No. _____

In the Supreme Court of the United States

Omar Agor, Petitioner

v.

United States of America, Respondent

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

Petition for Writ of Certiorari

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Question Presented

Is there an exception to the Sixth Amendment's right to a public trial for a closure of the courtroom during a criminal trial that the district and circuit courts (1) do not justify under the four factors dictated by this Court's precedent but (2) instead characterize as "trivial" and "administrative."

Parties and Proceedings

The caption lists all parties to the proceedings in this case.

The petitioner is not a corporation.

This case arises from the following proceedings in the United States District Court for the District of Hawaii and the United States Court of Appeals for the Ninth Circuit: *United States v. Agor*, Case 1:21-cr-00136-HG-1 (D. Haw.), and *United States v. Agor*, Case 24-119 (CA9).

Counsel is not aware of any other proceedings in any other court that are directly related to this case.

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Opinions Below

The Ninth Circuit's decision is unpublished. It can be found as *United States v. Agor*, 2025 WL 763481 (CA9) (Mar. 11, 2025) (unpublished). A copy is also provided in this petition's appendix. Pet. App. at 3. The district court's oral and written rulings are also unpublished. The district court's written ruling can be found as *United States v. Agor*, 2023 WL 2958326 (D. Haw.) (Apr. 14, 2023) (unpublished). This petition's appendix provides copies of the district court's rulings. Pet. App. at 11–25 (writing ruling); *id.* at 27–28 (oral ruling).

Jurisdiction

The Ninth Circuit decided Agor's appeal on March 11, 2025, and denied rehearing en banc on April 17, 2025. Pet. App. at 3 and 11. This Court has jurisdiction under 28 U.S.C. §1254(1). Having been filed before July 16, 2025, this petition is timely. Sup. Ct. R. 13.3.

Pertinent Positive Law

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

Proceedings Below

1. In the district court, the government indicted the petitioner, Omar Agor, Jr., on a single count of simple bank theft, in violation of 18 U.S.C. §656. He worked for an armored courier company and the allegation against him was that he stole bank money entrusted to him and his partner, Jake Torres, during one of their shifts. Prior to and during the first day of trial, the government's theory of

prosecution was that Agor used a knife to cut open sealed courier bags, from which he removed bundles of $100 bills, when loading the courier van on an airport tarmac. As reflected in pretrial litigation and highlighted in the government's opening statement at trial, the government believed that Agor acted alone, without Torres's involvement. The government was so committed to that lone-wolf Agor-acted-alone theory of guilt that it was prepared to have an expert demonstrate to the jury how Agor could have cut open the bags without Torres, who stayed in the driver's seat of the van on the tarmac while Agor got out and did the loading, noticing or aiding Agor's theft.[1] All of Torres's pretrial statements in the years leading up to trial—to his company's investigators, local police, and federal agents and prosecutors—consistently denied his involvement in Agor's theft. And, to this day, Torres has not been charged by either the State of Hawaii or the federal government with complicity in the theft. Agor was federally charged in this case because he was, some months later, caught with and spending some of the stolen money, and because his bank records suggested he deposited some of it into his account.

The district court judge who presided over trial was not the same judge who had presided over the years of pretrial litigation. The initial judge caught covid on (literally) the eve of trial and a different district court judge, without delay, stepped

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[1] To be clear, the trial evidence did not establish when or how the theft actually occurred. Instead, the trial evidence only vaguely established that the theft occurred at some point during a four-day window over a New Year's holiday while the money was transported from Oahu to Maui.

in to preside over the trial. That judge had little, if any, familiarity with the case prior to hearing the parties' opening statements and the first day of trial testimony.

When the government informed the presiding trial judge, on the second day of trial, that Torres would be its next witness, the judge sua sponte sealed the courtroom and aired her concerns about whether Torres had counsel or not. Pet. App. at 62–71; *id.* at 76. The government explained that, to the best of the government's knowledge, Torres had never said anything incriminating, that the issue had been previously raised by the district court judge initially assigned to the case (who had not seen fit to appoint Torres counsel or preclude him from testifying), and that the government's position was that it did not advise any of its witnesses they needed counsel unless and until the witness said or did something that was self-incriminating. Pet. App. at 62–63. Despite her acknowledgement that she had gotten the case "two days ago" and was basing her decision only on what she had heard during the first day of trial, the presiding judge precluded the government from calling Torres and appointed Torres counsel (without, moreover, much concern over whether he qualified for appointed counsel under the Criminal Justice Act). Pet. App. at 63–71.

