No. 17-2048

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES

v.

GLENN A. CHIN

TRUSTEES OF BOSTON UNIVERSITY (WBUR)

Intervenor-Appellant

ON APPEAL FROM AN ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

AMICI CURIAE BRIEF IN SUPPORT OF INTERVENOR-APPELLANT TRUSTEES OF BOSTON UNIVERSITY SUPPORTING REVERSAL OF THE DISTRICT COURT'S DECISION

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STATEMENT OF CONSENT TO FILING

Pursuant to Fed. R. App. P. 29(a)(2), all parties have consented to this filing.

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STATEMENT OF INTERESTS OF AMICI CURIAE

Pursuant to Fed. R. App. P. 29(a)(4)(D), amici curiae are engaged in newsgathering, represent the interests of journalists or publishers, or promote open and transparent government as public interest watchdog groups.

GateHouse Media, LLC is a preeminent provider of print and digital local content and advertising in small and midsize markets. Its portfolio of products, which includes over 630 community publications and more than 535 related websites, serves over 220,000 business accounts and reaches approximately 20 million people on a weekly basis.

The Keene Sentinel is one of the oldest continuously published newspapers in the United States and has long protected the First Amendment to the United States Constitution as part of its mission. The Keene Sentinel is also an organization dedicated to the public's right to know and has frequently advocated for these rights in its news and opinion pages and in the courts.

The Massachusetts Newspaper Publishers Association ("MNPA") is a voluntary association of daily and weekly newspapers published throughout Massachusetts. It represents those newspapers in legal and legislative matters of common concern. In particular, the MNPA focuses on preserving freedom of speech and the public's right to know.

MaineToday Media publishes the *Portland Press Herald*/*Maine Sunday Telegram*, the *Sun Journal* and other daily and weekly newspapers. It is Maine's largest newsgathering organization.

The New England First Amendment Coalition's mission is to advance and protect the five freedoms of the First Amendment, and the principle of the public's right to know, in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont. In collaboration with other advocacy organizations, it also seeks to advance understanding of the First Amendment across the nation and freedom of speech and press issues around the world. It is a nonpartisan, nonprofit organization that supports the rights of New England journalists to access government records and information, including judicial records and information. The Coalition has filed numerous other amicus briefs in this and other courts.

New England Society of News Editors Foundation, Inc. ("NESNE") is the regional association for editors of news organizations from the six New England States. Its corporate office is in Woburn, Massachusetts. NESNE's purpose is to promote the common interests of news editors at news organizations in the six New England states. Consistent with its purposes, NESNE is committed to preserving and ensuring the open and free publication of news and events in an open society.

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today it provides pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

As a leading publisher of newspapers and other media, the Union Leader Corporation recognizes the importance of the principles of free speech and free press, and the role of those essential liberties in preserving government by and for an informed citizenry. It believes that communications with jurors subsequent to court proceedings allow the press to shed light on the performance of various governmental agencies and actors.

CERTIFICATION OF AUTHORSHIP

Pursuant to Fed. R. App. P. 29(a)(4)(E), counsel to the New England First Amendment Coalition and no other counsel authored the entire brief, no other party or other party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person—other than the amici curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF THE ARGUMENT

"In a democracy, criminal trials should not, as a rule, be decided by anonymous persons." *In re Globe Newspaper Co*., 920 F.2d 88, 91 (1st Cir. 1990) ("*Globe Newspaper*"). Public access to juror information is a critical part of an open and transparent criminal justice system.

The district court erred by ordering disclosure of information too limited for the public to identify the jurors in a tried-to-verdict criminal case and by delaying public disclosure of any juror information for much longer than necessary—until after sentencing. The court's order restricting disclosure to names and hometowns provides too little information in many instances to identify a juror because hundreds of people share the same names in large communities within the district. The court should have allowed disclosure of juror names and full addresses immediately after the return of the verdict.

