No. 22-353

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 Arizona Supreme Court

BRIEF IN OPPOSITION

MARK BRNOVICH
Attorney General

JEFFREY L. SPARKS
Deputy Solicitor General / Chief of Capital Litigation
Counsel of Record
GINGER JARVIS
Unit Chief Counsel
OFFICE OF THE ARIZONA ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-5025
Jeffrey.Sparks@azag.gov

Counsel for Respondents

QUESTIONS PRESENTED

1. Does the First Amendment require that prospective juror names be revealed to the press and the public during voir dire as part of a qualified public right of access under this Court's case law?

2. Does the First Amendment qualified public right of access identified in this Court's case law vitiate state laws protecting juror expectations of privacy during and after criminal trial proceedings?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

CONSTITUTIONAL PROVISIONS

OPINIONS BELOW

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

JURISDICTION

The Arizona Supreme Court entered judgment on June 14, 2022. On August 14, 2022, Justice Kagan extended the time for Morgan to file a petition until October 12, 2022. Morgan filed a timely petition on that day. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment provides, in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I.

INTRODUCTION

Morgan's Petition presents stale, shallow splits at best. And this case would be a poor vehicle to resolve those splits given the factbound nature of the questions presented and the severe doubts that those questions are actually outcome determinative here. In any event, the Arizona Supreme Court's decision is plainly correct and does not warrant review.

Stale, Shallow Splits. Morgan's Petition cites (at 9-10) all of three cases supporting its side of the purported split. The most recent is from 2008, or more than 14 years ago. The other side of the purported split is even older, with Morgan citing (at

10-11) cases from 1985 and 1989, along with a district court decision from 2007.

The split is also shallow at best. All of the cases recognize only a "qualified right of access." And the Arizona Supreme Court made clear that Arizona courts continue to "ha[ve] discretion to order access to jurors' names." App.15a. On both sides of the putative split, access is thus qualified and not absolute.

Poor Vehicle. Even if this case presented a split that warranted review, this case would be a poor vehicle to resolve it. As an initial matter, Petitioner Morgan has previously been found by courts to have violated rules regarding juror privacy. Specifically, a court found that Petition "Morgan's video recording had violated [a rule] under which cameras in a courtroom 'must be placed to avoid showing jurors in any manner.'" *State v. Rojas*, 449 P.3d 1129, 1131, ¶8 (Ariz. Ct. App. 2019). As a result, jurors were publicly identified on Facebook by Petitioner Morgan on the penultimate day of a child sex trial in Cochise County. *Id.* at 1130–31, ¶¶ 2–5. This ultimately resulted in the grant of a new trial, which was affirmed on appeal. *Id.* at 1131–32, ¶¶ 8–9. The appellate court reasoned that, despite the promises of all jurors to remain fair and impartial, it could not conclude beyond a reasonable doubt that the publication of juror identities did not result in a tainted verdict, depriving the defendant of his constitutional right to a fair trial. *Id.* This resulted in the minor victim being required to testify a *second* time about the sexual abuse she suffered at the hands of the defendant.

Given that prior violation of court orders regarding juror privacy, this case would present significant factual complications that could confound reaching the questions presented. And whether Arizona trial courts exceeded their discretion in evaluating whether the "qualified right of access" is actually so expansive that it compels disregarding prior violations of court rules regarding juror privacy is a factbound dispute that does not warrant this Court's review.

There are other complications in the underlying cases here too. In the underlying Wilson case, for example, the defendant had a "history of violence toward his attorneys and the judge in the case" that would militate in favor in an innominate jury, as well as "concerns from the jurors themselves for their safety," and Petitioner "Morgan's relationship with Wilson's mother." App.20a. Similarly, the McCoy case specifically relied upon Morgan's prior violation of juror secrecy rules. App. 36a.

Merits. This case also does not warrant review because the Arizona Supreme Court's decision as to the two innominate juries at issue is obviously correct. Partly in response to debacle in the *Rojas* case, the Cochise County Superior Court implemented a system whereby trial judges could elect to use an innominate jury, joining other county superior courts in Arizona successfully employing this process.[1] The use of innominate juries protects jurors' right to privacy, and promotes and protects a defendants' right to a fair trial, as well as victims'

---

[1] Innominate juries (jurors' identities known to the parties, but not to the public) are currently used in Maricopa County, Pima County, Pinal County, and the District of Arizona.

rights to justice. But this is what Morgan seeks to undo—by claiming that the First Amendment and this Court's case law give him the "right" to know the jurors' names so that he and others can research and publish those names and details of their private lives, and also contact them post-verdict. And, of course, Morgan's prior misconduct regarding juror privacy further sharpened the State's interest in using innominate juries in the underlying cases.

