09-4738-cr

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

RAGHUBIR K. GUPTA,

Defendant-Appellant.

ON *EN BANC* REHEARING OF AN APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR *AMICI* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLANT

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BRIEF *AMICI CURIAE* FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS SUPPORTING APPELLANT AND URGING REVERSAL

PROPOSED QUESTIONS FOR *EN BANC* REVIEW

The Sixth Amendment, reflecting our nation's "long history" of "open" criminal prosecutions, *U.S. v. Canady*, 126 F.3d 352, 365 (2d Cir. 1997), says "the accused shall enjoy the right" to a "public" trial, "unquestionably" including jury selection. *U.S. v. Gupta*, 650 F.3d 863, 871 (2d Cir. 2011). In *Waller v. Ga.*, 467 U.S. 39 (1984), the Supreme Court ranked violations of this right among the limited class of what would come to be known as "structural" errors – those requiring automatic reversal, without review for harmlessness or a showing of prejudice. *Johnson v. U.S.*, 520 U.S. 461, 468-69 (1997) (internal quotes omitted).

But in *Peterson v. Williams*, 85 F.3d 39 (2d Cir. 1996), a panel of this Court declined to overturn a conviction where a trial judge had inadvertently – albeit unjustifiably – extended a courtroom closure she had appropriately ordered in the first instance. Though the courtroom remained shut for the duration of the defendant's 20-minute testimony, the *Peterson* court deemed the error too "trivial" to implicate what it perceived as the Sixth Amendment's underlying "values." *Id.* at 43-44. Central to those values, *Peterson* opined, is "ensur[ing] a fair trial." *Id.* & n.8.

Subsequent cases in this Court incrementally expanded *Peterson*'s reasoning, culminating in a so-called "triviality exception" to the Constitution's public trial guarantee and *Waller*'s automatic reversal rule for its breach. Applying the exception here, a split panel of the Court affirmed a conviction where the trial judge *intentionally* sealed the courtroom, on undisputedly inadequate grounds, for the *entirety* of jury selection – without even bothering to tell the parties.

With this background in mind, *amici* respectfully propose the following questions for *en banc* review:

1. The triviality exception purports to hold that "unjustified" courtroom closures, if "brief" and "inconsequential," *Gibbons v. Savage*, 555 F.3d 112, 120 (2d Cir. 2009), are "not significant enough to rise to the level of a constitutional violation." *Carson v. Fischer*, 421 F.3d 83, 94 (2d Cir. 2005). But in *Presley v. Ga.*, the Supreme Court found that the unjustified *voir dire* exclusion of "a lone ... observer" related to the defendant – a scenario commonly held to fit the exception – *did* violate the Sixth Amendment's public trial clause. 130 S. Ct. 721, 722 (2010) (*per curiam*). And the state courts on remand summarily reversed Presley's conviction without a triviality inquiry, despite citing a case that referenced the exception. *Presley v. State*, 706 S.E.2d 103, 104 & n.8 (Ga. Ct. App. 2011). Given the Supreme Court's disposition and that the exception was, as we will see, squarely before it, did the *Gupta* majority err in claiming *Peterson* survives *Presley*?

2. Even if *Peterson* endures, should this Court overrule it and abolish the triviality exception because they spring from a faulty method of Sixth Amendment interpretation – "abstract[ing] from the [public trial] right to its purposes, and then eliminat[ing] the right," *U.S. v. Gonzalez-*

Lopez, 548 U.S. 140, 145 (2006) (citation and internal quotes omitted) – since discredited by the Supreme Court?

3. At any rate, does *Peterson* misconstrue the Sixth Amendment's primary purpose by reading it to prescribe substantively fair trials rather than "particular [procedural] guarantee[s] of fairness," *id.* – including public access?

4. Does *Peterson*, in weighing the "effect" an improper closure has "on the conduct of the trial," 85 F.3d at 42, confound *Waller*'s automatic reversal rule by employing *de facto* harmless error analysis?

5. Does experience prove the triviality exception so vague, subjective and elastic as to be unworkable in practice?

6. Even by a triviality standard, does the panel majority opinion incorrectly underestimate both the importance of *voir dire* – a "critical" trial stage, *Gomez v. U.S.*, 490 U.S. 858, 873 (1989) – and the public's vital role in policing its integrity?

INTEREST STATEMENT

The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization in the United States advancing the mission

of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. A professional bar association founded in 1958, NACDL's more than 12,800 direct members – and 94 state, local and international affiliate organizations with another 35,000 members – include private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors and judges committed to preserving fairness within America's criminal justice system.

The New York State Association of Criminal Defense Lawyers (NYSACDL) – an affiliate of NACDL – is a non-profit membership organization of more than 650 criminal defense attorneys who practice in the state of New York and is the largest private criminal bar association in the state. Its purpose is to provide assistance to the criminal defense bar to enable its members to better serve the interests of their clients and to enhance their professional standing. NYSACDL is dedicated to assuring the protection of individual rights and liberties for all.

Amici file this brief supporting appellant because they believe the panel majority opinion profoundly misinterprets the Sixth Amendment, severely compromising the fundamental right to a public trial.[1]

ARGUMENT SUMMARY

The triviality exception is seriously flawed and must be abandoned, for a number of reasons:

1. ***It conflicts with the Supreme Court's recent*** **Presley** ***ruling***.

The *Gupta* majority, applying the triviality exception, held that an erroneous courtroom closure during *voir dire* was too insignificant to violate the Sixth Amendment's public trial clause. In *Presley*, however, the Supreme Court found a violation and reversed, without reviewing for triviality, based on a similarly erroneous *voir dire* closure – despite having the exception squarely before it. Because the exception is widely invoked on parallel facts, *Presley*'s considered decision to go the other way – to reverse – can only be seen as rebuking it, requiring this Court to follow suit.

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[1] No party's counsel authored this brief, in whole in part. And no one other than *amici*, their members or counsel contributed money intended to fund the brief's preparation or submission. *See* Fed. R. App. P. 29(c).

2. ***The triviality exception employs a prohibited method of Sixth Amendment analysis, exalting judicially ascribed values over express textual rights***. An erroneous courtroom closure doesn't violate the constitution, *Peterson* opines, unless it undermines some set of higher values believed to motivate the public trial guarantee. But the Supreme Court has since rejected this precise line of reasoning – abstracting purpose from right, and then disclaiming any violation if the purpose is met – in construing the coordinate Sixth Amendment rights of counsel and confrontation. Premise thus eroded, the triviality exception collapses and must be discarded.

3. ***Beyond employing a faulty analytic method, the exception misapprehends the amendment's core value to boot***. The Sixth Amendment's main goal, according to *Peterson*, is to ensure fair trials. So an erroneous courtroom closure doesn't violate the amendment, this Court says, unless it taints a trial's overall fairness. But the amendment's true purpose, the Supreme Court has since clarified, is to ensure fairness through particular procedural means – *not* fairness *per se*. And because public access is among the means prescribed, an erroneous closure *itself*

renders a trial unfair and *does* violate the amendment, dashing the exception's contrary claim.

4. ***The exception illicitly scrutinizes wrongful closures for harmlessness and improperly equates the concepts of error and right to relief.*** Because the benefits of a public trial are intangible and incalculable, but nonetheless essential, the Supreme Court has long counted access violations as structural errors requiring automatic reversal – fundamental defects in the trial mechanism that are presumptively prejudicial, and not susceptible to review for harmlessness. Harmless error review asks whether a given mistake *affected* substantial rights or had a substantial and injurious *effect* on the trial's outcome. The triviality exception asks whether an errant closure's *effect* on the trial's conduct deprived the defendant of the Sixth Amendment's protections. Those inquiries are functionally indistinguishable, making triviality little more than a stealth harmless error test. And pinning the existence of a Sixth Amendment deprivation on the effect of a particular closure also confuses the discrete issues of constitutional violation on the one hand – actually

the errant closure itself – and ostensible right to relief on the other – whether the violation impacted the trial to a degree warranting a remedy.

