No. 14-555

IN THE
Supreme Court of the United States

ANGELICA C. NELSON,

Petitioner,

v.

WISCONSIN

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND NATIONAL ASSOCIATION FOR PUBLIC DEFENSE AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 40,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates. NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice.

The National Association for Public Defense ("NAPD") is a national organization uniting nearly 8,500 public defense practioners across the 50 states. As public defense experts, NAPD's mission is to ensure strong criminal justice systems, policies and practices ensuring effective indigent defense, system reform that increases fairness for indigent clients, and education

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amici states that no counsel for a party authored this brief in whole or in part and that no person other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. *Amici* provided the parties ten days notice of their intention to file a brief and letters of consent from the parties have been lodged with the Clerk of the Court pursuant to Rule 37.2.

and support of public defenders and public defender leaders.

SUMMARY OF THE ARGUMENT

Amici agree with Petitioner that a writ of certiorari should be granted. *Amici* submit this brief to elaborate why, in their view, persistent uncertainty surrounding a defendant's right to testify improperly complicates defense strategy and threatens to erode respect for the criminal justice system in the eyes of defendants and the public alike.

The accused plays a dual role at a criminal trial. As a party to the proceedings and the target of the state's prosecution, the Constitution guarantees criminal defendants various rights to safeguard their ability to direct and mount a defense to the state's charges, including "as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." *In re Oliver*, 333 U.S. 257, 273 (1948). The accused is, therefore, both a party and a potential witness at trial, and juries repeatedly have signaled their keen desire to hear the defendant's side of the story. Recognizing the fundamental right of the accused in an adversarial system to speak out against her accusers, and mindful of the potentially outsized impact that a defendant's testimony can have on the proceedings, this Court has observed that "[t]he right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution. It is one of the rights that 'are essential to due process of law in a fair adversary process.'" *Rock v. Arkansas*, 483 U.S. 44, 51 (1987) (quoting *Faretta v. California*, 422 U.S.806, 819 n.15 (1975)).

Harmless error analysis cannot remedy the harm caused when this fundamental right is violated. Harmless error analysis simultaneously fails to recognize the impact of a defendant's testimony (or silence) at trial and fails to respect the defendant's autonomy and dignity, which give rise to the right. The harmless error doctrine is incapable of identifying and redressing errors of this nature because such errors can never be harmless.

The persistent split among the states on this issue is of particular concern to the NACDL and the NAPD. Given the fundamental nature of the right at stake – and the documented hostility of jurors to defendants who do not testify – the present uncertainty over the appropriate remedy to violations of the right to testify is problematic. It leaves defense counsel uncertain how to advise clients who desire to testify; counsel risks building a defense strategy around defendant's testimony only to have it denied by the court after the prosecution has rested, or pressing the unwilling defendant to forego her right in exchange for greater certainty at trial. This Court's review is necessary to clarify the law, to safeguard the defendant's right to control defense strategy, and, crucially, to protect the dignity and autonomy of the accused that animate the right to testify in the first place.

ARGUMENT

I. A Complete Bar on Defendant's Testimony at Trial Strips the Defendant of Control Over a Critical Component of Defense Strategy and Constitutes Structural Error

The Wisconsin Supreme Court's application of the harmless error doctrine assumes that the defendant's testimony is equivalent to the testimony of any other, non-party witness, and that its impact on the proceedings can be similarly assessed. But as this Court and many others have recognized, the defendant is no ordinary witness. Juries want to hear from defendants, and many courts, including this one, have long recognized the outsized impact that a defendant's testimony may have on the proceedings. The decision to testify is therefore not only a personal, constitutional right committed to the defendant, but also a crucial component of trial strategy. The singular importance of the defendant's testimony to the jury – as well as the inability of an appellate judge to take into account the intangible effects it may have – affects the entire framework of the trial. The deprivation of this right thereby constitutes structural error.

