No. 25-5537

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

---

REPLY BRIEF FOR PETITIONER

JACLYN S. FRANKFURT
Counsel of Record
DANIEL GONEN
PUBLIC DEFENDER SERVICE
633 3rd Street, NW
Washington, DC 20001
(202) 628-1200
jfrankfurt@pdsdc.org

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

The parties agree that there is a conflict on the constitutional question whether a trial is "public" if the public is barred from hearing it. The parties also agree that this recurring question is of fundamental importance. As petitioner argues, the purposes of the public-trial right, such as discouraging perjury, cannot be served if the public cannot hear the trial. The holding of the court below (and others) that public trials need only be seen, but not heard, therefore undermines the fairness of trials in those jurisdictions. The government, on the other hand, believes that shielding the voir dire of prospective jurors from public hearing is not only constitutionally permissible, but essential for selecting an impartial jury. If that's right, then the courts on the other side of the split, which have found this practice unconstitutional, are routinely depriving litigants, including the government, of fair trials. In short, the parties agree that there is a conflict on an issue of constitutional law, and whichever side of that conflict is wrong will continue to undermine the fairness of countless trials. Given that, the need for this Court to resolve the conflict is paramount. The Court should grant the petition.

A. The conceded conflict warrants this Court's review.

The government concedes that the lower courts are divided on the constitutional question whether the right to a "public trial" is violated when the public is barred from hearing the trial. BIO 13-14 (citing *In re Memphis Publ'g Co.*, 887 F.2d 646 (6th Cir. 1989)). But believing that the split is 3-1, the government urges denial of the petition because the conflict is "shallow." BIO 13.

This contention is both immaterial and incorrect. The Court routinely grants review of shallower conflicts where, as here, the issue is undisputedly important and

recurring. In any event, the conflict is deeper than the government acknowledges. But regardless of the conflict's depth, the importance of the question presented is enormous. It will impact thousands of trials each year across the nation. A conflict of such scope should be resolved by this Court.

1.a. A conceded conflict on an important question of constitutional law, arising in countless trials, warrants this Court's review. That is true even if, as the government believes, the split is 3-1 rather than 3-3. As the government has observed, "[t]his Court routinely grants review of shallower conflicts" involving 2-1 or even 1-1 splits.[1] It often does so over similar government objections of shallowness.[2]

Because "the public-trial right is important for fundamental reasons," *Weaver v. Massachusetts*, 582 U.S. 286, 299 (2017), a conflict on a substantial and recurring question about the basic meaning of that right warrants review. In the Court's last case on the scope of the public-trial right, it granted review and summarily reversed even in the absence of any acknowledged split. *See Presley v. Georgia*, 558 U.S. 209, 209 (2010) (per curiam). More recently, this Court granted review and summarily reversed in a case involving another Sixth Amendment provision, the Confrontation

---

[1] Reply Br., *Dep't of Agriculture Rural Dev. Rural Hous. Serv. v. Kirtz*, 2023 WL 3506012, at *1, *opinion at* 601 U.S. 42 (2024) (No. 22-846); *see also, e.g.*, *Wolford v. Lopez*, No. 24-1046, 2025 WL 2808808, at *1 (U.S. Oct. 3, 2025) (No. 24-1046) (1-1 split); *FS Credit Opportunities Corp. v. Saba Capital Master Fund, Ltd.*, 145 S. Ct. 2842 (2025) (No. 24-235) (2-1 split); *Perttu v. Richards*, 145 S. Ct. 1793, 1799 (2025) (No. 23-1324) (1-1 split).

[2] *See, e.g.*, BIO, *Hewitt v. United States*, 2024 WL 2786457, at *9 (arguing that "shallow and recent" 2-1 split did not warrant review), *opinion at* 606 U.S. 419 (2025) (Nos. 23-1002 & 23-1150); BIO, *Koons v. United States*, 2017 WL 6313955, at *19 (arguing that "only one court of appeals . . . has taken a position inconsistent with the decision below"), *opinion at* 584 U.S. 700 (2018) (No. 17-5716); BIO, *Bravo-Fernandez v. United States*, 2016 WL 537491, at *19 (arguing that a "single outlying decision by a state court does not warrant this Court's intervention"), *opinion at* 580 U.S. 5 (2016) (No. 15-537).

