

No. 23-\_\_\_\_\_

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In the  
Supreme Court of the United States

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Anthony Christopher Mendonca,

*Petitioner,*

-v-

United States of America,

*Respondent.*

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On Petition for a Writ of Certiorari to  
The United States Court of Appeals  
For the Second Circuit

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

The Constitution requires “public” criminal trials. U.S. Const. amend. VI. The First Amendment and Sixth Amendment guarantee the community and the defendant that criminal proceedings, including jury selection, will be open and accessible to the public. *Presley v. Georgia*, 558 U.S. 209, 213 (2010) (per curiam); *Waller v. Georgia*, 467 U.S. 39, 44-45 (1984). This openness “enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.” *Press-Enterprise Co. v. Superior Ct. of California, Riverside Cnty.*, 464 U.S. 501, 508 (1984).

The erroneous exclusion of the public from trial is a “structural” error that affects the entire framework of the proceeding and prevents the trial from “reliably serv[ing] its function as a vehicle for determination of guilt or innocence.” *Arizona v. Fulminante*, 499 U.S. 279, 310-11 (1991) (quoting *Rose v. Clark*, 478 U.S. 570, 577-78 (1986)). The questions presented are:

1. Does the plainly erroneous exclusion of the public from jury selection in a criminal trial seriously affect the fairness, integrity, and public reputation of trial, as the First Circuit holds, or not, as the Second, Third, and Ninth Circuits hold?
2. Does a clear and obvious structural error in a criminal trial necessarily affect the fairness, integrity, and public reputation of the trial?

## TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES .....	iii
OPINION AND ORDER BELOW .....	1
JURISDICTION.....	1
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS .....	1
STATEMENT OF THE CASE .....	2
A. Introduction.....	2
B. Arrest and Trial .....	5
C. Appeal.....	8
REASONS FOR GRANTING THE PETITION .....	10
I. The circuits are divided over this important and recurring question of federal law involving the public-trial right, and the interaction between structural errors and plain error review.....	11
II. This case presents an excellent vehicle to address these issues.....	16
III. The Second Circuit's holding is wrong because obvious public- trial-right violations, and other structural errors, seriously affect the fairness, integrity, and public reputation of criminal trials and should be corrected under Rule 52(b).....	17
A. Open criminal trials are deeply rooted in this country's common law history.....	18
B. Open criminal trials are critical to ensuring fairness for the defendant and the legitimacy and public reputation of the criminal justice system.....	19
C. Obvious, non-trivial public-trial-right violations, and other such structural errors, must be corrected under Rule 52(b).....	22
CONCLUSION.....	23

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>Cases</b>	
<i>Arizona v. Fulminante</i> , 499 U.S. 279 (1991) .....	i, 3
<i>Globe Newspaper Co. v. Superior Ct. for Norfolk Cnty.</i> , 457 U.S. 596 (1982) .....	2, 19
<i>Payne v. Stansberry</i> , 760 F.3d 10 (D.C. Cir. 2014) .....	16
<i>People v. Jones</i> , 391 N.E.2d 1335 (1979).....	22
<i>Presley v. Georgia</i> , 558 U.S. 209 (2010) .....	i, 3, 21
<i>Press-Enterprise Co. v. Superior Ct. of California, Riverside Cnty.</i> , 464 U.S. 501 (1984) .....	<i>passim</i>
<i>Richmond Newspapers, Inc. v. Virginia</i> , 448 U.S. 555 (1980) .....	18
<i>Rosales-Mireles v. United States</i> , 138 S. Ct. 1897 (2018) .....	22-23
<i>Rose v. Clark</i> , 478 U.S. 570 (1986) .....	i
<i>United States v. Atkinson</i> , 297 U.S. 157 (1936) .....	3
<i>United States v. Becerra</i> , 939 F.3d 995 (9th Cir. 2019) .....	14
<i>United States v. Cojab</i> , 996 F.2d 1404 (2d Cir. 1993) .....	20
<i>United States v. Gonzalez-Lopez</i> , 548 U.S. 140 (2006) .....	3
<i>United States v. Hougen</i> , 76 F.4th 805 (9th Cir. 2023) .....	4, 13-14
<i>United States v. Negron-Sostre</i> , 790 F.3d 295 (1st Cir. 2015) .....	<i>passim</i>
<i>United States v. Olano</i> , 507 U.S. 725 (1993) .....	3

