No. _____

IN THE

Supreme Court of the United States

MONTANA BARRONETTE, et al.

Petitioners

v.

UNITED STATES

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court observed in 1948 that without "exception all courts have held that an accused is at the very least entitled to have his friends, relatives and counsel present." *In re Oliver*, 333 U.S. 257, 271–72 (1948). Federal and state appellate courts, citing this passage from *Oliver*, apply heightened Sixth Amendment protections for the attendance of defendants' family and friends.

The Fourth Circuit is an exception. Alone among the 12 geographic circuits, the Fourth Circuit has never cited this passage from *Oliver* or acknowledged any special protection for defendants' friends and family.

To this day, the Fourth Circuit is adamant in refusing to address the issue. The district court reduced public seating from 100 to 25 because of security concerns in an eight-defendant drug trafficking trial. It took no action on sworn declarations that security was turning away family and friends. Petitioners emphasized the special role of family and friends in their briefs and at argument. The panel acknowledged the issue at argument. Its published opinion, however, affirmed based on the adequacy of twenty-five "spectators," going out of its way not to mention *who* was turned away at the door.

Does the Public Trial Clause require heightened protection for courtroom access for defendants' family and friends ?

LIST OF PARTIES

Petitioners are Montana Barronette, Linton Broughton, Timothy Floyd, John Harrison, Dennis Pulley, Terrell Sivells, Taurus Tillman, and Brandon Wilson. All are natural persons.

Respondent is the United States.

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PETITION FOR A WRIT OF CERTIORARI

Montana Barronette, Linton Broughton, Timothy Floyd, John Harrison, Dennis Pulley, Terrell Sivells, Taurus Tillman, and Brandon Wilson petition this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS AND ORDERS BELOW

The decision under review, *United States v. Barronette*, 46 F.4th 177 (4th Cir. 2022), was reported (App. A). A transcript of the district court's oral rulings partially closing the courtroom is attached as Appendix B. The district court did not rule on the mistrial motions (App. C & D), effectively denying them. *See* App. A at 16.

JURISDICTION

The Court has 28 U.S.C. § 1254(1) jurisdiction over this petition, filed within 90 days after the Fourth Circuit entered judgment on August 18, 2022.

PERTINENT CONSTITUTIONAL PROVISION

"In all criminal prosecutions, the accused shall enjoy the right to a … public trial." U.S. Const. amend. VI.

STATEMENT

A. The district court limited courtroom capacity with no priority for family and friends.

The Government charged petitioners with various drug trafficking offenses. Trial lasted for 25 days in a courtroom that seats 100. Early in trial, defendants

secured a ruling that an objection by one was an objection by all, unless any defendant opted out.[1]

On day six, the district court entered an order partially closing the courtroom, restricting attendance to 25 members of the public, on a first-come-first-seated basis. App. B at 1109.1-1109.2. It cited the murder of two cooperating witnesses, at least plausibly in connection with the case; probable cause to believe two defendants assaulted deputy marshals; a fight, verbal outbursts, and a box cutter in the gallery; gang initials carved into a lobby table; and one defendant's jailhouse communication that could be interpreted as a request to pack the courtroom during cooperating witnesses' testimony to intimidate them. *Id.* at 1129–31. The district court ordered an audio-only overflow courtroom. *Id.* at 1131. Two defendants objected, and none opted out. *Id.* at 1132–33.

B. Security turned friends and family away without opening an overflow courtroom.

On day nine, Harrison moved for a mistrial for Public Trial Clause violations. App. C. He attached two affidavits that security was turning away peaceful spectators, including friends and family, without opening the overflow courtroom. *Id.* at 1555–56. The first affidavit was from a defendant's mother, Lashawn Darnell:

> I work at the Baltimore County Detention Center as a dietary supervisor. I am the mother of Timothy Floyd and have been attending his trial when I am off from work. I have no criminal record.
>
> I came to Court on October 3, 2018. I sat through the morning session, but had to leave to pick up my granddaughter from school. I returned to

[11] 4th Cir. Joint App'x 912.

