No. 16-240

In the Supreme Court of the United States

KENTEL MYRONE WEAVER,

Petitioner,

V.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

On Writ of Certiorari to the Supreme Judicial Court of Massachusetts

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members and with its affiliates represents more than 40,000 attorneys. NACDL's members include private criminal defense attorneys, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the just, proper, and efficient administration of justice. It frequently appears as an amicus curiae before this Court and other federal and state courts, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal defense system as a whole.[1]

SUMMARY OF ARGUMENT

The right to a public trial is too important to be lost through counsel's incompetence. Openness to the public has been a fundamental element of criminal trials for centuries. A trial conducted behind closed

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus and its counsel made a monetary contribution to its preparation or submission. The parties' consents to the filing of this brief have been filed with the Court.

doors, like a trial without defense counsel or a jury, is simply not a trial in the Anglo-American tradition. Like the right to counsel and the right to a jury, the right to a public trial should have to be affirmatively waived before it is relinquished. It should not be lost merely because counsel is too incompetent to object to a courtroom closure.

For centuries, courts and commentators have emphasized the importance of public trials. In England, the ability of the public to attend trials was considered "one of the essential qualities of a Court of Justice." *Daubney v. Cooper*, 109 Eng. Rep. 438, 440 (K.B. 1829). In the United States, the right to a public trial "plays as important a role in the administration of justice today as it did for centuries before our separation from England." *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984).

This Court has recognized that the right to a public trial is essential to the integrity of the criminal justice system. The presence of spectators ensures that witnesses tell the truth, because they know that any member of the public could expose a lie. Openness to the public provides a powerful incentive for the judge and the jury to act impartially, for the prosecutor not to exceed the bounds of lawful advocacy, and for personnel like bailiffs and court reporters to do their jobs faithfully, because all these actors know that they are under constant public scrutiny. The ability to attend trials gives the public assurance that justice is being done and prevents the public from losing confidence in the courts even when the outcome of a trial is unpopular. Public trials are unique occasions for educating the public

about the criminal justice system. For all these reasons, openness to the public is a crucial element of a criminal trial.

The right to a public trial is too important to be forfeited by accident, merely because defense counsel is too inept to object to a courtroom closure. The right to a public trial should be grouped with similar rights that must be affirmatively waived before they can be lost, such as the right to counsel, the right to plead not guilty, the right to a jury, and the right to testify. Like these rights, the right to a public trial is a constitutive element of the trial itself. It is not a mere tactical matter, such as whether to object to inadmissible evidence. The decision below grossly undervalues the right to a public trial because it allows that right to be forever lost whenever defense counsel makes a mistake.

ARGUMENT

The right to a public trial is too important to be forfeited by counsel's incompetence.

Although the Question Presented in this case is phrased in terms of the right to effective assistance of counsel, the Court's decision will also answer an equally important question—whether the defendant's right to a public trial can be forfeited because of defense counsel's incompetence. Because the prejudice from a courtroom closure is inherently impossible to prove, the decision below means that the right to a public trial will be forever lost if counsel incompetently fails to object to a courtroom closure. Petitioner's view, by contrast, would ensure that counsel

cannot inadvertently forfeit a defendant's right to a public trial.

Petitioner's view is the correct one. The right to a public trial is simply too important to be forfeited by counsel's incompetence. The right to a public trial has always been a fundamental feature of the Anglo-American criminal trial, because it is essential to the integrity of our criminal justice system. Public trials are not just for the protection of the defendant. They also provide valuable benefits for the public and the legal system generally. These benefits should not be lost merely because counsel is too incompetent to realize their importance.

A. The right to a public trial has always been recognized as fundamental to the integrity of the criminal justice system.

The right to a public trial has been a fundamental structural feature of our criminal justice system for centuries. Courts and commentators have consistently emphasized the importance of public trials, because public trials are essential to the integrity of the criminal justice system.

1. For centuries, courts and commentators have emphasized the importance of public trials.

The right to a public trial has been a basic structural feature of the Anglo-American criminal trial since before the Norman Conquest. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505 (1984). In the 16th century, Thomas Smith, a Member of Parliament and an advisor to Elizabeth I, boasted that

English trials were conducted "not after the fashion of the civill law but openly," so that "as many as be present may heare what ech witnesse doeth say." Thomas Smith, *De Republica Anglorum* 99 (Mary Dewar ed. 1982) (originally published in 1583; spelling not modernized). Smith emphasized that this was no innovation. Not only had it already been the rule in England for centuries, but ancient Roman practice had been the same. "Although this may seem strange to our civillians nowe," he noted, "yet who readeth *Cicero* and *Quintillian* well shall see there was no other order or maner of examining witnesses or deposing among the Romans in their time." *Id* at 99-100.

