No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JONATHAN BLADES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In this case, the voir dire of every prospective juror was conducted at the judge's bench in the courtroom while the judge used a white-noise machine called a "husher" to prevent anyone in the audience from hearing. The question presented is: Does barring members of the public from hearing trial proceedings, without any special justification or findings, violate the right to a public trial guaranteed by the Sixth Amendment?

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INTRODUCTION

Although the Constitution requires that criminal trials, including jury selection, be "public," U.S. CONST. amend. VI; *Presley v. Georgia*, 558 U.S. 209, 213 (2010) (per curiam), the District of Columbia allows courts to question all prospective jurors in private. The trial judge in this case, over defense objection, followed the local practice of questioning each prospective juror at the judge's bench while using a mechanical device called a "husher" to shield the questioning from public hearing—a procedure designed for the jurors' "privacy." App. 10a n.4, 14a (citation omitted). This decision was not justified by anything special about this case, or about these particular jurors. The judge simply believed, as a general matter of policy, that jurors prefer answering questions under the "cover of the husher." App. 12a.

A divided panel of the District of Columbia Court of Appeals—acknowledging that its decision was directly contrary to that of at least one federal court of appeals—held that there was no public-trial violation, despite the husher, because the courtroom itself remained physically open. App. 18a-19a. The trial was "public," as the majority saw it, because people were free to enter the courtroom and watch the proceedings, albeit without hearing, and purchase a transcript later if they wanted to know what was said. Because the majority reasoned that the trial judge's decision to shield the entirety of voir dire from public hearing did not implicate the right to a public trial at all, the decision did not need to satisfy the four factors necessary to justify closing a trial to the public: that the closure is justified by an "overriding interest," "no broader than necessary to protect that interest," superior to any "reasonable alternatives," and supported by adequate findings. *Waller v. Georgia*, 467

U.S. 39, 48 (1984); *see also Press-Enterprise Co. v. Super. Court of Cal., Riverside Cty.*, 464 U.S. 501, 510-11 (1984). Instead, a court's use of the husher procedure requires no special justification or findings at all. Under the Court of Appeals' ruling, the public-trial right demands only that a trial be seen, not heard.

The decision below undermines the right to a public trial. Unlike a baseball game, which an informed spectator can follow through visual observation alone, a trial is primarily aural. The most important things that happen at a trial—testimony, objections, arguments, and rulings—happen through speech. The purposes of the public-trial right cannot be served if the public cannot hear these things. To "discourage[] perjury," *Waller*, 467 U.S. at 46, for example, the public must be able to hear the perjured testimony. A conversation that is shielded from public hearing by mechanical means is not made "public" by the fact that there are others inside the same large space who cannot hear it.

Despite the common-sense notion that a public trial is one that the public can hear, the lower courts are divided on the issue, as the decision below acknowledged. Two other state high courts, like the District of Columbia Court of Appeals, hold that a proceeding in a physically open courtroom is "public" for federal constitutional purposes even if the court uses mechanical means to bar the public from hearing. In contrast, two federal circuits and a state high court have reached the contrary conclusion, recognizing that the Constitution ordinarily requires voir dire to be held in open court, within public hearing. The practical impact of this split plays out in courtrooms across the nation every day, in hundreds if not thousands of jury trials

each year. In some jurisdictions, voir dire is a public event that audience members can watch and hear. In other jurisdictions, like the District of Columbia, voir dire in private is the norm. This fundamental difference in openness permeates the process of jury selection, and it affects the community's confidence in the fairness of the process and the ultimate impartiality of the jury. *See Press-Enterprise*, 464 U.S. at 509. This Court should grant certiorari, resolve the acknowledged split, and recognize that a public trial is one that the public can hear.

OPINION BELOW

The opinion of the District of Columbia Court of Appeals appears at App. 1a and is reported at 200 A.3d 230. The order denying rehearing en banc is unreported and appears at App. 63a. The relevant oral rulings of the Superior Court are unreported.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on January 23, 2019. The District of Columbia Court of Appeals denied rehearing en banc on October 1, 2019. On December 11, 2019, the Chief Justice granted an application (19A654) extending the time to file a petition for a writ of certiorari in this case to January 29, 2020. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."