This case involves no exceptional circumstances, such as concern for the personal safety of jurors, that have been found to justify limitations on public access to juror information. The justification given by the district court here, generalized concern for juror privacy, is indistinguishable from what the First Circuit found to be insufficient to block access to juror names and addresses in *Globe Newspaper*. In that case, the First Circuit "made clear that . . . neither the juror's individual desire for privacy nor the judge's general belief that . . . it would

be better to keep the names and addresses private constituted permissible grounds for withholding jurors' identities from the public . . . ." *United States v. Kravetz*, 706 F.3d 47, 61 (1st Cir. 2013) (quoting *Globe Newspaper*, 920 F.2d at 98) (quotation marks omitted). The rationale behind the district court's order applies categorically to every criminal case, and stands in irreconcilable conflict with *Globe Newspaper*.

The district court's order hindering and delaying access to juror identities is contrary to democratic norms of transparency and accountability inherent in the American criminal justice system. The court's order hampers the media's "'right to gather information'" about criminal proceedings, *Globe Newspaper*, 920 F.2d at 94 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)), undermines the integrity and legitimacy of the jury system in the guise of protecting it, and is unnecessary and ineffective to achieve its stated ends.

The amici curiae respectfully request that the Court reverse the order of the district court prohibiting public access to complete juror addresses and delaying disclosure of that information until after sentencing.

ARGUMENT

The First Circuit has for nearly thirty years, since *In re Globe Newspaper Co.*, 920 F.2d 88 (1st Cir.1990), construed the federal statute addressing disclosure of juror names (28 U.S.C. § 1863(b)(7)), and the District of Massachusetts Jury

Plan to narrowly constrain the district courts' discretion to keep secret from the public juror names and addresses. This Court revisited that holding recently, without suggesting that it had lost any force with the passage of time. In *United States v. Kravetz*, this Court wrote that in *Globe Newspaper*, "we held that 'given the absence here of particularized findings reasonably justifying non-disclosure, the juror names and addresses must be made public.'" 706 F.3d at 61 (quoting *Globe Newspaper*, 920 F.2d at 98). "We made clear that we deemed disclosure to be appropriate in that case only after determining that neither 'the juror's individual desire for privacy' nor 'the judge's general belief that . . . it would be better to keep the names and addresses private' constituted permissible grounds for withholding jurors' identities from the public, and only after noting the parties' concession that no special circumstances, such as concern for the personal safety of jurors, were present to justify non-disclosure." *Id*. This case presents a similar situation: a district court's limitation on public disclosure of juror names and addresses in a situation not presenting any special circumstances.

The district court's decision is contrary not only to *Globe Newspaper*, but also to institutional, First Amendment, and important public policy interests. It is also unnecessary and not tailored to achieve its stated aim of protecting juror privacy.

I. Secret Juries Are Contrary to Democratic Norms.

A privilege and obligation of every citizen is to serve as a juror. *See Powers v. Ohio*, 499 U.S. 400, 407 (1991) ("[W]ith the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process."). Because decision-makers in all branches of government, including our justice system, ultimately answer to the public, jurors generally cannot act in secret in an open society. C*f. Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980) ("People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002) ("Democracies die behind closed doors. The First Amendment, through a free press, protects the people's right to know that their government acts fairly, lawfully, and accurately . . . ."). The judicial branch is, of course, part of government. "[T]he prospect of criminal justice being routinely meted out by unknown persons does not comport with democratic values of accountability and openness." *Globe Newspaper*, 920 F.2d at 98. It follows that "[i]n a democracy, criminal trials should not, as a rule, be decided by anonymous persons." *Id.* at 91. By limiting and delaying disclosure of juror information, without any finding that special circumstances make doing so necessary, the district court has violated this essential principle.

II. Public Access to Information About Juries Bolsters the Legitimacy of the Judicial Process and Public Confidence in its Proper Functioning.