> the courthouse at approximately 3:15 PM with my 3-year-old granddaughter.
>
> As I was entering the courthouse, [courthouse security] at the front door asked me which courtroom I was going to. I told them I was going to Courtroom 1A. They informed me that the courtroom was at "capacity" and that they were not letting anyone else in. When I expressed my frustration at not being allowed in the courtroom to support my son during his trial, I was told that they were just enforcing the rules and I was asked to leave the courthouse.
>
> I was not informed that there was a way to watch the proceedings somewhere else in the courthouse. I was only told that the courtroom was at "capacity" and that I could not watch the proceedings. I did not know this was even an option until I spoke with a member of the defense team on the evening of October 4, 2018.
>
> I am willing to testify to this should the Court require it.

App. C at 1555. The second affidavit was from Harrison's friend, N'Kiya Hamlin:

> I manage a Baltimore psychiatry and counseling office. I am working towards a social work license. I am a friend of the family of Mr. Harrison and have been attending his trial when I am off from work. I have no criminal record.
>
> I came to Court after my shift on October 3, 2018. I arrived at Courtroom 1A at 2:55 PM …. Following this I talked to three members of the Court Security Staff …. I was first asked if I had already been in the courtroom. I replied that I had not. I was then told that I was not permitted to enter Courtroom 1A as the courtroom was at "capacity." I was told that I needed to leave the courthouse, which I did. Indeed, I was escorted out by a member of the courtroom security. I was not informed that there was a way to watch the proceedings somewhere else in the courthouse ….
>
> While I traveled to the courthouse alone, there were several people trying to enter at the same time that I was. To the best of my recollection, there were seven (7) of us total all trying to enter the courtroom at the same time. All of us were turned away, and all of us were escorted out. One of the gentlemen that was trying to enter when I was made a few remarks to the courtroom security, but the rest of us were respectful and were turned away for no other stated reason than the room was at "capacity." And all of us left the building as instructed

> by the courtroom security. I am willing to testify to this should the Court require it.

Id. at 1556. On the trial day described in the affidavits, the testimony was from law enforcement personnel, not cooperating witnesses.

The mistrial motion highlighted that it was "friends or family members of the accused that were wrongfully excluded." App. C at 1552. It cited *Oliver* and authority from other circuits that the Sixth Amendment applies with heightened force to friends and family. *Id.* The motion included a hearing request. *Id.* at 1553.

On day 12—with no ruling from the district court and no response from the Government—Harrison filed a second mistrial motion. He attached a second affidavit from Harrison's family friend, Ms. Hamlin:

> I came to Court for the afternoon session on October 11, 2018. I arrived at 3:10pm.
>
> I attempted to enter the courtroom at this time and was told that the courtroom was at "capacity." I asked if there was another room in the courthouse from which I could watch the proceedings. The U.S. Marshal said he did not know anything about that and he would check on it. He said he did not have the clearance to open another room. I asked if he could check and he asked someone over a walkie-talkie. The person he spoke to said that there wasn't another room, but that things may change tomorrow or next week.
>
> I waited outside of the courtroom and someone … apologized that there was no room and said that the proceedings were about to stop for the mid-afternoon break and that I would be able to get into the courtroom after the break. I was able to get into the courtroom after the mid-afternoon break.

App. D at 1819.

C. The district court did not acknowledge these facts, took no further evidence, and made no ruling.

The Government never responded to the mistrial motions. It did not dispute the facts in the affidavits. It did not try to build a record that the Public Trial Clause violations were trivial.

At no point did the district court acknowledge the mistrial motions. It did not hold the requested hearing. It took no evidence and made no findings that the Public Trial Clause violations were trivial. This inaction "effectively denied" the motions. App. A at 16.

D. The Fourth Circuit affirmed, treating all "spectators" the same.

Petitioners cited *Oliver* in their appellate briefs, emphasizing the trial court's failure to protect and prioritize family and friends' access.[2] Rather than trying to justify the district court's silence on the mistrial motions, the Government's brief misstated the record. It claimed that petitioners "do not cite any portion of the record where they complained to the judge" about "how court security personnel enforced the court's ruling," and that "the district judge cannot assailed for facts not brought to her attention."[3]

Petitioners devoted the majority of their oral argument to the district court's failure to address the evidence that courthouse security turned away family and friends.[4] Hearing this argument loud and clear, the panel asked:

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[2] Appellants' 4th Cir. Br. at 34–36, https://ecf.ca4.uscourts.gov/docs1/00408311226; Appellants' 4th Cir. Reply Br. at 15–16, https://ecf.ca4.uscourts.gov/docs1/00408692454.