Given these factbound considerations, the Arizona Supreme Court did not err in concluding that the trial courts' seating of two innominate juries here comported with the First Amendment, which further militates in favor of denying review here.

STATEMENT OF THE CASE

1. *Two consolidated special actions*

This case resulted from two consolidated petitions for special action from two cases (*State v. Wilson*, 2 CA-SA-2021-0007 and *State v. McCoy*, 2 CA-SA-2021-0019) in which Morgan sought access to the names of prospective jurors, but the trial judges declined to make the names publicly available, thus using innominate juries.

In *Wilson*, the trial judge, operating under Covid-19 restrictions, denied releasing the jurors' names to Morgan, finding that the extensive history of violence and the defendant's conduct throughout the proceedings justified maintaining privacy. App. 20a. Morgan, along with the public, was prohibited from being personally present in the courtroom due to Covid-19, but the court opened its phone line to permit Morgan and others to listen to the proceedings.

In *McCoy*, the trial judge also elected to use an innominate jury. Shortly before trial, Morgan again sought to learn the jurors' names, but the trial court denied his request, finding that: (1) releasing the names of jurors would infringe on the defendant's right to a fair trial; (2) the jurors' privacy would be invaded; and (3) Morgan had previously violated court orders in *Rojas* regarding publication of juror identities. App. 36a. Trial proceeded under relaxed Covid-19 restrictions, and the courtroom remained open during all stages of the trial, including voir dire. App. 37a.

2. *The Arizona Court of Appeals Affirms*

The Arizona Court of Appeals affirmed the Cochise County Superior Court's use of innominate juries in a published opinion, finding that Arizona law permitted innominate juries and that the First Amendment did not require disclosure of the jurors' identities. App. 19a.

Specifically, the court held that Arizona statutes and rules require a trial court to keep jurors' records and biological information private. App. at 24a. This includes juror names, release of which is only authorized when required by law or ordered by the court. *Id.*

Next, the court analyzed whether the use of innominate juries, while authorized by state law, violates the First Amendment. Citing and analyzing *Press-Enterprise Co. v. Superior Ct. of California, Riverside, Cnty. (Press-Enterprise I)*, 464 U.S. 501 (1984), and *Press-Enterprise Co. v. Superior Court of California for For Riverside Cnty. (Press Enterprise II)*, 478 U.S. 1 (1986), the court concluded that those cases addressed "public access to courtroom

proceedings, not to the disclosure of certain confidential information held by the court itself." App. at 24a–26a. Instead, the court held that juror biographical information, including their names, was part of a "broad spectrum of confidential information" not part of a court proceeding, but information held within government control for which there was no right of access under the First Amendment. *Id.* at 26a.

The court further held that, even applying this Court's test from *Press Enterprise II*, public disclosure of jurors' names did not further the goals of juror impartiality, fairness of the proceedings, or preserving public confidence because other mechanisms, such as voir dire, accomplish those. App at 26a–31a. The court, in contrast, found a substantial risk of harm from a presumption of disclosure for juror names, both to the judicial system and to the jurors. *Id.* at 31a. Additionally, the court foresaw significant fair-trial risks for defendants in high-profile cases attendant to presumptive public disclosure of juror names. *Id.* at 31a–32a. The court thus accepted special action jurisdiction, but denied relief. *Id.* at 33a.

3. *The Arizona Supreme Court Grants Review and Reaches the Same Conclusion with Somewhat Different Reasoning*

The Arizona Supreme Court granted Morgan's request for discretionary review, and on June 14, 2022, it concluded in a published opinion that the First Amendment did not provide either the press or the public with a qualified right to access juror names, even though historically jurors' names were revealed in court during voir dire proceedings. Pet.

App. 1a–16a. One justice filed a fully-agreeing concurring opinion to emphasize that Arizona's statute protecting juror names "survives even the most demanding First Amendment compelling-interest standard," and, further, that the Arizona Constitution contains an express privacy protection that the State "plainly has a compelling interest in enforcing" vis-à-vis juror privacy. *Id.* at 16a.