This Court has held that "access to the identities of the jurors" serves many of the same beneficial purposes served by public access to court information generally. *Globe Newspaper*, 920 F.2d at 94. The Court summarized the benefits of access to juror names and addresses:

> Knowledge of juror identities allows the public to verify the impartiality of key participants in the administration of justice, and thereby ensures fairness, the appearance of fairness and public confidence in that system. It is possible, for example, that suspicions might arise in a particular trial (or in a series of trials) that jurors were selected from only a narrow social group, or from persons with certain political affiliations, or from persons associated with organized crime groups. It would be more difficult to inquire into such matters, and those suspicions would seem in any event more real to the public, if names and addresses were kept secret. Furthermore, information about jurors, obtained from the jurors themselves or otherwise, serves to educate the public regarding the judicial system and can be important to public debate about its strengths, flaws and means to improve it. . . . Juror bias or confusion might be uncovered, and jurors' understanding and response to judicial proceedings could be investigated. Public knowledge of juror identities could also deter intentional misrepresentation at voir dire.

Id.

Other courts of appeal have recognized similar interests in disclosure of juror information. In *In re Baltimore Sun Co.*, 841 F.2d 74, 76 (4th Cir. 1988), the Fourth Circuit found the "risk of loss of confidence of the public in the judicial process" to be "too great to permit a criminal defendant to be tried by a jury whose members may maintain anonymity." In *United States v. Wecht*, 537 F.3d 222 (3d Cir. 2008), the Third Circuit reasoned that "[p]ublic knowledge of the jurors'

identities is desirable in part because it can deter . . . corruption and bias." *Id*. at 239. In *United States v. Blagojevich*, 612 F.3d 558, 561-62 (7th Cir. 2010), the Seventh Circuit recognized a "legitimate interest[ ]" in public access to juror names in a high-profile criminal trial to enable the press to do its own assessment of the jurors' suitability.

That the benefits of public access to juror information are not merely hypothetical is borne out by empirical study and many illustrative examples.

An empirical analysis of 761 news articles involving juror interviews over an eighteen-year period revealed that "post-verdict interviews serve valuable purposes: they can help ensure jury accountability; they can help the public understand, and therefore accept, trial outcomes; they can educate the public about the realities of jury service; and they can improve the justice system's functioning by exposing mistakes, misunderstandings, and misconduct." Nicole B. Cásarez, *Examining the Evidence: Post-Verdict Interviews and the Jury System*, 25 HASTINGS COMM. & ENT L.J. 499, 602 (2003). The same study demonstrated that "any furor over the perceived negative effects of post-verdict interviews is little more than a tempest in a teapot." *Id*. at 507. "The predicted horrors associated with post-verdict juror interviews have not materialized." *Id*.

Many examples support those conclusions. At one of several federal trials of the "Teflon Don," John Gotti, the trial court's decision to empanel an

anonymous jury prevented the prosecutors and the public from discovering that one of the jurors, George Pape, had ties to organized crime. Abraham Abramovsky & Jonathan I. Edelstein, *Anonymous Juries: In Exigent Circumstances Only*, 13 ST. JOHN'S J. LEGAL COMMENT. 457, 466-67 (1999) ("Abramovsky & Edelstein"). Pape arranged a bribe and in return delivered an acquittal. At voir dire, he had lied about his association with organized crime. *Id*. at 480. Had federal prosecutors or the public been able to investigate his background, "his potential for corruption might have been unearthed prior to trial." *Id*. at 480-81.

In *Blagojevich*, 612 F.3d at 561-62, the Seventh Circuit recognized that the trial court improved its own juror-vetting practices in the wake of the *Chicago Tribune*'s "[i]nvestigations of the jurors in the trial of Governor Blagojevich's predecessor (both in that office and at the defendants' table)," which "revealed that several had lied on their questionnaires and had disqualifying convictions or otherwise might have been subject to challenge for cause." *Id; see also* John Cass, *Failing to Order Jury Background Checks is Cruel and Unusual Punishment for Taxpayers*, CHI. TRIB. (Nov. 16, 2011)[1] (reporting the trial judge's attribution: "The information-gathering process used by the *Tribune* (is) now automatically applied to jurors in high-profile cases.").

[1] *available at* http://articles.chicagotribune.com/2011-11-16/news/ct-met-kass-1116-20111116_1_william-cellini-cellini-trial-background-checks.

