



November 29, 2021

By electronic filing

The Honorable Chief Justice Tani Cantil-Sakauye
and the Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, California 94102

**Re: *USA Today v. Los Angeles County Superior Court (Britney Spears)*
California Supreme Court Case No. SC271168
Amici Curiae Letter in Support of Petitioner**

To the Honorable Chief Justice and Associate Justices of the California Supreme Court:

Amici curiae First Amendment Coalition, American Civil Liberties Union of Southern California, University of California, Irvine, School of Law Adjunct Clinical Professor of Law Susan E. Seager, and National Press Photographers Association, (collectively, “First Amendment Amici”) submit this letter in support of petitioner USA Today. The Court should grant the Petition to decide a pressing constitutional question of public and press access to internet broadcasts of court proceedings initiated and controlled by the courts. This amici curiae letter is submitted pursuant to California Rule of Court 8.500(g).

1. Interests of Amici

Amici are California non-profit public interest organizations and a California law professor, all committed to protecting the constitutional rights of the press and visual journalism and opening the proceedings and files of government agencies – including the courts – to maximum public oversight through modern technology.

First Amendment Coalition is a nonprofit, public interest organization committed to freedom of speech, more open and accountable government, and public participation in civic affairs. Founded in 1988, FAC’s activities include free legal consultations on First Amendment and access issues, educational programs, legislative oversight of bills in California affecting access to government and free speech, and public advocacy, including extensive litigation and appellate work. FAC co-authored and sponsored Proposition 59, the Sunshine Amendment to the California State Constitution, enacted by voters in 2004 to amend the California Constitution at Article I section 3(b).

American Civil Liberties Union of Southern California (ACLU SoCal) is an affiliate of the national ACLU, a nationwide nonprofit, nonpartisan organization with nearly 2 million members dedicated to preserving and protecting the principles of liberty and equality embodied in the state and federal constitutions. ACLU SoCal has a longstanding interest in preserving the First Amendment rights of all, including individuals and organizations seeking access to judicial proceedings to disseminate news to the public, and has represented individuals and organizations in cases challenging restrictions on access to the courts.

Adjunct Clinical Professor of Law Susan E. Seager is a First Amendment academic and litigator who leads the Press Freedom and Transparency clinical practice at the University of California, Irvine, School of Law's Intellectual Property, Arts, and Technology clinic. Professor Seager supervises law students in litigation and policy research on First Amendment rights of the press and access to government records. She was the lead writer in the case that successfully challenged the constitutionality of a California divorce court secrecy statute in *In re Marriage of Burkle*, 135 Cal. App. 4th 1045, 1055-56 (2006).

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism.

First Amendment Amici have no direct connection with any party in this case, and no party, attorney for a party, or judicial member has played any part in the preparation of this letter.

2. Why Review Should Be Granted

A. Emerging Digital Technology and the COVID-19 Epidemic Have Brought an Important Constitutional Question to the Fore

Respondent Los Angeles County Superior Court contends in its Answer that this Court should not grant review because "there is no important legal question that this Court needs to settle." Answer at 9.

To the contrary, this Petition presents this Court with the opportunity to settle a new and important constitutional question that has arisen as California courts have employed a variety of new internet technologies to broadcast their own court proceedings to the public and press – known as "remote access" – during the deadly COVID-19 pandemic. The computer applications used by the state courts to provide computer and cell phone access to court proceedings include the Remote Audio Access Program (RAAP), Court Connect, and BlueJeans. The latter two provide both audio and video access to those who sign up.

This Court should accept review to consider whether the presumptive right of access to court proceedings under the state and federal constitutions ensure remote access for the public and press during the digital age and a global pandemic that shows no sign of disappearing.

The pressing legal question presented by the Petition under the First Amendment and California Constitution (as re-worded by First Amendment Amici) is:

- Did the Superior Court violate the presumptive right of public and press access to court proceedings under the First Amendment to the U.S. Constitution and Article I, sections 2(a) and 3(a) and (b)(1) of the California Constitution when it barred the public from accessing a court-enabled, live digital broadcast of its proceedings provided to parties and counsel?¹

The COVID-19 pandemic has forced courts to greatly and suddenly expand public access to court proceedings. From the United States Supreme Court to many superior courts across California, courts have adopted new practices and technologies to allow parties, counsel, and the public and press to “attend” court proceedings remotely via the live audio and video broadcasts provided by the courts. But in this case, the Superior Court abruptly cut off remote access to the public and press in the largest court in the nation, allowing only the parties and their counsel to attend proceedings via their computers.

