

No. S \_\_\_\_\_

**EMERGENCY STAY REQUESTED  
IN-PERSON TRIAL  
COMMENCING 10/26/20**

**IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA**

WELLS FARGO BANK, NATIONAL ASSOCIATION, ET AL.,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,  
COUNTY OF SAN DIEGO

Respondent.

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OVERLAND DIRECT, INC.  
Real Party in Interest.

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California Court of Appeal, Fourth District, Division One  
4th Civil No. D078087  
Appeal from San Diego Superior Court,  
Case No. 37-2013-00078078-CU-BTCTL, Hon. Joel R. Wohlfeil

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**EMERGENCY PETITION FOR REVIEW**

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## ISSUES PRESENTED

1. During the current pandemic, may a trial court compel participation in a large in-person trial—with 20 or more persons in the courtroom—in a civil case in which there is no calendar preference and no exigency requiring an immediate trial?
2. If such a trial is permissible, may the trial court, in an effort to comply with social-distancing requirements, exclude from the courtroom parties to the litigation, in violation of Evidence Code section 777 and of the due process requirements of the state and federal constitutions?

## INTRODUCTION

California’s courts face no greater challenge than the Covid-19 pandemic.

Ensuring the courts’ continuing ability to function is indispensable. But so too is preserving the health and safety of California citizens.

Resolution of this tension is not easy. But the bench, bar and public are entitled to guidance. The Court of Appeal, by summarily denying a writ petition, has declined to provide that guidance. This Court must now step in.

The San Diego Superior Court has ordered the parties and their counsel to participate in a potential “super-spreader” event: An in-person civil trial in which some 20 people must be in a modest-sized courtroom all day for several weeks, with others constantly coming and going, and with limited sanitary and other facilities. The trial court believes that “if along the way parties and counsel have to assume some measurable risk, then that is something that must yield to the administration of justice.” (PA 841:4-841:6.)<sup>1</sup>

The trial court is among the first to attempt an in-person *civil* trial in the middle of the Covid-19 pandemic. Like courts around the state whose calendars are ballooning with stalled

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<sup>1</sup> All record citations marked “PA” are to Petitioners’ Appendix submitted in support of the underlying writ petition filed October 20, 2020 with the Court of Appeal, Fourth District, Division One (Writ Petition).

cases, the trial court is itching to get back to work. But litigants, their counsel, and third-party trial participants—including court staff and subpoenaed witnesses—are justifiably wary of exposing themselves to a deadly pandemic that has already claimed the lives of over 221,000 Americans.

The courts must find a way to function. But endangering the health—indeed, the very lives—of the parties, their counsel, courthouse staff, and everyone they interact with is not acceptable collateral damage of a rushed mission to reopen the courts.

This Court should grant review and either retransfer this matter to the Court of Appeal for consideration on the merits or, better, take the reins itself to provide essential guidance to courts and litigants as to where to draw the reopening line.

In either case, the Court should stay the trial until a final decision.

## REQUEST FOR IMMEDIATE STAY

“Even if trial is about to start, the reviewing court always has the power to issue a temporary stay and thereby defuse the crisis . . . .” (*Kernes v. Superior Court* (2000) 77 Cal.App.4th 525, 531, fn. 4.)

The crisis petitioners ask this Court to defuse is the very real threat to trial participants and the general public posed by holding an in-person trial at a time when Covid-19 cases and deaths are yet again on the rise.

Because it summarily denied petitioners’ writ petition, the Court of Appeal did not stay the trial court proceedings. This Court should do so while it considers this petition for review and, if it grants review or retransfers the case, until there is a final decision.

## STATEMENT OF THE CASE

### A. Background of the Consolidated Action.

#### 1. The Underlying Transactions.

This petition arises from multiple consolidated business-tort cases consolidated in the San Diego Superior Court (Consolidated Action). The transactions underlying this litigation ultimately date back to the period between 2007 and 2011. (PA 76-79.)

Petitioners in the Court of Appeal and here are defendants in the Consolidated Action, along with various other parties including Dan Tepper and Esola Capital Investment, LLC.

The essence of the plaintiffs' claims is that during 2007-2010, period Overland made loans on several dozen properties, and that in around 2010 defendants Esola and Tepper, allegedly through fraudulent means, forged deeds or assignments from Overland to defendant Esola. In particular, plaintiffs allege that Tepper induced Overland to assign deeds of trust to Esola "in trust for" Overland's lender, Aurora Fidelity, but that the language in the assignments was doctored to instead indicate an unqualified conveyance to Esola. The ultimate goal of the litigation is to set these transactions aside, on the theory that if the assignments to Esola were forged, Overland is entitled to ownership because the third-party transferees (e.g., defendants Wells Fargo and A&S) never had good title and neither did their transferees or encumbrancers.

The Consolidated Action originally began as five separate cases filed in Los Angeles, San Bernardino, and San Diego counties. Over the objections of petitioners, the trial court consolidated these cases in early 2018.

## **2. The Matter Is Set For Trial—Then The Pandemic Strikes.**

In a June 7, 2019 order, the trial court memorialized a stipulation between the parties setting a trial date of March 20, 2020. (PA 191.) But by the scheduled trial date, the emerging Covid-19 pandemic was freezing trial court activity everywhere. On March 18, 2020, the trial court’s Presiding Department issued General Order 031820-34, suspending virtually all courthouse operations; this closure was later extended. (See Petitioners’ Motion for Judicial Notice submitted in support of the Writ Petition (MJN), MJN 19-MJN 35 [SDSC General Order Nos. 031820-34, 040320-39, 043020-47].)<sup>2</sup>

Around the same time, the Chief Justice of California issued Emergency Rule 10, which automatically extended the “five-year rule” (Code Civ. Proc., § 583.340) for all cases filed as of April 6, 2020. (MJN 59 [Cal. Rules of Court, App’x I, Emergency Rule 10].) On May 16, 2020, the trial court re-scheduled trial in

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<sup>2</sup> Although the Court of Appeal denied the Writ Petition, it granted petitioners’ motion for judicial notice. The federal, state, and local government orders, guidance, and other publications cited in this petition and the accompanying memorandum of points and authorities are proper subjects of judicial notice. (See MJN 6-MJN 10; Ev. Code §§ 452, 459; *Bullock v. Superior Court of Contra Costa County* (2020) 51 Cal.App.5th 134, 141, fn. 4.)

the Consolidated Action for September 18, 2020. (PA 183.) Then, on June 22, 2020, the trial court on its own motion set a new trial date of Friday, October 23, 2020. (PA 188.) It has since changed the trial date to the following Monday, October 26. (PA 841:20-841:24.)

