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16 UNITED STATES DISTRICT COURT

17 NORTHERN DISTRICT OF CALIFORNIA

18 SAN JOSE DIVISION

19 UNITED STATES OF AMERICA,

) Case No. 18-CR-00258 EJD

Plaintiff,

) UNITED STATES' RESPONSE TO MEDIA

v.

) COALITION'S MOTION TO INTERVENE FOR

ELIZABETH HOLMES and
RAMESH "SUNNY" BALWANI,

) LIMITED PURPOSE OF UNSEALING OF

Defendants.

) COMPLETED QUESTIONNAIRES OF SEATED

) JURORS AND ALTERNATES

) Date: September 30, 2021

) Time: 11:30 a.m.

) Court: Hon. Edward J. Davila

On September 16, 2021, ten companies affiliated with different media groups (collectively titled “the Media Coalition”) filed a Motion to Intervene for the Limited Purpose of Unsealing the Completed Questionnaires of the Twelve Jurors and Five Alternate Jurors who have been selected and sworn to render the verdict in this case. ECF No. 1026 (“Mot.”).¹ The government respectfully requests that the Court maintain the questionnaires under seal for the duration of the trial to avoid any potential outside influence on the seated jurors and alternates, and publicly file versions once the trial is complete that are redacted to protect the jurors’ privacy as detailed below. At a minimum, the government submits that the Court should not release the completed questionnaires without allowing the jurors an opportunity to raise any privacy concerns related to their answers in the questionnaires for the Court to consider.

I. The First Amendment’s Presumption of Public Access Can Be Overcome by a Conflicting Compelling Interest

The Supreme Court has held that the First and Sixth Amendment give rise to a “presumption of openness” during the jury selection process to protect the right to a fair trial. *Press-Enter. Co. v. Super. Ct. of Cal., Riverside Cty.*, 464 U.S. 501, 510 (1984) (quotation omitted); *see also Presley v. Georgia*, 558 U.S. 209, 212–13 (2010). This presumption is premised on the “view of human nature, true as a general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings.” *Waller v. Georgia*, 467 U.S. 39, 46 n.4 (1984) (quotation omitted).

The Supreme Court, however, has also “made clear that the right to an open trial may give way in certain cases to other rights or interests, such as the defendant’s right to a fair trial or the government’s interest in inhibiting disclosure of sensitive information.” *Id.* at 45. Thus, “[t]he 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.” *Press-Enter. Co.*, 464 U.S. at 510. For example, a trial judge may “impose reasonable limitations on access to a trial” if it finds that, rather than promoting a fair trial, the specific circumstances of the case mean that open proceedings would in fact interfere with the responsible performance of respective duties by the judge,

¹ The government notes that one juror has since been excused for financial hardship. 09/14/2021 Hearing Transcript (“9/14 Tr.”) at 665:16–666:13.

1 court staff, counsel, and jurors in a criminal trial. *See id.* at 511 n.10 (quotation omitted). Additionally,
 2 the Supreme Court has not decided—and there is no federal consensus—on whether the presumption of
 3 openness extends to juror names or juror questionnaires. *See, e.g., Jensen v. Obenland*, No. C15-1094
 4 JCC, 2016 WL 2930440, at *5 (W.D. Wash. May 19, 2016) (denying habeas relief where petitioner
 5 could not establish violation of well-established federal law in part because “the Supreme Court has
 6 never held that the sealing of juror questionnaires violates the public trial right”), *aff’d*, 705 F. App’x
 7 657 (9th Cir. 2017).

8 **II. Compelling Interests Warrant Certain Limitations on the Public’s Access to Completed
 9 Questionnaires for the Seated Jurors and Alternates**

10 The government submits that, even assuming the public right of access extends to juror
 11 questionnaires, the facts of this case thus far present compelling reasons to maintain the completed
 12 questionnaires under seal until the completion of the trial, at which point redacted versions may be
 13 published, a procedure which is narrowly tailored to serve the compelling interests.