In training on the closure's effect, triviality analysis demands exactly what the Supreme Court deems impossible as to structural defects generally and public trial violations specifically: proof of concrete harm where the deprivation is real but the attending damage inherently unquantifiable. Naturally, few defendants can make that showing. Closure errors thus become virtually irreversible under the triviality approach, nullifying their structural status – indeed defeating its whole purpose – and rendering the access right purely nominal, its denial having no consequence.

5. *The exception is unacceptably ambiguous, subjective and standardless*. It yields strikingly inconsistent results on substantially overlapping facts. It confers open-ended discretion to reverse or affirm based solely on judges' personal views of what is minor versus major, fostering arbitrary and unpredictable rulings. And different courts rely on different factors in applying the exception – also assigning those factors

varying weights – leaving its contours indecipherable and making it incoherent in practice.

6. ***The exception inappropriately devalues both the process of jury selection and the public's key role in policing its integrity***. Jury selection is a crucial phase of any criminal trial, and publicity plays an instrumental part in keeping the process honest. Among its advantages, the presence of spectators encourages judges to give fair and balanced preliminary instructions and introduce the case to prospective jurors in an objective and even-handed way. It also enhances juror candor regarding fitness and qualifications to serve. And, concomitantly, it affords the defendant's family and friends participatory input in the selection process, adding the community's collective wisdom and potentially producing more unbiased and impartial panels. Finally, it vindicates society's independent interest in seating juries neutral as to race, gender and ethnicity and otherwise free from the scourge of invidious discrimination. Conducting the entire process in secret, without adequate justification, is no mere technical oversight.

REASONS FOR REVERSAL

I. *PRESLEY* ABROGATES THE TRIVIALITY EXCEPTION, AT LEAST IN THE CIRCUMSTANCES AT HAND

At the outset, the panel majority was wrong to contend that the Supreme Court's 2010 *Presley* decision "does not alter the 'triviality exception.'" 650 F.3d at 872. To repeat, the exception purports to hold that an "unjustified" though "brief" and "temporary" courtroom closure, during "inconsequential" proceedings, *Gibbons*, 555 F.3d at 120, is "not significant enough to rise to the level of a constitutional violation." *Carson*, 421 F.3d at 94. Read correctly, *Presley* belies that supposition, at least in the jury selection context.

In *Presley*, a Georgia trial court had mistakenly closed *voir dire* to a "lone ... observer," the defendant's uncle, on grounds unlikely to satisfy the *Waller* test, and without considering reasonable alternatives. 130 S. Ct. at 722. The grounds articulated – concerns about space and the uncle "interming[ling]" with prospective jurors – tracked those belatedly offered in *Gupta*. *Id.* (citations and internal quotes omitted).

Notably, this Court and others routinely invoke the triviality exception on similar facts, finding no Sixth Amendment violation and

refusing to reverse.[2] And contrary to the *Gupta* majority's assertion – that the *Presley* court "had no occasion to consider a 'triviality exception' to the public trial guarantee," 650 F.3d at 871 – the justices were undoubtedly aware of the exception, an *amicus* having brought it to their attention.

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[2] *See, e.g., Gupta*, 650 F.3d 863 (defendant's brother and girlfriend impermissibly excluded from whole *voir dire*); *Gibbons*, 555 F.3d 112 (defendant's mother improperly excluded from part of *voir dire*); *U.S. v. Greene*, No. 10-3267, 2011 WL 2420185 (3d Cir. June 17, 2011) (defendant's brother barred from *voir dire*); *U.S. v. Izac*, 239 Fed. Appx. 1 (4th Cir. 2007) (same as to defendant's wife); *Yarborough v. Klopotoski*, CV 09-0336, 2009 WL 4810553, at *10-*12 (E.D. Pa. Oct. 30, 2009) (defendant's family banned from part of *voir dire*), *approved and adopted*, 2009 WL 4673862 (E.D. Pa. Dec. 8, 2009); *Wilson v. U.S.*, CV MJG-08-160, CR MJG-03-0309, 2008 WL 4189601, at *3 (D. Md. Sept. 5, 2008) (defendant's mother and girlfriend excluded during jury selection); *Kelly v. State*, 6 A.3d 396 (Md. Ct. Spec. App. 2010) (defendant's family excluded from part of *voir dire*), *cert. denied*, 131 S. Ct. 2119 (2011); *People v. Bui*, 183 Cal. App. 4th 675 (Cal. Dist. Ct. App. 2010) (same as to three spectators, including two relatives); *State v. Dreadin*, No. A-5721-06T4, 2009 WL 3430113, at *1-*2 (N.J. Super. A.D. Oct. 19, 2009) (defendant's husband expelled from jury selection), *cert. denied*, 999 A.2d 463 (N.J. 2010); *State v. Irizzary*, No. A-1072-05T4, 2007 WL 1574308, at *2 (N.J. Super. A.D. June 1, 2007) (defendant's girlfriend excluded from part of jury selection); *State v. Jackson*, No. A-4764-03T4, 2005 WL 3429738, at *3 (N.J. Super. A.D. Dec. 15, 2005) (defendant's nephew ousted from jury selection); *cf., e.g., Morales v. U.S.*, 635 F.3d 39 (2d Cir. 2011) (defendant's girlfriend and baby mother, among others, barred from part of jury selection) (ineffective counsel claim), *cert. denied*, No. 11-6727, 2011 WL 4707084 (Nov. 7, 2011); *Barrows v. U.S.*, 15 A.3d 673, 680-81 & nn.12-15 (D.C. 2011) (courtroom closed to public throughout jury selection) (error unpreserved).

Thus, on page six of its brief supporting Presley's *certiorari* petition, the Ga. Assn. of Criminal Defense Lawyers cited *Peterson* itself for the proposition that an "unjustified closure for twenty minutes is too trivial to violate the Sixth Amendment." For good measure, the organization also cited a leading Tenth Circuit case, *U.S. v. Al-Smadi*, for the proposition that a "brief and inadvertent closure of the courtroom did not implicate the Sixth Amendment." 15 F.3d 153, 154-55 (10th Cir. 1994).

If the high court recognized or approved a triviality exception, then, it would not have granted cert in *Presley*– much less reversed summarily. Instead, the Court would have simply denied the petition or affirmed, concluding that the closure at issue – even if transgressing *Waller* for failure to consider alternatives – was too insignificant to constitute a Sixth Amendment violation.[3]

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[3] *See Bui* 183 Cal. App. 4th at 684, 686 ("We *first* consider whether the claimed error was a denial of the defendant's right to a public trial" – or instead "whether th[e] exclusion was 'de minimus' and so did not rise to the level of a constitutional violation" – and "*only if that answer is ... affirmative* do we continue on to an analysis ... of whether the trial court considered alternatives to closure") (citation omitted) (emphasis supplied).

But by finding the amendment violated[4] and reversing with the exception before them – on facts where lower courts regularly apply it – the justices necessarily rejected that premise, sinking the exception's principal thesis. Indeed, the Georgia courts readily grasped this point on remand, summarily vacating Presley's conviction without reviewing for triviality – again with the exception at their fingertips. *See Presley v. State*, 706 S.E.2d at 707 & n.8 (citing *U.S. v. Agosta-Vega*, 617 F.3d 541, 545-48 (1st Cir. 2010), which expressly mentions it). It follows that the exception is, in fact, "no longer valid after *Presley*," *Gupta*, 650 F.3d at 871, at least in circumstances like these – reason enough to shelve the panel majority opinion.

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[4] *See* 130 S. Ct. at 722 (agreeing that Presley's "Sixth ... Amendment right to a public trial was violated when the trial court excluded the public from the *voir dire* of prospective jurors"); *Com. v. Wolcott*, 931 N.E.2d 1025, 1031 (Mass. App. Ct.) (couching *Presley* as "holding that the defendant's Sixth Amendment right to a public trial had been violated") (footnote omitted), *app. denied*, 938 N.E.2d 891 (Mass. 2010); *Kelly*, 6 A.3d at 418 (*Presley* "held that the trial court violated [defendant's] right to a public trial when it [impermissibly] excluded his uncle from the courtroom during *voir dire*").

