

THE RIGHT TO A PUBLIC TRIAL AND CLOSING THE COURTROOM TO DISRUPTIVE SPECTATORS

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The Sixth Amendment to the United States Constitution provides, in part, that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.”¹ Like many constitutional rights, however, the right to a public trial is not absolute.² Courtrooms may be closed to the public in some situations.³ In *Waller v. Georgia*,⁴ the Supreme Court set forth the test trial courts should apply to determine whether a courtroom closure is appropriate.⁵ However, some courts, led by the Second Circuit’s per curiam decision in *Cosentino v. Kelly*,⁶ have declined to apply the *Waller* test to closures ordered for the purpose of excluding “disruptive” audience members in the courtroom.⁷

The exception of these “disruptive” courtroom closures from the *Waller* test is unnecessary and unsupported for several reasons. First, nothing in *Waller* or the Court’s subsequent right to a public trial case, *Presley v. Georgia*,⁸ indicates that the test applies in only limited circumstances.⁹ Second, cases declining to apply *Waller*’s test in these instances do not adequately explain why they believe the test has an exception at all.¹⁰ The *Waller* test properly balances Sixth Amendment values against the need for decorum and accounts for the serious nature of courtroom closures.¹¹ Finally, the *Waller* test is easily administered by a trial court in effecting a courtroom closure, including those courtroom

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1. U.S. CONST. amend. VI.

2. See *Waller v. Georgia*, 467 U.S. 39, 45 (1984).

3. See, e.g., *United States v. Akers*, 542 F.2d 770, 772 (9th Cir. 1976) (per curiam) (“The court had been advised that the proceedings would be disrupted if the verdict were unfavorable to the appellants. The court could properly conclude that the threat of harm dictated partial closing of the proceedings.”).

4. 467 U.S. at 48.

5. See *infra* note 28 and accompanying text.

6. 102 F.3d 71 (2d Cir. 1996) (per curiam).

7. See *infra* notes 44–63 and accompanying text.

8. 558 U.S. 209 (2010) (per curiam).

9. See *infra* note 66 and accompanying text.

10. See *infra* notes 54–65 and accompanying text.

11. See *infra* notes 67–71 and accompanying text.

closures that exclude disruptive spectators.¹² This anomaly in the rules governing courtroom closures should be eliminated.

THE WALLER TEST AND COURTROOM CLOSURES

The Sixth Amendment's right to a public trial manifests "[t]he traditional Anglo-American distrust for secret trials."¹³ A violation of the right to a public trial is considered "structural" and thus not subject to harmless error review.¹⁴ The right to a public trial extends to many aspects of the trial, from voir dire¹⁵ to sentencing.¹⁶ Moreover, *Waller* held that the right to a public trial applies to suppression hearings.¹⁷ The right to a public trial also applies to the states through the Fourteenth Amendment's due process guarantee.¹⁸ Overall, the right to a public trial may yield to other rights or interests, but only in rare circumstances, and "the balance of interests must be struck with special care."¹⁹

Waller is the leading Supreme Court case on the Sixth Amendment's right to a public trial and courtroom closures.²⁰ In *Waller*, the defendants were charged with violating Georgia's gambling laws.²¹ Much of the prosecution's case in chief revolved around wiretap evidence; the defendants moved to suppress this evidence.²² Following the defendants' motion, the prosecution moved to close the suppression hearing to the public.²³ The trial court granted the prosecution's motion, closing the suppression hearing "to all persons other than witnesses, court personnel, the parties, and the lawyers."²⁴ The trial court reasoned that if the hearing

12. See *infra* notes 71–88 and accompanying text.

13. *In re Oliver*, 333 U.S. 257, 268 (1948).

14. See *Neder v. United States*, 527 U.S. 1, 8 (1999) (citing *Waller v. Georgia*, 467 U.S. 39 (1984)).

15. See *Presley v. Georgia*, 558 U.S. 209, 213 (2010).

16. See *United States v. Rivera*, 682 F.3d 1223, 1237 (9th Cir. 2012).

17. *Waller*, 467 U.S. at 43.

18. *In re Oliver*, 333 U.S. at 273.

19. *Waller*, 467 U.S. at 45.