Clause, again in the absence of any asserted conflict. *See Pitts v. Mississippi*, No. 24-1159, 2025 WL 3260171, at *1 (U.S. Nov. 24, 2025). The conflict here on an undisputedly important and recurring question about the meaning of the Sixth Amendment warrants this Court's review. This Court should not allow the Constitution's guarantee of a "public trial" to mean fundamentally different things in different courtrooms.

b. Although the shallowness of a split sometimes may indicate a more fundamental reason to deny review, the government identifies no such reason here. Shallowness may indicate the issue is unimportant, unlikely to recur, or may resolve itself. But the government does not contend that any of those concerns apply here.

The government's position on the merits only underscores the importance of resolving the conflict. The government argues that conducting voir dire of all prospective jurors privately at the bench is not only constitutionally permitted, but a "best practice" that is critical to encouraging juror "candor" and thus a "fair trial." BIO 8-10 (citations omitted). But the government concedes that there is a split on the constitutionality of that practice, and thus many trial courts are bound by precedent to question prospective jurors publicly in open court. According to the government, these courts are inhibiting the selection of impartial juries and systematically depriving litigants of fair trials. Indeed, the government itself apparently believes that, in the district courts within the Sixth Circuit bound by *Memphis Publishing*, it can never be assured of a fair jury trial. Thus, while the government is wrong on the merits, *see* Section B *infra*, its position confirms that resolving the conflict is critical.

The government offers no reason to leave the conflict in place. The conflict is firmly entrenched and this Court's intervention is necessary to resolve it.

c. The government, though conceding the square conflict between the court below and the Sixth Circuit, also tries to downplay it. According to the government, "[t]he Sixth Circuit did not analyze whether the husher procedure was, in fact, an 'alternative[] to closure,' rather than a closure itself." BIO 14 (quoting *Presley*, 558 U.S. at 214) (second alteration in original). But in holding that the husher procedure was a closure, the Sixth Circuit rejected the notion that it was an "alternative" to closure. *See Memphis Publ'g*, 887 F.2d at 648 (husher procedure "effectively closed [voir dire] to the public," and trial judge's concern about jurors' exposure to press coverage "was insufficient to justify closure"). The dissenting judge pressed that the husher procedure was the best among the "alternatives" to physical closure, *id.* at 651 (Norris, J., dissenting), but the majority disagreed. The Sixth Circuit's holding that the husher procedure was a "closure," and the court below's holding that the husher procedure "does not amount to a closure," *Blades v. United States*, 200 A.3d 230, 240 (D.C. 2019), *cert. denied*, 141 S. Ct. 165 (2020), are in direct conflict.

The government also contends that the Sixth Circuit did not "address concerns like those articulated by the trial court here concerning juror candor." BIO 14. But the court below did not address such concerns either. *Blades* held that use of a husher was not "a closure subject to the requirements of *Waller*[*v. Georgia*, 467 U.S. 39 (1984)]," and thus it required no justification at all. *Blades*, 200 A.3d at 239. The court below, in both *Blades* and petitioner's case, rejected the public-trial claim on that

basis without addressing juror candor. *See id.*; App. 25a n.1.

d. The government does not dispute that, like the court below, several other high courts have held that barring the public from hearing a trial does not violate the public trial right. The government acknowledges that the Supreme Judicial Court of Massachusetts so held in *Commonwealth v. Colon*, 121 N.E.3d 1157 (Mass. 2019). *See* BIO 10. And the government does not dispute that a divided Supreme Court of Ohio did also. *See* Pet'n 13-14 (citing *State ex rel. Law Office of Montgomery Cty. Pub. Def. v. Rosencrans*, 856 N.E.2d 250 (Ohio 2006) (per curiam)).