STATEMENT

Prior to Petitioner's trial for assault and weapons offenses, he requested that voir dire of prospective jurors be held in open court, pursuant to his Sixth Amendment right to a public trial. App. 11a-12a. This would have been a departure from the usual local practice of conducting voir dire at the judge's bench with the use of a husher—a white-noise machine activated by the presiding judge—to prevent anyone in the courtroom, other than those standing at the bench, from hearing the voir dire. App. 10a & n.4. The trial judge denied the defense request for voir dire in open court. The judge said that it was his "experience and belief that [potential jurors] are less forthcoming in response especially to sensitive questions when they don't have, at least, the cover of the husher and being up at the bench." App. 12a.

In accordance with the trial court's ruling, the entirety of each prospective juror's questioning was done privately at the bench, with the husher on. App. 10a. During voir dire, Petitioner pointed out several members of the public who were seated in the courtroom, but unable to hear what was said at the bench due to the husher (1/8/15 Tr. 304-306; 1/12/15 Tr. 18-19, 48). Petitioner also submitted an affidavit from an audience member, unaffiliated with the defense, who attested that he could not hear over the husher what was said during voir dire (R. 28, Greffenreid Aff. 1-2).

On appeal, Petitioner again argued that the use of a husher to prevent the public from hearing voir dire, absent specific privacy or other concerns, violated his Sixth Amendment right to a public trial. App. 9a-10a. Although acknowledging that the purpose of the husher was to "protect a juror's *privacy*," App. 14a (quoting *Copeland v. United States*, 111 A.3d 627, 634 (D.C. 2015)) (emphasis added), a majority of the panel

nonetheless held that this procedure does not violate the public-trial right because there was no "closure or partial closure of the courtroom." App. 18a. The majority reasoned that "use of a husher during the conduct of individual *voir dire* at the bench, along with access within a reasonable time to transcripts of the individual prospective-juror examinations, is a reasonable alternative to closure of the courtroom that enables the public to see the court proceedings, including facial expressions and body language of at least some of the participants at the bench, and thus honors the defendant's right to a public trial." App. 18a-19a (footnote omitted). Because the majority held that using the husher to block public hearing of the voir dire did not make the proceedings non-public, it concluded that the husher procedure does not require an "overriding interest," special findings, or the other factors required to justify closed proceedings under *Waller v. Georgia*, 467 U.S. 39, 46 (1984). App 19a-20a. The majority acknowledged that its holding was directly contrary to "at least one opinion," that of the Sixth Circuit. App. 15a n.6 (citing *In re Memphis Publ'g Co.*, 887 F.2d 646 (6th Cir. 1989)).

Judge Beckwith dissented. She found it "impossible to reconcile the majority's view of the husher procedure as somehow exempt from *Waller*'s requirements for proposed limitations on a public trial with the Supreme Court's public trial cases and with the decisions of this and other courts." App. 41a. Judge Beckwith also noted that "a practice that keeps the public from hearing what is going on during jury selection cannot be squared with the values the Supreme Court has said the public trial right serves." App. 48a. "Ensuring 'that judge and prosecutor carry out their duties responsibly,' 'encouraging witnesses to come forward,' and 'discouraging perjury,' are best

accomplished by people who can hear the proceedings." *Id.* (citing *Waller*, 467 U.S. at 46) (other citation omitted). Judge Beckwith urged the court to "follow the Sixth Circuit's lead in holding that making voir dire inaudible to spectators can violate that right—and that it *will* violate that right if it is not supported by case-specific findings that there is a compelling interest justifying some form of closure and that the chosen method of protecting that interest is no broader than necessary to do so." App. 48a-49a (citing *Memphis Publ'g*, 887 F.2d at 648-49).

Petitioner timely petitioned for rehearing en banc. The Court of Appeals denied the petition, but Judges Beckwith and Easterly would have granted it. App. 63a.

REASONS FOR GRANTING THE WRIT

This Court should grant the petition to resolve the important and recurring question about the meaning of the right to a public trial, a question on which there is an acknowledged split of authority. The court below recognized that its decision was directly contrary to that of the Sixth Circuit, but the split is actually deeper: Three courts have held that the public-trial right ordinarily requires proceedings in open court, where the public can hear, rather than private bench conferences or sidebars that are shielded from public hearing. *See In re Memphis Publ'g Co.*, 887 F.2d 646, 648-49 (6th Cir. 1989); *Cable News Network, Inc. v. United States*, 824 F.2d 1046, 1047 (D.C. Cir. 1987) (per curiam); *People v. Virgil*, 253 P.3d 553, 578 (Cal. 2011). Three other courts, including the court below, have held to the contrary that trial proceedings are "public" as long as they occur in a physically open courtroom, regardless of whether the public can hear what is said. *See* App 19a-20a;

Commonwealth v. Colon, 121 N.E.3d 1157, 1170 (Mass. 2019); *State ex rel. Law Office of Montgomery Cty. Pub. Def. v. Rosencrans*, 856 N.E.2d 250, 255 (Ohio 2006).

