**No. _____**

**IN THE**

# Supreme Court of the United States

DAVID M. MORGAN,
*Petitioner,*

v.

THE STATE OF ARIZONA, HON. TIMOTHY DICKERSON AND HON. LAURA CARDINAL, JUDGES OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, IN AND FOR THE COUNTY OF COCHISE,
*Respondents.*

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

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Does the qualified right of access to *voir dire* under the First Amendment to the United States Constitution, recognized in *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) ("*Press-Enterprise I*"), include the right to hear potential juror names during *voir dire*?

2. If the qualified First Amendment right of access to *voir dire* recognized in *Press-Enterprise I* does not include the right to hear potential juror names during *voir dire*, did the Arizona Supreme Court misapply the logic prong of the test articulated in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) ("*Press-Enterprise II*") when it held that there is also no presumptive right to hear juror names during *voir dire* under that test?

## LIST OF ALL PARTIES

All parties with an interest in the case are listed in the caption. At the Superior Court and Court of Appeals level, another reporter, Terri Jo Neff, participated in the case as an Intervenor/Appellant with Morgan. She declined to join the appeal to the Arizona Supreme Court, s*ee* App. at 3a, fn. 1, and is not a party with an interest in this matter.

## CORPORATE DISCLOSURE STATEMENT

Petitioner David M. Morgan is an individual. No corporations are connected with Petitioner.

## RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Supreme Court Rule 14.1(b)(iii):

- *State v. Wilson*, No. CR201700516 (Super. Ct. Cochise Cnty.), judgment entered Nov. 25, 2020;
- *State v. Wilson*, No. 2 CA-CR 2021-0003 (Ariz. Ct. App.), judgment entered May 18, 2022;
- *State v. McCoy*, No. CR201800156 (Super. Ct. Cochise Cnty.), judgment entered June 17, 2021;
- *Morgan v. Dickerson*, Nos. 2 CA-SA 2021-0007 and 2 CA-SA 2021-0019 (Ariz. Ct. App.) (consolidated), judgment entered July 20, 2021;
- *Morgan v. Dickerson*, No. CV-21-0198-PR (Ariz.), judgment entered June 14, 2022.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

**Statutes**



**Rules**



**Constitutional Provisions**



**Other Authorities**

## PETITION FOR A WRIT OF CERTIORARI

Petitioner David M. Morgan respectfully petitions this Court for a writ of certiorari to review the judgment of the Arizona Supreme Court in this case.

## OPINIONS BELOW

The Arizona Supreme Court's opinion is reported at 511 P.3d 202 and reproduced at App. 1a-16a. The opinion of the Arizona Court of Appeals is reported at 496 P.3d 793 and reproduced at App. 17a-33a.

## JURISDICTION

The Arizona Supreme Court issued its opinion on June 14, 2022. On August 18, 2022, the Honorable Justice Elena Kagan granted an application to extend the deadline to file this petition to October 12, 2022. This Court has jurisdiction to review this petition under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### Constitution of the United States, Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

**Ariz. Rev. Stat. § 21-312. Juror records**

A. The list of juror names or other juror information shall not be released unless specifically required by law or ordered by the court.

B. All records that contain juror biographical information are closed to the public and shall be returned to the jury commissioner, the jury manager or the court when jury selection is completed and may not be further disclosed or disseminated by a party or the party's attorney.

C. A random jury box seating list is confidential before use.

## STATEMENT OF THE CASE

Juror names have historically been spoken aloud during *voir dire*. Because the public holds a presumptive right to attend court proceedings, including *voir dire*, the public also holds a presumptive right to hear these juror names during *voir dire*.

Despite this presumptive right, the Arizona legislature amended A.R.S. § 21-312(A) in 2007 to provide that "[t]he list of juror names or other juror information shall not be released unless specifically required by law or ordered by the court." Twelve years later, the Chief Judge of Cochise County decided to use secret juries as a matter of course for the first time.

This case arises from the denial of Petitioner David Morgan's ("Morgan") presumptive right of access under the First Amendment to hear the names of potential jurors during *voir dire*. This is an essential

component of *voir dire* proceedings, which may be closed to the public only as a narrowly tailored solution to protect a compelling interest, and only after a finding has been made on the record that such a compelling interest exists. Neither of these conditions were present when Morgan was denied his right of access. Both A.R.S. § 21-312(A) and the Cochise County procedure for the use of secret juries ignore this Court's requirement that both conditions be met before closing *voir dire* proceedings to the public.

## I. Factual and Procedural Background.

Morgan is an Arizona-based journalist who, for over 15 years, has reported on local government and court proceedings. Morgan's Cochise County Record publishes news with related documents online and has a readership on those matters far exceeding that of local traditional media. Morgan intervened in two Cochise County Superior Court cases after judges in both cases made clear that they would use secret juries (otherwise known as "innominate" juries).[1]

### A. The *Wilson* Case.

On September 13, 2020, Morgan intervened[2] in the murder trial of Roger Wilson after learning that Respondent Judge Timothy Dickerson intended to use an innominate jury. The federal question before this Court was originally raised in Morgan's Motion to

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[1] Morgan also intervened to challenge COVID-19 access restrictions, but he does not bring that issue before this Court.