2. The undisputed 3-1 split warrants review. But the split is even deeper. Both the D.C. Circuit and the California Supreme Court have, like the Sixth Circuit, held that the Constitution bars shielding trial proceedings from the public's hearing. *See* Pet'n 11-13.

a. The government contends that in *Cable News Network, Inc. v. United States*, 824 F.2d 1046 (D.C. Cir. 1987) (per curiam), the D.C. Circuit addressed only voir dire conducted "outside the courtroom, in a private jury room from which the public was excluded entirely." BIO 13. But, as the government concedes, the case also concerned the very same practice challenged here of questioning jurors in the courtroom, but "at the bench out of the public's earshot." *Id.* The D.C. Circuit's opinion never even mentioned the use of a private jury room. The government instead pulls that fact from a subsequent petition for a writ of certiorari. BIO 13 (citing Pet'n, *Deaver v. Cable News Network, Inc.*, 1987 WL 954872, at *5-7 (1987) (No. 87-331)). Although the government claims that no one objected to the private questioning at

the bench, *id.*, that was only true for the first morning of voir dire. After a lunch break, members of the media repeatedly objected and pressed the judge to ensure that jurors "take the witness stand" and answer questions "in open court" unless a juror affirmatively requested private questioning and the trial court made findings that the juror's need for privacy was valid. Pet'n, 1987 WL 954872, at *5-6, *10. When the trial judge refused, the media filed an emergency interlocutory appeal in the D.C. Circuit, which reversed. *See id.* at *12-16.

Instead of opining on the limited aspect of the challenge concerning voir dire in a private room, *Cable News Network* more broadly held that voir dire must generally occur "in *open court*." 824 F.2d at 1047 (emphasis added). The government does not dispute that "open court" is consistently used to distinguish courtroom proceedings that are audible to the public from those at a bench conference. *See* Pet'n 12. The court below in *Blades* consistently uses "open court" this way. *See Blades*, 200 A.3d at 237, 244. So does the government. *See* BIO 3, 9-10, 13, 15-16. The D.C. Circuit's mandate of voir dire in "open court" directly conflicts with *Blades*. *See Blades*, 200 A.3d at 251 (Beckwith, J., dissenting) (recognizing this conflict).

b. The government acknowledges that the California Supreme Court held in *People v. Virgil*, 253 P.3d 553 (Cal. 2011), that under the "federal constitutional right to a public trial," the "general rule" is that "the questioning of prospective jurors should be conducted in open court." *Id.* at 578. Seeking to eliminate the conflict between *Virgil* and *Blades*, however, the government points to *Virgil*'s statement that it found "no case that holds sidebar conferences to discuss *sensitive or potentially*

prejudicial matters are akin to a closure of the courtroom." BIO 13 (citing *Virgil*, 253 P.3d at 578) (emphasis added). But unlike *Blades*, which held that any portion of the trial can be shifted to an inaudible bench conference without any justification, *Virgil* merely recognized the right to a public trial is not absolute and could "give way in certain cases to other rights or interests." *Virgil*, 253 P.3d at 577-78 (quoting *Presley*, 558 U.S. at 213). *Virgil* held that "brief bench conferences," in which some jurors discussed sensitive matters like sexual abuse, while the remaining jurors were questioned in open court, "imposed no more than a de minimus infringement of the public trial guarantee." *Id.* at 578. *Virgil*'s holding thus directly conflicts with the decision below, which upheld a blanket rule that all prospective jurors may be questioned at the bench.

3. The government observes that this Court denied review in *Blades*. BIO 5. But this Court often grants review after it has denied a similar petition in the past.[3] Given the "variety of considerations [that] underlie denials of the writ," *Teague v. Lane*, 489 U.S. 288, 296 (1989) (alteration in original) (citation omitted), a prior denial does not suggest that the issue is undeserving of review. Indeed, sometimes the filing of a subsequent petition confirms that review is warranted because, for example, it shows that the issue is recurring or unlikely to resolve itself without this Court's

