STATE OF RHODE ISLAND
PROVIDENCE, SC

Hearing: May 14, 2018 @ 2 p.m.
SUPERIOR COURT

LMG RHODE ISLAND HOLDINGS, INC. Plaintiff	)	
vs.	)	C.A. PC-2018-2854
RHODE ISLAND SUPERIOR COURT, PROVIDENCE COUNTY, and THE HON. NETTI C. VOGEL, in her official capacity as an Associate Justice of the Superior Court Defendants	)	

MEMORANDUM OF AMICI CURIAE IN SUPPORT OF PLAINTIFF'S EMERGENCY MOTION FOR PUBLIC ACCESS

The Amici Curiae hereby file this Memorandum in support of the Emergency Motion for Public Access filed by the Plaintiff LMG Rhode Island Holdings, Inc., the publisher of "The Providence Journal" (hereinafter, "The Providence Journal" or "the Journal"). The Amici Curiae submit that newspapers, other media, and the public, including attorneys, generally have a right to speak with and interview jurors after a trial, which right is protected by the First Amendment of the United States Constitution and Article 1, Section 21 of the Rhode Island Constitution. Similarly, the media and the public have a right of access to judicial records, including jury lists. The Superior Court violated these rights with its post-trial orders. Moreover, the Superior Court's denial of these rights without due process violates the Fourteenth Amendment of the United States Constitution and Article 1, Section 2 of the Rhode Island Constitution.

Although the Superior Court partially vacated its bench order on May 7, 2018, serious constitutional issues remain, including access to the jury list and whether members of the general public can communicate with the jurors about the trial. The Amici Curiae submit this memorandum to address those issues.

STATEMENTS OF INTEREST OF THE AMICI CURIAE

The Amici Curiae are the American Civil Liberties Union of Rhode Island ("ACLU-RI"), the New England First Amendment Coalition ("NEFAC"), Nexstar Media Group, Inc. ("Nexstar"), the Rhode Island Press Association ("RIPA"), and Sinclair Broadcast Group, Inc. ("Sinclair").

ACLU-RI, with over 6,000 members, is the Rhode Island affiliate of the American Civil Liberties Union, a nationwide, non-profit, nonpartisan organization. ACLU-RI, like the national organization with which it is affiliated, is dedicated to vindicating the principles of liberty embodied in the Bill of Rights to the U.S. Constitution and, especially, the First Amendment. ACLU-RI, through its volunteer attorneys, has appeared in numerous cases in state and federal court, both as counsel for parties or, as here, as amicus curiæ on numerous issues involving judicial limitations on the exercise of First Amendment rights. See, e.g., In re Providence Journal Company, 293 F.3d 1 (1st Cir. 2002); State v. Lead Industries Association, Inc., 951 A.2d 428 (R.I. 2008); United States v. Providence Journal, 485 U.S. 693 (1988); and Ruggieri v. Johns-Manville, 503 F.Supp. 1036 (D.R.I. 1980). Because the court directives at issue in this case raise issues of profound importance to First Amendment freedoms, ACLU-RI has an interest in the outcome of this case and believes that participating as amicus curiae will assist the Court in resolving the very significant issues at stake.

NEFAC is a non-profit organization working in the six New England states to defend, promote and expand public access to government and the work it does. The coalition is a broad-based organization of people who believe in the power of transparency in a democratic society. Its members include lawyers, journalists, historians and academicians, as well as private citizens and organizations whose core beliefs include the principles of the First Amendment. The coalition aspires to advance and protect the five freedoms of the First Amendment, and the

principle of the public's right to know in our region. In collaboration with other like-minded advocacy organizations, NEFAC also seeks to advance understanding of the First Amendment across the nation and freedom of speech and press issues around the world.

Nexstar Media Group, Inc. is one of the world's leading diversified media companies and is headquartered in Irving, Texas. Nexstar owns, operates, programs or provides sales and other services to 169 television stations and their related low power and digital multicast signals reaching 100 markets comprising approximately 38.7% of all U.S. television households. Its stations include WPRI ("Channel 12") in Rhode Island.

RIPA is a nonprofit organization which supports and promotes print journalism across the state, as well as supports the right of a free press and the First Amendment. Many Rhode Island print publications are part of RIPA, including, but not limited to, The Newport Daily News, The Woonsocket Call, The Valley Breeze, The Warwick Beacon, The Providence Business News, and the state's largest paper of record, The Providence Journal. RIPA is deeply troubled by Superior Court Justice Netti C. Vogel's initial order to ban the media from contacting jurors who served in the recent murder trial of Jorge DePina. Justice Vogel's May 7, 2018 order still appears to bar the general public from speaking with the jurors, which is an infringement of the First Amendment. RIPA supports the Providence Journal's stance that reporters should have access to a list of jurors since those documents are public record and such access is Constitutionally protected. Judge Vogel's denial also deprives the public of an understanding of how and why such verdicts are rendered.

Sinclair Broadcast Group is one of the largest and most diversified television broadcasting companies in the country. Based in Hunt Valley, Maryland, Sinclair owns and operates, programs, or provides sales services to 192 television stations in 89 U.S.

markets. Sinclair also owns a multicast network, four radio stations, and a cable network. Its stations include WJAR ("NBC 10") in Rhode Island, which extensively covered the Jorge DePina trial.