The wrongful conviction and near-execution of Anthony Porter illuminates the critical role of the press and public as a check on the criminal justice system. In Porter's case, among the jurors who voted to convict was an acquaintance of the victim's mother who had also attended the victim's funeral. Neither of these facts had been unearthed at voir dire. Porter, accused in the shooting death of a couple in Chicago's South Side, spent seventeen years on death row and exhausted his appeals. Due to the investigative efforts of student journalists, he was exonerated within two days of scheduled execution. Ken Armstrong et al., *Death Row Justice Derailed*, CHI. TRIB. (Nov. 14, 1999)[2] ("Porter was saved not by the justice system, but by journalism students.").

Jurors not telling the truth is not unique to Chicago. *See, e.g.*, *Sampson v. United States*, 724 F.3d 150, 163 (1st Cir. 2013) (juror lied on more than ten questionnaire answers and throughout voir dire because she "didn't think [her] personal life had anything to do with [ ] being a juror"); *In re Beverly Hills Fire Litig.*, 695 F.2d 207, 212 (6th Cir. 1982) (prejudicial independent investigation conducted by juror revealed in the *Kentucky Enquirer*). Juror interviews by a group of investigative journalists and Intervenor-Appellant WBUR recently led a state court in Massachusetts to order a new trial for a Boston man, Darrell Jones,

[2] *available at* http://articles.chicagotribune.com/1999-11-14/news/9911150001_1_death-row-capital-cases-capital-punishment.po

who may have been wrongly incarcerated for 32 years. According to *Boston Globe* reporting:

> Allegations of racial bias in the court were raised in a 2016 investigation by the New England Center for Investigative Reporting and WBUR public radio. Juror Eleanor Urbati, a white Hingham resident who said she always regretted convicting Jones, told the center that two jurors had told her they thought the defendant was guilty because he was black.
>
> [Judge Thomas F. McGuire Jr.], wrote that he first learned of allegations of racial bias when someone flagged the 2016 investigation and then requested Urbati and other jurors to detail what had occurred.

Jennifer McKim, "Man In Jail 30 Years Released on Bail," BOSTON GLOBE (Dec. 22, 2017), 2017 WLNR 39612422; *see also Reasonable Doubts: Reopening the Case of Darrell 'Diamond' Jones*, WBUR NEWS (Jan. 11, 2016).[3]

Media outlets unearthed juror misconduct throughout the tax evasion trial of notorious corporate raider Victor Posner. News reports revealed transgressions by several jurors so extensive that—in the court's own words—the Posner "jury, if existing in other jurisdictions around the country, would put those who engage in jury tampering as a profession out of business." *United States v. Posner*, 644 F. Supp. 885, 888 n.7 (S.D. Fla. 1986), *aff'd sub nom. United States v. Scharrer*, 828 F.2d 773 (11th Cir. 1987) (table); *id.* at 886 n.2 ("*The Wall Street Journal* presented the first reporting of outside material brought to the attention of the jury."). The *Miami Herald* revealed a juror's wholly improper independent

[3] http://www.wbur.org/news/2016/01/11/darrell-jones-investigation.

investigation of the facts, contrary to repeated instructions by the court. *See id*. ("The second instance in which the news media reported an instance of jury irregularity came one month later in the form of a news magazine article[.]").

Access to juror identities and resulting juror interviews have resulted in legislative reforms. The news media exposed the practice by some acquitted defendants of making post-trial payments to jurors, which has led to reforms to prevent post-verdict jury tampering. *See* Clyde Haberman, *Jury Booty: It's Lucrative and Legal*, N.Y. TIMES (Sept. 10, 1999)[4] (jurors were each gifted $2,500 post-trial checks as "good will" compensation after deadlocking at tax fraud trial of tycoon and serial defendant Abe Hirschfeld); *see also* Tom FitzGerald, *Verdict In; Jury's Still Out*, S.F. GATE (May 6, 2002)[5] (Bob Costas interview with Don King, who flew his former jurors to London and the Bahamas: "Normally, people try to get out of jury duty, but in your case they're lined up around the block").