In response to the district court's intervention in its presentation of its witnesses, the government adopted a "new theory of the case" on the third day of trial and "released" Torres from its witness list, because it now believed, at the court's prompting, that Torres was involved in the theft—even though years of investigation had not discovered any evidence against him. The defense then told

the district court that it would call Torres as a defense witness on the anticipation that he would testify (as the government had also thought he would) consistently with his numerous prior statements exonerating both himself and Agor. The district court, meanwhile, defended its decision to intervene based solely on its belief that Torres was at some risk if the court had allowed the government to call him as a government witness. When Torres and his counsel returned to court on the fourth day of trial, the district court confirmed that Torres did not wish to testify, and Torres invoked his Fifth Amendment right against self-incrimination. When asked to provide a good faith basis for Torres making a blanket invocation of the Fifth Amendment, Torres's counsel merely conveyed his belief that Torres had a good faith basis for doing so, which the district court (over Agor's objection) accepted without further inquiry.

Sealing the courtroom on the second day of trial, to preclude the government from calling Torres as a witness and to appoint Torres counsel, was not the only instance in which the presiding trial judge closed the courtroom to the public during Agor's trial. The trial judge also closed the courtroom twice during the first day of trial, both times to address the misconduct of two different jurors. Pet. App. at 32–60. During the first jury-related closure, the court dismissed a seated juror for engaging in outside research and seated an alternate in his stead. Pet. App. at 32–57. During the second jury-related closure, the court admonished a juror for refusing to abide, repeatedly, the court's order to wear a mask. Pet. App. at 57–60.

The presiding trial judge did not make any contemporaneous findings to justify the three closures. During trial, but after all three closures had occurred, Agor moved for a mistrial on the claim that each closure violated his Sixth Amendment right to a public trial. The district court denied the motion orally and, subsequently, in a written order. Pet. App. at 26 (oral ruling); *id.* at 11 (written order). The district court did not address the second closure (dealing with the non-masking juror), because the court insisted that it did not occur, even though it was reflected on the docket and in the transcripts and despite, in response to Agor's mistrial motion, the government's concession that the court had closed the courtroom to the public three times, not twice. Pet. App. at 15–16. As to the first and third closures, the district court ruled that Agor had "waived" his Sixth Amendment public-trial right by not objecting at the moment the closures occurred, and that, in any event, the closures were too "trivial" to implicate his right to a public trial. Pet. App. at 19–24.

The jury convicted Agor as charged. The district court thereafter sentenced him to 46 months of imprisonment, followed by three years of supervised release.

2. On direct appeal to the Ninth Circuit, Agor raised his public-trial claim, among other things. The Ninth Circuit relied on *United States v. Ivester*, 316 F.3d 955, 959 (CA9 2003), its case adopting an exception to the public-trial right for closures that are deemed "trivial" or "administrative." Applying *Ivester*, the Ninth Circuit held that the closure during which a seated juror was dismissed did not violate Agor's public-trial right because the district court could have conducted the

proceeding in chambers. Pet. App. at 4. Thus, "[b]ecause a trial judge may question a juror alone in chambers, without the public present, a fortiori the judge may do so with the parties and counsel present." *Id.* And, under *Ivester*, the Ninth Circuit held that the other two closures—dealing with the non-masking juror and Torres—were too trivial to "implicate" Agor's public-trial right, because they were "administrative" and did not bear on Agor's "ultimate guilt or innocence." Pet. App. at 4. It is difficult not to hear an echo of harmless-error analysis in the Ninth Circuit's reasoning, even though, as is discussed below, this Court has held that violations of the public-trial right are not subject to harmless-error analysis.

Reason to Grant the Writ of Certiorari

This Court should grant this petition to decide the important question of whether, as many courts (but not this Court) have held, there is a "triviality" and "administrative" exception to the Sixth Amendment's right to public trial and, if there is such an exception, to delineate its scope. Agor's primary contention is that the lower courts are wrong and that there is no such exception. That so many courts have wrongly adopted it—indeed, efforts to find a case that hasn't adopted it have, so far, been unavailing—adds weight to the importance of this petition.