II. THE TRIVIALITY EXCEPTION, IN PREFERRING EXTRA-TEXTUAL VALUES TO THE FRAMERS' WRITTEN WORDS, EMPLOYS A FLAWED METHOD OF SIXTH AMENDMENT ANALYSIS

Even if it survives *Presley*, the triviality exception draws a more fundamental objection: it flouts the Supreme Court's contemporary understanding of the rights to counsel and confrontation, publicity's Sixth Amendment counterparts.

The text of the publicity clause is clear, entitling the accused to a "public trial" in "all criminal prosecutions." Yet according to the exception, an errant courtroom closure doesn't violate this guarantee unless it impugns some broader set of "values" judges ascribe to the clause. *Gupta*, 650 F.3d at 867. In this Court's view, those values include the following:

> 1) to ensure a fair trial; 2) to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions; 3) to encourage witnesses to come forward; and 4) to discourage perjury.

Peterson, 85 F.3d at 43 (citing *Waller*, 467 U.S. at 46-47) (footnote omitted).

In the years since *Peterson* inaugurated the triviality approach, the Supreme Court has sharply criticized this line of Sixth Amendment

reasoning – first in *Crawford v. Wa.*,[5] revamping its confrontation jurisprudence, and then in *Gonzalez-Lopez*, classifying the wrongful denial of chosen counsel as a structural defect warranting automatic reversal, without a showing of prejudice or resort to harmless error review.

As Justice Scalia wrote for the *Gonzalez-Lopez* court:

> [T]he Government's argument in effect reads the Sixth Amendment as a more detailed version of the Due Process Clause – and then proceeds to give no effect to the details.... What the Government urges upon us here is what was urged upon us (successfully, at one time, see *Ohio v. Roberts*, 448 U.S. 56 (1980)) with regard to the Sixth Amendment's right of confrontation – a line of reasoning that "*abstracts from the right to its purposes and then eliminates the right*," *Maryland v. Craig*, 497 U.S. 836, 862 (SCALIA, J., dissenting). Since, it was argued, the purpose of the Confrontation Clause was to ensure the reliability of evidence, so long as testimonial hearsay bore "indicia of reliability," the Confrontation Clause was not violated. See *Roberts*, *supra*, at 65-66. We rejected that argument (and our prior cases that had accepted it) in *Crawford*, saying that the Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." [541 U.S.] at 61.

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[5] 541 U.S. 36 (2004).

> So also with the Sixth Amendment right to counsel of choice.... "The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause." *Strickland* [*v. Wa.*, 466 U.S. 668,] 684-85 [(1984)]. In sum, *the right at stake here is the right to counsel of choice, not the right to a fair trial; and* ***that right was violated because the deprivation of counsel was erroneous***.

548 U.S. at 145-46 (emphasis supplied).

The triviality idea, as enunciated in *Peterson* and elaborated subsequently, rests on the same fallacy condemned in *Crawford* and *Gonzalez-Lopez*. It "abstracts from the [public trial] right to its [assumed] purposes, and then eliminates the right" so long as appellate judges subjectively think the purposes satisfied. *Id.* (citation and internal quotes omitted).[6]

Under the triviality exception, that is, an erroneous courtroom closure isn't deemed to violate the Sixth Amendment unless it impacts the

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[6] Indeed, the exception has become the default rule in errant closure cases, this Court's invoking it to excuse them a virtual given. The *Gupta* majority opinion is a "self-contained demonstration" of this phenomenon, *Crawford*, 541 U.S. at 66, expounding on the values seen as stirring the public trial clause while dispensing with even quoting its actual words. That approach has the caboose pulling the train.

"values" claimed to guide the right to a public trial. *Gupta*, 650 F.3d at 867. But *Gonzalez-Lopez* indicates that the amendment means what it says: the accused is presumptively entitled to an open hearing, and this right is violated when it is erroneously taken away. To put it in fine, the error *is* the violation; the right and amendment are impaired precisely "*because*" the closure was "erroneous," 548 U.S. at 146 (emphasis supplied), and a public trial "violation occurs *whenever*" the courtroom is "wrongfully" shut during a critical stage of a criminal prosecution. *Id.* at 150; *see, e.g., Wolcott*, 931 N.E.2d at 1032 (failure to consider alternatives *per Waller* "in and of itself[] establishes that the defendant's right to a public trial was violated").

In suggesting otherwise, *Peterson*'s value-oriented approach defies the Supreme Court's operative mode of interpreting the Sixth Amendment and cannot stand.

III. EVEN IF VALUES COULD BE DIVORCED FROM WORDS, THE TRIVIALITY EXCEPTION MISCONSTRUES THE KEY VALUE DRIVING THE SIXTH AMENDMENT; THE AMENDMENT AIMS TO ENSURE FAIR TRIALS THROUGH SPECIFIC PROCEDURAL GUARANTEES, INCLUDING PUBLICITY – NOT, AS THE EXCEPTION OPINES, TO ENSURE FAIR TRIALS THEMSELVES

Looking past language to purpose isn't the triviality exception's only analytic flaw. It compounds that error by extracting the wrong values from the Sixth Amendment's text.

According to the exception, the publicity clause primarily seeks to promote fair trials. *Gupta*, 650 F.3d at 867. If a covered proceeding is fair, the argument goes, then an improper closure doesn't infringe the right of access that the clause serves to secure.

While the "rights set forth" in the Sixth Amendment may strive "to ensure a fair trial," however, it "does *not* follow" that they can be "disregarded so long as the trial is ... fair." *Gonzalez-Lopez*, 548 U.S. at 145 (emphasis supplied). For the amendment does *not* promise fair trials *per se*, as *Peterson* mistakenly assumes. Instead, as *Gonzalez-Lopez* illustrates, it promises fairness as ensured through *particular procedural means*. *Cf. id.* at 146 (Sixth Amendment "commands[] not that a trial be fair, but that a particular guarantee of fairness be provided – to wit, that

the accused be defended by the counsel he believes to be best"). And among the means prescribed, flanking those of counsel and confrontation, is public transparency. *U.S. v. Withers*, 638 F.3d 1055, 1066 (9th Cir. 2011) (access right "critical to ensuring a fair trial"). Working in tandem, these means themselves (or, more accurately, their presence or absence) are what make a trial fair or unfair in a constitutional sense – what determine its legitimacy or illegitimacy for Sixth Amendment purposes. *Cf. Gonzalez-Lopez*, 548 U.S. at 147-48 (right to counsel of choice does not "derive[]" from "purpose of ensuring a fair trial," but is itself "the root meaning of the constitutional guarantee") (citations and footnote omitted). *Peterson*'s opposing contention is not only circular, but reduces the amendment to a replica of the "Due Process Clause[']s" substantive decrees, rendering it redundant. *Gonzalez-Lopez,* 548 U.S. at 146 (citation and internal quotes omitted); *cf. State v. Easterling*, 137 P.3d 825, 834 (Wash. 2006) (Chambers, Owens and Sanders, JJ., concurring) (whether defendant "got due process of law is a completely different question than whether [public trial clause] was violated").

So fairness *qua* fairness is not, as the triviality exception would have it, what the Sixth Amendment aspires to achieve. Rather, by *Gonzalez-Lopez*'s logic, "openness" itself – paired again with confrontation and counsel – is a *bona fide* procedural "value" animating and enshrined in the amendment: one of independent and transcending "import[ance]." *Owens v. U.S.*, 483 F.3d 48, 61 (1st Cir. 2007) ("*Owens I*") (citation and internal quotes omitted); *accord*, *e.g.*, *In re Oliver*, 333 U.S. 257, 271 (1948) ("Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account.") (citations, footnote and internal quotes omitted). In short, a trial is considered fair for constitutional purposes *because* it follows the procedures the Sixth Amendment mandates, including publicity – not because judges think it fair *despite* any noncompliance. *E.g., Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975) (publicity "serves to guarantee the fairness of trials"); *Canady*, 126 F.3d at 362 ("open public trial" affords "assurance of fairness") (citation and internal quotes omitted); *Owens I*, 483 F.3d at 61 (Sixth Amendment presumes that "a trial is far more likely to be fair [under] the watchful eye of the public").