[2] Another reporter, Terri Jo Neff, joined Morgan's Motion to Intervene. She declined to appeal to the Arizona Supreme Court and is no longer a party to this proceeding.

Intervene, in which Morgan argued that the First Amendment provides the public and members of the press a qualified right of access to juror names.

Morgan objected to the use of a secret jury, citing this Court's holdings in both *Press-Enterprise I* and *Press-Enterprise II*. Morgan argued that the public has a qualified constitutional right of access to juror names as a component of *voir dire*, which can be overcome only by establishing either a compelling state interest in confidentiality, or a clear and present danger to a defendant's fair trial rights. Judge Dickerson denied the motion without addressing Morgan's constitutional concerns, but noted that the order would only be in effect during the trial. App. 44a-48a.

On December 16, 2020, after the *Wilson* trial concluded, Morgan moved for a second time to make the names of the jurors public. Morgan believed that because the criminal trial had already concluded, there was no longer a concern with making the juror names public. On January 21, 2021, Judge Dickerson held a hearing and denied the motion. *See* App. at 20a. Morgan subsequently brought a Special Action before the Arizona Court of Appeals. *See* App. at 17a-33a.

B. The *McCoy* Case.

While the first Special Action was being briefed, Morgan learned that another secret jury would be empaneled, this time in the trial of Lonney McCoy over financial abuse of a vulnerable adult, held before Respondent Judge Laura Cardinal. Morgan moved to make the names of potential jurors public during *voir dire*, again citing both *Press-Enterprise I* and *Press-Enterprise II* and arguing that the constitutional presumption in favor of public access to *voir dire* includes

the right to hear potential jurors' names. Judge Cardinal rejected Morgan's motion in a minute entry at the start of the trial. *See* App. at 20a-21a. Morgan subsequently brought a Special Action before the Arizona Court of Appeals. *See* App. at 17a-32a.

### C. Consolidated Special Action with the Arizona Court of Appeals.

The Arizona Court of Appeals consolidated the Special Actions and heard oral arguments on June 9, 2021. On July 20, 2021, the Arizona Court of Appeals issued its ruling, holding that the "experience and logic" prongs of the *Press-Enterprise II* test did not necessitate access to potential jurors' names during *voir dire*. *See* App. at 17a-33a.

### D. Appeal to the Arizona Supreme Court.

On August 19, 2021, Morgan sought review by the Arizona Supreme Court. *See* App. at 1a-16a. Morgan urged the Arizona Supreme Court to recognize a presumptive right of access to juror names under the First Amendment that can only be overcome in appropriate circumstances by sufficiently compelling interests. App. at 3a.

The Arizona Supreme Court declined to recognize that presumptive access to *voir dire* under *Press-Enterprise I* includes the right to hear potential jurors' names during that proceeding. App. at 7a ("the Supreme Court has not addressed whether the First Amendment guarantee of qualified public access to *voir dire* examinations extends to learning jurors' names."). The Arizona Supreme Court instead applied the "experience and logic" test of *Press-Enterprise II* in

an attempt to answer "whether announcing jurors' names forms an integral part of *voir dire* examinations, thereby giving the public a qualified constitutional right to learn those names." *See* App. at 7a-15a. In assessing the experience prong, the Arizona Supreme Court determined: "[w]e answer the experience inquiry by concluding that courts have historically revealed jurors' names during *voir dire* proceedings." App. at 11a. However, in assessing the logic prong, the Court concluded: "public access to jurors' names promotes neither fairness in *voir dire* proceedings nor the perception of fairness. As such, it does not play a significant positive role in the functioning of *voir dire*, and we answer the logic inquiry in the negative." App. at 15a. Ultimately, the Arizona Supreme Court held: "the First Amendment does not provide the press or public with a qualified right to access jurors' names, and § 21-312(A) is facially valid. The Cochise County Superior Court therefore did not err by presumptively using innominate juries." App. at 15a.

The Arizona Supreme Court further held that "[t]he court has discretion to order access to jurors' names," but stated: "[t]he standards for exercising that discretion are not before us today. We note, however, that when a court denies a request for access, a best practice would be to explain its reasoning on the record." App. at 15a.

## REASONS FOR GRANTING THE PETITION

### I. The Arizona Supreme Court's Incorrect Ruling on the First Amendment's Right of Access to *Voir Dire* Underscores the Need for this Court to Settle a Federal Question of Nationwide Importance and Resolve a Split Among State and Federal Courts.

This Court's intervention is necessary in order to settle the important federal question of whether the First Amendment's right of access to *voir dire* includes the right to hear potential jurors' names during such a public proceeding. Because this Court has not expressly said whether the First Amendment right of access to *voir dire* encompasses the right to hear potential jurors' names, state and federal courts reach different conclusions on the question. The growing split among lower courts creates substantial uncertainty about the contours of protected rights under the First Amendment. This Court should resolve this uncertainty by definitively settling this question.