[3] Gov't 4th Cir. Br. at 41 n.3, https://ecf.ca4.uscourts.gov/docs1/00408589418.

[4] Oral Arg. (May 4, 2022), https://www.ca4.uscourts.gov/OAarchive/mp3/19-4123-20220504-.mp3, at 00:45–13:00, 51:00-56:20. *See id.* at 4:45 (noting that Government's cited authorities looked

> Q Is there case law that somehow heightens... there's a heightened test for exclusion of family members or others?
>
> A Yes, Justice Black's opinion that we cite ... *In re Oliver*, 333 U.S. 257 (1948) …. "Without exception all courts have held that an accused is at the very least entitled to have his friends, relatives, and counsel present, no matter what offense with which he may be charged."[5]

When the Fourth Circuit issued its published opinion, however, *Oliver* and the family-and-friends issue were missing. Instead, the opinion spoke only of "spectators":

> On October 8, 2018, Harrison moved for a mistrial, noting that on two occasions, marshals did not allow *a spectator* to go to the overflow room and instead asked to (sic) them leave the courthouse. Affidavits from *spectators* were included in the motion. Three days later, Harrison submitted another affidavit stating that on October 11, 2020, a marshal told *a spectator* that the courtroom was "at capacity" and there was no "clearance" to open another courtroom. J.A. 1819. That *spectator* waited outside the courtroom and was admitted after the mid-afternoon break. The district court did not rule on Harrison's motion, effectively denying it.

App. A at 16 (emphasis added). It held that while "some *spectators* who wanted to be in the courtroom were not able to be there, Appellants still received the benefits of having a public trial as twenty-five *spectators* were able to be in the courtroom." *Id.* at 20 (emphasis added).

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to ensure family members were not excluded), 6:10 ("The trial judge was made aware that this 25-person, first-come-first-served system was causing family members to be excluded. Or close friends who are treated the same as family under the case law.").

[5] *Id.* at 8:15.

REASONS FOR GRANTING THE PETITION

The Sixth Amendment's Public Trial Clause applies with special force to defendants' family and friends.

A. Nearly all appellate courts recognize the special protection for attendance by defendants' family and friends.

Although the right to a public trial is not absolute, a trial court must ensure that any "closure must be no broader than necessary," based on adequate findings. *Waller v. Georgia*, 467 U.S. 39, 48 (1984). Trial "courts are required to consider alternatives to closure even when they are not offered by the parties," and "are obligated to take every reasonable measure to accommodate public attendance at criminal trials." *Presley v. Georgia*, 558 U.S. 209, 215 (2010).

In *Oliver*, the Court reversed a conviction in which the accused was "tried, convicted, and sent to jail, when everybody else is denied entrance to the court, except the judge and his attaches." 333 U.S. at 271. The many constitutional violations included the accused's public trial rights. Writing for the Court, Justice Black observed that, under the Public Trial Clause, "without exception all courts have held that an accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged." *Id.* at 271–72 & n.29 (collecting authorities).

Even while sometimes characterizing this passage as dicta, federal appellate courts have followed *Oliver* in establishing basic principles for trial courts:

- courts must protect access for defendants' family and friends;
- courts must prioritize seating for them over the general public;

- courts may exclude specific relatives or friends for particularized concerns, such as that the individual poses a security threat or is a witness subject to sequestration;
- courts must reevaluate restrictions when they learn that friends or family were denied access;
- exclusion for any non-trivial portion, even voir dire, violates the Sixth Amendment; and
- courts must make particular findings of triviality.[6]