14 **A. Avoiding the Potential for Undue Influence on the Jury Is a Compelling Interest**

15 First and foremost, the need to avoid any potential undue influence on a juror (or alternate)—or
 16 on the jury’s ultimate deliberations and verdict—is a compelling reason that warrants imposing
 17 limitations on the public’s right of access to additional identifying information about the empaneled
 18 members through their written juror questionnaires. While the Supreme Court has noted that the
 19 public’s First Amendment right of open access may sometimes align with the Sixth Amendment right to
 20 a fair trial, the Court also unequivocally held that “[n]o right ranks higher than the right of the accused to
 21 a fair trial.” *Press-Enter. Co.*, 464 U.S. at 508. And “the right of an accused to fundamental fairness in
 22 the jury selection process is a compelling interest.” *Id.* at 510. Thus, in some circumstances—such as
 23 here—the right to a fair trial is a compelling interest that can outweigh the public’s right of access.
 24 Indeed, in providing guidance for when such circumstances may arise, the Supreme Court has
 25 distinguished between cases presenting a “generic risk of jurors overhearing prejudicial remarks,
 26 unsubstantiated by any specific threat or incident,” and those “concrete enough to warrant” limiting the
 27 public’s access. *Presley*, 558 U.S. at 215.

1 Here, there have been demonstrated instances of outsiders attempting to discuss the case with
 2 members of the jury even while their identities are not widely known. While the attempts thus far have
 3 failed, both parties have acknowledged the media attention surrounding this case and worked with the
 4 Court to employ a *voir dire* process that ensured a fair and impartial jury was selected. *See, e.g.*, ECF
 5 Nos. 799, 813. The Court is continuing to ensure that impartiality remains intact by regularly
 6 admonishing the jurors and alternates to avoid media and news reports that relate to this case, consistent
 7 with Ninth Circuit Model Jury Instruction 1.8, and jurors and even prospective jurors have shown that
 8 they take this admonition seriously. *See, e.g.*, 09/01/2021 Hearing Transcript (“9/1 Tr.”) at 329:10–
 9 330:12, 339:1–340:20; 9/14 Tr. at 671:20–673:10, 676:12–677:22.

10 Nevertheless, within mere weeks of starting this trial, there have also been attempts to influence
 11 the jury. The Court acknowledged that a member of the public “shout[ed] as the jurors wait[ed] to go
 12 through security” and enter the courthouse: “Don’t forget the Me Too movement,” prompting the Court
 13 to remind the courtroom that tampering with the jury could result in a criminal investigation. 9/14 Tr. at
 14 668:3–669:1. Even though the jurors did not report hearing this comment, that same day brought an
 15 example of a more targeted nature. *Id.* at 671:20–673:10, 676:12–677:22, 682:21–683:11. A friend of
 16 Juror 12 has deduced that she is serving as a juror in this case and called her in response to something he
 17 saw on the news. *Id.* at 671:20–673:10. Juror 12 interrupted him before he could expand further (*id.*),
 18 but this is a clear example of the potential for influence over the jurors by others if the information in
 19 their juror questionnaires is released publicly. Members of the press and general public obviously are
 20 not bound by the limitations imposed on the jurors and may not be aware of the Court’s admonitions that
 21 the jurors have been instructed to follow. Indeed, Juror 12—or any other juror or alternate—could have
 22 been put in a more difficult position if a friend or family member learned through the *media*, and not
 23 from her directly, about her involvement in this case and caught Juror 12 by surprise by trying to talk
 24 about the case. Indeed, even during *voir dire*, prospective jurors noted that their coworkers and family
 25 members similarly deduced that they were called for jury selection for Defendant Holmes’s trial and
 26 expressed interest in discussing the case with the prospective juror. *See, e.g.*, 9/1 Tr. at 329:10–330:12,
 27 339:1–340:20. The circumstances of this case are “concrete enough to warrant” certain limitations on
 28 the public’s right of access. *See Presley*, 558 U.S. at 215.

