No. 23-452

In the Supreme Court of the United States

MICHIGAN,

Petitioner,

v.

ANTHONY JOSEPH VEACH,

Respondent.

On Petition for a Writ of Certiorari to the Michigan Supreme Court

BRIEF IN OPPOSITION

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511

STEVEN HELTON
Michigan State Appellate Defender Office
7200 N. Washington Sq.
Lansing, MI 48933

MICHAEL B. KIMBERLY
Counsel of Record
PAUL W. HUGHES
SARAH P. HOGARTH
ANDREW A. LYONS-BERG
McDermott Will & Emery LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
mkimberly@mwe.com

CHARLES A. ROTHFELD
Mayer Brown LLP
1999 K St NW
Washington, DC 20006

Counsel for Respondent

QUESTION PRESENTED

This case does not present the question set forth in the petition.

Fairly characterized, the question actually presented is whether the Michigan Supreme Court was correct to hold that the complete courtroom closure in this case violated the Public Trial Clause and that the proper remedy under both state and federal law was a new trial.

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INTRODUCTION

According to this Court's settled precedents, before a judge may close the courtroom in a criminal proceeding, he or she must determine that (1) there is an "overriding interest that is likely to be prejudiced" absent a closure; (2) "the closure [is] no broader than necessary to protect that interest"; and (3) there are no "reasonable alternatives to closing the proceeding." *Waller* v. *Georgia*, 467 U.S. 39, 48 (1984). And before the closure may take place, the judge "must make findings adequate to support the closure" on the record. *Ibid.* Accord *Presley* v. *Georgia*, 558 U.S. 209, 214 (2010).

This case concerns the Michigan Supreme Court's order for a new trial after a total courtroom closure in which the trial judge made no *Waller* findings before closing the courtroom.

During respondent's trial on criminal sexual conduct charges, the prosecutor moved to close the courtroom during the complainant's testimony. The motion was cursory, citing only a state evidentiary rule pertaining to the order of examining witnesses (Mich. Sup. Ct. App. 203a) and none of the relevant constitutional rules concerning when and how a courtroom may be closed to the public. Pet. App. 5 n.4.

Over respondent's objection, the trial court granted a total closure of the courtroom after brief consideration, citing only two grounds—that respondent had not objected to closing certain preliminary proceedings and that some family members may be called as witnesses and therefore sequestered anyway. The trial court did not hold that those reasons represented "overriding interests," did not consider alternatives to completely closing the courtroom, and did not make *Waller* findings on the record. The Michigan Supreme Court correctly held that this was a

violation of the Public Trial Clauses of the Michigan and federal Constitutions and that, under Michigan law, a new trial was warranted.

The petition presents the question whether a new trial is the automatic remedy for a failure to make *Waller* findings—what it describes as "technicality" (Pet. i)—or if, instead, an appellate court may find the error harmless. For three reasons, the petition must be denied.

First, this Court lacks jurisdiction. Apart from the federal constitutional issues at stake, the Michigan Supreme Court rested its decision on separate, adequate, and independent state law grounds: According to the court below, "the remedy *under Michigan law* for preserved structural error due to the deprivation of a defendant's public-trial right is a new trial." Pet. App. 7 n.8 (emphasis added). Moreover, the judgment of the state court is not "final" under 28 U.S.C. § 1257(a). The judgment below ordered a new trial, completion of which is not simply a "ministerial act." *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 68 (1948).

Second, this case does not present the question posed in the petition in any event. The state supreme court held not only that the trial court failed to make the necessary *Waller* findings, but also that it could not have made them even if it had tried. In particular, the court held, "a complete courtroom closure during the complainant's testimony was [not] the only reasonable course of action" and that the interests used to justify the closure were not in fact "overriding." Pet. App. 4 n.1, 5. The first and third *Waller* factors were not satisfied on their merits.

The petition's alleged circuit split also disintegrates upon inspection. This case is about a *total* courtroom closure, while the petition cites cases involving remedies for

improper *partial* closures. While some lower courts have adjusted the remedy for improper *partial* closures because they "do[] not implicate the same secrecy and fairness concerns that a total closure does" (*State* v. *Rolfe*, 851 N.W.2d 897, 903 (S.D. 2014) (*Rolfe II*) (internal quotation marks omitted)), none has done so with respect to total courtroom closures where, as here, the court failed to consider reasonable alternatives to totally closing the courtroom. Any differences among remedial outcomes are entirely the product of differences in facts; they do not reflect the slightest disagreement as to the law.