1. The public-trial right.

This Court's seminal cases on the public-trial right are *Press-Enterprise Company v. Superior Court of California, Riverside County*, 464 U.S. 501 (1984), *Waller v. Georgia*, 467 U.S. 339 (1984), and *Presley v. Georgia*, 558 U.S. 209 (2010).

In *Press-Enterprise*, this Court reaffirmed that the public-trial right guarantees an "open trial" for the benefit of both the defendant and the public and, thus, that the right may be invoked not only by a defendant under the Sixth Amendment, but by the public and press under the First Amendment. *Press-Enterprise*, 464 U.S. at 823; *Presley*, 558 U.S. at 212. This Court further held that closing the courtroom during a criminal trial should not only be rare, but must also be justified whenever a closure occurs:

> Closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness. In *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982), we stated that: "[T]he circumstances under which the press and public can be barred from a criminal trial are limited; the State's justification in denying access must be a weighty one. Where … the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Id.* at 606–607. The presumption of openness may be overcome by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

Press-Enterprise, 464 U.S. at 509–510 (paragraphing altered; parallel citations omitted).

In *Waller*, this Court held that the public-trial right reaches suppression hearings. *Waller*, 467 U.S. at 47. In doing so, this Court distilled its caselaw to require compliance with four things, typically before a closure occurs: "Under *Press-Enterprise*, 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 proceedings, and it must make findings adequate to support the closure." *Waller*, 467 U.S. at 48; *accord Weaver v. Massachusetts*, 582 U.S. 286, 298 (2017) (excusing delayed justification, but only when the reasons provided after the closure indeed provide the requisite justification for it in accord with *Press-Enterprise* and *Waller*).

This Court also recognized that a defendant did *not* need "to prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee." *Waller*, 467 U.S. at 48. Violation of the public-trial right is, rather, one of the rare structural errors that this Court has explicitly recognized, which necessitates a remedy without a showing of prejudice to the defendant. *McCoy v. Louisiana*, 584 U.S. 414, 427 (2018) (citing *Waller*, noting "public trial is structural," and reaffirming that, "when present," structural "error is not subject to harmless-error review"). And in *Waller*, this Court noted that the proper remedy for the unjustified closure of a suppression hearing was to conduct a new, open suppression hearing and, furthermore, that a new trial would be required if that "new, public suppression hearing result[ed] in the suppression of material evidence not suppressed at the [closed] suppression hearing, *or in some other material change in the positions of the parties*." *Waller*, 467 U.S. at 50 (emphasis added).

In *Presley*, this Court made clear that, as *Press-Enterprise* had held under the First Amendment, "the right to a public trial in criminal cases extends to the jury selection phase of the trial, and in particular the *voir dire* of prospective jurors." *Presley*, 558 U.S. at 212. This Court again reaffirmed that open public proceedings

are the "general rule," that closing the courtroom was a "rare" "exception to this general rule," and that any such closure was subject to the standard set out in *Press-Enterprise* and *Waller*. *Presley*, 558 U.S. at 213–214. This Court also squarely placed the onus on the *trial judge*, not the parties, to ensure fidelity to the public-trial right and this Court's precedent:

> The conclusion that trial courts are required to consider alternatives to closure even when they are not offered by the parties is clear not only from this Court's precedents but also from the premise that "[t]he process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system." [*Press-Enterprise*, 464 U.S.] at 505. The public has a right to be present whether or not any party has asserted the right. In *Press–Enterprise I,* for instance, neither the defendant nor the prosecution requested an open courtroom during juror *voir dire* proceedings; in fact, both specifically argued in favor of keeping the transcript of the proceedings confidential. *Id.,* at 503–504. The Court, nonetheless, found it was error to close the courtroom. *Id.,* at 513.

Presley, 558 U.S. at 214–215 (parallel citations silently omitted).

This Court's cases on the public-trial right have not condoned a "trivial" or "administrative" exception to the right. When this Court has spoken of "exceptions" to the general rule of open and public proceedings it has invariably referred to closures that are, be it at the time of the closure or at some point thereafter, explicitly justified under the *Waller* and *Press-Enterprise* factors by the circumstances that the case at hand presents. In *Waller*, for example, this Court remarked that its cases have "made clear that the right to an open trial 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. Such circumstances will be rare, however, and the balance of interests

must be struck with special care" under "the applicable rules in *Press-Enterprise*[.]" *Waller*, 467 U.S. at 45.