Disclosures by jurors who acquitted John Hinckley of the attempted assassination of President Reagan intensified the call for legislative reform and, ultimately, passage of the Insanity Defense Reform Act of 1984. Robert Lloyd Raskopf, *A First Amendment Right of Access to a Juror's Identity: Toward a Fuller Understanding of the Jury's Deliberative Process*, 17 Pepp.L.Rev. 357, 367

[4] *available at* http://www.nytimes.com/library/national/regional/091099ny-col-haberman.html.
[5] *available at* https://www.sfgate.com/sports/article/OPEN-SEASON-Verdict-in-jury-s-still-out-2840146.php.

n.77 (1990) ("There surely would have been public outcry even without juror interviews. However, the candid disclosures by the jury confirmed that, given the law as instructed to them by the trial judge, they had no choice but to acquit Hinckley."). In that case the district court had "found compelling the argument that it was essential that juror interviews be conducted at the end of the . . . trial because 'publicity about the case is likely to play a large role in shaping public and legislative attitudes toward the insanity defense in the future.'" *Id*. at 373 n.111.

News media interviews with identified jurors reveal when jurors neglected their charge by, for instance, sleeping on the job. *See* Daphne Duret, *Dalia Dippolito Lawyers Raise Sleeping Juror Claim for Third Time*, PALM BEACH POST (July 25, 2017)[6] ("Citing an interview that Dippolito juror Lee Anny Huey gave to WPTV-Channel 5 last week, defense attorney Greg Rosenfeld said Huey's claim that she saw [juror] Castaneda 'nodding off' a few times lends credence to his previous claims that Castaneda was in fact sleeping.").

Just as important as exposing misconduct, journalists' reports can foster public confidence in the judicial system. Jurors may recount fulfilling their duty with integrity, as occurred following the insider-trading trial of Martha Stewart. Immediately after the jury was discharged, several jurors granted media interviews. They described the meticulous, methodical, and objective process in which they

[6] *available at* http://www.palmbeachpost.com/news/crime--law/dalia-dippolito-lawyers-raise-sleeping-juror-claim-for-third-time/5UGD94KDYgcIv3YsubS2CN/.

engaged to reach their conclusions. The public had the opportunity to assess whether justice was served by hearing and reading statements directly from the jurors themselves, who attested that they "combed the evidence," were not influenced by the presence of celebrities in the courtroom, relied on record evidence they viewed as strong, dismissed flimsy exhibits as unpersuasive, and were especially cognizant of the need to be "very sure" about their decision and do "the right thing" in light of the prospect of public scrutiny.[7] It would have been difficult for a *Washington Post* reader to doubt the fair-minded sincerity of the jurors who divulged to the newspaper: "'A lot of us got really physically sick when we went back' to deliberate. 'We were making judgments that will set the pace for the rest of these people's lives.'"[8]

Some of the most consequential decisions concerning the judiciary have been informed by empirical studies of jury behavior made possible by post-trial interviews with former jurors. *See, e.g., Williams v. Florida*, 399 U.S. 78, 101 n.49 (1970) (citing empirical jury studies in holding 12-member criminal jury not constitutionally required); *Colgrove v. Battin*, 413 U.S. 149, 158-159 (1973) (same for civil jury); *Ballew v. Georgia*, 435 U.S. 223, 232-45 (1978) (relying

[7] *Juror: 'Victory for the Little Guys,'* CNN (March 5, 2004), http://www.cnn.com/2004/LAW/03/05/stewart.jurors/.

[8] Ben White, *Juror Chappell Hartridge, Man of the Martha Moment*, WASH. POST, (Mar. 7, 2004), *available at* https://www.washingtonpost.com/archive/lifestyle/2004/03/07/juror-chappell-hartridge-man-of-the-martha-moment/296a1b6a-cf34-472b-8578-2621142e9f2a/?utm_term=.eea1bd0d19dd.

substantially on a variety of statistical and empirical social-science data on jury composition in finding six-member criminal jury constitutional minimum).