[3] *See, e.g.*, *Rico v. United States*, 145 S. Ct. 2844 (2025) (No. 24-1056) (granting review after denying similar petitions, *see, e.g.*, *Thompson v. United States*, 141 S. Ct. 1427 (2021) (No. 20-6757)); *Fernandez v. United States*, 145 S. Ct. 2731 (2025) (No. 24-556) (granting review after denying similar petitions, *see, e.g.*, *Wesley v. United States*, 144 S. Ct. 2649 (2024) (No. 23-6384)); *Urias-Orellana v. Bondi*, 145 S. Ct. 2842 (2025) (No. 24-777) (granting review after denying a petition raising the same issue in *Fernandez v. Garland*, 142 S. Ct. 1677 (2022) (No. 21-6551)).

intervention. That is so here, where in the six years since *Blades*, no court on either side of the split has taken any step toward revisiting its own precedent.

* * *

In sum, there is no dispute that the lower courts are divided, either 3-3 or 3-1, on an important question of constitutional law that impacts the fairness of countless trials. The conflict is firmly entrenched and should be resolved by this Court.

B. The decision below is wrong.

The public's ability to hear the trial as it unfolds is an essential component of what makes a trial "public" within the meaning of the Constitution. The government fails to even respond to the bulk of petitioner's arguments, and the counter-arguments it advances lack merit.

1. The government does not dispute that conducting proceedings outside of the public's hearing is contrary to the nation's history and tradition of public trials. Petitioner reviewed the historical materials—many of which were cited in this Court's public-trial cases—confirming that the public's ability to hear the trial was considered essential. *See* Pet'n 18-20. The government offers no response.

2.a. The government reiterates the rationale of the court below that the husher procedure "still allow[ed] the public to observe the proceedings in person and obtain transcripts of any obscured dialogue." BIO 9. But the government does not meaningfully respond to petitioner's arguments that the purposes of a public trial cannot be served if the trial is made inaudible. *See* Pet'n 22-28. The government acknowledges that one purpose of a public trial is to discourage perjury. BIO 5. But it cannot explain how visual observation alone would reveal if a juror lied about her

qualifications or biases. It is the words spoken, not the visual display, that matter.

The after-the-fact availability of a transcript does not cure the problem. The government does not dispute that transcripts of jury selection typically cost hundreds or thousands of dollars, and are unavailable for days or weeks after trial. *See* Pet'n 23-24. Nor does the government address the many cases, from this Court and others, holding that a transcript is an inherently inadequate substitute for hearing the trial live. *See* Pet'n 24-26. If the public cannot hear, a trial's occurrence in an open courtroom is an empty formality.

b. The government's argument that private voir dire is justified to ensure juror candor, *see* BIO 8-10, is foreclosed by *Press-Enterprise Co. v. Superior Court of California, Riverside County*, 464 U.S. 501 (1984). *Press-Enterprise* rejected the very notion that generalized concerns about juror "candor" could overcome the public-trial right. *Id.* at 503, 513. The government, in effect, asserts that the quality of jury selection is better when it is done privately. But the Constitution enshrines the opposite view—that the quality of jury selection is better when done publicly. *See id.* at 508-10. Courts cannot override an enumerated constitutional right because they disagree with the underlying policy.

The cases the government cites do not suggest otherwise. Two of these cases upheld closing voir dire in unusual cases based on case-specific findings about prejudicial pretrial publicity. *See United States v. King*, 140 F.3d 76, 82-83 (2d Cir. 1998) (in trial of famous boxing promotor Don King, district court's "explicit findings" about prejudicial press coverage made this the "*unusual* case where the fairness of a

trial, or at least the *voir dire* phase, *that is usually promoted by public access* is seriously at risk of being impaired" (emphases added)); *In re S.C. Press Ass'n*, 946 F.2d 1037, 1041 (4th Cir. 1991) (closure justified in "highly charged" prosecutions of state legislators). The other two cited cases did not address the public-trial right at all. *See Coppedge v. United States*, 272 F.2d 504, 508 (D.C. Cir. 1959) (jurors should have been questioned about exposure to negative press coverage "out of the presence *of the remaining jurors*"—not outside the public's presence (emphasis added)); *Collins v. State*, 158 A.3d 553, 563 (Md. 2017) (encouraging the "questioning [of prospective jurors] at the bench or in a conference room" without mentioning public-trial right). These cases do not support the notion that private voir dire is permitted in *every* case based on a judge's general views about juror candor. To the contrary, *King* explained that the right to a public trial could not be "limited by the mere possibility that public questioning might inhibit the candor of the *voir dire* responses." *King*, 140 F.3d at 82.