English judges and lawyers of the 17th, 18th, and 19th centuries consistently placed great importance on the openness of the criminal trial. Matthew Hale, Chief Justice of the King's Bench in the 1670s (among other positions), declared that evidence must be given "in the open Court, and in the Presence of the Parties, their Attorneys, Counsel and all Bystanders." Matthew Hale, *The History of the Common Law of England* 253 (2d ed. 1716). John Hawkes, who was Solicitor General at the end of the 17th century, likewise insisted that "all matters of law are, or ought to be transacted publicly." 11 T.B. Howell, *A Complete Collection of State Trials* 460 (1816). Blackstone's ubiquitous *Commentaries* stressed "[t]his open examination of witnesses *viva voce*, in the presence of all mankind," as a crucial element of a criminal trial. 3 William Blackstone, *Commentaries on the Laws of England* 373 (1768).

"[W]e are all of opinion," the King's Bench observed in the early 19th century, "that it is one of the essential qualities of a Court of Justice that its proceedings should be public." *Daubney v. Cooper*, 109 Eng. Rep. 438, 440 (K.B. 1829). Even Jeremy Bentham, who disdained many common law modes of procedure, extolled "[t]he advantages of publicity" for the criminal trial. 1 Jeremy Bentham, *Rationale of Judicial Evidence* 522 (1827).

Colonial Americans followed the English practice of conducting criminal trials in public. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 567-69 (1980). Historical evidence suggests that trials often attracted large numbers of spectators:

> The community turned out to observe criminal trials for serious offenses. Curiosity played a part, as did concern for the victim of the crime or the defendant. Criminal trials were also markers of what a community would and would not tolerate from its members. By gathering at the trial, the community gave visible testimony to its shared values.

Peter Charles Hoffer, *Law and People in Colonial America* 116 (rev. ed. 1998).

The Bill of Rights shifted the foundation of the public trial guarantee from the common law to the Constitution. For the Founders, "[h]istory had proven that secret tribunals were effective instruments of oppression." *Estes v. Texas*, 381 U.S. 532, 539 (1965). The Founders were well aware of "the notorious use of this practice by the Spanish Inquisition, … the excesses of the English Court of Star Chamber, and …

the French monarchy's abuse of the *lettre de cachet*. All of these institutions obviously symbolized a menace to liberty." *In re Oliver*, 333 U.S. 257, 268-69 (1948) (footnotes omitted). As Justice Black observed, "it is not surprising that the men behind the First Amendment also insisted upon the Fifth, Sixth, and Eighth Amendments, designed to protect all individuals against arbitrary punishment by definite procedural provisions guaranteeing fair public trials." *Feldman v. United States*, 322 U.S. 487, 501 (1944) (Black, J., dissenting).

The right to a public trial thus continued to be as fundamental to American criminal trials as it had long been in England. Justice Story explained that the Sixth Amendment's Public Trial Clause "does but follow out the established course of the common law in all trials for crimes. The trial is always public." Joseph Story, *Commentaries on the Constitution of the United States* 664 (1833). Later American commentators likewise emphasized the importance of the fact that criminal trials were open to the public. *See, e.g.*, Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 312 (1868) ("It is also requisite that the trial be *public*."); 3 John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* 894 (2d ed. 1923) ("a trial must be conducted in such a way as to allow the access of the general public").

The Court has accordingly recognized that the right to a public trial "plays as important a role in the administration of justice today as it did for cen-

turies before our separation from England." *Press-Enterprise*, 464 U.S. at 508. "From this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, we are bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice." *Richmond Newspapers*, 448 U.S. at 573. The right to a public trial is one of our oldest and most universally valued legal traditions.

2. Public trials protect the integrity of the criminal justice system in several ways.

For centuries, the right to a public trial has been understood to protect the integrity of the criminal justice system. The right to a public trial is not just for the benefit of the defendant; it is also for the benefit of the public at large. This is why "[t]he public has a right to be present whether or not any party has asserted the right." *Presley v. Georgia*, 558 U.S. 209, 214 (2010).

Public trials serve several important purposes.

