

April 7, 2020

The Honorable Deborah A. Ryan
Presiding Judge, Santa Clara County Superior Court
191 North First Street
San Jose, California 95113
media@scscourt.org; BRada@scscourt.org

Via Email

RE: COVID-19 and Court Secrecy: Preserving Public Access to the Santa Clara County Superior Court

Dear Presiding Judge Ryan,

We write to join the First Amendment Coalition (“FAC”) and the American Civil Liberties Union of Northern California (“ACLU”), in expressing our concern that court proceedings in Santa Clara County continue to be held in secret, with no provision for public and press access. We are aware that both FAC and ACLU have previously written to raise this issue, and we add our voice in requesting that this Court amend its closure order to ensure that the press and the public have access to court proceedings that are occurring during the COVID-19-necessitated shutdown.

Public Justice is a national public interest law firm with offices in California, and represents a national membership base including hundreds of Californians. For more than 30 years, we have been dedicated to ensuring that our nation’s justice system works well and fairly for all Americans. Through our Access to Justice project, we have fought to ensure equal access to the courts by combating forced arbitration, chipping away at qualified immunity, and knocking down barriers to class actions. One of our areas of focus has for years been fighting back against court secrecy. For this reason, we frequently represent intervenors seeking access to sealed court records in courts across the nation, including in California.

As you know, the public has a right to access the proceedings of California courts under both the United States and California Constitutions.¹ This right extends to preliminary hearings in criminal cases, like arraignments and bail hearings—including the types of proceedings that remain ongoing in California courts during the shutdown.²

And yet, notwithstanding the public’s right to access these proceedings, the press and public have been shut out by this Court’s closure order dated March 23, 2020. That order acknowledges the presumption of openness of court proceedings, but finds that COVID-

¹ U.S. Const. amend. I; Cal. Const. art. I, § 3(b); Cal. Code Civ. Proc. § 124 (providing that the “sittings of every court shall be public”); *NBC Subsidiary (KNBC-TV), Inc. v. Super. Ct.*, 20 Cal. 4th 1178 (1999).

² See, e.g., *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986); *Seattle Times Co. v. U.S. Dist. Court for W. Dist. of Washington*, 845 F.2d 1513, 1517 (9th Cir. 1988); *United States v. Brooklier*, 685 F.2d 1162, 1170 (9th Cir. 1982).

19 presents an “overriding interest supporting restricting courthouse entry and permitting access to only those persons who are required to appear in person in any Santa Clara County Courthouse.”³ The order then states that “there is no less restrictive means of achieving this overriding interest.”⁴

We do not doubt that physically closing the courthouse was the right thing to do. The Coronavirus pandemic is ravaging the country, and keeping Californians safe must be a top priority. But while physically closing the courthouse may be entirely warranted, this Court’s order is simply wrong that there is no less restrictive means of achieving the overriding public health-related interest than wholesale closure. There exist easy-to-implement solutions that would allow the Santa Clara County courts to achieve their public safety ends and continue to provide public access to court proceedings. As FAC and the ACLU have already requested, this Court could provide a publicly-available call-in number so that members of the press and public, although unable to physically attend proceedings, could listen in as they occur.

Courts across the country, including a number in California, are already successfully deploying such measures. For example, the Superior Court of California, County of Sacramento has made it possible for the public to virtually attend all of its proceedings, publishing information for a YouTube channel through which the “public may simultaneously watch court proceedings” that will be “live streamed.”⁵ The Superior Court of California, County of Orange has done the same.⁶ The federal Ninth Circuit Court of Appeals has specifically authorized the courts within its jurisdiction to provide public access to proceedings “through electronic means, including audio, video, and/or the internet.”⁷ The Southern District of Illinois has provided that for “any traditional in-court proceeding that is conducted via video teleconference or telephone conference,” “audio and video feeds will be available to the public and press to the extent practicable.”⁸ Still other courts, like the Northern District of California and the District of Minnesota, are posting call-in numbers for hearings on their public dockets, allowing the “equivalent of a public hearing by telephone.”⁹ These are just a few examples of the