<i>United States v. Ramirez-Castillo,</i> 748 F.3d 205 (4th Cir. 2014) .....	16
<i>United States v. Ramirez-Ramirez,</i> 45 F.4th 1103 (9th Cir. 2022) .....	14-16
<i>United States v. Williams,</i> 974 F.3d 320 (3d Cir. 2020) .....	<i>passim</i>
<i>Waller v. Georgia,</i> 467 U.S. 39 (1984) .....	<i>passim</i>
<i>Weaver v. Massachusetts,</i> 582 U.S. 286 (2017) .....	3

## **Statutes**

18 U.S.C. § 3231 .....	1
18 U.S.C. § 2252 .....	6
28 U.S.C. § 1254 .....	1
28 U.S.C. § 1291 .....	1

## **Rules**

Fed. R. Crim. P. 52 .....	<i>passim</i>
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## **Other Authorities**

Jocelyn Simonson, <i>The Criminal Court Audience in a Post-Trial World</i> , 127 Harv. L. Rev. 2173 (2014) .....	20
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## **OPINION AND ORDER BELOW**

The Second Circuit's opinion is available at 88 F.4th 144 and appended at A.1.<sup>1</sup>

### **JURISDICTION**

The Second Circuit issued its decision and entered judgment on December 6, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1). The Second Circuit had jurisdiction under 28 U.S.C. § 1291. The district court had jurisdiction under 18 U.S.C. § 3231.

### **RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

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<sup>1</sup> The appendix to this petition is cited "A."

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Fed. R. Crim. P. 52.

## **STATEMENT OF THE CASE**

### **A. Introduction**

The Court should resolve a circuit split regarding whether the plainly erroneous, non-trivial exclusion of the public from a criminal trial seriously affects the fairness, integrity, and public reputation of the trial, meaning that the error should be noticed and corrected under Federal Rule of Criminal Procedure 52(b). More generally, the Court should clarify when unobjected-to structural errors in criminal trials should be corrected under Rule 52(b).

The Sixth Amendment guarantees that “the accused shall enjoy the right to a speedy and public trial.” U.S. amend. VI; *see also, e.g., Waller v. Georgia*, 467 U.S. 39, 44-46 (1984). The First Amendment also protects the right of the press and the public to access criminal trials, and this Court has long recognized the importance of public trials for both the accused and the broader community. *See, e.g., Globe Newspaper Co. v. Superior Ct. for Norfolk Cnty.*, 457 U.S. 596, 603-06 (1982).

The public trial right extends to the voir dire of prospective jurors. *Presley v. Georgia*, 558 U.S. 209, 212-13 (2010) (per curiam). The improper closure of trial to the public is a “structural” error, meaning that the error is not subject to harmless error review and “entitl[es] the defendant to automatic reversal” on direct review when an objection to the closure was made at trial. *See Weaver v. Massachusetts*, 582 U.S. 286, 290 (2017); *Arizona v. Fulminante*, 499 U.S. 279, 310-11 (1991). This is because the specific effects of excluding the public from trial, while difficult to quantify, are nonetheless significant: structural errors affect the entire “framework within which the trial proceeds,” infecting “the entire trial” and ultimately undermining the reliability of the proceeding. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 148-50 (2006); *Fulminante*, 499 U.S. at 310-11.

But federal appellate courts are divided over how to treat this structural error when no party makes a timely objection at trial and the error is reviewed under Federal Rule of Criminal Procedure 52(b). In *United States v. Olano*, this Court held that appellate courts should exercise their discretion to correct an error under Rule 52(b) if the error “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.” 507 U.S. 725, 736 (1993) (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)).

