No. 23-6648

In the
Supreme Court of the United States

Anthony Christopher Mendonca,

Petitioner,

-v-

United States of America,

Respondent.

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

REPLY BRIEF FOR PETITIONER

Sarah Baumgartel
Counsel of Record
Federal Defenders of New York, Inc.
Appeals Bureau
52 Duane Street, 10th Floor
New York, New York 10007
(212) 417-8772
Sarah_Baumgartel@fd.org

Counsel for Petitioner

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The questions presented by this petition are (i) whether the plainly erroneous exclusion of the public from a criminal trial seriously affects the fairness, integrity, and public reputation of the trial for purposes of Federal Rule of Criminal Procedure 52(b); and (ii) whether clear and obvious structural errors necessarily affect the fairness, integrity, and public reputation of a trial.

This Court has not previously decided these questions. These questions have divided the circuit courts.[1] P 11-16. And this petition presents a clean opportunity to review the questions. P 17. The Court should grant certiorari.

I. The Court has not previously decided the questions presented.

The government asserts that the Court should decline review in this case, GR 8, but the government's arguments are unpersuasive.

First, the government claims that the Second Circuit's decision here, as well as the Third Circuit's decision in *United States v. Williams*, 974 F.3d 320 (3d Cir. 2020), are consistent with this Court's precedents because the Court has previously held that structural constitutional errors do not necessarily affect the fairness, integrity, or public reputation of a criminal trial. *See* GR 15. For this proposition, the government cites *Johnson v. United States*, 520 U.S. 461 (1997), and *United States v. Cotton*, 535 U.S. 625 (2002). GR 15.

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[1] Anthony Mendonca's petition for certiorari is cited "P." The petition's appendix is cited "A." The government's April 2024 response is cited "GR."

But neither *Johnson* nor *Cotton* involved a structural error. *Johnson* concerned a trial court's failure to charge the jury regarding the materiality element of a perjury offense. *See* 520 U.S. at 463. *Cotton* involved the government's failure to allege the quantity of drugs in an indictment, in violation of *Apprendi v. New Jersey*. *See* 535 U.S. at 628. Neither error is structural. *See, e.g.*, *Neder v. United States*, 527 U.S. 1, 8-9 (1999) (jury instruction's omission of element is not structural error and is subject to harmless-error review on direct appeal); *Coleman v. United States*, 329 F.3d 77, 89 (2d Cir. 2003) (*Apprendi* errors are not structural).

As relevant here, *Johnson* did hold that appellate courts should apply Rule 52(b)'s plain error standard when reviewing all unpreserved errors, even if the error could be characterized as structural. *See* 520 U.S. at 466. But petitioner does not dispute that proposition. Instead, this petition concerns *how* to evaluate acknowledged structural errors under Rule 52(b), a question *Johnson* did not reach.

Weaver v. Massachusetts, 582 U.S. 286 (2017), also cited by the government, GR 12-13, is similarly inapposite. *Weaver* concerned the different question of the standard for granting a habeas petition based on a claim under *Strickland v. Washington*, 466 U.S. 668 (1984), that a defendant's trial counsel was constitutionally ineffective for failing to object to an improper courtroom closure. *See Weaver*, 582 U.S. at 299-300. In *Weaver*, this Court confirmed that,

to prevail on a *Strickland* claim, the defendant had to show that his counsel's failure to object prejudiced him. *See id.* at 301.

Weaver did not speak to how appellate courts should evaluate public-trial violations on direct review, or outside the *Strickland* framework. *See Weaver*, 582 U.S. at 302 (distinguishing standards for collateral versus direct review, emphasizing that the "systemic costs of remedying the error" are diminished on direct review). Nor did *Weaver* broadly hold "that not every public-trial violation renders the trial 'fundamentally unfair,'" GR 13. Instead, *Weaver* more narrowly affirmed that a defendant must always show individualized prejudice from his counsel's deficient performance to gain relief under *Strickland*. *See Weaver*, 582 U.S. at 306 (Thomas, J., concurring) (noting that majority opinion's references to "fundamental unfairness" are not "necessary to its result," since this is not the *Strickland* standard); *id.* at 308-09 (Alito, J., concurring) (explaining that "structural" nature of error is irrelevant to determining *Strickland* prejudice because *Strickland*'s specific inquiry is whether counsel's performance harmed the defendant).[2]

[2] To the extent *Weaver* is relevant to any aspect of Rule 52(b) review, it would be relevant to the third prong: an error's effect on the defendant's "substantial rights." *See, e.g.*, *United States v. Dominguez-Benitez*, 542 U.S. 74, 81-82 (2004) (analogizing *Strickland* prejudice to affecting substantial rights).