c. The government does not even try to reconcile its position with *Press-Enterprise*. In *Press-Enterprise*, this Court directed a procedure for those limited situations where prospective jurors may be questioned privately: a juror must "make an affirmative request" for private questioning, and the trial judge must then "ensure that there is in fact a valid basis for a belief that disclosure infringes a significant interest in privacy." 464 U.S. at 512; *see also Cable News Network*, 824 F.2d at 1049. As petitioner explained, *Press-Enterprise* is fundamentally incompatible with the husher procedure, which gives *every* juror complete privacy without any affirmative request or individualized findings. Pet'n 17-18. The government offers no response.

3. The government contends that a ruling that voir dire must be conducted in open court would render unconstitutional the longstanding practice of conducting mid-trial sidebars. *See* BIO 11. This is incorrect.

a. This Court has affirmed "the traditional authority of trial judges to conduct *in camera* conferences" out of the public's hearing. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982); *see also Smith v. Titus*, 141 S. Ct. 982, 986 (2021) (Sotomayor, J., dissenting from denial of certiorari); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 598 n.23 (1980) (Brennan, J., concurring). Private conferences to discuss legal or administrative matters are part of the nation's history and tradition of public trials. They do not violate the public-trial right whether they occur at a sidebar in the courtroom or in the judge's private chambers. *See, e.g.*, *United States v. Valenti*, 987 F.2d 708, 713 (11th Cir. 1993) (recognizing that this Court's public-trial cases permit "the exclusion of the public and the press from conferences at the bench and in chambers where such conferences are distinct from trial proceedings"); *United States v. Norris*, 780 F.2d 1207, 1210 (5th Cir. 1986). It is not their location, but their content and function, that make traditional sidebars compatible with the public-trial right.

Contrary to the government's claim, there is no difficulty in drawing a distinction between legitimate sidebars and trial proceedings that generally must be in open court. BIO 11. Petitioner noted—and the government does not contest—that many courts have long held that shifting trial proceedings to a bench conference in order to evade the public-trial right is impermissible. *See, e.g.*, *NBC Subsid. (KNBC-*

TV), Inc. v. Superior Court, 980 P.2d 337, 363 (Cal. 1999) (internal quotation marks and citation omitted); *see also* Pet'n 21-22. These is no suggestion that these courts have had any difficulty with line drawing. And in the many decades since *Memphis Publishing* and other cases held that the husher procedure violates the public-trial right, nothing suggests that anyone has questioned the constitutional propriety of traditional sidebars. That is unsurprising, as the taking of sworn testimony from jurors or witnesses is readily distinguishable from a legitimate sidebar.

b. It is the government's suggestion—that any portion of the trial can be shifted to a sidebar without offending the public-trial right—that is troubling. If this were correct, then entire trials—including witness testimony—could evade public scrutiny, without any legitimate justification, simply by being moved to a private bench conference. That was effectively the holding of *Rosencrans*: the Ohio Supreme Court held that, as long as a trial is in a public chamber, the entire trial may be made inaudible to the public. *See Rosencrans*, 856 N.E.2d at 254-55. *Contra People v. Ramey*, 606 N.E.2d 39, 41-42 (Ill. App. Ct. 1992) (deactivating sound system to prevent audience from hearing closing arguments violated the Sixth Amendment). The government does not defend *Rosencrans*. But it offers no limiting principle that would allow voir dire, but not any other part of a trial, to be shifted to a private bench conference without any constitutional constraint. General concerns about candor could lead trial courts to permit the private testimony of trial witnesses as easily as prospective jurors. This Court should grant review to hold that the public-trial right is not so easily evaded.

