No. 08-1394

IN THE
Supreme Court of the United States

JEFFREY K. SKILLING,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF ABC, INC., ADVANCE PUBLICATIONS, INC., THE ASSOCIATED PRESS, BLOOMBERG L.P., CABLE NEWS NETWORK LP, LLLP, CALIFORNIA NEWSPAPER PUBLISHERS ASSOCIATION, DOW JONES & COMPANY, INC., FIRST AMENDMENT COALITION, GANNETT CO., INC., THE HEARST CORPORATION, THE MCCLATCHY CO., MEDIA LAW RESOURCE CENTER, INC., MEDIANEWS GROUP, INC., THE NEW YORK TIMES CO., REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE TRIBUNE COMPANY, AND THE WASHINGTON POST AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

Amici curiae are newspaper and magazine publishers, radio and television broadcasters, cable networks and organizations of journalists and publishers that regularly cover and report upon criminal prosecutions across this Nation (the "*Press Amici*").[1] *Press Amici* take no position on whether Petitioner Skilling's conviction should stand on the record before the Court, but submit this Brief in opposition to his contention that a pretrial "presumption of prejudice" should be irrefutable, and to highlight for the Court the adverse consequences that would flow from such a holding. To declare that a pretrial "presumption of prejudice" cannot be rebutted would impose new pressures upon trial courts to limit public and press access in high profile cases, perversely encouraging more activity to be conducted outside of public view in the very criminal prosecutions of greatest concern to the public. Such a step would both weaken the integrity of the judicial system and undermine public confidence in the courts.

Press Amici are regularly confronted by claims from criminal defendants that courtrooms should be closed, judicial records sealed, and trial participants

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[1] A complete list of the *amici* is set out in Appendix A to this brief. Pursuant to S. Ct. R. 37.6, the *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

"gagged" from speaking with the press, when criminal prosecutions attract widespread attention. This Court's precedents currently provide clear standards on the limited circumstances when such steps to restrict public access are allowed. *Press Amici* have a vital interest in ensuring that the decision in this case, in its discussion of the circumstances under which a presumption of prejudice may properly be found and in defining the appropriate response to such a finding, does not inadvertently undermine those standards.

SUMMARY OF ARGUMENT

1. Declaring a pretrial presumption of prejudice to be *irrebuttable* would create a significant new incentive to restrict press coverage of the most intensely followed prosecutions and thwart the value of openness. Making the presumption irrebuttable would add pressure on trial courts to close pretrial proceedings, gag lawyers and restrict access to records in order to avoid the potential for a mandatory change of venue with its concomitant disruption, delay and expense. More secrecy, in turn, can only undermine the integrity of the judicial system and the public's confidence that justice is being done.

2. Any standard for identifying when a presumption of prejudice to the jury pool exists must limit the presumption to the rare case where extraordinary factors beyond just the volume and tenor of pretrial press coverage raise specific and concrete concerns about the ability of jurors to reach a verdict based upon the evidence presented in court.

Criminal defendants regularly object to publicity about their prosecutions, and point to extensive media coverage as sufficient grounds for restricting public access to various aspects of the proceeding. In most cases, these concerns are overstated and properly rejected by trial courts under the existing standards governing the constitutional access right. A relaxed standard for determining when a presumption of prejudice exists would threaten to undermine the public access right. To avoid such a result, the Court should make plain that a presumption of prejudice must be based upon more than the existence of significant publicity, but rather requires additional prejudicial factors. Particularly in a large metropolitan area such as Houston, substantial publicity *alone* should never be sufficient to sustain a presumption of prejudice.

3. Any presumption of prejudice should be rebuttable given the effective remedial tools that are available to a trial court to address concerns that may arise in a high profile criminal prosecution. *Voir dire*, properly used, is an effective device for screening out potentially biased jurors and those who may have prejudged a defendant's guilt or innocence. Other steps, such as calling a larger initial venire, allowing additional preemptory challenges, and strict instructions by the trial court can protect the fair trial right in most circumstances. An extensive record of fair and open trials conducted in the most intensely followed cases—resulting in both acquittals and convictions—confirms the ability of trial courts to ensure fair trials before unbiased juries.

ARGUMENT

I. Making a Presumption of Prejudice Irrebuttable Would Undermine the Important Interests Advanced by Open Judicial Proceedings.

If this Court were to declare that a presumption of prejudice arising from extensive pretrial news reporting is irrefutable, and a change of venue mandatory, trial courts would inevitably face increased pressure to restrict access to information in high profile cases to avoid the disruption, delay and expense inherently involved in moving a trial.

The vast majority of requests to close proceedings, issue gag orders or seal records in criminal cases are based upon claims that a defendant's Sixth Amendment rights are in jeopardy from pretrial publicity. *See, e.g.*, *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 563 (1976) (restraining order against the press issued due to fear that "'pre-trial publicity could impinge upon the defendant's right to a fair trial'") (citation omitted); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 560 & n.2 (1980) (murder trial closed to prevent press reporting from impairing a fair trial); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984) (jury selection closed and transcript sealed to protect defendant's fair trial right and jurors' privacy). Given the significant burden and expense involved in a change of venue—relocating records and evidence, securing the attendance of witnesses in a distant forum, attorney travel, and a variety of other inconveniences—the potential that an *irrebuttable* presumption of

prejudice might arise would necessarily lead trial courts to limit pretrial access to information about the very cases of greatest interest to the public. This, in turn, would undermine both the effectiveness of the judicial system and public confidence in the courts.

In first articulating a constitutional access right, this Court stressed the important contribution of openness to the proper functioning of the criminal justice system itself. As explained in *Richmond Newspapers, Inc.*, 448 U.S. at 569-70, public access improves the functioning of a trial by, *inter alia*, ensuring that proper procedures are being followed, encouraging those with information to come forward, and creating incentives for all participants to perform well. Public access also discourages perjury, misconduct, and bias, and in this respect "'is an effective restraint on possible abuse of judicial power.'" *Id.* at 592 (Brennan, J., concurring) (citation omitted). Two years later, in *Globe Newspapers, Inc. v. Superior Court*, 457 U.S. 596, 606 (1982), the Court underscored that by permitting the public to "serve as a check on the judicial process," the access right "enhances the quality and safeguards the integrity of the factfinding process." *Accord Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) (the press "guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism").

Public access not only improves the actual operation of the justice system, it improves the

appearance of justice. This, too, is vitally important because "[p]eople 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." *Richmond Newspapers*, 448 U.S. at 572. As the Court has explained:

> The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.

Press-Enterprise Co., 464 U.S. at 508. The crucial role that public access plays in ensuring respect for the results produced by a criminal trial is perhaps best illustrated by considering the converse:

> "Secret hearings—though they be scrupulously fair in reality—are suspect by nature. Public confidence cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court's decision sealed from public view."

