No. _____

In the Supreme Court of the United States

Quentin Veneno, Jr.,

Petitioner,

v.

United States of America

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. *Presley v. Georgia*, 558 U.S. 209 (2010), held that, before closing the courtroom during a criminal trial, "courts are required to consider alternatives to closure even when they are not offered by the parties." *Id.* at 214. Does this constitutional mandate apply even if the court intends to stream the trial via audio, video, or both?

2. When no court order is sought or made on a defendant's right to a public trial, what qualifies as an "opportunity to object" to the denial of that right under Rule 51(b) of the Federal Rules of Criminal Procedure?

3. Should the Court overrule *United States v. Kagama*, 118 U.S. 375 (1886), and hold that Congress lacks the constitutional authority to criminalize conduct between members of the same tribe that occurs on tribal land, or at least clarify the constitutional foundation on which Congress may criminalize such conduct?

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PETITION FOR WRIT OF CERTIORARI

Quentin Veneno, Jr., respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Tenth Circuit.

OPINIONS AND ORDERS BELOW

The Tenth Circuit's amended opinion appears at Pet. App. 1a–30a and is reported at 94 F.4th 1196.[1] The Tenth Circuit's original opinion appears at Pet. App. 31a–60a and is reported at 80 F.4th 1180. The oral ruling of the Federal District Court of New Mexico appears at Pet. App. 61a–70a. The order of the Court of Appeals denying panel rehearing and rehearing *en banc* appears at Pet. App. 71a–72a.

JURISDICTION

The District Court had jurisdiction under 18 U.S.C. § 3231 and entered judgment on August 19, 2021. The Court of Appeals had jurisdiction under 28 U.S.C. § 1291, affirmed on September 12, 2023, and issued an amended opinion while denying a timely petition for panel rehearing or rehearing *en banc* on March 7, 2024. This Court granted Petitioner two extensions, until July 26, 2024, to file a petition for writ of certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The **Sixth Amendment** provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .

Fed. R. Crim. P. 51(b) provides:

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[1] For reasons that remain unclear, Judge Rossman's opinion does not yet appear on Westlaw.

> **(b) Preserving a Claim of Error.** A party may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party.

STATEMENT OF THE CASE

In the decision below, a divided panel of the Tenth Circuit decided three issues that warrant this Court's review.

First, in *Presley*, this Court held that, before "excluding the public from any stage of a criminal trial," trial courts "are required to consider alternatives to closure even when they are not offered by the parties." 558 U.S. at 213–14. In physically closing the courtroom for the duration of Mr. Veneno's trial during the COVID-19 pandemic, the district court did not consider alternatives to that closure, such as whether it was possible, while complying with social-distancing guidelines, to "reserve seats for the public, the press, or Defendant's family in the gallery." Pet. App. 14a, 70a. The Tenth Circuit nonetheless held that the district court was not required to explore these alternatives because Mr. Veneno did not bring them to the court's attention. Pet. App. 14a. Because that holding cannot be squared with the rule announced in *Presley*, the Court should summarily reverse.

Second, the majority opinion imposed on Mr. Veneno preservation obligations that cannot be reconciled with the approach in other Circuits and that far exceed those imposed by Rule 51 of the Federal Rules of Criminal Procedure. Before trial, no court order was made or sought as to the public-trial implications of how Mr. Veneno's

trial would be conducted. Neither party asked the district court to address whether the public would be excluded from Mr. Veneno's trial, or whether the trial would be broadcast via audio, video, or both. Perhaps because it was preoccupied with conducting a trial during the pandemic, the court also did not take up these issues on its own. After the public was excluded from the morning *voir dire* session on the first day of trial and an audio-only stream of the session was provided, the government asked the district court to address the constitutionality of its approach to trial. After the government raised the issue, defense counsel objected that the district court's approach violated Mr. Veneno's Sixth Amendment right to a public trial. On review, the majority held that, by "fail[ing] to object to the closed courtroom at the start of the trial," Mr. Veneno had forfeited his objection. Pet. App. 16a. Because that holding conflicts with the way the Second and Seventh Circuits have approached similar preservation issues and is impossible to square with the plain language of Rule 51, the Court should grant review.

Third, citing only *Kagama*, 118 U.S. 375, the panel rejected Mr. Veneno's argument that his convictions are invalid because Congress lacks the constitutional authority to criminalize the intratribal conduct of Indians on tribal land. Pet. App. 17a. This Court should revisit and overturn *Kagama*. In holding that the Constitution authorized Congress to criminalize the conduct of Indians on tribal land, *Kagama* did not even pretend to rest its holding on the Constitution itself, frankly admitting that basing such authority on the Indian Commerce Clause, the only viable textual hook, "would be a very strained construction." 118 U.S. at 378. The ensuing years have

brought the Court no additional success in identifying the source of Congress's alleged constitutional authority to criminalize the conduct of Indians on Indian land. *See United States v. Antelope*, 430 U.S. 641, 648 (1977); *Bd. of Comm'rs of Creek Cnty. v. Seber*, 318 U.S. 705, 715 (1943).

In place of constitutional text and structure, the *Kagama* Court rested its holding on policy concerns and platitudes. Lumping all tribes together, the Court reasoned that Congress was free to displace tribal sovereignty and directly regulate the conduct of a tribe's members because the tribes' "very weakness and helplessness" gave rise to the Federal Government's "duty of protection, and with it the power . . . over these remnants of a race once powerful, now weak." 118 U.S. at 383–84. This approach to the constitutional limits on congressional power does not, of course, "follow[] from a reasoned analysis derived from the text or history of the United States Constitution." *See Haaland v. Brackeen*, 599 U.S. 255, 327 (2023) (Gorsuch, J., concurring) (cleaned up). Given the startlingly weak foundations on which this alleged constitutional authority rests, the time has come to jettison *Kagama*, to reaffirm that Congress's powers with respect to intratribal conduct between Indians on Indian land must be tied to an affirmative bestowal of constitutional authority, and to make clear that neither the text nor structure of the Constitution authorizes Congress to criminalize the conduct of Indians on Indian land. At a minimum, the Court should accept Judge Rossman's invitation to "explain the origins of a constitutional plenary power and to help lower courts square it with an understanding of the Federal Government as one of enumerated powers." Pet. App. 23a n.1.