³ Superior Court of the State of California, in and for the County of Santa Clara, “General Order Restricting Courthouse Entry and Permitting Access to Only Those Persons Required to Appear in Person at any Santa Clara County Superior Courthouse” (Mar. 23, 2020), available at http://www.sccourt.org/general_info/news_media/newspdfs/General%20Order%20Restricting%20Courthouse%20Entry%20and%20Permitting%20Access%20to%20Only%20Those%20Persons%20Required%20to%20Appear%20in%20Person%203.23.20.pdf (last visited April 7, 2020).

⁴ *Id.* at 2 (citing *NBC Subsidiary*, 20 Cal. 4th at 1181-82).

⁵ Superior Court of California, County of Sacramento, “Access to Court Proceedings by General Public-Restricted” (Mar. 30, 2020) available at <https://www.saccourt.ca.gov/general/docs/public-access-order-033020.pdf> (last visited April 7, 2020).

⁶ The Superior Court of California, County of Orange, Courtroom Live Streaming, available at https://www.occourts.org/media-relations/LiveStream.html?fbclid=IwAR2TWXezu-tqKp0uE9SxZPs9q_s8a5iX9_LyYxM0G76ZEslkrrECCxly9A (last visited Apr. 7, 2020).

⁷ Judicial Council of the Ninth Circuit, Policy Regarding Electronic Conduct of Court Proceedings during the COVID-19 Outbreak (March 24, 2020).

⁸ Southern District of Illinois Administrative Order No. 263 (March 30, 2020) available at <http://www.ilsd.uscourts.gov/Forms/AdminOrder263.pdf> (last visited April 7, 2020).

⁹ *E.g.*, *Roe v. SFBSC Management, LLC*, No. 3:14-cv-03616-LB (N.D. Cal.) (publicly circulating dial-in conference number “which can accommodate up to 200 people and allow the equivalent of a public hearing

simple and creative ways courts across the nation are attempting to ensure that both public safety and the public's right to access court proceedings are prioritized during this unprecedented time.

Public Justice therefore joins with FAC and the ACLU to request that this Court create a mechanism by which the press and public can meaningfully and remotely access any ongoing proceedings during the court shutdown. We thank you for your attention to this matter and look forward to a response by Monday, April 13, 2020.

Sincerely,



Stephanie Glaberson
Access to Justice Attorney
Public Justice

CC:

- Chief Justice Tani Cantil-Sakauye, Tani.cantil@jud.ca.gov
- Judicial Council, judicialcouncil@jud.ca.gov
- Molly O'Neal, Santa Clara County Public Defender, moneal@pdo.sccgov.org
- Jeff Rosen, Santa Clara County District Attorney, jrosen@dao.sccgov.org
- David Snyder, First Amendment Coalition, dsnyder@firstamendmentcoalition.org
- Kathleen Guneratne, ACLU Foundation of Northern California, kguneratne@aclunc.org
- Amy Gilbert, ACLU Foundation of Northern California, agilbert@aclunc.org
- Raj Jayadev, Silicon Valley De-Bug, raj@siliconvalleydebug.org
- Felicia Gomez, Essie Justice Group, felicia@essiejusticegroup.org

by telephone"); *see also* Notice Regarding Press and Public Access to Court Hearings (Updated April 3, 2020), available at <https://www.cand.uscourts.gov/notices/notice-regarding-press-and-public-access-to-court-hearings-april-3-2020/> (last visited April 7, 2020) (“[M]embers of the press and public will be permitted to hear and/or observe telephonic and video hearings, free of charge, to the extent practicable. Information on public and press access to telephonic or video hearings will be available on PACER.”); District of Minnesota General Order No. 6 (March 31, 2020), available at https://www.mnd.uscourts.gov/sites/mnd/files/2020-0331_COVID-19-General-Order-No6.pdf (setting out instructions for members of the press and public to locate public access information on individual case dockets) (last visited April 7, 2020).