FACTS

1. Plaintiff Providence Journal has the largest circulation of any daily newspaper in the State of Rhode Island. https://www.agilitypr.com/resources/top-media-outlets/top-10-alabama-daily-newspapers-by-circulation/.
2. Defendant Superior Court is the Rhode Island state trial court of general jurisdiction.
3. Defendant Associate Justice Netti C. Vogel is an associate justice of the Superior Court.
4. On July 11, 2013, Jorge DePina was charged with the murder of his ten-year-old daughter.
5. Suffice to say, the alleged crime was notorious. As set forth in The Providence Journal's memorandum, the newspaper provided extensive coverage of the crime and the prosecution of DePina, as did numerous other media, including WPRI and WJAR.
6. For example, WPRI broadcast these stories, among others:

   http://www.wpri.com/news/crime/trial-to-begin-for-father-accused-of-2013-killing-of-10-year-old-daughter/1082558052

   http://www.wpri.com/news/local-news/blackstone-valley/former-medical-examiner-at-depina-trial-its-a-homicide/1086055719

   http://www.wpri.com/news/local-news/blackstone-valley/witness-in-depina-murder-trial-says-girl-fell-off-bike-days-before-death/1094105084

   http://www.wpri.com/news/local-news/blackstone-valley/jorge-depina-verdict-april-6/1104632841

7. WJAR broadcast these stories about the trial:

   http://turnto10.com/news/local/trial-begins-for-man-accused-of-killing-10-year-old-daughter

http://turnto10.com/news/local/murder-defendant-cries-at-videos-of-10-year-old-daughter

http://turnto10.com/news/local/neighbor-testifies-about-10-year-old-murder-victim

http://turnto10.com/news/local/closing-arguments-set-in-depina-murder-trial

http://turnto10.com/news/local/pawtucket-man-found-guilty-of-2nd-degree-murder-in-death-of-10-year-old-daughter

8. Beginning in March 2018, Justice Vogel presided over a three-week jury trial during which the State of Rhode Island prosecuted DePina for the alleged murder. On April 6, 2018, the jury returned a verdict finding DePina guilty of second degree murder. The jury acquitted DePina of first degree murder.

9. Immediately following the verdict, Justice Vogel made the following statement on the record:

> No one, no spectator, no one in the spectator section of the courtroom, is permitted to contact my jurors. If the jurors choose to contact anyone, that's up to them. This is for their protection. The jurors have completed their job, and when they leave here, and they will be escorted to the door or to the area where they catch their bus, unless they show great interest in speaking to the lawyers, and I mean these four lawyers, do not approach them. No one else is to approach them.
>
> That is how it is. I want to protect their privacy. They have done their job, they have been here three weeks, and the attorneys on the case, if they wanted to speak to the jurors and the jurors showed interest in speaking to you, whole different story. But beyond that, if they don't show any interest, they have to be left alone. If you see them at Walmart, do not acknowledge that you know them. In other words, I do not allow people to contact jurors. They must be left alone to go on with their lives. (emphasis added).

10. On April 13, 2018, a Providence Journal reporter, Kathleen Mulvaney, requested a copy of the jury list. The same day, she was informed that "Judge Vogel has denied the request."

11. Some media outlets would have attempted to interview the jurors but for Justice Vogel's orders.

12. On April 25, 2018, the Journal filed its verified complaint and its motion seeking emergency access.[1]

13. On May 7, 2018, Justice Vogel issued an order in the criminal case which states:

> The order issued from the bench on April 6, 2018, immediately following the Jury verdict in the above captioned case, wherein the Court ruled that spectators in the courtroom were precluded from contacting jurors is hereby vacated. Members of the media are not precluded from contacting the jurors.

ARGUMENT[2]

A comparison of analogous federal and state case law shows the Rhode Island Supreme Court would follow federal law and hold that the media and the public generally have a right of access to jurors after the jury has rendered its verdict. This right of access includes the jury list which consists of information that, historically, has been publicly available. The Superior Court's April 6th bench order appears to bar even members of the public not present from discussing the trial with jurors. ("In other words, I do not allow people to contact jurors. They must be left alone to go on with their lives."). The Court's May 7, 2018 order vacates the April 6th bench order with respect to spectators and the media but not the general public. Moreover, the May 7th order does not address access to the jury list by anyone. Furthermore, to the extent

[1] The Amici Curiae infer that the Emergency Motion is the substantive equivalent of a motion for preliminary injunction, Super.R.Civ.P. 65(a). Thus, a denial of the motion would be immediately appealable. R.I.Gen.L. §9-24-7; Frenchtown Five L.L.C. v. Vanikiotis, 863 A.2d 1279, 1281 (R.I. 2004).

[2] The Amici Curiae acknowledge that their memorandum raises constitutional arguments not presented by Plaintiff. However, courts in other jurisdictions have considered constitutional arguments raised by amicus curiae but not by the parties. See Warren v. Commission of Internal Revenue, 282 F.3d 1119 (9th Cir. 2002) (appointing amicus counsel to address constitutional issue); State v. Tate, 220 N.J. 393, 106 A.3d 1195 (2015) (overturning conviction based on constitutional arguments raised by amicus curia); Riechert v. State ex rel McCulloch, 365 Mont. 92, 103, 278 P.3d 455, 464 (2012). Similarly, the Rhode Island Supreme Court has stated that it will consider constitutional arguments raised for the first time on appeal "wherein basic constitutional rights are concerned." State v. Mastracchio, 672 F.2d 438, 446-47 (R.I. 1996).