As these examples demonstrate, delays and obstacles to access to juror information are not in the public interest. Timely access is in the public interest. This is especially so for the news media and by extension the public watching, listening to, and reading the news. *See Int'l News Serv. v. Associated Press*, 248 U.S. 215, 235 (1918) ("The peculiar value of news is the spreading of it while it is fresh . . . ."); *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976) ("As a practical matter . . . the element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly."). "The newsworthiness of a particular story is often fleeting. To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression." *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994). A state court put the point this way:

> In relative terms, in reporting the news, time is of the essence. News is news when it happens and the news media needs access while it is still news and not history. The value of investigative reporting as a tool to discovery of matters of public importance is directly proportional to the speed of access. This is true when investigating court records after the case is closed as well as with a case in progress.

Courier-Journal v. Peers, 747 S.W.2d 125, 129 (Ky. 1988). This Court has rejected delay as unacceptable— "even a one to two day delay impermissibly burdens the First Amendment," *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497,

507 (1st Cir. 1989). The district court's order delays access to juror information by preventing access until after sentencing, which can be months after a verdict is returned and the jury has been discharged. Disclosure of incomplete address information causes further delay because research is required to positively identify jurors, if they can be identified at all.

These examples illustrate this Court's determination that "[k]nowledge of juror identities . . . ensures fairness, the appearance of fairness and public confidence in that system." *Globe Newspaper*, 920 F.2d at 94.

III. Limiting and Delaying Access to Information Identifying Jurors is Unnecessary and Ineffective to Protect Juror Privacy.

The district court's order is unnecessary and does little to advance the generalized interests articulated, let alone enough to override the presumption in favor of public access to juror information.

Hundreds of years of experience suggest that delaying or hindering public access to the identity of jurors is unnecessary. The first high-profile use of anonymous juries occurred in the late 1970s "as a judicial fluke." Abramovsky & Edelstein at 458. Until then, the use of anonymous juries was practically unheard of. *Id*. at 458 n.3. The "original American colonists 'brought with them a system in which a defendant in all types of criminal trials traditionally had been tried by individuals whom the defendant knew or, at least was highly likely to know.'" *Id*. at 481. In criminal cases, defendants often knew the jurors personally, and, if not,

at least members of the community from which the jurors were drawn knew who the jurors were. *See United States v. Wecht*, 537 F.3d 222, 235 (3d Cir. 2008) ("[J]uries have historically been selected from local populations in which most people have known each other [and] the traditional public nature of *voir dire* strongly suggests that jurors' identities were public."); *In re Baltimore Sun Co.*, 841 F.2d 74, 75 (4th Cir. 1988) ("When the jury system grew up with juries of the vicinage, everybody knew everybody on the jury and we may take judicial notice that this is yet so in many rural communities throughout the country."). In general, "public knowledge of jurors' names is a well-established part of the American judicial tradition." *Wecht*, 537 F.3d at 236. Our long and successful experience with publicly known jurors suggests that measures to delay or hinder access to juror identities simply are not necessary.

Even in cases involving notoriously dangerous felons, jurors have served with integrity and delivered convictions without any secrecy. Al Capone, "Lucky" Luciano and Murder, Inc.'s Louis "Lepke" Buchalter, were all successfully tried "without the use of anonymous juries." Abramovsky & Edelstein at 466. "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." *Id*. Of course, Glenn Chin is no Al Capone. Chin is a pharmacist who did not commit a violent crime and has no ties

to gangs. The district court did not find or even hint that he posed any threat to any juror.

Because this case does not involve disclosure of juror identities until *after* trial, there is no risk of jury tampering, and the district court cited none in its order. Thus the "stronger reasons" that may justify withholding juror names and addresses *during* trial are not at stake here. *Globe Newspaper*, 920 F.2d at 91. Even if disclosure of juror names and addresses had been sought during trial, experience has shown that court orders protecting juror identities are an ineffective remedy against jury tampering. Abramovsky & Edelstein at 466-467. Corrupt jurors have themselves reached out to contact parties to seek bribes, as occurred at a federal trial of John Gotti. *Id.* At Gotti's state trial he accessed jurors, despite efforts to keep their identities from him, by bribing a police officer. *Id.* at 467. Parties have also hired private investigators to uncover juror identities, as occurred in the Abner Louima case, where New York City police officers were prosecuted for torturing an immigrant. *Id.* "It is thus apparent that anonymity has not proven to be an effective procedure in guaranteeing the privacy of trial jurors against a determined defendant." *Id.*

