No. 24-5191

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

PETITIONER'S REPLY BRIEF

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All three questions presented warrant this Court's review. The points made—and not made—in the government's brief in opposition only reinforce the need for review.

First, despite the similarities between this case and *Presley*, the government urges the Court to deny review of the Tenth Circuit's so-called "factbound" error. But that's what summary reversal is for. When the courts of appeals blatantly disregard the fundamental principles of constitutional law this Court has announced, reversal is sometimes necessary to protect our hierarchical judicial system. *Presley* held that, when courts close their courtroom during *voir dire* based on space constraints, the Constitution requires them to *sua sponte* consider reasonable alternatives—including thinning out the venire panels or reserving a row for the public—before doing so. The pandemic did not nix this constitutional requirement. The district court disobeyed *Presley*'s rule, but rather than hold the district court to *Presley*'s strictures, the Tenth Circuit faulted Petitioner for failing to bring these options to the district court's attention. Because it is difficult to imagine a more on-point disregard of this Court's public-trial precedent, reversal is warranted.

Second, the Court should grant review to clarify the standard by which a court determines whether a criminal defendant has preserved his public-trial objection. The government's insistence (at 19) that Petitioner received "ample advance notice" that the district court would provide only an audio stream of his trial is belied by the record. The government invokes the makeup of the courtroom and the jury sitting in the galley, but neither circumstance says anything about whether or how the

proceeding would be streamed. The plan for the resumption of jury trials was not entered on the docket and did not say anything definitive about the streaming situation. And the email, whatever message it relayed, did not prompt the government to raise the audio-only issue until after the morning *voir dire* session. In sum, nothing beyond speculation supports the government's assertion that Petitioner was on notice before trial of the district court's audio-only approach to his trial.

Under these circumstances, there is little doubt that the Second and Seventh Circuits would not have found that Petitioner forfeited his Sixth Amendment objection to an audio-only stream of his trial. As both courts have made clear, they will not assume that a defendant is aware of the nature of a courtroom closure unless that awareness is "obvious from the record." *See United States v. Anderson*, 881 F.3d 568, 572 (7th Cir. 2018); *United States v. Gupta*, 699 F.3d 682, 689–90 (2d Cir. 2012). And for good reason: Given the presumption against the unknowing relinquishment of constitutional rights, it is better to address public-trial violations on the merits in cases where the record does not reveal the state of the defendant's knowledge, than to leave public-trial violations unremedied even though the defendant had no real opportunity to object.

Third, the Court should overrule *United States v. Kagama*, 118 U.S. 375 (1886), which held that Congress possesses constitutional authority to criminalize intratribal conduct on Indian land. It was egregiously wrong when decided, none of this Court's ensuing precedents have laid the foundation it lacks, and it has rendered this Court's Indian caselaw inherently illogical. Despite rebutting none of this, the

government urges the Court to leave *Kagama* in place based solely on principles of *stare decisis*. But those principles are at their nadir when, as here, adherence to *Kagama* undermines rather than promotes the "principled and intelligible" development of the law. *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986). If there are arguments in defense of *Kagama*'s constitutionality as an original matter, they are scarce, and the ensuing decades have not been friendly to this Court's attempt to articulate the grounds on which congressional criminalization of intratribal conduct passes constitutional muster.

With little else to go on, the government turns to the constitutional mosaic of Indian law—the Indian Commerce Clause, the Treaty Clause, the Federal Government's inherent power, and the trust relationship between the Federal Government and the tribes. None of these sources, however, empowers Congress to enact legislation like the Major Crimes Act. *Kagama* itself rejected the Indian Commerce Clause as a viable source of congressional authority, and despite somewhat differing views on the Clause's scope among members of the current Court, nobody seems to believe that the Clause, as originally understood, authorized Congress to criminalize intratribal conduct on Indian land. For its part, the Treaty Clause does not authorize direct legislation, and the government nowhere suggests that any of the relevant legislation was enacted pursuant to a lawfully ratified treaty.