This is an important and recurring question that touches on every jury trial, indeed every court proceeding, in the nation. The lower courts have embraced fundamentally different understandings of what it means for a trial to be "public." As a result, jury selection, and potentially other trial proceedings, looks and sounds dramatically different from one courtroom to another. In many places, members of the press and public can walk into any courtroom and observe jury selection by listening to the questions, answers, objections, arguments, and rulings. In other places, a person entering a courtroom during jury selection will merely see the backs of a small group of people huddled at the bench having a private conversation that is completely inaudible. Moreover, because courts below are split on whether the public must be allowed to hear for a proceeding to be "public," decisions that approve of shielding proceedings from public hearing cannot doctrinally or logically be limited to voir dire. Indeed, one decision did not involve voir dire at all. *See Rosencrans*, 856 N.E.2d at 255. These courts have held in effect that *all* court proceedings can be shielded from public hearing. The public-trial right is too important for this Court to allow it to be applied in such diametrically opposed ways across jurisdictions.

This Court should grant review to hold that a public trial is one that the public can hear. This common-sense notion is amply supported by precedent, history, and the public-trial right's purposes of discouraging perjury, ensuring that judges and prosecutors act responsibly, and giving the public confidence in the fairness of the

trial. All of these critical functions require that the public can hear what is happening. Contrary to the reasoning of the court below, the after-the-fact availability of an imperfect transcript is no substitute. It can take days or weeks and cost hundreds or thousands of dollars to get a transcript. And even then, a transcript is at best an imperfect and incomplete representation of what actually happened in the courtroom. A transcript cannot capture inflection, tone, cadence, demeanor, and the numerous other verbal and nonverbal aids to understanding spoken language. Only the public's ability to observe and *hear* trial proceedings as they happen allows a public trial to fulfill its constitutional functions.

This case is an ideal vehicle to resolve the question presented. The public-trial issue was litigated and decided at every level below. And this case turns on a pure question of law. The trial judge made a categorical decision to conduct the entirety of voir dire privately with the use of a husher, and the Court of Appeals affirmed that decision based on a legal determination that a public trial does not need to be heard by the public. There are no factual disputes, discretionary judgments, or weighing of factors to potentially complicate this case. For these reasons, this Court should grant review.

A. This Court should resolve the acknowledged split on whether a trial is "public" for constitutional purposes if the public cannot hear it.

There is no dispute that courts are divided on the question whether courts may, consistent with the Constitution, shield trial proceedings from the public's hearing. As the court below expressly acknowledged, App. 15a n.6; *see also* 48a-49a (dissenting opinion), its decision squarely conflicts with the Sixth Circuit's ruling in *In re*

Memphis Publishing Co., 887 F.2d 646 (6th Cir. 1989). In *Memphis Publishing*, the Sixth Circuit confronted the same procedure used in this case: use of a "device which emitted white noise during voir dire proceedings, making the questioning of one juror by the court or counsel inaudible to other potential jurors, and to the public and press attending the trial." *Memphis Publ'g*, 887 F.2d at 647. Despite the after-the-fact availability of a transcript, *see id.* at 648, the Sixth Circuit held that voir dire proceedings were "effectively closed to the public and press through the use of the noise device," and that this closure was insufficiently justified and therefore unconstitutional. *Id.* at 648-49.

Like the Sixth Circuit, the D.C. Circuit and the Supreme Court of California have held that prospective jurors must generally be questioned in open court, with private questioning, at a sidebar for example, reserved for situations involving specific concerns about juror privacy or prejudice. *See Cable News Network, Inc. v. United States*, 824 F.2d 1046, 1047 (D.C. Cir. 1987) (per curiam); *People v. Virgil*, 253 P.3d 553, 578 (Cal. 2011). In *Cable News Network*, the trial judge, concerned about jurors' privacy, refused a "request for open *voir dire*, determining instead that *voir dire* examinations would be conducted *in camera* save for any prospective jurors who elected to be questioned in open court." *Cable News Network*, 824 F.2d at 1047. The D.C. Circuit reversed, holding that "interrogation *in camera*" should be limited to particular questioning of any jurors who had a sufficiently weighty privacy interest at stake, and that voir dire should otherwise be held "in open court," *id.* at 1049, a term that excludes private bench conferences, *see, e.g.*, *Pounders v. Watson*, 521 U.S.