Peterson's contrary view has thus been eclipsed by intervening Supreme Court precedent, and the exception must be revisited and retired. After all, "[i]t is one thing to conclude that the [publicity] right" may be informed by "the need for fair trial, but quite another to say that the right does not exist" – or isn't violated – "unless its denial renders the trial unfair." *Gonzalez-Lopez*, 548 U.S. at 147-48 & n.3.

IV. IN ASSESSING THE ACTUAL EFFECT OF AN IMPROPER COURTROOM CLOSURE, THE TRIVIALITY EXCEPTION SUBVERTS A WEALTH OF SETTLED SUPREME COURT AUTHORITY BY APPLYING BACK DOOR HARMLESS ERROR ANALYSIS

To reiterate, the Supreme Court has long ranked public trial violations among the few structural errors compelling automatic reversal, without review for harmlessness or a showing of prejudice. *E.g.*, *Smith v. Hollins*, 448 F.3d 533, 540 (2d Cir. 2006) (citation and internal quotes omitted). These fundamental "defects in the constitution of the trial mechanism," implicating the very "framework within which [the prosecution] proceeds," *Az. v. Fulminante*, 499 U.S. 279, 309-10 (1991), are characterized by "unmeasurable" effects and "unquantifiable[,] indeterminate" consequences. *Sullivan v. La.*, 508 U.S. 275, 281-82 (1993);

see, e.g., Gonzalez-Lopez, 548 U.S. at 149 n.4 (structural errors distinguished by "difficulty of assessing [their] effect"); *Owens I*, 483 F.3d at 65 n.14 (prejudice "impossible to [determine or] quantify in [structural error] cases").

Impermissible courtroom closures comfortably fit this category because the benefits of a public trial – a "central tenet of our judicial structure," *Walton v. Briley*, 361 F.3d 431, 432 (7th Cir. 2004) – are "frequently intangible, [hard] to prove, or a matter of chance, [but] the Framers plainly thought them nonetheless real." *Waller*, 467 U.S. at 49-50 n.9 (recognizing that a prejudice requirement "would in most cases deprive the defendant of the public-trial guarantee, for it would be difficult to envisage a case in which he would have evidence available of specific injury") (citations, internal quotes and brackets omitted).

Indeed, Justice Scalia has described "the Sixth Amendment [publicity] right" – serving as it does to enhance a trial's quality, safeguard its integrity and augment its appearance of fairness[7] – as "provid[ing] benefits to the entire society *more important than many [other] structural*

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[7] *See U.S. v. Alcantara*, 396 F.3d 189, 194-95 (2d Cir. 2005).

guarantees." *Freytag v. Comm'r*, 501 U.S. 868, 896 (1991) (Scalia, J., concurring) (internal quotes omitted) (emphasis supplied); *cf. Gannett Co. v. DePasquale*, 443 U.S. 368, 383 (1979) (Blackmun, J., concurring and dissenting) (extolling "public trial" as "the soul of justice").

These "salutary effects of public scrutiny," *Waller*, 467 U.S. at 47 (footnote omitted), emanate from "a view of human nature, true as a general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings." *Estes v. Tx.*, 381 U.S. 532, 588 (1965) (Harlan, J., concurring); *see Oliver*, 333 U.S. at 266-67 n.14 ("By immemorial usage, wherever the common law prevails, all trials are in open court, to which spectators are admitted.") (citation and internal quotes omitted). Their absence thus "harms the integrity of our federal judicial system as a whole," *Alcantara*, 396 F.3d at 203, and "undercuts the legitimacy of the criminal justice process." *Canady*, 126 F.3d at 363.

The triviality exception purports to respect these principles, professing:

> A triviality standard, properly understood, does not dismiss a defendant's claim on the grounds that the

> defendant was guilty anyway or that he did not suffer "prejudice" or "specific injury." It is, in other words, very different from a harmless error inquiry. It looks, rather, to whether the actions of the court and the *effect that they had on the conduct of the trial* deprived the defendant – whether otherwise innocent or guilty – of the protections conferred by the Sixth Amendment.

Peterson, 85 F.3d at 42 (emphasis supplied); *accord, e.g., State v. Vanness*, 738 N.W.2d 154, 158 (Wis. App. 2007) (review "must focus on the *effect of the closing* to determine whether a defendant's right to a public trial has been violated") (emphasis supplied).

Notwithstanding the Court's disclaimer, this proffered distinction is, in fact, purely "semantical." *Carson*, 421 F.3d at 94. For to gauge an action's "effect" on a trial's conduct *is* to indulge in harmless error analysis, albeit by another name. *See* 28 U.S.C. § 2111 ("On ... hearing ... any appeal ... in any case, the court shall ... [dis]regard ... errors or defects which do not *affect* the substantial rights of the parties.") (emphasis supplied); Fed. R. Crim. P. 52(a) ("**Harmless error.** Any error, defect, irregularity, or variance that does not *affect* substantial rights must be disregarded.") (emphasis supplied); *Kotteakos v. U.S.*, 328 U.S. 750, 776 (1946) (review for harmlessness asks if error had "substantial and

injurious *effect* ... in determining ... verdict") (emphasis supplied). And to condition a "deprivation" of the Sixth Amendment's "protections" on the "effect" of a court's "actions"[8] is to confuse the question of *error* on the one hand – whether a given closure violates the right to a public trial (it necessarily does if it fails the *Waller* test) – with the question of ostensible *right to relief* on the other – whether the violation impacted the trial to a degree warranting a remedy (in reality, the violation *alone* demands a remedy because the error is structural).

The following chain of logic illustrates the latter point – *viz.*, that an erroneous *voir dire* closure *itself* violates the Constitution's access clause[9] and leaves no room for an extrinsic impact inquiry:

A. The Sixth Amendment, by its terms, entitles the defendant to a "public trial."

B. Jury selection is an "unquestionabl[e]" part of trial. *Gupta*, 650 F.3d at 871.

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[8] *Peterson*, 85 F.3d at 42.

[9] *See, e.g., Wolcott*, 931 N.E.2d at 1032.

C. Closing the courtroom during jury selection thus excludes members of the public from trial.

D. A trial closed to members of the public is, by definition, not the "public trial" the Sixth Amendment contemplates.

E. If erroneous – *i.e.*, not satisfying the *Waller* test – the closure therefore violates the amendment's public trial guarantee.

F. The violation is "complete" and requires reversal upon the erroneous closure itself. *Gonzalez-Lopez*, 548 U.S. at 146, 148 (footnote and internal quotes admitted); *see, e.g., Com. v. Lavoie*, 954 N.E.2d 547, 556 (Mass. App. Ct. 2011) (new trial the "only adequate remedy" for closure error "occurr[ing] in the course of jury selection"); *Watters v. State*, 612 A.2d 1288, 1292-93 & n.4 (Md. 1992) (new trial is necessary relief where access guarantee "violated during jury selection"); *State v. Cuccio*, 794 A.2d 880, 889 (N.J. Super. A.D. 2002) (reversal necessary because "impossible to separate jury selection process" from "rest of … trial"); *Com. v. Cohen*, 921 N.E.2d 906, 927 (Mass. 2010) ("we cannot separately order a new jury selection apart from a new trial").

In insisting otherwise, the triviality exception "ask[s] defendants to do [exactly] what the Supreme Court has said is impossible," *Owens I*, 483 F.3d at 65: make an additional showing that an erroneous closure adversely "[a]ffect[ed]" the trial's "conduct." *Peterson*, 85 F.3d at 42. Indeed, this Court itself has all but admitted as much, dubbing any distinction between triviality and harmless error review more "metaphysical" than actual. *Gibbons*, 555 F.3d at 121. Writing for the *Gibbons* panel, Judge Leval thus confessed that he "do[es] not know" the difference between an exclusion too trivial to "constitute a violation" and a violation too trivial to "justify voiding the trial." *Id.* at 120. And if another noted judicial scholar, Judge Korman, also cannot tell the concepts apart, *see Carson*, 421 F.3d at 94-95, they are inescapably one and the same. *See* Hon. John M. Walker, Jr., *Harmless Error Review in the Second Circuit*, 63 Brook. L. Rev. 395, 403 (1997) ("Walker") (conceding that any analytic "difference[]" between review for triviality and harmlessness is "insignificant in terms of the ultimate outcome").