The government's nontextual sources provide no more traction in support of *Kagama*. The notion of national sovereignty in the context of Indian tribes long stood for the proposition that tribal land was subject to sovereignty-related restraints on

alienation, meaning that tribes could not sell their land without the Federal Government's approval. Not until *Kagama* was sovereignty understood to give Congress *carte blanche* when it came to Indian affairs. The same is true of the so-called trust relationship. As this Court has reaffirmed, the trust relationship does not turn the Federal Government into a private trustee and all Indian tribes into beneficiaries. Instead, it merely requires the Federal Government to fulfill its statutory, regulatory, and treaty-based obligations to Indian tribes. Again, it was not until *Kagama* that the conception of a plenary-power-enabling trust relationship began to take hold. As applied here, it is no more grounded in the Constitution than any of the other potential constitutional sources of congressional authority.

Until *Kagama*'s flagrant misreading of the Constitution is eradicated root and branch, the Court's Indian caselaw will stick out like a sore thumb in our constitutional system. The Court should begin the process of bringing that law back into a stable and sound jurisprudential home.

I. *Presley* Requires Summary Reversal of the Tenth Circuit's Opinion.

The district court in this case committed the same constitutional errors as the state trial court committed in *Presley v. Georgia*, 558 U.S. 209 (2010). In both cases, the judge closed the courtroom during *voir dire* based on space constraints. *Id.* at 210 ("[T]here just isn't space for [the public] to sit in the audience."); Pet. App. 65a ("[W]e certainly just don't have the room . . . because of space limitations."). In both cases, the judges failed to consider the possibility of "reserving one or more rows for the public" or "dividing the jury venire panel to reduce courtroom congestion." *Presley*, 558 U.S. at 215; Pet. App. 65a–70a. In both cases, the reviewing court thought that

the lower court's closure of the courtroom reflected a reasonable approach to a vexing problem. *See Presley v. State*, 674 S.E.2d 909, 911 (Ga. 2009); Pet. App. 15a. And in both cases, the reviewing court held that the defendant could not challenge the lower court's failure to consider reasonable alternatives to closure unless the defendant presented those alternatives to the court. *See Presley*, 558 U.S. at 211; Pet. App. 14a.

In *Presley*, this Court reversed the Georgia Supreme Court on the ground that courtroom-closing courts "are required to consider alternatives to closure even when they are not offered by the parties." 558 U.S. at 214. In asking for summary reversal, Petitioner is simply asking the Court to reverse the Tenth Circuit's similarly "obvious" error in light of what the Court said in *Presley*, "itself a summary reversal." *See Gonzales v. Thomas*, 547 U.S. 183, 185 (2006).

The government (at 17) argues against further review of Petitioner's "factbound claim of error," but that's precisely the point. Even in the context of error correction, this Court has not hesitated to grant summary reversal when courts of appeals "ignore[] well-established principles," *see Sexton v. Beaudreaux*, 585 U.S. 961, 961–62 (2018), especially in the fair-trial arena, *see Presley*, 558 U.S. at 214. And here, even though the district court closed the courtroom based on the same spatial considerations that motivated the closure in *Presley*, the Tenth Circuit excused the district court's failure to consider reasonable alternatives to that closure, a step the district court was undeniably required to take under *Presley*. "If summary reversal is ever warranted," therefore, "it is warranted here." *See Andrus v. Texas*,

142 S. Ct. 1866, 1880 (2022) (Mem.) (Sotomayor, J., dissenting from the denial of certiorari).

Implicit in the government's (at 10, 17) repeated reference to "the context" is the notion that the pandemic somehow relieved the Tenth Circuit and the district court of strict compliance with *Waller*'s requirements. Not so. As this Court has emphasized, the pandemic did not send the Constitution on an extended hiatus. *See Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 19 (2020) ("But even in a pandemic, the Constitution cannot be put away and forgotten."); *see also id.* at 25 (Gorsuch, J., concurring) ("Nor does any Justice seek to explain why anything other than our usual constitutional standards should apply during the current pandemic."). As was true before the pandemic and as remained true after the pandemic, courts are required to consider reasonable alternatives to closure before closing the courtroom. The Court should correct the Tenth Circuit's indifference to the district court's disregard of that bedrock constitutional obligation.

II. The Court Should Hold that Criminal Defendants Do Not Forfeit Their Objections to Public-Trial Violations Unless the Record Establishes That They Are Apprised of the Court's Specific Approach and Fail to Object.

In requiring Petitioner to object to an audio-only stream of his trial without a court order and without any clear indication in the record that he received notice that only an audio stream would be provided, the Tenth Circuit majority deviated from the prophylactic approach adopted in the Second and Seventh Circuits. Pet. 17–20. It also conflicted with Rule 51 of the Federal Rules of Criminal Procedure and the well-established proposition that courts should not assume that criminal defendants have forfeited their fair-trial rights. Pet. 20–21.