982, 983 (1997) (per curiam); *United States v. Washington*, 705 F.2d 489, 496 (D.C. Cir. 1983); App. 10a. Although *Cable News Network* did not address the use of a husher in particular, it broadly prohibits shifting voir dire out of "open court" without sufficient justification, and thus directly conflicts with the decision below.

The Supreme Court of California in *Virgil* addressed voir dire of jurors at "sidebars," which are functionally equivalent to the private bench conferences used in this case, though not necessarily with the use of a husher. The court held that sidebar questioning was permissible for two prospective jurors who reported being abused as children, and one sworn juror who asked to speak with the court during the trial, because the questioning concerned "sensitive subjects" and was "no more than a de minimus infringement of the public trial guarantee." *Virgil*, 253 P.3d at 578. Contrary to the Court of Appeals' holding in this case, *Virgil* held that "as a general rule, the questioning of prospective jurors should be conducted *in open court*, with sidebar conferences *reserved for particularly sensitive or prejudicial topics*." *Id.* (emphases added).

In contrast to these decisions, the high courts of Massachusetts and Ohio, like the court below, have held that deliberately preventing the public from hearing court proceedings does not violate the Sixth Amendment. *See Commonwealth v. Colon*, 121 N.E.3d 1157, 1170 (Mass. 2019); *State ex rel. Law Office of Montgomery Cty. Pub. Def. v. Rosencrans*, 856 N.E.2d 250, 255 (Ohio 2006) (per curiam). In *Colon*, the Massachusetts Supreme Judicial Court confronted the identical procedure as used in this case—conducting voir dire of deliberating jurors at a bench conference with the

use of a husher—and adopted essentially the same reasoning as the D.C. Court of Appeals in holding that procedure to be constitutional: "Although the public cannot hear what is being said, the ability to observe the process furthers the values that the public trial right is designed to protect." *Colon*, 121 N.E.3d at 1170 (internal quotation marks and citation omitted). In *Rosencrans*, the public was purposefully prevented from hearing criminal proceedings in "mayor's court" by the mayor's decision not to activate the city council chamber's sound system during court proceedings. *Rosencrans*, 856 N.E.2d at 251-52. The mayor justified this decision not by any specific privacy concerns in any particular case, but rather by criminal defendants' general interest in preventing their alleged misdeeds from being publicly aired. *See id.* at 252. While the mechanical means by which the public was prevented from hearing differed in *Rosencrans* from those used in this case, the ultimate outcome was the same. The Supreme Court of Ohio, split 4-3, held that the mayor's court practice "does not violate any constitutional right." *Id.* at 255.

Justice Pfeifer dissented, rejecting the notion that "there is no right to *hear* the proceedings, only to *see* them." *Id.* at 258 (Pfeifer, J., dissenting); *see also id.* at 259. Noting the purposes served by the public-trial right as identified in this Court's precedents, Justice Pfeifer reasoned, "Without the public being able to hear the proceedings, the mayor's court proceedings are not as effective in checking potential abuse of power, assuring testimonial veracity, providing access to possible material witnesses, or imparting knowledge of government functioning." *Id.* at 259.

Because courts are divided on whether shielding trial proceedings from public hearing violates the public-trial right, this Court's review is warranted. With numerous courts having weighed in on the issue over the past thirty-plus years, the split is ripe and ready for this Court to resolve.