The trial court has made clear time and again that it intends to conduct an in-person trial of these consolidated cases as soon as possible. At a hearing on August 27, 2020, the court remarked, “If I had my way, for what it’s worth, the courthouse doors would be open, and you’d be inside the courtroom right now, but that decision is not up to me.” (PA 201:15-201:17.)

Now, in October, the pandemic is worsening, and the courts are still officially closed to almost all business. But the trial court has doubled down on its intent to immediately hold the trial in person: “If you want to file a writ with the Court of Appeal contesting whatever decision I’m making to push us to an in-person trial, recognizing that there’s going to be a lot of flexibility in that definition of ‘in person,’ here is your chance to do so. . . . If I’m abusing my discretion, put the transcript in front of them, and the Court’s ruling, and let the Court of Appeal tell Judge Wohlfeil, in Department 73, in San Diego, to stand down.” (PA 564:19-565:9.)

At this same hearing, which spanned October 7 and 8, the trial court declared that it was going to bifurcate the case, trying to the court “in a first phase, all claims styled ‘declaratory relief.’” (PA 412:6-412:8; see PA 842:4-842:15 [trial court reconfirms this

approach at later hearing]; PA 911-912 [trial court discusses format of trial in Oct. 19, 2020 minute order].)

**3. Petitioners Seek A Continuance To Prevent A “Super-Spreader” Trial.**

On October 13, 2020, petitioners filed their “Notice of Joint Emergency Health-Risk-Based Ex Parte Application And Ex Parte Application of All Defendants to Continue the Trial” (Continuance Application). (PA 636-653.) The Continuance Application included multiple supporting declarations from parties and counsel detailing Covid-19-relevant issues of age, health, family care, and more; it also explained the serious, ongoing public health risks associated with the Covid-19 pandemic. (*Ibid.*) It demonstrated the need for a continuance of the trial for six months or until a time when a large, in-person trial can be safely conducted. (*Ibid.*) The application included a detailed list of overarching and individualized issues, which are described in more detail below. (*Ibid.*)

**4. The Trial Court Refuses A Continuance, But Its Procedural Orders Are Inadequate To The Task And Violate The Parties’ Statutory And Constitutional Rights.**

At a hearing on October 14, 2020, the trial court denied petitioners’ Continuance Application. (PA 841:13-841:14.)

The minute order from this hearing, filed five days later on October 19, provides some detail about proposed trial protocols. (PA 911-916.) But both the hearing and the subsequent

procedural order revealed that the trial court is essentially improvising protocols for conducting an in-person trial during the pandemic. The trial court provided no evidence of (a) any formal process permitting the trial to proceed in the face of multiple public orders that on their face prohibit it, or (b) guidance from any kind of health professional. Instead, the court raised a number of red flags.

***Inadequate space.*** According to the trial court, “we’re not going to have enough room for parties themselves, at least not all of the parties, to be present in the courtroom.” (PA 564:4-564:6.)

Observing that “it’s not the most spacious department in the world,” the trial court allotted the parties a collective total of fourteen chairs—four for plaintiffs and ten for defendants. (PA 862:15-863:14; PA 915.) In other words, there will be a total of fourteen people—attorneys and parties combined—allowed in the courtroom to represent over a dozen parties. While some parties share corporate representatives or counsel, many do not, because among the broad swath of parties there are many divergent and competing interests at stake.

Nor is it settled whether these numbers take into account either side’s trial technician—a critical participant in a trial with “volumes of exhibits” and in which every effort must be made to use electronic exhibits because of the risks associated with physical exhibits. (PA 869:22-870:7, 871:5-871:9, 899:9-899:15, PA 914-915.) And this assumes the parties will be able to obtain the services of a trial technician willing to spend all day in a confined courtroom, four days a week, for several weeks.

*Uncertain trial duration, with unavoidable built-in delays.* The actual trial duration is unknown. In its October 19 minute order, the trial court allotted a collective 22 hours to plaintiffs to present evidence and a collective 30 hours to defendants. (PA 914.) The trial court also allotted an hour to plaintiffs and defendants for opening statements. (*Ibid.*) The trial court is dark Fridays, leaving only four days a week for trial. (PA 903:3-903:11.) Additionally, the trial court conducts law and motion hearings Wednesday mornings, meaning shortened time to conduct trial on Wednesdays. (*Ibid.*) As the trial court noted, “one trial day may include six hours of testimony, while another trial day may include only four hours.” (PA 914.) Certainly, there will also be evidentiary argument and other issues that consume court time. However long the trial takes, it will surely require multiple weeks.

The court acknowledged that masks are required at all times per order of the Presiding Judge. (PA 873:19-874:3, 882:11-883:13.) In its October 19 order, the trial court ruled for the first time that witnesses will testify unmasked, behind a plexiglass shield. (PA 913.) But the trial court has still not determined any procedure to accommodate witnesses who do not wish to remove their mask to testify. (PA 913.) No approach works well. Masks are of paramount importance to prevent the spread of Covid-19, but they will make it difficult for the court, parties and counsel, and—perhaps most critically—the court reporter to understand and evaluate testimony and argument. The need to resolve these

difficult issues, possibly many times each day, creates a substantial risk of delay.

