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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI`I

IN RE: PUBLIC FIRST LAW CENTER Movant.	MISC. NO. 24-653 [CR NO. 22-00048 TMB-NC] MOTION TO UNSEAL JUROR QUESTIONNAIRE RESPONSES; and CERTIFICATE OF SERVICE

MOTION TO UNSEAL JUROR QUESTIONNAIRE RESPONSES

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Pursuant to the public right of access guaranteed by the First Amendment of the United States Constitution and the common law, and in accordance with Criminal Local Rule 5.2(b)(4), Public First Law Center (Public First) moves to unseal and obtain public access to the completed juror questionnaires used for jury selection in *United States v. Keith Mitsuyoshi Kaneshiro*, Cr. No. 22-00048 TMB-NC.[1] Public First specifically seeks completed responses to the *second* and *third* questionnaires from *empaneled jurors* only.[2]

In *Press-Enterprise Co. v. Superior Ct.*, the U.S. Supreme Court held that the First Amendment right of access to court proceedings and records applies to jury *voir dire*. 464 U.S. 501 (1984). The public has the right to observe and understand the process—from start to finish—by which jurors in criminal cases are determined to be fair, impartial, and fit to serve. Consistently, courts following *Press-Enterprise* have uniformly held that because written juror questionnaires are part of *voir dire*, the public's right of access attaches to those questionnaires.

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[1] Unless otherwise specified, "Dkt." refers to the corresponding docket entry in *United States v. Kaneshiro*, No. 22-CR-48.

[2] Public First does not seek access to the first questionnaire, also referred to as the "ability to serve" questionnaire. *E.g.*, Dkt. 187, 190, 219.

I. FACTUAL BACKGROUND

Jury selection commenced March 12, 2024 and continued for a total of six days. Dkt. 525, 528, 530, 532, 537, 543, 559. Jurors completed the second and third questionnaires. *Id.*; *see also* Dkt. 187, 190.

The second questionnaire concerned routine demographic and background information about jurors. *E.g.*, Dkt. 313, 317-20, 354, 364. The third questionnaire concerned juror exposure to news media. *E.g.*, Dkt. 463, 492, 494, 496, 502, 505, 507, 508, 525.

The Court empaneled a jury on March 19, 2024; trial began the following day and was completed on May 17, when the jury returned a verdict of not guilty for all defendants on all counts. *See* Dkt. 559,837.

III. THE PUBLIC HAS A PRESUMED FIRST AMENDMENT RIGHT OF ACCESS TO *VOIR DIRE* PROCEEDINGS, INCLUDING WRITTEN QUESTIONNAIRES.

The public's presumptive First Amendment right of access to criminal trials, including the jury selection process, is well settled. *Press-Enter.*, 464 U.S. at 505, 509-510; *Civil Beat Law Ctr. for the Pub. Int., Inc. v. Maile*, 117 F.4th 1200, 1208 (9th Cir. 2024) ("As both we and the Supreme Court have recognized, the First Amendment grants the public a presumptive right to access nearly every stage of post-indictment criminal proceedings, including pretrial proceedings, preliminary

hearings, *voir dire*, trials, and post-conviction proceedings, as well as records filed in those criminal proceedings.").

When it extended the First Amendment right of access to the *voir dire* examination of potential jurors, the U.S. Supreme Court noted the significance of jury selection both to the parties and to the proper functioning of the criminal justice system. *Press-Enter.*, 464 U.S. at 505 ("The process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system"). Historical evidence shows that attendance at trial was "virtually compulsory" for free members of the community because it was these members of the public who "render[ed] judgment." *Id*. The public-at-large today still has a valid interest in "learn[ing] whether the seated jurors are suitable decision-makers." *United States v. Blagojevich*, 612 F.3d 558, 561 (7th Cir. 2010).

Courts uniformly hold that *voir dire* includes written juror questionnaires and responses:

> That a significant part of *voir dire* in this case was conducted through written questionnaires and not orally is of no constitutional significance. We can think of no principled reason to distinguish written questions from oral questions for purposes of the First Amendment right of public access. Jury questionnaires merely facilitate and streamline voir dire; their use does not constitute a separate process. *Every court that has decided the issue has treated jury questionnaires as part of the voir dire process and thus subject to the presumption of public access*.

