REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS

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June 30, 2022

Kevin M. Hodges, Esq.
Chairman, Advisory Committee on Local Rules
Williams & Connolly LLP
680 Maine Avenue SW
Washington, DC 20024

*Re: Invitation to Comment on Proposed Changes to Local Criminal Rule 24.1 and Local Civil Rule 47.1*

Dear Mr. Hodges,

The Reporters Committee for Freedom of the Press (the "Reporters Committee") and the 21 undersigned media organizations write in response to the Court's request for public comment on its proposed changes to Local Criminal Rule 24.1 and Local Civil Rule 47.1. In particular, the undersigned write regarding proposed Local Criminal Rule 24.1(b)(1) and proposed Local Civil Rule 47.1(b)—together, the "Proposed Rules."

The Proposed Rules, which are identical, provide that the "[n]ames of prospective and sitting petit jurors shall not be disclosed to the public outside of open court, except upon order of the Court. A request for disclosure of petit juror names to the public must be made to the presiding judge."

The undersigned respectfully urge the Court not to adopt the Proposed Rules, which suffer from two significant flaws. First, the Proposed Rules, as drafted, are inconsistent with the public's constitutional and common law rights of access to court proceedings and records. Second, the plain language of the Proposed Rules, as drafted, would impose an unconstitutional prior restraint on speech.

## I. The Proposed Rules are inconsistent with the public's presumptive rights of access to court proceedings and records.

The Proposed Rules would make the names of jurors and prospective jurors non-public by default. That is, although the Proposed Rules permit the disclosure of jurors' and prospective jurors' names in "open court," they otherwise require that jurors' and prospective jurors' names not be publicly disclosed absent an order from the Court permitting disclosure. Consequently, the Proposed Rules would require jury questionnaires, filings that referred to jurors by name, transcripts of proceedings containing jurors' names, jury lists kept on file in the clerk's office, and other, similar records to

be placed on the docket or otherwise made available to the public only in redacted form—if at all.[1]

This presumption of nondisclosure contravenes the First Amendment. The First Amendment gives the public a presumptive right to know the names of jurors and prospective jurors; as one court of appeals has put it, "public knowledge of jurors' names is a well-established part of American judicial tradition." *United States v. Wecht*, 537 F.3d 222, 235–36 (3d Cir. 2008) (collecting cases and scholarship); *see also Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 511 (1984) ("*Press-Enterprise I*") (holding that First Amendment presumption of public access applies to jury selection; explaining that a prospective juror's identity may be withheld from the public "in some circumstances," but only to the extent necessary to serve a "compelling interest"); *Wecht*, 537 F.3d at 235 (3d Cir. 2008) (holding that First Amendment right of access extends to the names of jurors and prospective jurors during voir dire); *In re Globe Newspaper Co.*, 920 F.2d 88, 93 (1st Cir. 1990) (recognizing that "[i]mpounding juror names" post-verdict "implicates the press's First Amendment right of access to criminal trials") (citing *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8–9) (1986) ("*Press-Enterprise II*")); *United States v. Espy*, 31 F. Supp. 2d 1, 2 (D.D.C. 1998) ("Many of the purposes served by open access to criminal proceedings are also served by recognizing the interest and putative right of the press to have access to the names of jurors following a verdict.").

Like all proceedings and records subject to the First Amendment presumption of access, the names of jurors and prospective jurors may be withheld from the public—but not by default—if the applicable legal standard is met. A party seeking to withhold the names of jurors and prospective jurors from the public must establish—and the court must find—that doing so is the least restrictive means of serving a compelling interest. *Press-Enterprise II*, 478 U.S. at 13–14. Put differently, it is the *withholding* of jurors' and prospective jurors' names, not their disclosure, that requires a court order; such is the case-specific nature of the First Amendment presumption in favor of access. By making jurors' and prospective jurors' names confidential by default, the Proposed Rules turn the First Amendment presumption on its head.