There is a presumptive right of access to *voir dire* under the First Amendment. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505 (1984) ("*Press-Enterprise I*"). In *Press-Enterprise I*, this Court recognized that "[t]he process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system," and found that juror selection "has presumptively been a public process with exceptions only for good cause shown." *Id.* Although *Press-Enterprise I* did not explicitly guarantee a right of access under the First Amendment to hear juror names during *voir dire*, it emphasized the open,

public nature of this proceeding. This Court held that "compelling [privacy] interest[s] of a prospective juror" regarding "deeply personal matters" may in some limited circumstances give rise to a need for anonymity, but that such privacy interests "must be balanced against [] historic values . . . and the need for openness." *Id.* at 511–12. In such circumstances, trial courts must "articulate findings with the requisite specificity" and "consider alternatives to closure." *Id.* at 513.

Two years later, this Court further clarified that the proper inquiry for determining whether the First Amendment guarantees a right of access to a trial proceeding requires examining the "experience and logic" of that proceeding. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 9 (1986) ("*Press-Enterprise II*"). When doing so, courts must scrutinize whether a particular trial proceeding has historically been open to the public, and whether public access to that proceeding plays "a significant positive role" in the functioning of that proceeding. *Id.* at 8.

*Press-Enterprise I* and *Press-Enterprise II* establish that *voir dire* is a proceeding open to the public, and that the right of access to trial proceedings under the First Amendment depends upon the "experience and logic" of allowing access to a proceeding. Together, these two holdings mandate how courts must treat *voir dire* and how they must approach issues concerning the right of access to trial proceedings.

State and federal courts have reached conflicting results, however, when applying *Press-Enterprise I* and *II* in the context of the right to hear potential jurors' names during *voir dire*. Because *Press-Enterprise I* did not expressly articulate a right of access to hear juror names during *voir dire*, courts have sought

to determine the right under the First Amendment by applying *Press-Enterprise II*'s "experience and logic" test. The outcomes of this inquiry differ considerably—even as courts examine the same issue and historical record.

Some courts have found that the right to hear potential jurors' names during this public trial proceeding satisfies both prongs of the "experience and logic" test. These courts concluded that juror names have historically been available to the public, and that the public's access to this information plays a significant positive role in the functioning of *voir dire*.

For example, in *State ex rel. Beacon J. Publ'g Co. v. Bond*, the Ohio Supreme Court held that "*Press-Enterprise I* [] explicitly include[s] juror identity as part of the *voir dire* proceedings that should be analyzed under the First Amendment." 781 N.E.2d 180, 192 (Ohio 2002). Applying *Press-Enterprise II*'s "experience and logic" test, that court found a "long tradition of access to juror names." *Id.* at 193. It also emphasized that "public access to [this] information plays a significant role in the functioning and enhancement of the judicial process" by preserving fairness and public confidence in juror selection and jury deliberations. *Id.* at 193–94.

Similarly, in *Commonwealth v. Long*, the Pennsylvania Supreme Court held that "jurors' names have commonly been disclosed during trial." 922 A.2d 892, 903 (Pa. 2007). That court also recognized the "additional check upon the prosecutorial and judicial process" that the public serves with this information in hand. *Id.* at 904. The court noted that public access to jurors' names deters misrepresentations during *voir dire*, allows for investigation into the accuracy of jurors' answers to questions during *voir dire*, and

ensures that potential jurors are fairly drawn from their community. *Id.* at 904.

In *United States v. Wecht*, the Third Circuit similarly found that "jurors' names have traditionally been available to the public prior to the beginning of trial," and that "[i]f any significant evidence to the contrary exists, we have not discovered it." 537 F.3d 222, 237 (3d Cir. 2008). The Third Circuit further emphasized that "the judicial system benefits from a presumption of public access to jurors' names." *Id.* at 238. Specifically, the court stated that it "cannot reconcile the Supreme Court's conclusion that the public has the right to see the process in which this power is exercised (*Richmond Newspapers*) and to see the process that selects those who will exercise the power (*Press-Enterprise I*), with the conclusion that the public has no right to know who ultimately exercises this power." *Id.*

Conversely, other courts have answered both prongs of this test in the negative, finding that juror names were not historically available to the public and that public access to juror names does not play a sufficiently positive role in the functioning of *voir dire*. For example, in *Gannett Co., Inc. v. State*, the Delaware Supreme Court found that there is a history of revealing juror names during *voir dire*, yet nonetheless declared that the "constitutional dimension" of this history is belied by the fact that many trial courts historically had discretion over revealing this information. 571 A.2d 735, 748 (Del. 1989). The court concluded that such discretion left the experience prong unsatisfied. *Id.*

With respect to the logic prong of the inquiry, the Delaware court held that "[a]nnouncement of jurors' names in court promotes neither the fairness nor

the perception of fairness." *Id.* at 751. However, in reaching that conclusion, the court erroneously applied a more exacting standard than *Press-Enterprise II* requires. Rather than examining whether public access to juror names plays "a significant positive role" in the functioning of *voir dire*, *Press-Enterprise II*, 478 U.S. at 8, the Delaware Supreme Court sought to determine whether access to juror names "plays 'an essential role' in the proper functioning of government." *Gannett Co., Inc.*, 571 A.2d at 749 (citing a standard employed by the District of Columbia Circuit prior to the *Press-Enterprise II* holding in *In re Reps. Comm. for Freedom of the Press*, 773 F.2d 1325, 1332 (D.C. Cir. 1985)). Thus, some courts have also applied outdated, overruled standards when conducting that inquiry. *See more detailed discussion infra at III.B.*

Similarly, in *United States v. Black*, the Northern District of Illinois found a lack of evidence supporting the conclusion that juror names were historically available to the public during *voir dire*. 483 F. Supp. 2d 618, 623–26 (N.D. Ill. 2007). Like the Delaware Supreme Court, the Northern District of Illinois emphasized the discretion many trial courts historically held over revealing this information to the public, concluding that this undermined the notion that this information was historically available. *Id.* at 624–26. Unlike the Delaware Supreme Court, however, the Northern District of Illinois employed the proper standard in examining the logic prong of the *Press-Enterprise II* test, but found that public access to juror names would not "play a significant positive role in the functioning of the particular process in question." *Id.* at 626 (citation omitted).