Contrary to the Court's supposition, then, it *does* "necessarily follow" that "every deprivation in a category considered to be 'structural'

constitutes a violation of the Constitution," *Gibbons*, 555 F.3d at 120[10] – or at least that every erroneous deprivation of the structural access right violates the Sixth Amendment's public trial guarantee. *E.g., Wolcott*, 931 N.E.2d at 1032. What the Court really means in attempting to deny this truth is that the relief these circumstances merit – "reversal of the conviction" – seems an "unimaginable," *id.* at 120, "windfall" when the Court considers the violation minor. *Smith*, 448 F.3d at 541 (citation and internal quotes omitted).[11] Again, one of the

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[10] To back its competing assertion, *Gibbons* posited a scenario in which counsel is momentarily absent – and his client "temporarily unrepresented" – during "an inconsequential portion" of a "lengthy, multi-defendant trial." 555 F.3d at 120. In that situation, the Court "very much doubt[ed], notwithstanding the brief 'structural' deprivation ..., that the Supreme Court would require that the conviction be vacated." *Id.* But only a "*total* deprivation of the right to counsel" – *not* a momentary one – qualifies as structural error under the Supreme Court's cases. *Sullivan*, 508 U.S. at 279 (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)) (emphasis supplied). By contrast, a momentary deprivation merely implicates the *effectiveness* of counsel – as distinct from a complete denial – and is reviewed for "prejudice" under *Strickland*. *Gonzalez-Lopez*, 548 U.S. at 146-48; *cf., e.g., Fulminante*, 499 U.S. at 307; *Coleman v. Al.*, 399 U.S. 1, 10-11 (1970); *Yarborough v. Keane*, 101 F.3d 894, 897 (2d Cir. 1996). Because the deprivation it posits is not structural at all, *Gibbons*'s analogy is thus misplaced and unpersuasive.

[11] *Amici* agree with those courts holding it "constitutionally irrelevant" whether a closure is "intentional or inadvertent." *Walton*, 361 (continued...)

[11](...continued)
F.3d at 433 (footnote omitted); *accord, e.g., U.S. v. Smith*, 426 F.3d 567, 571-72 (2d Cir. 2005) (error to "assum[e] ... Sixth Amendment rights cannot be violated unless a court itself restricts courtroom access," especially when court "ratifie[s]" closure initiated by third parties such as security officers); *Lavoie*, 954 N.E.2d at 552 ("It makes no difference that the judge did not know [exclusion] occurred; a courtroom may be closed in the constitutional sense without an express judicial order.") (citations and internal quotes omitted); *Vanness*, 738 N.W.2d at 158 ("court's intent ... irrelevant to determining whether ... accused's right to a public trial has been violated by an unjustified closure"); *cf. Kelly*, 6 A.3d at 407 n.10 ("That the intentional closure was by the sheriff's office rather than the court does not matter.") (citation omitted). After all, "judge[s] control the courtroom," *Watters v. State*, 612 A.2d at 1294 n.5, and it is up to them to "devise methods [that] protect the accused's right to a public trial," *Vanness*, 738 N.W.2d at 159 – including appropriately training and supervising auxiliary personnel.

But if this Court fears inordinate windfalls, it could, on the other hand, plausibly limit automatic reversal to erroneous closures involving "'some affirmative act by the trial court meant to exclude persons from the courtroom.'" *State v. Torres*, 844 A.2d 155, 159 (R.I. 2004) (quoting *Al-Smadi*, 15 F.3d at 154); *accord, e.g., Jackson*, 2005 WL 3429738, at *3 (same); *Downs v. Lape*, 657 F.3d 97, 108-09 n.1 (2d Cir. 2011) ("an *intentional*, unjustified abrogation of a defendant's public trial right under the Sixth Amendment is structural error, and thus inherently prejudicial") (Chin, J., dissenting) (citations omitted) (emphasis supplied); *Greene*, 2011 WL 2420185, at *4 (finding it decisive that subject closure "occurred unbeknownst to the trial judge"; "the Supreme Court did not intend th[at *Presley*'s] holding ... extend[] to unilateral actions taken by court security staff about which the ... judge was completely unaware") (citations and internal quotes omitted).

In fact, a judicial participation requirement would obviate any (continued...)

Peterson panelists essentially acknowledged as much in a contemporaneous law review article, allowing that the Court there had been "troubled" by the Supreme Court's automatic reversal rule and "found [a] different way[]" around it by holding that the closure at issue "was not error at all." Walker, 63 Brook. L. Rev. at 407-08.

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[11](...continued)
windfall concern entirely, as "trial courts" could then avoid reversal by simply "apply[ing] the [*Waller* criteria correctly] in the first instance." *Easterling*, 137 P.3d at 831-32 n.12 ("So long as a trial court applies the required factors and makes findings on the record, a reviewing court ... will not have to determine whether a ... courtroom closure was too trivial as to even implicate the public trial right as the question on review will focus, instead, on whether the trial court's decision to close was 'justified.'").

A potential rationale for this putative constraint is that a closure unknown to the judge arguably does not "attempt to employ our courts as instruments of persecution" or threaten "possible abuse of judicial power" – the twin evils the access right actually seeks to combat. *Oliver*, 333 U.S. at 270 (footnote omitted). While this alternative still missteps by abstracting purpose from text, it at least comports with the values truly moving the public trial clause. *E.g., Brown v. Kuhlmann*, 142 F.3d 529, 539, 541 (2d Cir. 1998) (automatic reversal remedy seeks to "deter unjustified courtroom closures" and remind judges that intangible access benefits should not be "lightly disregarded," rather than "correct[ing ...] error" concretely "harm[ing]" defendant).

The improper closure in this case, all concur, was not only deliberately ordered by the court but consciously withheld from the parties. Gupta's conviction therefore fails under either view of the need for judicial participation. *See generally* 650 F.3d at 872-76 (Parker, J., dissenting).

But whatever the Court's "indignation at the thought that a defendant may receive a new trial when" the public is unjustifiably excluded, *Gonzalez-Lopez*, 548 U.S. at 151 n.5, *Waller* teaches that *no* wrongful trial closure is properly considered a minor closure for Sixth Amendment purposes. *Cf. Easterling*, 137 P.3d at 834 ("While a defendant may not herself be harmed by a hearing in a closed courtroom, there is *no* case where the harm to the principle of openness ... can properly be described as *de minimis*.") (Chambers, Owens and Sanders, JJ., concurring) (emphasis supplied). And, respectfully, it is not for this Court to covertly defang *Waller*'s automatic reversal rule by engrafting a "foreign" requirement that erroneous exclusions also affect the trial's conduct. *Crawford*, 541 U.S. at 62; *cf. id.* at 67-68 ("By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design.").

That approach has the exception further swallowing the rule, as it is "virtually impossible for a defendant to demonstrate that the [public's] absence ... from his trial [concretely] affected its result." *Carson*, 421 F.3d at 95; *see Com. v. Downey*, 936 N.E.2d 442, 447 (Mass. App. Ct.)

("virtually impossible to demonstrate concrete harm flowing from a [public trial] violation"), *app. denied*, 939 N.E.2d 785 (Mass. 2010); *Waller*, 467 at 49-50 n.9 ("demonstrat[ing ...] prejudice in this kind of case is a practical impossibility") (citation and internal quotes omitted). As Judge Parker elsewhere observed for the Court:

> [T]here is good reason to be wary of invoking the harmless error doctrine with respect to the public trial guarantee.... [I]f we were to hold that [a closure] error was not structural and thus subject to harmless error analysis, it would almost always be held to be harmless. In this way, the right would become a right in name only, since its denial would be without consequence.

Gibbons, 421 F.3d at 95 (quoting *Canady*, 126 F.3d at 364).

In other words, since "the societal loss that [ensues] from closing courthouse doors" is "great[] though intangible," *Waller*, 467 U.S. at 49-50 n.9 (citation and internal quotes omitted), "little or nothing would remain of the [access] right" under a harmless error regime, as "the presence or absence of public spectators rarely if ever will [perceptibly] affect the [trial's] result." *Gibbons*, 555 F.3d at 119. That is especially true with regard to a closed "jury selection," which may have impalpable "cascading effects" on the "re[st] of the trial," *Owens v. U.S.*, 517 F. Supp. 2d 570, 572-

73 (D. Mass. 2007) ("*Owens II*") (Gertner, J.), making a prejudice "burden [doubly] impossible to meet." *Owens I*, 483 F.3d at 65-66.