The Arizona Supreme Court acknowledged that if the First Amendment provides a qualified right of public access to jurors' names, then it creates a presumption for access in all cases that can only be overcome by a compelling interest in secrecy, meaning that the presumption of protection of juror privacy created by A.R.S. § 21–312(A) cannot coexist. App. at 4a–5a. Noting that the First Amendment does not explicitly guarantee the press or public access to a criminal trial and, further, that the right of a public trial is personal to the defendant under the Sixth Amendment, the court turned to an analysis of this Court's relevant jurisprudence and its test for whether the public has a qualified right of access to criminal proceedings under the First Amendment. *Id.* at 5a–7a.

Applying the two considerations identified by this Court in *Press-Enterprise II*, (1) "whether the place and process have historically been open to the press and general public" (the experience inquiry), and (2) "whether public access plays a significant positive role in the functioning of the particular process in question" (the logic inquiry), the court noted that the inquiries are "an imperfect fit," as they were designed to analyze whether criminal proceedings should be open for public attendance, not whether the public has a presumptive right to information in

those proceedings that is not announced in open court. App. at 7a–8a. Nevertheless, the court applied both parts of the test.

The court accepted other courts' and commentators' recitation of the history of jury selection in concluding that jurors' names were traditionally revealed during jury selection proceedings. App. at 9a–10a. Finding that "tradition is the driving force" behind the experience inquiry, the court differed from the Arizona Court of Appeals and concluded that "courts have historically revealed jurors' names during the voir dire proceedings." *Id.* at 11a.

However, like the court of appeals, the supreme court found that Morgan failed the "exacting standard" of the logic inquiry that public access to jurors' names "plays a *significant* positive role in the functioning of" voir dire examinations. App. at 11a–12a. Citing this Court's reasoning in *Press-Enterprise I* for the value of open voir dire proceedings to ensure fairness and use of established standards, the court contrasted access to jurors' names as having far from a positive role or adding to the public's ability to assure itself that the voir dire is fairly conducted. *Id.* at 12a–14a. Given the personal nature of questions to potential jurors, together with the "lightning-fast access to a wealth of biographical information, including addresses" that would accompany revelation of juror names in open court, the risk to "jury integrity" is a net negative, without any real positive role in the functioning of voir dire proceedings, including fairness or the perception of fairness. *Id.* at 14a–15a. Therefore, the Cochise County Superior Court did not err by presumptively using innominate juries, and A.R.S. §21–312(A) is presumptively valid.

REASONS FOR DENYING THE WRIT

This case presents, at best, a stale and shallow split, involving significant factual complications and confounding factors, including a prior history of misconduct with Petitioner violating a court rule specifically regarding juror privacy. Morgan's petition is thus a poor vehicle to resolve a question not warranting this Court's review.

In addition, the Arizona Supreme Court correctly applied this Court's jurisprudence to ensure the proper balance between public access to trial proceedings, including voir dire, and protections for a fair trial for the defendant and victims, as well as privacy protections for jurors, who are essentially conscripted members of the tribunal.

I. MORGAN'S PETITION IS A POOR VEHICLE TO RESOLVE A SPLIT THAT DOES NOT WARRANT REVIEW

A. THE SPLIT HERE IS STALE AND SHALLOW

Morgan touts an entreched nationwide split in authority on the subject of protecting juror privacy versus a "qualified right of access" to their private information, including their names. Pet. at 8-13. Notably, the main state court opinions Morgan provides—*State ex rel. Beacon J. Publ'g Co. v. Bond*, 781 N.E.2d 180 (Ohio 2002), and *Commonwealth v. Long*, 922 A.2d 892 (Pa. 2007)—are from over 20 and 15 years ago, respectively. Similarly, the federal circuit case he cites—*United States v. Wecht*, 537 F.3d 222 (3d Cir. 2008), is nearly as old. Plainly, these issues neither come up often or recently.