In re Access to Jury Questionnaires, 37 A.3d 879, 885-86 (D.C. 2012) (emphasis added); *accord In re South Carolina Press Ass'n*, 946 F.2d 1037, 1041 (4th Cir. 1991) (applying the presumption of access to jury questionnaires); *United States v. McDade*, 929 F. Supp. 815, 817 n.4 (E.D. Pa. 1996) (finding that *Press-Enterprise* "encompass[es] all *voir dire* questioning — both oral and written"); *In re Washington Post*, 1992 U.S. Dist. LEXIS 16882, 1992 WL 233354, at *4 (D.D.C. July 23, 1992) (applying the presumption of access to jury questionnaires); *Bellas v. Superior Court*, 85 Cal. App. 4th 636, 102 Cal. Rptr. 2d 380, 386 (Cal. Ct. App. 2000) (following other courts that "make clear that the content of juror questionnaires [is] publicly accessible" unless the presumption is outweighed by a competing interest; the "limitation on access is tailored as narrowly as possible"; and "the trial court's findings are articulated with enough specificity that a reviewing court can determine" whether access was properly limited); *Copley Press, Inc. v. Superior Court*, 228 Cal. App. 3d 77, 278 Cal. Rptr. 443, 451 (Cal. Ct. App. 1991) ("It is clear that when the court distributed the questionnaires to the venirepersons with instructions to fill them out, *voir dire* had begun. The fact that the questioning of jurors was largely done in written form rather than orally is of no constitutional import."); *Stephens Media, LLC v. Eighth Judicial Dist. Court*, 221 P.3d 1240, 1249 (Nev. 2009) ("[T]he use of juror questionnaires does not implicate a separate and distinct proceeding . . . . [It is] merely a part of the overall

voir dire process."); *In re Newsday, Inc. v. Goodman*, 159 A.D.2d 667, 552 N.Y.S.2d 965, 967 (N.Y. App. Div. 1990) ("[Q]uestionnaires completed by the petit jurors in this criminal action were an integral part of the *voir dire* proceeding."); *Forum Communs. Co. v. Paulson*, 2008 ND 140, 752 N.W.2d 177, 185 (N.D. 2008) (holding that use of jury questionnaires "serves as an alternative to oral disclosure of the same information in open court"); *State ex rel. Beacon Journal Publ'g Co. v. Bond*, 98 Ohio St. 3d 146, 2002 Ohio 7117, 781 N.E.2d 180, 188 (Ohio 2002) ("Because the purpose behind juror questionnaires is merely to expedite the examination of prospective jurors, it follows that such questionnaires are part of the *voir dire* process."); *see also United States v. Bonds,* No. C 07-00732 SI, 2011 U.S. Dist. LEXIS 155885, at *9 (N.D. Cal. Mar. 14, 2011) (providing access to completed juror questionnaires during trial and access to juror names after the jury rendered its verdict and was excused); *Reeves v. Shinn*, No. CV-21-01183-PHX-DWL, 2022 U.S. Dist. LEXIS 222629, at *5 (D. Ariz. Oct. 18, 2022) (denying motion to seal "answers provided by potential jurors on their questionnaires or during *voir dire*" concerning views on capital punishment).

Here, the jury has rendered its verdict. Jurors have been excused from service. Thus, concerns about juror candor or protecting the secrecy and integrity of jury deliberations no longer exist. *E.g.*, *Bonds,* 2011 U.S. Dist. LEXIS 155885 at *9 (releasing completed juror questionnaires during *voir dire* and juror names

after the jury was released); *United States v. Jenkins*, No. 12-15-GFVT, 2012 U.S. Dist. LEXIS 165572, at *24 (E.D. Ky. Nov. 20, 2012) ("[O]nce the jury has rendered its verdict, the threat to the administration of justice is usually no longer so great as to justify curtailing the First Amendment rights of the press, and thus the media will generally be freely permitted by the court to contact and interview a willing juror at that time[.]").

