No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

BENITO M. VALDEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the Sixth Amendment right to a "public trial" violated where the trial court—for the stated purpose of keeping the proceedings private rather than public, but without making any case-specific findings on an overriding need for privacy—conducts an entire phase of the trial at the judge's bench while using a white-noise machine to prevent anyone in the audience from hearing the trial?

STATEMENT OF RELATED PROCEEDINGS

District of Columbia Court of Appeals:

- *Benito M. Valdez v. United States*, No. 18-CF-826 (Dec. 4, 2018) (granting motion to remand the case to correct an illegal sentence)

- *Benito M. Valdez v. United States*, No. 21-CO-81 (Mar. 11, 2021) (affirming denial of motion for compassionate release)

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INTRODUCTION

The Constitution requires that criminal trials, including jury selection, be "public." U.S. CONST. amend. VI; *see also Presley v. Georgia*, 558 U.S. 209, 213 (2010) (per curiam). But the trial court in this case conducted an entire phase of the trial—the voir dire of all prospective jurors—in private. Over defense objection, the judge questioned each prospective juror at the judge's bench while using a white-noise machine called a "husher" to prevent any member of the public from hearing—a procedure used for the express purpose of ensuring the proceedings' "privacy." App. 55a; *see also id.* at 38a, 42a; *Blades v. United States*, 200 A.3d 230, 237 n.4, 238 (D.C. 2019), *cert. denied*, 141 S. Ct. 165 (2020) (explaining that the husher's purpose is to ensure "privacy" (internal quotation marks and citations omitted)). Keeping the trial private is directly contrary to the constitutional mandate of a *public* trial and is therefore unconstitutional.

Yet—deepening a split of authority—a divided panel of the District of Columbia Court of Appeals held that this procedure does not violate the right to a public trial. *See Blades*, 200 A.3d at 240-41; *see also* App. 25a n.1 (concluding it was bound by *Blades* to reject Petitioner's public-trial claim). The *Blades* majority reasoned that, because the muted trial occurs in a courtroom that is physically open to the public, shielding the trial from public hearing has no constitutional significance. *Blades*, 200 A.3d at 240.

The Constitution, however, does not speak of physically open courtrooms; rather, it protects a right to a "*public* trial." U.S. CONST. amend. VI (emphasis added). "The ability to see *and to hear* a proceeding as it unfolds is a vital component" of a

public trial. *ABC, Inc. v. Stewart*, 360 F.3d 90, 99 (2d Cir. 2004) (emphasis added). A trial that occurs in a physically open courtroom is not "public" where an electronic device is used to keep it private. Such a trial is functionally no different than one held in a closed but windowed room. The trial can be seen, but not heard. As the trial judge put it, the husher's very purpose is to ensure that the trial participants are "*not* speaking *public[]ly*." App. 42a (emphases added). This procedure is the opposite of a public trial.

Shielding a trial from public hearing is inconsistent with our nation's history and tradition of public trials. Stretching all the way back to its roots in English tradition, public trials have always been understood to be events that the public could see and hear. *See Press-Enterprise Co. v. Super. Court of Cal., Riverside Cty.*, 464 U.S. 501, 507 (1984); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980) (plurality). This makes sense, because the purposes of the public-trial right cannot be served if the public cannot hear. The most important things that happen at a trial—testimony, objections, arguments, and rulings—happen through speech. To "discourage[] perjury," *Waller v. Georgia*, 467 U.S. 39, 46 (1984), for example, the public must be able to hear the perjured testimony. Even if the courtroom is technically open, the husher makes the proceedings "effectively closed to the public and press." *In re Memphis Publ'g Co.*, 887 F.2d 646, 648-49 (6th Cir. 1989); *see also* Jocelyn Simonson, *The Criminal Court Audience in A Post-Trial World*, 127 Harv. L. Rev. 2173, 2228 (2014), *cited by Weaver v. Massachusetts*, 582 U.S. 286, 298 (2017).

Despite the common-sense notion that a public trial is one that the public can see and hear, the lower courts are divided on the issue, as the court below acknowledged. Two other state high courts, like the court below, have held that a proceeding in a physically open courtroom is "public" for federal constitutional purposes even if the court bars the public from hearing anything said. In contrast, two federal circuits and a state high court have reached the contrary conclusion, recognizing that the Constitution generally requires trial proceedings to be held in open court within public hearing.