Other than the witness testifying, only one witness may be in the courthouse to wait in the hallway. (PA 912.) Any witness not in the courtroom testifying must remain not just outside the courtroom, but outside the courthouse. (PA 860:25-861:12.) The trial court acknowledged that this too will create delay. (*Ibid.*)

***Inadequate safety protocols.*** Restrooms on the floor where trial is to take place will be cleaned once in the morning and once after closing. They will not be cleaned at all during the day. (PA 873:10-873:14.) Limiting the number of persons allowed inside restrooms will require more significant delays.

The October 19 order requires that the witness stand area and the podium be wiped down after each use (PA 913), and other surfaces will necessarily require regular cleaning. This too will add delays. As the court's order suggests, the witness stand will be an enclosed space surrounded by plexiglass, in which most witnesses will presumably testify unmasked. (*Ibid.*) According to the October 19 order, "Counsel who called the witness will clean the witness stand after each witness completes his or her testimony" if the deputy is not available. (*Ibid.*) The order says nothing about requiring people to wear necessary personal protective equipment (PPE) to perform this cleaning—much less about whether the court will provide and keep on hand a supply of sterilized PPE to prevent cross-contamination.

**B. The Ongoing Covid-19 Pandemic Presents Myriad Substantial Risks To All Trial Participants And The Public At Large.**

“As the Chief Justice explained in [a] recent emergency order: “[C]ourts are clearly places of high risk during this pandemic because they require gatherings of judicial officers, court staff, litigants, attorneys, witnesses, defendants, law enforcement, and juries—well in excess of the numbers allowed for gathering under current executive and health orders.” (*Stanley v. Superior Court of Contra Costa County* (2020) 50 Cal.App.5th 164, 170.)

**1. Covid-19 Is Once Again On The Rise In San Diego County.**

Covid-19 cases and deaths are once again approaching record daily numbers in the United States with no sign of slowing—a third surge in this pandemic. (CDC COVID Data Tracker <<https://covid.cdc.gov/covid-data-tracker/>> [as of Oct. 20, 2020].) The same is true in San Diego County, where cases have increased by 8.4 percent and deaths have increased by 6.2 percent in the two weeks preceding the filing of the Writ Petition. (CA.GOV, COVID-19: Cases <[https://public.tableau.com/views/COVID-19CasesDashboard\\_15931020425010/Cases?:embed=y&:showVizHome=no](https://public.tableau.com/views/COVID-19CasesDashboard_15931020425010/Cases?:embed=y&:showVizHome=no)> [as of Oct. 20, 2020].) On October 19, 2020, San Diego recorded 380 new cases—second only to Los Angeles County for highest day-over-day new cases in the state. (*Ibid.*)

The burden and health risks associated with this in-person trial will be borne more significantly by defendants and their counsel. While plaintiffs and most of their counsel reside in San Diego, all individual defendants, party representatives, and their counsel live in and around Los Angeles. (PA 815:18-816:15; see PA 655-717.) The trial court indicated that it was defendants' choice to select counsel from outside of San Diego (PA 839:2-839:19), but that observation glosses over the fact that the subject transactions occurred in Los Angeles, that none of the subject properties are in San Diego County, that petitioners reside in Los Angeles, that they were sued in Los Angeles and San Bernardino, and that they were only pulled into court in San Diego over their vociferous objection and after litigating their cases in other counties for at least a year.

To participate in a weeks-long trial in San Diego, these participants will need to move into hotels or make other housing arrangements, eat at restaurants (or have food delivered—neither is especially safe), and outsource other tasks normally performed in the home and office. These needs are common and expected during ordinary times, but they present innumerable risks and issues during a pandemic.

**2. Trial Participants Are At Particularly High Risk Of Serious Illness Or Death Due To Covid-19.**

“The age, condition, and health of a significant portion of the population of [San Diego County] places it at risk for serious health complications, including death, from COVID-19.” (See

MJN 72-MJN 73 [Oct. 9, 2020 Order of the Health Officer and Emergency Regulations (Health Order)], § 17.) “[V]ulnerable members of the public—such as older adults, and those with underlying health conditions—[are] at significant risk.” (*Ibid.*)

The age and underlying health conditions of parties, party representatives, witnesses, and counsel are existing, known risks for serious health complications, including death, from Covid-19. In brief, multiple participants are in their 60s, 70s and even 80s, and several suffer from heart, pulmonary or other co-morbidities that significantly increase Covid-19 risk.

**3. The Trial Places An Unreasonable Burden On Participants In Light Of Covid-19-Related Family Obligations.**

Still other trial participants have substantial familial obligations in Los Angeles. As the Chief Justice observed in an emergency order, “(e)ven if court facilities could allow for sufficient social distancing, the closure of schools means that many court employees, litigants, witnesses, and potential jurors cannot leave their homes to attend court proceedings because they must stay home to supervise their children.” (MJN 64 [Judicial Council of California, Mar. 23, 2020 Statewide Order].) As detailed in the appendix, there are multiple such problems here specifically tied to Covid-19. These include caregiver needs for young children in an environment in which outside help, even if available, may not be safe.

#### **4. The Planned Trial Runs Afoul Of State And Local Orders Relating To Covid-19.**

In addition, moving forward with the trial as planned is impracticable, if not impossible, in light of state and local orders that are binding on the trial court—and that will unavoidably be violated every single day that court is in session:

- In-person access to the courts is “subject to county, state, and federal public health guidance and other general orders of [the] court, including, but not limited to, social-distancing, face-covering, and screening requirements.” (MJN 44 [SDSC General Order No. 090920-90 (Restricted Access Order)], ¶ 1.c.)
- As a general rule, “gatherings” including members of more than three households are prohibited. (MJN 66, MJN 72 [Health Order], ¶¶ 2, 15a; see MJN 76 [Cal. Dep’t of Pub. Health, Guidance for Private Gatherings], incorporated by reference in *id.*, ¶ 2.)
- Although “gatherings” excludes operations at essential businesses and the definition of essential businesses includes courts and professional legal services (MJN 72 [Health Order], ¶ 15.a.iii), workers are considered essential only upon a determination that remote work is not practical. (MJN 68 [Health Order], ¶ 10a; MJN 95, MJN 102 [Cal. Dep’t of Pub. Health, Essential Workforce (Essential Workforce Order)], incorporated by reference in *id.*, ¶ 10a.)