Further complicating matters, in the case at hand, the Arizona Supreme Court reached a mixed

conclusion from the *Press-Enterprise II* test. That court determined that "courts have historically revealed jurors' names during *voir dire* proceedings." App. at 11a. Despite finding this experience in the historical record, the Arizona Supreme Court nevertheless decided the "logic" prong in the negative after declaring that the public's right to hear juror names during *voir dire* "does not play a significant positive role in the functioning of *voir dire*." App. at 15a. In reaching this determination, the Arizona Supreme Court noted the holding in *Commonwealth v. Long*, detailing the Pennsylvania Supreme Court's conclusion that public access to jurors' names deters misrepresentations during *voir dire*, allows for investigation into the accuracy of jurors' answers to questions during *voir dire*, and ensures that potential jurors are fairly drawn from their community. App. at 13a-14a. To this, the Arizona Supreme Court simply concluded: "We disagree." App. at 14a. According to the Arizona Supreme Court, "the First Amendment does not provide the press or public with a qualified right to access jurors' names." App. at 15a.

The split among state and federal courts when applying *Press-Enterprise I* and *II* in the context of the right to hear potential jurors' names during *voir dire* is decades old and wide-spread. These courts' inconsistent applications of the "experience and logic" test—including the erroneous use of unsupported exacting standards—fuel uncertainty about the contours of protected rights under the First Amendment.

A continued lack of clarity about whether the First Amendment's right of access to *voir dire* includes a qualified right of access to hear juror names during *voir dire* is untenable. As this Court noted in *Press-Enterprise I*, openness at trials is meant to, and often

does, "enhance both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise I*, 464 U.S. at 508. Without a clear understanding of the First Amendment's bounds in this area, the public is left uncertain about whether requirements of fairness during trial proceedings are being met, risking additional loss of faith in the justice system. Because this Court has not directly addressed this issue, and because lower court rulings continue to create substantial uncertainty about the First Amendment's guarantees in this context, this Court should definitively settle this important federal constitutional question.

## II. A Default Rule or Practice which Makes Juror Names Secret Materially Changes the *Voir Dire* Proceeding and Therefore Impermissibly Conflicts with the Public's Presumptive Right of Access to *Voir Dire* Recognized in *Press-Enterprise I*.

This Court conclusively held in *Press-Enterprise I* that a presumption of public access attaches to *voir dire* proceedings:

> The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

464 U.S. at 510. The default use of innominate juries is fundamentally in conflict with this Court's decision in *Press-Enterprise I* because it forecloses the case-by-case finding of a compelling interest and narrowly tailored solution that is necessary to overcome the presumption of public access. Furthermore, the Arizona Supreme Court's decision fails to recognize that *Press-Enterprise I* controls and instead chooses to analyze the practice of secret juries under *Press-Enterprise II*.

The Court should find that the public's presumed right of access to *voir dire* established in *Press-Enterprise I* includes a presumed right of access to juror names. This presumption of access can still be overcome by the showing of a compelling interest and a narrowly tailored solution, but that showing must nonetheless be made on a case-by-case basis. A default prohibition on the disclosure of juror names is irreconcilably in conflict with *Press-Enterprise I*, and thus the Court should simply grant certiorari, vacate the decision of the Arizona Supreme Court, clarify that the presumption of public access extends to juror names, and remand the case for proceedings consistent with *Press-Enterprise I.*[3]

The guarantee of a constitutionally vested right must mean something about "the content and requirements" of such right, such as when this Court held that "trial by an impartial jury" carries with it the requirement of verdict unanimity. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1395 (2020). Just as unanimous verdicts are a requirement of the terms of the Sixth Amendment, access to juror names is a substantive

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[3] This Court has applied the "grant, vacate and remand" principle before in a case involving the *voir dire* process and a court's overlooking of the *Press-Enterprise I* standard. *See Presley v. Georgia*, 558 U.S. 209 (2010).

requirement of the public's First Amendment right of access to *voir dire* under *Press-Enterprise I*. To prohibit the public's access to juror names during *voir dire* is to remove the public's core interest in access. *Press-Enterprise I* should be applied to invalidate the default use of secret juries.

Although *Press-Enterprise I* did not expressly state that access to *voir dire* carries with it a presumption of access to juror names, *Press-Enterprise I* must be read such that the lack of that explicit articulation was "because all this was so plainly included in the promise" of the public's access to *voir dire*. *See Ramos*, 140 S. Ct. at 1400 (holding that "[t]aking the State's argument from drafting history to its logical conclusion would thus leave the right to a 'trial by jury' devoid of meaning" regarding jury unanimity). If the Arizona Supreme Court's decision is permitted to stand, the public's presumed right of access to *voir dire* will lose a fundamental aspect of its "content and requirements." *Id*. at 1395. The shell of the right might remain, but the promise of that right will ring hollow.