When the First Amendment right of access applies, public access is presumed. *Oregonian Publ'g Co. v. United States Dist. Court*, 920 F.2d 1462, 1466-67 (9th Cir. 1990). "It is the burden of the party seeking closure . . . to present facts supporting closure and to demonstrate that available alternatives will not protect his rights." *Id.* at 1467. The proponent of sealing thus has the burden to prove that: "(1) closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect the compelling interest." *Phoenix Newspapers, Inc. v. U.S. Dist. Ct.*, 156 F.3d 940, 949 (9th Cir. 1998). The findings may not be based on "conclusory assertions." *Id.; accord Jury Questionnaires*, 37 A.3d at 888 (generalized concerns about jury candor are insufficient to overcome the presumption); *see also ABC, Inc. v. Stewart*, 360 F.3d 90, 102 (2d Cir. 2004) (rejecting trial court's conclusory finding

that the presence of reporters at *voir dire* proceedings would have chilled juror candor).

IV. THE PUBLIC ALSO HAS A PRESUMED COMMON LAW RIGHT OF ACCESS TO COURT RECORDS.

The Ninth Circuit has recognized a few criminal court records that are not subject to the common law right of access "because the records have traditionally been kept secret for important policy reasons." *United States v. Bus. of the Custer Battlefield Museum & Store*, 658 F.3d 1188, 1192 (9th Cir. 2011). Those categorically exempt records include grand jury proceedings and warrant materials *during pre-indictment investigation*. *Id.* For all other judicial records, "a strong presumption in favor of access is the starting point." *Id.* at 1194.

For the common law analysis, the "party seeking to seal a judicial record then bears the burden of overcoming this strong presumption" by "articulating compelling reasons" that "outweigh the general history of access and the public policies favoring disclosure." *Id.* at 1194-95. The court must balance the competing interests and "base its decision on a compelling reason and articulate the factual basis for its ruling, without relying on hypothesis or conjecture." *Id.* at 1195. "[T]he court may not restrict access to the documents without articulating both a compelling reason and a factual basis for its ruling." *Id.* at 1196.

VI. NOTHING SUPPORTS SEALING THE ENTIRETY OF THE EMPANELED JURORS' RESPONSES TO THE SECOND AND THIRD QUESTIONNAIRES.

Even if there was a compelling interest here and substantial probability that disclosure would harm such an interest, the scope of sealing must be narrowly tailored to address the purported harm. There must be no other less drastic alternative to sealing the entire questionnaires.

"Even with findings adequate to support closure, the trial court's orders denying access to *voir dire* testimony failed to consider whether alternatives were available to protect the interests of the prospective jurors that the trial court's orders sought to guard. Absent consideration of alternatives to closure, the trial court could not constitutionally close the *voir dire.*" *Press Enter.,* 464 U.S. at 511. The Court must articulate with specific facts why other alternatives will not suffice. *E.g.*, *Phoenix Newspapers*, 156 F.3d at 950-51 (holding insufficient the court's conclusory observation concerning redactions "that so much of the transcript would have to be redacted that the remaining portion would be unintelligible and/or would shed little, if any, light on the proceeding.").

It is unclear what might justify sealing in questionnaires with simple demographic information and responses about media exposure. Absent further information regarding specific concerns, the public cannot suggest alternatives to sealing. *United States v. Brooklier*, 685 F.2d 1162, 1169 (9th Cir. 1982)

(encouraging those asserting the First Amendment right of access "to assist in the search for alternatives"). Without knowing more, some alternatives to total sealing of the subject questionnaire responses may include providing courthouse-only access or targeted redactions.

CONCLUSION

Based on the foregoing, the Public First respectfully requests that the Court unseal and provide public access to the second and third juror questionnaire responses completed by the jurors empaneled in *United States v. Kaneshiro*.

DATED: Honolulu, Hawai`i, November 15, 2024

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI`I

IN RE: PUBLIC FIRST LAW CENTER, Movant.	MISC. NO. 24-653 [CR NO. 22-00048 TMB-NC] CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that, on the dates and by the methods of service noted below a true and correct copy of the foregoing will be served on the following at their last known addresses:

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