Gannett Co. v. DePasquale, 443 U.S. 368, 429 (1979) (Blackmun, J., concurring in part and dissenting in part) (citation omitted); *see also Nebraska Press*

Ass'n, 427 U.S. at 587 (Brennan, J., concurring) ("[s]ecrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges"). A responsible press thus has "always been regarded as the handmaiden of effective judicial administration, especially in the criminal field." *Sheppard*, 384 U.S. at 350.

Beyond its critical role in the functioning of the judicial system itself, the right of access also furthers other important interests: It provides an outlet for community hostility, educates the public about the judicial process, and fosters an informed electorate. *E.g.*, *Richmond Newspapers, Inc.*, 448 U.S. at 592; *Globe Newspapers, Inc.*, 457 U.S. at 604-05; *Press-Enterprise Co.*, 464 U.S. at 508-09.

Declaring a presumption of prejudice arising from pretrial press coverage of a prosecution to be irrebuttable would inevitably undermine the many significant public benefits provided by open access to the criminal justice system. This alone is sufficient reason to reject petitioner's request that a presumption of prejudice be declared irrebuttable.

II. A "Presumption of Prejudice" Should Not Be Based Upon the Level of Press Coverage Alone.

The Fifth Circuit Court of Appeals held that petitioner Skilling "demonstrated sufficient inflammatory and pervasive coverage to raise a presumption of prejudice," Pet. App. 57a, but notably found that "the prejudice came from *more than just*

pretrial media publicity," *id.* at 58a (emphasis added). Rather, the Court of Appeals based its finding of a presumption of prejudice upon a number of extraordinary factors beyond the press coverage in Houston, including the large percentage of individuals in the community who were directly affected economically by the alleged crime, *id.*, and a guilty plea entered by another defendant shortly before Mr. Skilling's trial was to begin, *id.* at 57a. The "non-media prejudice" in this case renders Mr. Skilling's claim of pretrial prejudice highly *atypical*.

While taking no position on whether the confluence of circumstances in this case is sufficient to sustain the Court of Appeals' finding of a rebuttable presumption of prejudice,[2] this Court's review of that finding should take care to underscore that such a presumption may not properly be based on a high level of press coverage *alone*.

A. The Impact of Press Coverage on Potential Jurors Is Difficult to Assess and Regularly Overstated.

A high level of press interest in a case, without more, should never be sufficient to presume the

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[2] The finding of a presumption of prejudice by the Court of Appeals was set against the legal backdrop of binding and well-settled Circuit precedent holding that: the "presumption is rebuttable." Pet. App. 55a. *See United States v. Harrelson*, 754 F.2d 1153, 1159 (5th Cir. 1985) (presumption is rebuttable); *United States v. Parker*, 877 F.2d 327, 331 (5th Cir. 1989) (same); *United States v. Smith-Bowman*, 76 F.3d 634, 637 (5th Cir. 1996) (same); *United States v. Lispcomb*, 299 F.3d 303, 337-49 (5th Cir. 2002) (same).

existence of prejudice to a defendant's fair trial right because it is extraordinarily difficult to assess the impact of publicity, and too easy to assume adverse consequences that often do not exist. This Court previously has recognized the speculative nature of the impact of pretrial publicity on a fair trial. *E.g.*, *Nebraska Press Ass'n*, 427 U.S. at 565 ("pretrial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial"); *see also id.* at 599-600 (difficult to predict "the scope of the audience that would be exposed to the [allegedly prejudicial] information, or the impact . . . the information would have on that audience") (Brennan, J., concurring).

In assessing the potential of press coverage to cause prejudice, moreover, even exposure to prejudicial information does not "*alone* presumptively deprive[] the defendant of due process." *Murphy v. Florida*, 421 U.S. 794, 799 (1975) (emphasis added). Rather, courts "must distinguish between mere familiarity with [the defendant] and his past and an actual predisposition against him . . . ." *Id.* at 800. *Accord Beck v. Washington*, 369 U.S. 541, 557-58 (1962) (although "trial jury had been exposed to some of the [inculpatory] publicity" about defendant, claim of jury bias was still "'a matter of speculation [rather than] a demonstrable reality'") (citation omitted); *Reynolds v. United States*, 98 U.S. 145, 155-56 (1878) ("every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any

one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion").

In highly publicized cases "'[t]he relevant question is not whether the community remembered the case, but whether the jurors . . . had such fixed opinions that they could not judge impartially the guilt of the defendant.'" *Mu'Min v. Virginia*, 500 U.S. 415, 430 (1991) (quoting *Patton v. Yount*, 467 U.S. 1025, 1035 (1984)). As the Court instructed in *Irvin v. Dowd*, 366 U.S. 717, 723 (1961):

> To hold that the mere existence of any pre-conceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

See also United States v. Haldeman, 559 F.2d 31, 61-62 (D.C. Cir. 1976) (only press coverage specifically questioning the defendant's guilt or innocence is directly relevant to the issue of potential prejudice); *United States v. Campa*, 459 F.3d 1121, 1144 (11th Cir. 2006) (prejudice "cannot be presumed from pretrial publicity regarding peripheral matters that do not relate directly to the defendant's guilt for the crime charged").

Press Amici do not intend to disparage all claims of prejudice regardless of their factual predicate, but claims based solely on pretrial news

reporting are regularly overstated and virtually impossible to assess before *voir dire* occurs. Experience has shown, time and again, the exaggerated nature of claims bemoaning the inability to seat a jury unaffected by press coverage, even in the highest profile cases. As the Fourth Circuit Court of Appeals in 1989 cogently summarized nearly two decades of experience with highly publicized criminal prosecutions after this Court's ruling in *Sheppard v. Maxwell*:

> Cases such as those involving the Watergate defendants, the Abscam defendants, and more recently, John DeLorean, all characterized by massive pretrial media reportage and commentary, nevertheless proceeded to trial with juries which—remarkably in the eyes of many—were satisfactorily disclosed to have been unaffected (indeed, in some instances, blissfully unaware of or untouched) by that publicity.

In re Charlotte Observer (United States v. Bakker), 882 F.2d 850, 855-56 (4th Cir. 1989). *See also CBS, Inc. v. U.S. District Court (United States v. DeLorean*) 729 F.2d 1174, 1179 (9th Cir. 1984) ("even when exposed to heavy and widespread publicity many, if not most, potential jurors are untainted by press coverage").

For example, in the prosecution of Attorney General John Mitchell and President Nixon's top aides for their roles in the Watergate conspiracy, the Court of Appeals for the District of Columbia found

defendants' pretrial claims that it would be impossible to seat a jury untainted by press coverage to have been flatly refuted during *voir dire*: "Most of the venire simply did not pay an inordinate amount of attention to Watergate. This may come as a surprise to lawyers and judges, but it is simply a fact of life that matters which interest them may be less fascinating to the public generally." *Haldeman*, 559 F.2d at 62 n.37.