Presumptive access to juror names during *voir dire* is implicit in the reasoning of *Press-Enterprise I* as the Court points to the withholding of juror names as a type of narrowly tailored solution that might be permissible if justified by a compelling interest. *See Press-Enterprise I*, 464 U.S. at 512 ("a valid privacy right *may* rise to a level that part of the transcript should be sealed, or the name of a juror withheld, to protect the person from embarrassment.") (emphasis added). It would be illogical for the Court in *Press-Enterprise I* to point to withholding juror names as a narrowly tailored solution, requiring a finding of a compelling interest before that solution may be employed, if the presumption of openness was not attached to

juror names. A default rule providing for secret juries is fundamentally at odds with this Court's reasoning that keeping juror names secret is a potential narrowly tailored solution to a compelling need.

This Court also explained in *Press-Enterprise II* that: "We have *already determined* in *Richmond Newspapers*, *Globe*, and *Press-Enterprise I* that public access to criminal trials and *the selection of jurors* is essential to the proper functioning of the criminal justice system." 478 U.S. at 11-12 (emphasis added). In articulating the first prong of the *Press-Enterprise II* test to consider "whether the place and process have historically been open to the press and general public," the Court offers as the illustrative example from *Press-Enterprise I* that "since the development of trial by jury, the process of selection of jurors has presumptively been a public process with exceptions only for good cause shown."). *Id.* at 8 (citing *Press-Enterprise I*, 464 U.S. at 505). In articulating the second prong of the *Press-Enterprise II* test to consider "whether public access plays a significant positive role in the functioning of the particular process in question," the Court again invoked *Press-Enterprise I*, "noting that openness in criminal trials, *including the selection of jurors*, "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Id.* at 8-9 (citation omitted) (emphasis added). To permit the decision of the Arizona Supreme Court to stand would allow for an untenable outcome: the experience and logic test would be permitted to support a conclusion that there is insufficient logic to find a presumption of access to juror names, despite the fact that the logic prong was built upon the strength of that very reasoning.

When last faced with a case in which an inherent aspect of a constitutional right was subject to critical assessment, the Court found that even making such an assessment was in error. *See Ramos*, 140 S. Ct. at 1401-02 ("The deeper problem is that the plurality subjected the ancient guarantee of a unanimous jury verdict to its own functionalist assessment in the first place."). It is worth quoting the Court's reasoning from *Ramos* at length because it provides an analytical framework that Morgan urges the Court to apply in this case:

> All this overlooks the fact that, at the time of the Sixth Amendment's adoption, the right to trial by jury *included* a right to a unanimous verdict. When the American people chose to enshrine that right in the Constitution, they weren't suggesting fruitful topics for future cost-benefit analyses. They were seeking to ensure that their children's children would enjoy the same hard-won liberty they enjoyed. As judges, it is not our role to reassess whether the right to a unanimous jury is "important enough" to retain. With humility, we must accept that this right may serve purposes evading our current notice. We are entrusted to preserve and protect that liberty, not balance it away aided by no more than social statistics.

*Id.* at 1402. Morgan similarly asks this Court to affirm a core component of the public's First Amendment right of access to *voir dire*—knowledge of juror names. That the right to juror names exists within the greater issue of access to *voir dire* generally does not diminish

the importance of that right; rather, it places it closer to the heart of the underlying liberty guaranteed by the First Amendment. This Court has already noted that "[p]ublic jury selection . . . was the common practice in America when the Constitution was adopted." *Press-Enterprise I*, 464 U.S. at 508.

Indeed, the Arizona Supreme Court itself recognized that, historically, the presumption of public access to *voir dire* included within it an implicit presumption of access to juror names. App. at 11a. ("[C]ourts have historically revealed jurors' names during *voir dire* proceedings."). The Arizona Supreme Court was correct in that assessment. The Arizona Supreme Court was also correct in its assessment that "Morgan conflates the right to attend *voir dire* with a right to access juror names," but erred when it concluded that "[t]hey are far from the same thing." App. at 7a. The right to attend *voir dire* must carry with it the presumed right, albeit qualified, to access juror names.

In sum, courts "should not assume the existence of a juror's privacy right without considering carefully the implications of that assumption." *Press-Enterprise I*, 464 U.S. at 515 (Blackmun, J., concurring). And yet, that is precisely what the default use of secret juries does. The notion that "[t]he jury selection process may, in *some circumstances*, give rise to a compelling interest of a prospective juror when interrogation touches on deeply personal matters that person has legitimate reasons for keeping out of the public domain," assumes that the juror's privacy right must first rise to that level. *Id.* at 511 (emphasis added). Such a level cannot be the default. As such, Arizona's blanket rule and practice prescribing secret juries in all cases impermissibly circumvents the right

of access to *voir dire* established by this Court in *Press-Enterprise I*. Such rule and practice must be held unconstitutional, the decision of the Arizona Supreme Court vacated, and this case remanded for further proceedings consistent with *Press-Enterprise I*.