A. Legal Framework

1. The Constitution guarantees "the accused" in criminal prosecutions a fair trial. U.S. Const. Amend. VI. At the heart of that foundational right lies another of the Sixth Amendment's promises: a "public trial." *Id.* Allowing "*anyone* . . . to attend" the trial of a criminal defendant ensures "that established procedures are being followed and that deviations will become known," thereby promoting "both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise Co. v. Super. Ct. of Cal.*, 464 U.S. 501, 508 (1984). Public attendance also "discourage[s] perjury," "misconduct of participants," and "decisions based on secret bias or partiality." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980). A long line of this Court's cases has "uniformly recognized the public-trial guarantee as one created for the benefit of the defendant." *Presley*, 558 U.S. at 213.

A "public trial" is exactly what it sounds like: a trial in which the "doors of the courtroom be kept open," thereby allowing "the public, or such portion thereof as may be conveniently accommodated, [to] be admitted, subject to the right of the court to exclude objectionable characters and persons of tender years." 75 Am. Jur. 2d Trial § 136 (Feb. 2022 Update). "As part of the right to a public trial, the Sixth Amendment guarantees public jury selection." *Wilder v. United States*, 806 F.3d 653, 660 (1st Cir. 2015); *see Presley*, 558 U.S. at 213. Although closure may, on rare occasions, be constitutionally permissible, "[t]rial courts are obligated to take every reasonable measure to accommodate *public attendance* at criminal trials." *Presley*, 558 U.S. at 215 (emphasis added).

If a court "exclud[es] the public from any stage of a criminal trial," it must analyze the courtroom closure based on four factors: (1) whether closure serves an overriding interest; (2) whether closure is "no broader than necessary to protect that interest"; (3) whether there are "reasonable alternatives" to closure; and (4) "findings adequate to support the closure." *Waller v. Georgia*, 467 U.S. 39, 48 (1984). On the third factor, "trial courts are required to consider alternatives to closure even when they are not offered by the parties." *Presley*, 558 U.S. at 214.

2. Waiver and forfeiture are distinct concepts. *United States v. Olano*, 507 U.S. 725, 733 (1993). Forfeiture "is the failure to make the timely assertion of a right," whereas waiver "is the intentional relinquishment or abandonment of a known right." *Id.* A court is precluded from reviewing a waived issue but may review a forfeited issue for plain error. *See Puckett v. United States*, 556 U.S. 129, 135 (2009). Constitutional rights, including rights to a fair trial, may be forfeited or waived. *See id.* at 134 (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944)). But a waiver of constitutional rights "cannot be presumed." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps. Council 31*, 585 U.S. 878, 930 (2018); *see also Illinois v. Allen*, 397 U.S. 337, 343 (1970) ("Courts must indulge every reasonable presumption against the loss of constitutional rights.").

"In federal criminal cases, Rule 51(b) tells parties how to preserve claims of error," *i.e.*, how to avoid forfeiture. *Puckett*, 556 U.S. at 135. Parties do so by "informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the

grounds for that objection." *Id.*; *accord Greer v. United States*, 593 U.S. 503, 507 (2021). But if the defendant does not have "an opportunity to object to a ruling or order," his claim of error is not forfeited. *See* Fed. R. Crim. P. 51(b); *see Greer*, 593 U.S. at 507.

3. Like many other sovereign Indian tribes, the Jicarilla Apache Nation has enacted its own statutes, which are compiled as the Jicarilla Apache Nation Code. The Code creates the "crime of domestic violence," which the Code defines as "an act of abuse by a perpetrator on a family member of household member of the perpetrator." J.A.N.C. § 3-5-2(C). The Code defines "abuse," in turn, as "the infliction of physical or bodily injury or sexual assault or the infliction of imminent physical harm, bodily injury or sexual assault, and includes but is not limited to assault and assault and battery as defined in the Jicarilla Apache Nation Code." *Id.* § 3-5-2(A). A person convicted of domestic violence under this law "shall be sentenced to confinement not to exceed six (6) months." *Id.* § 3-5-3(A).

Several federal statutes also criminalize certain kinds of conduct between Indians on tribal land. The Major Crimes Act, for instance, turns some serious crimes Indians commit on tribal lands into federal offenses. 18 U.S.C. § 1153. Under the Act, "[a]ny Indian who commits . . . a felony assault under section 113 . . . within the Indian country, shall be subject to the same law and penalties as all other persons." 18 U.S.C. § 1153(a). Section 113, in turn, states that any person who commits an assault "resulting in serious bodily injury" shall be punished "by a fine . . . or imprisonment for not more than ten years, or both." 18 U.S.C. § 113(a)(6).

In the 2005 Violence Against Women and Department of Justice Reauthorization Act, Congress enacted 18 U.S.C. § 117(a), which makes it a federal crime for a person to "commit[] a domestic assault within . . . Indian country" if that person has been convicted "on at least 2 separate occasions in Federal, State, or Indian tribal court proceedings for offenses that would be, if subject to Federal jurisdiction, any assault, sexual abuse, or serious violent felony against a spouse or intimate partner, or against a child of or in the care of the person committing the domestic assault." 18 U.S.C. § 117(a)(1); *United States v. Bryant*, 579 U.S. 140, 142–43 (2016).

The Court addressed Congress's constitutional power to enact these kinds of laws, as applied to "to the acts of an Indian of some tribe, of a criminal character, committed within the limits of the reservation," in *Kagama*. 118 U.S. at 383. The Court there rejected the proposition that Congress's authority to enact such laws fell within the Indian Commerce Clause. *Id.* at 378–79; *see* U.S. Const. Art. I, § 8. "It seems to us," the Court nonetheless declared, "that this is within the competency of congress." *Kagama*, 118 U.S. at 383. Out of the tribes' "very weakness and helplessness," the Court reasoned, arose the Federal Government's "duty of protection, and with it the power . . . over these remnants of a race once powerful, now weak." *Id.* at 384. This power "must exist" in the Federal Government, the Court concluded, "because it has never existed anywhere else." *Id.*

B. Factual and Procedural Background

1. Quentin Veneno Jr. is an enrolled member of the Jicarilla Apache Nation. *Cf. United States v. Jicarilla Apache Nation*, 654 U.S. 162, 166 (2011). In March 2019, a grand jury returned a superseding indictment charging Mr. Veneno with

three domestic-assault offenses against a member of the same tribe, two arising under 18 U.S.C. § 117(a) and the third under 18 U.S.C. §§ 1153 and 113. The alleged offenses occurred within the boundaries of the Jicarilla Apache Nation Reservation.