A. The Decision To Testify is a Crucial Component of Trial Strategy

Whether to testify is one of the few matters of defense strategy committed solely to the defendant, such as "whether to plead guilty, waive a jury . . . or take an appeal . . . ." *Jones v. Barnes*, 463 U.S. 745, 751 (1983). It is "an important tactical decision as well as a matter of constitutional right." *Brooks v. Tennessee*, 406 U.S. 605, 612 (1972).

The importance of this decision cannot be overstated. As this Court has recognized, the accused is not just any witness at trial. The "most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." *Green v. United States*, 365 U.S. 301, 304 (1961) (plurality opinion) (Frankfurter, J.). The defendant's testimony has the "power of a face-to-face appeal . . . [defendant's] testimony, and his demeanor while testifying, could have special significance to the jury on this matter." *Cannon v. Mullin*, 383 F.3d 1152, 1172 (10th Cir. 2004). While this is true of all witness testimony, "[t]he testimony of a criminal defendant at his own trial is unique and inherently significant." *Nichols v. Butler,* 953 F.2d 1550, 1553 (11th Cir. 1992). The accused's testimony is of "prime importance" at trial. *United States v. Walker*, 772 F.2d 1172, 1178-79 (5th Cir. 1985).

This Court and others also recognize that the decision *not* to testify is fraught with peril. Notwithstanding the protections of the Fifth Amendment, experience tells us that the defendant who does not testify invites risks of a different kind. This Court has noted that jurors "can be expected to notice a defendant's failure to testify" and "[n]o judge can prevent jurors from speculating about why a defendant stands mute in the face of a criminal accusation." *Carter v. Kentucky*, 450 U.S. 288, 303-04 (1981). Jurors may draw adverse inferences from a defendant's failure to testify and "such inferences may be inevitable." *Lakeside v. Oregon*, 435 U.S. 333, 340 n.10 (1978). John H. Wigmore's observation rings as true to human nature today as it did in 1891: "[T]he

average lawyer, as well as the average layman, if asked for his candid opinion, would admit that in the nature of things there is no reason why, if an accused person is innocent, he should be unwilling to say so, and to explain the facts of his conduct and vindicate himself . . . ." John H. Wigmore, *Nemo Tenetur Seipsum Prodere*, 5 HARV. L. REV. 71, 86 (1891). Courts have long been convinced that "[t]he importance the jury attaches to the accused's not taking the stand and denying his guilt cannot be overemphasized." *Poe v. United States*, 233 F. Supp. 173, 177 (D.D.C. 1964), *aff'd* 352 F.2d 639 (D.C. Cir. 1965).

B. Jurors Penalize Defendants Who Do Not Testify

Empirical studies confirm this Court's concern that jurors will inevitably penalize defendants who do not testify. Jurors both expect defendants to answer the charges against them, and often punish those who fail to live up to that expectation. In fact, "[n]o matter how vigorously the court instructs the jurors not to take into account that failure to testify, they are almost certain to do so." *See, e.g.*, Richard D. Friedman, *Character Impeachment Evidence: Psycho-Bayesian Analysis and a Proposed Overhaul*, 38 UCLA L. REV. 637, 667 (1991) ("[T]he accused's failure to testify affirmatively raises the jurors' probability assessment of guilt from the baseline level."); *accord* David R. Shaffer, *The Defendant's Testimony*, *in* THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE pp. 124-49 (S.M. Kassin & L.S. Wrightsman eds., 1985); David R. Shaffer & Thomas Case, *On the Decision to Testify in One's Own Behalf: Effects of Withheld Evidence, Defendant's Sexual Preferences, and Juror Dogmatism*

on Juridic Decisions, 42 J. PERS. & SOC. PSYCH. 335-46 (1982); David R. Shaffer & Cyril Sadowski, *Effects of Withheld Evidence on Juridic Decision II: Locus of Withholding Strategy*, 5 PERS. & SOC. PSYCH. BULL. 40-43 (1979).