At bottom, the decision below faithfully applied settled doctrine to correctly conclude that a new trial was warranted. The Michigan Supreme Court analyzed the sparse trial record to hold that the court's findings were "inadequate to support closure." Pet. App. 5. A new trial is the proper remedy and would be in any of the jurisdictions the petition cites. Review should be denied.

STATEMENT

A. Legal background

The Sixth Amendment to the U.S. Constitution enshrines the right to a public trial for all who are accused. U.S. Const. amend. VI. This Court has recognized that the public trial right "may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." *Waller*, 467 U.S. at 45. But these cases are "rare," and "the balance of interests must be struck with special care." *Ibid.*

In *Waller*, this Court set forth a four-part test for when a party seeks to close the courtroom:

> The party seeking to close the hearing must advance an overriding interest that is likely to be

> prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.

467 U.S. at 48.

Any violation of this test violates the public-trial right and is a "structural error." *Weaver* v. *Massachusetts*, 582 U.S. 286, 299 (2017). For preserved structural errors, this Court has held that defendants are "generally * * * entitled to 'automatic reversal.'" *Ibid.*

In *Waller*, the Court fine-tuned the remedy for a public-trial violation in the context of collateral challenges, ruling that the remedy "should be appropriate to the violation." 467 U.S. at 50. In *Waller* itself, a public-trial right violation during a suppression hearing warranted a new suppression hearing first. *Ibid.*

Michigan's courts interpret Mich. Const. Art. 1, § 20, which guarantees criminal defendants the right to a public trial, in accordance with this Court's precedent on the Sixth Amendment right to a public trial. Consistent with this Court's teachings, the Michigan Supreme Court has held that public-trial right violations objected to at trial and raised on appeal entitle the defendant to automatic relief and that, as a matter of Michigan law, the relief warranted for a violative total courtroom closure is a new trial. Pet. App. 7 n.8.

B. Proceedings below

1. The State charged respondent with "seven counts of first-degree criminal sexual conduct" and "two counts of second-degree criminal sexual conduct." Pet. App. 64.

The complainant is respondent's daughter, who was 14 to 16 years old at the time of the alleged abuse. *Id.* at 65.

The charges were brought after the complainant told her stepmother (respondent's ex-wife) that respondent sexually assaulted her. Pet. App. 13. Aside from her stepmother, the complainant's family members testified against her. *Id.* at 18.

2. At trial, the prosecutor moved to close the courtroom to the public during the complainant's testimony. Pet. App. 2. It was a barebones motion, citing only Michigan Rule of Evidence 611(a), pertaining to the judge's control over the presentation of evidence. Mich. Sup. Ct. App. 203a; see Pet. App. 5 n.4 (observing that the prosecutor "failed to cite controlling caselaw in its motion to close the courtroom"). The closure motion argued that "having anyone in the courtroom who is not necessary to the proceeding will further traumatize this now seventeen (17) year old [complainant] who has already suffered great emotional trauma." Mich. Sup. Ct. App. 203a.

Respondent's counsel contemporaneously objected to the closure, explaining that at least one or two non-witnesses wanted to attend and hear the proceeding. Mich. Sup. Ct. App. 219a.

The trial court granted closure after brief consideration:

> The Court reviewed the motion in this matter. I also reviewed the preliminary exam transcript from * * * February 3, 2017 * * *. There was no objection at that time to closing the courtroom raised by counsel. I see no reason not to close the courtroom in this case in particular, since the other witnesses are family members or the other family members may be called as witnesses and

> be sequestered anyway. Based on that, I will go ahead and grant the motion to close the courtroom for the purpose of the complaining witness testimony.

Mich. Sup. Ct. App. 219a-220a. That is, the court gave only two reasons for the closure: that the defendant had not objected to closure in a preliminary proceeding and that some family members might be called as witnesses and sequestered anyway.

None of the three preliminary examinations involved a discussion or development of the reasons for closure. The extent of the rationale provided was that the complainant was a minor and that her testimony would be "of a sensitive nature, given what the offense is." Mich. Sup. Ct. App. 22a.

