No. 15-550

In the Supreme Court of the United States

JAMES ROBERT STACKHOUSE, PETITIONER

v.

STATE OF COLORADO

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Cases—Continued: **Page(s)**

Cases—Continued: **Page(s)**

Other Authorities:

REPLY BRIEF FOR THE PETITIONER

Respondent does not deny the question presented is important and recurs frequently. It hardly could. As *amicus* the Reporters Committee for Freedom of the Press explains, "judges routinely close courtrooms" without considering the standards this Court has established. *Amicus* Br. 7. By insulating trial courts from appellate oversight, decisions holding failure to object waives public trial claims foster the "widespread trend[] in audience physical exclusion * * * across the country," Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 Harv. L. Rev. 2173, 2191 (2014), and increase the risk trial judges will continue to disregard their independent "responsibility [to] avoid[] even the appearance that our nation's courtrooms are closed or inaccessible to the public," *United States* v. *Negron-Sostre*, 790 F.3d 295, 306 (1st Cir. 2015) (internal quotation marks omitted).

Respondent also effectively concedes a split on the question presented. The purported "outlier[s]" respondent acknowledges, Br. in Opp. ("BIO") 13 n.3, 19, represent only a fraction of the jurisdictions that diverge from the decision below by holding that mere non-objection to a courtroom closure constitutes forfeiture, not waiver, and thus does not foreclose appellate review, Pet. 11-14. Underscoring the need for this Court's review, the split puts several States in conflict with their regional federal circuits. *Id.* at 14-15.

Ultimately, respondent's opposition reduces to two flimsy arguments: the decision below rested on an adequate and independent state ground, and

petitioner's failure to object was intentional, not inadvertent. But "[t]he question of a waiver" of the "federally guaranteed constitutional right" to a public trial is "a federal question controlled by federal law." *Brookhart* v. *Janis*, 384 U.S. 1, 4 (1966). Even casual review of the decision (and respondent's briefing) below confirms the Colorado Supreme Court's holding rests on its understanding of federal law. And respondent's unsupported assertion that "[p]etitioner's failure to object was knowing, intentional, and likely strategic," BIO 11, conflicts with respondent's concession that "the record is devoid of evidence" the non-objection was anything other than inadvertent, *id.* at 21 n.10. Certiorari is warranted.

A. The Split Is Real

1. The mature, entrenched split on the question presented has been recognized by numerous courts and commentators and is acknowledged in the opinions below. *E.g.*, *Sixth Amendment at Trial*, 44 Geo. L.J. Ann. Rev. Crim. Proc. 729, 730 n.1978 (2015) ("circuits disagree"); Pet. App. 14a n.6, 23a n.1.

Respondent asserts there is no "genuine split requiring this Court to intervene," BIO 15, but buried in a footnote (*id.* at 13 n.3) is respondent's concession that the decision below "represents a stark departure from the approach taken" in *Walton* v. *Briley*, 361 F.3d 431 (7th Cir. 2004). In *Walton*, Judges Bauer, Posner, and Easterbrook unanimously held a habeas petitioner's public trial right was "not waived by [defense counsel's] fail[ure] to object" because the mere non-objection did not "indicate that [the petitioner had] intelligently and voluntarily

relinquished a known right." *Id.* at 434. Moreover, although respondent attempts to distinguish *United States* v. *Gomez*, 705 F.3d 68 (2d Cir. 2013), it concedes *Gomez* reviewed an unpreserved public trial claim for plain error (BIO 18), meaning the Second Circuit treated the defendant's non-objection as forfeiture, not waiver. See 705 F.3d at 74-76; accord *United States* v. *Killingbeck*, 616 Fed. Appx. 14, 16 (2d Cir. 2015) (citing *Gomez* in reviewing unpreserved public trial claim for plain error). Respondent also acknowledges *State* v. *Wise*, 288 P.3d 1113 (Wash. 2012), "invoked the United States Constitution to find reversible error in the public-trial context" despite the defendant's non-objection. BIO 18-19. And respondent concedes Michigan, North Dakota, and South Dakota all have adopted a forfeiture standard. *Id.* at 18. These decisions are irreconcilable with the Colorado Supreme Court's holding that "a defendant affirmatively waives his public trial right by not objecting to a known closure." Pet. App. 2a.

2. Given the breadth of the conflict respondent effectively acknowledges, respondent's remaining efforts to minimize the split are immaterial. They are also unavailing.