B. The question presented is important and recurring.

The question presented is a recurring one that affects the basic framework in which trials are conducted in hundreds, if not thousands, of cases every year throughout the nation. As the court below noted, the "husher" procedure is widespread in the District of Columbia. App. 18a; *see also Williams v. United States*, 51 A.3d 1273, 1284 (D.C. 2012). Each year in the District of Columbia alone, hundreds of trials are conducted in a manner that is elsewhere deemed unconstitutional. *See, e.g.*, *D.C. Courts Statistical Summary 2017*, at 10, 12, *available at* https://www.dccourts.gov/about/organizational-performance/annual-reports. A similar practice of conducting voir dire at the bench, out of public earshot, is used in many state and federal courtrooms throughout the country. *See, e.g.*, *United States v. Johnson*, 677 F.3d 138, 141 (3d Cir. 2012); *Dukette v. Brazas*, 93 A.3d 734, 735-36 (N.H. 2014); *Commonwealth v. Hunsberger*, 58 A.3d 32, 35 (Pa. 2012); *Commonwealth v. Cohen*, 921 N.E.2d 906, 925 (Mass. 2010); *Diaz v. State*, 743 A.2d 1166, 1170 (Del. 1999); *In re Cardinal*, 649 A.2d 227, 228 (Vt. 1994); *State v. Hilario*, 394 P.3d 776, 785 (Haw. Ct. App. 2017). In contrast, many other jurisdictions recognize that voir dire must generally be done in open court, with private bench conferences reserved only for situations when "a question calls for the juror to reveal especially personal or private matters or when there is a risk that the expected answer could potentially prejudice

the panel." James J. Gobert et al., Jury Selection: The Law, Art & Science of Selecting a Jury § 10:6 (2018-19 ed.); *see also, e.g.*, *Virgil*, 253 P.2d at 578; *State v. Beskurt*, 293 P.3d 1159, 1160 (Wash. 2013); *United States v. Burgos Montes*, No. 06-009-01, 2012 WL 1190179, at *3 (D.P.R. Apr. 7, 2012). The meaning of the federal constitutional right to a public trial should not vary from one courthouse to another.

The recurring constitutional question is important. As this Court has said, "The 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; *see also Gomez v. United States*, 490 U.S. 858, 873 (1989); *Morgan v. Illinois*, 504 U.S. 719, 729-30 (1992). The public-trial right is so fundamental to our system of justice that violations of the right fall in the rare class of errors that are deemed structural, i.e., they "affec[t] the framework within which the trial proceeds." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148-49 (2006) (alteration in original) (citation omitted); *see also Waller*, 467 U.S. at 49-50. "While the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance, the Framers plainly thought them nonetheless real." *Waller*, 467 U.S. at 49 n.9. This Court should ensure that a right so essential to the basic framework of our justice system is interpreted consistently and correctly.

Moreover, the ruling in this case is in no way logically or doctrinally limited to voir dire, but would justify conducting any portion of a trial out of public hearing, including witness testimony. Because the court below held that courtroom proceedings that are deliberately rendered inaudible to spectators are nevertheless

"public," there is no constitutional constraint on shielding any portion of a trial from public hearing. Without any compelling need or special findings, a judge could allow a witness to testify privately at the bench, within the hearing of the defendant and the jury, if the judge thinks that this privacy would make the witness more comfortable or the testimony more candid. Witnesses are often uncomfortable testifying in front of the defendant's, or the victim's, friends and family, and trial judges are sometimes too eager to accommodate them with unjustified courtroom closures. *See, e.g.*, *Guzman v. Scully*, 80 F.3d 772, 775 (2d Cir. 1996); *Longus v. State*, 7 A.3d 64, 81 (Md. 2010). But, under the decision below, trial judges can freely offer witnesses the same degree of privacy as a physically closed courtroom through "the cover of the husher," App. 12a, no matter how weak or generalized the purported justification. It is therefore even more vital for this Court to clarify that a trial is public only if the public is allowed to hear it.

C. The decision below is wrong.

Review is also warranted because the decision below subverts the right to a public trial. The audience's ability to hear is a key component of what makes a trial "public." The lower court's holding to the contrary is fundamentally inconsistent with this Court's public-trial decisions, incompatible with the constitutional purposes of a public trial, and contrary to the original understanding of the public-trial right.

1. This Court and others have recognized that the Constitution protects the "right to attend criminal trials *to hear*, see, and communicate observations concerning them." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980) (plurality) (emphasis added); *accord ABC, Inc. v. Stewart*, 360 F.3d 90, 99 (2d Cir. 2004); *United*

States v. Beckham, 789 F.2d 401, 413 (6th Cir. 1986); *Associated Press v. Bost*, 656 So. 2d 113, 117 (Miss. 1995); *Raper v. Berrier*, 97 S.E.2d 782, 784 (N.C. 1957). Although many of these cases addressed the public-trial guarantee under the First Amendment, "there can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public." *Waller*, 467 U.S. at 46. Thus, decisions recognizing a public-trial right under the First Amendment apply *a fortiori* to the Sixth Amendment. *Id.*; *see also Presley*, 558 U.S. at 213.