20. Of course, standards by which the propriety of a courtroom closure could be measured existed years before the Supreme Court's *Waller* decision. For instance, five years before *Waller*, the Ninth Circuit approved a courtroom closure because the closure was "reasonably limited to the circumstances for which it was invoked." *United States v. Hernandez*, 608 F.2d 741, 748 (9th Cir. 1979) (affirming court order closing the courtroom to the public, which was primarily issued to protect a witness and his family from "harassment and physical harm").

21. *Waller*, 467 U.S. at 41.

22. *Id.*

23. *Id.*

24. *Id.* at 42.

were open to the public, “insofar as the wiretap evidence related to alleged offenders not then on trial, the evidence would be tainted and could not be used in future prosecutions.”²⁵ The Georgia Supreme Court reviewed the trial court’s order and held that the closure comported with the Sixth Amendment.²⁶

The Supreme Court reversed, holding that the trial court’s order was improper because “the trial court failed to give proper weight to Sixth Amendment concerns.”²⁷ The Court noted that a courtroom closure must meet a four-part test to properly comply with the Sixth Amendment:

[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] it must make findings adequate to support the closure.²⁸

The *Waller* test is rigorous.²⁹ While no court has explicitly stated so, the test is in the nature of “strict scrutiny” review.³⁰ Like other government actions reviewed under a strict scrutiny standard, the government must demonstrate a strong interest, along with a solution applied that has been narrowly tailored to serve that interest.³¹

The *Waller* test has been applied not only to complete closures of trial proceedings, but also to partial closures of court proceedings (e.g., closures for certain portions of a proceeding and closures to certain individuals).³² Most courts have applied a slightly different version of the *Waller* test to partial closures.³³ While three of the four *Waller* factors

25. *Id.*

26. *Id.* at 43.

27. *Id.*

28. *Id.* at 48 (adopting test from a courtroom closure case arising under the First Amendment, *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 511–12 (1984)).

29. *Johnson v. Sherry*, 586 F.3d 439, 447 (6th Cir. 2009).

30. *Cf. In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1354 (D.C. Cir. 1985) (citing *Press-Enterprise*, 464 U.S. at 509–11, and observing that “[t]he Supreme Court has most recently spoken as if closure orders must meet the test of strict scrutiny”).

31. See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 800 (2006) (explaining strict scrutiny as a two-factor inquiry, requiring that “the governmental ends are compelling” and “the law is a narrowly tailored means of furthering those governmental interests”).

32. See, e.g., *State v. Turrietta*, 308 P.3d 964, 967 (N.M. 2013).

33. See, e.g., *United States v. Simmons*, 797 F.3d 409, 413–14 (6th Cir. 2015) (citations omitted) (“Nearly all federal courts of appeals . . . have distinguished between the total closure of proceedings and situations in which a courtroom is only partially closed to certain spectators.”).

remain unchanged when a court reviews a partial closure, these courts provide that in a partial closure case an “overriding interest” need not be shown; instead, they require only a “substantial reason.”³⁴ “[T]he difference between the two standards is not perfectly clear, other than the fact that the reviewing court knows that the ‘substantial reason’ standard is a more lenient standard than the ‘overriding interest’ standard.”³⁵ The “modified” *Waller* test used in partial closure cases hews very closely to *Waller* in its original form.³⁶ It simply minimizes the showing necessary under *Waller*’s first factor.

In 2010, the Supreme Court revisited the right to a public trial in *Presley v. Georgia*.³⁷ In *Presley*, the trial court closed the courtroom during jury selection, believing that there was not enough room in the courtroom to accommodate spectators.³⁸ The Georgia Supreme Court held that the closure comported with the Sixth Amendment’s requirements, noting, in particular, that the trial court had no *sua sponte* duty to investigate reasonable alternatives to closure.³⁹ On appeal, however, the US Supreme Court held that the closure was improper.⁴⁰ The Court reiterated that *Waller* set forth the appropriate test for evaluating courtroom closures.⁴¹ The Court indicated that the “overriding interest” asserted must be specific and substantiated,⁴² and held that the required

34. See, e.g., *Woods v. Kuhlmann*, 977 F.2d 74, 76 (2d Cir. 1992) (applying “substantial reason” test); *Commonwealth v. Downey*, 936 N.E.2d 442, 449 n.12 (Mass. App. Ct. 2010) (citing *Commonwealth v. Cohen* (No. 1), 921 N.E.2d 906, 921 (Mass. 2010)) (“When a closure is partial, a ‘substantial reason’ rather than an ‘overriding interest’ may suffice to justify the closure.”). But see *Turrieta*, 308 P.3d at 967 (holding *Waller*’s “overriding interest” factor applies in partial closures excluding only some courtroom spectators); *People v. Jones*, 750 N.E.2d 524, 529 (N.Y. 2001) (holding, in the partial closure context, that “[w]hen the procedure requested impacts on a defendant’s right to a public trial, nothing less than an overriding interest can satisfy constitutional scrutiny”).