The district court's order is also ineffective to accomplish its stated purpose of protecting juror privacy. It is both overbroad and too narrow in so far as it discloses juror names and home towns, but not full addresses, and merely delays

(until sentencing) disclosure of that information to the public. It therefore cannot survive First Amendment scrutiny, which is similar to the standard for sealing juror information this court endorsed in *Globe Newspaper*. *See Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 104-05 (1979) (statute is insufficiently tailored to interest in protecting anonymity where it restricted only newspapers, not the electronic media or other forms of publication, from identifying juvenile defendants); *Carey v. Brown*, 447 U.S. 455, 465 (1980) (finding that the "underinclusiveness" of a statute abridging First Amendment rights "would seem largely to undermine" the claimed justification for it); *Florida Star v. B.J.F.*, 491 U.S. 524, 542 (1989) (Scalia, J., concurring in part and in the judgment) ("a law cannot be regarded as protecting an interest 'of the highest order,' and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited") (citation omitted).

Any juror with a sufficiently unusual name (or from a small enough town) can be readily identified by anyone willing to spend the time because the number of false positives—persons who share the same name as the juror—is likely to be small. But jurors with common names in large cities are virtually anonymous under the district court's order because of the large number of people sharing popular names living in the same city. To illustrate that point, the "PeopleMap" feature on Westlaw reveals that there are 729 results for Michael Murphy in

Boston, MA. Had Michael Murphy served on the jury, it would be very difficult to find the Michael Murphy who actually served, it that were possible at all.[9]

The district court's concern with full addresses also misses the practical reality that home addresses are not particularly private. In general, where people live is widely known, available through simple Internet searches, publicly accessible at registries of deeds, available from property tax records, and findable through databases. An address, unlike a social security number (for example), is generally not highly personal or confidential information.

The district court asks why juror addresses should be disclosed to the public when judges' home addresses are not. There are several reasonable answers to this concern. The first is that judges' addresses are not disclosed primarily for personal safety reasons. In cases where there is a bona fide risk to jurors' safety, courts have been willing to keep their identities from the public and—when necessary—even from the defendant. This is not such a case. And such cases are infrequent. The incidence of physical harm to former jurors because of their jury service is near zero. "In the 200-year history of the American justice system, there are few if any instances in which jurors have been injured, and none of which a juror has been killed, as a result of his service on a jury." Abramovsky & Edelstein at 466;

[9] A related effect of the district court's order is to subject many people who did not serve on the jury to questions or, perhaps, incorrect assumptions that they did so merely because they share a name and town with someone identified as a juror.

s*ee also* Christopher Keleher, *The Repercussions of Anonymous Juries*, 44 U.S.F. L. Rev. 531, 559 (2010) ("The fear that jurors could be harmed because of their verdict is understandable but unfounded."). This may be because jurors hear one or perhaps a handful of cases over a lifetime, while judges hear cases and impose sentences for a living. Judges therefore come into contact with more potentially dangerous criminals much more often than any juror. The negligible risk of harm to jurors in ordinary cases may also be because jurors act collectively, so the ire of an angry party is dissipated among all members of a jury, not focused on one person.

Even in cases involving the most dangerous criminals, judges are never anonymous. Their business address, phone number, and often email address (or at least the email addresses of clerks) are readily available. Judges do receive interview requests from researchers and journalists, and have granted requests for interviews from time-to-time.

Journalists should also have the opportunity to contact jurors, some of whom have been willing to speak publicly about their service, and by speaking shed important light on the functioning of the criminal justice system.

CONCLUSION

WHEREFORE, the amici curiae respectfully request that the Court reverse and remand to the district court with instructions to immediately make public the names and addresses of the jurors.

Dated this 9th day of February, 2018.

Respectfully Submitted,
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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

The undersigned certifies that this Brief contains 4,670 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(f). In preparing this certification, I relied on the word-processing system used to prepare the foregoing Brief. The foregoing Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2018 I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

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