Justice Vogel's April 6th bench order indicates it is her standard practice, it is a matter that is capable of repetition, yet evading review. Preservation Society of Newport County v. City Council of City of Newport, 155 A.3d 688, 692 n.7 (R.I. 2017). Accordingly, this Court should still address the practice of barring the media and spectators from contacting jurors after a trial.

I. THE UNITED STATES AND RHODE ISLAND CONSTITUTIONS RECOGNIZE A RIGHT OF ACCESS TO THE COURTS

Federal courts have long recognized a right of access to the courts under the First Amendment of the United States Constitution. Press-Enterprise Co. v. Superior Court, 478 U.S 1 (1986) ("Press-Enterprise II") (a qualified First Amendment right of access attaches to preliminary criminal hearings); Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) ("Press-Enterprise I") (the public's constitutional right of access includes a right to attend jury selection in criminal trials and obtain a transcript of it); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1983) (Massachusetts statute excluding the public from all rape trials involving minors violates the First Amendment right of access); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (the public has a qualified right to attend criminal trials). The public's right of access is coextensive with that of the media. See Branzburg v. Hayes, 408 U.S. 665, 684-85 (1972). Thus, the general public has just as much of a right to contact jurors about the trial as the media or anyone who was a spectator in the courtroom.

In Richmond Newspapers, Chief Justice Burger wrote eloquently about the importance of public access to criminal trials:

> When a shocking crime occurs, a community reaction of outrage and public protest often follows. [citation omitted]. Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some sort of vengeful "self-help," as

> indeed they did regularly in the activities of vigilante "committees" on our frontiers.

Id. at 571. The Chief Justice continued:

> Civilized societies withdraw both from the victim and the vigilante the enforcement of criminal laws, but they cannot erase from people's consciousness the fundamental, natural yearning to see justice done—or even the urge for retribution. The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is "done in a corner [or] in any covert manner." [citation omitted].

Id. Here, the Amici Curiae submit that the Rhode Island Supreme Court would also hold that the administration of justice, including the jurors' views and insights on the trial and on their verdict, should not operate in a "covert manner."

The Rhode Island Supreme Court has indicated it will look to federal decisions applying the First Amendment to interpret the meaning and scope of Article 1, Sec. 22 of the Rhode Island Constitution, which states, in part: "No law abridging the freedom of speech shall be enacted." See, e.g., Town of Barrington v. Blake, 568 A.2d 105, 1018 (R.I. 1990). Like the federal courts, the Rhode Island Supreme Court has repeatedly recognized a right of press and public access to trials, including during voir dire. See Providence Journal Co. v. Superior Court, 593 A.2d 446 (R.I. 1991) ("Superior Court"); State v. Cianci, 496 A.2d 139 (R.I. 1985) ("Cianci"). In Cianci, the parties requested that the discovery on file on a criminal case be sealed from the public. Without holding a hearing, the Superior Court entered a protective order providing that all discovery materials should be sealed. The Supreme Court issued a writ of certiorari and reviewed the prior U.S. Supreme Court decisions respecting when a trial court may close court proceedings or records to the public and said:

> What emerges from these cases is a four-party inquiry that should be made by the trial court before closure is justified. A protective order (1) must be narrowly tailored to serve the interest sought to be protected, (2) must be the only reasonable alternative, (3) must permit access to those parts of the record not

> deemed sensitive, and (4) must be accompanied by the trial justice's specific findings explaining the necessity for the order.

496 A.2d at 144. The Court held: "It is clear that the trial court's brief inquiry and blanket statement of a potential prejudice was not sufficient to demonstrate compelling reasons for ordering the sealing of the discovery documents." Id. at 145. The Court remanded for a "more thorough inquiry and explanation, based on the four criteria." Id. Further, "before making a decision, the trial justice should conduct a hearing at which representatives of the press may be heard before they are excluded or material is ordered sealed." Id.

In Superior Court, the Superior Court closed the individual voir dire examination of the prospective jurors to the press and public. The Supreme Court issued a writ of certiorari. It said its holding in Cianci applied to the Superior Court's actions in Superior Court:

> In applying the standard enunciated in Cianci to the facts of this case, we come to the conclusion that the trial court's closure of the individual voir dire examination of prospective jurors may have been an unconstitutional infringement on the press and public's right of access to criminal proceedings because the four-part inquiry set forth in Cianci was not complied with. The trial court concluded that concern for the privacy rights of prospective jurors and the defendant's right to a fair trial merited limited closure. This conclusion, however, was unsupported by any facts in the record that demonstrated that an open proceeding would in fact imperil or prejudice those important interests. Consequently there was no compelling governmental interest that justified the limit imposed by the trial court on the press and public's right of access. In this respect the trial court's concerns were speculative and were an insufficient basis on which to conclude that a limited closure was necessary.

593 A.2d at 449. The Court said that rather than entirely closing the voir dire because of privacy concerns, it should inform the jurors that they may request an *in camera* voir dire for "matters that are sufficiently sensitive to justify the extraordinary measure of a closed proceeding." Id., quoting In re Dallas Morning News Co., 916 F.2d 205, 206-07 (5th Cir. 1990).