Applying this standard, the First Circuit holds that public-trial-right violations impact the fairness, integrity, and public reputation of the

proceedings, and therefore warrant a new trial. *See United States v. Negron-Sostre*, 790 F.3d 295, 305 (1st Cir. 2015).

In contrast, the Third and Ninth Circuits hold the opposite. *See United States v. Williams*, 974 F.3d 320, 347 (3d Cir. 2020); *United States v. Hougen*, 76 F.4th 805, 811 (9th Cir. 2023).

Here the Second Circuit joined the latter two circuits, deepening this split, by holding that a non-trivial, plainly erroneous exclusion of the public from jury selection did not affect the fairness, integrity, or public reputation of petitioner's trial.

The Court should address this division among the circuits and should hold that an obvious public-trial-right violation affects the fairness, integrity, and public reputation of the proceeding, and that such clear structural errors should be noticed and corrected under Rule 52(b).

This case presents a clean opportunity to consider these issues. The Second Circuit explicitly held that petitioner's right to public voir dire had been violated, and that this violation was not trivial. A.18-21. But the circuit declined to notice this error because it opined that the error did not affect the fairness, integrity, or public reputation of the proceedings. A.23-24. The Court should grant this petition and reverse.

## **B. Arrest and Trial**

Petitioner Anthony Christopher Mendonca was convicted of possession of child pornography for files found on a disconnected hard drive in his home. Mendonca, then 44-years old, lived with his wife in Brooklyn. He had no prior criminal history. He and his wife both worked in the IT field, and Mendonca occasionally did IT work from home, fixing or upgrading others' computers. He also collected and tried to rebuild old devices.

In May 2018, federal agents received a tip from another law enforcement agency indicating that an online account affiliated with a particular Internet Protocol (IP) address was sharing known child pornography images through peer-to-peer software. Agents linked this IP address to Mendonca's Brooklyn address and obtained a search warrant for his home. A.3.

Pursuant to this warrant, on November 20, 2018, agents searched Mendonca's house. During this search, they found over 140 electronic devices, including multiple desktop computers, laptops, detached hard drives, thumb drives, cell phones, tablets, and decades-old "collectible" computers. A.4. Some of these devices belonged to Mendonca, some to his wife, and others were devices Mendonca was working on. Most were located in the house's basement, where Mendonca had a makeshift office. In his desk there, agents found one drawer full of hard drives. One of these drives—which had no identifying

information or other files or programs—contained thousands of files of child pornography.

After finding this hard drive, officers interrogated Mendonca in his home and at the local police precinct. At the precinct, officers subjected Mendonca to a polygraph examination, which they told him he failed. They asserted this failed polygraph proved he had both looked at child pornography and that he had committed “hands on” abuse of children. Mendonca repeatedly denied looking at child pornography, or committing any other crime, and said that he did not know a hard drive in his home contained child pornography. But over hours of questioning, agents wore him down. Among other tactics, an officer threatened that if Mendonca did not admit that the child pornography was his, the officer would conclude Mendonca had committed more serious crimes and tell the prosecutor as much: as the officer put it to Mendonca, “should my recommendation to the district attorney be that he’s an asshole who probably raped and murdered a bunch of kids?” The officer also threatened to arrest Mendonca’s wife if he did not confess.

After roughly six hours with officers, Mendonca made inculpatory statements indicating that he had viewed and downloaded child pornography.

Mendonca was indicted on one count of possession of child pornography, in violation of 18 U.S.C. §§ 2252(a)(4)(B) and 2252(b)(2), and tried before a federal jury in June 2021. A.5. The government’s evidence against him

included primarily the child pornography files found on the hard drive and Mendonca's subsequent inculpatory statements.