First, the presence of spectators keeps witnesses honest. *Waller v. Georgia*, 467 U.S. 39, 46 (1984) (noting that a public trial "discourages perjury"). "[T]he publicity of the examination or deposition operates as a check upon mendacity," Bentham explained. "Environed, as [the witness] sees himself, by a thousand eyes, contradiction, should he hazard a false tale, will seem ready to rise up in opposition to him from a thousand tongues." 1 Bentham, *Rationale of Judicial Evidence* at 522 (internal quotation marks omitted). For Hale, "[t]he Excellency of this open Course of Evidence" was that it forced wit-

nesses to tell the truth, unlike secret trials, "where oftentimes Witnesses will deliver that which they will be asham'd to testify publickly." Hale, *History of the Common Law*, at 254. *See also* 3 Blackstone, *Commentaries*, at 373 ("a witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal"); 3 Wigmore, *Treatise*, at 892 (observing that the presence of spectators "produces in the witness' mind a disinclination to falsify").

Second, the presence of spectators provides a powerful incentive for the judge and jury to act impartially, and for the prosecutor not to exceed the bounds of proper advocacy. "The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." *Oliver*, 333 U.S. at 270. As Bentham memorably put it, publicity "keeps the judge himself, while trying, under trial." 1 Bentham, *Rationale of Judicial Evidence*, at 523. When jurors are aware that they are being scrutinized by the public, they are "keenly alive to a sense of their responsibility and to the importance of their functions." Cooley, *Constitutional Limitations*, at 312. The Court has accordingly observed that one purpose of a public trial is "ensuring that judge and prosecutor carry out their duties responsibly." *Waller*, 467 U.S. at 46.

Third, the presence of spectators ensures that other court personnel, such as court reporters and bailiffs, also carry out their assigned tasks properly. Publicity has served as a check on inaccurate reporting for centuries. In proceedings not governed by a

requirement of openness, Hale noted, "oftentimes, yea too often, a crafty Clerk, Commissioner, or Examiner, will make a Witness speak what he truly never meant, by his dressing of it up in his own Terms, Phrases and Expressions." Hale, *History of the Common Law*, at 254. When spectators can observe the trial, security personnel know not to treat the defendant more roughly than is warranted, because any misbehavior on their part will be on public display.

Fourth, a public trial gives the public assurance that justice is being done. "The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known." *Press-Enterprise*, 464 U.S. at 508. *See also Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982) ("public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process"). A trial conducted behind closed doors would be viewed with suspicion, especially when an unpopular defendant is acquitted or a popular one convicted. "A result considered untoward may undermine public confidence," the Court has explained, "and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted." *Richmond Newspapers*, 448 U.S. at 571. For this reason, "the appearance of justice can best be provided by allowing people to observe it." *Id.* at 572.

Fifth, public trials are an essential component of democratic accountability. For better or worse, judges and district attorneys are elected in most states. If the voters could not watch these elected officials perform their duties, the voters' choices would be even less informed than they are now.

Finally, public trials are unique occasions for educating the public about the criminal justice system. "[B]y publicity, the temple of justice adds to its other functions that of a school," Bentham noted, "a school of the highest order, where the most important branches of morality are enforced by the most impressive means." 1 Bentham, *Rationale of Judicial Evidence*, at 525. The Court has likewise concluded that the public's ability to attend trials "affords citizens a form of legal education and hopefully promotes confidence in the fair administration of justice." *Richmond Newspapers*, 448 U.S. at 572 (citation and internal quotation marks omitted). *See also Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 428 (1979) (Blackmun, J., dissenting) ("Public judicial proceedings have an important educative role.").

These purposes served by the right to a public trial are hardly controversial. They have been cited, again and again, for centuries. They are among the reasons the denial of a public trial is a structural error, *Waller*, 467 U.S. at 49 n.9, like the denial of counsel, *Gideon v. Wainwright*, 372 U.S. 335 (1963), and the denial of the reasonable doubt standard, *Sullivan v. Louisiana*, 508 U.S. 275 (1993). *See generally United States v. Gonzalez-Lopez*, 548 U.S. 140, 148-49 (2006). Openness to the public is a crucial element of a criminal trial.

B. The right to a public trial should not be inadvertently forfeitable through counsel's incompetence.

The right to a public trial is too fundamental to be frittered away by a defense lawyer who incompetently fails to object to a courtroom closure. The right should have to be affirmatively waived by the defendant. At the very least, the forfeiture of a public trial should be a *decision* made by defense counsel, not the accidental by-product of counsel's neglect.