The rare circumstances that can, under the *Press-Enterprise* and *Waller* factors, justify closing a courtroom will usually, if not invariably, arise when there is a valid concern of jury tampering or a safety concern of some sort—a point this Court made plain in *Presley*:

> Petitioner also argues that, apart from failing to consider alternatives to closure, the trial court erred because it did not even identify any overriding interest likely to be prejudiced absent the closure of *voir dire*. There is some merit to this complaint. The generic risk of jurors overhearing prejudicial remarks, unsubstantiated by any specific threat or incident, is inherent whenever members of the public are present during the selection of jurors. If broad concerns of this sort were sufficient to override a defendant's constitutional right to a public trial, a court could exclude the public from jury selection almost as a matter of course. As noted in the dissent below, "the majority's reasoning permits the closure of *voir dire* in *every criminal case* conducted in this courtroom whenever the trial judge decides, for whatever reason, that he or she would prefer to fill the courtroom with potential jurors rather than spectators." [*Presley v. State*,] 285 Ga. [270,] 276 (Ga. Sup. Ct. 2009) (opinion of Sears, C.J.). There are no doubt circumstances where a judge could conclude that threats of improper communications with jurors or safety concerns are concrete enough to warrant closing *voir dire*. But in those cases, the particular interest, and threat to that interest, must "be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Press–Enterprise I*, [464 U.S.], at 510.

Presley, 558 U.S. at 215 (paragraphing altered; some citations silently omitted).

What this Court's cases condone, in sum, is the idea that a closure can be justified when the *Press-Enterprise* and *Waller* factors are met, when the careful balance that the trial court must strike under those factors weighs in favor of closing the courtroom for the safety of the jurors (or, perhaps, the judge or other

trial participants) or to prevent juror tampering or, perhaps, for some other overriding interest, such as a defendant's right to a fair trial or the government's interest in preventing public disclosure of classified or otherwise sensitive information. This Court has never endorsed nor even suggested that there is a "trivial" or "administrative" categorical exception to the public-trial right. But inferior courts, the Ninth Circuit and the District Court for the District of Hawaii among them, have.

2. The lower courts misconstrue the public-trial right.

As the Eighth Circuit has noted in collecting the cases and tracing its history, *Peterson v. Williams*, 85 F.3d 39 (CA2 1996), is largely credited with creating the "trivial" and "administrative" exception to the public-trial right:

> The Minnesota court's decision to apply a "triviality" standard, however, is not the outlier that Zornes suggests. The Second Circuit in *Peterson* … ruled that an unjustified temporary closure in that case was "too trivial to amount to a violation" of the right to a public trial. [*Peterson*, 85 F.3d] at 42. Judge Calabresi's opinion for the court explained that a triviality standard looks to "whether the actions of the court and the effect that they had on the conduct of the trial deprived the defendant ... of the protections conferred by the Sixth Amendment." *Id*. Where "the values furthered by the public trial guarantee" were not jeopardized when the trial court briefly neglected to reopen the courtroom after an undercover officer finished testifying, the court held that the defendant's rights were not infringed. *Id*. at 43-44. Several courts have adopted the *Peterson* approach, *e.g.*, *United States v. Perry*, 479 F.3d 885, 890 (D.C. Cir. 2007); *Braun v. Powell*, 227 F.3d 908, 918-20 (7th Cir. 2000), and have continued to apply it after *Presley*. *See United States v. Lewis*, No. 19-6148, 2022 WL 216571, at *7-8 (6th Cir. Jan. 25, 2022) (deputy marshal for twenty minutes excluded two spectators who were speaking loudly); *United States v. Anderson*, 881 F.3d 568, 573 (7th Cir. 2018) (trial continued after courthouse was locked for the night at 5:00 p.m.); *United States v. Patton*, 502 F. App'x 139, 141-42 (3d Cir. 2012) (members of defendants' families allegedly denied entry during jury selection because courtroom was filled to

> capacity); *United States v. Greene*, 431 F. App'x 191, 195-97 (3d Cir. 2011) (court security officer excluded defendant's brother from *voir dire* for want of seating space); *Kelly v. State*, 195 Md.App. 403, 6 A.3d 396, 408-11 (2010) (exclusion of defendant's family for two to three hours during *voir dire* due to insufficient space in courtroom).