2. Mr. Veneno's trial was the first trial held in the New Mexico Federal District Court during the COVID-19 pandemic. On April 28, 2020, several months before trial, the United States District Court for the District of New Mexico issued administrative order 20-MC-00004-17 (Order 4-17). Order 4-17 stated that "only those persons with official court business shall enter the courthouses . . . of the United States District Court for the District of New Mexico" and that "all civil and criminal trials scheduled to commence now through May 29, 2020" were continued. It said nothing about how criminal trials would be conducted if allowed to resume.

In August 2020, about a month before trial, the Clerk of Court published version 5 of the Plan for Resumption of Jury Trials in DNM During the Pandemic (the Plan). The cover page contained the following text, in blue: "Adopted by the Court on _____." Consistent with that text, the Plan's introductory sentence made clear that it was still "subject to approval by the Court." The Plan did not differentiate between civil and criminal trials, was not entered on the docket before Mr. Veneno's trial, and made several potentially contradictory statements about how trials would be conducted and whether the public would be allowed to attend, including:

- "Separate video feeds should be set up from a dedicated courtroom";
- "Family and victim/complaining witness members can view the trial from the dedicated courtroom";
- "Members of the general public and media can attend the trial through the Court's existing DCASS audio feed from the Court's website";

- "USMS policy limits the number of people in a courtroom to ten (trials notwithstanding)";
- "Priority is given to family members of trial participants"; and
- "Video streaming is being explored by the Court's Information Services Innovations team."

There is no evidence that Mr. Veneno or his counsel were given an opportunity to review the Plan, or even were made aware of the Plan, before trial.

At the pretrial conference, the district court showed the parties how the courtroom would be set up to accommodate social distancing but made no mention of the fact that no one would be allowed to enter the courtroom besides trial participants. Nor did the court say anything about providing an audio or video stream of the proceedings. In the lead-up to trial, neither party asked the Court about the public-trial implications of its approach.

On the morning of the first day of trial, the courtroom deputy sent an email containing a link to counsel for both parties. Because the email is not in the record, it is not known when the email was sent, to whom it was sent, what exactly it said, or when the parties or their counsel clicked on the link it contained. The morning *voir dire* session on the first day of trial was closed to the public; as it turns out, the link was to an audio stream of the proceedings. After the morning *voir dire* session, the government asked the district court to address on the record "the constitutionality of only providing audio versus video" of the trial. Pet. App. 61a.

In responding to that request, the court explained that it had "reconfigure[d] the entire courtroom based on this pandemic and concerns for the safety of everyone." Pet. App. 61a–62a. In response to defense counsel's objection that only an audio feed

was being provided, the district court stated: "We do not have the capability of a video feed." Pet. App. 62a. After a break, defense counsel objected to the court's proposed approach, stating that it was improper to exclude the public from the courtroom, and that providing "only audio" of the proceedings "even further compromises the Sixth Amendment right to a public trial." Pet. App. 63a–64a.

The district court disagreed, holding that the way in which the trial was being conducted had not violated Mr. Veneno's right to a public trial because "the *Waller* factors have been satisfied." Pet. App. 69a. The court held, first, that protecting public health is an overriding interest that justified closing the courtroom. Second, the court found that the closure was not broader than necessary to protect the public health. Third, the court concluded that reasonable alternatives had been put in place because the proceeding would, from that point forward, be streamed via both audio and video. Fourth, the Court thought its findings were adequate to justify closing the courtroom. Pet. App. 69a–70a. At no point did the district court consider the possibility of reserving a few seats for Mr. Veneno's family, for members of the media, or for the public generally. Pet. App. 14a. Nor did it defend its decision to provide an audio-only stream of the morning *voir dire* session.

3. A divided panel of the Tenth Circuit affirmed Mr. Veneno's convictions. The majority acknowledged that "the district court could possibly have made room for a few members of the public," Pet. App. 15a–16a, and that the district court had not considered "reserv[ing] seats for the public, the press, or Defendant's family in

the gallery," Pet. App. 14a, but nonetheless affirmed on the ground that Mr. Veneno was obligated to bring those alternatives to the district court's attention.

The majority then held that Mr. Veneno had not adequately preserved his objection to the way the district court approached the public-trial implications of his trial. Pet. App. 14a, 16a. The majority acknowledged that Mr. Veneno's counsel "objected that the district court compromised his Sixth Amendment right to a public trial" upon "realizing that the district court broadcasted the morning *voir dire* session via audio only," but nonetheless refused to evaluate this issue *de novo* because Mr. Veneno was obligated "to object to the closed courtroom at the start of the trial." Pet. App. 16a. In a footnote, the majority defended its preservation decision based on Order 4-17, the Plan, and the email, as well as the district court "invit[ing] the parties to view the courtroom on multiple occasions." Pet. App. 16a n.5.

The majority also rejected Mr. Veneno's argument that Congress lacked the authority to criminalize the conduct of which he had been convicted because that argument "contradict[ed] Supreme Court authority." Pet. App. 17a (citing *Kagama*, 118 U.S. at 379–80).

Judge Rossman concurred in part and dissented in part. She agreed that this Court's binding precedent foreclosed "Mr. Veneno's contention [that] Congress lacks the constitutional authority to criminalize conduct by Indians in Indian Country." Pet. App. 53a n.1. She wrote separately, however, to "confess an unease with continued reliance on 'plenary power' precedents 'baked in the prejudices of the day.'" *Id.* (quoting *Haaland*, 559 U.S. at 327 (Gorsuch, J., concurring)). Judge Rossman urged

this Court to revisit "*Kagama* and its contemporaries," "if only to explain the origins of a constitutional plenary power and to help lower courts square it with an understanding of the Federal Government as one of enumerated powers." Pet. App. 23a n.1.