35. *Turrieta*, 308 P.3d at 970. For purposes of this discussion, it is unnecessary to establish the relative showings that must be made under each standard.

36. See *Simmons*, 797 F.3d at 414 (“All federal courts of appeals that have distinguished between partial closures and total closures modify the *Waller* test so that the ‘overriding interest’ requirement is replaced by requiring a showing of a ‘substantial reason’ for a partial closure, but the other three factors remain the same.”).

37. 558 U.S. 209, 209 (2010).

38. *Id.* at 210.

39. *Id.* at 211 (quoting *Presley v. State*, 674 S.E.2d 909, 912 (2009), *rev’d*, 558 U.S. 209 (2010), *vacated*, 695 S.E.2d 268 (2010)).

40. *Id.* at 216.

41. *Id.* at 213–14.

42. *Id.* at 215–16; accord *Waller v. Georgia*, 467 U.S. 39, 48 (1984) (criticizing certain findings as insufficient because they were “broad and general”). *Presley* makes no mention of closures as “partial” or “complete.”

findings should also include specific findings of “reasonable alternatives” to closure, which the court must make *sua sponte*.⁴³

THE *COSENTINO* EXCEPTION—DECLINING TO APPLY *WALLER* TO CLOSURES EXCLUDING DISRUPTIVE AUDIENCE MEMBERS

Despite the test set forth in *Waller* and reiterated in *Presley*, some courts have concluded that *Waller*’s right to a public trial analysis is not implicated when objectionable spectators are excluded from trial. The seminal case is *Cosentino v. Kelly*.⁴⁴

In *Cosentino*, a guilty verdict resulted in “bedlam”:

[T]here were a great many members of the [petitioners’] family, friends here, I say 10 to 15 and not all of them but a good many of them just went absolutely off the wall yelling and screaming, several had to be physically restrained, taken out of the courtroom, we had quite a scene here. As I indicated to the jury, one unlike any that I’ve ever seen or the attorneys have ever seen, as they indicated to me.⁴⁵

After substantial motion practice by both sides that referenced the disturbance, the trial court declared a mistrial, and a second trial was held.⁴⁶ The trial judge excluded from the second trial some of the family members who had participated in the earlier disruption.⁴⁷ On appeal, the appellants contended that the closure of the courtroom to the family members violated their rights to a public trial.⁴⁸ The Second Circuit wrote that the disruption the spectators had caused in the courtroom was “something more than a breach of decorum,”⁴⁹ instead reaching the level of “pandemonium [which] had directly caused a mistrial.”⁵⁰ The court concluded that the need for an orderly trial outweighed the need for

43. *Presley*, 558 U.S. at 214 (“[T]rial courts are required to consider alternatives to closure even when they are not offered by the parties . . .”).

44. 102 F.3d 71 (2d Cir. 1996) (per curiam).

45. *Id.* at 72 (quoting the trial transcript).

46. *Id.*

47. *Id.*

48. *Id.* at 71.

49. *Id.* at 73.

50. *Id.*

access,⁵¹ and stated that it would not perform a *Waller* analysis because it believed that the *Waller* standard “governs the closing of the courtroom to peaceable individuals or to the public at large.”⁵² Some subsequent cases, in and out of the Second Circuit, have repeated this sentiment.⁵³

THE REASONING OF *COSENTINO* AND ITS PROGENY

Cosentino is a per curiam decision, appearing over a scant three pages of the Federal Reporter. The case provides little reasoning to support the dramatic cabining of the *Waller* test’s applicability to only closures of courtrooms to “peaceable individuals or to the public at large.”⁵⁴

