios argues that a continuance would have been another reasonable alternative. We disagree. Recall that trials were suspended from mid-March to October 2020 due to the COVD-19 pandemic, leading to a six-month backlog of cases waiting to be tried. Significantly, only one felony jury trial could be held in the Twentieth Judicial District at a time under Order 20-110 and the Resumption Plan due to the CDC's public health restrictions. This meant that a continuance would have led to months of further delay, not only in Rios's trial, but in all the other backlogged cases waiting to go to trial. All this delay, of course, would then be compounded even further by the delays that accompany the scheduling of any two-and-a-half-week jury trial due to attorney and witness schedules.

¶47 Plus, recall that Rios went to trial in October 2020, well before the development of a COVID-19 vaccine. Outbreaks of the virus plagued not only Boulder County, but almost every county in the state. There was tremendous

uncertainty at that time about how, precisely, COVID-19 was spread, when a vaccine would be developed, how long the pandemic would last, and when the public health restrictions would end. All signs suggested that the scheduling of jury trials would likely continue to be limited for quite some time and that jury trials might even be halted again.

¶48 Additionally, a continuance could have prejudiced the prosecution's case because some of its witnesses were elderly, and one of its witnesses had been diagnosed with dementia. Based on these circumstances, we conclude that the third factor was satisfied.

¶49 Last, we turn to the fourth *Waller* factor—whether the court made findings adequate to support the closure. *Id.* We conclude that the trial court did so.

¶50 We begin our analysis by observing that most cases involving a defendant's right to public access involve courtroom closures ordered in response to an unexpected event rather than a known condition. *See Turner*, ¶¶ 1–3, 519 P.3d at 356. Cases involving courtroom closures based on public health restrictions imposed due to COVID-19 are markedly different. The CDC's social distancing and other public health restrictions shuttered courtrooms to jury trials for months on end. Chief judges and affected stakeholders spent countless hours deciding how to safely *re-open* physical courtrooms, in light of those restrictions, so that districts could resume jury trials. The reality is that these efforts, as here, at times

necessarily required the total closure of courtrooms simply to keep trial participants safe.

¶51 We note that the trial court did not cite *Waller* by name in its various orders and comments regarding the closure but conclude for several reasons that it made sufficient findings to support the closure. First, it is clear from the record that short of violating the pertinent public health restrictions, the trial court had no choice but to close the courtroom to the public so Rios's trial could safely proceed. Second, the record reflects that the court was engaged in planning how to safely re-open the courtroom to conduct Rios's trial, which, as noted, necessarily involved closing the courtroom to the public. This was not a spur of the moment closure order, but rather one that was planned well in advance, based on the public health guidance that animated Order 20-110 and the Resumption Plan, and designed to protect trial participants from contracting or spreading COVID-19. Thus, we look not only to the court's ruling on Rios's objection to the closure at the outset of the trial, but at the broader record, including the court's findings and comments about the need for the closure in advance of the trial. And here, the court explicitly found in several orders before trial that the restrictions to the proceedings were "based upon procedures required by the health emergency." Third, on the first day of trial, the court stated that public access to the physical courtroom was "restricted due to the health emergency and the fact that the jury

will be sitting in all of the benches" to maintain the social distancing guidelines set forth in the Resumption Plan. The court explained, "public access to the courtroom will be via Web[e]x and will have a projection of the Web[e]x" in an auxiliary courtroom.

¶52 The bottom line is that the court's decision to close the courtroom to all spectators was animated by its concern with preventing the spread of COVID-19 among trial participants. Any one of the multiple findings and comments by the court leading up to the trial regarding the need for the closure would be sufficient to support its decision. As we have observed, we gauge "compliance by substance, not form." *Turner*, ¶ 35, 519 P.3d at 362. Here, the substance of the court's various findings and comments leading up to the trial leaves no doubt that the fourth *Waller* factor was satisfied.

¶53 Because the court's COVID-19 closure satisfies the *Waller* requirements, we conclude that Rios's right to a public trial was not violated.