- All essential businesses must post and adhere to a Social Distancing and Sanitation Protocol, requiring: (1) certification that those who can work remotely have been advised to do so; (2) all desks or work stations are separated by at least six feet; and (3) frequent disinfecting of break rooms, bathrooms, and other common areas. (MJN 68 [Health Order], ¶ 10b; MJN 103 [County of San Diego, Social Distancing and Sanitation Protocol].)
- Face coverings are required at all times. (MJN 44 [Restricted Access Order], ¶ 1.c; MJN 67 [Health Order], ¶ 8.)
- Social distancing mandates at minimum six feet of distance between all persons at all times (excepting “household members, first responders and medical providers or employees conducting temperature screenings”). (MJN 72 [Health Order], ¶ 15.c.)
- Any person diagnosed with Covid-19 must immediately isolate in their home or another residence and notify all persons in close contact that they should quarantine themselves for at least 14 days after the last contact. (MJN 71 [Health Order], ¶ 14; MJN 106 [Health Officer Order re Isolation of All Persons with or Likely to have COVID-19 (Isolation Order)], ¶ 1, incorporated by reference in *ibid.*)
- Even in the absence of a positive Covid-19 test, “[i]solation is immediately required if a person” shows “[s]igns and symptoms that are consistent with COVID-19 (cough,

shortness of breath or trouble breathing, fatigue, fever or chills, muscle or body aches, headache, sore throat, new loss of taste or smell, congestion or runny nose, nausea or vomiting, or diarrhea).” (MJN 71 [Health Order], ¶ 14; MJN 107 [Isolation Order], ¶ 2.b, incorporated by reference in *ibid.*)

- “All persons who have had close contact with a COVID-19 Patient must immediately take the following actions: [¶] [1.] Quarantine themselves in their home or another residence for 14 days after the last contact with a COVID-19 Patient.” “Essential workers needed to maintain continuity of operations of sectors designated in [Essential Workforce Order] may report to work if they have notified their employer about the close contact, have no symptoms of COVID-19, and wear appropriate personal protective equipment as required by their job/position.” (MJN 71 [Health Order], ¶ 14; MJN 109 [Health Officer Order re Quarantine of Persons Exposed to COVID-19 (Quarantine Order)], ¶ 1, incorporated by reference in *ibid.*) No such exemption is made for trial participants who are not “essential workers,” i.e., parties and witnesses. Nor is it clear whether attorneys and other non-court employees would need to obtain permission from their employer (rather than the trial court) to resume work, as suggested by the text of the order.
- Violation of, or failure to comply with, the Health Order, Isolation Order, or Quarantine Order is punishable by

imprisonment, fine, or both under California Health and Safety Code sections 120275 and/or 120295. (MJN 74 [Health Order], ¶ 26; MJN 108 [Isolation Order], ¶ 4; MJN 110 [Quarantine Order].)

Nor are there any orders in place exempting the trial court from the Covid-19 orders emanating from the state, the County of San Diego, or from the Superior Court itself.

These concerns also highlight yet another problem with the trial court's belief that the trial can be concluded relatively quickly: If a single trial participant contracts Covid-19, the entire trial must be immediately shut down for at least two weeks as all participants quarantine. Even if a trial participant is screened with a fever at the courthouse entrance, the entire trial will need to be stayed and the participants quarantined until the person with a fever tests negative for Covid-19. This is true of participants displaying any Covid-19 symptoms. These circumstances all but guarantee a mistrial—meaning a complete waste of time and needless risk for all participants.

**5. There Is No Evidence That The Trial Court Has Received, Or Has Even Sought, Any Advice From Health Professionals As To Whether To Hold The Trial Or What Safety Protocols Are Appropriate.**

Petitioners are aware of no evidence that any health professional, much less any representative of the State of California or the County of San Diego, has participated in any

evaluation of whether the trial should proceed or has provided any advice regarding what kind of safety protocols could ensure a safe trial—if indeed any are even possible.

Indeed, the trial court appears to be still developing protocols on an ad hoc basis. For example:

- Less than two weeks before trial, it had not yet occurred to the trial court, in determining how many people could fit into its “not the most spacious” courtroom (PA 862:15-862:21), that parties would need technical personnel for the presentation of their case (PA 870:6-870:7 [“I had not taken that person into account. Wow.”])—this, even though “[e]lectronic exhibits are encouraged” (PA 899:11-899:13). Whether these technicians will count toward the parties’ extremely limited headcount remains undetermined. (PA 915.)
- Asked whether it would allow participants to remove their mask, the court responded: “To be determined, counsel. I don’t know the answer to that right now.” (PA 882:13-882:18.) The trial court’s October 19 minute order inverts the equation entirely, providing for the first time that witnesses will be unmasked while testifying (which creates a host of new concerns), yet leaving unresolved the issue of witnesses who prefer to remain masked. (PA 913.)
- The court’s solution to not having enough room for parties to be in court—as both statutes and the Constitution entitle them to be (see § IV, *post*)—is to simply exclude them,

allowing only remote viewing. (PA 915 [parties will observe using the Microsoft Teams program]; PA 899:1-899:8.)