The Second Circuit reached a similar conclusion during the highly publicized prosecution of several members of Congress caught in the federal "Abscam" sting operation, in which FBI agents posed as wealthy Arab businessmen offering bribes for legislative favors. *In re NBC*, 635 F.2d 945 (2d Cir. 1980). Despite the "explosion of publicity in the national and local media" and "contrary to the expectations of [the criminal defendants] . . . , only about one-half of the prospective jurors indicated that they had ever heard of Abscam" and in the large venire called "only eight or ten had 'anything more than a most generalized kind of recollection what it was all about.'" *Id*. at 947-48 (citation omitted). *See also United States v. McVeigh*, 153 F.3d 1166, 1180-81, 1184 n.6 (10th Cir. 1998) (more than one half of potential jurors were unaware of Timothy McVeigh's purported confession to the Oklahoma City bombing despite ubiquitous press coverage).

Courts have also regularly called into question the reliability of the often methodologically suspect and speculative nature of polling data typically offered to demonstrate presumed prejudice within a

general jury pool. The Eighth Circuit Court of Appeals, for example "has expressed doubts about the relevance of such polls when reviewing rejected change-of-venue motions" and has taken note that "[a]t least three other circuits have declined to rely on public opinion polls when reviewing denials of motions for change of venue in criminal cases." *United States v. Rodriguez*, 581 F.3d 775, 785-86 (8th Cir. 2009). *See also Campa*, 459 F.3d at 1146 (finding poll "too ambiguous to be reliable"); *Haldeman*, 559 F.2d at 64 n.43 ("public opinion poll data . . . is open to a variety of errors"); *South Carolina v. Truesdale*, 296 S.E.2d 528, 531 (S.C. 1982) ("profound difficulty lies in the standards of proof applied" to polls offered to demonstrate prejudice).[3]

The observation of the Court of Appeals for the District of Columbia is particularly apt regarding the lack of utility of such polling data:

> It is our judgment that in determining whether a fair and impartial jury could be empanelled the trial court did not err in relying less heavily on a poll taken in private by private pollsters and paid for by one side than on a recorded, comprehensive

[3] *Accord, e.g.*, *United States v. Malmay,* 671 F.2d 869, 875-76 (5th Cir. 1982); *Bundy v. Dugger*, 850 F.2d 1402, 1425 (11th Cir. 1988); *United States v. Mandel*, 431 F. Supp. 90, 100-01 (D. Md. 1977); *United States v. Means*, 409 F. Supp. 115, 116 (D. N.D. 1976) (contrary to testimony of survey expert, "jurors [can] recognize and discipline their prejudices, and make factual judgments from the evidence before them").

> *voir dire* examination conducted by the judge in the presence of all parties and their counsel pursuant to procedures, practices and principles developed by the common law since the reign of Henry II.

Haldeman, 559 F.2d at 64 n.43. *See also* Kevin F. O'Malley, FEDERAL JURY PRACTICE & INSTRUCTIONS—*Jury Trial* §2:2 (6th ed. 2009) (opinion "polls, for the most part, have not proven to be convincing given that a court can ferret out bias through effective *voir dire*").

Particularly in large metropolitan areas, widespread press coverage should never be sufficient to presume prejudice. Even in a small community pervasive publicity does not necessarily prevent the seating of an impartial jury, but this Court has recognized that the size of the jury pool is self-evidently a significant factor in the presumed prejudice analysis, and indeed may be dispositive in some cases. *Compare Irvin*, 366 U.S. at 725 (rural county where murder defendant was tried had 30,000 persons and criminal trial "had become the cause célèbre of this small community") *with Mu'Min*, 500 U.S. at 429 (observing that suburban county in which murder defendant was tried "is a part of the metropolitan Washington [D.C.] statistical area, which has a population of over 3 million, and in which, unfortunately, hundreds of murders are committed each year"). *See also, e.g.*, *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1044 (1991) (no likelihood of prejudice where "potential

jury venire would be drawn" from a pool of 600,000 persons and trial not imminent).

Experience convincingly establishes that claims of potential prejudice based on press coverage are regularly overstated, and the simple volume of reporting provides an unreliable predictor of a court's ability to seat an impartial jury. The finding of a presumption of prejudice must be limited to those extraordinary cases where a confluence of factors beyond adverse pretrial publicity combine to render highly suspect the impartiality of an overwhelming majority of the potential jury pool.

B. This Court's Past Findings of Presumed Prejudice Have Rested on More Than the Volume and Tenor of Pretrial Press Coverage.

Precedent of this Court supports the proposition that a presumption of prejudice should not be based solely upon extensive news reporting about a criminal proceeding. As recognized in *Nebraska Press Association*, 427 U.S. at 554, "pretrial publicity[—]even pervasive, adverse publicity[—] does not inevitably lead to an unfair trial." In *Gentile*, 501 U.S. at 1054-55, the Court similarly instructed that "[o]nly the occasional case presents a danger of prejudice from pretrial publicity," and pointed to empirical research indicating that "in the few instances when jurors have been exposed to extensive and prejudicial publicity, they are able to disregard it and base their verdict on the evidence presented in court." *See also Irvin*, 366 U.S. at 722 (jurors are not required to be "totally ignorant of the

facts and issues involved . . . and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case").

Understanding that even pervasive publicity is not inconsistent with a fair trial, this Court's decisions addressing the fair trial right typically have found prejudice to exist when factors *beyond* pretrial publicity serve to inflame the jury pool or interfere with the decorum of a trial, such as the circus-like atmosphere infecting the trial proceedings in *Estes v. Texas*, 381 U.S. 532 (1965) and *Sheppard v. Maxwell*, 384 U.S. 333 (1966). In those cases the Court found that unusual circumstances attendant in part to the broadcasting of the trials during the relative infancy of the television age "were entirely lacking in the solemnity and sobriety to which a defendant is entitled." *Murphy*, 421 U.S. at 799.

In *Sheppard*, for example, "bedlam reigned at the courthouse during the trial and newsman took over practically the entire courtroom, hounding most of the participants in the trial." 384 U.S. at 355; *see also id.* at 345 (noting that the "court permitted photographers to take pictures of the jury in the box" and "pictures of the jury appeared over 40 times in the Cleveland papers alone"). Similarly, in *Estes*,

> at least 12 cameramen were engaged in the courtroom throughout the [pretrial] hearing taking motion and still pictures and televising the proceedings. Cables and wires were snaked across the courtroom floor, three microphones were on the

> judge's bench and others were beamed at the jury box and the counsel table.