This Court should resolve the split. The lower courts' disagreement not only concerns the basic understanding of an enumerated constitutional right, but its practical impact plays out in courtrooms across the nation every day, in hundreds if not thousands of trials each year. In some jurisdictions, the trial, including voir dire, is a public event that audience members can see and hear. In other jurisdictions, voir dire or other trial proceedings held in private is the norm, with the trial participants huddled in the back, speaking inaudibly amongst themselves. This fundamental difference in openness permeates the process of jury selection, and it affects not only defendants but "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 509.

Moreover, the holding of *Blades* and cases like it is in no way logically or doctrinally limited to jury selection, but fully applies to any portion of a trial, including witness testimony. Because the court below held that courtroom

proceedings that the audience is barred from hearing are nevertheless "public," there is no constitutional constraint on shielding entire trials from public scrutiny. Even without finding that a closure is justified by an "overriding interest" and supported by adequate findings, *Waller*, 467 U.S. at 48; *Press-Enterprise*, 464 U.S. at 510-11, a judge could allow witnesses to testify privately at the bench, within the hearing of only the parties and the jury, if the judge thinks that this privacy would make the witnesses more comfortable or candid. *Blades* permits trial judges to achieve the same degree of privacy as a closed courtroom through "the cover of the husher," *Blades*, 200 A.3d at 238, without any constitutional constraint. It is therefore vital that this Court clarify that a trial is public only if the public is allowed to hear it. This Court should grant certiorari, resolve the acknowledged split, and hold that to be "public," a trial must be publicly heard.

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals appears at App. 1a and is reported at 320 A.3d 339. The order denying rehearing en banc is unreported and appears at App. 48a. The relevant oral ruling of the Superior Court is unreported; excerpts from the transcript containing the ruling appears at App. 36a.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on August 15, 2024. App. 1a. The District of Columbia Court of Appeals denied rehearing en banc on April 1, 2025. *Id.* at 48a. On June 24, 2025, the Chief Justice granted an

application (24A1272) extending the time to file a petition for a writ of certiorari in this case to August 29, 2025. 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 first-degree murder, kidnapping, and sodomy charges, he requested that voir dire of prospective jurors be held in open court, under his Sixth Amendment right to a public trial. App. 37a. The trial judge explained that her "usual view" is to follow the local practice of conducting voir dire at the judge's bench with the use of a husher—a white-noise machine activated by the judge—to prevent anyone in the courtroom, other than the trial participants, from hearing. *Id.* at 37a-38a, 55a. The judge understood the D.C. Court of Appeals to have approved this procedure in *Copeland v. United States*, 111 A.3d 627 (D.C. 2015). *See* App. 37a, 40a-41a, 46a-47a. The judge explained that, in her view, prospective jurors "when they're feeling more *private* will give us more information" than if they are "speaking *public[]ly*." *Id.* at 38a, 42a (emphasis added).

After briefly shifting to other matters, the government reiterated its view that "the public trial is satisfied by the procedure that we talked about" and voir dire need not "be done in open court." *Id.* at 46a-47a. The trial judge agreed, reasoning that conducting the trial in a physically open courtroom, but at a private bench conference that the public

cannot hear, is "considered open court." *Id.* at 47a. The judge ruled that she would conduct voir dire "with the husher." *Id.*

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. *See id.* at 53a-55a. The judge told the jurors that, "when you come up to the bench, in order to try to protect a little bit more that—your *privacy*, I'm going to have what we call the husher on." *Id.* at 55a (emphasis added). The judge explained that, with the husher on, "the people in the courtroom can't hear you." *Id.* Although if the audience tried "really, really, really hard, [they] might be able to catch a few words," the judge told the audience not to do that. *Id.* At least one member of the public was present. *See id.* at 51a-52a.

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. *See* App. 25a n.1.