1 The government submits that maintaining under seal the completed questionnaires for seated
 2 jurors and alternates until after the trial is complete will reduce the ability for friends and family of the
 3 empaneled members to determine the identity of the jurors and attempt—even innocuously—to
 4 influence their deliberations or ultimate verdict. The government acknowledges and commends the
 5 jurors, alternates, and even prospective jurors for taking the Court’s admonitions seriously. However, it
 6 would make life unnecessarily difficult for the seated jurors and alternates to continue following those
 7 admonitions if the press coverage were specifically about the juror—which may well catch the attention
 8 of friends or family members not presently following the media coverage of the trial but who may be
 9 interested in coverage of someone they know personally. *See, e.g., United States v. Black*, 483 F. Supp.
 10 2d 618, 631 (N.D. Ill. 2007) (“[P]ublic reports discussing the jurors’ specific identities (or other personal
 11 information about the jurors) also would undermine the jurors’ ability to adhere to the Court’s repeated
 12 instructions not to read, watch, or listen to any media coverage regarding this case.”). Furthermore, the
 13 possibility that the media or public will confront members of the jury if additional identifying
 14 information is released is more than theoretical, as this sampling of cases shows:

15 1) Judge Posner, joined by three other Seventh Circuit judges, dissented from denial
 16 of rehearing *en banc* in *United States v. Blagojevich*, 614 F.3d 287, 288 (7th Cir. 2010), a
 17 case involving ex-governor of Illinois and celebrity Rod Blagojevich in which the panel
 18 decision required the district court to release the names of seated jurors and monitor what
 19 harassment, if any, they suffered. In a subsequent, post-remand order, the district court
 20 collected that information from jurors, noting that media was waiting outside the homes
 21 of jurors and, while some requests to leave were honored, at least one reporter told a juror
 22 that “it was his job to attempt to get an interview [with the juror] and would knock every
 23 fifteen minutes whether she answered the door or not,” ultimately knocking until almost
 24 midnight. *United States v. Blagojevich*, No. 08 CR 888-1, 2011 WL 812116, at *1–2
 25 (N.D. Ill. Feb. 28, 2011). Another juror did not feel safe returning home and her family
 26 members were called by the media while at work. *Id.* at *2. Yet another juror received a
 27 threatening voicemail. *Id.*

28 2) In *United States v. Jackson*, 209 F.3d 1103, 1107–08, 1110 (9th Cir. 2000), the
 29 Ninth Circuit remanded for an evidentiary hearing on a habeas petition that allegedly
 30 uncovered jury tampering after the conclusion of the trial. During jury deliberations, a
 31 juror received a threatening phone call from an unidentified person. Although the juror
 32 initially denied that he believed the call was related to the trial, three years after the trial
 33 concluded he told the defendant’s investigator that he believed the call may have been an
 34 attempt to hang the jury. *Id.*

1 3) In *United States v. Sylvester*, 143 F.3d 923, 931–32 (5th Cir. 1998), the
 2 Fifth Circuit ordered a limited remand to determine whether three instances of contact
 3 with jurors resulted in prejudice to the defendants. In the case, there were three separate
 4 instances of potential jury tampering, including phone calls to two jurors (one followed
 5 by an attempted delivery of a “mysterious package”) and an in-person incident in which
 6 an individual told a juror to “take it easy” on the defendants. *Id.*

7 4) In *United States v. Ruggiero*, 928 F.2d 1289, 1290, 1292–96 (2d Cir. 1991), the
 8 Second Circuit affirmed the district court’s excusal of a juror during deliberations.
 9 Despite the anonymity of the jury names, a neighbor of a juror received a letter at his
 10 home address associating him with the trial and stating he should not serve on the jury for
 11 the trial and, the night before deliberations began, that same juror was confronted in his
 12 driveway late at night by two men who addressed him as being a juror on the trial. The
 13 juror became fearful for his family because his residential address was known, and he
 14 refused to vote during deliberations. The Court ultimately dismissed the juror from
 15 deliberations. *Id.*

16 5) In *United States v. McAnderson*, 914 F.2d 934, 943–44 (7th Cir. 1990), the
 17 Seventh Circuit upheld the district court’s dismissal of five jurors where four received
 18 threatening phone calls during the trial and a fifth juror had heard about the threatening
 19 calls, and all were genuinely fearful. *Id.*

20 6) In *Stockton v. Virginia*, 852 F.2d 740, 743 (4th Cir. 1988), several jurors were
 21 eating lunch at a diner the day they were deliberating the defendant’s sentence in a capital
 22 case, when a member of the public asked about the progress of their deliberations and
 23 advised them to “fry the son of a bitch[.]”