381 U.S. at 536; *id.* at 551 ("four of the jurors selected had seen all or part of those [pretrial] broadcasts").[4]

In the few cases where prejudice has been presumed based upon pretrial publicity, the finding arose from the extreme nature of the content of the coverage, not on its volume alone, and from the very large percentage of the jury pool exposed to the prejudicial reports. *Rideau v. Louisiana* and *Irvin v. Dowd*, for example, involved the most extremely inflammatory and inculpatory publicity, including the defendants' confession to a particularly

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[4] Of course, and as the Court predicted, the technological advances in the broadcasting of trials have rendered the presence of courtroom cameras unobtrusive and unremarkable. *See Estes*, 381 U.S. at 595 (Harlan, J., concurring) ("[T]he day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process."); *Chandler v. Florida*, 449 U.S. 560, 582-83 (1981) (unanimously holding that televised proceedings do not amount to a *per se* violation of a defendant's Sixth Amendment rights); *accord Hollingsworth v. Perry*, No. 09A648, 558 U.S. ---, 2010 WL 105264, at *8 (Jan. 13, 2010) (*per curiam*) ("arguments in favor of developing procedures and rules to allow broadcast of certain cases have considerable merit . . . ."). Indeed, all fifty states now allow cameras in their courtrooms in at least some types of judicial proceedings, and thirty-seven states allow cameras in criminal proceedings. *See* National Center for State Courts, *Summary of TV Cameras in the State Courts* (Aug. 1, 2001), http://www.ncsconline.org/WC/Publications/KIS_CameraPub.pdf.

reprehensible crime. *See Rideau v. Louisiana*, 373 U.S. 723, 724 (1963) (finding presumption of prejudice because two-thirds of a community of 150,000 had seen and heard the defendant's televised confession to "kidnapping and murder");[5] *Irvin*, 366 U.S. at 728 (finding presumption of prejudice where pretrial reports of defendant's confession to six murders and twenty-four burglaries was publicized extensively in county of 30,000 and two-thirds of jurors seated "had an opinion that petitioner was guilty and were familiar with the material facts").

Courts throughout the country have construed this Court's decisions addressing presumed prejudice to require either a "circus-like atmosphere" infecting the trial itself (*Estes*, *Sheppard*), or extremely inflammatory and prejudicial publicity (*e.g.*, a defendant's inadmissible confession to a particularly violent crime) to which essentially an entire small community has been exposed (*Rideau*). *See, e.g.*, *United States v. Lawson*, 535 F.3d 434, 441 (6th Cir. 2008) (finding presumption of prejudice was inappropriate "since a circus-like atmosphere did not pervade the courthouse and surrounding

[5] The jailhouse confession in *Rideau v. Louisiana* came in response to an interrogation by the sheriff and was broadcast on three consecutive days on local television before audiences of 24,000, 53,000 and 20,000, respectively. 373 U.S. at 724. Three of the jurors seated had seen the confession and two jurors were deputy sheriffs. *Id.* at 725. The Court characterized these events as little more than "kangaroo court proceedings," and determined that the jury pool "had been exposed repeatedly and in depth to the spectacle of Rideau personally confessing in detail to the crimes." *Id.* at 726.

community"); *Stafford v. Saffle*, 34 F.3d 1557, 1566 (10th Cir. 1994) (limiting presumed prejudice finding to circumstances characterized by "a circus atmosphere or a lynch mob mentality, or that a suppressed confession was broadcasted, or of any other community-wide rush to judgment"); *Campa*, 459 F.3d at 1150 ("[t]he rare instances in which the Supreme Court has presumed prejudice [have involved] 'kangaroo court proceedings' in combination with the 'circus atmosphere' generated by sensational pretrial publicity") (citation omitted); *Haldeman*, 559 F.2d at 61 n.32 (this Court's pretrial publicity decisions characterized by "preventable intrusions on the trial process" or a "pattern of deep and bitter prejudice shown to be present throughout the community") (internal quotation marks and citations omitted).

The highly unusual circumstances where this Court has found a presumption of prejudice bear little resemblance to even the most newsworthy criminal proceedings in recent decades. As the Tenth Circuit Court of Appeals observed in the criminal prosecution of Timothy McVeigh for the 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City, this Court "has not found a single case of presumed prejudice in this country since the watershed case of *Sheppard* [in 1966]." *McVeigh*, 153 F.3d at 1182. *Accord, e.g.*, *Bundy,* 850 F.2d at 1424 (under Court's decisions, the "principle [of presumed prejudice] is rarely applicable and reserved for extreme situations"); *United States v. Chagra*, 669 F.2d 241, 251 (5th Cir. 1982) (holding same).

As this history establishes, a presumption of prejudice in a criminal prosecution requires more than simply a large volume of press coverage—even inflammatory press coverage—and the Court should reaffirm this point in this case.[6]

III. Given the Effective Remedial Tools Available, There is No Justification for an Irrefutable Presumption of Prejudice.

Even when circumstances create a presumption that the jury pool has been prejudiced, a trial judge has adequate tools to ensure a fair trial in most cases, without requiring a change in venue. A variety of measures are available to a trial judge "to blunt the impact of pretrial publicity," and "the measures a judge takes or fails to take to mitigate the effects of pretrial publicity" can "determine whether the defendant receives a [fair] trial." *Nebraska Press Ass'n*, 427 U.S. at 555. Among the available measures, a trial court can: (1) undertake extensive *voir dire* examination of prospective jurors;

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[6] Petitioner construes the Court's precedents to mandate a "per se transfer/reversal rule" where a presumption of prejudice arises—without regard to the efficacy of *voir dire* in the circumstances of the case. Pet. Br. 32. However, that interpretation has properly been rejected as inconsistent with the actual holding of *Rideau* and subsequent decisions. *See Coleman v. Kemp*, 778 F.2d 1487, 1541 n.25 (11th Cir. 1985) ("We do not read *Rideau* to imply that the voir dire cannot rebut a presumption of prejudice."); *Mayola v. Alabama,* 623 F.2d 992, 1000 (5th Cir. 1980) ("*Rideau* did not go so far as to indicate that voir dire had no role in the paradigm of presumptive prejudice").

(2) enlarge the size of the jury venire; (3) increase the number of peremptory challenges; and (4) use emphatic and clear instructions on the sworn duty of each juror to decide the issues only on the evidence presented in open court. *See Sheppard*, 384 U.S. at 362-63 (cataloging a panoply of prophylactic measures available to judges to prevent unfair prejudice); *Nebraska Press Ass'n*, 427 U.S. at 552-55 (same); *accord People v. Botham*, 629 P.2d 589, 596 (Colo. 1981).

Even in cases that have garnered "massive" or "pervasive" press attention before trial, measures other than a change of venue have often proven sufficient to protect the defendant's fair trial rights. Because effective remedial measures are typically available, a pretrial presumption of prejudice should always be rebuttable.