Press-Enterprise at least implicitly recognized that voir dire must ordinarily be heard by the public. This Court observed that, "in some circumstances," voir dire might "touch[] on deeply personal matters" such that prospective jurors might properly be questioned privately. *Press-Enterprise*, 464 U.S. at 511. The opinion emphasized the importance of "requiring the prospective juror to make an affirmative request" for private questioning so that "the trial judge can ensure that there is in fact a valid basis for a belief that disclosure infringes a significant interest in privacy." *Id.* at 512. But the decision below makes the foregoing discussion from *Press-Enterprise* a nullity. There is no need for jurors to "make an affirmative request" for private questioning, as "requir[ed]" by *Press-Enterprise*, or for the judge to make appropriate findings. Instead, the decision below allows trial judges to question jurors privately as a matter of course, in every case. Here, the trial court was able to offer jurors the same degree of "privacy" through the "cover of the husher" that they would

have gotten from a physically closed courtroom. The decision below cannot be squared with the procedure for private questioning laid out in *Press-Enterprise*.

2. The purposes of a public trial are fundamentally incompatible with a procedure that shields the trial from public hearing. A public trial "discourages perjury," and ensures "that judge and prosecutor carry out their duties responsibly," *Waller*, 467 U.S. at 46, by subjecting their conduct "to contemporaneous review in the forum of public opinion." *In re Oliver*, 333 U.S. 257, 270 (1948). A public trial also "gives assurance that established procedures are being followed and that deviations will become known," and "vindicate[s] the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct by jurors fairly and openly selected." *Press-Enterprise*, 464 U.S. at 508-09. And "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." *Gannett Co. v. DePasquale*, 443 U.S. 368, 380 (1979) (quoting *Oliver*, 333 U.S. at 270 n.25). None of these interests can be served if the public cannot hear.

To detect perjury, for example, the public must be able to hear it. This is no less true during jury selection, in which prospective jurors are called on to give truthful testimony to determine if they are qualified and impartial. *See Gomez v. United States*, 490 U.S. 858, 874-75 & n.27 (1989). Prospective jurors often omit information or outright lie during voir dire. *See, e.g.*, *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 861 (2017); *Judge May Charge Man Who Claimed He's Racist to Get Off Jury Duty*, FoxNews.com, July 10, 2007, https://www.foxnews.com/story/judge-may-

charge-man-who-claimed-hes-racist-to-get-off-jury-duty. Such instances may be discovered by members of the public or press. *See, e.g.*, *United States v. Warner*, 498 F.3d 666, 676 (7th Cir. 2007). Prompt discovery of a juror's false testimony may give rise to a for-cause or peremptory challenge, ensuring the fairness and impartiality of the jury. And prospective jurors will be deterred from lying by knowing that their answers are subject to contemporaneous fact-checking by the press and members of their community. *See Stewart*, 360 F.3d at 102 (citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.26 (1982)); *Commonwealth v. Long*, 922 A.2d 892, 904 (Pa. 2007); *see also In re Globe Newspaper Co.*, 920 F.2d 88, 94 (1st Cir. 1990). But if the audience members cannot hear what the jurors are saying, then they cannot discover and bring to light any perjury. And jurors who believe that their testimony is private would have less fear of any falsehoods being brought to light and feel emboldened to exaggerate or lie.

The after-the-fact availability of a transcript is inadequate for several reasons. First, transcripts take too long and cost too much. In the District of Columbia, members of the public ordinarily cannot purchase transcripts of criminal proceedings that are "not held in open court" until after the trial is over, which could be days, weeks, or months after voir dire. D.C. Super. Ct. Crim. R. 36-I(b)(3), (b)(4)(B). Even assuming that a person is able to obtain special permission to order a transcript before the trial is over, *see id.*, it still takes days or weeks to get a transcript, and costs hundreds or thousands of dollars—several dollars per page for a transcript that can easily run into many hundreds of pages. *See* Nat'l Ctr. for State Courts, Court

Reporting: State Links, https://www.ncsc.org/Topics/Court-Management/Court-Reporting/StateLinks; U.S. Courts, Federal Court Reporting Program, https://www.uscourts.gov/services-forms/federal-court-reporting-program#rates. In this case, for example, the 234-page transcript of the first day of voir dire ordered at the "daily" rate would not have been available until four days later, and at a whopping cost of $1,418.04. *See* Request for Transcript Order Form, *available at* https://www.dccourts.gov/sites/default/files/REQUEST_FOR_TRANSCRIPT_ORDER_FORM-5-24-19.pdf. The cheapest option would take up to 30 days, and would still cost a hefty $854.10. *See id.* For most members of the public, these costs are prohibitive. Even for larger press enterprises that can foot the bill, an expedited transcript often takes days or weeks to prepare. *See, e.g.*, Mass.gov, Order a court proceeding transcript, https://www.mass.gov/how-to/order-a-court-proceeding-transcript.