The *Cosentino* court noted that the right to a public trial “has always been interpreted as being subject to the trial judge’s power to keep order in the courtroom.”⁵⁵ *Cosentino* quotes two cases that support the proposition that courtroom decorum is important. The first case, *United States ex rel. Orlando v. Fay*,⁵⁶ noted that when the public trial right is weighed against the need to deter indecorous behavior, a court must balance “the requirement that the actions of the courts be open to public scrutiny and the need to have the trial proceed in an orderly manner.”⁵⁷ In the second case, *Illinois v. Allen*,⁵⁸ the Supreme Court stated that “[t]he flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated.”⁵⁹ Each of these cases set forth an important governmental interest: the need for order in the court. Neither case, however, says anything about whether the *Waller* test should apply in the situation the court in *Cosentino* addressed. Nor could it—each case predates *Waller*.

The courts following *Cosentino* down its path have fared little better in providing reasoning to support limiting *Waller*’s application to

51. *Id.* The Second Circuit concluded that the trial judge “struck a scrupulous ‘balance between the requirement that the actions of the courts be open to public scrutiny and the need to have the trial proceed in an orderly manner.’” *Id.* (quoting *United States v. Fay*, 350 F.2d 967, 971 (2d Cir. 1965)).

52. *Id.*

53. See, e.g., *Shepard v. Artuz*, No. 99 CIV.1912 (DC), 2000 WL 423519, at *5 (S.D.N.Y. Apr. 19, 2000); *State v. Sowell*, No. 06AP-443, 2008 WL 2600222, at *10 (Ohio Ct. App. June 30, 2008). But see *Commonwealth v. Caldwell*, 945 N.E.2d 313, 325 n.15 (Mass. 2011) (rejecting *Cosentino* and applying the *Waller* test).

54. *Cosentino*, 102 F.3d at 73.

55. *Id.* (quoting *Fay*, 350 F.2d at 971).

56. *Fay*, 350 F.2d 967.

57. *Id.* at 971.

58. 397 U.S. 337 (1970).

59. *Id.* at 343.

“peaceable” audience members. For instance, *Shepard v. Artuz* simply relies on *Cosentino* to reach its conclusion that it need not undertake a *Waller* analysis.⁶⁰ Similarly, *State v. Sowell* cites to both *Cosentino* and *Shepard* to conclude that *Waller* need not be applied, simply adopting those cases’ assertions.⁶¹

Two other courts have also adopted *Cosentino* as authoritative, citing it, without further analysis, for the proposition that the *Waller* factors need not be considered in the case of disruptive audience members.⁶² Only one court has explicitly rejected, without significant discussion, *Cosentino*’s assertion that *Waller* does not apply in cases of disruption.⁶³ Many other courts have applied *Waller*, or its modified version often applied to partial closures, in cases of disruption, without any discussion of *Cosentino* or suggestion that *Waller* might not apply.⁶⁴

Cosentino does not say “anything goes” in terms of closing the courtroom to disruptive spectators. It requires *some* sort of showing, if only a somewhat nebulous balancing of the right to a public trial against the need for order in the courtroom.⁶⁵ It is unclear, however, why *Cosentino* determined that this showing should deviate from *Waller*. The facts in *Cosentino* likely satisfied the *Waller* test, but perhaps the court was concerned that the trial court had made inadequate findings, and believed that for the verdict to survive, it had to carve out an exception to *Waller*.

60. *Shepard v. Artuz*, No. 99 CIV.1912 (DC), 2000 WL 423519, at *5 (S.D.N.Y. Apr. 19, 2000) (citing *Cosentino* and declining to apply *Waller* factors in a habeas proceeding when the state court barred petitioner’s “mother from the courtroom only after a court officer had seen her make threatening gestures at the prosecution witness in open court”). Neither *Shepard* nor *Harvey v. Headley*, No. 98 CIV. 8660 (MBM), 2001 WL 755386 (S.D.N.Y. July 5, 2001), can be impugned, of course, for following *Cosentino*, as each case arose within the Second Circuit.

61. *State v. Sowell*, No. 06AP-443, 2008 WL 2600222, at *8 (Ohio Ct. App. June 30, 2008) (citing *Cosentino* and *Shepard* and stating that “when the exclusion is based on misconduct by the spectator, the *Waller* test does not apply”). *Sowell* also relies, in part, on the separate Sixth Amendment doctrine of “triviality” to resolve the question before it. *Id.* at *8–*11. That doctrine, however, is unrelated to the specific question of disruptive spectators.