Recent research reaffirms that jurors place tremendous importance on a defendant's silence at trial. *See generally* Mitchell J. Frank & Dawn Broschard, *The Silent Criminal Defendant and the Presumption of Innocence: In the Hands of Real Jurors, Is Either of Them Safe?*, 10 LEWIS & CLARK L. REV. 237 (2006). Even when explicitly instructed not to consider a defendant's silence, more than one third of the jurors surveyed in that study discussed the defendant's decision not to testify during deliberations. *Id.* at 263-65. Twenty-one percent of the jurors indicated that it mattered to the jury that the defendant did not testify, and eighteen percent believed that the defendant "had an obligation to testify." *Id.*; *see also Carter*, 450 U.S. at 303 n.21 (observing that "[t]he importance of a no-inference instruction [from a defendant's failure to testify] is underscored by a recent national public opinion survey conducted for the National Center for State Courts, revealing that 37% of those interviewed believed that it is the responsibility of the accused to prove his innocence"). Even worse, slightly more than sixteen percent of the jurors admitted that "the defendant not testifying made it more likely that he/she would be found guilty." Frank & Broschard, 10 LEWIS & CLARK L. REV. at 265. Jurors also engaged in speculation about why a defendant chose not to testify – inevitably to the defendant's detriment. In particular, in cases where the defendant

did not take the stand, almost forty-four percent agreed or strongly agreed that the defendant "did not testify because his/her testimony would have shown that he/she was guilty." *Id.* at 268.

Furthermore, these jurors' sentiments were statistically related to their ultimate verdict. In verdicts returned by jurors who reported that the jury had discussed the defendant's decision not to testify, the number of defendants found not guilty on all charges was almost ten percent lower than the same value recorded across all criminal cases in the study. *Id.* at 265. Among jurors who said that it mattered in deliberations that the defendant did not testify, the number of defendants acquitted on all charges was approximately fifteen percent lower. *Id.* In verdicts reported by jurors who believed that the defendant had an obligation to testify, that number was almost eighteen percent lower. *Id.* And defendants were more than three times more likely to be found guilty than acquitted by jurors who agreed or strongly agreed that not testifying made it more likely that a defendant would be found guilty. *Id.*

A study by the Capital Jury Project reached similar conclusions. *See* Michael E. Antonio & Nicole E. Arone, *Damned If They Do and Damned If They Don't: Jurors' Reaction to Defendant Testimony or Silence During a Capital Trial*, 89 JUDICATURE 60 (2006). Based on 84 juror narratives drawn from capital trials, the study concluded that over twenty-seven percent of the jurors surveyed felt that a defendant's failure to testify during the guilt phase of a capital trial implied that the defendant was, in fact, guilty. *Id.* at 62. Additionally, almost eleven percent of the jurors believed that a

failure to testify showed a lack of remorse and thirteen percent were at least curious why the defendant chose not to testify. *Id.*

Jurors' predisposition to punish silent defendants underscores the potential damage to the defendant's defense strategy when she or he is barred from taking the stand. When, as here, the defendant seeks to testify with the endorsement of counsel and the defense case relies on this testimony, the defense's strategy is effectively nullified by the court. Painted with the same broad brush by jurors who are not privy to the defendant's attempt to take the stand, defendants who are precluded from testifying are forced to suffer the same stigma as defendants whose silence was the product of careful strategy and calculation. That penalty is all the more severe in cases – like this one – where the defendant's testimony is the only evidence that the defense can marshal.

C. Denying the Accused the Opportunity to Testify Is Structural Error Because Its Impact on the Proceedings Cannot be Assessed and It Affects the Framework of the Trial

Courts have recognized that the defendant's willingness to take the stand against her accusers, as well as other intangibles flowing from that decision, exerts a powerful effect on the proceedings. These intangibles can permeate the jury's consideration of all aspects of the prosecution's case. A reviewing court

> cannot weigh the possible impact upon the jury of factors such as the defendant's willingness to mount the stand rather than avail himself of the shelter of the Fifth

> Amendment, his candor and courtesy (or lack of them), his persuasiveness, his respect for court processes. These are elusive and subjective factors, even among persons who might perceive and hear the defendant, but more significantly, they are matters neither communicated to an appellate judge nor susceptible of communication to him. Appellate attempts to appraise impact upon the jury of such unknown and unknowable matters is purely speculative."