24 7) In a highly publicized case in New York court, the jurors’ identities were
 25 published during deliberations, after which a juror received a letter pressuring her to
 26 convict, which led the judge to declare a mistrial. *See People v. Kozlowski*, New York,
 27 2004, discussed in <http://www.nytimes.com/2004/04/03/business/tyco-mistrial-overview-tyco-trial-ended-juror-cites-outside-pressure.html> (Tyco Mistrial).

28 8) In *Gannett Co., Inc. v. State*, 571 A.2d 735, 736–38 (Del. 1990), the Supreme
 29 Court of Delaware held there is no constitutional right of access to the names of jurors
 30 and upheld the trial judge’s decision to keep confidential the names of prospective jurors
 31 in a highly publicized serial murder trial. The Court pointed to a recent murder case,
 32 where a local newspaper published an article in the midst of trial highlighting the names
 33 of jurors and giving unflattering, detailed profiles of the individual jurors, and a
 34 television crew followed some jurors to lunch and attempted to film them eating. *Id.*

1 The government submits that revealing juror names, or even additional information about the
 2 jurors and alternates from their written questionnaires that could aid in identifying them, could increase
 3 the chances of jury tampering in this case—particularly given the various forms of social media
 4 available in modern times. As but one example, counsel for the government have received several
 5 unsolicited emails from members of the public expressing views on the merits and underlying facts of
 6 the case. If the public were able to discern the identity of the jurors and contact them on social media
 7 with similar messages, it will become increasingly difficult for the jurors to follow the Court’s
 8 admonitions to avoid outside information about the case. The Court has employed several measures to
 9 ensure the parties receive the full benefit of a fair trial by an impartial jury, and the government
 10 recommends that maintaining under seal additional information about the seated jurors and alternates
 11 while the trial is ongoing would continue to ensure the safeguards the Court has employed thus far.

12 **B. Protecting Jury Privacy and Candor Is a Compelling Interest**

13 The Supreme Court has also acknowledged that privacy interests may be compelling interests at
 14 times, such as a prospective juror who is a rape survivor. *See Press-Enter. Co*, 464 U.S. at 512. The
 15 government submits that the questionnaires in this case include similarly sensitive topics, including
 16 whether the individual has experienced or knows someone who experienced intimate partner abuse or
 17 domestic violence. As stated by Justice Blackmun in his concurring opinion, “[c]ertainly, a juror has a
 18 valid interest in not being required to disclose to all the world highly personal or embarrassing
 19 information simply because he [or she] is called to do his [or her] public duty.” *Id.* at 514 (Blackmun, J.
 20 concurring). The majority opinion even notes that privacy interests of the jurors may be accounted for
 21 by delaying disclosure for a reasonable amount of time—and may sometimes warrant permanent
 22 sealing. *Id.* at 512 (majority opinion).

23 Here, as the Media Coalition acknowledges in its Motion (ECF No. 1026 at 6), the Court
 24 expressly told the then-prospective jurors that their answers to the questionnaire would be kept
 25 confidential and that “the Court is sensitive to [the prospective juror’s] privacy.” ECF No. 928 at 2.
 26 The Court stated that the questionnaires would be “kept under seal and [would] only be disclosed, if at
 27 all, with names and other identifying information removed.” *Id.* Disclosing information in the
 28 questionnaires of the seated jurors and alternates—without their input—may, as Judge Posner expressed,

1 “force[the trial judge] to renege on his promise, the jurors may well be upset, concerned for their
 2 privacy, fearful of the prospect of harassment . . . , and angry at having been induced by false pretenses
 3 to agree to take months out of their life to perform jury service.” *Blagojevich*, 614 F.3d at 288
 4 (Posner, J., dissent from denial of rehearing *en banc*). Indeed, as at least one district court found, by
 5 “promis[ing] potential jurors that the information would be kept under seal, prospective jurors were
 6 remarkably candid and forthcoming” in the questionnaires. *United States v. Mitchell*, No. 2:08-CR-125
 7 DAK, 2010 WL 4386915, at *4 (D. Utah Oct. 29, 2010).