However, before Petitioner's appeal was briefed, a divided panel of the Court of Appeals held in *Blades* that the identical procedure does not violate the public-trial right. *See Blades*, 200 A.3d at 240-41. Although acknowledging that the husher's purpose was to "protect a juror's *privacy*," *id.* at 238 (quoting *Copeland*, 111 A.3d at 634) (internal quotation marks omitted) (emphasis added), the majority held that the right to a public trial cannot be violated absent a physical "closure or partial closure of the courtroom," *id.* at 240. 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." *Id.* (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 this Court's decision in *Waller*. *See Blades*, 200 A.3d at 239 (holding that use of husher is not "subject to the requirements of *Waller*"). The court acknowledged that its holding was directly contrary to "at least one opinion"—that of the Sixth Circuit. *Id.* at 239 n.6 (citing *Memphis Publ'g*, 887 F.2d 646).

Judge Beckwith dissented in *Blades*. 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." *Id.* at 249 (Beckwith, J., dissenting). 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." *Id.* at 252. "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.* (quoting *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." *Id.* (citing *Memphis Publ'g*, 887 F.2d at 648-49).

Citing *Blades*, the Court of Appeals in Petitioner's case "deem[ed] it unnecessary, as a three-judge panel of the court, to discuss [Petitioner's] final contention that his right to a public trial was violated by the use, over his objection, of a 'husher' during individual voir dire of prospective jurors." App. 25a n.1. The Court noted that, although "the claim is foreclosed by precedent binding on this panel," Petitioner "has preserved the issue." *Id.* Rejecting Petitioner's other claims, the Court of Appeals affirmed his convictions and the judgment of the Superior Court. *Id.* at 24a.

Petitioner timely petitioned for rehearing en banc. The Court of Appeals denied the petition. App. 48a.

REASONS FOR GRANTING THE WRIT

This Court should grant the petition to resolve the meaning of the constitutional right to a public trial, a question on which there is an acknowledged split of authority. The court below recognized that its holding on this issue is directly contrary to that of the Sixth Circuit. *See Blades*, 200 A.3d at 239 n.6 (citing *Memphis Publ'g*, 887 F.2d 646). That split alone warrants this Court's review.

But the split is deeper: Three courts have held that a public trial means that the public must be permitted to hear the trial. *See Memphis Publ'g Co.*, 887 F.2d at 648-49; *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, even if the public is barred from hearing the trial. *See* App. 25a n.1 (citing *Blades*, 200 A.3d at 240-41); *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 constitutional question that recurs in countless trials. The lower courts have embraced fundamentally different understandings of what it means for a trial to be "public." In many places, a public trial means that members of the press and public generally can see and hear the trial. In other places, a trial is "public" as long as it occurs in a physically open courtroom, even if the public is barred from hearing a word the trial participants are saying. Although many of the cases on this issue involve jury selection, their holdings are not doctrinally or logically limited to that particular trial phase. Indeed, one decision did not involve voir dire at all, but held that *all* of the trial court's criminal proceedings could be conducted out of public hearing. *See Rosencrans*, 856 N.E.2d at 251-52. The public-trial right is too important for this Court to allow it to be applied in such diametrically opposed ways.

This Court should grant review to hold that a public trial is one that the public can see and hear. This common-sense notion is amply supported by precedent, the history and tradition of the public-trial right, and the 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 is able hear what is happening in the trial.

This case is an ideal vehicle to resolve the question presented. The public-trial issue was litigated and decided at every level below. The Court of Appeals expressly held that the issue was "preserved." App. 25a n.1 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, believing that this procedure was always consistent with the public-trial right. And the Court of Appeals affirmed that decision based on its categorical ruling that a trial is public even if the public is barred from hearing it. 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 the Constitution permits courts to shield trials from the public's hearing. As the court below acknowledged, *Blades*, 200 A.3d at 239 n.6; *see also id.* at 249-50 (Beckwith, J., dissenting), its decision squarely conflicts with the Sixth Circuit's ruling in *Memphis Publishing*. 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 to satisfy the Constitution. *Id.* at 648-49. There is therefore an acknowledged split on whether the identical procedure of conducting trial proceedings at the bench with the use of a white-noise machine to prevent the public from hearing violates the right to a public trial.

But the split is deeper. Like the Sixth Circuit, the Supreme Court of California and the D.C. Circuit 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 unfair prejudice.

The Supreme Court of California in *Virgil* addressed a Sixth Amendment challenge to conducting 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 [federal] public trial guarantee." *Virgil*, 253 P.3d at 578. But, 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).