II. These questions have divided the circuits.

The actual questions presented here—involving how appellate courts should consider structural public-trial right violations on direct review—have divided the circuits. As Mendonca's petition explains, circuit courts have reached opposite conclusions on these questions when faced with substantially similar facts. P 11-16. For this reason, the government's attempt to cast these divisions as "intensely fact-bound," GR 8, or case-specific, GR 18, fails.

Compare *United States v. Negron-Sostre*, 790 F.3d 295, 299 (1st Cir. 2015), with *United States v. Williams*, 974 F.3d 320, 337 (3d Cir. 2020). In both cases, trial courts excluded members of the public from jury selection based on courtroom capacity issues, but with no further justification. *See Negron-Sostre*, 790 F.3d at 302, 305; *Williams*, 974 F.3d at 337. Both cases involved multiweek, multidefendant trials. *See Negron-Sostre*, 790 F.3d at 300; *Williams*, 974 F.3d at 335. No party made a timely objection to the closure of voir dire, and the trials were otherwise generally open to the public. *See Negron-Sostre*, 790 F.3d at 305; *Williams*, 974 F.3d at 337-38, 346-47. Both closures were deemed clear errors. And in both cases, there was no "case-specific" showing, GR 14, that the errors caused individualized prejudice. Yet in one case the First Circuit held that the closure affected the fairness, integrity, and public reputation of the trial, while in the other case the Third

Circuit held that it did not. *See Negron-Sostre*, 790 F.3d at 305-06; *Williams*, 974 F.3d at 345.

These divergent outcomes are not the product of different facts—they are the product of a legal disagreement among the circuits as to how the structural nature of an error should factor into plain-error review.[3] *Compare Negron-Sostre*, 790 F.3d at 305-06 ("[G]iven 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.") *with Williams*, 974 F.3d at 341 ("The fact that a type of error has been deemed 'structural' has no independent significance for applying *Olano*'s fourth prong."); *see also* P 15-16; A.25-29 (Lynch, J., writing for circuit majority) (disregarding structural nature of error in deciding error did not affect the fairness, public reputation, and integrity of petitioner's trial); A.66-67 (Lohier, J., concurring) (disagreeing with majority that structural nature of error was irrelevant for plain-error review and opining that a court should "presume" that structural errors seriously affect

[3] Contra the government, *Negron-Sostre* has not been abrogated or repudiated by the First Circuit. *See* GR 18-19. The government cites *Owens v. United States*, 483 F.3d 48 (1st Cir. 2007), and *Lassend v. United States*, 898 F.3d 115 (1st Cir. 2018), for this proposition. But, like *Weaver*, *Owens* and *Lassend* involved habeas motions raising *Strickland* claims. Neither case involved direct, plain-error review.

the fairness, integrity, and public reputation of proceedings). That is the legal issue this Court should decide.

III. This petition is a good vehicle to address the questions.

Finally, this petition presents a good vehicle to address these legal questions. P 16-17. The government highlights that petitioner's trial was conducted during the COVID-19 pandemic. *See* GR I, 12. But that fact is irrelevant to the legal issues. The circuit (and petitioner) recognized that the pandemic required logistical adjustments at trial.[4] A.18-19. Nonetheless, the circuit held that the trial court's complete exclusion of the public from most of voir dire could not be justified based on the pandemic: the circuit found that the trial judge initiated an unjustified courtroom closure, and that this was a clear error. A.19-21. Further, the circuit's decision to deny relief for this error rested exclusively on the final prong of plain-error review, including its determination that the structural nature of the error was not relevant to deciding whether the error affected the fairness, integrity, or public reputation of the trial. A.23.

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[4] Nor are the logistical issues caused by the pandemic materially different than the logistical issues that often cause judges to close courtrooms. Because of the pandemic, the trial court sought to limit the number of people in the courtroom and allow for social distancing. In other words, the issue was courtroom capacity. Limited courtroom capacity is a justification frequently invoked to improperly exclude the public from court. *See, e.g.*, *Weaver*, 582 U.S. 290; *Williams,* 974 F.3d at 337.

* * *

For the reasons detailed in the original petition and this reply, the plainly erroneous exclusion of the public from jury selection undermined the fundamental fairness and public reputation of petitioner's trial, and this error should have been noticed and corrected by the appellate court. Moreover, the Second Circuit's decision deepens a division among the circuits as to how to evaluate structural constitutional errors on plain-error review. This Court should grant certiorari.

Respectfully submitted,

By: __/s/ Sarah Baumgartel_____
Sarah Baumgartel
Federal Defenders of New York, Inc.
52 Duane Street, 10th Floor
New York, New York 10007
Sarah_Baumgartel@fd.org
Tel.: (212) 417-8772