In In re Derderian, 972 A.2d 613 (R.I. 2009), the Providence Journal sought access to 32-page questionnaires that the prospective jurors had completed to aid in jury selection during the

criminal case resulting from the Station Nightclub Fire. Defendant was charged with 100 counts of involuntary manslaughter under two different theories. The questionnaire said the responses were not confidential but if the juror chose, he or she could respond "private" to a particular question and the court would question him or her privately about it. After the defendant had pled guilty, the trial justice disclosed the form questionnaire to the media but declined to provide the completed questionnaires. The Journal appealed.

The Supreme Court discussed "[t]he competing First Amendment and Sixth Amendment principles at issue in the instant matter…" Id. at 617. "Not only does this case concern the public's First Amendment right of access to jury selection in criminal proceedings and future defendants' Sixth Amendment right to a fair trial, it also involves the privacy interests of all people who have been or who will be called to serve on a jury and the judiciary's interest in the fair and efficient administration of justice." The Court noted:

> The value of openness in the jury selection process has been articulated by the First Circuit Court of Appeals: "[I]nformation 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."

Id. at 618, n.3, quoting In re Globe Newspapers Co., 920 F.2d 88, 94 (1st Cir. 1990) ("Globe Newspapers"). Nonetheless, the Supreme Court found the issue had been rendered moot by Derderian's plea and it was unlikely to repeat itself. Id. at 618. Thus, the Rhode Island Supreme Court has indicated that the First and Sixth Amendments could work in tandem to assure fair jury trials.

Similarly, in State v. Torres, 844 A.2d 155 (R.I. 2004), the Supreme Court considered whether it was proper for the Superior Court to exclude the defendants' two sisters from the courtroom during voir dire. The Court initially held that the Sixth Amendment and Art. 1, Sec.

10 of the Rhode Island Constitution "both provide that accused persons in criminal prosecutions shall enjoy the right to a public trial." Id. at 158. "The public-trial requirement benefits the defendant, discourages perjury, and ensures that judges, lawyers, and witnesses perform their duties responsibly." Id. The Court added: "In Press-Enterprise Co. v. Superior Court, the Supreme Court held that the press and public's right of access to criminal trials under the First Amendment extends to the voir dire examination of potential jurors." Id.[3]

The Court concluded that "the trial justice's action deprived the defendant of the inherent protections of the Sixth Amendment, specifically, the assurance that those individuals participating in his trial perform their respective duties honestly, fairly and responsibly." Id. at 162. The Court reversed the defendant's conviction. The Amici Curiae point out that a similar prohibition on the media and the public discussing the trial with jurors also deprives defendants and the public of assurances that the individuals participating in the trial performed their duties.

Moreover, jurors in Rhode Island have historically been accessible to the media and others after they have rendered their verdicts. There are examples of jurors giving interviews after other Superior Court trials as recently as 2016 and going back at least as far as 1987:

http://www.telegram.com/sports/20161205/worcester-native-dan-doyle-convicted-of-embezzlement-from-ri-sports-institute

http://caught.net/2018/hazard2.htm

https://www.upi.com/Archives/1987/12/10/Insurance-agent-Stanley-Henshaw-III-was-acquitted-Thursday-of/9839566110800/

[3] The Court noted that: "The Press-Enterprise Court enunciated the following inquiry: '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." Id., n. 3, citing Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 (1984).

The Rhode Island Supreme Court has clearly indicated it will follow U.S. Supreme Court and other federal precedent with respect to keeping Superior Court trials open to the media and the public, including the views of jurors, as expressed during voir dire. Thus, Amici Curiae respectfully suggest the Court would similarly follow federal decisions respecting access to jurors after they have rendered their verdict, a stage where any arguments against disclosure are even less compelling.

II. THE COURTS OF THE UNITED STATES AND RHODE ISLAND GENERALLY RECOGNIZE A RIGHT OF ACCESS TO JUDICIAL RECORDS

Federal and Rhode Island courts have recognized a right of access to judicial records that have historically been public. Press-Enterprise I, 464 U.S. at 513; Globe Newspaper v. Superior Court, 457 U.S. 596 (1982) ("Where, as in the instant case, the State attempts to deny the right of access [to judicial records] in order to inhibit the dissemination of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest and is narrowly tailored to serve that interest."); Nixon v. Warner Communications, Inc., 435 U.S. 589 (1994) ("Nixon") (there is a common law right of access to judicial records); United States v. Antar, 38 F.3d 1348 (3rd Cir. 1994); Dahl v. Bain Capital Partners, LLC, 891 F.Supp.2d 221 (D. Mass. 2012).

In Press-Enterprise I, the Court vacated a state trial court order barring a newspaper from obtaining a transcript of the voir dire in a criminal case. Chief Justice Burger wrote: "Those parts of the transcript reasonably entitled to privacy could have been sealed without such a sweeping order; a trial judge should explain why the material was entitled to privacy." Id. at 513. Notably, Justice Blackmun concurred but doubted that a juror could have a reasonable expectation of privacy in most, if not all, of the information disclosed during voir dire. Id. at 513-15.

In Dahl, the plaintiff filed an amended complaint with exhibits under seal. The New York Times moved to intervene to unseal the complaint. The district court said:

> There is a well-established common law presumption of access to judicial documents. [citation omitted]. The presumption of access exists in part to allow the public to serve its essential function of monitoring the judiciary, fostering "the important values of quality, honesty and respect for our legal system." While the access right is "not unfettered," [citation omitted], the citizens' right to know is not lightly to be deflected, "and only the most compelling reasons can justify the non-disclosure of judicial records." [citation omitted].