The D.C. Circuit also held that questioning jurors privately without adequate justification violated the public-trial right. 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 only those jurors who had a sufficiently weighty privacy interest at stake, and that voir dire should otherwise be held "in open court," *id.* at 1049.

The D.C. Circuit's opinion did not specify what it meant by "*in camera*," and *Blades* distinguished *Cable News Network* by assuming that it only barred jury selection from being held "in a place from which the public is excluded," such as the judge's chambers. *Blades*, 200 A.3d at 239. But, as Judge Beckwith pointed out, the phrase "in camera" can also include private bench conferences in an open courtroom. *See id.* at 251-52 (Beckwith, J., dissenting). And the government's petition for a writ of certiorari in *Cable News Network* clarifies that the process struck down in that case involved questioning jurors *both* in a private room *and* in an open courtroom privately "at the bench." Pet'n, *Deaver v. Cable News Network, Inc.*, No. 87-331, 1987 WL 954872, at *6 (U.S. Aug. 26, 1987).

Moreover, *Cable News Network* held that jury selection must generally be done "in open court," *Cable News Network*, 824 F.2d at 1049, a term that is widely understood to exclude private bench conferences that the public cannot hear, *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). By broadly prohibiting voir dire outside of "open court" without sufficient justification, *Cable News Network*—like *Virgil* and *Memphis Publishing*—directly conflicts with *Blades*. *See Blades*, 200 A.3d

at 251 (Beckwith, J., dissenting) (calling effort to distinguish *Cable News Network* "perplexing").

On the other side of the split, the high courts of Massachusetts and Ohio, like *Blades*, have held that deliberately preventing the public from hearing court proceedings does not violate the Sixth Amendment. *See Colon*, 121 N.E.3d at 1170; *Rosencrans*, 856 N.E.2d at 255. 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 court below in holding that procedure does not violate the Sixth Amendment right to a public trial: "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 chamber's sound system during court proceedings, deliberately making them inaudible to the public. *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 public was barred from hearing. The Supreme Court of

Ohio, narrowly divided 4-3, held that the mayor's court practice "does not violate any constitutional right," including the federal right to a public trial. *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 three decades, the split is ripe and ready for this Court to resolve.

The split is unlikely to resolve itself absent this Court's review. The D.C. Court of Appeals has twice denied rehearing en banc on this issue—first in *Blades* and now in this case. On the other side of the split, *Memphis Publishing* has stood for 36 years. Cases on both sides of the divide are firmly entrenched, and only this Court can achieve uniformity on this important issue.

B. The question presented is important and recurring.

The question presented is a recurring one that affects fundamental disagreement on the meaning of the constitutional guarantee of a "public trial." And the answer to that disputed question affects the basic framework in which trials are conducted on a daily basis in courtrooms across the nation. The "husher" procedure

is widespread in the D.C. Superior Court, where hundreds of jury trials are conducted each year. *See Blades*, 200 A.3d at 240; *see also, e.g.*, *Williams v. United States*, 51 A.3d 1273, 1284 (D.C. 2012). In contrast, other jurisdictions recognize that voir dire must generally be done in open court within hearing of the public, with private bench conferences out of public hearing limited to situations where "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; *United States v. Burgos Montes*, No. 06-009-01, 2012 WL 1190179, at *3 (D.P.R. Apr. 7, 2012); Jury Instructions Comm. of the Ninth Cir., *A Manual on Jury Trial Procedures* 54 (2013 ed.) ("*When there are legitimate privacy concerns*, judges should inform the potential jurors of the general nature of sensitive questions to be asked and allow individual jurors to make affirmative requests to proceed *at sidebar* or in chambers." (emphases added)); Fed. Judicial Ctr., *Benchbook for U.S. Dist. Ct. Judges* § 2.06, at 89 (6th ed. 2013) ("[F]ollow-up questions will be addressed to the juror(s) (*at sidebar, if such questions concern private or potentially embarrassing matters*) . . . ." (emphasis added)). The meaning of the federal constitutional right to a public trial should not vary from one courthouse to another.

This 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 Co. v. Super. Court of Cal., Riverside Cty.*, 464 U.S. 501, 505 (1984); *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.