III. Conclusion

¶54 Virtual access alone is not a substitute for giving the public the opportunity to observe proceedings in the physical courtroom for purposes of the Sixth Amendment. Here, even though virtual access was provided, the trial court's order totally excluding the public from the physical courtroom nonetheless constituted a nontrivial closure. No new trial is warranted, however, as the record

justifies the closure order under *Waller*. We therefore affirm the judgment of the court of appeals.

JUSTICE HART, joined by **JUSTICE BOATRIGHT,** and **JUSTICE SAMOUR** concurred in the judgment.

JUSTICE HART, joined by JUSTICE BOATRIGHT, and JUSTICE SAMOUR, concurring in the judgment.

¶55 The majority today holds that "virtual access alone is not a substitute for the public's reasonable opportunity to personally observe critical proceedings in a physical courtroom." Maj. op. ¶ 3. I cannot agree. The right guaranteed by both the U.S. and Colorado Constitutions, U.S. Const. amends. VI, XIV; Colo. Const. art. II, § 16, is a public *trial* right. It is *not* a public *courtroom* right.

¶56 In the circumstances presented here—where the court provided an auxiliary space with video- and audio-streaming of the proceedings and the proceedings were made available for public viewing over Webex—I do not believe that Isaiah Ismael Rios's public trial right was violated because I do not believe there was a closure of the proceedings. I therefore respectfully concur in the judgment only.

¶57 As the U.S. Supreme Court has explained, "The purpose of the requirement of a public trial was to guarantee that the accused would be fairly dealt with and not unjustly condemned. History had proven that secret tribunals were effective instruments of oppression." *Estes v. Texas*, 381 U.S. 532, 538–39 (1965); *see also In re Oliver*, 333 U.S. 257, 270 (1948) (explaining that the Sixth Amendment is designed to "safeguard against any attempt to employ our courts as instruments of persecution"). Public trials also increase public confidence in the justice system and ensure that victims and the broader community know that offenders are being

held responsible. *Press-Enter. Co. v. Super. Ct.*, 464 U.S. 501, 508–09 (1984); *see also Smith v. Doe*, 538 U.S. 84, 99 (2003) ("Transparency is essential to maintaining public respect for the criminal justice system, ensuring its integrity, and protecting the rights of the accused.").

¶58 The majority notes (and I agree) that the public trial right also serves to keep the participants in the process—the jurors, the witnesses, the judge, and the lawyers—aware of the importance of their functions. *See* Maj. op. ¶ 27. Justice Harlan, concurring in *Estes*, noted that "the [public trial] guarantee embodies a view of human nature, true as a general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings." 381 U.S. at 588 (Harlan, J., concurring).

¶59 Where the majority and I part company is in the leap from a recognition of those purposes to the conclusion that a public trial requires a proceeding in which members of the public have what the majority describes as "a reasonable opportunity" to be physically present in the courtroom. Maj. op. ¶¶ 28, 33.

¶60 I would conclude that a trial has not been closed where, as was the case here, (1) critical proceedings are open to contemporaneous public scrutiny (in-person or virtual), and (2) the participants in the process (jurors, lawyers, witnesses, and judges) are aware that those critical proceedings are subject to contemporaneous

public scrutiny. If those two criteria are met, the purposes of the Sixth Amendment public trial guarantee are served.

¶61 By offering a route for contemporaneous, in-person observation by the public, even virtual proceedings serve the goals of system accountability, increased confidence in the justice system, and provision of a means for victims and members of the public to see that the offender is being held responsible. And by making it clear to the participants in the process that the public has access to that route for observation, the judge can ensure that those participants are "keenly alive to a sense of their responsibility and to the importance of their functions." *Waller v. Georgia*, 467 U.S. 39, 46 (1984).

¶62 The majority relies heavily on *Waller*'s reference to the public's "presence" as being the thing that keeps the participants "keenly alive" to their duties. Maj. op. ¶ 27. In fact, the majority seems to suggest that *Waller* actually stands for the proposition that one of the purposes of the public trial right is "to ensure the presence of interested spectators." Maj. op. ¶ 19. *Waller* says no such thing. And I don't think one can put meaningful weight on the single word "presence" in the text the majority is quoting from *Waller*, 467 U.S. at 46, which is from a 1948 opinion, *Oliver*, 333 U.S. at 270 n.25, that in turn quotes from a 1927 legal treatise. There were no options other than physical presence to observe the critical proceedings of a trial during those times.