Mendonca's trial took place over a year after the start of the COVID-19 pandemic, but the Brooklyn federal court was still operating under modified procedures related to the pandemic. These procedures affected how the judge conducted jury selection. To allow for social distancing among prospective jurors, the judge questioned jurors in two groups, conducted questioning in two separate courtrooms, and physically excluded all members of the public from the courtrooms where voir dire took place. To give the public contemporaneous access to the proceedings, the court set up a livestream to a third courtroom, where the public could watch. A.9-11. Pretrial, the judge assured the parties that this livestream would allow the public to witness everything that went on during jury selection. A.11.

In fact, however, once jury selection began, the judge conducting voir dire intentionally disabled the livestream for most of her questioning of the prospective jurors, entirely closing the proceeding to the public. A.11-14. The judge did not explain why she was doing this or provide any justification for this total courtroom closure. The judge informed the parties and jurors that she was disabling the livestream, but the parties neglected to object at the time. A.14.

Jury selection took one day. The trial itself took less than two days. The government's evidence included agent testimony about the search of Mendonca's home, his electronics, and the hard drive containing the child pornography. The government also offered Mendonca's inculpatory statements and images of child pornography.<sup>2</sup> The defense did not call any witnesses.

Mendonca was convicted at trial. On April 6, 2022, the district court sentenced him to 30 months in prison, followed by five years of supervised release. A.8. Mendonca is currently serving his prison sentence.

### **C. Appeal**

On appeal, Mendonca argued that he should be granted a new trial based on two errors: first, his inculpatory custodial statements were involuntary and should have been excluded; and second, the trial court violated his constitutional rights by closing most of his jury selection to the public. A.2-3. Both claims were subject to Federal Rule of Criminal Procedure 52(b) because they were not properly preserved by Mendonca's trial counsel.

By order dated December 6, 2023, the Second Circuit affirmed Mendonca's conviction. A.1. With respect to his statements, the circuit said that it was "troubled by some of the police tactics employed in this case" and

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<sup>2</sup> Mendonca was charged with possessing images of previously identified child pornography found on the internet. There was no allegation that he had solicited or created any images.

that the case “present[ed] a troubling blend of ingredients that, at the very least, imperil voluntariness,” but that “Mendonca failed to preserve the issue below.” A.30, 58.

The circuit similarly relied on Rule 52(b) to resolve Mendonca’s public trial claim. To start, the circuit held that the trial court had committed a clear and obvious constitutional error: per the circuit, “the district court demonstrably erred when it decided not to livestream large portions of the jury selection process to the separate courtroom reserved for the public.” A.18-19. This total exclusion of the public from most of jury selection, without any justification, violated this Court’s “long-standing precedents,” including *Waller v. Georgia*, 467 U.S. 39 (1984), and *Press-Enterprise Co. v. Superior Ct. of California, Riverside Cnty.*, 464 U.S. 501, 508 (1984). A.21. The circuit also rejected the government’s argument that this violation could be deemed “trivial.” A.19-20.

Turning to the next portion of the plain error standard, the circuit found that, even assuming this structural constitutional error affected Mendonca’s substantial rights,<sup>3</sup> the circuit would not notice and correct the error because

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<sup>3</sup> The circuit recognized that the exclusion of the public from a criminal trial is a structural error and that cases have suggested that structural errors always affect a defendant’s substantial rights and thereby satisfy that portion of the plain error test. A.21-23. The circuit did not endorse this position but proceeded to discuss the remainder of the plain error standard.

it did not seriously affect the fairness, integrity, or public reputation of the trial. A.23. The circuit reasoned that the trial court was operating under logistical constraints caused by the pandemic and that the judge might have accepted an alternative to closure if the parties had presented one (but, since the defendant failed to object at trial, he did not). As a result, the circuit declined to act on the error and upheld Mendonca's conviction. A.25-29.

## **REASONS FOR GRANTING THE PETITION**

The Court should grant this petition for three reasons.

First, the petition presents an issue over which the circuits are divided, involving an important and recurring question of federal law, as well as an unsettled question regarding the interaction between structural errors and Rule 52(b) plain error review.

Second, the case is an excellent vehicle to address these issues because the questions are cleanly presented.