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, contrary to our nation's history and tradition of public trials, and incompatible with the constitutional purposes of a public trial.

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 v. Georgia*, 558 U.S. 209, 213 (2010) (per curiam).

Press-Enterprise, which held that jury selection is part of the trial for public-trial purposes, *see* 464 U.S. at 505; *see also Presley*, 558 U.S. at 213, 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 outside of public hearing. *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.

The Court's recognition of a limited exception for private voir dire proves the rule that the public must ordinarily be permitted to hear jurors' statements. Otherwise, there would be no reason to be concerned about jurors' privacy when discussing "deeply personal matters." There would be 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, if jurors can always be questioned privately at a sidebar. Here, the trial court was able to offer every single prospective juror the same degree of "privacy" through the "cover of the husher," *Blades*, 200 A.3d

at 238, that they would have received from a physically closed courtroom. The decision below cannot be squared with *Press-Enterprise*.

2. Precluding the public from hearing a trial is inconsistent with the history and tradition of public trials embodied in the Constitution.

a. The Sixth Amendment right to a public trial "has its roots in our English common law heritage." *In re Oliver*, 333 U.S. 257, 266 (1948); *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 the public could 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*). In a 1649 trial "cited as evidence that English common law included a right to a public trial," Stephen E. Smith, *The Online Criminal Trial as a Public Trial*, 51 Sw. L. Rev. 116, 119 (2021), the defendant recounted his refusal to testify "till by special Order they caused their Doors to be wide thrown open, that the People might have free and uninterrupted Access to *hear*, see and consider of what they said to me." The Trial of John Lilburne [1649], 4 How. St. Tr. 1270, 1273 (emphasis added), *cited by Gannett Co. v. DePasquale*, 443 U.S. 368, 387 n.18 (1979), *and Oliver*, 333 U.S. at 266 n.14.

Sir William Blackstone also wrote of the importance of the public's ability to hear the "open examination of witnesses viva voce, in the presence of all mankind." 3 William Blackstone, *Commentaries* *373 (footnote omitted). An early-nineteenth-century English case reflects the importance of 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 of public trials recognized the importance of the public's ability to hear the statements of judges, lawyers, and witnesses during the trial.[1]

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

[1] The tradition of public hearing of trials extends even further back to ancient Greece, where the physical layout of courts was chosen to make "it easier for bystanders to hear the litigants." Adriaan Lanni, *Publicity & the Courts of Classical Athens*, 24 Yale J.L. & Human. 119, 123 (2012). Plutarch wrote of a litigant who claimed a "right to have [his] trial held at his house," but the King, Antigonus, "said, 'It shall be in the Forum and with *everybody listening* to see whether we do any injustice.'" 3 Plutarch, *Moralia* 71 (Frank Cole Babbitt trans. 1968) (emphasis added).

added)), *reprinted in Sources of Our Liberties* 188 (R. Perry ed. 1959), *quoted by Richmond Newspapers*, 448 U.S. at 567. In a nineteenth-century case, the Supreme Court of Ohio reasoned that a defendant's right to a public trial requires "that all that can be said or preferred against him, and all that can be said or urged in his favor, shall be in the *hearing* and presence of the public." *Kirk v. State*, 14 Ohio 511, 512 (1846) (emphasis added).[2]

This history and tradition confirms the common-sense notion of what it means for a trial to be "public": "[T]he primary description of a public trial . . . is one in which members of the public may observe proceedings, using their senses of sight *and hearing*." Smith, *The Online Criminal Trial as a Public Trial*, *supra*, at 120 (emphasis added). To the Framers, the notion that a "public" trial was one in which 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.