62. *See Harvey*, 2001 WL 755386, at *3 n.2 (“[The *Waller*] test need not be satisfied here because *Harvey*’s children were disruptive and the courtroom was otherwise open to the public.”); *People v. Shepard*, 243 A.D.2d 290, 290 (N.Y. App. Div. 1997) (citations omitted) (“The ejection was based on the actual misconduct of the spectator in open court and the court’s responsibility to maintain order. In such circumstances, the test for courtroom closure set forth in *Waller* . . . does not apply.”).

63. *See Commonwealth v. Caldwell*, 945 N.E.2d 313, 325 n.15 (Mass. 2011).

64. *See, e.g., United States v. Laureano-Perez*, 797 F.3d 45, 78 (1st Cir. 2015) (applying *Waller* test to disruptive spectator closure); *United States v. Sherlock*, 962 F.2d 1349 (9th Cir. 1989) (same); *People v. Cooper*, 849 N.E.2d 142 (Ill. App. Ct. 2006) (same).

65. *See Cosentino v. Kelly*, 102 F.3d 71, 73 (2d Cir. 1996) (per curiam) (quoting *United States v. Fay*, 350 F.2d 967, 971 (2d Cir. 1965)).

THE *WALLER* TEST SHOULD APPLY TO CLOSURES EXCLUDING
DISRUPTIVE SPECTATORS

For three reasons, *Waller* should be applied to assess the propriety of courtroom closures to disruptive spectators. First, the language of *Waller* does not support an exception for disruptive spectators. Second, the purposes of the right to a public trial are fulfilled by applying *Waller* scrutiny to closures excluding disruptive spectators. Third, the *Waller* test is easily administered in cases presenting disruptive spectators. *Waller* provides a consistent, uniform test for trial judges to apply before closing their courtrooms.

First, as a threshold matter, *Waller* does not support a disruptive spectator exception. There is no question that *Cosentino*'s facts, involving dramatic upheaval in the courtroom, are distinct from the facts in *Waller*, where no disruption occurred. But there is equally no question that neither *Waller* nor *Presley* purport to limit their holdings to a certain class of excluded persons. Indeed, *Waller*'s language is to the contrary. The Court writes, "we hold that under the Sixth Amendment *any closure* of a suppression hearing over the objections of the accused must meet the tests set out" in the Court's opinion.⁶⁶

Second, to serve the purposes of the right to a public trial, the *Waller* test should extend to all court spectators. Two purposes of the Sixth Amendment's right to a public trial are to "ensure a fair trial" and "remind the prosecutor and judge of their responsibility to the accused and the importance of their functions."⁶⁷ To further these purposes, trial judges should err on the side of including, rather than excluding, the people most invested in the outcome of criminal trials: family and friends. Their presence allows them to scrutinize the proceedings, and lets the prosecutor and judge know that the accused's fate affects more than the accused alone.⁶⁸

The scalpel provided by *Waller* properly serves the Sixth Amendment's public trial guarantee as opposed to the hammer *Cosentino* equips trial judges with. A blanket rule excluding "disruptive" spectators ignores human nature and eliminates any *locus poenitentiae* for those court spectators. The accused is entitled to have friends and family

66. *Waller v. Georgia*, 467 U.S. 39, 47 (1984) (emphasis added).

67. *Peterson v. Williams*, 85 F.3d 39, 43 (2d Cir. 1996) (citing *Waller*, 467 U.S. at 46-47).

68. *See United States v. Rivera*, 682 F.3d 1223, 1230 (9th Cir. 2012).

members present in the courtroom,⁶⁹ and in many cases family members will be disruptive.⁷⁰ It is hard to imagine a criminal case resulting in anything other than emotional pain for the accused's family, and it is unreasonable to expect the family not to give a voice to that emotional pain. Trial courts should reasonably expect exclamation from loved ones.