As Morgan notes, the Arizona Supreme Court acknowledged that *Long* expanded the qualified right

of access to jurors' names. Pet. at 11-12. However, Morgan ignores that the court in *Long* stopped short of including their addresses as part of the "right of access." 922 A.2d at 904-05. The Pennsylvania court reasoned that this was a fair balance between the public knowing who served and alleviating "the average citizens' concern that the media will be camped out on their front lawn and fear of physical harm . . . ." *Id.* at 905. Given that that articulated balance is no longer viable in today's social-media age, it is doubtful that the Pennsylvania court would reach the same conclusion today. And it is far from clear that the Pennsylvania Supreme Court would reach a different outcome in a case involving a party with a prior history of violating a court order involving juror privacy.

Morgan scoffs at the Arizona Supreme Court simply noting its disagreement with the *Long*. Pet. at 12. However, as detailed previously, both Arizona appellate courts in this case specifically cited the inordinate speed with which an unprecedented volume of personal information about a person can be gleaned with simply a name. Pet. App. at 15a, 31a. Thus, to the extent that there is any legitimate nationwide split in applying this Court's *Press-Enterprise II* framework, it is outdated and warrants further percolation in the lower courts.

Simply put, regardless of whether juror names were traditionally disclosed under the "experience" test, any court approaching the "logic" inquiry with awareness of the current climate will quickly realize that practically *anyone* with the will and a lack of compunction can, provided with only a jurors' name, wreak havoc on potential, seated, and discharged jurors who are performing a compulsory role as part

of the tribunal (without the safeguards and security afforded judges).

B. THIS CASE IS A POOR VEHICLE TO RESOLVE THE QUESTIONS PRESENTED

In addition, as set forth above, this case presents unique facts that make it a poor vehicle to resolve the questions presented. *Supra* at 2-3. Petitioner's prior violation of a court rule regarding juror privacy creates unique, factbound concerns that would frustrate resolving the questions presented. That is particularly true as that violation in the *Rojas* case had recently required a new trial in the same superior court. *Rojas*, 247 Ariz. at 404 ¶¶20-22.

Whatever the "qualified right of access" might be, it surely is more qualified as it relates to a party with a documented history of misconduct in violating a court rule regarding juror privacy in a manner that mandated a new trial. And those facts make it doubtful that the presumption that Morgan challenges was outcome-determinative—or did any meaningful work at all—in these cases. Given Morgan's history, even a presumption *against* innominate juries would likely have been overcome in the underlying cases here.

This case is thus a poor vehicle to resolve any disputes regarding innominate juries given the unique factors at play.

II. THE ARIZONA SUPREME COURT CORRECTLY APPLIED THIS COURT'S CASE LAW TO PROTECT FAIR TRIAL PROCEEDINGS AND RELEVANT FIRST AMENDMENT RIGHTS

Jurors are part of the tribunal. *See*, *e.g.*, *Rivera v. Illinois*, 556 U.S. 148, 161–62 (2009) (holding that the improper-under-state-law seating of an otherwise competent and unbiased juror does not convert the jury into an ultra vires tribunal). However, unlike judges, who voluntarily seek appointment or election to a high profile (and consequently potentially dangerous)[2] position, ordinary citizens are instead threatened with sanctions should they fail to respond to a jury summons. *See* A.R.S. § 21-223 (person failing to respond to second jury summons may be subject to contempt of court or a fine of up to $500). And yet, juries (both grand and petit) are a vital check on the power of the government vested in both the judiciary and the executive branches. *See Blakely v. Washington*, 542 U.S. 296, 305–06 (2004) (jury trial right is "a fundamental reservation of power in our constitutional structure" meant to ensure the people's "control in the judiciary"); *Duncan v. State of Louisiana*, 391 U.S. 145, 156 (1968) (juries are "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge"). Thus, it is not hyperbolic to note that a threat to jurors is a threat to our

---

[2] The U.S. Marshals Service estimates that in 2021, federal judges were the target of more than 4,500 threats and other inappropriate communications. *See* https://www.reuters.com/world/us/us-judges-faced-over-4500-threats-2021-amid-rising-extremism-official-2022-02-14/.

judicial system at large, specifically the right to a jury trial itself, guaranteed by both the Sixth Amendment to the federal Constitution, and Article 2, sections 23 and 24 of the Arizona Constitution. Voir dire, oath of the jurors, repeated jury admonition, and all the attendant proceedings each go to ensuring this vital right.