**C. Petitioners Seek Writ Relief; The Court of Appeal Denies Relief At The Last Possible Moment.**

In light of the foregoing circumstances, petitioners sought review by the Court of Appeal via the Writ Petition, which they filed at approximately 6:30 pm on October 20, 2020, about 24 hours after the trial court issued its October 19 minute order specify some of the trial protocols for the first. The petition requested an immediate stay.

The Court of Appeal did not act until 4:42 p.m. on Friday, October 23, 2020, when it issued a summary denial of the Writ Petition. The court did, however, grant petitioners' concurrently filed motion for judicial notice and took judicial notice of the Covid-19-related guidance, orders, and other official publications included in that motion.

**D. This Petition Is Timely.**

Petitioners seek review by this Court within 10 days of the Court of Appeal's summary denial of the Writ Petition. (Cal. Rules of Court, rules 8.490(b)(1)(A), 8.500(e)(1).)

## WHY REVIEW IS NECESSARY

### I. INTRODUCTION.

Seven months into the Covid-19 pandemic, there is no end in sight. In California, across the United States, and throughout the world, every attempt at reopening has been followed by sharp increases in Covid-19 diagnoses and deaths. As the pandemic stretches on, courts and litigants are facing questions about how to move cases toward resolution without creating unreasonable risks and imposing unacceptable burdens.

Taking a “wait-and-see” approach is no longer acceptable. There must be a way for litigants’ cases to be heard—the courts cannot be shut down indefinitely.

But at the same time, there is a fundamental unfairness in wielding the coercive power of the state to compel litigants, their duty-bound counsel, and unwilling third parties to subject themselves to substantial risk of illness or even death—with no legal recourse against a trial court that enjoys near-complete immunity.

This Court is in the best position to balance the efficient administration of justice against the need to protect the health and the rights not only of litigants, but also of all trial participants and the people of California in general.

**II. WITH NO END TO THE PANDEMIC IN SIGHT,  
ISSUES RELATING TO THE SAFETY OF  
COMPELLING LITIGANTS, COUNSEL, AND THIRD-  
PARTIES TO ATTEND IN-PERSON TRIALS WILL  
ARISE WITH INCREASING FREQUENCY.**

**A. Civil Litigants Require Guidance On The  
Relationship Between Covid-19 And Good  
Cause To Postpone Trial.**

Because the issue will undoubtedly arise time and again over the coming months—and possibly years—this Court should provide lower courts and litigants guidance on the scope of a trial court’s discretion to deny a request for continuance because of risks burdens caused by the Covid-19 epidemic.

Like any other place of business, the courts are directly impacted by Covid-19 and subject to limits on whether and how business may be conducted in person. “As the Chief Justice explained in [a] recent emergency order: *‘[C]ourts are clearly places of high risk* during this pandemic because they require gatherings of judicial officers, court staff, litigants, attorneys, witnesses, defendants, law enforcement, and juries—well in excess of the numbers allowed for gathering under current executive and health orders.” (*Stanley, supra*, 50 Cal.App.5th at p. 170, italics added.)

As the Court of Appeal held when affirming the continuance of a criminal trial despite the statutory deadline for trying the case, “[u]nder these circumstances [set forth by the

Chief Justice], the trial court unquestionably was justified in finding that the COVID-19 pandemic constitutes good cause to continue [the] trial . . . . Given the grave risks to court personnel, jurors, attorneys, and the defendant himself that would be created by proceeding in accordance with the normal timeline, *any other conclusion would have been unreasonable in the extreme.*” (*Stanley, supra*, 50 Cal.App.5th at p. 170, italics added; see *id.* at p. 166 [“the severity of the COVID-19 pandemic and the impact it has had within this state independently support the trial court’s finding of good cause to continue defendant’s trial under Penal Code section 1382”].) Other courts “agree with the general proposition that health quarantines to prevent the spread of infectious disease constitute good cause for a continuance.” (*In re M.P.* (2020) 52 Cal.App.5th 1013, 1021.)

Because “[p]ublic health concerns trump the right to a speedy trial” (*Stanley, supra*, 50 Cal.App.5th at p. 169, quoting *People v. Tucker* (2011) 196 Cal.App.4th 1313, 1314.), this Court should provide guidance regarding what constitutes good cause for a continuance in the age of Covid-19.<sup>3</sup>

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<sup>3</sup> *Stanley* discusses the right to a speedy trial in the criminal context, where the right to a speedy trial is guaranteed by the state and federal Constitutions (U.S. Const., Amend. VI, cl. 1; Cal. Const., art. I, § 15, cl. 1) and by statute (Pen. Code, § 1382 [setting 60-day time limit for criminal trial]). A fortiori *Stanley* compels a continuance the civil context, where a general policy in favor of resolving matters efficiently does not carry the weight of an explicit constitutional right.

**B. Civil Litigants Require Guidance On The Impact of Federal, State, and Local Covid-19 Mandates On Courts' Authority To Order In-Person Trials.**

**1. The Complex Framework Of Covid-19 Mandates Has Become A Fixture Of Daily Life.**

As this Court recently observed, the Covid-19 pandemic is “a public health crisis caused by a newly discovered coronavirus that has spread rapidly around the globe, on a scale not seen in a century.” (*Legislature v. Padilla* (2020) 9 Cal.5th 867, 873.) As *Stanley* acknowledged just a few months ago, “[d]espite state and local shelter-in-place orders throughout the country, including in California and [at the county level], according to the Center for Disease Control there have been almost two million cases of COVID-19 in the country and over 110,000 deaths caused by the virus. California itself has seen nearly 130,000 cases and over 4,600 deaths.” (*Stanley, supra*, 50 Cal.App.5th at pp. 169-170, citing Centers for Disease Control and Prevention (CDC), Coronavirus Disease 2019 (COVID-19), Cases in the U.S. <<https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>> (CDC COVID Data Tracker) [as of June 9, 2020].)