While some rights can be forfeited through counsel's failure to object, others must be affirmatively waived by the defendant. *Gonzalez v. United States*, 553 U.S. 242, 247-49 (2008); *New York v. Hill*, 528 U.S. 110, 114-15 (2000). In the latter category are "fundamental rights," including the right to counsel, *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938), the right to plead not guilty, *Brookhart v. Janis*, 384 U.S. 1, 7-8 (1966), the right to avoid double jeopardy, *Green v. United States*, 355 U.S. 184, 191-92 (1957), the right to a jury, *Jones v. Barnes*, 463 U.S. 745, 751 (1983), the right to testify, *Rock v. Arkansas*, 483 U.S. 44, 53 n.10 (1987), and the right to appeal, *Florida v. Nixon*, 543 U.S. 175, 187 (2004).

These "fundamental" rights cannot be forfeited through counsel's mere failure to object; they must be affirmatively waived by the defendant. "Almost without exception, the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial." *Schneckloth v. Bustamonte*, 412 U.S. 218, 237 (1973).

As the Court has emphasized, with respect to these fundamental rights, "[w]e have been unyielding in our insistence that a defendant's waiver of his trial rights cannot be given effect unless it is 'knowing' and 'intelligent.'" *Illinois v. Rodriguez*, 497 U.S. 177, 183 (1990).

By contrast, the rights that can be forfeited by counsel's failure to object are "trial management matters." *Gonzalez*, 553 U.S. at 249. They are "tactical decision[s]," *id.* at 250, such as whether to object to inadmissible evidence, *Henry v. Mississippi*, 379 U.S. 443, 451 (1965), whether the defendant should be personally present at an in-chambers conference between the judge and a juror, *United States v. Gagnon*, 470 U.S. 522, 528 (1985) (per curiam), and whether a magistrate judge should preside over jury selection, *Peretz v. United States*, 501 U.S. 923, 936 (1991). These tactical decisions are for defense counsel to make, so defense counsel's failure to object constitutes a forfeiture.

Such decisions must often be made quickly: "The adversary process could not function effectively if every tactical decision required client approval." *Taylor v. Illinois*, 484 U.S. 400, 418 (1988). Moreover, such decisions often require knowledge and experience that most defendants do not possess. *Gonzalez*, 553 U.S. at 249-50. For these tactical matters, "the defendant is deemed bound by the acts of his lawyer-agent." *Hill*, 528 U.S. at 115 (citation and internal quotation marks omitted). If defense counsel fails to object, the right is forfeited.

The Sixth Amendment right to a public trial is fundamental, not tactical. Like the right to counsel or the right to a jury, the right to a public trial is one of the constituent elements of the trial itself. It is not a mere matter of "trial management," *Gonzalez*, 553 U.S. at 249; rather, it is a part of the trial's very structure. A trial conducted behind closed doors, like a trial without defense counsel or a jury, is simply not a trial in the Anglo-American tradition. Before the courtroom may lawfully be closed without the showing required by *Waller*, the defendant should have to knowingly and intelligently waive his right to a public trial. The right to a public trial should not be forfeited by counsel's failure to object to the closure.

Moreover, the decision whether to waive a public trial is akin to deciding whether to waive a jury or to waive the right to testify. It is a decision normally made only once, and a decision normally made when the defendant and counsel can take the time to consider the costs and benefits of a waiver. It is quite unlike the tactical decision whether to object to evidence, a decision that must normally be made very quickly and requires legal training to understand fully. The right to a public trial should thus have to be waived; it should not be forfeited by a failure to object.

It bears remembering that defendants and their families often have an interest in keeping the courtroom open even when defense counsel does not. Just as public scrutiny keeps judges and prosecutors on their toes, it does the same for defense lawyers. Most criminal defendants have counsel appointed for

them. Their lawyers are strangers they are meeting for the first time. Defendants and their families are well aware that the source of their lawyer's paycheck is the same government that employs the prosecutor and the judge. They know that defense counsel works each day with the prosecutor and the judge in the same courtroom. Defendants and their families sometimes harbor suspicions that appointed counsel's true allegiance is to the court or to the government rather than to the defendant.

A public trial allows the defendant's family and friends to *see* that defense counsel is in their corner, working for the defendant rather than for the government. If defense counsel were allowed to forfeit the right to a public trial without the defendant's affirmative waiver, the defendant's community could hardly be faulted for viewing the forfeiture as evidence of collusion between defense counsel and the prosecutor, for the purpose of keeping defense counsel's conduct out of sight. If trials could be closed without the defendant's affirmative consent, trials would thus lack "the appearance of fairness so essential to public confidence in the system." *Press-Enterprise*, 464 U.S. at 508.