Respondent's unsupported suggestion (BIO 20-21) that the standard for finding waiver in a collateral proceeding might be lower than on direct review conflicts with the general recognition that collateral review is, if anything, *more* exacting because of finality interests. See *Calderon* v. *Thompson*, 523 U.S. 538, 554-555 (1998). Respondent's strained effort to distinguish collateral proceedings based on

the availability of "evidence-gathering" (BIO 20-21) overlooks that courts on direct review can remand for evidentiary hearings, or could simply reject factually undeveloped claims for failure to satisfy the plain-error standard. See, *e.g.*, Pet. App. 26a-27a (Márquez, J., dissenting).

Respondent's suggestion that the split is undercut because even waived error may support a claim of ineffective assistance of counsel (BIO 20) is nonsensical. That argument does nothing to refute that many courts have *squarely held* non-objection merely forfeits (and does not waive) a public trial claim, before *separately* analyzing whether that forfeiture constituted ineffective assistance. *E.g.*, *Charboneau* v. *United States*, 702 F.3d 1132, 1138 (8th Cir. 2013); *People* v. *Vaughn*, 821 N.W.2d 288, 302-303 (Mich. 2012). Indeed, before it became expedient to deny the split, respondent acknowledged courts' differing views. Resp. Colo. Sup. Ct. Br. 23-31 (surveying decisions).

Respondent's efforts to discount other cases in the split also fail. The First Circuit in *United States* v. *Espinal-Almeida*, 699 F.3d 588, 599-601 (2012), expressly "review[ed] * * * for plain error" two defendants' unpreserved argument that the trial court had "violated their Sixth Amendment right to a public trial." *Espinal-Almeida* held a separate spectator-exclusion claim waived not because the defendant failed to object, but because the defendant's appellate brief identified no record evidence that the spectator had been excluded. *Id.* at 601. Contra BIO 16 n.6. *United States* v. *Acosta-Colon*, 741 F.3d 179, 186-187 (1st Cir. 2013) (BIO 17

n.8), merely found waiver on "the particular facts of [that] case," where two attorneys in a multi-defendant trial failed to object to closure *after other lawyers expressly acquiesced*; it did not disavow *Espinal-Almeida*'s application of plain-error review.

The D.C. Court of Appeals' non-precedential decision finding waiver based on counsel's "actively support[ing]" partial courtroom closure, *Littlejohn* v. *United States*, 73 A.3d 1034, 1036-1038 (2013) (quoting unpublished decision) (cited at BIO 16-17 nn.7-8), casts no doubt on that court's consistent position that mere non-objection to courtroom closure triggers plain-error review, see *Williams* v. *United States*, 51 A.3d 1273, 1282 (2012) (citing *Barrows* v. *United States*, 15 A.3d 673, 677 (2011)). Similarly, respondent's attempt to minimize *United States* v. *Rivera*, 682 F.3d 1223 (9th Cir. 2012) (BIO 17-18), fails given the Ninth Circuit's later reliance on *Rivera* in "review[ing] for plain error" an unpreserved public trial claim, *United States* v. *Santos*, 501 Fed. Appx. 630, 632 (2012).

* * * * *

The split on the question presented is deep and pits state courts against their regional federal circuits. Pet. 14-15. The stark conflict between the availability of appellate review in jurisdictions applying a forfeiture standard and the total foreclosure of appellate review in jurisdictions equating non-objection with waiver warrants certiorari.

B. No State-Law Issue Precludes Certiorari

Respondent contends this Court's review is foreclosed because the decision below rests on two adequate and independent state-law doctrines. BIO 7-11. That is incorrect. The decision below held "a defendant affirmatively waives his [Sixth Amendment] public trial right by not objecting to a known closure of the courtroom." Pet. App. 2a. The question of "waiver of [such] a federally guaranteed constitutional right is, of course, a federal question controlled by federal law." *Brookhart*, 384 U.S. at 4; accord *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969). No state-law issue precludes this Court from reviewing the purely federal-law waiver question decided below.

1. First, respondent contends that "as a matter of state procedure, Colorado deems a public-trial claim waived in the absence of an objection to a known closure." BIO 9. But the decision below identified no Colorado statute or rule of criminal procedure setting forth this rule, *cf.* *Melendez-Diaz* v. *Massachusetts*, 557 U.S. 305, 327 (2009) ("States are free to adopt procedural rules governing [Confrontation Clause] objections.") (cited at BIO 8),[1] nor even characterized

[1] Although *Melendez-Diaz* stated in *dicta* that "[t]he right to confrontation may * * * be waived, including by failure to object," that statement was directed at procedural defaults that under *United States* v. *Olano*, 507 U.S. 725, 733-734 (1993), constitute forfeiture—i.e., non-compliance with "procedural rules governing the exercise of [Confrontation Clause] objections." *Melendez-Diaz*, 557 U.S. at 313 n.3. *Melendez-Diaz* does not purport to overrule or modify *Olano*, and it elsewhere refers to a defendant "*forfeit[ing]* [his confrontation right] by silence." *Id.* at 325-326 (emphasis added). Even if special waiver rules

its ruling to be a matter of state procedure. Instead, the Colorado Supreme Court relied on its decision in *Anderson* v. *People*, 490 P.2d 47 (1971). See Pet. App. 6a-15a. And in holding that a defendant's failure to object to the closure of *voir dire* waived his public trial claim, *Anderson* relied exclusively on *Levine* v. *United States*, 362 U.S. 610 (1960), see Pet. 10, and a handful of federal appellate and out-of-state cases—*not* Colorado law. See *Anderson*, 490 P.2d at 48-49; see also Pet. 17-20.