A. *Voir Dire* Can Effectively Safeguard Against Juror Prejudice, Even in Cases of Pervasive Pretrial Publicity.

Courts have long found that a thorough *voir dire* examination of potential jurors can effectively eliminate from jury service those so affected by exposure to pretrial publicity that they cannot fairly decide issues of guilt or innocence. As three concurring Justices in *Nebraska Press Association* explained, even where highly prejudicial information is published in advance of a trial, "the Sixth Amendment rights of the accused may still be adequately protected" through the use of *voir dire* probing "fully into the effect of publicity." 427 U.S.

at 601-02 (Brennan, J., concurring).[7] The Court made the same point in *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981), noting the obligation of a trial judge to conduct "an adequate *voir dire*" in order to "remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence." *See also Mu'Min*, 500 U.S. at 431 (*voir dire* "serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges"); *accord In re Charlotte Observer*, 882 F.2d at 856 ("*voir dire* can serve in almost all cases as a reliable protection against juror bias however induced").

Particularly when a criminal trial is conducted in a large metropolitan area like New York City, Los

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[7] Justices Brennan, Stewart and Marshall gave further direction on how such *voir dire* should be conducted:

> Particularly in cases of extensive publicity, defense counsel should be accorded more latitude in personally asking or tendering searching questions that might root out indications of bias, both to facilitate intelligent exercise of peremptory challenges and to help uncover factors that would dictate disqualification for cause. Indeed, it may sometimes be necessary to question on *voir dire* prospective jurors individually or in small groups, both to maximize the likelihood that members of the venire will respond honestly to questions concerning bias, and to avoid contaminating unbiased members of the venire when other members disclose prior knowledge of prejudicial information.

Nebraska Press Ass'n, 427 U.S. at 602.

Angeles, Miami, or Houston,[8] it is almost inconceivable that a court cannot find twelve jurors who either have not been exposed to a significant amount of pretrial publicity concerning the case[9], or who cannot otherwise faithfully discharge their sworn duty to render an impartial verdict based exclusively on the evidence presented in court. As the Ninth Circuit Court of Appeals has observed:

> [I]n a large metropolitan area, prejudicial publicity is less likely to endanger the defendant's right to a fair trial. The size and heterogeneity of such communities make it unlikely that even the most sensational case will become a "*cause célèbre*" where "[t]he whole community . . . becomes interested in all the morbid details." Moreover, in a populous metropolitan area, the pool of potential jurors is so large that even in cases attracting extensive and inflammatory publicity, it is usually possible to find an adequate number of untainted jurors.

CBS, Inc., 729 F.2d at 1181 (citations omitted) (collecting authorities holding same). *See, e.g.*, *People v. Manson*, 132 Cal. Rptr. 265, 318 (1976) ("[a]

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[8] The petitioner here was tried in the Houston Division of the Southern District of Texas, which is comprised of 13 counties and in 2004 had a population of approximately 4.5 million persons. Resp. Br. 32.

[9] In the case at bar, thirty-seven of forty-three potential jurors questioned individually stated that they had limited exposure to media coverage of Enron. Resp. Br. 12.

metropolitan setting with its diverse population tends to blunt the penetrating effect of publicity."); *Campa*, 459 F.3d at 1154 ("Miami-Dade County is a widely diverse, multi-racial community of more than two million people. Nothing in the trial record suggests that twelve fair and impartial jurors could not be assembled by the trial judge . . . ."); *United States v. De La Vega*, 913 F.2d 861, 865 (11th Cir. 1990) (impact of more than three hundred newspaper articles did not create a presumption of prejudice "where the relevant community contained approximately 1.8 million persons").

In short, even when a general venire has been exposed to "pervasive" and even "inflammatory" pretrial publicity, experience establishes that *voir dire* (among other prophylactic and curative measures) is almost always a constitutionally adequate means to seat an impartial jury. Rather than making a presumption of prejudice irrebuttable and mandating a change of venue, a decision on the actual need for venue change should be based upon the information gleaned from the *voir dire* process itself. *See*, *e.g.*, *Nebraska Press Ass'n*, 427 U.S. at 603 (Brennan, J., concurring) ("*voir dire* may indicate the need to grant a brief continuance or to grant a change of venue"); *United States v. Yousef*, 327 F.3d 56, 155 (2d Cir. 2003) ("the key to determining the appropriateness of a change of venue is a searching *voir dire* of the members of the jury pool."); *accord* 1 National Jury Project, Inc., JURYWORK SYSTEMATIC TECHNIQUES §7:38 (2009) ("common practice [is] for trial judges to wait until

jury selection is complete before deciding whether a change of venue is necessary").[10]

B. Experience Demonstrates That Even Extensive Media Coverage Need Not Prevent a Fair Trial.

This nation's experience with "notorious" and "high-profile" criminal proceedings (regularly dubbed "trial of the century" cases) demonstrates that pervasive pretrial publicity does not prevent a criminal defendant from obtaining a fair trial. The *presumption* of prejudice can be, and has been, rebutted time and again.

Shortly after our nation was founded, for example, one of the most notorious trials in our history took place amidst a firestorm of press coverage and intense public debate: The publicity surrounding the trial of Aaron Burr on charges of treason caused the defendant to complain that "the public mind ha[s] been so filled with prejudice

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[10] Indeed, given the nature of nationally distributed news coverage, a rule mandating change of venue whenever presumed prejudice is found might render it all but impossible for a defendant like a Timothy McVeigh, Nidal Hasan, or Michael Jackson to obtain a trial anywhere. *See, e.g.*, *Mu'Min*, 500 U.S. at 450 (Kennedy, J., dissenting) (a rule disqualifying a juror due to exposure to publicity would mean "suspects in many celebrated cases might be able to claim virtual immunity from trial"); *Campa*, 459 F.3d at 1148 n.243 (prejudice "spread through multiple forms of media . . . would not stop at district lines"); *Calley v. Callaway*, 519 F.2d 184, 210 (5th Cir. 1975) (disqualifying from jury service those "who have heard about an alleged crime" could mean "truly heinous or notorious acts will go unpunished").

against him that there was some difficulty in finding impartial jurors." *United States v. Burr*, 25 F. Cas. 49, 49 (Cir. Ct. D. Va. 1807). *See also Nebraska Press Ass'n*, 427 U.S. at 548 ("Few people in the area of Virginia from which jurors were drawn had not formed some opinions concerning Mr. Burr or the case, from newspaper accounts and heightened discussion both private and public."). The then-sitting President, Thomas Jefferson, publicly declared prior to the trial that Burr was guilty. Nevertheless, after Chief Justice John Marshall's "careful *voir dire* inquiry into the matter of possible bias," *id.*, the jury acquitted.

Similarly, in a more recent "trial of the century," *People v. O.J. Simpson*, Case No. BA097211 (L.A. Super. Ct. filed Sept 27, 1994), a defendant accused of brutally murdering a wife and her purported paramour was acquitted notwithstanding a level of press coverage arguably not seen before or since. *See* Thomas L. Jones, *The O.J. Simpson Murder Trial: Prologue*, TRUTV, http://www.trutv.com/library/crime/notorious_murders/famous/simpson/index_1.html ("2000 reporters covered the trial. . . . There were over 80 miles of cable servicing 19 television stations and eight radio stations. 23 newspaper and magazines were represented" and an estimated "142 million people listened on radio and watched television as the verdict was delivered").