A. The qualified First Amendment Right Of Access To Criminal Proceedings Does Not Include Jurors' Names Or Other Private Information

"No right ranks higher than the right of the accused to a fair trial." *Press-Enterprise I*, 464 U.S. at 508. The public, however, has confidence that standards of fairness are being followed by virtue of the guarantee that "*anyone* is free to attend." *Id.* (emphasis in original). "Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Id.* (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569–71 (1980)). However, the presumption of openness may be overcome to serve higher values. *Id.* (quoting *Globe Newspaper Co. v. Superior Ct. for Norfolk Cnty.*, 457 U.S. 596, 606-07 (1982)). And "openness" in this context means observation of the proceedings, while "higher values" can certainly include inhibiting "the disclosure of sensitive information." *Id.*

This Court recognized the potential harm to prospective jurors that relevant, sensitive voir dire questioning can pose and suggested that trial judges provide in camera options for juror privacy, albeit with counsel present and on the record. *Press-*

Enterprise I, 464 U.S. at 512. Innominate juries[3] actually address these concerns while potentially allowing the public (and the press) to maintain observation. With use of juror numbers, sensitive questions may be able to be answered in the courtroom, rather than in camera, because the jurors' names will be kept from the public record. Thus, when, as this Court observed in *Press-Enterprise I*, a prospective juror in a case involving the alleged rape of a teenage girl is called upon to answer questions regarding whether the juror or a family member has endured similar experiences, the juror's name and family are insulated from exposing legitimately private information into the public record through use of numbers rather than names.[4] *Id.* at 511-12.

Morgan repeatedly insists that this presumptive right of access to the voir dire proceedings as an essential part of a criminal trial necessarily includes a right to know the names of the jurors, and not just to hear the questions asked and answers given to ensure that the seated jury is a fair and impartial

---

[3] Morgan continues to incorrectly refer to innominate juries as "secret juries," however, this is misleading. Innominate jurors' names are withheld from the press and the public, but are known to the parties and thus are not "secret." The jurors are present in the courtroom and are referred to by number, rather than by name.

[4] Of course, there may still be instances where in camera questioning is appropriate in the trial judge's discretion because prospective jurors are hesitant to reveal private medical or other information in the presence of a roomful of strangers.

tribunal.[5] However, as the Arizona Supreme Court noted, there is a key distinction between the presumptive right to *attend* voir dire and an alleged right to *know* the jurors' names. App. at 7a. Nevertheless, Morgan posits that a presumptive use of innominate juries conflicts with *Press-Enterprise I*, and that use of such juries should occur only on a case-by-case basis. Pet. at 14. Of course, this ignores that the risks posed to defendants, victims, verdicts, and the jurors themselves by permitting potentially unscrupulous members of the press and public access to juror names in *any* criminal case, regardless of its notoriety.

As detailed previously, Morgan's own history in this regard illustrates this reality. *See Rojas*, 449 P.3d at 1134 (new trial granted where journalist posted information about jurors to social media during trial). *All* of the concerns in *Press-Enterprise I* regarding public confidence in the judicial system, together with a defendant's Sixth Amendment's right to a fair trial and the victim's right to a prompt and final conclusion of the case, were grossly thwarted precisely because the trial judge did *not* adequately constrain public access to jurors' names. A case-by-case analysis in that case would not necessarily have revealed the need for innominate jurors, and yet, the interests and higher constitutional values of *every* stakeholder in the system were violated by an unscrupulous member of the press.

Because Morgan has not shown that a qualified First Amendment right of access to the names of the

---

[5] Morgan admits, however, that *Press-Enterprise I* does not "explicitly guarantee of right of access under the First Amendment to hear juror names during voir dire." Pet. at 7.

jurors exists at all, this Court should deny his petition. However, even under this Court's *Press-Enterprise II* framework, the Arizona Supreme Court correctly endorsed the presumptive use of innominate juries.

B. Logic Endorses The Presumptive Use Of Innominate juries

"[T]he constitutionally preferable method for reconciling the First Amendment interests of the public and press with the legitimate privacy interests of jurors and the interest of defendants in a fair trial is to redact transcripts in such a way as to preserve the anonymity of jurors while disclosing the substance of their responses." *Press-Enterprise I*, 464 U.S. at 520 (Marshall, J., concurring). In other words, it is the substance of the prospective jurors' answers, *not* access to their names that implicates the First Amendment regarding the public and the press. With innominate juries, redaction of transcripts will not be required to maintain juror anonymity. This illustrates why the Arizona Supreme Court correctly applied of the second prong (the logic test) of this Court's *Press-Enterprise II* framework.