An after-the-fact transcript, even just one day late, is inadequate given the speed of the news cycle, where coverage is often updated throughout the day. "The peculiar value of news is in the spreading of it while it is fresh," *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 235 (1918), and "the element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly," *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976). The benefits of a public trial come from "*contemporaneous* review in the forum of public opinion," *Gannett*, 443 U.S. at 380 (emphasis added), and the value of information gleaned from voir dire "can only be diminished after trial has begun, and diminished

even further once a verdict has been rendered by a corrupt or biased jury," *United States v. Wecht*, 537 F.3d 222, 239 (3d Cir. 2008).

Second, even putting aside these practical obstacles, "the availability of a trial transcript is no substitute for a public presence at the trial itself. As any experienced appellate judge can attest, the 'cold' record is a very imperfect reproduction of events that transpire in the courtroom." *Richmond Newspapers*, 448 U.S. at 597 n.22 (Brennan, J., concurring). "[O]nly words can be preserved for review; no transcript can recapture the atmosphere of the *voir dire* . . . ." *Gomez*, 490 U.S. at 875. A transcript "does not reflect the numerous verbal and non-verbal cues that aid in the interpretation of meaning," *United States v. Simone*, 14 F.3d 833, 842 (3d Cir. 1994), such as tone, emphasis, and hesitation. *See* Keith A. Gorgos, Comment, *Lost in Transcription: Why the Video Record Is Actually Verbatim*, 57 Buff. L. Rev. 1057, 1059-60, 1105-20 (2009). Thus, "[t]he ability to see *and to hear* a proceeding *as it unfolds* is a vital component" of a public trial, not "an incremental benefit." *Stewart*, 360 F.3d at 99 (emphases added). Moreover, transcripts are rife with errors and omissions, which members of the public excluded from hearing the trial would be unable to detect. *See* Gorgos, *supra*, at 1084-85; *see also, e.g.*, *United States v. Mageno*, 786 F.3d 768, 778 (9th Cir. 2015) (order granting rehearing after discovery of transcription error); *Smith v. United States*, 966 A.2d 367, 384 (D.C. 2009); *Robinson v. United States*, 878 A.2d 1273, 1279 n.8 (D.C. 2005). Of course, if there are legitimate grounds to restrict public access to a trial, then later releasing a transcript is better than nothing. *See Gannett*, 443 U.S. at 393. But a transcript is not fungible

with the ability to see and hear the trial as it unfolds, *Gomez*, 490 U.S. at 874-75, and this Court has found public-trial violations from unwarranted closures even though a transcript is later available. *See, e.g.*, *Presley*, 558 U.S. at 214; *Waller*, 467 U.S. at 43; *see also Oliver*, 333 U.S. at 270-71.

The public's ability to visually observe voir dire without hearing is also inadequate to serve the purposes of a public trial. Observations of demeanor have value only if the public can place the demeanor in the context of what is being said. *See* Jocelyn Simonson, *The Criminal Court Audience in A Post-Trial World*, 127 Harv. L. Rev. 2173, 2177 (2014), *cited by Weaver v. Massachusetts*, 137 S. Ct. 1899, 1909 (2017). Even with a later-obtained transcript, an audience member's attempt to match her recollection of a juror's demeanor or facial expression at a particular moment with a particular statement in the transcript would be an exercise in futility. Any attempt to recall demeanor or facial expressions of the jurors would be further complicated by the fact that the audience's "primary view during voir dire would have been of their backs." *Hager v. United States*, 79 A.3d 296, 303 (D.C. 2013). As far as the constitutional values of a public trial are concerned, allowing the public to watch a muted jury selection is materially indistinguishable from physically sealing the courtroom doors. Indeed, courts—including the District of Columbia Court of Appeals—have reached that precise conclusion. *See Barrows v. United States*, 15 A.3d 673, 681 (D.C. 2011); *see also Wilder v. United States*, 806 F.3d 653, 660 (1st Cir. 2015); *People v. Ramey*, 606 N.E.2d 39, 41 (Ill. App. Ct. 1992).