Id. at 224. The court ordered defendant to show cause why the amended complaint or a redacted version should not be unsealed. Id. at 225-26.

Similarly, Rhode Island courts recognized the common law right of access to judicial records long ago. See, In re Caswell's Request, 18 R.I. 835, 29 A. 259 (1893) ("The judicial records of the state should always be accessible to the people for all proper purposes, under reasonable restrictions as to the time and mode of examining the same; but they should not be used to gratify public spite or promote public scandal."). Since then, Rhode Island courts have repeatedly reaffirmed and expanded this right, absent some compelling policy against access. See Providence Journal Co. v. Rodgers, 711 A.2d 1131 (R.I. 1998) ("Rodgers"); The Rake v. Gorodetsky, 452 A.2d 1144, 1146 (R.I. 1982) ("The Rake"), citing, *inter alia*, Globe Newspaper v. Superior Court, 457 U.S. 596 (1982); Richmond Newspapers v. Virginia, 448 U.S. 555 (1980); see also, In re Derderian, supra; Doe v. Edward A. Sherman Publishing Co., C.A. NC-1990-0089, 1990 WL 10000171 (R.I.Super. May 16, 1990).

In The Rake, the Supreme Court recognized that "the public's right to know and have access to governmental records, including judicial records, is an essential part of the First

Amendment." 452 A.2d at 1146.[4] In Rodgers, the Providence Journal challenged the Superior Court's policy of sealing court files in criminal prosecutions involving child victims of sexual molestation pursuant to the Superior Court's interpretation of R.I.Gen.L. §11-37-8.5(a): "All court records which concern the identity of a victim of child molestation sexual assault shall be confidential and shall not be made public." The Supreme Court quoted the United States Supreme Court that "the courts of this country recognize a general right to inspect and copy public records, including judicial records and documents." Id. at 1135, quoting, Nixon, 435 U.S. at 597. Again quoting the U.S. Supreme Court, the Rhode Island Supreme Court acknowledged that such access must be balanced against privacy interests: "If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information. Their political institutions must weigh the interests in privacy with the interests of the public to know and of the press to publish." Id. at 1136, quoting Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 495-96 (1975). Moreover, the balancing of the interests in the common law right of access to judicial records "should be evaluated by a balancing test identical to that performed in the case of governmental curtailment of a *constitutional* right." (emphasis original). Id. at 1136, quoting Nixon, 435 U.S. at 602.

The Rodgers Court said that the State's interest in the protection of minor victims of sex crimes from further trauma and embarrassment was "compelling." Id. at 1137. The Court adopted a policy providing for public access to the judicial records as redacted to remove the victim's name and other victim-identifying information, as well as any other information required to be kept confidential by the State's statutes and policies. Id. at 1138.

[4] Presumably, the public's right to know and have access to governmental records is also an essential part of Art. 1, Sec. 21 of the Rhode Island Constitution.

Here, the jurors publicly fulfilled out the State's constitutional obligation of providing DePina with a trial by jury. They apparently rejected the evidence that DePina's daughter may have died from an unrelated head injury, but they also found him not guilty of first-degree murder. Certainly, there is a significant public interest in how the jurors carried out their duties, including, perhaps, their views of the evidence, the Superior Court's rulings, its jury instructions, etc., and their verdict. The Superior Court provided no explanation for the denial of access to the information about the jurors other than "Justice Vogel has denied this request." Justice Vogel provided no basis for her bench order other than general references to the jurors' "protection" and "privacy." Moreover, it appears the Superior Court did not balance the competing interests.

Here, there is no compelling interest in hiding the names and addresses of the jurors. They are not children or victims of sex crimes. To the contrary, the jurors have relatively little privacy interest in their addresses. After all, they can decide not to speak with reporters or the public if they are contacted, just as they can decide not to respond to the myriad of other unsolicited communications that we all receive every day. There is no identifiable threat to the jurors in this matter nor have the jurors openly expressed any desire for privacy. In any event, it is entirely unclear how "privacy" applies when the jurors just completed sitting through a highly-publicized, three-week trial respecting a notorious crime. Press-Enterprise I, 464 U.S. at 513-516 (Blackmun, J., concurring).

As a policy matter, there is nothing inherently secret about the identity of jurors (nor should there be, in most cases). After all, litigants are supposed to receive a trial by a jury of their peers, State v. Hazard, 785 A.2d 1111, 1122 (R.I. 2001), and that cannot be confirmed unless the identity of the jurors is known. Potential jurors are drawn from publicly available lists

including registered voters. R.I.Gen.L. § 9-9-1(a)(3).[5] The grounds to disqualify a person as a juror include whether he or she has been adjudicated a felon or to be *non compos mentis*, R.I.Gen.L. §9-9-1.1(b) and (c), or "whether he or she is related to either party [or] has any interest in the cause." R.I.Gen.L. §9-10-14. Both the trial judge and the parties may examine the prospective jurors about all these issues, usually in open court. State v. Gomes, 690 A.2d 310 (R.I. 1997).

The process of voir dire in Superior Court involves the distribution of a list of the names of the prospective jurors, as well as the cities or towns where they live, their occupations, and their spouses. Thus, the parties may identify the jurors by name and question them about their individual characteristics. To the knowledge of the Amici Curiae's counsel, there is no statute, regulation, or rule that prohibits the circulation of that list. Counsel for the Amici Curiae are aware that some lawyers use computers and the internet at counsel table to research prospective jurors, including their social media posts, during voir dire.[6] Accordingly, the process of jury selection is usually open, the jurors' names and residences (at least, of their city or town), are available in open court, and the jurors' identities are a proper subject of public examination.