¶63 Similarly, the majority turns to an argument that the ordinary understanding of the term "public" is best understood as requiring physical presence. The majority supports this claim by noting that one definition of "public" is "exposed to general view: open." Maj. op. ¶ 30 (quoting *Public*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/public [https://perma.cc/9KAV-94U6]). The opinion then suggests some connection to presence. *Id.* But synonyms for "public" include "open," "publicized," "shared," "broadcast," "available," and "unrestricted." *Id.* I am not convinced these dictionary battles help answer the question we face here. If anything, I think they suggest that a proceeding is public if it is available to as many people as are interested in observing it. Virtual proceedings—and particularly livestreaming—have made trials as available, and as unrestricted, as one can currently imagine. The actions of lawyers and judges and the testimony of witnesses have never faced the kind of public scrutiny they face in today's trial proceedings.

¶64 I acknowledge that public access to a physical courtroom has benefits that virtual access does not.[1] While technology continues to improve, and today's

[1] And further, within the world of virtual access, it would be best if the participants in the courtroom could see any spectators in an overflow or ancillary viewing space to increase their awareness of those spectators' presence.

technology is better than that of a decade ago, it has limitations that in-person viewing does not. On the other hand, as the majority acknowledges, the reality of the many sizes and shapes of courtrooms—and the difference in public interest from one trial to the next—means that there will be many trials in which public access to a physical courtroom is limited. *Id.* at ¶ 34; *see also Estes*, 381 U.S. at 588 (Harlan, J., concurring) ("Obviously, the [public trial] guarantee is not violated if an individual member of the public cannot gain admittance to a courtroom because there are no available seats."). Courts, including the majority here, have generally accepted that not every member of the public who wants to observe a trial in person will necessarily be able to do so.

¶65 The majority addresses this concern in two ways. First, it says that virtual access can be a supplement to, but never a replacement for, *some* physical access. Maj. op. ¶ 36. Second, it says that the fact that not everyone will be able to watch because of space or other limitations is a *capacity* problem and not a closure problem. *Id.* at ¶¶ 34–35.

¶66 I struggle to see the constitutional principle supporting either of these distinctions. As to the first, I've already addressed why I don't believe that the public trial right requires physical presence for protection; what it requires is contemporaneous public scrutiny and the awareness of the participants in the proceeding that the public is—or could at any time be—watching. As to the

second, I have heard no explanation for where the lines are appropriately drawn. It seems from the companion case, *People v. Bialas*, 2025 CO 45, __ P.3d __, to this one that opening the physical courtroom to only six members of the public would be sufficient to satisfy the Sixth Amendment. Would opening it to five members of the public be sufficient? Or two? Or one?

¶67 Moreover, I worry that, by making the absolute statement that virtual access is not enough—that "the public trial right requires that spectators have the opportunity to view the proceedings in the physical courtroom," Maj. op. ¶ 37—we are hobbling ourselves for a future in which a growing number of critical proceedings take place virtually—even in the absence of a global pandemic.[2] I cannot predict what the future will bring in how we use technology—and neither can the majority. Prior to 2020, the idea that criminal trials would be livestreamed for free public viewing was hard to imagine. Today, it is legally required. *See* § 13-1-132(3.5)(a), C.R.S. (2024).

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[2] I worry generally about the absolute statements that we make in this area of the law. For example, when we say there *must* be physical access to critical proceedings to satisfy the public trial right, it strikes me that there may be procedures our courts are currently following that we will need to change. For example, do courts need to reserve some seats for the public in jury assembly rooms as prospective jurors fill out questionnaires and watch the jury orientation video? That is part of voir dire, which is a critical proceeding. *Stackhouse v. People*, 2015 CO 48, ¶ 13, 386 P.3d 440, 444; *see also* Maj. op. ¶ 20.

¶68 I believe that a trial is not closed when critical proceedings are subject to virtual, contemporaneous public scrutiny and the participants in the process are aware that those critical proceedings are subject to contemporaneous public scrutiny. For this reason, I do not believe that Rios was denied his Sixth Amendment right to a public trial. I therefore respectfully concur in the judgment only.