Despite not citing Rule 51 or otherwise suggesting that a "court ruling or order" apprised Petitioner that an audio-only stream would be provided at his trial, the government (at 18–21) argues against review of this question. The government first takes aim at the premise of Petitioner's argument, insisting (at 19–20) that Petitioner "had ample advance notice of the district court's plan." But in defending that proposition, the government loses track of the specific part of the plan Petitioner was challenging—the audio-only stream of the trial proceedings. It is not clear, for instance, how (at 19) "the district court's invitation to the parties to view the courtroom in advance" or Petitioner's presence "in the courtroom during jury selection" would have provided Petitioner with "ample advance notice" that only an audio stream of his trial would be provided.

What is left (at 19) is the "district-wide plan for the resumption of jury trials" and the "pretrial email with a link to the audio feed." But, in addition to not qualifying as a "court order or ruling" under Rule 51, the not-yet-adopted plan informed parties 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 additional guidance from the judge overseeing his trial, none of these representations informed Petitioner that the public would hear but not see his trial. The Tenth Circuit majority emphasized that the plan "made clear it was only *exploring* a video feed," Pet. App. 16a n.5, but given how quickly the district court went from being incapable of providing a video feed, Pet. App. 62a, to providing a

video feed, Pet. App. 70a, it would have been reasonable for Petitioner and his counsel to surmise that exploration of a video feed meant that a video feed would be available.

As for the email, it too does not qualify as a "court ruling or order," its precise contents are unknown, and everyone agrees that the clerk sent it to counsel on the morning of the first day of trial. Counsel should not be found to have forfeited their clients' constitutional rights by failing to click on a link to a feed in an email while scrambling to pull things together on the first morning of trial. And, in all events, the government, like the majority, never explains why defense counsel was obligated to object before government counsel, who was also concerned about the constitutionality of providing only an audio stream, brought the issue to the district court's attention.

At the end of the day, the point holds: the record is at best inconclusive as to whether Petitioner was notified before trial that only an audio stream of his trial would be provided. Pet. 20.

Although the government does not dispute that violations of the public-trial right are relatively difficult to detect, it thinks (at 20–21) the issue still doesn't warrant further review because no other court of appeals would have reached a different conclusion on these facts. That assertion is based on a superficial reading of the relevant cases. In analyzing (at 20) *United States v. Gupta*, 699 F.3d 682 (2d Cir. 2012), for instance, the government focuses almost exclusively on the question of the defendant's knowledge of the closure as opposed to his counsel. *Gupta*, 699 F.3d at 690. That cramped reading fails to recognize the more important point—that the

Second Circuit refused to rely on the government's speculation to find that the defendant knew about the closure.

The Seventh Circuit demanded the same showing as the Second Circuit in *United States v. Anderson*, 881 F.3d 568 (7th Cir. 2018). Although the court ultimately applied plain-error review on the ground that the courtroom was locked for two days in a row, it refused to find the issue forfeited as to the first day of trial. As to that day, the court noted, "the district court made no findings as to whether Anderson or his counsel was aware" of the courtroom closure, and because "that awareness [wa]s not obvious from the record," the issue was not forfeited as to the first day of trial. *Id.* at 572.

Because the streaming situation was never discussed before trial, the district court made no findings, the plan and the email were not on the docket before trial, and Petitioner objected at the same time the government raised the issue, it is not "obvious from the record" that Petitioner received notice before trial of the district court's audio-only approach to his trial. Only the government's speculation supports that proposition. Despite these evidentiary shortcomings, the Tenth Circuit concluded that Petitioner was sufficiently aware of the streaming situation to impose on him the obligation to object. Given the principles of preservation the Second and Seventh Circuits espoused in *Anderson* and *Gupta*, there is every reason to think that those courts would have reviewed Petitioner's public-trial objection *de novo*. Because preservation should not depend on geographic happenstance, especially in the context of fundamental constitutional rights, the Court should grant review.