Judge Rossman disagreed, however, with the majority's conclusion that Mr. Veneno had not timely objected to the provision of an audio-only stream of the first few hours of trial. Pet. App. 24a. Judge Rossman pointed out that "a defendant and his counsel must know what they are objecting to." *Id.* And because the record revealed that Mr. Veneno, his counsel, and the government did not learn of the audio-only stream until after the first *voir dire* session of trial, the issue was preserved. Pet. App. 26a–27a. In Judge Rossman's view, the documents on which the majority relied to find Mr. Veneno's public-trial objection unpreserved—Order 4-17, the Plan, and the email—were not sufficient to put Mr. Veneno and his counsel on notice. Pet. App. 27a n.2. Judge Rossman went on to explain why the district court's *Waller* findings as to the audio-only stream during the first *voir dire* session did not pass constitutional muster. Pet. App. 28a–30a. Because the district court's approach violated Mr. Veneno's right to a public trial, Judge Rossman concluded, he was entitled to "a new trial." Pet. App. 30a.

REASONS FOR GRANTING THE PETITION

I. BECAUSE THE TENTH CIRCUIT'S OPINION APPROVES OF AN APPROACH TO THE THIRD *WALLER* FACTOR THAT *PRESLEY* EXPRESSLY REJECTS, THE COURT SHOULD SUMMARILY REVERSE.

The Tenth Circuit's approach to the third *Waller* factor—consideration and exploration of reasonable alternatives to closure—directly contradicts *Presley*. Once a defendant objects to a courtroom closure, the district court is obligated "to consider

all reasonable alternatives to closure" before closing the courtroom. *Presley*, 559 U.S. at 214. The court must do so, moreover, "even when" the parties themselves "proffer" no alternatives to closure. *Id.* If a court fails to "consider all reasonable alternatives to closure," even without input from the parties, the conviction resulting from the closed trial must be reversed. *Id.* at 216. Closure in this context, of course, means "excluding the public from any stage of a criminal trial" or failing "to accommodate public attendance at criminal trials." *Id.* at 214, 215. A different approach to holding trial does not qualify as a "reasonable alternative" to closing the courtroom, therefore, unless it "accommodate[s] public attendance" at trial.

The Tenth Circuit assumed that the district court "ordered a total closure" of the courtroom because it "exclud[ed] live spectators" from the courtroom. Pet. App. 12a n.1. To comply with *Presley*'s rule, therefore "it was . . . incumbent upon [the district court] to consider all reasonable alternatives to closure." 558 U.S. at 215; *accord Weaver v. Massachusetts*, 582 U.S. 286, 297 (2017). It did not do so. As the Tenth Circuit acknowledged, even though "the district court could possibly have made room for a few members of the public," it never countenanced the possibility of "reserv[ing] seats for the public, the press, or Defendant's family in the gallery." Pet. App. 14a, 16a. What's worse, had the district court simply considered the alternatives mentioned in *Presley*—(1) "reserving one or more rows for the public" or (2) "dividing the jury venire panel to reduce courtroom congestion," 558 U.S. at 215—it would have realized that social-distancing principles did not preclude public attendance. Instead of faulting the district court for its failure to comply with *Presley*, however, the Tenth

Circuit faulted Mr. Veneno for his failure to bring these alternatives to the district court's attention. Pet. App. 14a ("If Defendant wanted the district court to reserve seats for the public, the press, or Defendant's family in the gallery, he needed to say so . . . ."). That reprimand cannot be reconciled with *Presley*.[2]

For its part, the district court wrongly assumed that streaming the trial proceedings via audio, video, or both, qualified as a reasonable alternative to closure. Pet. App. 70a ("[R]easonable alternatives have been put in place, as the proceeding is available to the public through audio and video."). As noted above, reasonable alternatives to closure are those options that serve the "overriding interest" while at the same time protecting the bedrock Sixth Amendment right—public attendance at trial. Broadcasting trial proceedings while closing the courtroom is not an alternative to closing the courtroom, therefore, because it is not a "reasonable alternative" to closure. It is closure. *Cf. Smith v. Titus*, 141 S. Ct. 982, 985–86 (2021) (Mem) (Sotomayor, J., dissenting from denial of certiorari) (rejecting, based on *Waller*, the implication "that an unconstitutional courtroom closure can be cured by contemporaneous publication of the substance of the closed proceedings"). To paraphrase Justice Scalia, "[v]irtual [public trials] might be sufficient to protect virtual constitutional rights; I doubt whether [they are] sufficient to protect real ones." *Amendments to Rule 26(b)*

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[2] The Tenth Circuit purported to review the district court's *Waller* findings for plain error. Pet. App. 15a–16a. As explained below, the court wrongly concluded that Mr. Veneno did not preserve his objection to the violation of his right to a public trial. But because the district court's failure to explore reasonable alternatives directly contradicted what this Court said in *Presley*, this Court should summarily reverse regardless of the standard of review.

of the Federal Rules of Criminal Procedure, 207 F.R.D. 89, 94 (2002) (statement of Scalia, J.).

Because the majority imposed on Mr. Veneno an obligation that cannot be squared with *Presley*, the Court should summarily reverse.

II. This Court Should Grant Review to Make Clear That a Defendant Does Not Have an Opportunity to Object to a Public-Trial Violation Under Rule 51(b) Unless It Is Clear from the Record That a Ruling or Order Has Been Sought or Made Regarding the Circumstances Under Which Trial Will Be Held.

"Public trials help to prevent perjury, unjust condemnation, and keep the accused's 'triers keenly alive to a sense of their responsibility and to the importance of their functions.'" *Walton v. Briley*, 361 F.3d 431, 432 (7th Cir. 2004) (quoting *In re Oliver*, 333 U.S. 257, 270 n.25 (1948)). "The corrective influence of public attendance at trials for crime was considered important to the liberty of the people, and it is only by steadily supporting the safeguard that it is kept from being undermined and finally destroyed." *Davis v. United States*, 247 F. 394, 395 (8th Cir. 1917). Given the foundational interests the public-trial right protects, this Court will not "presume acquiescence in the loss" of that right. *See Ohio Bell Tel. Co. v. Pub. Util. Comm'n of Ohio*, 301 U.S. 292, 307 (1937).