The decision below leaves no doubt that the reaffirmance of *Anderson* rested on the court's interpretation of federal law. The principal question addressed below was whether *Anderson* "ha[d] been abrogated by" this Court's decisions in *Waller* v. *Georgia*, 467 U.S. 39 (1984), and *Presley* v. *Georgia*, 558 U.S. 209 (2010) (per curiam). Pet. App. 2a. The court's conclusion that "*Anderson* remains good law," *id.* at 14a, rested on its observation that "the Supreme Court itself has recognized, albeit in dicta, that a defendant waives his right to a public trial by failing to object," citing *Levine* and *Peretz* v. *United States*, 501 U.S. 923 (1991). Pet. App. 10a. Respondent's brief before the Colorado Supreme Court is tellingly silent about any purported state procedural rule, instead arguing, based on citation to numerous out-of-state decisions, that "[t]he finding of waiver in *Anderson* does not conflict with *federal* case law * * * address[ing] whether the *Sixth Amendment*

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applied to confrontation claims, which focus specifically on protecting individual defendants, no grounds exist for extending those rules to public trial claims, which also advance the public's First Amendment interest in open courts. See Pet. 22-23.

right to a public trial can be waived by counsel." Resp. Colo. Sup. Ct. Br. 39 (emphasis added). This case is thus *not* one where the state court's holding is *independent* of federal law.

As the Colorado Supreme Court's extensive discussion of *United States* v. *Olano*, 507 U.S. 725 (1993), makes clear, Pet. App. 10a n.5, the court well understood the distinction between state procedural default rules and waiver, which "extinguish[es] an 'error'" and thus wholly forecloses appellate review, *Olano*, 507 U.S. at 733-734. Had the Colorado Supreme Court intended to rule that petitioner had forfeited his public trial claim as a matter of state procedure, it would have had no need to examine *Olano*'s statement of the standard for waiving federal rights. To the contrary: The court *could not rely on state procedural default rules* because, as the court explained, absent "affirmative[] waive[r]," Colorado law provides that a public trial violation "requires automatic reversal." Pet. App. 7a n.3. Therefore, no state-law ground for affirmance exists.

2. Respondent likewise contends the Colorado Supreme Court relied on "a state-law presumption that a defendant who is made aware of a courtroom closure and does not object to it is not acting 'inadvertent[ly],' but has instead made an 'affirmative waiver of the public trial right.'" BIO 11 (citation omitted) (quoting Pet. I and Pet. App. 14a). But respondent cites no support for the proposition that state-law presumptions can be used to sidestep the *federal*-law inquiry into whether a *federal* right has been waived. This Court has ultimate authority to establish the standard for determining waiver of a

federal right. *E.g.*, *Brookhart*, 384 U.S. at 4. The Colorado Supreme Court could not, and did not purport to, circumvent that authority under a state-law guise. It merely offered the "presum[ption] that attorneys know the applicable rules of procedure" as an additional "reason [not] to deviate from *Anderson*," which—as explained above—was rooted in federal law. Pet. App. 12a-14a (internal quotation marks omitted); see also p. 7, *supra*.

3. Even if this Court were uncertain whether the decision below rests on federal waiver principles or a state procedural default rule, that would not bar review. Given its extensive examination of this Court's precedents, the decision below "fairly appears to rest primarily on federal law," or *at minimum* is "interwoven with * * * federal law"; therefore, "the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Michigan* v. *Long*, 463 U.S. 1032, 1040-1041 (1983). This Court thus may exercise jurisdiction based on the "conclusive presumption" that "the state court decided the case the way it did because it believed that federal law required it to do so." *Coleman* v. *Thompson*, 501 U.S. 722, 733 (1991) (quoting *Long*, 463 U.S. at 1040-1041).