While honoring these precepts in theory, however, the Court fails to heed them in practice. To the contrary, the triviality exception demands precisely what *Carson* and the other cases disavow as "virtually impossible," 421 F.3d at 95: proof that an erroneous closure actually "[a]ffect[ed] ... the [trial's] conduct." *Peterson*, 85 F.3d at 42. The upshot, as Judge Parker's *Gupta* dissent rightly complains, is a *de facto* rule that "spectators c[an] *always* be excluded" from any proceedings the Court deems "inconsequential" – that "all such proceedings" can be "closed to the public" with impunity. 650 F.3d at 876. And that rule, in turn, relegates the openness pledge to a "right in name only" – the very outcome the Court purports to disdain. *Canady*, 126 F.3d at 364.

Because it functionally mandates a prejudice showing and otherwise imposes an illicit harmlessness gloss, the triviality exception thus contradicts *Waller*'s holding that wrongful access denials are structural defects forcing blanket reversal. It follows that the exception is empirically untenable and must be stricken – particularly in the integral

jury selection setting. *Cf. Presley*, 130 S. Ct. at 725 (decrying "reasoning" that would allow "courts [to] exclude the public from jury selection almost as a matter of course ... in *every criminal case*") (citation and internal quotes omitted).

V. THE TRIVIALITY EXCEPTION IS IMPERMISSIBLY ARBITRARY, SUBJECTIVE AND STANDARDLESS, PRECLUDING CONSISTENT APPLICATION

On top of its analytic and doctrinal problems, triviality – like "[r]eliability" in the pre-*Crawford* confrontation context – is "an amorphous, if not entirely subjective, concept." 541 U.S. at 63. And years of struggling to interpret and apply it have generated such "improbable" and "unpredictable" rulings – in this court and others nationwide – that the exception manifestly "fails to provide meaningful protection from even core [public trial] violations." *Id.* at 63, 68.

First, the exception breeds vastly divergent results on materially equivalent facts. To cite just a few examples, some courts deem closure for the duration of the defendant's testimony trivial, *e.g.*, *Peterson*, 85 F.3d 39, while others – recognizing that s/he is "one of the most significant trial witnesses," *Brown*, 142 F.3d at 541 – do not, calling "the accused's

response to the accusations ... critical." *Vanness*, 738 N.W.2d at 159. Some courts find closure for "the rendering of the verdict" trivial, *Wilson v. State*, 814 A.2d 1, 16 (Md. App. 2002), while others celebrate the verdict as "the focal point of the entire criminal trial" – even a bench trial – and refuse to "excuse" errant exclusions. *Canady*, 126 F.3d at 363-64.

Some courts – but not others – consider a closure's length, trivializing exclusions for a full morning's or afternoon's proceedings. *Compare, e.g., Gupta*, 650 F.3d 863 (at least full morning trivial) *and Gibbons*, 555 F.3d 112 (full afternoon trivial) *and Kelly*, 6 A.3d at 410-11 (full morning trivial) *with, e.g., Gonzalez v. Quinones*, 211 F.3d 735, 737 (2d Cir. 2000) (full morning not trivial) *and Torres*, 844 A.2d at 162 (same). Some courts – but again not others – feel it trivial to close substantial portions of jury selection.[12] And some courts think a closure for *all* of jury

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[12] *Compare, e.g., Morales*, 635 F.3d 39 *and Gibbons*, 555 F.3d 112 *and Yarborough*, 2009 WL 4810553 *and Kelly*, 6 A.3d 396 *and Bui*, 183 Cal. App. 4th 675 *and Irizarry*, 2007 WL 1574308 (trivial) *with, e.g., Bucci v. U.S.*, Nos. 09-2468, -2493, _ F.3d _, 2011 WL 4840625, at *6 & n.5 (1st Cir. Oct. 13, 2011) *and Cohen*, 921 N.E.2d 906 *and Downey*, 936 N.E.2d 442 (nontrivial).

selection trivial; others disagree.[13] These "conflicting results," stemming from "painstaking attempts [by] enlightened judges" to apply the exception in a coherent and sensible way, are a telltale sign that it is intolerably "vague[.]" *Skilling v. U.S.*, 130 S. Ct. 2896, 2939 n.2 (2010) (Scalia, Thomas and Kennedy, JJ., concurring) (citation and internal quotes omitted).

Second, the exception is too indefinite and "manipulable" to effectively cabin "judicial discretion," *Crawford*, 541 U.S. at 67-68, spawning arbitrary distinctions based on judges' disparate perceptions of what is trivial versus important. Again, by way of illustration only, some courts believe that delivering a verdict at a bench trial is a signal event from which the public may not constitutionally be excluded. *E.g.*, *Canady*, 126 F.3d at 363-64. Yet at the same time, those courts discount the selection of jurors – the fact-finders who control the defendant's fate and

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[13] *Compare, e.g., Gupta*, 650 F.3d 863 *and Izac*, 2007 WL 2025178 *and Wilson*, 2008 WL 4189601 *and Barrows*, 15 A.3d 673 *and Dreadin*, 2009 WL 3430113 (trivial) *with, e.g., U.S. v. Agosto-Vega*, 617 F.3d 541, 554 (1st Cir. 2010) (Howard, J., concurring) *and Owens I*, 483 F.3d at 62-63 *and Owens II*, 517 F. Supp. 2d at 574-75 *and Lavoie*, 954 N.E.2d 547 *and Torres*, 844 A.2d 155 *and Cuccio*, 794 A.2d 880 *and Watters*, 612 A.2d 1288 (nontrivial).

will issue a verdict of their own – as trifling. *E.g.*, *Gupta*, 650 F.3d 863; *Morales*, 635 F.3d 39; *Gibbons*, 555 F.3d 112.

Other courts view the testimony of a chief *prosecution* witness as a crucial trial phase demanding public access. *E.g., Smith*, 448 F.3d 533; *Gonzalez*, 211 F.3d 735. Yet, equally incongruous, those same courts dismiss testimony from the *accused* – typically the chief witness for the *defense* – and other prime witnesses as constitutionally insignificant. *E.g.*, *Peterson*, 85 F.3d 39; *Carson*, 421 F.3d 83; *cf., e.g., People v. Woodward*, 841 P.2d 954, 959 (Cal. 1992) (locking courtroom during summations constitutionally "de minimus"); *Com. v. Dykens*, 784 N.E.2d 1107, 1115-16 (Ma. 2003) (approving practice of locking courtroom during jury instructions) (collecting cases).

These dichotomies confirm what intuition suggests: triviality is purely in the eye of the beholder, turning largely on individual judges' peculiar and idiosyncratic – if assuredly well-meaning – ideas of what does and doesn't amount to a decisive part of trial. Far from serving the publicity clause's intended purpose, such unchecked subjectivity is the very "vice," *Crawford*, 541 U.S. at 63, the access right abhors and aims to

eradicate. For "[o]ur founders were smart." *Easterling*, 137 P.3d at 186 (Chambers, Owens and Sanders, JJ., concurring). "They knew," in drafting the Sixth Amendment, "that judges could not always be trusted to safeguard the rights of the people" and were "loath to leave *too much discretion in judicial hands*," realizing that the "impartiality of even those at the highest levels of the judiciary might not [always] be so clear." *Crawford*, 541 U.S. at 67-68 (emphasis supplied); *cf. Oliver*, 333 U.S. at 273 (access guarantee reflects "our nation's historic distrust of secret proceedings" and the grave "dangers to freedom" they inherently pose).

And "[e]ven more disturbing," as Judge Parker's *Gupta* dissent aptly laments, the exception's indeterminancy and malleability have "no apparent end." 650 F.3d at 876. Indeed its "logic," such as it is, allows appellate judges to uphold wholesale closures of criminal trials from start to finish, reasoning that "'nothing of significance happened'" because they personally find the evidence damning, the case indefensible and conviction inevitable. *Id.* "It is difficult to imagine the [publicity right] providing any meaningful protection in th[e]se circumstances." *Crawford*, 541 U.S. at 68.