8 The government submits that another compelling interest is protecting the seated jurors’ and
 9 alternates’ privacy, as well as encouraging juror candor in future cases. The government believes juror
 10 candor would be significantly inhibited by full and concurrent access to the empaneled members’
 11 completed questionnaires prior to the end of trial. Particularly given the ease, speed, and unlimited
 12 reach with which information can be disseminated in modern times via social media and other electronic
 13 means, there is a heightened risk that information about and opinions of the jurors and alternates
 14 expressed in their questionnaires will be publicly disseminated.² Members of the press or public may
 15 give unflattering, detailed profiles of the individual jurors, which could easily circulate or “go viral” on
 16 social media, and perversely the jurors would be bound by the Court’s admonitions not to review or
 17 engage in such commentary. *See Gannett Co.*, 571 A.2d at 738 (in recent case local newspaper
 18 described jurors’ expressions and demeanors, as well as physical characteristics such as “mostly bald,”
 19 “short and round,” or “stout”). Knowing that questionnaire answers—believed in the moment to remain
 20 confidential—would be unveiled could make the jurors and alternates feel exposed or vulnerable to
 21 cyber-bullying or other electronic contact, and could easily make a reasonable person shy away from
 22 jury service in the future. It could also have a chilling effect on future jury pools, who may feel less
 23 inclined to be candid after viewing stories of prior jurors thrust into national spotlight for his or her role
 24 as a juror in this case. It may skew the jury towards individuals who do not fear or even seek an
 25 association with a high-profile case rather than citizens simply performing their civic duty.³

26 ² Even individuals less directly tied to this case than the jurors care about protecting their privacy. *See*
 27 <https://www.npr.org/2021/09/14/1036835868/elizabeth-holmes-trial-hotelier-bill-evans-goes-incognito>.

28 ³ *See generally* Kenneth J. Melilli, *Disclosure of Juror Identities to the Press: Who Will Speak for the Jurors?*, 8 Cardozo Pub. L. Pol’y & Ethics J. 1 (2009); David Weinstein, *Protecting a Juror’s Right to U.S.’ RESPONSE TO MOT. TO UNSEAL JUROR QUESTIONNAIRES*,

1 The government recommends the Court maintain the completed juror questionnaires for
 2 empaneled members under seal until a verdict is reached, at which time the jury will be free from the
 3 Court's admonition and more capable of defending themselves in the public arena. More critically, the
 4 Court could ask the jurors to review their questionnaires for any information they would like to request
 5 be kept private, allowing them to voice any concrete privacy interests in the presence of the parties. *See*
 6 *Mitchell*, 2010 WL 4386915, at *5 (notifying jurors of privacy rights during *voir dire* before releasing
 7 information in questionnaires and finding this approach served the goal of "balance[ing] the rights of the
 8 individuals involved with the rights of the Defendant and the rights of the public"); *Copley Press, Inc. v.*
 9 *Super. Ct.*, 228 Cal. App. 3d 77, 85–86, 89–90 (1991) (noting that privacy interests may outweigh public
 10 right of access to juror questionnaires, but the jurors must be given the opportunity to raise legitimate
 11 privacy concerns with the Court *in camera*).

12 **C. The Government's Recommendation Is Narrowly Tailored**

13 The government submits that there are compelling reasons to maintain sealing of the completed
 14 juror questionnaires for a limited time in this case, and that its recommendation is narrowly tailored to
 15 serve the interests it seeks to protect. The Court must craft a limitation that is no broader than necessary
 16 to protect the right to a fair trial—free of jury tampering—and to protect the jurors' right to privacy, and
 17 the Court must make explicit, supported findings to justify its order. *Waller*, 467 U.S. at 48.
 18 Furthermore, the Ninth Circuit has endorsed partial closures of even live *voir dire*, noting that the
 19 comparatively short length of the closure was "an important consideration[.]" *United States v. Lee*,
 20 290 F. App'x 977, 979 (9th Cir. 2008) (finding no plain error in *voir dire* format where for-cause
 21 challenges were outside presence of public but remainder was open to public). While the Media
 22 Coalition cites *United States v. Bonds*, No. C 07-00732 SI, 2011 WL 902207, at *6 (N.D. Cal. Mar. 14,
 23 2011) (ECF No. 1026 at 5), the *Bonds* case occurred more than a decade ago and before social media
 24 platforms became ubiquitous. In addition, the Court in *Bonds* did not have concrete instances of

