No. _____

In the Supreme Court of the United States

QUENTIN VENENO, PETITIONER

v.

UNITED STATES OF AMERICA

APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

To the Honorable Neil Gorsuch, Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Tenth Circuit:

1. Under Supreme Court Rule 13.5, petitioner Quentin Veneno, Jr. respectfully requests a 35-day extension of time, until Wednesday, July 10, 2024, within which to file a petition for a writ of certiorari. The United States Court of Appeals for the Tenth Circuit issued its opinion on September 12, 2023. A copy of the opinion is attached at Appendix A. Petitioner filed a timely petition for rehearing or rehearing en banc on October 10, 2023. The Tenth Circuit denied the petition and issued an amended opinion on March 7, 2024. A copy of the denial and the amended opinion is attached at Appendix B. This Court's jurisdiction would be invoked under 28 U.S.C. § 1254(1).

2. Absent an extension, a petition for a writ of certiorari would be due on June 5, 2024. This application is being filed at least 10 days in advance of that date, and no prior application has been made in this case.

3. The questions presented in this case are, first, the circumstances under which Rule 51 triggers a criminal defendant's obligation to object to a violation of his or her right to a public trial, and second, whether Congress enjoys constitutional authority to criminalize the conduct of Indians on tribal land.

4. On the first issue, after a two-day trial, a jury convicted Mr. Veneno of three offenses: two counts of domestic assault by a habitual offender in Indian Country under 18 U.S.C. §§ 117(a)(1), 1153, and one count of assault resulting in serious bodily injury under 18 U.S.C. §§ 113(1)(6), 1153.

5. Mr. Veneno's trial was the first criminal trial held in the District of New Mexico during the COVID-19 pandemic. At the pretrial conference, the district court showed the parties how the courtroom would be set up to accommodate social distancing but made no mention of the fact that no one would be allowed to enter the courtroom besides trial participants. *See, e.g.*, Vol. 3:98:14–18.[1] Nor did the court say anything about providing an audio or video stream of the proceedings.

6. On April 28, 2020, the United States District Court for the District of New Mexico issued administrative order 20-MC-00004-17 (Order 4-17). Vol. 1:386. Order 4-17 stated that "only those persons with official court business shall enter the courthouses . . . of the United States District Court for the District of New Mexico"

[1] Record citations are to the Tenth Circuit record on appeal.

and that "all civil and criminal trials scheduled to commence now through May 29, 2020" were continued. Vol. 1:388. It said nothing about how criminal trials would be conducted if allowed to resume.

7. In August 2020, the Clerk of Court published version 5 of the Plan for Resumption of Jury Trials in DNM During the Pandemic (the Plan). Vol. 1:398. The cover page contained the following text, in blue: "Adopted by the Court on _____." Vol. 1:398. Consistent with that text, the Plan's introductory sentence made clear that it was still "subject to approval by the Court." Vol. 1:399. The Plan did not differentiate between civil and criminal trials and made several potentially contradictory statements about whether family members would be allowed to attend in person or watch the proceedings via video.

8. The record indirectly suggests that, on the morning of the first day of trial, the courtroom deputy sent an email containing a link to counsel (the Email). Vol. 4:133. Because the Email is not in the record, it is not known when the Email was sent, to whom it was sent, what exactly it said, or when the government or defense counsel clicked on the link it contained.

9. The public was not allowed to enter the courtroom during the morning *voir dire* session, and the session was broadcast via audio only—there was no video of the proceedings.

10. After the morning *voir dire* session, the government asked the district court to address on the record "the constitutionality of only providing audio versus video" of the trial proceedings. Vol. 4:133.

11. After the government raised the issue, defense counsel stated that he had not an opportunity to click on the link that was circulated that morning, but that he had assumed that the proceedings were being streamed via both audio and video. He then objected to the fact that the morning *voir dire* session had been broadcast only via audio. The district court responded that the Court did not have the capability to broadcast the proceedings on video.