Third and finally, the Second Circuit's holding is wrong: plainly erroneous exclusions of the public from trial undermine the fairness and integrity of that proceeding both from the perspective of the defendant and from the perspective of the public. Obvious, non-trivial public trial right violations should be noticed and corrected by an appellate court, even when they are not properly objected-to at trial. More generally, under Rule 52(b),

circuit courts should notice and correct plain and obvious structural errors in criminal trials.

**I. The circuits are divided over this important and recurring question of federal law involving the public-trial right, and the interaction between structural errors and plain error review.**

While it is well established that a violation of the defendant's constitutional right to a public trial is a structural error, the circuits are divided over whether this error warrants reversal under Federal Rule of Criminal Procedure 52(b)'s plain error standard. The First Circuit holds that it does, while the Third, Ninth, and now Second Circuits hold that it does not.

The First Circuit's decision in *United States v. Negron-Sostre*, 790 F.3d 295, 299 (1st Cir. 2015), involved the exclusion of the public from jury selection in a multidefendant trial that spanned three months. No party objected to this exclusion before the trial court. *Id.* at 304.

On appeal, the First Circuit found that there had been a complete, unjustified courtroom closure and that this constituted a structural error. *Id.* at 304-05. But because no objection was raised below, the circuit applied plain error review. *Id.* The circuit readily found that the error affected the defendants' substantial rights: "Our precedent is unequivocal; structural error in the form of a denial of the public trial right prejudices a defendant notwithstanding that the prejudice may be difficult to detect." *Id.* at 305.

The First Circuit similarly found that this structural error affected the fairness, integrity, or public reputation of the trial. *Id.* at 306. According to the circuit, because this was a structural error, it “call[ed] into question the fundamental fairness of [the] trial.’ ... ‘[S]tructural error transcends the criminal process by depriving a defendant of those basic protections [without which] a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.’ ... Indeed, given the importance of the public trial right, it would be hard to see how the public reputation and integrity of the proceedings would not be compromised in this case.” *Id.* at 306 (internal citations omitted).

Considering substantially similar facts, the Third Circuit reached the opposite conclusion. In *United States v. Williams*, 974 F.3d 320, 337 (3d Cir. 2020), several defendants were charged with RICO violations and drug offenses. During trial, the court *sua sponte* closed jury selection to the public due to a “concern with ‘courtroom capacity limitations.’” *Id.* at 337. Neither party objected. *Id.*

On appeal, the Third Circuit considered this error under Rule 52(b). The circuit opined that the fact that this courtroom closure was a structural error had “no independent significance” to its Rule 52(b) analysis. *Id.* at 341. The circuit weighed what it considered to be the interests underlying the violated

public trial right against the costs of correcting or not correcting the error, concluding that it would not correct the error because it could not find that the closure seriously affected the fairness, integrity, or public reputation of the proceedings. *Id.* at 347-48.

One member of the Third Circuit panel, the Honorable L. Felipe Restrepo, dissented from this holding. Judge Restrepo's opinion detailed the "deep roots the right to a public trial has in our history and its critical importance to the functioning of our criminal justice system." *Id.* at 380. The judge recognized that "[a]n open courtroom during jury selection is fundamental to protecting defendants' right to a jury free from prejudice and ensuring public confidence in the administration of justice." *Id.* at 383. The judge rejected the "cost-benefit analysis" undertaken by the majority as "foreign and detrimental to our structural error jurisprudence," since erroneously excluding the public "undermine[d] the structural integrity of the criminal tribunal itself." *Id.* at 385-86. The judge concluded that "[a]s the reviewing court, it is imperative that we correct the District Court's structural error because it undermines the integrity and public reputation of criminal proceedings that resulted in Appellants' convictions." *Id.* at 385.