Since then, that has number exploded to *over 8.3 million cases and 221,000 deaths* nationwide, with *over 877,000 cases and 17,000 deaths in California*. (CDC COVID Data Tracker <<https://covid.cdc.gov/covid-data-tracker/>> [as of Oct. 23, 2020].)

Mitigation measures in federal, state, and local orders have been the key to stemming the tide of Covid-19. “Widespread implementation and enforcement of sustained community mitigation measures, including mask wearing, informed by state and local officials’ continual data monitoring and collaboration can help prevent transmission of SARS-CoV-2 and decrease the numbers of COVID-19 cases.” (MJN 111 [CDC, Morbidity and Mortality Weekly Report, October 9, 2020].) Courts at every level have recognized as much, upholding these orders against myriad legal challenges. (See, e.g., *South Bay United Pentecostal Church v. Newsom* (2020) — U.S. —, [140 S. Ct. 1613] [denying injunction that would prohibit enforcement of health order against indoor religious services]; *Harvest Rock Church, Inc. v. Newsom* (9th Cir., Oct. 1, 2020) — F.3d —, 2020 WL 5835219 [denying motion to stay enforcement of Governor’s executive orders restricting in-person worship during COVID-19 pandemic]; *Six v. Newsom* (C.D. Cal., May 22, 2020) — F.Supp.3d —, 2020 WL 2896543 [declining to issue TRO based on numerous alleged violations of the Fifth and Fourteenth Amendments to the U.S. Constitution and Article 1, section 1 of the California Constitution].)

**2. The Trial Court Is Subject To Federal, State, And County Guidance And Orders.**

The San Diego Superior Court’s September 9, 2020 Restricted Access Order provides that “[i]n-person access shall be subject to county, state, and federal public health guidance and other general orders of this court, including, but not limited to,

social-distancing, face-covering, and screening requirements.”  
(MJN 44:23-MJN 44:25 [Restricted Access Order].)<sup>4</sup>

The County of San Diego recently updated its health guidance and general orders addressing the spread of Covid-19. Pursuant to California Health and Safety Codes sections 101040, 120175, and 120175.5(b), the Public Health Officer of the County of San Diego (Health Officer) has issued her Order of the Health Officer and Emergency Regulations (Health Order) dated October 9, 2020. (See MJN 66-MJN 75 [Health Order].)

The Health Order provides that all persons are to remain in their homes or at their place of residence, with some exceptions. (MJN 66-MJN 75 [Health Order], § 1.) The Health Order prohibits all public or private “gatherings” that do not comply with California Department of Public Health Guidance for Private Gatherings. (*Id.*, § 2.) “‘Gathering’ is any event or convening that brings together more than one person in a single room or single indoor or outdoor space at the same time.” (*Id.*, § 15a.) A “gathering” does not include operations at “essential businesses,” defined as “any business or activity (or a business/activity that employs/utilizes workers) designated by

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<sup>4</sup> In light of the Restricted Access Order, there is no dispute that the trial court is subject to federal, state, and county Covid-19 mandates. Whether the trial court would remain bound by those orders were the Restricted Access Order rescinded raises important separation of powers questions this Court may ultimately need to resolve.

the State Public Health Officer as ‘Essential Critical Infrastructure Workers’ . . . .’ (*Id.*, §§ 10a, 15a.iii.)<sup>5</sup>

Essential Workforce does include (1) “The Courts, consistent with guidance released by the California Chief Justice,” and (2) ”Professional services, such as legal . . . services, when necessary to assist in compliance with legally mandated activities and critical sector services.” (MJN 95, MJN 102 [Essential Workforce Order].) But these employees are “Essential Workforce” *only* “if remote working is not practical.” (*Ibid.*) There has been no showing by plaintiffs, nor any finding by the trial court, that conducting remote proceedings—a practice that has become widespread throughout California in 2020—is “not practical.” Indeed, the Chief Justice has made explicit provision for judicial proceedings to be held remotely as a result of the Covid-19 pandemic. (MJN 47 [Cal. Rules of Court, App’x I, Emergency Rule 3, subd. (a)].) In the absence of any determination that the holding the trial remotely is “not practical,” the trial participants are not Essential Workforce and the trial constitutes a prohibited “gathering” under Health Order sections 1 and 15.a.

Other provisions of the Health Order compel the same outcome. All essential businesses in San Diego County must certify, pursuant to the mandatory Social Distancing and Sanitation Protocol, that “[e]veryone who can carry out their

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<sup>5</sup> “Essential Critical Infrastructure Workers” refers to a document published by the State of California. (MJN 80 [defining “Essential Workforce”].)

work duties from home has been directed to do so.” (See MJN 68 [Health Order], § 10b; MJN 103 [Social Distancing and Sanitation Protocol].) This sets an even higher bar than the “not practical” standard set forth in the State’s Essential Workforce guidelines, *requiring* remote work whenever it is possible. Adherence to the Social Distancing and Sanitation Protocol is required by section 10b of the Health Order. (See MJN 68 [Health Order], § 10b [“All essential businesses shall implement the Social Distancing and Sanitation Protocol and provide evidence of its implementation to any authority enforcing this Order upon demand. . . . Any business that fails to prepare and successfully implement a Social Distancing and Sanitation Protocol shall immediately close”].)

These orders are in place to protect the people of California, including civil litigants. Those litigants—along with their counsel, subpoenaed third parties, and other trial participants—deserve clarity on the extent to which the courts may require them “assume some measurable risk” to their health in order to “yield to the administration of justice.” (PA 841:4-841:6.)

**III. CIVIL LITIGANTS REQUIRE CLARIFICATION OF THE NATURE AND SCOPE OF THE RIGHT TO BE PRESENT AT TRIAL, BOTH GENERALLY AND DURING THE CONTINUING COVID-19 PANDEMIC.**

The trial court’s orders, and the Court of Appeal’s denial of relief, raise another significant issue inherent in running a massive multi-party trial in a small, confined courtroom during a pandemic: No “room for parties themselves, at least not all of

the parties, to be present in the courtroom.” (PA 564:4-564:6.)  
The trial court’s solution: Parties can watch the trial from afar using Microsoft Teams software. (PA 915.)