For similar reasons, the public cannot serve its function of ensuring that the "judge and prosecutor carry out their duties responsibly," *Waller*, 467 U.S. at 46, if it cannot hear. *See* Simonson, *supra*, at 2228. Like any other phase of the trial, the process for selecting jurors is vulnerable to abuses of power, which the presence of an audience can deter. *See Press-Enterprise*, 464 U.S. at 505; *see also Gomez*, 490 U.S. at 873. But to detect these kinds of potential abuses, the public needs to hear them.

Moreover, the jurors themselves are not kept "keenly alive to a sense of their responsibility and to the importance of their functions," *Gannett*, 443 U.S. at 380 (citation omitted), when they are selected in a manner designed to ensure their "privacy." For example, a prospective juror's sworn assurance that she can put aside a potential bias and decide a case impartially carries more weight when it is made publicly, in open court, in front of members of her community. *See* Gobert et al., *supra*, § 10:2. Conversely, some jurors seeking to evade jury service may feel more emboldened to exaggerate their personal hardships, or even their biases, under "the cover of the husher" than they would be if forced to espouse those positions in the hearing of their fellow citizens. In these ways, public voir dire emphasizes to prospective jurors the importance of their impartiality and the solemnness of their service. But to serve these functions, the public must be able to hear.

3. The history of the public-trial right further supports the common-sense notion that a public trial is one that can be heard by the public. In enacting the Sixth Amendment, the Framers of our Constitution sought to preserve the English common-law tradition of public trials. *See Oliver*, 333 U.S. at 266-67; *see also* Joseph

Story, Commentaries on the Constitution of the United States 664 (1987). In both England and the colonies, it was understood that a public trial was one in which the public was entitled to hear. *Press-Enterprise* quoted the sixteenth-century work *De Republica Anglorum*'s praise of the English practice where, after the indictment, "[a]ll the rest is doone 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,* and all depositions and witnesses given aloude, *that all men may heare from the mouth of the depositors and witnesses what is saide*." 464 U.S. at 507 (quoting Thomas Smith, De Republica Anglorum 96 (Alston ed. 1906)) (emphasis in *Press-Enterprise*). An early-nineteenth-century case also reflects the English concern with public hearing: "we are all of opinion, that it is one of the essential qualities of a Court of Justice that its proceedings should be public, and that all parties . . . have a right to be present *for the purpose of hearing what is going on*." *Daubney v. Cooper*, 109 E.R. 438, 440 (K.B. 1829) (emphasis added), *cited by Richmond Newspapers*, 448 U.S. at 567, *Gannett*, 443 U.S. at 395 (Burger, C.J., concurring), *and id.* at 423 n.8 (Blackmun, J., concurring in part and dissenting in part). The English tradition carried over into colonial America, where the very first public-trial provision expressly included the right not only to "come into" court, but also to "*hear*." Concessions and Agreements of West New Jersey (1677), ch. XXIII ("That in all publick courts of justice for tryals of causes, civil or criminal, any person or persons, inhabitants of the said Province may freely come into, and attend the said courts, *and hear and be present*, at all or any such tryals as shall be there had or passed, that justice may not be done in a corner

nor in any covert manner." (emphasis added)), *reprinted in* Sources of Our Liberties 188 (R. Perry ed. 1959), *quoted by Richmond Newspapers*, 448 U.S. at 567.

To the Framers, the notion that a "public" trial was one in which all the relevant participants huddled in the back of a large room and whispered privately to one another would have been unthinkable. The decision below cannot be squared with the original understanding of the Sixth Amendment.

D. This case is an ideal vehicle to resolve the question presented.

This case presents an ideal opportunity for the Court to resolve the important and recurring question presented. The constitutional public-trial issue was squarely raised, argued, and decided in both the Superior Court and the Court of Appeals. The issue here is a pure question of law: whether a trial remains "public" if it is shielded from the public's hearing. Because the Court of Appeals held that barring the public from hearing a trial is not a "closure" that requires a special justification or findings under *Waller*, this case does not involve the more discretionary and fact-specific questions that might arise in a case concerning application of the *Waller* factors. Moreover, as the violation of the right to a public trial is a structural error, *Waller*, 467 U.S. at 49-50, this case would not involve any harmless-error analysis. The answer to the question presented would be dispositive. In short, there are no substantive or procedural obstacles to this Court's resolution of the important question presented in this case.

CONCLUSION

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

Respectfully submitted,

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