III. The Court Should Overrule *United States v. Kagama*.

This Court's decision in *United States v. Kagama*, 118 U.S. 375 (1886), is a blight on this Court's jurisprudence. Sharply deviating from constitutional text and structure, the judicial role, and the Federal Government's longstanding approach to tribal sovereignty, *Kagama* authorized Congress to do something it had never been allowed to do before—criminalize and punish the intratribal conduct of Indians on Indian land. This rudderless ruling not only gave rise to the self-contradictory tension at the heart of this Court's Indian law jurisprudence, but it also resulted in more than a century of indicting and incarcerating countless Indians. Worse still, the only rationale the *Kagama* Court explicitly embraced was race-based and paternalistic, 118 U.S. at 383–84, exactly the kind of thinking that this country and this Court have worked so hard to eradicate. *See, e.g.*, *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 221 (2017) ("It must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons."). Given its prejudicial and paternalistic underpinnings, *Kagama* "has no place in law under the Constitution," and belongs in the same dustbin "of history" as *Korematsu v. United States*, 323 U.S. 214 (1944). *See Trump v. Hawaii*, 585 U.S. 667, 710 (2018).

The only part of the preceding paragraph the government disagrees with is the second clause of the last sentence. The government implicitly concedes, in short, that *Kagama* was egregiously wrong when decided, that *Kagama* cannot be reconciled with the Constitution or the Federal Government's post-ratification approach to Indian tribes, and that *Kagama* rests on distasteful and prejudicial attitudes towards Indian tribes and their members. The government nonetheless resists Petitioner's

request to overrule *Kagama* on *stare decisis* grounds. But *stare decisis* principles, properly understood, demand that *Kagama* be overruled, not preserved.

Petitioner does not dispute, as the government points out (at 22), that this Court has occasionally cited *Kagama* in defense of Congress's "undoubted constitutional power to prescribe a criminal code applicable in Indian country." *See, e.g.*, *United States v. Antelope*, 430 U.S. 641, 648 (1977). Far from "reinforc[ing] *Kagama*," BIO. 23, however, these cases, bereft of any additional reasoning or analysis in support of the congressional power *Kagama* bestowed, have done nothing more than prop up an empty vessel, an ill-reasoned decision unworthy of this Court's ongoing solicitude. *Stare decisis*, after all, is not the "revolting" practice of upholding a decision for "no better reason . . . than that it was laid down in the time of Henry IV." Bryan A. Garner et al., The Law of Judicial Precedent 390 (2016) (quoting Justice Holmes). It is instead "the means" by which this Court "ensures that the law . . . will develop in a principled and intelligible fashion." *Vasquez v. Hillary*, 474 U.S. 254, 256 (1986). When "fidelity" to a prior precedent does not advance that purpose but rather defeats it, principles of *stare decisis* compel reversal. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring).

Under these principles, *Kagama* is ripe for reversal. Continuing to adhere to *Kagama* "actually impedes the stable and orderly adjudication of future cases" because its "underlying reasoning has become so discredited that the Court cannot keep [it] alive without jury-rigging new and different justifications to shore up the original mistake." *Id.* at 379. If anything, the situation here is even more dire. The

Court has not even bothered to try "jury-rigging new and different justifications" to shore up *Kagama*'s misreading of the Constitution—it simply cites the opinion and leaves it at that.[1]

As if to emphasize *Kagama*'s hollowness, the government offers no fewer than four possible bases to rehabilitate *Kagama*'s finding of congressional authority, while failing to analyze or defend any one of them. The government's reticence makes sense. None of the four comes anywhere close to rectifying *Kagama*'s original sin.

As for text, the government points to the Indian Commerce Clause, but not even *Kagama* was willing to read that Clause, which merely authorizes Congress to regulate commerce with the Indian tribes, to bestow on Congress authority to also adopt "a system of criminal laws for Indians living peaceably in their reservations." 118 U.S. at 378–79. For their part, members of this Court have expressed nuanced views of the Indian Commerce Clause, *compare Adoptive Couple v. Baby Girl*, 570 U.S. 637, 660 (2013) (Thomas, J., concurring), *with Haaland v. Brackeen*, 599 U.S. 255, 321–25 (2023) (Gorsuch, J., concurring), but even those Justices who believe "Congress's powers under the Indian Commerce Clause are broader than those it enjoys under the Interstate Commerce Clause" have acknowledged that "[n]othing in the Clause grants Congress the affirmative power to reassign to the federal