Zornes v. Bolin, 37 F.4th 1411, 1417 (CA8 2022). On taking a closer look at *Peterson*, it is difficult to spot how any member of this Court would think it was correctly decided.

The Second Circuit quoted the Sixth Amendment's public-trial clause and acknowledged that violating it was a structural error in the first sentence of its opinion. *Peterson*, 85 F.3d at 40. It then was done reckoning with the clause's straightforward text, because the Second Circuit thought it "obvious" that "[w]ords, even absolute words," could mean something different from what they plainly say. *Peterson*, 85 F.3d at 40–41. The Second Circuit then took it upon itself to dispense with the absolute words of the Sixth Amendment to decide for itself, that, "on the particular facts before [it]," the "inadvertent" closure of the courtroom "for twenty minutes during which the defendant testified" was so "insignificant that no violation of the Sixth Amendment occurred." *Id.* at 41. According to the Second Circuit, and all the courts, including the Ninth Circuit and district court here, who have followed *Peterson*, "even an *unjustified* closure may, on its facts, be so trivial as to not violate the" Sixth Amendment's public-trial clause. *Id.* at 40 (emphasis added); *see also*, *e.g.*, *United States v. Gupta*, 699 F.3d 682, 688 (CA2 2012) (collecting some of the cases, *Ivester* among them, adopting the *Peterson* triviality standard).

The Second Circuit's decision did not grapple with this Court's cases. Instead, it turned to its own circuit law to reaffirm that the public-trial right gives way whenever "exigent circumstances require it." *Id.* at 42 (quoting *Guzman v. Scully*, 80 F.3d 772, 774 (CA2 1996)). And it then turned to discussing the circumstances that the case before it presented to hold that they simply did not warrant relief because they did not implicate the "values" of the public-trial right. *Id.* at 43. True enough, the Second Circuit cited *Waller* (its only citation to one of this Court's cases) for what those values were, but it did so only to dismiss those values out of hand, because three of them—ensuring a fair trial, reminding participants of their responsibilities and the importance of their functions, and discouraging perjury—were "hardly in issue in this case given the brevity and inadvertence of the closure." *Id.* While the fourth value, encouraging witnesses to come forward, "might have been somewhat implicated, … the repetition, in the summation, of the defendant's brief testimony could well have served to give notice to some potential corroborating witnesses." *Id.* at 43–44. "It follows," the Second Circuit said, "that the rights sought to be protected by the words of the Constitution [were] not … infringed in [Peterson's] case." *Id.* at 44.

The Second Circuit's reasoning became even more ad hoc and fit-to-purpose (the purpose being to not undo a conviction on a technicality) as it went on to say that it did not do what it had just done:

> We do not hold today that the fact that a closure of a courtroom was brief, that it was inadvertent, or that what went on *in camera* was later repeated in open court, by themselves, mean that no Sixth Amendment violation occurred. We do not even hold that the

> combination of all three necessarily compels a finding of constitutionality. We only hold that in the context of this case, where the closure was 1) extremely short, 2) followed by a helpful summation, and (3) entirely inadvertent, the defendant's Sixth Amendment rights were not breached.

Id. at 44. Such ad hoc judicial hindsight is not, at least it wasn't the last time counsel dipped into Justice Scalia's treatise, a recognized canon of constitutional construction. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012).