The Arizona Court of Appeals and the Arizona Supreme Court reached different conclusions regarding whether there exists a "traditional" access to the names of jurors in criminal voir dire proceedings. App. at 9a-11a, 24a-32a. However, ultimately that is inconsequential because both courts agreed that logic dictates that presumptive press access to juror names does *not* play a "significant positive role in the functioning" of voir dire in the course of seating a fair and impartial jury

in criminal trial proceedings. *See Press-Enterprise II*, 478 U.S. at 8, 11. The Arizona Supreme Court pointed out that, even without access to juror names, the public and the press can "attend voir dire proceedings" and "observe the screening process, including voir dire examinations," such as for-cause challenges, judicial rulings, counsels' objections, and the like. App. at 13a. The public and the press are therefore able to witness whether the process comports with established statutes, rules, and procedures designed to seat fair and impartial juries in Arizona's criminal trials. *Id.* Morgan dismisses this as "mere observation," (Pet. at 22) but this Court calls it the "community therapeutic value of openness." 478 U.S. at 13 (cleaned up).

The common concern for defendants and the public addressed by an open public trial is "the assurance of fairness." *Press-Enterprise II*, 478 U.S. at 7. Press and public access to juror names does little to assure fairness, and conversely, likely undermines it. As the Arizona Supreme Court observed, "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." App. at 15a. The Arizona Court of Appeals was similarly concerned, noting that "once a juror's name is public, with the current availability of information through the internet and other sources, a vast array of information about [the jurors] is accessible—sometimes in a matter of seconds." *Id.* at 31a. *See Rojas*, 449 P.3d at 1131, ¶ 8 (in ordering new trial after Morgan exposed the jurors online, the court stated that the ruling was "intended to protect

jurors, but it was also intended to protect the integrity of the jury system. Persons who serve on juries must be protected from possible intimidation or reprisals for any verdicts they may reach.")

Regrettably, tribunals—judges and juries alike—are subject to attack and intimidation by one or the other side of our increasingly polarized and caustic political climate and society in general. Judges know this when they apply for the job.[6] Jurors, however, are compelled upon pain of legal retribution to take on the role. This is why Arizona has taken steps to protect jurors, during and after their service. This protection services the overarching goal of fairness in criminal proceedings by assuaging trepidatious jurors' legitimate fears of the consequences of participation in the public arena.

III. A.R.S. SECTION 21-312 IS CONSTITUTIONAL AND REFLECTS GOOD PUBLIC POLICY

As Justice Blackmun noted, "[c]ertainly, a juror has a valid interest in not being required to disclose to all the world highly personal or embarrassing information simply because he is called to do his public duty." *Press-Enterprise I*, 464 U.S. at 514 (Blackmun, J., concurring). The juror also has an interest in not being subjected to continual harassment and questioning after the trial has concluded.

This Court recognized in *Press-Enterprise I*, that jurors have valid privacy rights that trial judges

---

[6] Recognizing this, Arizona judges and other public personnel may apply for confidentiality screening of publicly-held personal identifying information. *See* A.R.S. § 11-483.

should strive to safeguard. 464 U.S. at 512–13. This could "rise to the level that part of the transcript should be sealed." *Id.* at 512. In fact, this Court faulted the trial judge in that case for not considering "whether he could disclose the substance of the sensitive answers while preserving the anonymity of the jurors involved." *Id.* at 513. *This is precisely what presumptive innominate juries accomplishes*—disclosing the substance of the sensitive answers while preserving juror anonymity. And it is one of the many solid public policy considerations behind Arizona's 14-year-old statute protecting juror privacy.

A.R.S. section 21-312(A) provides 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." This is complimented by subsection (B) of the same statute requiring that "[a]ll 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." The Arizona Criminal Rules of Procedure further provide that juror information is "limited to use for the purpose of jury selection only" and that the "court must keep all jurors' home and business telephone numbers and addresses confidential, and may not disclose them unless good cause is shown." Ariz. R. Crim. P. 18.3(b).

Morgan asserts that A.R.S. § 21-312(A) facially violates the First Amendment's public right of access. Pet. at 28-30. But as previously explained, the qualified public right of access is to the

proceedings, not to the jurors' names. Furthermore, these protections actually *do* play a "significant positive role" in ensuring the fairness of criminal jury trials, as well as the greater goal of protecting and promoting the jury trial system.