Wright v. Estelle, 572 F.2d 1071, 1081 (5th Cir. 1978) (en banc) (Godbold, J., dissenting).

1. The Harm from Denying the Accused the Right to Testify Cannot be Assessed

Errors may be structural when their effects are difficult for a reviewing court to assess. For example, where the right to a public trial is denied, the error is structural because "the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance" – that is, because it is difficult, if not impossible, to assess whether denial of the public trial right is harmful or not. *Waller v. Georgia*, 467 U.S. 39, 49 n.9 (1984). The employment of improper criteria in the selection of grand and petit juries has similarly been characterized as a structural error for this reason. *See*, *e.g.*, *Vasquez v. Hillery*, 474 U.S. 254, 263-64 (1986) (reversing conviction where indictment was handed down by a grand jury from which African Americans had been systematically excluded, because where that error occurs, "a reviewing court can neither indulge a presumption of regularity nor evaluate the

resulting harm"); *Davis v. Georgia*, 429 U.S. 122 (1976) (per curiam) (reversing a capital murder conviction handed down by a jury from which a prospective juror had been improperly excluded based on general objections to the death penalty).

This Court has already recognized, in a different context, the impossibility of evaluating the nature and impact of proposed testimony by the accused. In *Luce v. United States*, 469 U.S. 38 (1984), the Court held that in limine rulings regarding the admissibility of certain evidence during a defendant's testimony are not preserved for appellate review unless the defendant actually takes the stand to testify. This rule is necessary because "the precise nature of the defendant's testimony" is "unknowable when, as here, the defendant does not testify." *Id.* at 41. Thus, any attempt to evaluate the harm caused by an allegedly improper ruling would be "wholly speculative." *Id.* Here, as in *Luce*, there is no way of knowing how Ms. Nelson's testimony would have unfolded because the trial court prevented her from offering testimony. *See also Ohler v. United States*, 529 U.S. 753, 760-61 (2000) (Souter, J. dissenting) ("An appellate court can neither determine why a defendant refused to testify, nor compare the actual trial with the one that would have occurred if the accused had taken the stand."). Moreover, "[r]equiring a defendant to make a proffer of testimony is no answer; his trial testimony could for any number of reasons, differ from the proffer." *Luce*, 469 U.S. at 41 n.5.

Just as the defendant's testimony may differ from the proffer, it is impossible to assess *ex post* how the

jury may have received this testimony, let alone the demeanor, attitude, or presentation of the defendant. Juries enjoy

> a prerogative of lenity and equity, contrary to the judge's instruction, when the case is one where it can empathize with the defendant, feeling either that the jurors might well have been or come to be in the same position, or that in the large the defendant's conduct is not so contrary to general conduct standards as to be condemned as criminally deviate conduct.

United States v. Dougherty, 473 F.2d 1113, 1130 n.33 (D.C. Cir. 1972). How juries would receive the testimony of the accused therefore cannot be assessed in the abstract, let alone by a reviewing court that has no record to the defendant's testimony to consult, nor any opportunity to assess those intangibles that make a defendant's testimony so powerful.

2. Denying the Accused's Right to Testify Affects the Framework of the Trial

Errors that are structural may also affect the framework of the trial. *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). The Wisconsin Supreme Court reasoned here that "as with other errors in the 'trial error' category, the denial of a defendant's right to testify occurs at a discrete point in the trial. By contrast, errors that are structural permeate the entire process." Pet. App. 13a. This reasoning proves too much – all errors "occur[] at a discrete point" – but it is

true that the effects of structural errors "permeate the entire trial," or as this Court has put it, affect the trial's "framework." *Fulminante*, 499 U.S. at 310. Structural errors are those errors that "necessarily render [the trial] fundamentally unfair . . . ." *Neder v. United States*, 527 U. S. 1, 8 (1999).