And in other high-profile trials of national celebrities, the late "King of Pop" Michael Jackson was acquitted of molesting a young boy, and "Baretta" star Robert Blake was acquitted of

murdering his wife, despite non-stop press coverage of those crimes.[11]

Nor does pretrial publicity of specific inculpatory information automatically defeat a defendant's fair trial rights within a jurisdiction, given the remedial measures available to the trial court. In 1984, for example, celebrity car manufacturer John DeLorean was acquitted on drug conspiracy charges, despite the repeated broadcast before trial of a videotape showing DeLorean discussing the sale of millions of dollars worth of cocaine with undercover federal agents. *See CBS, Inc.,* 729 F.2d at 1176 (vacating prior restraint order prohibiting television network from broadcasting the government's surveillance tapes). In the widely followed prosecution, the trial judge in the DeLorean case excoriated the press for publicly assessing before trial the credibility and background of an alleged government informant and witness:

> It is obvious that these articles, which were based upon unproven allegations contained in documents filed with this court prior to

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[11] *See* Dan Glaister & David Teather, *Jackson Found Not Guilty: Singer Cleared of Molesting Child*, THE GUARDIAN (LONDON), June 14, 2005, at 1 (reporting statement from Jackson jury that it felt "the weight of the world's eyes upon us" and it "thoroughly and meticulously studied the testimony, evidence and rules of procedure presented in this court" in reaching verdict); Greg Risling, *Actor Robert Blake Acquitted of Murdering His Wife*, THE ASSOCIATED PRESS, March 17, 2005 ("the state simply didn't make its case, jurors said" in the Blake prosecution, despite fact that case "provided endless fodder for the tabloids and cable networks").

> its sealing order, both prejudice defendant DeLorean and compromise the integrity of the entire proceeding by "trying the action in the newspapers" on the basis of what may ultimately be false or groundless allegations.

United States v. DeLorean, 561 F. Supp. 797, 802 (C.D. Cal. 1983). And yet, despite the trial judge's speculation regarding the prejudice to Mr. DeLorean, the defendant was subsequently acquitted.[12]

Most recently, two prominent hedge fund managers for the trading company Bear Stearns went to trial following extensive publicity characterizing their prosecution as an effort to hold individuals accountable for the massive collapse of the sub-prime mortgage market that affected millions of investors. *See* Patricia Hurtado, *et al.*, *Bear Managers' Acquittal May Hamper U.S. Fraud Prosecutions*, BLOOMBERG NEWS, Nov. 11, 2009. Defendants Ralph Cioffi and Matthew Tenon were acquitted, despite the widespread publicity blaming them for a role in the collapse of the economy. *See* Patricia Hurtado, *et al.*, *Ex-Bear Fund Managers Not Guilty of Subprime Fraud*, BLOOMBERG NEWS, Nov. 10, 2009.

Other criminal defendants whose alleged crimes were the subject of massive media coverage in the local venues but who were nevertheless acquitted by

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[12] The broad docket sealing order issued by the *DeLorean* trial court was vacated by writ of mandamus. *Associated Press v. U.S. District Court*, 705 F.2d 1143, 1147 (9th Cir. 1983).

juries include Angela Davis, an African-American activist accused of kidnapping and murdering a judge. *See* Earl Caldwell, *Angela Davis Acquitted on All Charges*, N.Y. TIMES, June 5, 1972. *See also, e.g.*, *Puff Daddy Acquitted; Rap Star, Bodyguard Found Not Guilty; Barrow Convicted on Lesser Charges*, ABC NEWS, March 17, 2001, http://abcnews.go.com/Entertainment/story?id=108138 (Shawn "P. Diddy" Combs, a rap music recording artist, acquitted of gun possession and bribery charges in relation to a nightclub shooting in December 1999); Paul Feldman, *All 'Twilight Zone' Figures Acquitted; Jurors Clear Director Landis and 4 Others of Manslaughter Charges*, L.A. TIMES , May 30, 1987 (movie director John Landis, acquitted of charges of manslaughter in connection with the 1982 deaths of three actors killed during the making of the movie *Twilight Zone*, even though Landis acknowledged that child labor laws were violated).

An acquittal on some counts or with respect to certain defendants, as happened in this case,[13] also indicates that a jury discharged its responsibilities impartially. *See, e.g.*, *United States v. Rugiero*, 20 F.3d 1387, 1389 (6th Cir. 1994) (jury's acquittal on some counts shows it was not influenced by exposure to prejudicial television reports); *Haldeman*, 559 F.2d at 60 n.28 (that jury acquitted one defendant "is some indication that the voir dire examination succeeded in eliminating any unfairness that might otherwise have resulted from the pretrial

[13] Here, Mr. Skilling was acquitted on nine of the counts with which he was charged. Resp. Br. 13.

publicity").[14] Again, the examples of such outcomes in high profile cases are legion. In the 1970s, for example, New York Congressman Mario Biaggi and New York Democratic County Executive Committee Chairman Meade Esposito were convicted, *inter alia*, of accepting gratuities for official acts and violating the Travel Act, but were acquitted of more serious charges that they had conspired to defraud the federal government and had taken bribes. *See United States v. Biaggi*, 853 F.2d 89 (2d Cir. 1988). Other high-profile defendants who were acquitted of some or all charges despite massive pretrial publicity included Klaus von Bulow,[15] Imelda Marcos,[16]

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[14] *Accord United States v. Elder*, 90 F.3d 1110, 1120 (6th Cir. 1996) (holding jury exposure to highly publicized evidence of murder charges against one defendant for the killing of four children did not require trial court's severance of defendants' trials, as "[n]one of the defendants who were indicted on multiple counts were convicted for all the counts for which they were indicted, and the verdicts reflected an individualized determination of each defendant's guilt"); *United States v. Smith*, 918 F.2d 1551, 1560 (11th Cir. 1990) (observing "convictions invariably are sustained when it may be inferred from the verdict that the jury meticulously sifted the evidence, by acquitting on particular counts indicating an individual assessment of the guilt of each defendant") (internal quotation marks and citations omitted).

[15] Tom Stites, *'5 Years of Worry' Over as Jury Acquits Von Bulow*, CHICAGO TRIBUNE, June 11, 1985.

[16] Craig Wolff, *The Marcos Verdict; Marcos Is Cleared of All Charges In Racketeering and Fraud Case*, N.Y. TIMES, July 3, 1990.

accused axe murderess Lizzie Borden,[17] and, ultimately, the defendant in *Sheppard v. Maxwell*.[18]

Even when criminal defendants in notorious high-profile cases have been convicted, reviewing courts have found that the use of *voir dire* and other curative techniques were effective in ensuring those defendants a fair trial, free from juror bias or actual prejudice. In one of the most widely publicized criminal cases in this nation's history, for example, Timothy McVeigh was accused of bombing the federal building in Oklahoma City. Charged with the worst act of domestic terrorism ever committed on U.S. soil, media coverage of the arrest and prosecution of McVeigh was practically ubiquitous. *See McVeigh*, 153 F.3d at 1179-81.