In any event, A.R.S. § 21-312(A) has "*plainly legitimate sweep*" in light of the State's interests here. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) (emphasis added). Indeed, Morgan's own history of misconduct is powerful evidence of such "plainly legitimate sweep." Morgan's facial challenge thus fails.

A. Protecting Juror Privacy Serves The Integrity and Finality Of Jury Verdicts

Morgan seeks to undo the decision below in order to gain unfettered, presumptive, and ongoing access to the jurors' names in this (and all) criminal trials. However, the parties themselves are bound by confidentiality rules regarding juror identities, and the press has no superior right than do the parties. Moreover, integrity of the criminal trial process and jury verdicts, as well as the due process right of defendants to a fair trial and victims to a prompt and final conclusion of the case[7] all militate in favor of protecting juror identity and/or contact information. This is supported by Arizona and federal law.

Arizona subscribes to the "general rule, known as Lord Mansfield's rule, [] that a juror's testimony is not admissible to impeach the verdict." *State v. Acuna Valenzuela,* 426 P.3d 1176, 1194, ¶ 60 (Ariz. 2018) (quoting *State v. Nelson*, 273 P.3d 632, 643,

---

[7] *See* Ariz. Const. art. II § 2.1(10).

¶ 48 (Ariz. 2012)). The purpose of this rule is "to protect the process of frank and conscientious jury deliberations and the finality of jury verdicts," as well as to prevent undue harassment of jurors. *Id.* (quoting *State v. Poland*, 645 P.2d 784, 797 (Ariz. 1982)); *State v. Callahan*, 580 P.2d 355, 357 (Ariz. App. 1978). This is a "policy long followed by courts nationwide," *Nelson*, 273 P.3d at 643, ¶ 48, and for this reason, Arizona forbids any testimony or affidavit "that relates to the subjective motives or mental processes which led a juror to agree or disagree with the verdict." Ariz. R. Crim. P. 24.1(d).

Moreover, the Constitution does not require courts to permit post-verdict interviews of jurors. *See Tanner v. United States*, 483 U.S. 107, 113–28 (1987); *see also Smith v. Cupp*, 457 F.2d 1098, 1100 (9th Cir. 1972) ("there is no federal constitutional problem involved in the denial of a motion to interrogate jurors where [] there has been no specific claim of jury misconduct."). Even when this Court more recently created a narrow exception to the so-called "no impeachment rule,"[8] it reiterated that rule's importance because it "promotes full and vigorous discussion by providing jurors with considerable assurance that after being discharged they will not be summoned to recount their deliberations, and they will not otherwise be harassed or annoyed by litigants seeking to challenge the verdict," which "gives stability and finality to verdicts." *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 137 S. Ct. 855, 865 (2017). The press does not have a constitutional right to do what the parties are forbidden to do.

---

[8] *See* Federal Rules of Evidence, 606(b).

None of the appropriate and fair trial or post-conviction procedures are advanced by unfettered press access to juror identities, which in today's world of internet access essentially guarantees access to all contact information as well. Indeed, it would permit the press to stand in for parties to conduct interviews and fishing expeditions in a manner not permitted for the parties.

For example, a post-conviction fishing expedition is not countenanced by the reduced constitutional trial rights and limited discovery afforded to a post-verdict defendant. *See* Ariz. R. Crim. P. 32.6 (b)(1) (requiring showing of "substantial need" for discovery after filing of notice), and (b)(2) (requiring showing of "good cause" for discovery after filing of petition). Unlike pre-trial, after a defendant has been convicted and sentenced, presumptions in post-conviction collateral attack are in favor of the State because a "presumption of regularity" attaches to final judgments, even when the question is a waiver of constitutional rights. *See Parke v. Raley*, 506 U.S. 20, 29–30 (1992) (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983)).