This Court should grant review of this case to consider whether the Superior Court’s abrupt termination of remote access for the public and press violated the First Amendment and the California Constitution by closing off access that is essential for many in a world where physical presence in court presents the potentially fatal risk of exposure to COVID-19.

The risk of infection and death is real. At least four people who worked in the Superior Court system have died of COVID-19 and the court has been hit with a proposed fine of \$25,000 for multiple state workplace safety violations.² Just last month, the Superior Court announced that a person attending the highly publicized sentencing hearing for convicted murderer Robert Durst tested positive for the virus and the health department initiated contact tracing with everyone in the courtroom.³

B. The Petition Raises an Issue of First Impression

The Superior Court incorrectly asserts that the Petition be denied because “there is no conflict in the case law.” Answer at 18. But the Superior Court misstates the First Amendment issue raised by the Petition, cites inapposite cases, and misstates the holdings of some of those cases.

The Superior Court asserts that *Estes v. Texas*, 381 U.S. 352, 539-40 (1965) and *Chandler v. Florida*, 449 U.S. 560, 599 (1981) establish that “the media have no constitutional right to have electronic equipment in the courtroom.” Answer, p. 18.

¹ First Amendment Amici take no position on Petitioner’s Equal Protection argument.

² Debra Cassens Weiss, *Los Angeles superior court fined over \$25K for COVID-19 safety violations after courthouse worker deaths*, ABA JOURNAL (July 8, 2021, 11:38 AM), <https://www.abajournal.com/news/article/los-angeles-courts-fined-25k-for-covid-19-safety-violations-after-courthouse-worker-deaths>

³ Press Release, Superior Court of California (October 16, 2021), http://www.lacourt.org/newsmedia/uploads/142021101618215321_NRDurst.pdf.

In fact, the Supreme Court did not decide whether the media has a First Amendment right of access to court proceedings in *Estes* or *Chandler*, let alone a First Amendment right to televise court proceedings or attend court proceedings through new remote access technologies. Both of those cases were based on the defendant's Fourteenth Amendment due process right to a fair trial, not the media's First Amendment rights. The Supreme Court held in *Estes* held that the televising of a criminal trial violated the defendant's due process right to a fair trial under the Fourteenth Amendment. *Chandler*, 449 U.S. at 573. *Chandler* explained that "*Estes* is not to be read as announcing a [Fourteenth Amendment] constitutional rule barring still photographic, radio, and television coverage in all cases and under all circumstances." *Id.*

The Superior Court also cites *People v. Dixon*, 148 Cal. App. 4th 414, 434 (2007), saying that the Court of Appeal "held that 'the public and press do not have a constitutional right to televise [courtroom] proceedings or videotape them for future broadcasting.'" Answer at 18. But the Superior Court admits in its Answer that Petitioner "is not itself seeking to televise the proceedings in this case – it wants to shift that obligation to LASC." Answer, p. 19.

Dixon, *Estes*, and *Chandler*, therefore, are red herrings. The Petition does *not* ask this Court to hold that the media has a First Amendment right to bring media cameras and recording devices into the courtroom and broadcast those proceedings. Even if it did, the Supreme Court has not ruled whether there is a First Amendment right for the media to bring its own equipment into court to record and broadcast court proceedings, nor has this Court.

The question before this Court is this: whether a court's *own* use of internet technologies to broadcast its public court proceeding to the parties and their counsel through their computers should be presumptively open to the public and press under the First Amendment and California Constitution to promote public confidence in the judicial system and improve the truth-finding function of court proceedings.

This Court also is urged by the Superior Court not to grant review because the Supreme Court allegedly already decided that the First Amendment right of access to court proceedings is limited to *physical* access, where journalists can "listen, take notes, and publish what an individual observes at the proceeding." Answer at 18 (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575-80 (1980).)

In fact, neither the Supreme Court nor this Court has ruled on whether the First Amendment right of access to court proceedings is limited to physical access – because neither court has been asked that question. Nor do any decisions by the Supreme Court or this Court consider whether physical access is sufficient under the First Amendment when physical access presents serious health and safety risks due to a pandemic and remote access is both available and far safer in 2021.