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[1] The government relies heavily (at 22–23) on *Haaland v. Brackeen*, 599 U.S. 255 (2023) for *stare decisis* support. But for one thing, *Brackeen* did not even cite *Kagama*. What's more, *Brackeen*'s admirable effort to organize this Court's Indian-law precedents was in no way a reaffirmation of those precedents. *See Brackeen*, 599 U.S. at 273–75. To the contrary, the Court acknowledged that its jurisprudence in this area is "unwieldy" and imprecise. *Id.* at 275–76. But because the Court had not been asked to "overrule" its precedent, it remained bound by it. *Id.* at 279.

government inherent sovereign authorities that belong to the Tribes," *see Brackeen*, 599 U.S. at 325 (Gorsuch, J., concurring). Try as they might, scholars have likewise come up empty. *See, e.g.*, Lorianne Updike Toler, *The Missing Indian Affairs Clause*, 88 U. Chi. L. Rev. 413, 443 (2021).

The Treaty Clause does not fill the plenary-power-sized hole in the Indian Commerce Clause. For one thing, "[t]he treaty power does not literally authorize Congress to act legislatively." *United States v. Lara*, 541 U.S. 193, 200 (2004). For another, 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. The 1855 and 1873 treaties between the Jicarilla Apache Nation and the United States certainly bestowed no such authority. *See* Treaty with the Jicarilla Apache, 1855, *available at* https://shorturl.at/Knycv (last visited Dec. 4, 2024); Convention with the Jicarilla Apache, 1873, *available at* https://shorturl.at/RKq7A (last visited Dec. 4, 2024).

The government's non-textual sources provide no sounder foundation for *Kagama*'s rule. The structure of the Constitution—sometimes referred to as inherent sovereign power—was long understood to encompass only restrictions on the tribes' ability to convey property to anyone other than the United States. *See Brackeen*, 599 U.S. at 274 (describing this power as "an aspect of military and foreign policy"); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 Tex. L. Rev. 1, 30–42 (2002).

The trust relationship between the United States and Indian tribes, in turn, "evolved from early treaties with tribes." *Cohen's Handbook of Federal Indian Law* § 5.04[3][a], at 413 (Nell Jessup Newton ed., 2012) (*Cohen's Handbook*). Despite the trust-beneficiary component of a trust relationship, however, the Court in recent years has emphasized that the Federal Government is not a private trustee but a sovereign, and that any obligations the Federal Government owes Indian tribes "must be based on specific provisions of positive law, not merely an amorphous 'trust relationship.'" *Arizona v. Navajo Nation*, 599 U.S. 555, 571 (2023) (Thomas, J., concurring) (citing and discussing *United States v. Jicarilla Apache Nation*, 564 U.S. 162 (2011)). Given these recent developments, pointing to the so-called trust relationship to support congressional authority to criminalize intratribal conduct on Indian land suffers from the same flaw as other alleged sources of authority: it "lack[s] any real support in our constitutional system." *Id.* at 573; *see also* Cohen's Handbook § 5.04[3][a], at 414 (noting that the concept of a trust relationship untethered from the Constitution "formed the linchpin for the excesses of the late 19th and early 20th century invocations of a nearly absolute and unreviewable congressional plenary power").

The government says (at 23) that Petitioner has not shown that this "longstanding legal framework is unworkable." We would have thought that showing that *Kagama* has no footing in the Constitution, that *Kagama* has left this Court's Indian-law jurisprudence in tatters, and that *Kagama* has authorized Congress to unconstitutionally incarcerate thousands upon thousands of Indians for 136 years,

would, by definition, allow the Court to conclude that the *Kagama* regime is "unworkable." *See Arizona v. Gant*, 556 U.S. 332, 353 (2009) (Scalia, J., concurring) (that prior precedent "was badly reasoned and produces erroneous (in this case unconstitutional) results" is "ample reason" to abandon that precedent). Regardless, whether Indians are a political or a racial group, the unworkability—to say nothing of the undesirability—of a scheme that allows them to be convicted and incarcerated based on authority that does not exist under the Constitution seems obvious.

Finally, the government misconstrues the Petition when it says (at 22) that Petitioner wishes to dismantle "Congress's broad authority over Indians in Indian country." As Petitioner has repeatedly made clear, he desires no such thing. Pet. 4, 22 n.4, 28–29, 31. Petitioner does not deny, of course, that, given the undeniable incoherence in this Court's Indian-law jurisprudence, he sees his Petition as a choice opportunity for the Court to begin a long-overdue course correction back toward the Constitution. But that point strengthens, not weakens, the need for review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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