Without the rigor of *Waller* review, a trial judge may simply point to any response or reaction, declare the responsible parties "non-peaceable," and exclude them from future proceedings. For instance, an outburst following a jury verdict, presumably an unfavorable one for the spectator, may cause the trial judge to label the spectator as disruptive. This, in turn, may lead to the spectator's exclusion from post-trial proceedings such as sentencing. Sentencing is perhaps the second most momentous event in a criminal proceeding and thus a bar to such a proceeding would be significant. Sentencing is a point at which prosecutors and judges need to be particularly "remind[ed] . . . of their responsibility to the accused."⁷¹ Permitting a cursory exclusion of interested spectators is at odds with this Sixth Amendment value.

Under *Waller*, on the other hand, the circumstances must be considered with greater sensitivity. A family member's outburst would be considered at the "overriding interest" or "substantial reason" phase of the *Waller* test, but the possibility that those family members might be able to restrain themselves in later proceedings would simultaneously have to be considered under *Waller*'s "narrow tailoring" and "alternatives" factors. Moreover, *Waller* mandates detailed findings from the trial court, requiring the trial judge to reflect rather than simply react. By ensuring that interested spectators and their actions are considered carefully before they are excluded, *Waller* respects the importance of the right to a public trial in a way *Cosentino* does not.

Finally, the *Waller* test is easily administered and may be applied in the same way it would apply in any other closure situation. There is nothing inherently different in the "disruptive spectator" context that necessitates abandoning the *Waller* test in favor of a more cursory analysis. A discussion of the administrability of each factor demonstrates this.

The first factor requires the court to find an "overriding interest" or "substantial reason" for the closure. Depending on the nature of the disruption, an "overriding interest," or "substantial reason," may be found.

69. *In re Oliver*, 333 U.S. 257, 271–72 (1948) ("[W]ithout exception all courts have held that an accused is at the very least entitled to have his friends, relatives and counsel present . . .").

70. *See, e.g.*, *People v. Cooper*, 849 N.E.2d 142, 144 (Ill. App. Ct. 2006).

71. *Peterson*, 85 F.3d at 43.

Courtroom decorum can undoubtedly constitute an interest sufficient to justify a closure.⁷² For instance, in *People v. Cooper*, members of the courtroom audience made “audible sounds and tisks and disagree[d] audibly and loudly with the witnesses.”⁷³ The defendant did not contest that “maintaining proper courtroom decorum is an overriding interest.”⁷⁴ Other cases have also found courtroom disorder sufficient to justify closures.⁷⁵

Conversely, situations will arise when an asserted disruption is not great enough to satisfy the “overriding interest” or “substantial reason” factors.⁷⁶ This is exactly why the *Waller* test *should* apply in a “disruption” situation. The need for action should be carefully considered, rather than quickly settled with an unconsidered incantation of “disruption.” It cannot be true that *any* disruption can lead to closure and exclusion. *Waller* provides the framework within which the gravity of the disruption and propriety of response can be evaluated.

The other *Waller* factors may also be easily processed in case of a courtroom disruption. *Waller*’s second factor requires that “the closure must be no broader than necessary.”⁷⁷ In the case of spectator disruption, this factor appears to require little more than identifying the particular spectators the court seeks to exclude.

The third factor mandates that “the trial court must consider reasonable alternatives to closing the proceeding.”⁷⁸ Admittedly, there are few “reasonable alternatives” in a disruption case. A spectator can and should be warned to end her behavior and be offered an ultimatum—respect court

72. *See Cooper*, 849 N.E.2d at 146.

73. *Id.* at 144.

74. *Id.* at 146.

75. *See, e.g., United States v. Fay*, 350 F.2d 967, 971 (2d Cir. 1965) (holding that a partial closure of a courtroom was not unreasonable “when it became apparent that both in and out of the courtroom the defendant and his sympathizers were attempting to prevent the orderly presentation of the case”); *Edwards v. Brown*, No. 10-CIV-6475 (NRB), 2011 WL 5920901, at *5 (S.D.N.Y. Nov. 18, 2011) (finding that a “fracas” between a witness and the defendant’s family members was sufficient to justify a partial closure of the courtroom); *Waller v. United States*, No. 1:08-CV-936 (1:04-CR-13), 2010 WL 750219, at *8, *10 (N.D. Ohio Feb. 26, 2010) (finding that family member outbursts, including yelling that a witness was “lying,” were sufficient to justify a partial closure of the courtroom). In fact, this point was settled before *Waller* was decided. *See United States v. Akers*, 542 F.2d 770, 772 (9th Cir. 1976) (per curiam) (holding that a partial closure of a courtroom in order “to avoid disorder” was proper).