What is certain is that the Supreme Court – and this Court – have been emphatic about the importance of the presumptive First Amendment right of public and press access to court proceedings. More than 40 years ago, the Supreme Court held that criminal court proceedings are presumptively open to the members of the public and press under the First Amendment and common law. *Richmond Newspapers*, 448 U.S. 555, 580 (1980). This Court held that this First Amendment presumptive right of access applies with equal weight to civil proceedings in *NBC*

Subsidiary, Inc. v. Superior Court, 20 Cal. 4th 1178, 1207 (1999). In *NBC Subsidiary*, the Court found that the public has “an interest, in all civil cases, in observing and assessing the performance of its public judicial system, and that interest strongly supports a general right of access in ordinary civil cases.” *Id.* at 1210. This Court emphasized that providing the public and press with access to court proceedings allows the public to have increased confidence in the judicial system and supports the likelihood that truth will be more present in the proceedings. *Id.* at 1219.

This Court is not restricted to deciding the First Amendment question of public and press access to remote proceedings. This Court can also decide whether the more expansive Article 1, sections 2(a) and 3(a) and (b)(1) of the California Constitution provide a presumptive right of the public and press to attend court proceedings via the court’s own remote access.⁴

A review by this Court also would allow this Court to decide whether the Superior Court’s abrupt cancellation of remote access to the public and press failed to meet the First Amendment test for a court closure. The test for closing court proceedings required the Superior Court to find that there was: (1) an “overriding interest supporting [remote access] closure;” (2) a “substantial probability that the interest will be prejudiced absent [remote access] closure;” (3) the remote access closure is “narrowly tailored to serve the overriding interest;” and (4) there were no other “less restrictive means of achieving the overriding interest.” *See NBC Subsidiary*, 20 Cal. 4th at 1218.

The California Constitution also requires that the Superior Court base any action restricting remote access to court proceedings on specific findings of identified protected interests. Cal. Const., art. I, § 3(b)(2) (“A ... court rule, or other authority ... that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.”). First Amendment Amici agree with Petitioner that to the extent the Superior Court made findings, they were insufficient to meet the requirements of the First Amendment and Article I, section 3(b)(2) of the California Constitution. *See* Petition at 31-37. It is hard to imagine findings that would justify the termination of the court’s remote access program on the grounds that closure *benefitted* the governmental interests of advancing transparency and reducing public health concerns associated with travel and indoor gatherings during the pandemic, as required by Article I, section 3(b)(2).

The new statutes adopted by the California Legislature do not address the problem here, as the Superior Court suggests. Answer at 15. For example, the Superior Court cites SB 716, which has been enacted as California Code of Civil Procedure section 124(b), but that law simply requires courts to allow the public and press to attend court proceeding via remote audio technology if the physical courtroom is closed to the public.

⁴ The California Constitution-based argument for remote access was raised by Petitioner in its Media Request for Order Restoring Remote Audio Access Program (RAAP) and/or Providing Links to LA Court Connect. Petitioner’s Exhibits at 16-30. The Superior Court did not address the issue in its September 9, 2021 minute order denying the Request. PE at 280-84

Unlike many closure orders, the Superior Court's closure order was not aimed at limiting publicity that might prejudice potential or sitting jurors – because there was no jury in the conservatorship case for superstar Britney Spears.

3. Conclusion

Because this Petition raises an important question about the presumptive right of access to state court proceedings under the First Amendment and California Constitution via a new remote technology during a global pandemic, First Amendment Amici respectfully request this Court to grant review and resolve the first question presented by Petitioner.

Sincerely,



Peter Eliasberg
Chief Counsel
Manheim Family Attorney
for First Amendment Rights
for the ACLU Foundation of
Southern California



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/s/ David Snyder
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PROOF OF SERVICE

I, Susan E. Seager, declare: At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Orange, State of California. My business address is UC Irvine School of Law, Law Clinics, IPAT Clinic, P.O. Box 5479, Irvine, California, 92616-5479.

AMICI CURIAE LETTER IN SUPPORT OF PETITIONER

On November 29, 2021, I served true copies of the foregoing document addressed as set forth below:

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BY MAIL: I enclosed the foregoing document(s) in a sealed envelope or package with postage prepaid addressed to the persons at the addresses listed above and placed the envelope for collection and mail by the United States mail.

BY ELECTRONIC FILING: I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system. Participants not registered TrueFiling users will be served by mail or other means permitted by court rules.

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VIA TRUEFILING

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