Subsequently, in *United States v. Hougen*, 76 F.4th 805, 811 (9th Cir. 2023), the Ninth Circuit joined the Third Circuit in holding that the erroneous exclusion of the public from voir dire did not affect the fairness, integrity, or

public reputation of trial. *Hougen* involved a partial closure of voir dire, where the public was physically excluded from jury selection but could access a contemporaneous audio broadcast. *Id.* at 808. The parties did not object to this procedure. *Id.*

The Ninth Circuit held the trial court made a clearly erroneous courtroom closure. But, like the Third Circuit, the Ninth Circuit concluded that it would not correct this error because the closure did not affect the fairness, integrity, or public reputation of the proceedings. *Id.* at 811.

*Hougen* appeared to break with earlier, but still recent Ninth Circuit precedents holding that clear structural errors necessarily affect the fairness, integrity, and public reputation of criminal proceedings. *See United States v. Ramirez-Ramirez*, 45 F.4th 1103, 1109 (9th Cir. 2022) (holding structural errors “necessarily ‘affect[] substantive rights’ and ‘undermine[] the fairness of a criminal proceeding as a whole,’” meaning that “they satisfy the third and fourth prongs of plain error review”) (citation omitted); *United States v. Becerra*, 939 F.3d 995, 1005-06 (9th Cir. 2019) (finding that the reasoning that “justifies categorizing this error as structural” shows why the error seriously affects the fairness, integrity, or public reputation of the proceeding).

Particularly, in *United States v. Ramirez-Ramirez*, 45 F.4th at 1110, the Ninth Circuit held that the lower court violated the defendant’s Sixth Amendment right to a public trial by making only written findings of guilt

following a bench trial, rather than announcing the verdict in a public proceeding. The circuit stated that since the “violation of the public trial right is a structural error,” “[t]he third and fourth prongs of plain error review are therefore satisfied.” *Id.* at 1110.

Finally and most recently, in petitioner’s case the Second Circuit agreed with the Third and Ninth Circuits in holding that a violation of the constitutional right to public voir dire did not affect the fairness, integrity, or public reputation of the proceeding. As described above, the circuit found that most of petitioner’s jury selection was entirely—erroneously—closed to the public. This was a clear, obvious, non-trivial violation of petitioner’s Sixth Amendment right and a structural error. Nonetheless, under Rule 52(b), the circuit declined to order a new trial because it opined that the error did not affect the fairness, integrity, or public reputation of the proceeding.

The circuits’ specific dispute as to how to treat public-trial-right violations on plain error review is part of a larger circuit division regarding how to treat structural errors on plain error review. Some circuits, as the Second Circuit did here, conclude that the fact that an error is “structural” is ultimately irrelevant to the plain error analysis. *See A.25-29* (deciding error did not seriously affect the fairness or integrity of trial without regard to structural nature of the error); *Williams*, 974 F.3d at 341 (holding structural nature of error has “no independent significance” for plain error standard).

In contrast, other courts hold that the structural nature of an error is significant for purposes of plain error review because it shows that the error necessarily affects a defendant's substantial rights and affects the overall fairness, integrity, and public reputation of the proceeding. *See, e.g., Ramirez-Ramirez*, 45 F.4th at 1109 ("Because structural errors necessarily 'affect[] substantive rights' and 'undermine[] the fairness of a criminal proceeding as a whole,' ... they satisfy the third and fourth prongs of plain error review ....") (citations omitted); *Negrón-Sostre*, 790 F.3d at 305-06 (emphasizing structural nature of the error in holding that error affected substantial rights and the fairness, integrity, and reputation of trial); *United States v. Ramirez-Castillo*, 748 F.3d 205, 215-17 (4th Cir. 2014) (holding structural error necessarily affects a defendant's substantial rights and should be corrected under Rule 52(b)); *Payne v. Stansberry*, 760 F.3d 10, 15 (D.C. Cir. 2014) (opining that finding error "structural" would "go a significant way towards establishing the last two prongs of the plain error inquiry" since such errors "will be deemed" to have affected defendant's substantial rights and are "likely to have an effect on the fairness, integrity or public reputation of judicial proceedings").