After hearing the complainant's testimony in a closed courtroom, the jury convicted on all nine counts. Mich. Sup. Ct. App. 1217a-1219a.

3. The state court of appeals upheld the trial court's decision closing the courtroom over respondent's objection. Pet. App. 69. The court identified the *Waller* test, as articulated in Michigan Supreme Court precedent, but it did not analyze whether the record satisfied each prong of the test. *Id.* at 66-67 (quoting *People* v. *Vaughn*, 821 N.W.2d 288, 296 (Mich. 2012)). Instead, it focused on state law standard of Michigan Rule of Evidence 611(a)(3), under which a court is ostensibly allowed to close the courtroom based on "protect[ing] a witness from harassment or undue embarrassment." *Id.* at 68-69. The court concluded that the trial court "narrowly tailored the closure" and, "[u]nder the circumstances," did not violate the public trial right. *Id.* at 69. The court did not

meaningfully engage with the specific requirements of the *Waller* test.

4. The Michigan Supreme Court reversed and remanded for a new trial in an unsigned order issued in lieu of granting leave to appeal. Pet. App. 1-8. *First*, the court held that respondent's public-trial right had been violated. *Id.* at 1-7. Citing *In re Oliver*, 333 US 257, 272 (1948), the court emphasized that the accused are generally entitled to have their friends, relatives, and counsel present and that, to overcome that presumption, there must be "an overriding interest that is likely to be prejudiced, the closure [is] no broader than necessary to protect that interest, the trial court [considers] reasonable alternatives to closing the proceeding, and [the trial court makes] findings adequate to support the closure." Pet. App. 2 (alterations in original) (quoting *People* v. *Davis*, 983 N.W. 2d 325, 333 (Mich. 2022)).

The court first held that the trial court "did not consider any reasonable alternatives to closure" even though it was "'incumbent upon it to consider all reasonable alternatives to closure.'" Pet. App. 3-4 (quoting *Presley*, 558 U.S. at 216). Because "'[i]t did not,'" and because "[p]ost-hoc rationalizations * * * made by an appellate court" cannot suffice, "'that is all this Court needs to decide.'" *Id.* at 4 (quoting *Presley*, 558 U.S. at 216 and citing *Waller*, 467 U.S. at 49 n.8).

The court next held that the trial court failed to make on-the-record findings adequate to support any of the necessary findings, including as to the overriding interest, the bounds necessary to protect that interest, or alternatives. Pet. App. 5-6. Instead, the court noted, neither the prosecutor nor the trial court recognized the controlling law. *Id.* at 2, 5 n.4.

The court finally addressed the issue of remedy. Pet. App. 6-8. It rejected the State's attempt to characterize the closure as partial, rather than total. *Id.* at 6. And it then held that "the erroneous denial of a defendant's public-trial right is a structural error entitling the defendant to automatic relief." *Id.* at 8 (citing *Davis*, 983 N.W.2d at 333; *Weaver*, 582 U.S. at 295-297, 301-303). That relief, the court held, was a new trial: "the remedy under Michigan law for preserved structural error due to the deprivation of a defendant's public-trial right is a new trial." *Id.* at 7 n.8.

A single justice dissented. In Justice Zahra's view, possible justifications could be divined from the record, and the remedy if any, should be limited to remand for the trial court to make on-the-record *Waller* findings. See Pet. App. 43-45.

REASONS FOR DENYING THE PETITION

Certiorari should be denied. *First*, the Court lacks jurisdiction. The lower court held that Michigan *state* law compelled the remedy of a new trial, which is an independent and adequate state ground for the judgment. Even as to *Waller*, the judgment below remanded for a new trial, and the state court's decision is therefore not final, making jurisdiction improper under § 1257(a).

Second, beyond the jurisdictional issues, the case does not squarely present the question framed in the petition. The Michigan Supreme Court held not only that the trial court failed to make findings on the record, but also that the trial court could not have made the necessary findings because the reasons given for the closure were not overriding, and a partial closure was reasonable and narrower than a total closure.