12. Starting with the afternoon session of *voir dire*, however, Mr. Veneno's trial was broadcast via video and audio.

13. In a 2-1 opinion, the Tenth Circuit majority held that Mr. Veneno had not preserved his objection to the provision of an audio-only feed of the morning *voir-dire* session. The majority opinion acknowledged that Mr. Veneno's counsel "objected that the district court compromised his Sixth Amendment right to a public trial" upon "realizing that the district court broadcasted the morning *voir dire* session via audio only," but nonetheless refused to evaluate this issue de novo because Mr. Veneno was obligated "to object to the closed courtroom at the start of the trial." *United States v. Veneno*, 94 F.4th 1196, 1206–07 (10th Cir. 2024).

14. Judge Rossman dissented, agreeing with Mr. Veneno that "general administrative orders, a not-yet-approved planning document, and an email from a courtroom deputy" were insufficient to put Mr. Veneno on notice of the public-trial aspects of the district court's approach to Mr. Veneno's trial. Diss op. at 5 n.2.

15. The majority's approach to preservation in the public-trial context runs contrary to the Seventh and Second Circuits, both of which have held that a criminal

defendant is not obligated to object to a courtroom closure unless the record makes clear that the defendant or counsel were put on notice of the closure. *See United States v. Anderson*, 881 F.3d 568, 572 (7th Cir. 2018); *United States v. Gupta*, 699 F.3d 682, 689 (2d Cir. 2012) (refusing to impose on the defendant "an obligation to raise a legal objection as to which his own defense counsel [wa]s ignorant in the throes of trial"); *see also United States v. Moon*, 33 F.4th 1284, 1299–1300 (11th Cir. 2022) (explaining that counsel's obligation to object to a courtroom closure arises when the issue is "unmistakably on the table").

16. On the second issue, the panel unanimously agreed that it was powerless to address Mr. Veneno's contention that Congress lacked the constitutional authority to criminalize Indian conduct on tribal land. But Judge Rossman wrote "separately on this point to confess an unease with continued reliance on 'plenary power' precedents 'baked in the prejudices of the day.'" Diss. Op. at 1 n.1 (quoting *Haaland v. Brackeen*, 143 S. Ct. 1609, 1658 (2023) (Gorsuch, J., concurring)). The Supreme Court's plenary-power precedents "should be revisited," Judge Rossman continued, "if only to explain the origins of a constitutional plenary power and to help lower courts square it with an understanding of the Federal Government as one of enumerated powers." *Id.*

17. The second issue is therefore likewise squarely presented with no impediments to this Court's review.

18. Petitioner respectfully requests an extension of time to file a petition for certiorari. The press of other matters has interfered with counsel's ability to submit

a petition in a timely fashion. In addition to this petition and a long-planned family vacation from May 27 to June 2, 2024, counsel is dealing with numerous recent and upcoming deadlines, including:

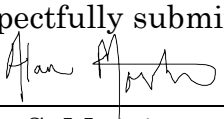
- March 15, 2024: 8000-word reply memorandum in support of motion for summary judgment in *Equine Holdings, LLC v. Auburn Woods, LLC et al.*, Case No. 160500054 (Utah Third Judicial District);
- March 15, 2024: Appellants' Reply Brief in *Phillips v. Henderson*, Case No. 20231098-SC (Utah Supreme Court);
- April 8, 2024: draft 25-page arbitration demand;
- May 8, 2024: drafting and filing of a 10,000-word memorandum in opposition to a motion for a new trial in *Boynton v. Industrial Supply Co., et al.*, Case No. 160902693 (Utah Third Judicial District);
- May 20, 2024: current due date for petition for certiorari in *E.S. v. University of Utah*, 2024 UT App 57;

No prejudice would result from the requested extension. The petition can be considered this summer and, if granted, argued and decided in the OT 2025 term. Respondents have graciously consented to the requested relief.

Wherefore, petitioner respectfully requests that an order be entered extending the time to file a petition for a writ of certiorari to Wednesday, July 10, 2024.

May 21, 2024

Respectfully submitted,



Alan S. Mouritsen
Counsel of Record
PARSONS BEHLE & LATIMER
201 S Main Street, Suite 1800
Salt Lake City, Utah 84111
(801) 536-6927
amouritsen@parsonsbehle.com

Counsel for Petitioner