## III. As a Result of a Fundamental Misunderstanding of the Public's Right of Access under the First Amendment, the Arizona Supreme Court Erred When It Concluded that the Right Does not Apply to Juror Names During *Voir Dire* Under *Press-Enterprise II*.

If *Press-Enterprise I* is interpreted to not include a right of access to juror names during *voir dire*, then the *Press-Enterprise II* test applies. The Arizona Supreme Court did consider the *Press-Enterprise II* analysis, but misapplied the "logic" prong of the test and did not give proper weight to the value of openness in criminal proceedings recognized by this Court.

### A. The Arizona Supreme Court Erred by Finding that the Right of Access to *Voir Dire* Does Not Include Information Essential to the Proceedings, Like Jurors' Identities.

The Arizona Supreme Court expressed skepticism about application of the *Press-Enterprise II* two prong "experience" and "logic" test to access to juror names during *voir dire*. App. at 8a ("The experience and logic inquiries are an imperfect fit."). This skepticism represents a common and divided understanding of *Press-Enterprise II* in federal and state courts. *See*

*Gannett Co., Inc. v. State*, 571 A.2d 735, 740-41 (Del. 1989) (holding that "[access to juror names during *voir dire*] does not fit neatly into any analytical structure previously applied in first amendment cases involving jurors' names."); *See also Commonwealth v. Long*, 922 A.2d 892, 900-06 (Pa. 2007) (holding that the *Press-Enterprise II* should be used to determine if the public has a right of access to juror names during *voir dire*).

The confusion among lower courts arises from a mistaken understanding by some courts, such as the Arizona Supreme Court, that the public's presumptive right of access only protects the public's right to attend criminal proceedings and does not extend to information typical to those proceedings. *See* App. at 8a ("They were designed to determine whether criminal proceedings should be open for public attendance and scrutiny, not whether the public has a presumptive right to information concerning criminal proceedings that is not announced in open court."). However, this Court's prior decisions make it clear that the public's presumptive right of access is not limited to the right to sit in the courtroom during criminal proceedings. A proper review of this Court's prior First Amendment right of access cases demonstrates that access to information is at the heart of the right. The "scrutiny" that the Arizona Supreme Court recognized as part of the right cannot logically include complete secrecy of the identities of those involved in the proceedings.

In *Richmond Newspapers*, this Court recognized the public's presumptive right of access to criminal trials under the First Amendment. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). This Court held that the right of access is rooted in fundamental principles of self-governance that the Framers sought to protect under the First Amendment. The

plurality decision in *Richmond Newspapers* held that "in guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees." *Id.* at 575. This Court went on to hold that "Free speech carries with it some freedom to listen. 'In a variety of contexts this Court has referred to a First Amendment right to 'receive information and ideas." *Id.* at 576 (citing *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972)).

From the beginning, the public's right of access to criminal proceedings was understood, by this Court, as a right to access information during proceedings, not simply a right to attend. This understanding is further supported by the many concurring opinions in *Richmond Newspapers*. In his concurrence, Justice Stevens emphasized that "the Court unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment." *Id.*, 448 U.S. at 583 (Stevens, J., concurring). The public's need to access information clearly underlies this Court's recognition of the public's right of access to criminal proceedings.

The Arizona Supreme Court's skepticism about the application of *Press-Enterprise II* is unsupported by this Court's prior decisions and fails to recognize that automatically withholding juror names in every case is a partial closure of the *voir dire* proceeding. The public's right of access to criminal proceedings under the First Amendment is as much about information at the proceeding as it is about attendance. Therefore, when a state attempts to withhold information from the public during an "open" proceeding, the *Press-Enterprise II* analytical framework should

be utilized to determine if the public's right of access attaches to that information.

### B. The Arizona Supreme Court and Other Courts Have Significantly Erred in Their Application of the "Logic" Prong of the *Press-Enterprise II* Test as a Result of an Error Made by the Delaware Supreme Court that has been Perpetuated for Decades by Subsequent Lower Courts.

The Arizona Supreme Court erred in its analysis of the "logic prong" of the *Press-Enterprise II* test. Since this Court's decision in *Press-Enterprise II*, state and federal courts are divided on the *Press-Enterprise II* "logic" prong when analyzing public access to juror names during *voir dire*. This split has created significant confusion about the application of the *Press-Enterprise II* test to historically open proceedings. Courts that hold public access to juror names during *voir dire* does not satisfy the "logic" prong fail to give proper weight to this Court's emphasis on the inherent and practical value of openness. Further, these lower courts ignore this Court's precedents which clearly articulate the public's participatory role in the proceedings. These courts apply a standard that improperly limits the public's role to mere observation.

This confusion is primarily the result of the D.C. Circuit's mistaken quotation of this Court's opinions in *Press-Enterprise I*. Prior to this Court's decision in *Press-Enterprise II*, the D.C. Circuit issued an opinion in *In re Reporters Committee for Freedom of the Press,* 773 F.2d 1325 (D.C. Cir. 1985). The opinion, written by then Judge Scalia, described the *precursor* to the formal two-part *Press-Enterprise II* test as

asking in its second part "whether the right of access plays an essential role in the proper functioning of the judicial process and the government as a whole." *Id. at* 1332.