The Court has never addressed whether the Sixth Amendment right to a public trial is a fundamental right that must be affirmatively waived or a tactical right that can be forfeited by counsel's failure to object to a courtroom closure. In *Levine v. United States*, 362 U.S. 610, 619-20 (1960), the Court held that a *Due Process* claim involving the right to a public trial can be forfeited by counsel's failure to object, but the Court expressly left open the analogous

question with respect to a claim under the Sixth Amendment's Public Trial Clause. *Levine* involved a criminal contempt proceeding. The Court explained that "[p]rocedural safeguards for criminal contempts do not derive from the Sixth Amendment. Criminal contempt proceedings are not within 'all criminal prosecutions' to which that Amendment applies." *Id.* at 616. Because Levine's claim was based on the Due Process Clause rather than the Public Trial Clause, the Court reasoned that its "decision must turn on the particular circumstances of the case, and not upon a question-begging because abstract and absolute right to a 'public trial.'" *Id.* at 616-17. The Court accordingly held that a defendant can prevail under the Due Process Clause only if his counsel objected to the closure and he suffered prejudice from the closure. *Id.* at 619 ("nor is it urged that publicity would in the slightest have affected the conduct of the proceedings or their result").

A claim based on the Public Trial Clause, by contrast, *does* turn on the "absolute right to a public trial." Unlike the Due Process Clause, the Public Trial Clause guarantees an open courtroom whether or not the defendant requests one, and whether or not the defendant can show prejudice from the closure of the courtroom. *Waller*, 467 U.S. at 49 n.9. *Levine* thus has no bearing on whether the Sixth Amendment right to a public trial is one of the rights that must be affirmatively waived.[2]

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[2] In passing dicta, the Court has twice referred to this passage from *Levine*, and even there the Court avoided characterizing *Levine* as having any bearing on the forfeitability of a claim

Moreover, *Levine* was decided back in 1960, when Public Trial Clause jurisprudence looked nothing like it does today. When *Levine* was decided, the Court had not yet articulated the distinction between structural errors and ordinary trial errors. The Court had not yet determined whether a defendant must show prejudice to prove that he has been denied the right to a public trial. The Court had not yet established the factual findings a trial court must make before closing the courtroom, or even the legal principles governing the relevance of those findings.

Now, of course, the surrounding legal landscape is completely different. The Court has made clear that the denial of a public trial is a structural error, and thus that a showing of prejudice is not required. *Waller*, 467 U.S. at 49 n.9. And the Court has instructed trial courts not to close the courtroom without finding that a closure is "no broader than necessary" to advance "an overriding interest that is likely to be prejudiced" by the presence of spectators. *Id.* at 48. Even if *Levine* had addressed the forfeitability of a claim under the Public Trial Clause, any conclusion reached in *Levine* would be ripe for reexamination.

In any event, the Court could resolve the present case without deciding that the Sixth Amendment right to a public trial must be affirmatively waived. The Court could adopt the more limited holding that

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under the Public Trial Clause, as opposed to the Due Process Clause. *Peretz*, 501 U.S. at 936; *Richmond Newspapers*, 448 U.S. at 574 n.10.

if the right to a public trial can be forfeited by counsel's failure to object, that failure must be an intentional *decision* made by counsel rather than the accidental by-product of counsel's incompetence. Such a holding would be consistent with *Levine*, which was careful to emphasize that the defendant was "acting under advice of counsel," 362 U.S. at 620, when he declined to object to the closure of the courtroom. The Court explained that the defendant and his counsel "saw no disregard of a right" when the public was excluded from his criminal contempt proceeding. *Id.* There was not even any allegation in *Levine* that defense counsel had been ineffective. *Levine* was decided on the assumption that counsel, acting competently, had deliberately refrained from objecting during the contempt proceeding, and was raising the issue "only as an afterthought on appeal." *Id.*

Requiring an affirmative waiver from the defendant, or at the very least an intentional decision by defense counsel, before the courtroom may be closed would be commensurate with the historical roots and continuing importance of the Sixth Amendment right to a public trial. The decision below, by contrast, grossly undervalues the right to a public trial. It allows that right to be forever lost whenever defense counsel makes a mistake. We would not allow the right to a jury or the right to testify to be lost so easily. We should not allow it of the right to an open courtroom, which is likewise a fundamental structural feature of the American criminal trial.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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