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[2] Even in the District of Columbia, the practice of conducting private voir dire is a relatively recent development. For most of the District's history, prospective jurors were questioned in open court where all could hear. *See Robinson v. United States*, 456 A.2d 848, 850 (D.C. 1983). The practice shifted only slightly in response to *United States v. Ridley*, 412 F.2d 1126 (D.C. Cir. 1969), which held that prospective jurors' answers to questions about their personal experiences as crime victims might impact other prospective jurors, prejudicing the defense. *See id.* at 1128. *Ridley* recommended conducting "this aspect of the voir dire" outside the hearing of other prospective jurors. *Id.* After *Ridley*, answers to the so-called "*Ridley* question" about crime victimization were typically given at private bench conferences, but "most questions asked during voir dire pose no danger of prejudice or embarrassment, and the answers to them [were] taken *in open court*." *Robinson*, 456 A.2d at 850 (emphasis added). At some point in the decades after *Robinson*, trial judges in the Superior Court, perhaps out of convenience, began to simply conduct all questioning at the bench. A practice initially designed to protect defendants' right to an impartial jury thereby morphed into a practice that subverts their right to a public trial.

b. The recognition that the public must be able to hear a trial does not conflict with tradition of discussing mid-trial legal or administrative matters at a sidebar. That longstanding and widely accepted practice is consistent with the history and tradition of public trials because it is essential that the judge is able hear objections and make rulings that a testifying witness or a jury should not hear. These sidebars are "tools of expediency for the benefit of all parties to which, generally speaking, no party objects." *Smith v. Titus*, 141 S. Ct. 982, 986 (2021) (Sotomayor, J., dissenting from denial of certiorari). Traditional sidebars are constitutional because they "are distinct from trial proceedings" to which the right of public access attaches. *Richmond Newspapers*, 448 U.S. at 598 n.23 (Brennan, J., concurring); *see also Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982) (affirming "the traditional authority of trial judges to conduct *in camera* conferences"); *United States v. Valenti*, 987 F.2d 708, 713 (11th Cir. 1993); *United States v. Norris*, 780 F.2d 1207, 1210 (5th Cir. 1986).

On the other hand, "shifting portions of the proceedings to a bench conference or an in camera proceeding to escape the open-trial right *goes beyond the historically accepted uses of these proceedings and is unconstitutional*." *NBC Subsid. (KNBC-TV), Inc. v. Superior Court*, 980 P.2d 337, 363 (Cal. 1999) (emphasis added) (internal quotation marks and citation omitted); *see also State v. Whitlock*, 396 P.3d 310, 316 (Wash. 2017); *Morris Publ'g Grp., LLC v. State*, 136 So. 3d 770, 783 (Fla. Dist. Ct. App. 2014). "[M]erely characterizing something as a 'sidebar' does not make it so," and "[t]o avoid implicating the public trial right, sidebars must be limited in content

to their traditional subject areas." *State v. Smith*, 334 P.3d 1049, 1054 n.10 (Wash. 2014). Conducting an entire phase of the trial, such as voir dire, at a sidebar or bench conference goes beyond the traditional and accepted use of these procedures.

3. The purposes of a public trial are fundamentally incompatible with a procedure that shields the trial from public hearing. As recognized in this Court's cases, 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." *Oliver*, 333 U.S. at 270. 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*, 443 U.S. at 380 (quoting *Oliver*, 333 U.S. at 270 n.25).

None of these interests can be served if the public cannot hear the trial. 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*, 490 U.S. at 874-75 & n.27. Prospective jurors often omit information or outright lie during voir

dire.[3] Such instances may be discovered by members of the public or press.[4] 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*, 457 U.S. at 609 n.26); *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, cited by the court in *Blades*, is inadequate for several reasons. Transcripts take too long and cost too much. In the District of Columbia, members of the public ordinarily cannot purchase transcripts

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[3] *See, e.g.*, *Peña-Rodriguez v. Colorado*, 580 U.S. 206, 211-13 (2017) (juror failed to disclose anti-Hispanic bias); Jesse Zanger, *Juror in Sean "Diddy" Combs Trial Dismissed Over Questions About Where He Actually Lives*, CBS News, June 16, 2025, https://www.cbsnews.com/newyork/news/sean-diddy-combs-trial-juror-dismissed/ (juror dismissed due to "'serious concerns about the juror's candor and whether he shaded answers [about his residence] to get on, and stay on' the jury"); *Judge May Charge Man Who Claimed He's Racist to Get Off Jury Duty*, FoxNews.com, updated January 13, 2015, https://www.foxnews.com/story/judge-may-charge-man-who-claimed-hes-racist-to-get-off-jury-duty (prospective juror falsely claimed to be biased to avoid jury duty); *see also* Richard Seltzer et al., *Juror Honesty During the Voir Dire*, 19 J. Crim. Just. 451, 455-56 (1991) (finding that substantial numbers of D.C. Superior Court prospective jurors lied or omitted information during voir dire); Nancy J. King, *Juror Delinquency in Criminal Trials in America, 1796-1996*, 94 Mich. L. Rev. 2673, 2704, 2730 n.225 (1996) (73% of judges reported that a juror lied at least once in the past three years).