Ignoring these principles, the Tenth Circuit analyzed and resolved the preservation of Mr. Veneno's public-trial objection in a way that not only conflicts with the approach of two other Circuits, but that also flies in the face of Rule 51(b) and this Court's precedent.

A. The Tenth Circuit's ruling conflicts with the approach of at least two other Circuits.

Unlike the violation of other fair-trial rights bestowed by the Constitution, the violation of a defendant's public-trial right is not always immediately apparent to a defendant or his counsel. *See United States v. Anderson*, 881 F.3d 568, 571 (7th Cir. 2018) (unbeknownst to defense counsel, courthouse doors were locked after 5:00 p.m., while trial was still going); *United States v. Negron Sostre*, 790 F.3d 295, 302–03 (1st Cir. 2015) (security officers—stationed at the courtroom door—prevented the public from entering during jury selection); *United States v. Gupta*, 699 F.3d 682, 686 (2d Cir. 2012) (unbeknownst to the defendant or his counsel, members of the public were asked to leave the courtroom before the start of jury selection); *Martineau v. Perrin*, 601 F.2d 1196, 1199 (1st Cir. 1979) (defense counsel did not learn about the courtroom doors being locked until the fifth day of trial). Given this uncertainty, most courts in this context, including the Second and the Seventh, construe knowledge- and preservation-related gaps in the record against the government, *i.e.*, in favor of the defendant's right to a public trial.

In *Gupta*, for example, the district court instructed the bailiff to remove members of the public during *voir dire*. 699 F.3d at 686. The government argued that defense counsel forfeited his objection to the closure by failing to "contemporaneously object to" that instruction. *Id.* at 689. The government "base[d] its argument on the theory that Gupta learned of the district court's exclusion of his brother and girlfriend prior to the close of *voir dire*, and, for this reason, Gupta had an obligation either to object to the exclusion himself or to inform his counsel of this fact." *Id.* According to

the government, in other words, because the defendant "ha[d] not affirmatively demonstrated that he did not know of the closure," the court was required to "assume that he had such knowledge." *Id.* The Second Circuit disagreed. *Id.* Because nothing beyond the government's speculation supported the government's contention that the defendant "was aware of the closure when it happened," the court "reject[ed] the government's argument that Gupta ha[d] forfeited his Sixth Amendment claim." *Id.* at 689–90; *United States v. Tramunti*, 500 F.2d 1334, 1341 n.3 (2d Cir. 1974) ("Defense counsel cannot fairly be penalized for failure to raise at trial an issue of which he was, without his own fault, ignorant.").

In *Anderson*, meanwhile, parts of two days of trial were held after the courtroom doors had been locked for the night. Defense counsel did not object. The government argued that the issue was forfeited and reviewable only for plain error. As to the first day on which the courtroom doors were locked, the Seventh Circuit disagreed. "[T]he district court made no findings," the court noted, "as to whether Anderson or his counsel was aware that the courthouse would be locked at 5:00 p.m." *Anderson*, 881 F.3d at 572. In addition, neither Anderson's nor his counsel's "awareness" of the courtroom closure was "obvious from the record." *Id.* At least as to the first day of trial, therefore, "the issue [wa]s not waived [forfeited]."[3] *Id.*

[3] Succumbing to the waiver-forfeiture confusion discussed above, the Seventh Circuit uses the term "waived" in *Anderson* when it must have meant forfeited. *See* 881 F.3d at 572 (applying the "plain error standard set forth in Federal Rule of Criminal Procedure 52(b)" despite finding the issue "waived").

Mr. Veneno's public-trial objection was preserved under the standard applied in the Second and Seventh Circuits. No one disputes that neither the district court nor the parties specifically addressed, before trial, whether the public would be barred from physically attending the trial or whether the trial proceedings would be broadcast via audio or video to the public. None of the documents the majority pointed to fill this gap because none informed the parties of the district court's specific approach to Mr. Veneno's trial. What's more, defense counsel raised the issue at the same time the government did, and no one, including the majority below, challenged the reasonableness of defense counsel's "understanding" or "assum[ption]" that an audiovisual broadcast of the proceedings was being aired. Pet. App. 6a, 26a–27a (Rossman, J., concurring in part and dissenting in part) ("The record confirms Mr. Veneno objected to the audio-only feed as soon as he—and apparently, the government—learned of it."), 62a. Mr. Veneno's objection would be preserved in the Second and Seventh Circuits, therefore, because Mr. Veneno's and his counsel's awareness of the nature of the closure is not "obvious from the record," *Anderson*, 881 F.3d at 572, and nothing more than speculation supports the proposition that Mr. Veneno or his counsel "was aware of the closure when it happened," *Gupta*, 699 F.3d at 689; *cf. United States v. Moon*, 33 F.4th 1284, 1300 (11th Cir. 2022) (counsel not obligated to object to public-trial violation until the issue is "unmistakably on the table").

In the Tenth Circuit, by contrast, Mr. Veneno's public-trial objection was deemed unpreserved. The majority pointed to Order 4-17, but that administrative order said nothing about how criminal trials would be conducted if allowed to resume.

The majority highlighted the Plan, but the Plan declared that an "audio feed" would be available, that "[v]ideo streaming [wa]s being explored," and that "family members of trial participants" would be given "priority" in physically attending trial. Without further guidance from the district court, in short, the Plan said nothing concrete about how Mr. Veneno's trial would be conducted. Finally, the email is not on the docket, so no one knows what it told the parties beyond the link it contained. At bottom, the record is at best inconclusive as to whether Mr. Veneno or his counsel were aware of the district court's specific approach to Mr. Veneno's trial. In other Circuits, that uncertainty would mean that Mr. Veneno preserved his public-trial objection when he objected after the morning *voir dire* session. The majority, however, saw things differently. The Court should resolve this conflict. U.S. Sup. Ct. R. 10(a).

B. The Tenth Circuit's ruling cannot be squared with Rule 51(b) or this Court's precedent on the presumption against loss of a person's constitutional rights.

In addition to conflicting with the approach adopted in the Second and Seventh Circuits, the majority opinion contradicts two different strands of this Court's precedent, further confirming the need for review. U.S. Sup. Ct. R. 10(c).