76. *See, e.g., United States v. Simmons*, 797 F.3d 409, 415 (6th Cir. 2015) (holding that trial court’s finding of a “possibility” of witness intimidation “did not reach the conclusion necessary to satisfy the first prong of the modified *Waller* test”).

77. *Waller v. Georgia*, 467 U.S. 39, 48 (1984).

78. *Id.*

decorum or face exclusion.⁷⁹ Should the spectator decline to acquiesce, exclusion is the only recourse. The administrative burden on the court is necessarily minimal. Offering the second-chance, stay-quietly-or-go ultimatum may be an extra step, but it seems like a small one to require when a constitutional guarantee is at issue.

Finally, the fourth *Waller* factor requires the court to “make findings adequate to support the closure.”⁸⁰ Here, too, the burden on the court seems easily borne. The court must note for the record the nature of the disruptive activity to demonstrate its impact on the proceedings and the interest served by a potential courtroom closure.⁸¹ The court must then explain what alternatives it can pursue.⁸² There are no particular procedures required by the Supreme Court’s decisions in *Waller* and *Presley*. All these cases require is that the trial court’s conclusions “be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.”⁸³

While courts have held that “the court must hold a hearing on the closure motion,”⁸⁴ the form of hearing is not prescribed. The evidence considered may be minimal, as closure may be based on the trial judge’s own observations.⁸⁵ No noticed motion is required to precede a closure hearing;⁸⁶ it may occur in the course of a trial or other proceedings.⁸⁷ Nor do the findings made require a particular form of opinion or order.⁸⁸ Such findings may, presumably, be made by a minute entry or issued orally from the bench. In short, *Waller*’s administrative requirements are easily

79. See, e.g., *United States v. Laureano-Perez*, 797 F.3d 45, 78 (1st Cir. 2015) (addressing narrow tailoring factor and approving “district court’s requirement that [defendant’s] wife leave until she promised to behave herself”).

80. *Waller*, 467 U.S. at 48.

81. See *Presley v. Georgia*, 558 U.S. 209, 215 (2010) (quoting *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984)) (“[T]he particular interest, and threat to that interest, must ‘be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.’”).

82. See *id.* at 214–15.

83. *Id.* at 215 (quoting *Press-Enterprise*, 464 U.S. at 510).

84. *United States v. Rivera*, 682 F.3d 1223, 1236 (9th Cir. 2012).

85. See *State v. Tucker*, 290 P.3d 1248, 1259 (Ariz. Ct. App. 2012) (“[A] trial judge’s own observations of spectator behavior [may] support closure of trial”); see also *Tinsley v. United States*, 868 A.2d 867, 876 (D.C. 2005) (“The judge observed [the basis for closure] directly and her finding on that score is amply supported by the transcript.”).

86. See *United States v. Charboneau*, Nos. 2:09-cr-7, 2:11-cv-61, 2011 WL 5040717, at *1-2 (D.N.D. Oct. 24, 2011), *aff’d*, 702 F.3d 1132 (8th Cir. 2013) (motion to close brought by government orally, and granted by court orally, after the commencement of trial).

87. See *id.*

88. See *Bell v. Jarvis*, 236 F.3d 149, 172 (4th Cir. 2000) (“[T]he *Waller* Court prescribed no particular format to which a trial judge must adhere to satisfy the findings requirement.”).

satisfied and do not need to be suspended, even tentatively, to accommodate the problem of courtroom disruption.⁸⁹

CONCLUSION

Cosentino and its progeny take a “short form” approach to determining whether to close a courtroom to disruptive spectators. This cursory form of review is at odds with the Supreme Court’s holdings; *Waller* does not anticipate exceptions. Moreover, the goals of the right to a public trial under the Sixth Amendment are best achieved by applying *Waller*. Finally, the *Waller* test is easily administered in disruptive spectator situations. There is no good reason to apply a courtroom exclusion test for “peaceable” spectators that is separate from the one applied to disruptive spectators.

89. See *Commonwealth v. Caldwell*, 945 N.E.2d 313, 325 n.15 (Mass. 2011) (noting that, in the case of a disruption in the courtroom, the reviewing court “will give substantial deference to a judge’s determination that the removal of a violent or disruptive spectator from the court room satisfies these requirements”).