Third, "[t]here are countless factors" – many of them contradictory – "bearing" on whether a given closure is trivial. *Id.* at 63. And courts have neither established "settled criteri[a] for choosing among the[m]" nor "consistently described ... any test" that fixes the exception's scope. *Skilling*, 130 S. Ct. at 2937-38 & n.1 (Scalia, Thomas and Kennedy, JJ., concurring). "Whether a [closure] is deemed" to fit thus "depends heavily on which factors the [particular] judge considers and how much weight he accords each," *Crawford*, 541 U.S. at 63, yielding "no 'ascertainable standard'" or "clear indication of what constitutes a denial of the [public trial] right." *Skilling*, 130 S. Ct. at 2938, 2940 (Scalia, Thomas and Kennedy, JJ., concurring) (citation and internal quotes omitted).

For instance, some courts purport to apply heightened scrutiny before trivializing evictions of a defendant's family and friends. *E.g., Rodriguez v. Miller*, 537 F.3d 102, 109 (2d Cir. 2008) (collecting cases); *Smith*, 426 F.3d at 573 n.2. But other courts disagree, using a unitary approach for relatives and the "general public" alike. *E.g., Owens I*, 483 F.3d at 62 n.12. Indeed, "[s]ome courts [actually] wind up attaching the same significance to opposite facts" in this regard, *Crawford*, 541 U.S. at

63, finding closures trivial both because family members were *admitted* ***and*** because they were *excluded*. *Compare*, *e.g., Peterson*, 85 F.3d at 42 (closure trivial because only spectators, not family members, barred from courtroom) *with, e.g., Kelly*, 6 A.3d at 410 (closure trivial because only family members, not spectators, barred) *and State v. Venable*, 986 A.2d 743, 748-49 (N.J. Super. A.D.) (same), *cert. denied*, 997 A.2d 231 (N.J. 2010). *But cf., e.g., Carson*, 421 F.3d at 93 (closure trivial because only one family member barred); *Cohen*, 921 N.E.2d 906 (closure *not* trivial where friends, supporters and other spectators, but *not* family members, barred).

Similarly, as discussed earlier in n.10, some courts apply the exception equally to "intentional [and] inadvertent" closures, *e.g.*, *Walton*, 361 F.3d at 433 (footnote omitted), while others profess to exempt "affirmative act[s] by the trial court meant to exclude persons from the courtroom." *E.g.*, *Al-Smadi*, 15 F.3d at 154. And still others steer a middle course, exempting intentional acts but construing deliberate closures by non-judicial staff as intentional and imputing them to the court, *e.g.*, *Watters*, 612 A.2d at 1293-94 (footnote omitted) – especially, though not

necessarily, if judicially ratified. *Compare, e.g., id.* (unratified) *and Lavoie*, 954 N.E.2d 547 (same) *with, e.g., Wolcott*, 931 N.E.2d 1025 (ratified).

Finally, some courts mulling triviality stress that displaced spectators can learn what happened in their absence through alternate means like transcripts and summation references. *E.g., Peterson*, 85 F.3d at 44 (summation); *Carson*, 421 F.3d at 93 (same); *Bowden v. Keane*, 237 F.3d 125, 130 (2d Cir. 2001) (transcript); *Brown*, 142 F.3d at 535-38 (same). But other courts pan those options as pale and inadequate substitutes for contemporaneous physical presence. *Cf., e.g., Alcantara*, 396 F.3d at 202 (transcript "would not fully implement the right of access because some information, concerning demeanor, non-verbal responses, and the like, is necessarily lost in the translation of a live proceeding to a cold transcript") (citations and internal quotes omitted).

Keying the existence of a reversible public trial violation to this patchwork of "vagaries," *Crawford*, 541 U.S. at 61 (Scalia, Thomas and Kennedy, JJ., concurring), is anomalous and irrational. It produces no discernible ordering principle, *see Sorich v. U.S.*, 129 S. Ct. 1308, 1310 (2009) (Scalia, J., dissenting from *certiorari* denial), making the triviality

exception impracticable at best and "*inherently* and ... *permanently* unpredictable" at worst – still more ammunition for overthrowing it. *Crawford*, 541 U.S. at 68 n.10 (Scalia, Thomas and Kennedy, JJ., concurring). As the Supreme Court resolved long ago, an "uncertain" right, or one that "purports to be certain but results in widely varying applications by the courts, is little better than no [right] at all." *Upjohn Co. v. U.S.*, 449 U.S. 383, 393 (1981).

VI. THE PANEL MAJORITY OPINION INAPPROPRIATELY DEMEANS BOTH THE SIGNIFICANCE OF THE JURY SELECTION PROCESS AND THE PUBLIC'S PIVOTAL ROLE IN POLICING ITS INTEGRITY, ESSENTIAL TO THE APPEARANCE OF FAIRNESS AND SOCIETY'S CONFIDENCE IN OUR COURTS

Even if the triviality exception stands, unjustifiably closing a courtroom for the entirety of jury selection is no small mistake. To the contrary, the Supreme Court recently reaffirmed that *voir dire* is a matter of "critical," *Gomez*, 490 U.S. at 873, "importance," *Presley*, 130 S. Ct. at 724 (citation and internal quotes omitted), and a "crucial part of any criminal case," *Owens I*, 483 F.3d at 63, setting a tone and creating an "atmosphere" that "may persist throughout the trial." *Gomez*, 490 U.S. at

875; *see, e.g., Owens II*, 517 F. Supp. 2d at 572-73 ("unfair jury selection" may have "cascading effects" on trial's "remainder").

In contrast to the "administrative empanelment process" the *Gupta* majority envisions, *voir dire* thus represents

> jurors' first introduction to the substantive factual and legal issues in a case. To detect prejudices, the examiner – often, in the federal system, the court – must elicit from prospective jurors candid answers about intimate details of their lives. The court further must scrutinize not only spoken words but also gestures and attitudes of all participants to ensure the jury's impartiality.

Gomez, 490 U.S. at 874-75 (citations omitted). And the public plays an indispensable role in this dynamic, its presence presumptively impelling everyone involved – "judges, lawyers ... and [prospective] jurors" – to "perform their respective functions more responsibly." *Owens I*, 483 F.3d at 65 (quoting *Estes*, 381 U.S. at 588 (Harlan, J., concurring)) (internal quotation marks omitted).

For one thing, most judges give preliminary "instructions" during *voir dire*, usually conveying "general information about [the] case" and "describ[ing] the charging instrument." *Gupta*, 650 F.3d at 868. These synopses, "jurors' first introduction to the [trial's] substantive factual and

legal issues," *Gomez*, 490 U.S. at 874, can indelibly color their impressions of the case. And the presence of spectators, acting to "remind" the judge of his "responsibility to the accused and the importance of his [duties,]" *Gupta*, 650 F.3d at 867 (citations and internal quotes omitted), may help make the summaries more scrupulously fair and balanced – a benefit the panel majority completely overlooks. *E.g., Oliver*, 333 U.S. at 271 n.25 (publicity keeps trial participants "keenly alive to a sense of their responsibility") (citation and internal quotes omitted).