First, as this Court has made clear, "Rule 51(b) tells parties how to preserve claims of error: 'by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection.'" *Puckett*, 556 U.S. at 135 (quoting Fed. R. Crim. P. 51(b)). Without citing Rule 51(b), the majority found this standard satisfied based on Order 4-17, the Plan, and the email. None of these documents fits the definition of a "court ruling or order" under Rule 51(b) because none was

entered on the court's docket. But even if they did fit that definition, they did not trigger Mr. Veneno's obligation to object because, as explained above, they did not apprise Mr. Veneno of how his trial would be conducted in public-trial terms. Without that information, Mr. Veneno had no "opportunity to object" to the district court's specific approach. And without that opportunity, his failure to object may not be held against him. *See Greer*, 593 U.S. at 507.

Second, the majority's preservation determination cannot be squared with the longstanding "presumption against the loss of constitutional rights." *See Illinois v. Allen*, 397 U.S. 337, 343 (1970). "The Constitution requires that every effort be made to see to it that a defendant in a criminal case has not unknowingly relinquished the basic protections that the Framers thought indispensable to a fair trial." *Schneckloth v. Bustamonte*, 412 U.S. 218, 241–42 (1973). Disregarding this standard, the Tenth Circuit majority went out of its way to find that Mr. Veneno had "unknowingly relinquished" his right to a public trial.

III. THIS COURT SHOULD OVERRULE *UNITED STATES V. KAGAMA* AND HOLD THAT CONGRESS LACKS THE CONSTITUTIONAL AUTHORITY TO CRIMINALIZE THE INTRA-TRIBAL CONDUCT OF INDIANS ON TRIBAL LAND. AT A MINIMUM, THE COURT SHOULD REVISIT THE QUESTION.

Mr. Veneno was convicted for conduct he engaged in as an enrolled member of the Jicarilla Apache Nation, against another enrolled member, on tribal land. He was convicted under federal statutes—18 U.S.C. §§ 117(a), 1153, and 113—under which Congress purports to criminalize such conduct. The validity of Mr. Veneno's convictions, therefore, depend on whether Congress may, consistent with the Constitution,

criminalize the intratribal conduct of Indians on Indian land. In upholding Congress's constitutional authority to do so, the Tenth Circuit cited only *Kagama*. Pet. App. 17a.

Kagama was wrong when it was decided in 1886, and nothing that has happened in the century-and-a-half since has remedied its errors. Although "the precedents of this Court warrant [its] deep respect," *see Ramos v. Louisiana*, 590 U.S. 83, 105, the factors that determine whether to revisit precedent—the quality of its reasoning, its consistency with subsequent decisions, reliance interests, and workability, *see, e.g.*, *id.* at 106—all counsel in favor of overruling *Kagama*.[4] Doing so is especially warranted given that, besides an unlikely constitutional amendment, there is no way to correct *Kagama*'s misreading of the scope of Congress's constitutional authority. *See Janus*, 585 U.S. at 917.

A. *Kagama* was egregiously wrong when decided.

"As separate sovereigns pre-existing the Constitution," *Bryant*, 579 U.S. at 149, Indian tribes have long held "the inherent power to prescribe laws for their members and to punish infractions of those laws," *United States v. Wheeler*, 435 U.S. 313, 323 (1978), *superseded by statute as stated in United States v. Lara*, 541 U.S. 193, 207 (2004). "Like all sovereign bodies," their "right of internal self-government" includes the power "to enforce their criminal laws against tribe members." *Id.* at 322.

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[4] The Court recently reaffirmed that "Congress's power to legislate with respect to Indians is well established and broad." *Haaland*, 599 U.S. at 275. Petitioner is not asking the Court to reverse the "long line of cases" in which it has endorsed Congress's "muscular" power in the field of Indian affairs. *Id.* at 272–73. Petitioner is merely asking the Court to revisit *Kagama* and hold that, however far Congress's power over Indian affairs otherwise extends, it does not extend to criminalizing the intratribal conduct of Indians on tribal land.

For nearly 100 years after the Constitution was ratified, if the Federal Government wished to exert influence over the way Indian tribes exercised their right of self-government, including the enforcement of their criminal laws, it did so via treaty. *See Lara*, 541 U.S. at 201; *Kagama*, 118 U.S. at 382. In an 1868 Treaty between the Federal Government and "certain bands of the Sioux Indians," for example, the Indian signatories to the treaty made the following promise: "If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, *or Indian*, . . . the Indians herein named solemnly agree that they will . . . deliver up the wrong-doer to the United States, to be tried and punished according to its laws." *Ex Parte Crow Dog*, 109 U.S. 556, 562–63 (1883).

In 1871, Congress embarked "upon a new departure"—to attempt to govern Indian tribes directly "by acts of Congress." *Kagama*, 118 U.S. at 382. In the final section of the Indian Appropriations Act of 1885, Congress enacted the Major Crimes Act, which, for the first time, made it a federal crime for an Indian to commit certain serious offenses against another Indian in Indian country, including a member of the same tribe. *Bryant*, 579 U.S. at 147. The question presented in *Kagama* was straightforward—without a treaty on point, did Congress's constitutional "authority . . . extend" to passing the Major Crimes Act. 118 U.S. at 383.

By the time the Court wrestled with this question in *Kagama*, it was well established that the Federal Government was "'one of enumerated powers,' which mean[t] that every law enacted by Congress must be based on one or more of those powers." *United States v. Comstock*, 560 U.S. 126, 133 (2010) (quoting *McCulloch v.*

Maryland, 4 Wheat. 316, 405 (1819), and otherwise cleaned up); *see Gibbons v. Ogden*, 9 Wheat. 1, 195, 204–05 (1824). Consistent with that longstanding principle, the *Kagama* Court attempted to fit the Major Crimes Act within one of Congress's enumerated powers. The only viable option[5] was "the clause which gives [C]ongress 'power to regulate commerce with . . . the Indian tribes.'" *Id.* The Court was unpersuaded, however, "that a system of criminal laws for Indians living peaceably in their reservations . . . was authorized by the grant of power to regulate commerce with the Indian tribes." *Id.* at 378–79.