Accordingly, the Superior Court cannot decide *ad hoc* to bar public access to jury records after trials. Rather, any such denial of access must be based on good cause and specific factual

[5] Records of registered voters, including their addresses, are publicly available. R.I.Gen.L. §§ 17-9.1-6(a) and (b).

[6] Indeed, there are legal authorities suggesting it may be malpractice not to do so. See, United States v. Daugerbas, 867 F.Supp.2d 445, 479 (S.D.N.Y. 2012) (holding defendant had waived his right to a new trial after not using due diligence to investigate online a juror's truthfulness); Johnson v. McCullough, supra; N.H. Bar Ass'n Ethics Comm., Op. 2012-13/05 (2013) (lawyers have "a general duty to be aware of social media as a source of potentially useful information in litigation, to be competent to obtain that information directly or through an agent, and to know how to make effective use of that information"); N.Y.County Lawyer Ass'n Formal Op. 743 (2011) ("standards of competence and diligence may require doing everything reasonably possible to learn about the jurors who will sit in judgment on a case.").

findings after the Court balances the public and private interests. Here, the public interest greatly outweighs the private one. Moreover, since a month has passed since the jury rendered its verdict and was discharged, the jury list is essential to the media if they are to contact the jurors.

III. COURTS IN OTHER JURISDICTIONS RECOGNIZE A RIGHT OF THE MEDIA AND THE PUBLIC, INCLUDING THE PARTIES' ATTORNEYS, TO INTERVIEW JURORS AFTER A VERDICT

Courts in other jurisdictions have generally held that the First Amendment permits the media, the parties' attorneys, and the public to speak with and interview jurors after the verdict. United States v. Wecht, 537 F.3d 222 (3rd Cir. 2008); United States v. Long, 250 F.3d 907 (5th Cir. 2001); In re Globe Newspaper Co., 920 F.2d 88, 92 (1st Cir. 1990); In re Baltimore Sun Co., 841 F.2d 74, 75 (4th Cir. 1988); Journal Publishing Co. v. Mechem, 801 F.2d 1233 (10th Cir. 1986); United States v. Sherman, 581 F.2d 1358 (9th Cir. 1978); United States v. Doherty, 675 F. Supp. 719, 721 (D. Mass. 1987); Commonwealth v. Fujita, 470 Mass. 484, 23 N.E.3d 882 (2015); Commonwealth v. Long, 592 Pa. 42, 922 A.2d 893 (2007); State ex rel. Beacon Journal Publ'g Co. v. Bond, 98 Ohio St. 3d 146, 781 N.E.2d 180 (2002); In re Disclosure of Juror Names & Addresses, 233 Mich. App. 604, 605–06, 592 N.W.2d 798, 799 (1999); Des Moines Register & Tribune Co. v. Osmundson, 248 N.W.2d 493 (Iowa 1976); see also Ramirez v. State, 922 So.2d 386 (Fla.App. 2006) (holding defense counsel were entitled to interview jurors respecting alleged premature deliberations before filing defendant's new trial motion).

The First Circuit has held that "…given the absence… of particularized findings reasonably justifying non-disclosure, the juror names and addresses must be made public." Globe Newspapers, 920 F.2d at 92. In Globe Newspapers, the district court judge advised the jurors that it is at their own discretion whether they speak to the media, and that anything regarding jury deliberations should be kept confidential. That same day, when reporters from the

"The Globe" tried to obtain the jury information, they were denied access. The First Circuit held that the trial judge must identify "specific, valid reasons necessitating confidentiality in the particular case. To justify impoundment after the trial has ended, the court must find a significant threat to the judicial process itself." Id. at 90. The Court said that a judge may specifically determine a need for jury confidentiality when the "interests of justice" so require and absent that determination, juror information is publicly available information. This "interest of justice" standard requires a specific and convincing reason why the court should withhold the juror identities. Further, the trial court should withhold those identities only in exceptional cases. Id. at 91. Such circumstances would be a credible threat of jury tampering; risk of personal harm to individual jurors; and other evils affecting the administration of justice. These circumstances do not include the mere personal preferences or views of the judge or jurors. Id. at 92.

The Third Circuit has held that "a tradition of openness exists and that anonymous juries have been the rare exception rather than the norm." United States v. Wecht, 537 F.3d 222 (3rd Cir. 2008). To determine what aspects of a criminal trial are subject to public access, the Court applied the "experience and logic" test outlined by the United States Supreme Court in Press Enterprise I. Id. at 235-39. First, courts will look to experience in whether the information has historically been open to the public. Id. Second, they will look to see if public access plays a significant role in the functioning of the particular process in question. Id. The Court in Wecht found that under the "experience" prong, historically, juror information has been available to the public and it is seen as a presumptive right. Id. at 235-37. As to the "logic" prong, the Court stated it is a case-by-case analysis and there must be particular findings establishing the existence of a compelling government interest. Id. at 238-39. Under the Supreme Court's "experience and logic test," juries should not be anonymous absent a specific, compelling government interest.