The lower courts have this wrong. Manifestly so, as Justice Sotomayor has pointed out, in a dissent from this Court's denial of certiorari in a habeas case a few years ago, *Smith v. Titus*, 141 S.Ct. 982 (Mem) (March 22, 2021) (Sotomayor, J., dissenting from denial of certiorari). In *Smith*, a state court trial judge "cleared all members of the public from the courtroom before issuing a key evidentiary ruling." *Id.* at 982. And the state appellate court held there was no constitutional error, even though the trial judge "did not justify the closure in accordance with the dictates of this Court's cases," by characterizing the ruling as an "administrative" one that did not implicate the defendant's right to a public trial. *Id.*

Although this Court has often cautioned against reading anything into its summary denials of certiorari, it seems likely that this Court did not take up *Smith* because it was not, dressed in habeas' trappings, a good vehicle for addressing the validity of *Peterson*'s triviality standard. Even so, Justice Sotomayor expounded at some length as to why the *Peterson* triviality standard is "manifestly incorrect." *Id.* Justice Sotomayor correctly noted that, after *Presley*, it should be clear that the public-trial right requires compliance with the "four-factor test" that *Waller* culled

from *Press-Enterprise* when "excluding the public from *any stage* of a criminal trial." *Id.* at 984 (quoting *Presley*, 558 U.S. at 213) (Justice Sotomayor's emphasis). As Justice Sotomayor has recognized, there is no basis in the text of the Sixth Amendment's public-trial clause, its history, or this Court's cases construing it for an exception based on an ad hoc judicial determination that any given closure was trivial or administrative. *Id.* at 984–988.

3. The Ninth Circuit and district court wrongly decided the petitioner's public-trial claim.

Neither the district court nor the Ninth Circuit complied with the four-factor test required by *Press-Enterprise*, *Waller*, and *Presley* as to any of the three closures that occurred here. Pet. App. at 3–5 (CA9); *id.* at 18–24. Instead, the district court—contrary to what its own docket reflects and the transcripts attest—ruled that the second closure (reprimanding a non-masking juror) did not occur and that the other two (during which the court first dismissed a seated juror for engaging in outside-research and then precluded the government from calling a witness and appointed that witness counsel) were "[b]rief, routine administrative matters that [had] no bearing on the defendant's guilt" and, thus, were "too trivial to implicate" Agor's public-trial right. Pet. App. at 11; *see also id.* at 23–24. For its part, the Ninth Circuit cited its decision, *Ivester*, adopting the *Peterson* triviality standard and held that all three closures "did not violate the Sixth Amendment right to a public trial" because they were "administrative" and "trivial" and, as to the two that addressed juror problems, they could have been done in chambers under *Ivester*. Pet. App. at 4–5. That latter thought was one that echoed the government's argument that what

occurred during the closures could have been done at sidebars and, thus, should not be deemed violations of the public-trial clause.

But the closure during which the district court dismissed a juror for engaging in outside research and then seated an alternate to replace him seems to fall directly under *Presley*. In *Presley*, this Court unequivocally held that the process of selecting a juror implicates a defendant's public-trial right. *Presley*, 558 U.S. at 209; *id.* at 213–216. If *selecting* a juror is within the public-trial right, then *de*selecting one juror and seating another in his place is also within the public-trial right. It simply cannot be, under *Presley*, that selecting a juror is not too trivial to be within the public-trial clause, but dismissing a seated juror and replacing him with another *is* too trivial to fall within the clause.

And the closure during which the district court precluded the government from calling its next witness (Torres) on the second day of trial and appointed him counsel runs directly into *Waller*. This Court there recognized that the public-trial clause is implicated when what occurs during a closed proceeding "results … in [a] material change in the position of the parties." *Waller*, 467 U.S. at 50. As explained above, this closure did precisely that. Up until this closure occurred, the government intended to call Torres as a prosecution witness in support of its Agor-acted-alone theory of guilt. As noted, the government was so committed to that lone-wolf theory that it had developed evidence, litigated prior to trial, that would demonstrate how Agor could have quickly cut open the bank bags and stolen the money without his courier partner, Torres, being in on the theft. After this closure

occurred, the government changed its theory of the case, struck Torres from its witness list, and Torres and his appointed counsel successfully invoked Torres's Fifth Amendment right against self-incrimination when the defense sought to call him instead. Not only did both parties make material changes in their positions, but Torres (who was prepared and willing to testify both as a prosecution and as a defense witness prior to the closure) did too. The district court's ruling and the Ninth Circuit's holding as to this closure are irreconcilable with *Waller* and this Court's other public-trial right cases.