In June of 1986, this Court issued its opinion in *Press-Enterprise II*. In that opinion, this Court formally articulated the two-prong test of "experience" and "logic" and clarified that the "logic" prong is much broader than recited by Scalia. *Press-Enterprise II*, 478 U.S. at 8. This Court's opinion in *Press-Enterprise II* stated that public access passes the "logic" prong if it "plays a significant positive role in the functioning of the particular process in question." *Id*. The opinion further stated "[a]lthough many governmental processes operate best under public scrutiny, it takes little imagination to recognize that there are some kinds of government operations that would be totally frustrated if conducted openly," providing the grand jury system as an example of a process that would be "totally frustrated if conducted openly." *Id.*

This description of the "logic" prong is broader, more favorable to finding access, and more compatible with prior precedents than the standard stated by Scalia nine months earlier in *In re Reporters Committee for Freedom of the Press*. However, this did not stop the Delaware Supreme Court from citing the stricter standard described by Scalia in its 1989 case *Gannett Co., Inc. v. State*: "[t]his 'logic' criterion requires us to examine whether the 'historical practice play[s] 'an essential role' in the proper functioning of government." 571 A2.d 735, 749 (Del. 1989).

The Delaware Supreme Court case is important because subsequent courts considering the question of access to juror names during *voir dire*, including the Arizona Supreme Court in this case, regularly cite and

consider the *Gannett* case when deciding whether public access to juror names during *voir dire* satisfies the "logic" prong of *the Press-Enterprise II* test. *See generally* App. 1a-15a (citing *Gannett* throughout its opinion both as a representation of the minority view of the "experience" prong and as support for finding that access to juror names does not satisfy the "logic" prong); *see also Long*, 922 A.2d at 892 (Declining to follow the holding in *Gannett* and holding that the public does have a right of access to juror names during *voir dire*). Further, courts are regularly called to address the *Gannett* decision when lower courts rely on it to deny public access to juror names during *voir dire*. The *Gannett* decision, which drastically departed from this Court's established right of access jurisprudence, has framed the question of access to juror names during *voir dire* for some courts for more than thirty years. It is essential for this Court to squarely answer this question and finally put an end to the confusion and uncertainty created by the *Gannett* decision.

### C. The Arizona Supreme Court's Analysis of the *Press-Enterprise II* "Logic" Prong Incorrectly Limited the Public and Press' Right of Access Under the First Amendment to Simple Observation.

The Arizona Supreme Court held that access to juror names did not positively contribute to either the quality of the proceedings or the appearance of fairness of the proceedings. App. at 13a. The Arizona Supreme Court held that attendance, without access to juror names, alone was sufficient to satisfy the public's interest in openness, stating conclusively that

"accessing jurors' names would not significantly add to the public's ability to assure itself that *voir dire* is fairly conducted or to check the courts in disregarding established standards for jury selection." App. at 13a.

But this Court has held that public access to criminal proceedings "historically has been thought to enhance the integrity and quality of what takes place." *Richmond Newspapers,* 448 U.S. at 578. This Court has also held that openness adds value beyond this: "Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise I*, 464 U.S. at 508.

The Arizona Supreme Court erroneously limited the public's access role to that of an observer. App. at 14a ("First, the public's role in *voir dire* is an observer, not as a participant charged with selecting a fair jury."). This Court has been clear that access to criminal proceedings encompasses much more than simple observation. In fact, in *Globe Newspaper,* this Court plainly stated "[a]nd in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process — an essential component in our structure of self-government." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982). What this Court recognized as an important check — public participation in criminal proceedings — the Arizona Supreme Court diminished to mere attendance. The Arizona Supreme Court held that the public can be sure that the proceeding is fair, without access, because the government has procedures in place to ensure fairness in jury selection, a notion that has been directly rejected by this Court. App. at 14a; *see Richmond Newspapers,* 448 U.S. at 569 ("Without publicity, all other checks

are insufficient: in comparison of publicity, all other checks are of small account.") (citation omitted).

Analyzing the question with this diminished role in mind, the Arizona Supreme Court concluded that generalized privacy concerns always outweigh any value openness would add to the proceeding. App. at 15a ("in this internet age, where jurors' names can trigger lightning-fast access to a wealth of biographical information, including addresses, any slightly positive role in divulging jurors' names to the public is outweighed by the risk to jury integrity."). This conclusion is unsupported by historical or statistical findings. App. at 15a.

In *Globe Newspaper*, this Court overturned a Massachusetts law that required closure in "specified sexual offenses involving a victim under the age of 18, to exclude the press and general public from the courtroom during the testimony of that victim." *Globe Newspaper Co.*, 457 U.S. at 598. The state in that case argued that partial closure was required to encourage "minor victims of sex crimes to come forward and provide accurate testimony." *Id.* at 609. This Court rejected the state's argument because it "offered no empirical support for the claim that the rule of automatic closure," would increase the likelihood of victims to come forward or to present more accurate testimony. *Id.*

In the same way, neither Respondents or the Arizona Supreme Court provided any support for the assertion that a presumption of public access to juror names would lead to juror harassment or tampering. In fact, juror names have historically been open to the press and public without issue. *See, e.g.*, Order & Mem. Op., *Minnesota v. Chauvin*, No. 27-CR-20-1246, at 3 (Minn. Dist. Ct. Oct. 25, 2021) (unpublished)