Indeed, the fact that this case arises from state court makes it a particularly attractive vehicle for addressing the question presented. The case provides an opportunity to clarify that federal law requires that waivers of federal rights be knowing, intentional, and voluntary, but that states remain free to adopt procedural default rules restricting appellate review where rights are forfeited through

inadvertent failures to object. "[F]ar from *undermining* state autonomy," granting certiorari here to clarify the division of authority between the federal waiver standard and potential state procedural default rules would "*return power to the State, and to its people*." *Kansas* v. *Carr*, No. 14-449 (Jan. 20, 2016), slip op. 9 (quoting *Kansas* v. *Marsh*, 548 U.S. 163, 184 (2006) (Scalia, J., concurring)).

C. The Decision Below Wrongly Resolved a Recurring, Important Issue

Respondent does not deny the question presented arises frequently and concerns a fundamental trial right. Nor does it meaningfully contest that under *Olano*, 507 U.S. at 733-734, defense counsel's inadvertent failure to object to courtroom closure cannot waive the defendant's federal right. Respondent instead tries to dodge the issue by arguing that "[p]etitioner's failure to object was knowing, intentional, and likely strategic."[2] BIO 11; accord *id.* at 12. That is pure fantasy. *Neither* court below found petitioner's counsel was aware of petitioner's right to public *voir dire* and made a conscious decision not to challenge the closure. Indeed, respondent elsewhere concedes "the record is devoid of evidence as to the reasons defense counsel declined to object." *Id.* at 21 n.10.[3]

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[2] As for respondent's make-weight suggestion (BIO 12-13) that a ruling for petitioner would mean trials could *never* be closed over a defendant's objection, the mere fact that the public trial right, like all rights, is subject to limitations does not lower the bar for finding waiver where the right applies.

[3] The trial court hardly "invited objections" (BIO 4) by saying, "Anything *further*?" after stating closure "will be the order of the

Respondent's argument thus distills to nothing more than an assumption that because attorneys are "presume[d] [to] know the applicable rules of procedure" requiring contemporaneous objections, they must *always* have some good, tactical reason for not objecting to procedural errors. Pet. App. 12a-13a (internal quotation marks omitted). As explained above, see pp. 8-9, *supra*, whether such a blunderbuss assumption can serve as the basis for finding waiver of a federal right is a federal question subject to this Court's review. And the assumption violates the principle that "courts indulge every reasonable presumption against waiver of fundamental constitutional rights." *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938) (internal quotation marks omitted). Presuming every failure to object "was knowing, intentional, and likely strategic," Pet. 11, would obliterate *Olano*'s distinction between waiver and forfeiture; every non-objection would become an error-extinguishing "intentional relinquishment or abandonment of a known right," eliminating the well established practice of plain-error review on appeal. *Olano*, 507 U.S. at 733-734 (internal quotation marks omitted).

To the extent the record contains any evidence of defense counsel's intentions, it underscores that counsel's non-objection to the courtroom's closure was inadvertent. In characterizing the non-objection as "likely strategic," BIO 11, respondent primarily

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Court." Mar. 1, 2010 Tr. 15 (emphasis added). The prosecutor's response—asking whether a witness "ha[d] been endorsed," *id.*—confirms counsel's understanding the court was referencing *additional* "housekeeping matters," *id.* at 10.

argues that defendants accused of sexually assaulting a minor *might* desire closure because "prospective jurors may be more forthcoming about their personal histories of abuse, rape, and child molestation when they are not being questioned in public," *id.* at 1. But for that very reason, the trial court performed *voir dire* in chambers for prospective jurors whose questionnaires indicated their personal histories might make it difficult for them to try the case fairly. *Id.* at 5, 19 n.9; Mar. 1, 2010 Tr. ("Tr.") 25, 33. *All* discussions of personal experiences respondent cites, BIO 1 n.1, occurred during these *in camera* sessions, which petitioner does *not* challenge.

Petitioner *does* challenge the 112-transcript-pages' worth of in-court *voir dire*—over 25% of the total trial transcript—that respondent does not dispute was closed to the public.[4] Tr. 17-39, 86-174. Given the availability of in-chambers *voir dire*, and the trial judge's express assurance that jurors could request a "private[] [discussion] in the jury room" if they did not "want to talk * * * publicly," *id.* at 34, no rational attorney would have refrained from objecting to the public's exclusion from the in-court *voir dire* to encourage "prospective jurors [to] be more forthcoming," BIO 1.[5]

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[4] By contrast, in-chambers *voir dire* takes up just 45 pages. Tr. 39-78, 82-86.

[5] The other "strategic reasons" hypothesized below for why defense counsel *generally* might prefer closure also cannot explain counsel's non-objection here. Pet. App. 11a-12a. There was no evidence of potential jury taint from pretrial publicity, and as this Court has recognized, there are numerous measures

CONCLUSION

The petition should be granted.

Respectfully submitted.

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besides courtroom closure for preventing communications between the venire and spectators, see *Presley*, 558 U.S. at 215.