The various rationales advanced by the lower courts and the government throughout this case are also persuasively refuted by Justice Sotomayor in her dissent to certiorari in *Smith*, which, for that reason, is worth quoting at length:

> *Waller* and *Presley* straightforwardly govern the courtroom closure at issue in this case. During Smith's trial, the court removed all members of the public and media from the courtroom. The court then proceeded to issue an evidentiary ruling that precluded several defense witnesses from testifying. Because the evidentiary ruling issued at what was undoubtedly a "stage of [Smith's] criminal trial," *Presley*, 558 U.S., at 213, and because the court failed to consider, much less satisfy, any of the requirements set forth by *Waller*, the courtroom closure clearly violated Smith's Sixth Amendment right to a public trial.
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> The Minnesota Supreme Court, however, thought differently. In its view, any proceeding that might be deemed "administrative in nature"—including "scheduling," "routine evidentiary rulings," and "matters traditionally addressed during private bench conferences or conferences in chambers"—fall outside the Sixth Amendment's protection entirely. [*State v.*] *Smith*, 876 N.W.2d [310,] 329–330 [(Minn. Sup. Ct. 2016)]. This novel exception sharply departs from this Court's precedents.
>
> The Minnesota Supreme Court reasoned that courtroom closures during "administrative exchanges" " 'do not hinder the objectives which the Court in *Waller* observed were fostered by public trials' " because such exchanges " 'ordinarily relate to the application of legal principles

to admitted or assumed facts so that no fact finding function is implicated.' " *Id.,* at 329 (quoting *United States v. Norris*, 780 F.2d 1207, 1210 (C.A.5 1986)). But even if *Waller* could be read to apply only to factfinding proceedings (a dubious assertion), *Presley* plainly cannot. *Presley* held that "the Sixth Amendment right to a public trial extends to the *voir dire* of prospective jurors." 558 U.S., at 213. Jury selection hardly implicates a court's "fact finding function." That does not matter, of course, because "the Sixth Amendment right to a public trial extends beyond the actual proof at trial" to "any stage of a criminal trial." *Id.,* at 212–213. Indeed, it is telling that, to support its distinction between factfinding and law-application proceedings, the Minnesota Supreme Court primarily relied upon a case that predates *Presley* by almost 25 years. See *Smith*, 876 N.W.2d, at 329 (citing *Norris*, 780 F.2d, at 1210).

The Minnesota Supreme Court also relied on the fact that the closed-courtroom ruling at issue here was "an outgrowth of two previous public hearings" in which "the court explain[ed] the parameters of its ... written decision." *Smith*, 876 N.W.2d, at 330. The court thus implied that an unconstitutional courtroom closure can be cured by contemporaneous publication of the substance of the closed proceedings. That premise is false, as *Waller* made abundantly clear: Even though "the transcript of the [closed] suppression hearing was released to the public" in *Waller*, this Court nevertheless found that the defendant's Sixth Amendment right to a public trial had been violated. 467 U.S., at 43, 48.

That conclusion makes perfect sense in light of the origins and purposes of the Sixth Amendment public-trial right. " 'The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions.' " *In re Oliver*, 333 U.S. [257,] 270, n. 25 [(1948)] (quoting 1 T. Cooley, Constitutional Limitations 647 (8th ed. 1927)). A written order is no substitute for a live proceeding, especially when the order has been curated by the same court that concealed its ruling from public view. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980) (plurality opinion).

Finally, the Minnesota Supreme Court drew an analogy between the closed proceeding in Smith's case and sidebar-like proceedings such as "private bench conferences or conferences in chambers." *Smith*, 876

> N.W.2d, at 329. That analogy is inapt. Sidebars smooth the flow of trial by allowing the court to have succinct, private discussions with counsel without having to remove the jury each time such a conversation is necessary. When sidebar discussions become too lengthy or too contentious, judges commonly excuse the jury and discuss the matter in open court. Sidebars are thus tools of expediency for the benefit of all parties to which, generally speaking, no party objects. In Smith's case, by contrast, the court closed the courtroom before the jury was even seated (and over Smith's objection), not to facilitate trial efficiency but for the stated purpose of concealing information from the public. Thus shielded from public view, the court proceeded to exclude the testimony of witnesses Smith thought critical to his self-defense theory. Therefore, even accepting the Minnesota Supreme Court's view that some classes of sidebar-like exchanges do not constitute part of "any stage of a criminal trial," *Presley*, 558 U.S., at 213, 130 S.Ct. 721, the trial court's ruling here was no sidebar. The courtroom closure was therefore improper.

