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 SUPREME COURT OF ARIZONA

REPLY BRIEF FOR PETITIONER

Gregg P. Leslie
Counsel of Record
Arizona State University
Sandra Day O'Connor College of Law, First Amendment Clinic, Public Interest Law Firm
111 E. Taylor St., MC 8820
Phoenix, AZ 85004
Gregg.Leslie@asu.edu
(480) 727-7398
Counsel for Petitioner

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ARGUMENT

Respondents really only attempt two arguments related to whether this Court should grant the petition to consider the merits of the questions presented: 1) Petitioner David Morgan's ("Morgan") claimed "misconduct" in an unrelated case somehow renders this case a "poor vehicle" to resolve the purely legal issue of whether the First Amendment provides the public with a qualified right to hear juror names during *voir dire*; and 2) the jurisdictional split related to such legal issue (though not denied by Respondents) has somehow become "stale and shallow." Both arguments are clearly incorrect. The Court's intervention is necessary at this time to resolve a pervasive conflict amongst jurisdictions on the basic legal issue of whether the First Amendment provides the public with a qualified right to hear juror names during *voir dire*. Though the parties may disagree about the merits of this legal issue, there is nothing about this case which makes it an undesirable opportunity for this Court to provide the requested resolution.

I. Respondents' Irrelevant Factual Claims Could Not Affect Review Because Morgan Simply Requests that the Court Resolve the Legal Issue of Whether the First Amendment Provides the Public with a Qualified Right to Hear Juror Names During *Voir Dire*.

This appeal involves an Arizona statute (A.R.S. § 21-312) and county court rule/practice which presumptively require a secret (innominate) jury without consideration of any facts about the case. Petition, 1-

2. Morgan's challenge is to the presumptive secrecy of juror identities. The two questions presented by Morgan for review offer a single legal issue for resolution: does the First Amendment provide the public with a qualified right to hear juror names during *voir dire*, which right can only be overcome by a compelling state interest that is accomplished in a narrowly tailored manner?

Respondents repeatedly attempt to label Morgan as a poor candidate to *eventually* assert a qualified right of access to hear juror names in *voir dire* because he allegedly violated a court rule in an entirely unrelated case by publishing juror identities. Opposition at 2-3, 11. Respondents' attempt is entirely irrelevant to the pure legal issue of whether the basic qualified right exists in the first place—which was what the courts below have rejected. Moreover, no court below ever analyzed Morgan's claimed "misconduct" in the separate *State v. Rojas* case in relation to whether Morgan himself should be precluded from hearing juror names during *voir dire*. As such, Respondents' repeated references to the *State v. Rojas* case are irrelevant and are otherwise wrongful attempts to inject improper points into this appeal at its final stage. Respondents do not present any other claimed factual issue that could affect the legal resolution requested.

In addition, Respondents made unsubstantiated claims about how public disclosure will affect jurors. Opposition at 17-18. Many of the scenarios presented by Respondents ignore the fact that criminal defendants themselves in the majority of cases can know who the jurors are, even in cases where they are not publicly named. And the claim that the practice of journalists conducting interviews is no more than the "sensational exploitation of jurors," *id.* at 23, ignores

the entire point of public access and openness underlying this Court's cases, which is that public awareness of how the system of justice operates benefits both the people and the system.

II. Respondents Failed to Provide a Persuasive Reason Why the Court Should Not Resolve the Admitted Jurisdictional Split.

In his petition, Morgan took care to extensively describe the conflicting approaches, and ultimate split, that has arisen amongst several jurisdictions on the question of whether the First Amendment provides the public with a qualified right to hear juror names during *voir dire*. Petition at 7-13, 22-24. This split at least includes the Third Circuit and D.C. Circuit, as well as the Supreme Courts of Ohio, Pennsylvania, Delaware, and now Arizona. *See id*. Respondents do not deny that a jurisdictional split exists on this important question, but rather argue that this Court should not concern itself with such conflict because it is somehow "stale." Opposition at 1-2, 9-11.

Respondents' "stale" characterization is puzzling given that Respondents do not deny that the identified cases are in fact currently controlling in each of these respective circuits and states. *See id*. There is nothing "stale" about them. Moreover, the competing approaches, interpretations, and holdings in these cases collided yet again in this very case, leading the Supreme Court of Arizona to just now takes its place within the split. This case only emphasizes the very current need to resolve the issue.

Respondents argue that cases like *United States v. Wecht*, 537 F.3d 222 (3d Cir. 2008), *Commonwealth v. Long*, 922 A.2d 892 (Pa. 2007), and *State ex.*

Rel. Beacon J. Publ'g Co. v. Bond, 781 N.E.2d 180 (Ohio 2002)—which support the public's qualified right to hear juror names during *voir dire*—are "outdated" because Respondents believe that they were decided in some different technological age wherein the public could not have located jurors using their name. Opposition at 9-10. Even setting aside the point that the *Wecht*, *Long*, and *Bond* cases were decided well after the prevalence of the internet, search engines, and social media (not to mention telephone books), if there really was concern that a number of these controlling cases are "outdated" because of technological advances, such concern could only support a need for this Court to resolve the issue now. Respondents provide no reason whatsoever why the Court should allow "further percolation in the lower courts." Opposition at 10. Indeed, such "percolation" could only lead to further confusion and conflict on this issue.

Respondents otherwise say that the jurisdictional split is "shallow at best" because the "cases" supporting Morgan's argument "recognize only a qualified right of access" and "the Arizona Supreme Court made clear that Arizona courts continue to '[h]ave discretion to order access to jurors' names.'" Opposition at 2. Respondents' argument is again puzzling given that the Supreme Court of Arizona specifically held that "the First Amendment *does not* provide the press or public with a qualified right to access jurors' names" and therefore the presumptive use of innominate juries under A.R.S. 21-312(A) and the Cochise County Superior Court rule/practice was valid. App. 15a (emphasis added). A qualified constitutional right in this context would instead presume the public's right to hear juror names during *voir dire*, which could

only be overcome by a compelling state interest accomplished in a narrowly tailored manner. Petition at 14. The distinction between a presumed right of public access and a presumed rule of secrecy is not at all "shallow." It is the difference between the existence of a constitutional right and no right at all.

CONCLUSION

For the foregoing reasons, and those provided in Morgan's petition for a writ of certiorari, this Court should grant Morgan's petition, vacate the Arizona Supreme Court's holding as inconsistent with *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (*Press Enterprise I*), and remand the case to that court.

Or, in the alternative, grant the petition to consider the right to hear juror names during *voir dire* under *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (*Press-Enterprise II*).

Respectfully submitted,

Gregg P. Leslie
Counsel of Record
Arizona State University
Sandra Day O'Connor
College of Law
First Amendment Clinic
Public Interest Law Firm
111 E. Taylor St., MC 8820
Phoenix, AZ 85004
Gregg.Leslie@asu.edu
(480) 727-7398
Counsel for Petitioner

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