## **II. This case presents an excellent vehicle to address these issues.**

The circuits are divided over whether a clear and obvious public-trial-right violation affects the fairness, integrity, and public reputation of proceedings, meaning that it must be corrected under Rule 52(b). More

generally, circuit decisions conflict over whether the structural nature of an error is significant or material to the Rule 52(b) analysis.

This case is a clean opportunity to resolve this circuit split and to address how Rule 52(b) applies to obvious structural errors. The Second Circuit found a clear and obvious violation of petitioner's right to a public trial, and this is a well-established structural error. The circuit also held that this was a non-trivial error.

Further, the circuit's rejection of petitioner's public trial claim squarely relied on the Rule 52(b) standard and a ruling that this structural error did not seriously affect the fairness, integrity, or public reputation of the proceedings.

**III. The Second Circuit's holding is wrong because obvious public-trial-right violations, and other structural errors, seriously affect the fairness, integrity, and public reputation of criminal trials and should be corrected under Rule 52(b).**

Finally, the Court should grant this petition because the Second Circuit's holding is wrong. Clear and obvious violations of the public-trial right seriously affect the fairness, integrity, and public reputation of criminal trials and therefore must be corrected under plain error review. More broadly, clear structural errors necessarily affect the fairness, integrity, and reputation of a criminal trial and should be corrected under Rule 52(b).

**A. Open criminal trials are deeply rooted in this country’s common law history.**

Public proceedings are a cornerstone of the American criminal justice system, protected by both the First and Sixth Amendments, and firmly established in this country’s common law heritage. “The roots of open trials reach back to the days before the Norman Conquest when cases in England were brought before ‘moots’ a town meeting kind of body such as the local court of the hundred or the county court. Attendance was virtually compulsory on the part of the freemen of the community ....” *Press-Enterprise Co. v. Superior Ct. of California, Riverside Cnty.*, 464 U.S. 501, 505 (1984). These “moots” ultimately evolved into the English jury. *Id.* at 505-07. And as early as the sixteenth century, jurors were selected “openlie in the presence of the Judges, the Justices, the enquest, the prisoner, *and so many as will or can come so neare as to heare it.*” *Id.* at 507 (quoting Sir Thomas Smith, *De Republica Anglorum* 96 (Alston ed. 1906)).

“The presumptive openness of the jury selection process in England ... carried over into proceedings in colonial America.” *Id.* at 508. Many of the colonies enacted laws requiring public trials and jury selection. *See id.*; *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 567-68 (1980). The “Bill of Rights was enacted against [this] backdrop of the long history of trials being presumptively open.” *Richmond Newspapers, Inc.*, 448 U.S. at 575.

In short, “since the development of trial by jury,” both the trial itself and the process of selecting jurors “has presumptively been a public process with exceptions only for good cause shown.” *Press-Enterprise Co.*, 464 U.S. at 505.

**B. Open criminal trials are critical to ensuring fairness for the defendant and the legitimacy and public reputation of the criminal justice system.**

In modern times, this Court has repeatedly recognized the importance of public access to criminal trials, including during jury selection: “[T]he right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole. Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole. Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in 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. for Norfolk Cnty.*, 457 U.S. 596, 606 (1982).

From the defendant’s perspective, a public trial is important to ensure the fairness and accuracy of the proceeding. “Openness in court proceedings not only gets to the truth more readily, but also results in all those connected with the trial—parties, counsel, witnesses, jurors and judges—performing

their functions more conscientiously.” *United States v. Cojab*, 996 F.2d 1404, 1407 (2d Cir. 1993). The “presence of interested spectators may keep [a defendant’s] triers keenly alive to a sense of their responsibility and to the importance of their functions,” helping ensure that the judge, prosecutor, and jurors “carry out their duties responsibly.” *Waller v. Georgia*, 467 U.S. 39, 46 (1984); *see also* Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 Harv. L. Rev. 2173, 2177, 2184 (2014) (describing how “audiences affect the behavior of government actors inside the courtroom,” reminding “the judge and the prosecutor that they have a responsibility to the public to ensure the fairness of the proceedings”).