(ordering release of the names of jurors, alternate jurors, and prospective jurors, as well as their completed juror questionnaires, in criminal trial of Derek Chauvin, convicted of murdering George Floyd in 2020); *see also* Order, *Florida v. Cruz*, No. 18-1958CF10A, at 2 (Fla. Cir. Ct. Feb. 11, 2022) (unpublished) (denying defendant's motion to use a secret jury in criminal trial of Nikolas Cruz, charged with numerous counts of murder following a 2018 school shooting in Parkland, Florida); Abraham Abramovsky & Jonathan I. Edelstein, *Anonymous Juries: In Exigent Circumstances Only*, 13 St. John's J.L. Comm. 457, 466 (1999) (explaining that "the trials of many notorious organized crime figures, including Al Capone, 'Lucky' Luciano, and Murder, Inc.'s Louis 'Lepke' Buchalter, were all successfully undertaken without the use of anonymous juries. In each of these cases, the names and addresses of jurors were read aloud in open court, and in none of them was any juror harmed.") (citations omitted)).

Moreover, this Court has expressed its own concerns with closure supported by generalized concerns for juror privacy: "By requiring the prospective juror to make an affirmative request, the trial judge can ensure that there is in fact a valid basis for a belief that disclosure infringes a significant interest in privacy. This process will minimize the risk of unnecessary closure." *Press-Enterprise I,* 464 U.S. at 512. The Arizona Supreme Court's decision drastically departs from this Court's jurisprudence and failed to give adequate weight to the important role public access plays in criminal proceedings.

As was shown above, access to criminal proceedings allows the public to perform its important function as an additional check on the function of the

judicial system. This role is important in *voir dire* generally as well as to juror names during *voir dire*. Further, the public's ability to act as a check on the judicial system, which is only possible with open proceedings, is a far cry from the Arizona Supreme Court's assertion that observation, without access to information, is sufficient.

## IV. A.R.S. § 21-312(A) Is Facially Unconstitutional Because It Reverses the Presumption of Access that Attaches to *Voir Dire* and Violates the Requirements of *Press-Enterprise I*.

This Court should address the facial constitutionality of A.R.S. § 21-312(A). Doing so will clarify the important issue of how state statutes prescribing the handling of juror information must comport with the First Amendment's requirements of public access to trial proceedings.

In *Press-Enterprise I*, this Court recognized a presumption of access to *voir dire*, and established a high bar that must be met by those seeking to wall off the public from access to that proceeding. 464 U.S. at 510. "The presumption of openness," this Court held, "may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id*. Moreover, any sufficiently overriding interest "is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Id.* In other words, *voir dire* is a proceeding presumptively open to the public, and any closure of this proceeding is permitted only if absolutely necessary in individual cases, and

only by narrowly tailored means, all of which must be thoroughly explained by the trial court ordering closure.

The Arizona Legislature's enactment of A.R.S. § 21-312(A), and the Arizona Supreme Court's endorsement of the statute's constitutionality, flips the command of *Press-Enterprise I* on its head. Despite *Press-Enterprise I*'s clear directive to preserve the openness of *voir dire*, with only necessary, narrow, and thoroughly justified exceptions to openness permitted in individual cases, A.R.S. § 21-312(A) does just the opposite. The statute declares that, in all cases, "[t]he list of juror names or other juror information shall not be released unless specifically required by law or ordered by the court." In so doing, the statute makes the use of innominate juries—a form of *voir dire* closure—the default position of all Arizona state courts. Rather than permitting narrow case-by-case closure of juror identities after a clearly articulated showing that closure is essential, as *Press-Enterprise I* expressly requires, A.R.S. § 21-312(A) demands none of these things. Instead, it eschews this constitutional command and deems this information presumptively closed, forcing the public to work to obtain it. A.R.S. § 21-312(A)'s broad prohibition on the disclosure of juror names during the public proceeding of *voir dire* wields a hatchet in an inquiry requiring the precision of a scalpel.

Of course, openness in *voir dire* is not absolute; it is simply a presumption. A presumed right of access to hear potential jurors' names during *voir dire* does not necessitate the availability of these names in every single *voir dire* proceeding. Certainly, there are circumstances in which the narrowly tailored denial of access to potential jurors' names during *voir dire*—

possibly through the use of innominate juries—may be necessary to preserve compelling interests. Courts routinely weigh the public's right of access against such compelling interests in order to make these determinations. A presumptive right of access to hear potential jurors' names during *voir dire*, which can be overcome under appropriate circumstances, is entirely consistent with the need to protect those interests.

Irrespective of the viability of innominate juries in particular circumstances, or the exact frequency with which potential jurors' names might constitutionally be withheld from the public during *voir dire*, this statute presents significant constitutional defects that this Court should address. A statute that so directly contradicts First Amendment requirements of openness, established in *Press-Enterprise I* and continuously recognized by this Court, should be rejected as unconstitutional.

## CONCLUSION

For the foregoing reasons, this Court should grant Morgan's petition for a writ of certiorari, vacate the Arizona Supreme Court's holding as inconsistent with *Press-Enterprise I*, and remand the case to that court;

Or, in the alternative, grant the petition for a writ of certiorari to consider the right to hear juror names during *voir dire* under *Press-Enterprise II*.

Respectfully submitted,

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