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 26 *Privacy: Constitutional Constraints and Policy Options*, 70 Temple L. Rev. 1, 1–3 (1997); Nancy J.
 27 King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Trials*,
 28 49 Vand. L. Rev. 123, 124–30, 151–59 (1996); Kenneth B. Nunn, *When Juries Meet the Press:
 Rethinking the Jury's Representative Function in Highly Publicized Cases*, 22 Hastings Const. L.Q. 405,
 405–07, 429–34 (1995); Abraham S. Goldstein, *Jury Secrecy and the Media: The Problem of
 Postverdict Interviews*, 1993 U. Ill. L. Rev. 295 (1993).
 U.S.' RESPONSE TO MOT. TO UNSEAL JUROR QUESTIONNAIRES,
 CASE NO. 18-CR-258 EJD

1 attempted influencing of jurors already before it when reaching its ruling, as we have here, and this
 2 Court provided a significantly more robust assurance of confidentiality in the questionnaire the jurors
 3 completed than in *Bonds*. See *id.* at *1 (stating only that the questionnaires would be kept under seal).

4 The government recommends maintaining sealing until the conclusion of Defendant Holmes's
 5 trial to reduce as much as possible the potential for members of the public to influence—innocuously or
 6 not—empaneled members of the jury. Once the jury has reached a verdict, then this driving need is all
 7 but extinguished. However, the seated jurors and alternates also have a right to privacy that they should
 8 be given the opportunity to assert before any information they shared under the auspices of remaining
 9 confidential is released publicly. The government submits this approach is narrowly tailored to address
 10 the compelling interests identified that may outweigh the public's First Amendment right of access to
 11 the completed questionnaires of seated jurors and alternates.

12 **D. Alternative Limitations Are More Burdensome for the Jury**

13 Finally, before maintaining sealing of the questionnaires in any manner, the Court "must
 14 consider reasonable alternatives to closing the proceeding[.]" *Waller*, 467 U.S. at 48; *Bonds*, 2011 WL
 15 902207, at *7. In considering whether to adopt the limitations suggested by the government, this Court
 16 should consider various alternatives and their ability to address the concerns of potential juror
 17 harassment / influence, juror privacy, future juror candor, and the ability for jurors to be able to follow
 18 instructions to shield themselves from extrajudicial opinions and information about this case. Potential
 19 alternatives include:

- 20 • Sealing the entirety of the jury questionnaires permanently
- 21 • Sealing the entirety of the jury questionnaires until the verdict is rendered and the jury
 dismissed, and then releasing the questionnaires without redactions for privacy
- 22 • Sealing the entirety of the jury questionnaires until the verdict is rendered and the jury
 dismissed, and then releasing the questionnaires redacting only personally identifiable
 information and juror names
- 23 • Releasing juror questionnaires with juror names, residence information, and any other
 information the juror requests on legitimate privacy grounds redacted
- 24 • Releasing juror questionnaires with juror names and residence information redacted

- 1 • Requiring jurors to abstain from accessing computers or phones until they have been
- 2 dismissed
- 3 • Sequestering the jury
- 4 • Ordering any party, counsel, representative of the media, or member of the public to
- 5 refrain from publishing in any way the name or address of any juror, or the likeness
- 6 of a juror, in a manner that may disclose the identity of that person prior to the end of
- 7 trial and dismissal of the jury

8 The government submits that its recommendation strikes a more appropriate balance between the
9 rights of the parties, the public, and the individuals involved—here the seated jurors and alternates—in a
10 manner that renders the other proposed alternatives insufficient.

11 **III. CONCLUSION**

12 In sum, the government recommends the Court maintain the questionnaires under seal for the
13 duration of the trial to avoid any potential outside influence on the seated jurors and alternates, and
14 publicly file versions once the trial is complete that are redacted to protect the jurors' privacy, as
15 requested by the individual jurors at the conclusion of the trial.

16

17 DATED: September 23, 2021

Respectfully submitted,

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