On the basis of that reasoning, discrete errors in evidentiary rulings or jury instructions ordinarily are considered trial errors. Evidentiary and jury instruction errors are considered "trial error" where they occur during presentation of the case to the jury and can be "quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Id.* at 308. Various evidentiary errors meet this definition, *see*, *e.g.*, *id.* at 306-11 (admission of an illegally obtained confession is trial error); *Chapman v. California*, 386 U.S. 18 (1967) (permitting prosecutor to comment on the defendant's invocation of the right not to testify is trial error), as do various jury instruction errors, *see*, *e.g.*, *Neder v. United States*, 527 U.S. 1 (1999) (omission of an element of an offense is trial error); *Pope v. Illinois*, 481 U.S. 497 (1987) (misstatement of an element of an offense is trial error). These errors can fairly be described as "discrete" – a single instruction or piece of evidence added to one side of the ledger or the other.

By contrast, certain errors are "so fundamental" that they affect the trial's framework and cannot be quantified like the errors just mentioned. *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). This Court has held that an improper jury instruction regarding the reasonable doubt standard is structural error. *Sullivan*

v. Louisiana, 508 U.S. 275, 281-82 (1993) (reasoning that a defective reasonable doubt instruction produces "consequences that are necessarily unquantifiable and indeterminate," and "vitiates *all* the jury's findings") (emphasis in original). Similarly, in *Herring v. New York*, 422 U.S. 853 (1975), the Court signaled that the complete denial of the defendant's right to offer a closing argument is likely structural error. The *Herring* Court explained:

> Some cases may appear to the trial judge to be simple – open and shut – at the close of the evidence. And surely in many such cases a closing argument will, in the words of Mr. Justice Jackson, be "likely to leave (a) judge just where it found him." But just as surely, there will be cases where closing argument may correct a premature misjudgment and avoid an otherwise erroneous verdict. And there is no certain way for a trial judge to identify accurately which cases these will be, until the judge has heard the closing summation of counsel.

Id. at 863 (footnotes omitted); *but see Glebe v. Frost*, 574 U.S. __ (2014) (per curiam) (assuming without deciding that *Herring* held it was structural error to completely bar summation from the defense).

This logic applies with equal force to the defendant's testimony: a judge cannot know for certain whether, how, or to what extent the testimony of the accused will affect the jury, and, as this Court has recognized, a proffer like the one the trial court required here is no substitute for the actual testimony. *See Luce*, 469 U.S.

at 41 n.5. As discussed above, denial of the right to testify produces consequences that cannot be quantified or determined. The defendant's testimony is more than "mere" evidence; like summation, it may very well serve as the lens through which the jury views and interprets all other evidence. As a result, a verdict rendered by a jury that did not hear the defendant – a defendant who *wanted* to testify – address the facts in her own words is no more fair or reliable than a verdict rendered by a jury that was incorrectly instructed about reasonable doubt. Indeed, a "reviewing court can only engage in pure speculation – its view of what a reasonable jury would have done" absent the error. *Sullivan*, 508 U.S. at 281.

The appellate court's inability to assess what a defendant's testimony would be, how it would affect the jury, and recognition by courts that the defendant's testimony is a crucial aspect of a defense makes the harmless error test a poor fit to assess (and redress) the harm when a defendant is completely denied the right to testify.

II. A Complete Bar on the Testimony of the Accused Offends the Dignity and Autonomy Interests Underlying the Right and Demands Reversal

In *Rock v. Arkansas*, this Court held that "the necessary ingredients of the Fourteenth Amendment's guarantee that no one shall be deprived of liberty without due process of law include a right to be heard and to offer testimony." 483 U.S. at 52. At its core, the accused's right to testify at trial is the right "to present his own version of events in his own words. A defendant's opportunity to conduct his own defense by

calling witnesses is incomplete if he may not present himself as a witness." *Id.* Indeed, the right of the accused to raise her voice in her own defense is so fundamental in an adversarial system that this Court recognized that the accused's right to testify is "even more fundamental to a personal defense than the right of self-representation." *Id.*