The Proposed Rules are also inconsistent with the public's common law right of access to judicial records. Under the common law, before a court withholds judicial records from the public, it must consider whether nondisclosure is justified in light of the "facts and circumstances" of the individual case; this requires the court to conduct, at minimum, the multi-factor analysis set forth by the D.C. Circuit in *United States v. Hubbard*, 650 F.2d 293, 317–21 (D.C. Cir. 1980). The Proposed Rules, however, require

[1] The Proposed Rules would not restrict the disclosure of jurors' names in "open court." This structure of restrictions—non-disclosure by default, except in "open court"—would be difficult to manage and could lead to absurd results. For example, under the Proposed Rules, a party would be required to redact a juror's name from a motion filed on the public docket absent a Court order to the contrary, yet would be permitted to refer to the juror by name during a hearing in open court on the same motion.

the redaction or nondisclosure of judicial records containing jurors' or prospective jurors' names regardless of the "facts and circumstances" of the case, and without any balancing of interests. *Id.* In this way, too, the Proposed Rules are incompatible with the public's presumptive right to inspect court records.

## II. As drafted, the Proposed Rules would impose an unconstitutional prior restraint on speech by members of the press and public.

The Proposed Rules, as written, would prohibit any person from publicly disclosing the names of jurors or prospective jurors "outside of open court," unless given permission by "order of the Court." Such a prohibition would have wide-ranging consequences. For example, if a journalist were to learn the name of a juror or prospective juror while attending open court proceedings (or otherwise), the Proposed Rules ostensibly would prohibit the journalist from communicating that name to anyone else, either privately or through publication. In fact, the Proposed Rules would prevent jurors and prospective jurors from disclosing their *own* identities outside of open court unless they first obtained the Court's permission. Thus, as drafted, the Proposed Rules would impose an unconstitutional prior restraint on speech. *See, e.g.*, *United States v. Quattrone*, 402 F.3d 304, 312 (2d Cir. 2005) (holding that "district court's order barring publication of jurors' names" after they were revealed in open court was an unconstitutional prior restraint).

The Supreme Court has long recognized that prior restraints are among "the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) ("*Stuart*"). For that reason, prior restraints are permissible, if at all, only in the narrowest of circumstances. *See N.Y. Times v. United States*, 403 U.S. 713, 714 (1971) (emphasizing the heavy burden that the government carries in justifying prior restraints on speech); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (a prior restraint on speech bears a "heavy presumption against its constitutional validity"); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931). The circumstances here are anything but narrow: the Proposed Rules would, by their terms, presumptively restrain public speech about the names of jurors and prospective jurors in all matters, criminal and civil—without regard for the facts of any particular case. There can be no genuine question that a prior restraint of such breadth would violate the First Amendment. *See, e.g.*, *Stuart*, 427 U.S. at 570 (holding order of trial court "clearly invalid" when it prohibited publication of "reporting or commentary on judicial proceedings" in high-profile murder trial); *Cap. Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1304 (1983) (Brennan, J.) (entering emergency stay of trial court order which stated, *inter alia*, that "[n]o person shall print or announce in any way the names or addresses of any juror").

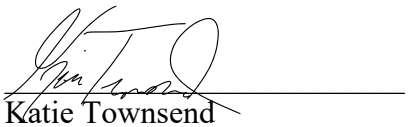
* * *

As the Supreme Court has recognized, "[a] responsible press has always been regarded as the handmaiden of effective judicial administration." *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966). Members of the media function as "surrogates for the public"

by attending court, reviewing filings, and reporting on judicial matters to the public at large. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980). It follows that to restrict reporting on court proceedings, including the identities of jurors in civil and criminal matters, is to limit public access to, and public trust in, the institution of the judiciary. *Stuart*, 427 U.S. at 573 (Brennan, J., concurring) (recognizing the "fundamental and salutary constitutional mandate that discussion of public affairs in a free society cannot depend on the preliminary grace of judicial censors").

Thank you for your consideration. Please do not hesitate to contact Reporters Committee Deputy Executive Director and Legal Director Katie Townsend at ktownsend@rcfp.org with any questions.

Respectfully submitted,



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