In almost any other case, the Court's inability to pinpoint an express grant of constitutional authority would have ended the matter. *See, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 535 (2012) ("The Federal Government has expanded dramatically over the past two centuries, but it still must show that a constitutional grant of power authorizes each of its actions."). But not in *Kagama*. Seeing no textual or structural basis in the Constitution that would authorize the Major Crimes Act, the Court turned its gaze to "the right of exclusive sovereignty which must exist in the national government." *Id.* at 380. The Court struggled, however, to reconcile the Federal Government's so-called "exclusive sovereignty" with the Indian tribes' power to "regulat[e] their internal and social relations." *Id.* at 381–82.

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[5] The Court did not address the Treaty Clause, Art. II, § 2, cl. 2, the only other potential textual source of Congress's power, *see Lara*, 541 U.S. at 200, likely for two related reasons. First, "[t]he treaty power does not literally authorize Congress to act legislatively." *Id.* at 201. Second, although Congress may legislate pursuant to lawfully enacted treaties, Congress made no effort to tie its passage of the Major Crimes Act to a specific treaty with a particular tribe or group of tribes.

Rather than attempt to reconcile that tension in any meaningful way, the Court simply proclaimed: "It seems to us that this is within the competency of congress." *Id.* at 383. But what, according to the Court, gave Congress that competency? Nothing beyond the Indian tribes' status as "wards of the nation," as "weak[] and helpless[]," as "remnants of a race once powerful." *Id.* at 384. Embracing an unfortunate syllogism of constitutional authority, the Court suggested that the Federal Government's "course of dealing" with the tribes had left the tribes weak and in need of protection, which justified the Federal Government's exercise of greater authority. *Id.* Aside from being unmoored from any constitutional text, this bestowed on the Federal Government more constitutional power despite, or perhaps because of, its failure to properly exercise the limited constitutional power it had already been given.

Beyond breaking from prior precedent, *Kagama*'s approach to Congress's constitutional authority starkly deviated from the interpretive principles this Court has long embraced. *See Haaland*, 599 U.S. at 327 (Gorsuch, J., concurring) (pointing out that no aspect of *Kagama*'s holding "follow[ed] from a reasoned analysis derived from the text or history of the United States Constitution"); *Id.* at 362 (Thomas, J., dissenting) ("At bottom, *Kagama* simply departed from the text and original meaning of the Constitution, which confers only the enumerated powers discussed above."); *see generally United States v. Rahimi*, 144 S. Ct. 1889, 1910–1926 (2024) (Justices Kavanaugh and Barrett discussing proper interpretive approaches to the Constitution). Scholars see it the same way. *See, e.g.*, Lorianne Updike Toler, *The Missing Indian Affairs Clause*, 88 U. Chi. L. Rev. 413, 443 (2021) ("In contrast to the long prehistory

of federal Indian affairs regulation and grant of explicit power via the Articles [of Confederation], no corollary power is found in any discrete text of the Constitution."). Thus, *Kagama* "was not just wrong. Its reasoning was exceptionally ill founded" from the beginning. *See Knick v. Township of Scott, Pa.*, 588 U.S. 180, 203 (2019).

B. *Kagama*'s atextual holding has not been rehabilitated by time or subsequent precedent.

This Court's subsequent caselaw has not strengthened the ground on which *Kagama* lies. In the decades after deciding *Kagama*, the Court embraced *Kagama*'s bestowal of extensive congressional authority over Indian tribes while admitting that it lacked any grounding in constitutional text. In the mid-twentieth century, for instance, the Court candidly conceded that the power to criminalize intratribal conduct on Indian land "is not expressly granted in so many words by the Constitution," but nonetheless insisted that its existence "could not be doubted." *Bd. of Comm'rs of Creek Cnty. v. Seber*, 318 U.S. 705, 715 (1943). As time passed, the Court continued to express absolute confidence in *Kagama*'s holding without saying anything about the Constitution. *See, e.g.*, *United States v. Antelope*, 430 U.S. 641, 648 (1977) (citing *Kagama*, and only *Kagama*, for the proposition that "Congress has undoubted constitutional power to prescribe a criminal code applicable in Indian country"). More recently, however, the Court seems to have grown increasingly troubled by *Kagama*'s overreach, citing it in a majority opinion only once in the last fifteen years, in (ironically enough) *Jicarilla Apache Nation*, 564 U.S. at 180 (citing *Kagama* as an example of the Federal Government "invok[ing] its trust relationship to prevent state interference with its policy toward the Indian tribes").

Try as it might, therefore, the Court has not yet identified an alternative constitutional basis for Congress's authority to criminalize the intratribal conduct of Indians on Indian land. *See Indian Affairs*, 88 U. Chi. L. Rev. at 443 ("[T]he efforts to find an alternative textual hook for plenary power . . . demonstrate near consensus with the *Kagama* Court: situating plenary power in the Indian Commerce Clause strains credulity."); *Bryant*, 579 U.S. at 160 (Thomas, J., concurring) ("Over a century later, *Kagama* endures as the foundation of this doctrine, and the Court has searched in vain for any valid constitutional justification for this unfettered power."). Thus, far from securing *Kagama*'s constitutional foundation, the passage of time and this Court's precedent has left that foundation only further eroded.

To be sure, the Court's precedent in this area, which "rarely ties a challenged statute to a specific source of constitutional authority," makes it "hard[] to discern the limits on Congress's power." *Haaland*, 599 U.S. at 275–76. But this Petition, which deals with conduct at the heart of tribal sovereignty, gives the Court the chance to begin the journey back to the Constitution. *Cf. id.* at 279 ("[T]hey neither ask us to overrule the precedent they criticize nor try to reconcile their approach with it."). The Court's course correction should therefore start here, with the Court declaring that, whatever else Congress may do vis-à-vis Indian tribes, it may not displace tribal law by criminalizing the conduct of members of the same tribe on tribal land. *See id.* at 331 (Gorsuch, J., concurring) (expressing hope that the Court will "return us to the original bargain struck in the Constitution—and, with it, the respect for Indian

sovereignty it entails"); *see also Ramos*, 590 U.S. at 105 ("[S]tare decisis isn't supposed to be the art of methodically ignoring what everyone knows to be true.").