Although the trial was moved from Oklahoma City to Denver, the case received pervasive "saturation" press coverage in the days and weeks leading up to the trial. Less than a month before trial, that reporting included nationwide publication, on multiple occasions through scores of media

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[17] Judge Robert Sullivan, GOODBYE LIZZIE BORDEN, 193 (1974).

[18] Following the reversal of his conviction by this Court, Sam Sheppard was retried and acquitted in a trial employing safeguards that his first trial had lacked. *Nebraska Press Ass'n*, 427 U.S. at 553-54. Sheppard's acquittal came despite the massive publicity that surrounded his first trial, the reversal of his conviction and his subsequent retrial. *See Sheppard*, 384 U.S. at 356 ("'Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals.'") (citation omitted).

outlets, of a purported confession by McVeigh that was allegedly leaked by an investigator within the defense team. *See id.* at 1180. In these press accounts, McVeigh was reported to have methodically timed his attack on the federal building "in order to obtain a higher 'body count.'" *Id.* (citation omitted). Despite the extensive reporting of McVeigh's own highly inculpatory statements, the trial court denied a defense motion to postpone the trial for a year:

> There is no reason to believe that fair-minded persons would be so influenced by anything contained in this recent publicity that they would not be ready, willing and able to perform the duty to follow the law and decide according to the evidence presented in a vigorously contested trial.
>
> A salient virtue of a free people in an open society is a healthy skepticism about what they are told. We have a strong tradition of civic responsibility and the great majority of our citizens consistently display a respect for fair play in all aspects of their lives. The extensive voir dire to be conducted in this case will determine whether the persons summoned from 23 counties in Colorado include at least 18 people who can serve as jurors and alternates in the forthcoming trial. I have full confidence that a fair minded jury can and will be empanelled and that those

> selected will return a just verdict based on the law and evidence presented to them.

United States v. McVeigh, No. 96-CR-68-M, 1997 WL 117369, at *3 (D. Colo. Mar. 17, 1997).[19]

After McVeigh was convicted and sentenced to death, he appealed his conviction on grounds that the saturation pretrial reporting about the confession presumptively prejudiced his right to a fair trial. The Tenth Circuit rejected his arguments, finding that even nationwide publication of a purported *confession* on the *eve of trial* had not prejudiced his fair trial right. *See McVeigh*, 153 F.3d at 1183-84.[20] The court concluded that the prophylactic measures of *voir dire* and jury admonitions had been sufficient to protect the defendant's fair trial rights: "Questioning by the court and the parties [during *voir dire*] goes a long way towards ensuring that any prejudice, no matter how well hidden, will be revealed . . . . [W]e give due deference to jurors' declarations of impartiality and the trial court's credibility determination that those declarations are sincere." *Id*. at 1184.

Again, in *Mu'Min v. Virginia*, 500 U.S. 415 (1992), the facts of the crime and of the pretrial

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[19] The Tenth Circuit rejected McVeigh's Petition for a Writ of Prohibition, on grounds that it was premature because *voir dire* had not yet begun. *United States v. McVeigh,* No. 97-1117, 1997 WL 154760 (10th Cir. Mar. 28, 1997) (*per curiam*).

[20] Forty out of the ninety-nine venirepersons, and four of the seated jurors reported having heard about McVeigh's alleged confession. *McVeigh*, 153 F.3d at 1181, 1184 n.6.

publicity were both of an inherently inflammatory nature. Mu'Min was a prisoner in the Virginia prison system who, while on a work detail away from the prison, escaped during a lunch break and travelled on foot to a nearby shopping center, where he used a self-made knife to rape, rob, and murder a local shopkeeper. *Id*. at 418. In support of his unsuccessful motion for a change of venue, Mu'Min tendered 47 newspaper articles that related to the murder. *Id*. The articles contained details of Mu'Min's prior criminal record, including his prior murder conviction, six parole rejections, and alleged prison infractions. *Id*. Moreover,

> [t]he circumstances of the murder generated intense local interest . . . . Most of the stories were carried on the front pages of local papers, and almost all of them were extremely prejudicial to Mu'Min. Readers of local papers learned that [the murder victim] had been discovered in a pool of blood, with her clothes pulled off and semen on her body. In what was described as a particularly "macabre" side of the story, a local paper reported that, after raping and murdering Nopwasky, Mu'Min returned to the work site to share lunch with other members of the prison detail.
>
> Readers also learned that Mu'Min had confessed to the crime. Under the banner headlines "Murderer Confesses to Killing Woman," and "Inmate Said to Admit to

> Killing," the press [. . . reported] that the State had already secured Mu'Min's acknowledgement of responsibility for the murder . . . . [A]ccording to these reports, Mu'Min . . . confessed to having stabbed Nopwasky twice with a steel spike, once in the neck and once in the chest . . . .

Id. at 435-36 (Marshall, J., dissenting) (citations omitted). Notably, of the twelve jurors who decided Mu'Min's case, eight acknowledged that they had read or heard something about the case. *Id*. at 421.

Nevertheless, this Court was satisfied that the trial court's *voir dire*—including excusing one juror for cause and another *sua sponte* when she equivocated as to her impartiality—was adequate to protect the defendant's rights to a fair and impartial jury. *Id*. at 431. The Court found that Mu'Min's request to *voir dire* the jurors concerning the content of what they had read or seen was not constitutionally required, because

> [n]one of those eventually seated stated that he had formed an opinion or gave any indication that he was biased or prejudiced against the defendant. All swore that they could enter the jury box with an open mind and wait until the entire case was presented before reaching a conclusion as to guilt or innocence.

Id. at 421.

At bottom, overwhelming precedent—from this Court and the Courts of Appeals—demonstrates the

efficacy of properly conducted *voir dire* in protecting the fair trial right in even the most notorious cases: "[T]he method we have relied on since the beginning, *e.g., United States v. Burr*, usually identifies bias." *Patton*, 467 U.S. at 1038. Given the unreliability of claims of prejudice, the availability of myriad means available to trial court judges to protect against juror bias, and the significant public damage caused by increased secrecy, petitioner's request to declare a presumption of prejudice irrebuttable should be rejected.

CONCLUSION

For each and all the foregoing reasons, the Court should reject petitioner's request to declare that a pretrial presumption of prejudice is irrebuttable.

February 2, 2010

Respectfully submitted,

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APPENDIX

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ABC, Inc. is a broad-based communications company with significant holdings in the United States and abroad. Alone or through its subsidiaries, it owns ABC News, abcnews.com, and local broadcast television stations that regularly gather and report news to the public. ABC News produces the television programs *World News* with Diane Sawyer, *20/20*, *Primetime*, *Good Morning America* and *Nightline*, among others.