C. There is no vehicle issue.

This case is an ideal vehicle to resolve the question presented. The government does not dispute that the issue was squarely preserved and decided at every level, as the court below expressly held. App. 25a n.1. Nor does it dispute that at least one member of the public was prevented from hearing the voir dire. *See* Pet'n 6.

The government asserts that this case is an "unsuitable vehicle" because "[e]ven if petitioner were correct that the courtroom was effectively closed during voir dire, that closure was justified based on the trial court's findings." BIO 14. This is not a vehicle problem for three independent reasons.

1. A potential alternative ground for affirmance, not addressed by the court below, poses no obstacle to this Court's review. Because the court below held, in both *Blades* and petitioner's case, that the husher procedure was not "a closure subject to the requirements of *Waller*," it did not go on to address any claim that the trial court made the specific findings, required by *Waller*, to justify a closure. *Blades*, 200 A.3d at 239; *see also* App. 25a n.1. The government does not contend otherwise. Thus, even if this were an issue, it would not be an issue for this Court. Rather, this Court could follow its usual practice: resolve the question presented and, if petitioner prevails, "remand for resolution of any claims the lower courts' error prevented them from addressing." *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012); *see also, e.g.*, *Doe v. Dynamic Physical Therapy, LLC*, No. 25-180, 2025 WL 3506945, at *1 (U.S. Dec. 8, 2025) (per curiam) (reversing and noting that, while petitioner's claims may fail on other grounds, "that is for the [lower] courts to decide in the first instance"); *Pitts*, 2025 WL 3260171, at *3; *United States v. Miller*, 604 U.S. 518, 538-39 (2025).

2. In addition, the government forfeited this claim below. The government did not claim that the trial court's findings satisfied *Waller* in its brief in the Court of Appeals. *See* Br. for Appellee 74 n.47. That is a forfeiture. *See Rose v. United States*, 629 A.2d 526, 535-37 (D.C. 1993). Although the government did attempt to raise the issue for the first time in its opposition to petitioner's rehearing petition below, *see* Opp'n to Appellant's Pet'n for Reh'g En Banc 12-15, this Court does not consider issues first raised in response to a rehearing petition. *See Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984) (respondent raised "argument for the first time in his response to petitioners' motion for rehearing in the Court of Appeals," and this "failure to raise this issue in a timely manner precludes our consideration" of it); *see also Adams v. Robertson*, 520 U.S. 83, 89 n.3 (1997).

3. Finally, the government's argument that the trial court's generalized concerns about juror candor were an "overriding interest" that justified the closure under *Waller*, even if not forfeited, would fail. In *Press-Enterprise*, this Court considered this same purported justification—that "juror responses would lack the candor necessary to assure a fair trial," 464 U.S. at 503—and held it was insufficient, *id.* at 513. Here, the trial judge discussed her concerns about candor to explain why she was rejecting petitioner's request to deviate from the standard practice in the Superior Court of conducting voir dire at the bench. *See* App. 37a-38a, 40a-41a. The judge never found that these concerns rose to the level of an "overriding interest" necessary to overcome the right to voir dire in public. The judge's understanding was that no such finding was needed because "doing [voir dire] as a bench conference does

not violate the right to a public trial." App. 37a-38a; *see also id.* at 40a.

Even assuming that juror candor were an overriding interest in this case, the closure would fail under the second *Waller* factor for being broader than necessary. *See Waller*, 467 U.S. at 48. At most, concerns about juror candor could justify private questioning of the subset of jurors who were discussing sensitive topics such as "involvement in past criminal matters or experiences as either a witness or victim of a . . . crime." BIO 15. Such concerns would not justify questioning *all* prospective jurors privately, even those who had no such sensitive matters to discuss.

For these three independent reasons, there is no vehicle issue that would prevent this Court from resolving the undisputed conflict in this case.

CONCLUSION

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

Respectfully submitted,

/s Jaclyn S. Frankfurt
JACLYN S. FRANKFURT
Counsel of Record
DANIEL GONEN
PUBLIC DEFENDER SERVICE
633 3rd Street, NW
Washington, DC 20001
(202) 628-1200
jfrankfurt@pdsdc.org

Counsel for Petitioner

December 15, 2025