For another thing, while publicity's additional goal of "discourag[ing] perjury" by trial witnesses may not be implicated during *voir dire*, *Gupta*, 650 F.3d at 867 (citations and internal quotes omitted), deterring perjury by *prospective jurors* – themselves "sworn" participants in the proceedings, *Com. v. Grant*, 940 N.E.2d 448, 451 (Mass. App. Ct. 2010)[14] – certainly is. *E.g., Waller*, 467 U.S. at 46 n.4 (openness promotes conscientious performance by "*jurors*" as well as "judges, lawyers [and] witnesses") (emphasis supplied); *Owens II*, 517 F. Supp. 2d at 573 n.3 (publicity "structurally" important for its "potential effect on ... venire persons"); *id.*

[14] The "absence of [an] oath," however, would not be "dispositive" in any event. *Crawford*, 541 U.S. at 52.

at 577 ("spectators ... necessary to remind ... *jury* of its responsibility") (emphasis supplied).[15]

To this end, courts have recognized that "[c]onducting voir dire examinations in open court permits members of the public to observe ... prospective jurors" – especially nonverbal cues in their demeanor[16]– so as to evaluate their fitness and "qualifications to serve." *Cohen*, 921 N.E.2d at 925-26 (citation and internal quotes omitted). And correlatively, experience attests that jurors may well be "more forthcoming about biases and past experiences [when] they ... face[] the public." *Owens I*, 483 F.3d

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[15] The *Gupta* majority's contrary suggestion – that the public was sufficiently represented by the *prospective jurors*, 650 F.3d at 869-71 – has the *venire* members policing themselves, and thus the fox guarding the proverbial henhouse. Other courts wisely shun those scenarios, noting that "venirepersons are *not* members of the public in the relevant sense, so the presence of veniremembers in the courtroom does not mean it has not been closed for constitutional purposes." *Com. v. Alebord*, 953 N.E.2d 744, 747 n.2 (Mass. App. Ct. 2011) (emphasis supplied); *see, e.g., Grant*, 940 N.E.2d at 455 ("knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and ... deviations will become known") (citations and internal quotes omitted). Indeed, if jurors can be trusted to police themselves, there is no need for open jury trials at all. The Framers obviously thought otherwise. *See Easterling*, 137 P.3d at 834-35 (Chambers, Sanders and Owens, JJ., concurring).

[16] *Cf., e.g., Alcantara*, 396 F.3d at 201-02.

at 65; *accord Watters*, 612 A.2d at 48 (closure detrimentally prohibits "venirepersons" from eyeballing "interested" spectators).

Conversely, excluding concerned citizens – particularly the defendant's relatives – prevents them from "contribut[ing] their knowledge or insight to the jury selection," *id.*, denying the parties an opportunity to "pick[] a more impartial jury or ask[] different questions with [the] local [populace] watching." *Owens I*, 483 F.3d at 65.

Tellingly, this is true even if, as sometimes occurs, individual jurors are examined at the bench or in chambers. *Cf., e.g., Gupta*, 650 F.3d at 869; *Morales*, 635 F.3d at 44-45 & nn.9-10; *Gibbons*, 555 F.3d at 114-15. As the highest court in Massachusetts cogently explains:

> Even though the public cannot hear what is being said [in those circumstances], the ability to observe itself furthers the values that the public trial right is designed to protect.... The defendant ha[s] a right to have the public present during these individual juror examinations, just as he ha[s] a right during the trial to have spectators present in the court room while sidebar conferences t[ake] place out of their earshot. Moreover, ... jury selection proceedings also include[] voir dire questions publicly posed to the venire as a group, to which potential jurors g[i]ve substantive responses by raising their hands. The defendant ha[s] ... the

> right to have the public hear the judge's questions and witness the prospective jurors' responses.

Cohen, 921 N.E.2d at 925-26 (citations omitted).

Put more concisely, it makes no "difference that a large portion of the jury selection proceedings [may] t[ake] place at sidebar [or in chambers] where they could not ... be[] heard by spectators"; the defendant is entitled to "have the public present in [the] courtroom during both general and individual voir dire." *Lavoie*, 954 N.E.2d at 552 (citations omitted). Any other conclusion "mistakenly equate[s] the values protected by the right to public trial with the interests protected when inquiry regarding sensitive matters is done at sidebar in open court. While concerns regarding the disclosure of ... sensitive matters can be addressed at sidebar in an open courtroom, the values underlying the right to public trial *can not be preserved when the courtroom is closed to the public*." *Downey*, 936 N.E.2d at 449-50 n.13 (emphasis supplied).

Indeed, as *Cohen* accurately points out, much of what happens during the trial proper also transpires beyond the immediate hearing of the audience in the gallery. The *Gupta* majority position would thus allow blanket closure of entire criminal trials simply because parts of them take

place at the bench or in chambers – anathema to the Sixth Amendment access guarantee.

Last but not least, there is the 800-pound gorilla: the parties exercise causal and peremptory strikes during *voir dire*, and the public cannot patrol their use – or enforce its independent interest in nondiscriminatory selection – with the courtroom on lockdown. *See generally, e.g., Batson v. Ky.*, 476 U.S. 79 (1986); *cf. Gomez*, 490 U.S. at 873 ("[j]ury selection is the primary means by which ... [to] enforce a *defendant's* right to be tried by a jury free from ethnic, racial, or political prejudice") (citations omitted) (emphasis supplied). This consideration is especially urgent because there are cases where the parties "themselves might ... *want*" to rig the jury along invidious lines, and so might *want* the "courtroom[] closed" to cover it up. *Cf. Easterling*, 137 P.3d at 834 (Chambers, Owens and Sanders, JJ., concurring) (emphasis supplied). How can the public even know that is happening – much less try to stop it – if judges may accede to the parties' wishes without apparent consequence? The question answers itself. And as already demonstrated, it makes no analytic difference that challenges are occasionally exercised out of the public's immediate earshot.

For all these reasons, this Court should minimally join its chorus of peers holding that picking a jury in secret – unless otherwise justified under *Waller* – is a Sixth Amendment "violation" too "severe [to] be considered *de minimus*." *Torres*, 844 A.2d at 162; *accord*, *e.g.*, *Agosto-Vega*, 617 F.3d at 554 (Howard, J., concurring) (improper courtroom closure "for the entirety of jury selection" cannot "support ... invocation of a triviality exception"); *Owens I*, 483 F.3d at 64 (impermissibly "closing the trial for an entire day of jury selection, *one of the most important phases of a criminal trial*, deprived Owens of a substantial fair trial right") (emphasis supplied); *Lavoie*, 954 N.E.2d at 552 (erroneous exclusion "persist[ing] for the entire process of jury selection" cannot "'be characterized as so trivial or de minimis as to fall entirely outside the range of 'closure' in the constitutional sense'") (quoting *Cohen*, 921 N.E.2d at 920); *Downey*, 936 N.E.2d at 229-30; *Wolcott*, 931 N.E.2d at 1030 n.4; *Cuccio*, 794 A.2d at 891-92 (wrongful closure for duration of jury selection "substantial, rather than *de minimis*"); *Watters*, 612 A.2d at 1293 ("hard pressed to declare a violation of this magnitude" – improper closure for whole *voir dire* – "*de minimus*, or otherwise not of constitutional

significance"). On the strength of these authorities, the *en banc* Court should reverse the panel majority opinion, void Gupta's conviction and likewise order "a new trial, free of structural error." *Owens II*, 517 F. Supp. 2d at 577.

CONCLUSION

The triviality exception to the public trial guarantee is an ill-advised and unwarranted departure from the Framers' intent, the Sixth Amendment's text and controlling Supreme Court precedent. Its central assumption – that some unjustified courtroom closures are too petty to even violate the Constitution – does not survive the high court's recent *Presley* decision. Its key analytic device – distilling purpose from words, and then ignoring the words if the purpose is deemed met – has been flatly rejected by the Supreme Court in interpreting other Sixth Amendment rights. It distills the wrong core purpose in any event, the access clause promising fair trials through a specific procedural guarantee – openness to public scrutiny – as opposed to fair trials generally. It conflates error and right to relief and illicitly reviews for harmlessness – despite settled law recognizing improper closures as structural defects, inherently

prejudicial and automatically reversible – by pegging the existence of a constitutional violation to its effect on the trial's conduct. And experience shows that it is so vague, subjective and pliant as to be unworkable in practice. For all these reasons, the exception should be consigned to history.

Finally, because the violation in this case – erroneously exiling the public from the entirety of jury selection – was substantial rather than trivial, Gupta is entitled to reversal and retrial at any rate.

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Respectfully submitted,

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MARC FERNICH, an attorney admitted to practice in this Court, certifies pursuant to Fed. R. App. P. 32(a)(7) that, according to his word processing system, this brief contains approximately 10,392 words of proportionately-spaced Century 14-point typeface.

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CERTIFICATE OF SERVICE

I certify that on Nov. 14, 2011, I caused to be served true and correct copies of the attached brief by first-class mail and email upon:

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