Public proceedings also “encourage[] witnesses to come forward and discourage[] perjury,” *Waller*, 467 U.S. at 46, including perjury by prospective jurors during voir dire, *see Negron-Sostre*, 790 F.3d at 306 (finding closed voir dire makes jurors less likely to be “forthcoming about biases and past experiences”); *Williams*, 974 F.3d at 384 (Restrepo, J., dissenting) (“[p]ublic jury selection proceedings impact the way in which potential jurors respond to questions about their past experiences”).

It is imperative that prospective jurors provide complete and truthful answers during voir dire because jury selection “is the primary means by which a court may enforce a defendant’s right to be tried by a jury free from ethnic, racial, or political prejudice ... or predisposition about the defendant’s

culpability.” *Negron-Sostre*, 790 F.3d at 301 (citation omitted). In this way, “open voir dire is key to ensure that unprejudiced jurors are ultimately selected to serve on juries” and to protecting a defendant’s right to be tried by an impartial, unbiased jury. *Williams*, 974 F.3d at 384 (Restrepo, J., dissenting).

From the public’s perspective, open criminal proceedings help assure the public that “the law is being enforced and the criminal justice system is functioning,” in turn “vindicat[ing] the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct ....” *Press-Enterprise*, 464 U.S. at 509. “Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.” *Id.* at 508. In contrast, closed proceedings “frustrate the broad public interest.” *Id.* at 509.

The public-trial right is unique in that it resides both with the defendant and with the larger community. As a result, the right exists regardless of whether any party asserts it (and, indeed, even when the parties themselves seek to close the proceedings). *See Presley*, 558 U.S. at 214-15. This is why trial judges have a special obligation to safeguard the openness of proceedings, and “take every reasonable measure to accommodate public attendance,” including by proposing alternatives to any closure even if none are suggested by the parties. *See Presley*, 558 U.S. at 214-15.

This is also why it is “particularly problematic”—and important for appellate courts to correct—when trial judges themselves initiate improper closures. *See Williams*, 974 F.3d at 385 (Restrepo, J., dissenting).

The importance of the public-trial right, both to an individual defendant and systemically; the intrinsic harmfulness of violating this right; and the difficulty of quantifying the effects of any particular violation, are why this Court has categorized public-trial-right violations as structural errors: courtroom closures cause “great, though intangible, societal loss.” *Waller*, 467 U.S. at 49 n.9 (quoting *People v. Jones*, 391 N.E.2d 1335, 1340 (1979)).

**C. Obvious, non-trivial public-trial-right violations, and other such structural errors, must be corrected under Rule 52(b).**

Following the persuasive reasoning of the First Circuit, and Judge Restrepo’s dissent in the Third Circuit, the Court should hold that obvious, non-trivial violations of the public-trial right necessarily affect the fairness, integrity, and public reputation of that trial, meaning that they must be corrected under Rule 52(b). As described in the preceding section, such structural errors undermine the fairness and reliability of the trial, as well as the public legitimacy and reputation of the proceedings. Like the type of Sentencing Guidelines error addressed by this Court in *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1907 (2018), a public trial right violation is “precisely the type of error that ordinarily warrants relief under Rule 52(b).”

*Rosales-Mireles* presents a particularly apt analogy because, just as a trial judge has an independent obligation to accurately calculate the Sentencing Guidelines, *id.* at 1904, a trial judge has an independent obligation to ensure an open courtroom. This means that any error “ultimately result[s] from judicial error,” which “particularly undermines the fairness, integrity, or public reputation of judicial proceedings.” *Id.* at 1908.

More broadly, as at least the First and Fourth Circuits have recognized, most obvious structural errors generally undermine the fairness, integrity, and public reputation of a criminal trial. At the least, the structural nature of an error should be a significant factor in a reviewing court’s Rule 52(b) analysis.

## CONCLUSION

For these reasons, the Court should grant this petition and reverse the decision of the Second Circuit.

Respectfully submitted,

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