Smith, 141 S.Ct. at 985–986 (footnotes and parallel citations omitted).

For the reasons noted above and those Justice Sotomayor lodged against the state courts in *Smith*, the Ninth Circuit and district court wrongly decided the issue this case presents.

4. This case is an ideal vehicle for deciding if there is a "trivial" and "administrative" exception to the public-trial right and, if there is, its scope.

This case is not, as was *Smith*, a habeas case. The public-trial right issue is presented here on direct appeal from a federal criminal conviction. The issue was preserved in the trial court while Agor's criminal trial was still on-going, albeit after all three closures had occurred. Although the district court ruled that the issue was "waived," the Ninth Circuit did not rest its opinion on that ground and, in any event, the contention lacks merit, because this Court's precedents do not require *any* objection on the part of defense counsel, much less a contemporaneous one. *Presley*, 558 U.S. at 214 (reaffirming that "trial courts are required to consider

alternatives to closure even when they are not offered by the parties" and that the right's applicability does not turn on "whether or not any party as asserted [it]"); *id.* ("[i]n *Press-Enterprise I*, for instance, neither the defendant nor the prosecution requested an open courtroom during juror *voir dire* proceedings; in fact, both specifically argued in favor of keeping the transcript of the proceedings confidential"). Waiver, then, is not an impediment here.

Another reason that this case makes an excellent vehicle for addressing whether there is a "trivial" and "administrative" exception to the public-trial right is because this case presents three different closures, which can readily be placed at different points on any such trivial-to-not-trivial spectrum. One closure briefly reprimanded a non-masking juror. One involved a seated juror conducting outside research and being dismissed and replaced by an alternate. And one involved the district court interfering with the government's presentation of its case to preclude it from calling a witness and appointing that witness counsel, rulings that had ripple effects on the way the entire case proceeded from there, with both sides and that witness materially altering their pre-closure positions. If there is any such triviality exception to the public-trial right, then this case allows this Court to delineate its full scope and to say what is trivial and what is not as it addresses each of these three, quite different, closures.

And, finally, the issue this petition presents has been fully percolated in lower courts, which have uniformly—as they once did on the issue *Apprendi v. New Jersey*, 530 U.S. 466 (2000), corrected—gotten wrong. As noted above, Justice

Sotomayor remarked that the Minnesota Supreme Court had adopted a "novel exception" from the public-trial right for proceedings that were "administrative in nature" and that this "novel exception sharply depart[ed] from this Court's precedents." *Smith*, 141 S.Ct. at 985. The trivial/administrative exception *is* novel in the sense that no such exception can be sourced from this Court's precedent. But it is *not* novel in the sense that it was a one-off applicable only in Minnesota state courts. As discussed above, the *Peterson* exception has fully percolated in the lower courts, who have uniformly adopted it or otherwise implied that it would be adopted in a case in which it made a difference in outcome. *See Owens v. United States*, 483 F.3d 48, 62–63 (CA1 2007); *Peterson*, 85 F.3d at 42–43 (CA2); *Greene*, 41 F. App'x at 195–196 (CA3); *United States v. Izac*, 239 F. App'x 1, 4 (CA4) (July 11, 2007) (unpublished); *Norris*, 780 F.2d at 1210 (CA5); *Lewis*, 2022 WL 216571, at *8 (CA6); *Braun*, 227 F.3d at 918 (CA7); *Zornes*, 37 F.4th at 1417–1418 (CA8); *Ivester*, 316 F.3d at 960 (CA9); *United States v. Al-Smadi*, 15 F.3d 153, 154–155 (CA10 1994); *Perry*, 479 F.3d at 890 (CADC). As was so in *Apprendi*, this is another instance in which the circuit courts (and many state courts as well) have gotten an important point of constitutional law wrong and only this Court can correct them. It should take the opportunity Agor's case presents to do so.

Conclusion

This Court should grant a writ of certiorari in this case. Whether there is an exception to the Sixth Amendment's public-trial clause for closures that are said to be "trivial" or "administrative" is an important question that affects all criminal

proceedings in both state and federal courts. And this case presents an ideal vehicle for both deciding whether there is such an exception and, if there is, to delineate its scope.

Respectfully submitted on July 9, 2025.

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