Advance Publications, Inc., directly and through its subsidiaries, publishes over 20 magazines with nationwide circulation, daily newspapers in over 20 cities, and weekly business journals in over 40 cities throughout the United States. It also owns, directly or through its subsidiaries, many internet sites and has interests in cable systems serving over 2.3 million subscribers.

The Associated Press (AP) is a not-for-profit mutual news cooperative. The members of AP are more than 1,500 newspapers and more than 5,000 television and radio stations throughout the United States. AP also serves thousands of subscribing newspapers, news networks and other publishers and distributors of news worldwide. Founded in 1848, AP is now the largest newsgathering organization in the world.

Bloomberg L.P. operates Bloomberg News, which is comprised of more than 1,500 reporters in 145 bureaus around the world. Bloomberg News publishes more than 6,000 news stories each day, electronically delivering business, financial, and

legal news to more than 300,000 business and financial professionals in real-time through the Bloomberg Professional Systems, a propriety desktop system. Bloomberg News also operates as a wire service, distributing news to more than 450 newspapers worldwide with a combined circulation of 80 million people. Bloomberg News operates eleven 24-hour cable and satellite news channels broadcasting worldwide in six different languages; WBBR, a 24-hour business news radio station; Bloomberg Press, a book publisher; Bloomberg Magazines and Bloomberg.com, which is read by the investing public more than 300 million times each month.

Cable News Network LP, LLLP (CNN), a division of Turner Broadcasting System, Inc., which is a subsidiary of Time Warner Inc., is one of the world's most respected sources for news and information. Its reach extends to more than 10 cable and satellite television networks; one private place-based network; two radio networks; wireless devices around the world; four Web sites, including CNN.com, the first major news and information Web site; CNN Newsource, the world's most extensively syndicated news service; and partnerships for four television networks and one Web site.

The California Newspaper Publishers Association (CNPA) is a non-profit trade association representing more than 800 daily, weekly and student newspapers in California. CNPA has defended the First Amendment rights of publishers

to disseminate and the public to receive news and information for well over a century.

Dow Jones & Company, Inc. is the publisher of *The Wall Street Journal*, a daily newspaper with a national circulation of over two million, *WSJ.com*, a news website with more than one million paid subscribers, *Barron's*, a weekly business and finance magazine, and through its Dow Jones Local Media Group, community newspapers throughout the United States. In addition, Dow Jones provides real-time financial news around the world through Dow Jones Newswires as well as news and other business and financial information through Dow Jones Factiva and Dow Jones Financial Information Services.

The First Amendment Coalition is a nonprofit public interest organization dedicated to advancing free speech and open-government rights. A membership organization, The Coalition's activities include educational and informational programs, strategic litigation to enhance First Amendment and access rights for the largest number of citizens, legal information and consultation services, and legislative oversight of bills affecting free speech. The Coalition's members are newspapers and other news organizations, bloggers, libraries, civic organizations, academics, freelance journalists, community activists—and ordinary individuals seeking help in asserting rights of citizenship. The Coalition's offices are in San Rafael, California.

Gannett Co., Inc. is an international news and information company that publishes 84 daily

newspapers in the United States, including *USA TODAY*, as well as nearly 850 non-daily publications. Along with each of its daily newspapers, the company operates Internet sites offering news and advertising that is customized for the market served and integrated with its publishing operations. In broadcasting, the company operates 23 television stations in the U.S. with a market reach of more than 20 million households.

The Hearst Corporation is a diversified media company that publishes newspapers, consumer magazines and business publications. Hearst also owns a features syndicate, has interests in several cable television networks, produces programming for television and is the majority owner of Hearst Television Inc., which comprises 29 television and two radio stations, in geographically diverse U.S. markets.

The McClatchy Company owns 30 daily newspapers in 29 U.S. markets, including *The Kansas City Star*, *The Sacramento Bee*, *The Miami Herald*, *The Star-Telegram* of Fort Worth, *The Charlotte Observer*, and about 45 non-daily papers. In each of its daily newspaper markets, McClatchy operates the leading local website, offering readers information, comprehensive news, advertising, e-commerce and other services.

Media Law Resource Center, Inc. (MLRC) is a non-profit information clearinghouse originally organized by a number of media organizations to monitor developments and promote First Amendment rights in the libel, privacy and related

legal fields. MLRC's major projects and programs include various publications, services and events. Some of its most notable resource include the MLRC 50-State Surveys, which provide comprehensive information on the law in all 50 states and the District of Columbia; as well as the MLRC Bulletin, which publishes the results of MLRC-initiated statistical studies on media libel, privacy and related litigation; symposia; and legal research.

MediaNews Group, Inc. is one of the largest newspaper companies in the United States situated throughout California, the Rocky Mountain region and the Northeast. It is privately owned and operates 54 daily newspapers in 11 states with combined daily and Sunday circulation of approximately 2.4 million and 2.7 million, respectively. Each of its newspapers maintains a Web site focused on local news content, hosted by MediaNews Group Interactive. MediaNews Group also owns a television station in Alaska and operates radio stations in Texas.

The New York Times Company is the owner of *The New York Times*, *The Boston Globe*, the *International Herald Tribune*, 15 other daily newspapers, and more than 50 websites, including NYTimes.com, About.com, and Boston.com.

The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors which works to defend First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance

and research in First Amendment litigation since 1970.

The Tribune Company operates businesses in publishing, broadcasting and on the Internet. In publishing, Tribune's leading daily newspapers include the *Los Angeles Times*, *Chicago Tribune*, *The Baltimore Sun*, *Sun Sentinel* (South Florida), *Orlando Sentinel*, *Hartford Courant*, *Morning Call* and *Daily Press*. The company's broadcasting group operates 23 television stations, WGN America on national cable, and Chicago's WGN-AM. Popular news and information websites complement Tribune's print and broadcast properties and extend the company's nationwide audience.

The Washington Post (washingtonpost.com) is a leading newspaper with a nationwide daily circulation of over 1.6 million and a Sunday circulation of over 2.2 million. *The Washington Post* is a wholly owned subsidiary of The Washington Post Company. The Washington Post Company also owns Cable ONE, serving subscribers in midwestern, western and southern states; *Express* and *El Tiempo Latino*; Post-Newsweek Stations (Detroit, Houston, Miami, Orlando, San Antonio and Jacksonville); The Slate Group (*Slate*, TheRoot.com, DoubleX, TheBigMoney.com and *Foreign Policy*); *The Gazette* and Southern Maryland Newspapers; *The Herald* (Everett, WA); *Newsweek* magazine (Newsweek.com); *Budget Travel* (BudgetTravel.com); and Avenue100 Media Solutions, an analytics-based performance marketing company.