But the trial court does not have discretion to exclude the parties from the courtroom for mere logistical reasons. To the contrary, parties have *both* a statutory *and* a constitutional right to be present in the courtroom during trial, to communicate with counsel in real time, to give counsel the benefit of their percipient factual knowledge, and to assist in cross-examination.

Litigants and courts lack guidance on how to balance a party’s right to attend trial against the need to keep the court system moving during this pandemic. This Court should take the opportunity to provide that much needed guidance.

**A. Evidence Code Section 777 Precludes Courts From Excluding Parties.**

Evidence Code section 777 protects a party’s right to be present at trial. (Evid. Code, § 777, subd. (b) [“A party to the action cannot be excluded under this section”].) “Under the existing law, *the judge may not exclude a party to an action.*” (*Curtis, supra*, 143 Cal.App.3d at p. 603, italics added [applying rule in civil action], quoting Law Revision Com. cmt., Evid. Code, § 777; accord, *People v. Gonzalez* (2006) 38 Cal.4th 932, 950 [“Subdivision (b) prohibits the court from excluding a ‘party to the action’”]; see also 3 Witkin, Cal. Evid. (5th ed. 2020) Discretion To Exclude, § 85 [“A party to the action cannot be excluded”].) This applies equally to corporate entities and to

natural persons. “If the party is a corporation, an officer designated by its attorney is entitled to be present. Section 777 permits the right of presence to be exercised by an employee as well as an officer. Also, because there is little practical distinction between corporations and other artificial entities and organizations, Section 777 extends the right of presence to all artificial parties.” (*Curtis*, at p. 603, quoting Law Revision Com. cmt., Evid. Code, § 777.)

In short, a party, whether a natural person or a fictitious legal “person,” “is clearly entitled to be present through its designated officer within the meaning of Evidence Code section 777, subdivision (c) and is expressly exempt from exclusion by the court.” (*Curtis, supra*, 143 Cal.App.3d at p. 601; see also *Pedrow v. Federoff* (1926) 77 Cal.App. 164, 174 [(“A) party to an action is entitled to remain in the court during the trial of such action and aid in and observe the progress thereof . . . “].)

The trial court’s order excluding the parties from the courtroom runs afoul of section 777 and frustrates its purpose, which the *Curtis* court held to be reversible error. (*Curtis*, at p. 603 [reversing judgment because “we cannot declare that the denial of the statutory right to be present and actively participate at trial did not amount to a miscarriage of justice”].)

**B. This Court Has Not Addressed A Civil Litigant’s Due Process Right To Be Present At Trial.**

Multiple California and non-California courts—but not yet this Court—have addressed the “fundamental constitutional

right” of litigants to be present in the courtroom for trial and other proceedings. (See *In re Watson* (1979) 91 Cal.App.3d 455, 460-461 [petitioner had fundamental due process right to be present during a civil commitment proceeding]; *Holschen v. Int’l Union of Painters & Allied Trades/Painters Dist. Council #2* (8th Cir. 2010) 598 F.3d 454, 464, fn.4 [“Fundamental due process also gives a party the right to be present during proceedings brought against him or her, subject to limited exceptions”]; *Helminski v. Ayerst Labs.* (6th Cir. 1985) 766 F.2d 208 [analyzing contours of due process right of parties to be present at civil trials]; *Cary by and through Cary v. Oneok, Inc.* (Okla. 1997) 940 P.2d 201, 204 [“The ideals behind due process and a fair trial permit a party to be present in the courtroom absent extreme conditions”].)

“[C]ertain fundamental constitutional rights are guaranteed to every person, not solely to those who are accused of criminal activity. Due process is one such fundamental right. Both the Fourteenth Amendment to the United States Constitution and now article I, section 7 of the California Constitution prevent the state from depriving any person of life, liberty or property without due process.” (*In re Watson, supra*, 91 Cal.App.3d at p. 460.) “While it is true that this right, as others previously noted, has been generally vindicated in criminal cases, the right to be present should not be confused with the privilege of confrontation which is the right of an accused to confront his accusers. The right to a fair hearing is an essential of due process whether life, liberty or property is being taken by criminal or civil process.” (*Id.* at pp. 460-461.)

The rare cases upholding exclusion of a party from the courtroom during trial uniformly involve (1) undue prejudice to or interference with the proceedings caused by (2) some act or condition of the party being excluded. (See, e.g., *Province v. Center for Women’s Health & Family Birth* (1993) 20 Cal.App.4th 1673, 1685-1687 [no abuse of discretion to exclude plaintiff (a disfigured child) during liability phase of bifurcated trial where she was “unable to aid counsel in the proceedings” and her presence was prejudicial to defendant], disapproved on another point by *Heller v. Norcal Mutual Ins. Co.* (1994) 8 Cal.4th 30, 41; see also Cal. Judges Benchbook Civil Proceedings—Trial, Excluding Witnesses, Parties, and Other Persons From Courtroom, § 8.69 [“Ordinarily, a judge may not exclude any party to the action from the courtroom, unless the party, after repeated warnings, continues to disrupt the trial,” citing *Illinois v. Allen* (1970) 397 U.S. 337, 345-346].) Across the board, the cases deal with “*extraordinary situations*” involving disruption and prejudice caused in some way by the party being excluded. (See Wegner et al., Cal. Practice Guide: Civil Trials & Evidence (The Rutter Group) ¶ 4:448.1, original italics, citing *Province*, at p. 1686.) Petitioners are aware of no case where a trial court has excluded parties from the proceedings for what amounts to simple expediency, especially where, as here, suitable alternatives exist.