Third, even assuming the case presented the question of the proper remedy for failure to make on-the-record *Waller* findings under federal law, there is no disagreement among the lower courts. While some lower courts, following *Waller*'s teaching, have determined that remand for on-the-record findings sometimes is an appropriate remedy for an improper *partial* closure, none has so held with respect to complete courtroom closures like occurred here. See Pet. App. 6-7 & n.7.

The petition significantly overstates the importance of the Court's review. As the absence of any division on the question presented shows, lower courts are not having any difficulty following *Waller*'s standard or ensuring that the needs of testifying complainants are appropriately balanced against the public-trial right.

The Michigan Supreme Court faithfully applied settled law to order remand for a new trial in this case. The petition should be denied.

A. The Court lacks jurisdiction

1. This Court lacks jurisdiction to review decisions of state courts when those decisions rest on "separate, adequate, and independent state grounds." *Michigan* v. *Long*, 463 U.S. 1032, 1033 (1983). "Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide [such] cases." *Id.* at 1040. Where a state court "indicates clearly and expressly that [the decision] is alternatively based on bona fide separate, adequate, and independent grounds," this Court will not review that decision. *Id.* at 1041.

While the lower court in this case relied in part on federal precedent to describe the contours of the public trial right, it also made clear that it was issuing a remedial

ruling grounded expressly in state law. It held that "the remedy *under Michigan law* for preserved structural error due to the deprivation of a defendant's public-trial right is a new trial." Pet. App. 7 n.8 (emphasis added) (citing *Davis*, 983 N.W.2d at 333).

Indeed, "[a]though constitutional standards provide a uniform floor for state law, individual states are free to go above that floor and adopt standards exceeding constitutionally mandated minimums." Jerold H. Israel, *On Recognizing Variations in State Criminal Procedure*, 15 U. Mich. J. L. Reform 466, 467 (1982). The Michigan Supreme Court has frequently construed Michigan's criminal procedural law to be more protective than federal and other states' laws. See, *e.g.*, *People* v. *Tanner*, 853 N.W.2d 653, 672 (Mich. 2014) (observing that "states are free to adopt more protective standards under state law" and holding that the right against self-incrimination in the Michigan Constitution extends beyond that of the Fifth Amendment); *People* v. *Beach*, 418 N.W.2d 861, 867 (Mich. 1988) (explaining that "[t]he lesser included offense instruction scheme developed by the [Michigan] Court is more protective of defendants than a significant number of states and the federal system"); *People* v. *Parks*, 987 N.W. 2d 161, 170 (Mich. 2022) ("in addition to those protections * * * under the Eighth Amendment of the federal Constitution, our state Constitution has historically afforded greater bulwarks against barbaric and inhumane punishments.").

Even if the new-trial remedy ordered by the Michigan courts for violations of the public trial right is broader than the one that this Court might require as a matter of federal law (in this case, it is not), it is nonetheless a valid interpretation of Michigan law by its highest court. This

is an adequate and independent state law ground for the judgment below. For that reason alone, the petition must be denied.

2. For the judgment of a state court to be reviewable by this Court under 28 U.S.C. § 1257(a), it must be "final." Generally, a state-court judgment is final only when "nothing more than a ministerial act remains to be done" on remand. *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 68 (1948); see *Bateman* v. *Arizona*, 429 U.S. 1302, 1306 (1976) (applying the general rule).

The judgment here remands the case for a new trial, which is not a mere "ministerial act." Pet. App. 1; *Republic Natural Gas Co.*, 334 U.S. at 68. The Court thus lacks jurisdiction to entertain the petition under Section 1257(a). Although this Court recognized certain extratextual exceptions to the finality requirement in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), the petition does not explain whether or how any of those exceptions apply in those circumstances. Because the Court's jurisdiction is in question, review should be denied.

B. This case does not present the question posed in the petition

The petition asks this Court to decide the appropriate remedy for the failure to make findings on the record supporting courtroom closure under *Waller*. It frames the question as whether "the failure to articulate the reasons for a courtroom closure, even when there is ample record evidence supporting the closure, automatically mandates a new trial" (Pet. 1-2) or variously as whether "a remand for post-hoc articulation of the *Waller* factors is an appropriate remedy" (*id.* at 3).