[4] *See, e.g.*, *United States v. Warner*, 498 F.3d 666, 676 (7th Cir. 2007) (press discovered that juror lied about his criminal history); Adriana Marroquin, *Questions of Juror Misconduct Continue in Two-Defendant Murder Case*, D.C. Witness, May 26, 2023, https://dcwitness.org/questions-of-juror-misconduct-continue-in-two-defendant-murder-case/ (co-defendant's friend reported that a seated juror failed to disclose that she attended high school with the defendants).

of criminal proceedings that are "not held in open court"—a phrase defined to exclude "bench conferences"—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 if 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—typically several dollars per page for a transcript that can easily run into many hundreds of pages. *See* U.S. Courts, Federal Court Reporting Program, https://www.uscourts.gov/services-forms/federal-court-reporting-program#rates. In this case, for example, the 316-page transcript of voir dire ordered for the next business day would cost a whopping $2,306.80; the cheapest option takes 30 days and costs $1,390.40. *See* D.C. Courts, How to Request a Transcript, https://www.dccourts.gov/about/learn-more/court-reporting-and-recording-division. For most members of the public, these costs are prohibitive.

Even for larger press enterprises that can foot the bill, an expedited transcript might still take 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 ("rush" delivery of a transcript takes 1-7 days or longer). An after-the-fact transcript, even if only a 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).

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). Moreover, transcripts are rife with errors and omissions, which members of the public excluded from hearing the trial would be unable to detect. *See id.* 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). 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).

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. Thus, this Court has found public-trial violations from unwarranted restrictions on public access even though a transcript is 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 *see* voir dire is also inadequate to serve the purposes of a public trial if the public cannot hear. Visual 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*, 582 U.S. 286, 298 (2017). A juror's glare at the defendant, for example, could mean very different things depending on whether the juror was just asked if she can be impartial toward someone accused of a serious crime or asked if she recognizes the defendant because they live in the same neighborhood. 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 impossible. 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 court below—have reached that very conclusion: Noting that "[t]he undoubted value of an open courtroom is that it 'gives assurance that established procedures are being followed and that deviations will become known' and thereby 'enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system,'" the Court of Appeals reasoned, in a different case, that a physical courtroom closure did not warrant reversal because, "*given the (unobjected-to) use of the husher* during the individual juror interviews, we *cannot* say that allowing the courtroom to remain open during the relatively short *voir dire would have contributed appreciably to those goals*." *Barrows v. United States*, 15 A.3d 673, 681 (D.C. 2011) (quoting *Press-Enterprise*, 464 U.S. at 508) (emphasis added); *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. The

public cannot know if the judge is striking jurors for cause fairly or consistently if it cannot hear what any of the jurors said. "[A]ny failure to make the judge, counsel, defendant and jury subject to the public's eye (*as well as its ear*) undermines confidence in the proceedings." *United States v. Allen*, 34 F.4th 789, 796 (9th Cir. 2022) (emphasis added).

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* James J. Gobert et al., *Jury Selection: The Law, Art & Science of Selecting a Jury* § 10:2 (2018-19 ed.). Conversely, some jurors seeking to evade jury service may feel more emboldened to exaggerate their personal hardships or biases under "the cover of the husher," *Blades*, 200 A.3d at 238, than they would be if forced to espouse those positions in the hearing of their fellow citizens. In these ways, public voir dire—within the presence and hearing of members of the community—emphasizes to prospective jurors the importance of their impartiality and the solemnness of their service. To vindicate the right to a public trial, this Court should grant review and reverse the decision below.

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, which expressly held that the issue was "preserved." App. 25a n.1. And 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 trial court and the Court of Appeals both relied on the categorical notion that a trial in a physically open courtroom is always "public" even if the public is barred from hearing, there is no fact-finding or discretionary weighing of factors to complicate the pure constitutional issue.

CONCLUSION

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

Respectfully submitted,

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