*Helminski, supra*, 766 F.2d 208, which the Court of Appeal relied upon in *Province, supra*, 20 Cal.App.4th at pp. 1686-1687, is a prototypical example. It involved the involuntary exclusion

of a plaintiff whose mental disability prevented him from understanding the proceedings or assisting in his case. The court's task was to determine "what circumstances might, consistent with due process, justify involuntary exclusion of a party." (*Helminski, supra*, 766 F.2d at p. 214.)

With regard to cases like the present case, in which presumably healthy parties are being excluded, the court noted that although the due process clause does not guarantee an absolute right to a civil litigant to be present personally at a trial, "representation by counsel does not justify arbitrary exclusion of a litigant who wishes to be personally present in the courtroom." (*Helminski, supra*, 766 F.2d at p. 214; see also *id.* at p. 213 [(S)ince an attorney is merely the representative or agent of the litigant and not the litigant's 'alter ego,' a court may not exclude arbitrarily a party who desires to be present merely because he is represented by counsel; such exclusion would violate the due process clause of the Fifth Amendment"].)

Ultimately, the court concluded, "[c]onsistent with due process, a plaintiff who can comprehend the proceedings and aid counsel may not be excluded from any portion of the proceedings absent disruptive behavior or a knowing and voluntary waiver." (*Helminski, supra*, 766 F.2d at pp. 216-217; see also *Preferred Props., Inc. v. Indian River Estates, Inc.* (6th Cir. 2002) 276 F.3d 790, 797 ["Exclusions would comport with due process, however, if a litigant were unable to 'comprehend the proceedings and aid counsel,' engaged in 'disruptive behavior,' or gave 'a knowing and voluntary waiver'"].)

A party's interest in being physically present at hearings and trial is most often stated in terms of that party's ability to aid counsel. (See, e.g., *Curtis, supra*, 143 Cal.App.3d at p. 603 ["Unquestionably, (the attorney) was at a serious tactical disadvantage in being deprived of the assistance of the informed (party representative) in assessing the effects of witnesses' testimony and suggesting areas which should be probed, sifting through the documentary evidence in determining its significance and materiality and otherwise providing useful information to guide the (attorney) in the conduct of his case"]; *Pedrow, supra*, 77 Cal.App. at p. 174 ["(A) party to an action is entitled to remain in the court during the trial of such action and aid in and observe the progress thereof . . . [.]") There is no doubt that the ability to observe proceedings in real time and to assist counsel in the litigation of one's case is invaluable to a party—particularly with regard to the party's ability to give the attorney the benefit of firsthand factual knowledge in real time for use in cross-examination.

But the ability to assist counsel is only half the story. The full extent of "the dignitary interest . . . in enabling [individuals] to present their side of the story before a responsible government official" (*In re William M.W., supra*, 43 Cal.App.5th at p. 588) was explained most effectively by the Georgia Supreme Court: "There is, in other words, a personal element to the right to be present. The right is based not only on what the party can do to the case, but on what the case will do to the party. It is the *party's* interests that are being determined by the jury and the judge,

and it is the *party's* life that will be directly affected by the outcome of the case.” (*Kesterson v. Jarrett* (2012) 291 Ga. 380, 392.)

While the circumstances presented by the Covid-19 pandemic are unique, these cases establish the paramount significance of a party's right to be present for trial. They show that only extreme conditions warrant exclusion. No such extreme conditions exist here—the reason for exclusion is only the trial court's insistence on holding a trial that shouldn't be held.

### CONCLUSION

The Covid-19 pandemic has brought unprecedented legal and constitutional questions to the forefront. Trial participants deserve clarification on their right to preserve and protect their health while still actively engaging in the litigation process. Parties deserve to know whether and when their statutory and constitutional right to attend trial must yield to external factors entirely outside their control. With cases once again reaching new records and no end to the pandemic in sight, we cannot afford to wait it out.

But trial-court improvisation is no solution, either. Errors that threaten the health and even lives of trial participants cannot be remedied by a later appeal.

The pandemic has forced upon us questions about the administration of justice that only this Court can answer. This petition provides an opportunity for the Court do so.

Date: October 23, 2020

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## CERTIFICATION

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that this **PETITION FOR REVIEW** contains **7,869** words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Date: October 23, 2020

*/s/ Jeffrey Gurrola*

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Jeffrey Gurrola

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

Court of Appeal  
Fourth Appellate District  
**FILED ELECTRONICALLY**  
*10/23/2020*  
Kevin J. Lane, Clerk  
By: Michael Hubbard

WELLAS FARGO BANK, NATIONAL  
ASSOCIATION, et al.,

Petitioners,

v.

THE SUPERIOR COURT OF SAN  
DIEGO COUNTY,

Respondent;

OVERLAND DIRECT, INC.,

Real Party in Interest.

D078087

(San Diego County  
Super. Ct. No. 37-2013-00078078-  
CU-BT-CTL)

THE COURT:

The petition for writ of mandate, prohibition or other appropriate relief, request for immediate stay, and motions for judicial notice have been read and considered by Justices Benke, Huffman, and O'Rourke. The motions are GRANTED. The petition and request are DENIED.

O'ROURKE, Acting P. J.

Copies to: All parties

**PROOF OF SERVICE**

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On October 23, 2020, I served the foregoing document described as: **EMERGENCY PETITION FOR REVIEW** on the parties in this action by serving:

**SEE ATTACHED SERVICE LIST**

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 in the case who are not registered TrueFiling users will be served by mail or by other means permitted by the court rules.

By Personal Service: On October 20, 2020, I caused the above named document to be delivered to First Legal, 530 B Street, Suite 1050, San Diego, CA 92101. Per my instruction and under the normal course of business, First Legal personally served the above named document to the office of the addressee so indicated below.

Executed on October 23, 2020, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

/s/ Leslie Y. Barela  
Leslie Y. Barela

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## SERVICE LIST

### Via Personal Service:

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