But the remedy for a failure to make on-the-record findings is not presented here because the Michigan

Supreme Court held that *Waller* could not have been satisfied even if findings had been made. Pet. App. 3-5 & n.1. The third *Waller* factor requires the trial court to consider—and adopt, if appropriate—reasonable alternatives to closing the proceeding. See *Waller*, 467 U.S. at 48. As the Michigan Supreme Court observed, the trial court below should have considered and ordered a partial closure prohibiting only the complainant's family members from observing. Pet. App. 4 n.1.

Indeed, defense counsel expressly requested that unrelated third parties be able to watch. Mich. Sup. Ct. App. 219a. While the circumstances of the case might have justified exclusion of family members, the Michigan Supreme Court observed, a partial closure would have better balanced that interest with the accused's right to a public trial. The trial court failed to consider this reasonable alternative to a total closure. See Pet. App. 3-4 & n.1.

Lower courts have recognized that partial closures do not implicate the same fairness and secrecy concerns as total closures. Indeed, cases across circuits have permitted tailored partial closures in cases like this by excluding only the defendant's family members. See *United States* v. *Farmer*, 32 F.3d 369, 370-372 (8th Cir. 1994) (upholding removal of defendant's family members during the victim's testimony in a case involving sexual assault); *United States* v. *Sherlock*, 962 F.2d 1349, 1356 (9th Cir. 1989) (same); *Woods* v. *Kuhlmann*, 977 F.2d 74, 76-77 (2d Cir. 1992) (upholding removal of the defendant's family because of the victim's fear stemming from threats they had made against her).

Here, there was nothing in the record to suggest that a partial closure would not have served the cited interests equally well. Pet. App. 3-4 n.1. The lower court thus held

that trial court was wrong not only in its failure to justify the total closure via on-the-record findings, but in its failure to even consider, let alone adopt, a less restrictive alternative to total courtroom closure. The Michigan Supreme Court expressly voiced its "disagree[ment] * * * that a complete courtroom closure during the complainant's testimony was the only reasonable course of action. For example, it may have been reasonable to exclude some, but not all, members of the public during the complainant's testimony." *Ibid.*

Concerning the sufficiency of the interests cited, the lower court also held straightforwardly that "the trial court did not identify an overriding interest." Pet. App. 5. In fact, "the trial court's sole discernable rationale for closure—that some unidentified observing family members may be sequestered as witnesses—lacks specificity and is thus insufficient to support appellate review." *Id.* at 6. Thus, what little the trial court did put on the record was substantively insufficient.

The real question here is thus not whether the Sixth Amendment right to a public trial requires automatic retrial based on the "technicality" (Pet. i) of failing to expressly state the reasons for a complete courtroom closure—it is whether a complete courtroom closure was justified in this case at all. The lower court rightly held it was not.

C. There is no disagreement among lower courts

Review is further unwarranted because the State has not identified a single case in conflict with the decision below. Any differences in outcomes among the cases cited in the petition are attributable to factual differences across them, not any differences in legal rules.

The petition first asserts that a split of authority has emerged among states and the Tenth Circuit case *United States* v. *Galloway*. Pet. 29. That is wrong.

In *Galloway*, the Tenth Circuit considered the remedy for a public trial violation after a district court closed the courtroom "to all but the defendant, the relatives of the complaining witness and defendant, courtroom personnel, attorneys for the parties, and the press" without making *Waller* findings. 937 F.2d 542, 545 (10th Cir. 1991). In the course of ruling that the appropriate remedy in the case was a remand for findings, the Tenth Circuit observed that courts have "developed a more lenient standard for closure orders which only partially exclude the public or are otherwise narrowly tailored to specific needs." *Id.* at 546 (quoting *Davis* v. *Reynolds*, 890 F.2d 1105, 1109 (10th Cir. 1989)). Because the press and the defendant's relatives were allowed to remain in the courtroom, thus constituting a partial closure, the court determined that the appropriate remedy was to remand the case to the district court with directions to supplement the record with *Waller* findings justifying the closure. *Id.* at 547.

Following *Galloway*, the subsequent state cases that the petition cites all fall neatly into this doctrinal divide between partial and complete closures when a trial court fails to make on-the-record findings.