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[6] *United States v. Negron-Sostre*, 790 F.3d 295, 299 (1st Cir. 2015) (ordering new trial because "the defendants' family members and friends were excluded from the courtroom" during voir dire); *United States v. Laurent*, 33 F.4th 63, 96 (2d Cir. 2022) ("While the fact that the excluded observers were [defendant's] family members heightens our concern, the court's exclusion did not seriously affect the fairness, integrity, or public reputation of the trial, particularly in light of [defendant's] acquiescence and the alternative offered sua sponte by the district court."); *United States v. Kobli*, 172 F.2d 919, 922 (3d Cir. 1949) ("spectators having no immediate concern with the trial need not be admitted in such numbers as to over-crowd the courtroom and take up room needed for those who do have special concern with the trial such as … the relatives and friends of the defendant"); *United States v. Cervantes*, 706 F.3d 603, 613 (5th Cir. 2013) (allowance for "defendants to each have three family members present, combined with the general public's access to voir dire, protected Appellants' interest in a public trial, thereby satisfying the Sixth Amendment"); *United States v. Cook*, 550 F. App'x 265, 270 (6th Cir. 2014) ("[Defendant] has not pointed to any evidence that the district court ultimately barred his children from the courtroom"); *United States v. Anderson*, 881 F.3d 568, 575 (7th Cir. 2018) ("we are not presented with a case in which friends or relatives of the defendant, or anyone else for that matter, were actually excluded"); *United States v. Ricker*, 983 F.3d 987, 994 (8th Cir. 2020) (*Oliver*'s "entitlement is not absolute, however, and does not necessarily prohibit the sequestration … of … friends or relatives who may be called as witnesses"); *United States v. Rivera*, 682 F.3d 1223, 1233 (9th Cir. 2012) ("The exclusion of [defendant's] relatives thus implicates Sixth Amendment values more directly than the exclusion of the general public."); *Nieto v. Sullivan*, 879 F.2d 743, 754 (10th Cir. 1989) (trial judge made detailed findings to support the "exclusion of the [defendant's] relatives"); *United States v. McPherson*, 587 F. App'x 556, 565 (11th Cir. 2014) ("courts should be reluctant to close the courtroom to a defendant's family during trial"); *United States v. Flanders*, 752 F.3d 1317, 1337 (11th Cir. 2014) ("when defense counsel expressed concern after closing arguments that some of Defendants' family had been locked out of the courtroom, the court offered counsel the opportunity to redeliver their closing arguments with the doors unlocked, but both sides declined."); *United States v. Perry*, 479 F.3d 885, 890 (D.C. Cir. 2007) (trial court narrowly tailored exclusion to defendant's eight-year-old son and allowed wife to attend).

These principles are not controversial. State appellate courts follow them as well.[7]

B. The Fourth Circuit stands alone in recognizing no difference among "spectators."

Anywhere outside the Fourth Circuit, it would have mattered whether the excluded spectators were family, friends, or the general public. But in the Fourth Circuit a spectator is a spectator is a spectator. App. A at 16, 20.

The Fourth Circuit has made a conscious choice not to address differences between defendants' family and friends, on the one hand, and the general public, on the other. Since 1948, the Fourth Circuit has cited *Oliver* in 20 published and unpublished opinions. None of those citations was for the proposition that the Sixth Amendment protects defendants' right to have family and friends present.

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[7] *People v. Schoonover*, 190 N.E.3d 802, 810 (Ill. 2022) ("the record does not reflect that the persons excluded were immediate family members or otherwise interested parties."); *People v. Scott*, 216 Cal. Rptr. 3d 223, 229 (Ct. App. 2017) ("the exclusion of appellant's family from the courtroom during the testimony of three of the victims violated appellant's constitutional right to a public trial"); *Steadman v. State*, 360 S.W.3d 499, 510 (Tex. Crim. App. 2012) ("Even if removing the appellant's family members from the courtroom would have proven unavoidable at the end of voir dire, for the trial court to prevent the family members from observing jury selection—at least up until the point of the actual seating of the jury—clearly violated the appellant's Sixth Amendment right to a public trial."); *Longus v. State*, 7 A.3d 64, 75 (Md. 2010) ("the defendant's family and friends are the people who have the strongest interest or concern in the handling of the defendant's trial and their attendance perhaps best serves the purpose of the Sixth Amendment guarantee"); *People v. Nazario*, 823 N.E.2d 1274 (N.Y. 2005) ("an order of closure that does not make an exception for family members will be considered overbroad, unless the prosecution can show specific reasons why the family members must be excluded"); *Tinsley v. United States*, 868 A.2d 867, 873 (D.C. 2005) ("a criminal defendant's family and friends are the people most likely to be interested in, and concerned about, the defendant's treatment and fate, so it is precisely their attendance at trial that may best serve the purposes of the Sixth Amendment"); *State v. Torres*, 844 A.2d 155, 160 (R.I. 2004) ("Under any circumstances, a trial justice must be particularly sensitive to a criminal defendant's right to have members of his or her family present during trial proceedings; endeavors toward that end were absent here."); *State v. Ortiz*, 981 P.2d 1127, 1138 (Haw. 1999) ("[Defendant's] family was prevented from entering the courtroom, not merely during the testimony of one or two witnesses, but over the course of at least five days of trial."); *Commonwealth v. Martin*, 629 N.E.2d 297, 302 (Mass. 1994) (proceedings "may not be closed to the family and close friends of the defendant").