The district court in Wecht set forth three explanations why it decided to empanel an anonymous jury, including, first, the impact on juror's willingness to serve on juries if their identities were public knowledge. The Third Circuit found that this argument was too general and that access to jury information is necessary to ensure the fairness on which our justice system thrives. Id. at 240. Second, the district court stated there would be an increased risk of intimidation of jurors if their information was open to the public. The Third Circuit found this to be too conclusory and generic, therefore justifying anonymity for every jury. The Circuit Court said the trial court must find a specific, definite need for anonymity. Id. at 240-41, citing United States v. Scarfo, 850 F.2d 1015 (3d Cir. 1988). Third, the district court stated that defendants may have made many enemies and these enemies could find their way into the jury pool. The Third Circuit said this factor indicated that the media should then be allowed to have access to jury information to ensure these enemies do not enter the jury pool. Id. at 241-42. Juror information must be kept available to the public to ensure the integrity of the First Amendment. In the rare occurrence when jury information is kept anonymous, the trial court must make a finding of specific circumstances and those circumstances must be compelling.

A study of 761 news articles involving juror interviews over an eighteen-year period demonstrated 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 showed 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.

A few examples prove those conclusions. At one of several federal trials of John Gotti, the trial court empaneled an anonymous jury which 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). Pape lied during voir dire about his connections to organized crime. Id. at 480. He received a bribe and delivered an acquittal. Had federal prosecutors or the public been able to investigate Pape's background, "his potential for corruption might have been unearthed prior to trial." Id. at 480-81.

The wrongful conviction and near-execution of Anthony Porter illustrates the important 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 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*, Chicago Tribune, (Nov. 14, 1999)[7] ("Porter was saved not by the justice system, but by journalism students.").

Juror interviews by a group of investigative journalists and WBUR recently led a state court in Massachusetts to order a new trial for a Boston man, Darrell Jones, who may have been wrongly incarcerated for 32 years. According to the Boston Globe:

Allegations of racial bias in the court were raised in a 2016 investigation by

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

> 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).[8]

Accordingly, for all these reasons, it seems clear that, under the First Amendment and Art. 1, Sec. 21 of the Rhode Island Constitution, the Rhode Island Supreme Court would recognize a right of the media, the parties, through their counsel, as well as other members of the general public to communicate with jurors about the trial after they have rendered their verdict.

IV. THE SUPERIOR COURT'S PER SE PROHIBITION ON CONTACTING JURORS IS UNCONSTITUTIONALLY OVERBROAD

The Superior Court's *per se* prohibition on communications with the jurors is overbroad. Cape Publications, Inc. v. Braden, 39 S.W.3d 823 (Ky. 2001); Contra Costa Newspapers, Inc. v. Superior Court, 61 Cal.App.4th 862, 72 Cal.Rptr. 2d 69 (1998). A statute (or an order) is overbroad and unconstitutional under the First Amendment where "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." See United States v. Stevens, 559 U.S. 460, 473 (2010); Cranston Teachers Alliance Local No. 1704 AFT v. Miele, 495 A.2d 233, 235 (R.I. 1985) ("Particularly suspect are laws that contain prohibitions that are too broad in their sweep, that fail to distinguish between conduct that may

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

be proscribed and conduct that must be permitted."); Ferriera v. Gleason, No. 83-0210, 1983 WL 486824 at *4 (R.I.Super. Oct. 7, 1983) (overbreadth doctrine protects freedom of speech).

In Contra Costa Newspapers, the California Superior Court entered an order at the conclusion of a trial which required the press to abide by the jurors' preference not to be contacted. The trial judge confirmed in open court that the jurors purportedly did not want to be contacted by the press. The newspaper filed a petition asking the trial court to withdraw the order, which petition the trial court did not address. The newspaper petitioned the appeals court. The appeals court said:

> Any inhibitions against news coverage of a trial carry a heavy presumption of an unconstitutional prior restraint, [citation omitted], and where the state attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling government interest and narrowly tailored to serve that interest. [citation omitted]. In the absence of particularized findings reasonably justifying nondisclosure, federal courts have required that juror names and addresses be made public after the trial has terminated. [citation omitted].

61 Cal.App.4th at 867, 72 Cal.Rptr.2d at 72. The court added:

> [T]he order was not directed at anyone in particular, it was not based on any showing of unreasonable behavior by anyone, and it was not carefully crafted to restrain conduct while preserving the constitutional rights of those interested in the trial. Accordingly, we conclude that the trial court's order restricting press contact with former jurors was without jurisdiction and was impermissibly overbroad. It contained no time or scope limitations and encompassed every possible juror interview situation.

Id. at 868, 72 Cal.Rptr.2d at 72-73. The appeals court vacated the trial court's order. Id., 72 Cal.Rptr.2d at 73.

Similarly, the Superior Court's two orders are overbroad, even as "vacated" on May 7th. The April 6th bench order seemingly prohibited any contact by any person with any juror at any time for any reason under any circumstances. The denial of access to the jury list bars the media, including the Providence Journal, from even asking jurors if they want to speak with it. Nothing

in the orders limits their effect with respect to time, place, or manner of the communication. The orders constitute prior restraints on communications. Thus, they are facially overbroad and unconstitutional.

V. THE SUPERIOR COURT'S PER SE DENIAL OF ACCESS TO JURORS VIOLATES DUE PROCESS

Pursuant to the Fourteenth Amendment of the United States Constitution and Art. 1, Sec. 2 of the Rhode Island Constitution, federal courts and the Rhode Island Supreme Court recognize that persons cannot be deprived of their rights without due process, including reasonable notice and an opportunity to be heard. "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." Mathews v. Eldridge, 424 U.S. 319, 332 (1976); In re Stephanie B., 826 A.2d 985, 993 (R.I. 2003) (same re Art. 1, §2 of the Rhode Island Constitution). Freedom of speech is a liberty interest protected by due process. Vasquez v. Rackauckas, 734 F.3d 1025, 1042 (9th Cir. 2013).