Further, as the Arizona district court has recognized, post-conviction "investigation aimed at discovering inadmissible considerations of motives and influences that led to a juror's verdict, including questions designed to elicit a juror's thoughts on what their verdict might have been in response to evidence not presented at trial, is inappropriate and unethical." *State v. Harrod*, 2:16-cv-02011-PHX-GMS (Doc. 20, Order dated 10/18/16) (citing *Northern Pac. Ry. Co. v. Mely*, 219 F.2d 199, 202 (9th Cir. 1954) ("improper and unethical for lawyers . . . to interview

jurors to discover what was the course of deliberation of a trial jury"); *Traver v. Meshriy*, 627 F.2d 934, 941 (9th Cir. 1980) (because evidence concerning the manner at which a jury arrived at its verdict is inadmissible to test the validity of a verdict, "the practice of counsel in propounding questions on these subjects to jurors after trial should be discouraged.")).

But this is precisely what Morgan wants to do—before, during, and after a jury trial—by gaining increased access to juror names and private information. He seeks not to promote fair trials, but to undermine them. The sensational exploitation of jurors outside the courtroom by Morgan's proposed expansion of the qualified public right of access to observe the proceedings into an unqualified public right to harass the citizen tribunal will obliterate fairness for all stakeholders.

B. THE ABILITY OF TRIAL COURTS TO SEAT FAIR AND IMPARTIAL JURIES IS COMPROMISED WHEN JUROR EXPECTATIONS OF PRIVACY AND CONFIDENTIALITY ARE ERODED

Jurors have an expectation of privacy and confidentiality. The Arizona Legislature validated this expectation by making juror contact information confidential. A.R.S. § 21–312(B). In fact, even before A.R.S. § 21–312(A) was enacted, the Arizona Supreme Court acknowledged the trial court's ability to limit juror contact. *State v. West*, 862 P.2d 192 (Ariz. 1993), overruled on other grounds *by State v. Rodriguez,* 961 P.2d 1006, 1012, ¶ 30 n.7 (Ariz. 1998). In *West*, "[a]fter trial, defendant asked the judge to provide him with the names and addresses

of the trial jurors, contending he was entitled to this information to investigate and see whether any juror was guilty of misconduct." 862 P.2d at 206. The trial court refused. *Id.* On direct appeal, West argued this was error because capital cases justified "the exercise of judicial authority to order more liberal discovery than usual." *Id.* at 207. The Arizona Supreme Court disagreed: "[i]n researching the cases cited by counsel, and through our own research, we find the judge's refusal of this information *to be entirely proper*." *Id.* (emphasis added). Morgan cannot parlay a qualified public right of access to observe proceedings into an unqualified right to perform acts the parties themselves are not permitted.

Additionally, public interest favors jury service and the finality of jury verdicts. These goals will be thwarted if the press is permitted to harass jurors with impunity. Individuals will be discouraged from serving on juries if they know that they may be contacted indiscriminately, years later, to explain their thought processes and conduct during trial. Jurors who performed their civic duty should not have to be concerned about their privacy years after they have been released from this duty. Neither a person's civic duty to serve on a jury, nor a post-verdict defendant's limited right to due process, forfeits a juror's right to privacy under Arizona's criminal rules and statutes. Morgan cannot use the First Amendment as an end-run around these protections.

Moreover, nothing prohibits a dismissed juror from initiating contact with the press or independently publicizing his or her juror experience. However, there is a substantial difference between a juror voluntarily choosing to speak with an attorney or the

press within days of the conclusion of a trial and a juror being contacted by the press or the defendant (or his representative) whom the juror found guilty and/or sentenced to death. *See United States v. Gutman*, 725 F.2d 417, 422 (7th Cir. 1984) (practice of obtaining affidavits from jurors is "inherently intimidating"). This type of improper post-verdict contact years later will be encouraged and will increase with indiscriminate publication of juror names.

And whether any particular juror wishes to speak with the press (or the parties) or may not be distressed by unsolicited contact from the press (or the parties) does not change the principle: jurors (actively serving and released) are protected by Arizona statutes and rules from identity publication and post-verdict contact from the press, as well as the parties and their representatives. The First Amendment does not conflict with these protections. Court oversight of active and post-verdict juror anonymity and contact is thus imperative because it is consistent with federal constitutional principles and Arizona law, and is also good public policy.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

MARK BRNOVICH
Attorney General

JEFFREY L. SPARKS
Deputy Solicitor General/
Chief of Capital Litigation
Counsel of Record
GINGER JARVIS
Unit Chief Counsel
OFFICE OF THE ARIZONA
ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-5025
Jeffrey.Sparks@azag.gov

Counsel for Respondents