C. The other *stare decisis* criteria counsel in favor of overruling *Kagama*.

For two related reasons, concerns about reliance and workability reinforce the need to revisit *Kagama*. *See South Dakota v. Wayfair*, 585 U.S. 162, 185–86 (2018). First, in place of the treaty-by-treaty approach to Indian tribes the Federal Government adopted after ratification of the Constitution, *Kagama* blessed a blanket Congress-focused approach, one that treated all tribes "as possessing an identical quantum of sovereignty" that Congress was free to displace. *Bryant*, 579 U.S. at 159 (Thomas, J., concurring). But "Indian tribes have varied origins, discrete treaties with the United States, and different patterns of assimilation and conquest." *Bryant*, 579 U.S. at 159 (Thomas, J., concurring); *see also* Saikrishna Prakash, *Against Tribal Fungibility*, 89 Cornell L. Rev. 1069, 1071–72 (2004) ("As far as the constitutional limits of federal power are concerned, however, it is a fundamental mistake to treat Indian tribes as if they were all fungible."). Until the Court stops "treating all Indian tribes as an undifferentiated mass," therefore, "[its] case law will remain bedeviled by amorphous and ahistorical assumptions about the scope of tribal sovereignty." *Bryant*, 579 U.S. at 160–61 (Thomas, J., concurring).

Second, and on a related note, allowing Congress to criminalize the intratribal conduct of Indians on Indian land makes it impossible to articulate the scope of sovereignty Indian tribes retain. Revisiting *Kagama*, in other words, will give the Court an opportunity to fix the fundamental flaw that "haunt[s]" its Indian law cases. *See Lara*, 541 U.S. at 226 (Thomas, J., concurring). On the one hand, this Court has

repeatedly reaffirmed Indian tribes' sovereign authority, including "the sovereign power of a tribe to prosecute its members for tribal offenses." *Wheeler*, 435 U.S. at 326. On the other hand, the Court has repeatedly held that "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess." *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) (citing *Kagama*). These propositions are fundamentally at odds because, as Justice Thomas notes, "[i]t is quite arguably the essence of sovereignty not to exist merely at the whim of an external government." *Lara*, 541 U.S. at 218 (Thomas, J., concurring).

This case highlights this tension. The Jicarilla Apache Nation proscribes domestic violence among its members and within its boundaries, subjecting those who commit such acts to incarceration and fines. J.A.N.C. § 3-5-3(A). But although "tribal prosecutions of tribal members are purportedly the apex of tribal sovereignty," under *Kagama* Congress is free to "second-guess[] how tribes prosecute domestic abuse perpetrated by Indians against other Indians on Indian land." *Bryant*, 579 U.S. at 159 (Thomas, J., concurring). Only upon revisiting *Kagama* and the schizophrenic, sovereignty-enabling-whilst-sovereignty-destroying approach it mandates, can the Court begin the process of bringing some semblance of order to its Indian caselaw.

In sum, *Kagama* relied upon the kind of paternalistic and prejudicial concepts that no constitutional doctrine should embody. Maybe there are other grounds on which Congress specifically, or the Federal Government generally, may regulate the intratribal conduct of Indians on Indian land. But if so, the Court should grant review and say what they are, rather than continuing to rely on the "theory that Congress

must assume all-encompassing control over the 'remnants of a race' for its own good." *Bryant*, 579 U.S. at 161 (Thomas, J., concurring); *see also* Pet. App. 24a n.1 (Rossman, J., concurring in part and dissenting in part) ("*Kagama* and its contemporaries should be revisited, if only to explain the origins of a constitutional plenary power and to help lower courts square it with an understanding of the Federal Government as one of enumerated powers.").

IV. THIS CASE IS A STRONG VEHICLE TO RESOLVE THE QUESTIONS PRESENTED.

This case presents a clean vehicle to decide all three questions presented. On the first question, the district court purported to find that closing the courtroom complied with the four *Waller* factors, including its consideration of reasonable alternatives to closure. Pet. App. 69a-70a. The Tenth Circuit affirmed the district court's *Waller* analysis, including its approach to the third *Waller* factor. Pet. App. 15a. That the Tenth Circuit reviewed the district court's ruling for plain error is no barrier to this Court's review because the opinion warrants summary reversal under *Presley* regardless of which standard applies. The Court should not let the Tenth Circuit's misreading of this Court's precedent stand unscathed. *See* Daniel Levitas, *Scaling* Waller*, How Courts Have Eroded the Sixth Amendment Public Trial Right*, 59 Emory L. J. 493, 494 (2009) ("Although the Supreme Court has consistently held that violation of the public trial right belongs to an exceedingly small class of constitutional errors requiring reversal, state and federal appellate courts persist in upholding improper courtroom closures.").

The second question—on preservation—is likewise squarely presented. The record makes clear that there was no order made or sought on the public-trial

implications of the district court's approach until the government raised the issue after the morning *voir dire* session on the first day of trial. Pet. App. 61a. There is also no dispute as to the undocketed materials on which the Tenth Circuit majority relied in holding that Mr. Veneno had an "opportunity to object" to the audio-only stream of the morning *voir dire* session. Pet. App. 16a n.5. The majority and the dissent joined issue on the question of preservation, with Judge Rossman citing the Second Circuit's decision in *Gupta*, 699 F.3d at 690, to support her contention that Mr. Veneno did not forfeit his objection. *Compare* Pet. App. 16a n.5, *with* Pet. App. 26a–27a & 27a n.2. Nothing prevents this Court from reviewing the majority's contrary conclusion.

Third, and finally, this case presents the Court with the opportunity to correct *Kagama*'s flagrant misreading of the Constitution in a context where the sovereignty of the Jicarilla Apache Nation is at its "apex." *Bryant*, 579 U.S. at 159 (Thomas, J., concurring). The record establishes that Mr. Veneno is an enrolled member of the Jicarilla Apache Nation, that the victim of his alleged offenses is also a member, and that his alleged conduct took place on the Jicarilla Apache Nation Reservation. There is no obstacle, therefore, to the Court overruling *Kagama* and holding that, whatever the extent of Congress's plenary power over Indian affairs, it does not extend to criminalizing the intratribal conduct of Indians on Indian land.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ 

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APPENDICES