The distinction stems from the fact that "a partial closure does not 'implicate the same secrecy and fairness concerns that a total closure does.'" *Rolfe II*, 851 N.W.2d at 903 (citation omitted). The public trial right is meant to shine a light of transparency into the courtroom, preventing miscarriages of justice and abuses of power. Because that concern can be mitigated by the presence of any members of the public, the exclusion of only some

individuals presents a lesser constitutional incursion than a total courtroom closure. Indeed, this concept is implicit in *Waller*'s third prong, requiring courts to assess reasonable alternatives to totally closing a courtroom. 467 U.S. at 48. Thus, in cases in which a trial court improperly ordered a partial closure without making on-the-record findings, some lower courts have found the strict remedy of a full retrial unnecessary to protect the lesser interests infringed by a mere partial closure.

In *Rolfe II*, for example, the trial court ordered a "partial closure" in which the courtroom remained open to members of the press and the complaining witness's relative. 851 N.W.2d at 903. The Supreme Court of South Dakota "recognized" that "the *Waller* test has been modified by some federal circuits where the courtroom was only partially closed." *Id.* at 902. As the closure at issue in *Rolfe II* was a partial one permitting the complainant's mother and representatives of the media, among others, the court found that a remand to the trial court to make findings was an appropriate remedy. *Id.* at 905.

As for the Minnesota Supreme Court's decision in *State* v. *McRae*, there is likewise no conflict. Although *McRae* suggested in pure dictum that it "might be appropriate" to remand for *Waller* findings in some narrow range of cases, the court ultimately ordered a new trial after "considering all the circumstances" there presented. 494 N.W.2d 252, 260 (Minn. 1992).

The petition states that *Galloway* and *Rolfe II* are in conflict with *State* v. *Cox*, 304 P.3d 327 (Kan. 2013). But *Cox* instead highlights the *absence* of division among the lower courts, explaining precisely the accepted remedial distinction between improper total and improper partial closures. The *Cox* court, discussing *Galloway*, rejected

the state's argument that a "wholesale [courtroom] closure" without any *Waller* findings could be remedied by a post-hoc remand for findings. *Id.* at 333-334. It expressly observed that "*Galloway* did not involve a total closure of the courtroom, and the United States Court of Appeals for the Tenth Circuit specifically drew and relied upon this distinction when it remanded Galloway's case rather than reversing it." *Id.* at 335.

The decision below harmonized these cases in precisely the same way. Pet. App. 7 n.7. Indeed, this distinction is precisely why the parties disputed whether the closure below was partial or total—with the Michigan Supreme Court holding, and the State now accepting, that it was a total courtroom closure. See *id.* at 6-7. No other court has blessed a remand for *Waller* findings to remedy a total courtroom closure in which the trial court did not consider reasonable alternatives or make adequate findings on other elements. The State's own argument below acknowledged as much.

Because every court in the petition would have ordered a retrial in these circumstances, this Court's intervention is unnecessary.

The decision below applied settled Sixth Amendment doctrine to conclude that a retrial was warranted. When the trial court granted the prosecutor's motion to close the courtroom, its reasoning consisted of a brief statement referencing the prosecutor's arguments in favor of closure, the fact that the court was closed during the complainant's preliminary examination, and that family members desiring to hear the testimony would likely be called as witnesses and sequestered anyway. See Pet. App. 2-3.

Analyzing the sparse record, the Michigan Supreme Court found the trial court's record to be deficient on multiple prongs of the *Waller* test. The law (both state and federal) is settled that, in circumstances like these, a new trial is required. The Michigan Supreme Court knew that this was an egregious violation of *Waller*. There is no disagreement among the lower courts on that point.

Waller provides clear guidance to the lower courts on the steps that must be followed before completely closing a courtroom during a criminal trial. The test is not onerous: It requires limited findings on the record, which courts nearly always make as a matter of settled practice in cases like this. And *Weaver* is clear that, if they do not, a "violation of the right to a public trial is a structural error." 582 U.S. at 296. Review is thus unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

Eugene R. Fidell
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511

Steven Helton
Michigan State Appellate
Defender Office
7200 N. Washington Sq.
Lansing, MI 48933

Michael B. Kimberly
Counsel of Record
Paul W. Hughes
Sarah P. Hogarth
Andrew A. Lyons-Berg
McDermott Will & Emery LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
mkimberly@mwe.com

Charles A. Rothfeld
Mayer Brown LLP
1999 K St NW
Washington, DC 20006

Counsel for Respondent