One of the fundamental requirements of due process is notice that is "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 309, 314 (1950); In re Stephanie B., 826 A.2d at 993-94; Avanzo v. R.I. Dept. of Human Services, 625 A.2d 208, 210-11 (R.I. 1993). Due process requires that notice and a hearing must be granted at a time when the deprivation of a right can still be prevented. Fuentes v. Shevin, 407 U.S. 67, 82 (1972). An opportunity for a hearing "must be provided before the deprivation at issue takes effect." Id.

In Cape Publications, Inc. v. Braden, 39 S.W.3d 823 (Ky. 2001), the Courier-Journal challenged a trial court order barring any media contact with the jurors after a murder trial. The appeals court said:

> [A] party or an intervenor is entitled to procedural due process when the court seeks to restrict anyone from exercising a constitutionally protected news interest including news gathering. The minimum requirements of due process are notice and an opportunity for a hearing appropriate to the nature of the case. [citation omitted]. In addition, a particularized finding of fact must be made for the record. [citation omitted]. The burden of establishing a compelling government interest is on the government. The findings must demonstrate a clear and present danger to the privacy of the jurors. [citation omitted]. The Court must articulate findings of the actual expectation of the probability of harassment of jurors. There must be proof of a threat of harassment to support such order. Irritation and annoyance are not sufficient.

Id. at. 827. The appeals court added:

> It is abundantly clear that if a juror does not wish to communicate with another individual, such juror is not required to do so. [citation omitted]. The desire not to communicate is best achieved by simply refusing to talk. Seeking the protection of a court for a prior restraint is far more serious and much more difficult because it can involve an unconstitutional state action so as to create a prior restraint.

Id. The court reversed in part the trial court's order and remanded for further proceedings. Id.

In the context of judicial proceedings, the Rhode Island Supreme Court has made clear that any order foreclosing public access to the proceedings or judicial records requires notice to the public, an opportunity to be heard and, if a closure order is granted, "specific findings explaining the necessity for the order." Cianci, 496 A.2d at 144; Providence Journal Co. v. Cresto, 716 A.2d 726, 730 (R.I. 1998) ("Cresto").

In Cresto, one Superior Court judge had sealed the discovery materials in a criminal case following an *in camera* review. The Providence Journal filed suit seeking to unseal the materials. A second Superior Court judge unsealed the materials based on a review of the order but not of the materials themselves. On appeal, the Supreme Court noted that:

> [P]retrial discovery in a criminal case often involves hearsay and other materials not admissible at trial and that a protective order may be necessary to preclude disclosure of confidential materials. [citation omitted]. In light of the public's strong interest in access to the state's criminal court records, however, closure must be cautiously exercised and a protective order must be strictly limited to avoid sealing material that is not of a sensitive nature. [citation omitted]. Consequently a protective order is available only after a trial justice conducts an *in camera* inspection of the documents in the presence of the parties to determine whether the closure is warranted.

716 A.2d at 728-29. The Supreme Court reversed the second justice's order for failing to conduct that *in camera* hearing.

Here, the Superior Court justice provided no notice that she intended to deprive the Journal (or any other interested person) of the right to speak with jurors after the trial. The Superior Court justice provided no opportunity for the Journal or any other persons to be heard before issuing her bench order that: "I do not allow people to contact jurors." The Superior Court provided no justification for the order other than some vague interest in the jurors' "protection" and "privacy." There was no indication that any juror was threatened or had expressed any interest in privacy. In any event, the jurors had just finished hearing a highly-publicized three-week trial of a notorious criminal resulting in a guilty verdict. It is unclear, at best, what the "privacy" interest would be with respect to the trial, itself. Press-Enterprise I, 464 U.S. at 513-15 (Blackmun, J., concurring). Moreover, when the Providence Journal's reporter made a request for the jury list after the trial, the request was summarily denied without a hearing or an explanation. This is complete absence of due process.

CONCLUSION

The Superior Court's orders facially violate the Providence Journal's freedoms of the press and of speech under the First Amendment and Art. 1, Sec. 21 of the Rhode Island Constitution. The orders also violate the freedom of speech of other Rhode Islanders who may

wish to speak with the jurors about the jurors' exercise of their citizenship duties. This prevents all of us from confirming whether the jury acted as the conscience of the community in discharging those duties and whether the jurors were confident in their verdict. The Superior Court's orders are also overbroad in that they place no reasonable limits as to the time, place, or manner of their prohibitions against free speech. Finally, the Court's orders violate due process because the Court implemented them without notice and an opportunity to be heard. For these reasons, the Court should grant the Providence Journal's Emergency Motion for Public Access.

Amici Curiae, the American Civil Liberties Union of Rhode Island, the New England First Amendment Coalition, Nexstar Media Group, Inc., the Rhode Island Press Association, and Sinclair Broadcast Group, Inc., by their attorneys,

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CERTIFICATION

I hereby certify that a copy of foregoing was filed electronically through the Superior Court's electronic filing system and served upon all counsel of record on May 9, 2018.

/s/ Rhiannon S. Huffman
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