The Fourth Circuit did not overlook this issue; it did its best to avoid it. As argument made clear, the Fourth Circuit knew petitioners were arguing for heightened Sixth Amendment protection for family and friends' attendance under *Oliver* and other circuits' decisions. Still, its opinion used the word "spectator" over and over, with no details or even pronouns to hint at who these spectators were. App. A at 16, 20.

To understand the cost of avoiding the issue, consider *why* the district court saw no need to address the mistrial motions. There was no Fourth Circuit precedent telling the district court to prioritize and protect access for defendants' family and friends. But for this gap in circuit law, the district court would have known to hit the brakes, hold a hearing, build a fuller record, and make specific findings. Even if the district court had found the violations to be trivial, it could have modified its courtroom restrictions going forward. Or, if those violations were substantial, it could have declared a mistrial and started over. Instead, the Fourth Circuit blessed the district court's inaction.

Across the circuit's nine districts, there is little practical difference between the Fourth Circuit's "spectator" analysis and an express holding that the Sixth Amendment gives no heightened protection for family and friends. In a circuit that grants oral argument and publishes opinions at a comparatively low rate, trial judges and counsel are accustomed to dissecting the closest on-point Fourth Circuit opinion. They will find the briefs and see that the generic reference to "spectators" was a deliberate rejection of petitioners' *Oliver* argument. And then the cycle will repeat.

C. The Court should summarily vacate or grant review on the merits.

The "circuit split" here is not the traditional split in express holdings. Rather, the divide is between Fourth Circuit and the rest of the country on whether to acknowledge that an issue exists.

This petition seeks modest summary relief. As a first step, we ask that, if the Government waives a response, the Court require an answer. After the Government declined to oppose the mistrial motions in the district court, and declined to acknowledge those motions on appeal, it would be beneficial to know the Government's position on the question presented.

Does the Government dispute that the Public Trial Clause prioritizes courtroom access for defendants' family and friends ? Does it believe that courts have uniformly erred, that *Oliver*'s family-and-friends language should be disregarded as ill-considered dicta, and that it is irrelevant whether excluded spectators are defendants' friends and family?

If the Government concedes this distinction to be relevant—not dispositive, but simply relevant—then a GVR order would be appropriate. The Court could remand to the Fourth Circuit for further consideration and an amended opinion that expressly accounts for the heightened Sixth Amendment protection for family and friends' attendance.

There is no impediment to such a limited remand. While the Government disputes preservation as to some petitioners, the parties agree that, for example, Mr. Harrison fully preserved his argument.[8]

Or, if the Government believes the Fourth Circuit was correct to treat all spectators the same, it should say so and explain why. The Court could then balance the Government's arguments against the mountain of authority and decide whether they warrant per curiam treatment or full merits review.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted:

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Dated: October 11, 2022

[8] Mr. Harrison's mistrial motions were sufficient regardless of the district court's silence. *See Holguin-Hernandez v. United States*, 140 S. Ct. 762, 766 (2020). Defendants secured a ruling that an objection for one was an objection for all, unless a defendant opted out. Had the district court held a hearing on the mistrial motions, as it should have, that hearing would have been the opportunity for any defendant to opt out or address any individual circumstances. In any case, the Fourth Circuit could address any preservation issues as to those petitioners for whom the Government challenges preservation.