The accused's right to testify, like the accused's right to self-representation, is therefore also animated by "that respect for the individual which is the lifeblood of the law" and which entitles the defendant not just to a fair trial, but to defend himself in the manner and mode of his choosing. *Faretta v. California*, 422 U.S. 806, 834 (1975) (citing *Illinois v. Allen*, 397 U.S. 337, 350-51). The Court's concern in the self-representation cases is not that the accused would be afforded a better defense as a result of representing herself, but that she must be afforded the opportunity "personally to decide" how to conduct her own defense. *Id.* Harmless error analysis is not intended to redress or serve these types of concerns; rather, it serves the strong public interests in finality and judicial economy where the errors at trial were "so unimportant and insignificant" that they do not require the "automatic reversal of [a] conviction." *Chapman*, 386 U.S. at 22. "Harmless error analysis has not been applied to rights that are essential to the fundamental fairness of a trial or that promote systemic integrity and individual dignity." *Johnstone v. Kelly*, 808 F.2d 214, 218 (2d Cir. 1986).

At bottom, the autonomy and dignity interests of the accused are inextricably linked to our fundamental notions of due process; whether the *processes* by which culpability is determined are fair, not just whether the

end *result* itself is fair. *Johnstone*, 808 F.2d at 218. For "[t]o deny the defendant the right to tell his story from the stand dehumanizes the administration of justice" and risks "allow[ing] a jury to condemn to death or imprisonment a defendant who desires to speak, without ever having heard the sound of his voice." *Wright,* 572 F.2d at 1078 (Godbold, J. dissenting).

III. Failure to Resolve This Issue Threatens to Erode Confidence in the Criminal Justice System

"Testifying at trial is the quintessential embodiment of the defendant's right to speak for himself." Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1459 (2005). The significance of that right is exemplified by the number of defendants who choose to exercise it; when defendants go to trial, just over half of those charged with felonies actually take the stand. *See id.*; Gordon Van Kessel, *Quieting the Guilty and Acquitting the Innocent: A Close Look at a New Twist on the Right to Silence*, 35 IND. L. REV. 925, 951 (2002); Stephen J. Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 VAL. U. L. REV. 311, 329-30 (1991).

The uninhibited exercise of this right is essential to defendants' perceptions of whether they have been treated fairly and justly by the penal system. *See, e.g.*, Markus D. Dubber, *Legitimating Penal Law*, 28 CARDOZO L. REV. 2597, 2610-11 (2007); *see also* Jonathan D. Casper et al., *Procedural Justice in Felony Cases*, 22 LAW & SOC'Y REV. 483 (1988). Those perceptions, in turn, are closely linked to rates of recovery, reintegration, and recidivism. *See* Natapoff,

80 N.Y.U. L. REV. 1492-1503; Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 Yale L.J. 85, 89-90 (2004) (arguing that "[r]emorse and apology are useful as more than mere metrics for punishment," and may help to "teach offenders lessons, vindicate victims, and encourage communities to welcome wrongdoers back into the fold").

The defendant's right to testify is also integral to the public's perception of the criminal justice system. This is particularly true given that this right is exercised in a public context, "where defendants address the government and the public, where the public and media have the right to hear them, and where the official process of adjudication takes place." Natapoff, 80 N.Y.U. L. REV. at 1486. "To work effectively, it is important that society's criminal process 'satisfy the appearance of justice' . . . ." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571-72 (1980) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)). Indeed, public oversight of criminal proceedings is so important that "the First Amendment . . . standing alone, prohibit[s] government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted," including during "criminal trials." *Id.* at 576. As the most visible "weapon with which defendants protect themselves against the executive branch and supplicate the judiciary," the defendant's right to testify bears directly on the perceived legitimacy of the criminal judicial process. Natapoff, 80 N.Y.U. L. REV. at 1475.

CONCLUSION

For the reasons stated above, *amici curiae* the NACDL and NAPD respectfully urge the Court to grant Ms. Nelson's petition for a writ of certiorari.

Respectfully submitted,

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