

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

USA TODAY,
a division of Gannett Satellite Information Network, LLC,
Petitioner,

v.

LOS ANGELES COUNTY SUPERIOR COURT,
Respondent;

BRITNEY JEAN SPEARS,
Real Party in Interest.

After a Decision by the Court of Appeal
Second Appellate District, Division Two, Case Number B315096

Los Angeles Superior Court, Case Number BP108870
Honorable Brenda J. Penny

PETITION FOR REVIEW

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I. ISSUES PRESENTED

1. Did the Los Angeles Superior Court create an undue burden on the constitutional right of the public and media to access nonconfidential court proceedings when it cancelled public and media participation in its remote audio program, thereby requiring those who wish to exercise their right of access to risk their health by travelling to, and appearing in person at, courthouses during a surge in the pandemic?

2. Did the Los Angeles Superior Court fail to provide equal protection under the law when it cancelled remote access privileges to one class (i.e., the public and media) while continuing to allow another class to appear remotely (i.e., parties, attorneys and others), without justifying the suspect classification by showing the termination of remote access to the public and media was necessary to serve a compelling interest, and that its action was narrowly-tailored to achieve that objective?

II. WHY REVIEW SHOULD BE GRANTED

During the pandemic, the Los Angeles Superior Court established two programs for remote access to its courts: LACourtConnect (LACC) for litigants, attorneys, witnesses, interpreters, and others to participate in proceedings; and the Remote Audio Access Program (RAAP) for the public and media to listen to nonconfidential hearings. These programs made it feasible for everyone to safely exercise their constitutional right to participate in, or observe, proceedings in Los Angeles courthouses.

But the superior court abruptly cancelled RAAP, citing two reasons:

(1) Someone recorded a hearing in the Britney Spears conservatorship action (even though the court cannot tell if the recording was made by a user on the LACC or RAAP platforms, or someone in the courtroom); and,

(2) The court lifted its social distancing mandate (which allowed more members of the public and media to attend proceedings in person, but a subsequent surge in the pandemic led court leadership to warn against coming to courthouses unless necessary).

The court continues to provide remote access by LACC to parties, attorneys, and others to safely access the courts, and encourages the use of those means instead of going to court in person. The public and media, however, are no longer allowed remote access. To exercise their presumptive constitutional right to access, they must risk their health by observing proceedings in person during a surge in the pandemic. Courts are operated for the public, and transparency is crucial for courts to maintain their integrity. By taking away remote access to the public and media in all cases because someone recorded a nonconfidential proceeding in one case, the court has not considered the vital role the public and media play in the justice system.

Restoring audio access to the public and media would be easy; the court has not said cost is a reason for discontinuing RAAP. In denying the request to reinstate RAAP, the court

simply said that seats in the courtroom is all it must provide. That was true historically but the Los Angeles Superior Court created a remote access program for the public and media. It cannot close that method of accessing the courts without passing constitutional scrutiny.

Procedural History. On June 23, 2021, Britney Spears made a statement during a public court proceeding in the probate conservatorship that has been placed upon her. Eleven attorneys participated by LACC, members of the public and media listened via RAAP, and others attended in person. When the judicial officer learned someone recorded the statement by Ms. Spears earlier in the proceeding, audio access was immediately terminated for the public and media. The following day, court leadership announced it was cancelling RAAP because of the recording incident and due to the lifting of social distancing in its courthouses.

At the next hearing on July 14, the court allowed approximately 15 parties, attorneys, and others to appear remotely by LACC. The public and media could observe only in person—if they traveled to the courthouse, waited in line, and found one of the seats in the crowded courtroom, placing their health at risk due to the pandemic. Notes could be taken by paper and pencil. The media had to wait for breaks to report on the proceeding, making it hard to accurately convey information.

On August 26, USA TODAY asked the court to reinstate RAAP, or provide other remote access to the public and media for the next hearing on September 29. The request was made under

our state and federal constitutions, which provide a presumptive right of access for the public and media to observe court proceedings, and guarantee equal protection under the law. The court denied it, stating that no constitutional right was implicated by its cancellation of remote access because it was providing seats in its courthouses for the public and media. The court also said there are differences between those who may use LACC compared to the public and media.

A petition for writ of mandate was made in the Court of Appeal, which was denied on September 21, 2021.

Undue Burden. No one should have to risk their health to exercise their constitutional right of access by travelling to, and attending, court in person. Free speech includes the ability to comment on what happens in our courts. That right is meaningless if we cannot see or hear what happens without undue restriction. Transparency is crucial to the court's legitimacy. The court can easily allow the public and media to exercise their right of access by restoring RAAP, but will not.

The right of access is unduly burdened by the cancellation of RAAP because the court granted the public and media the right to observe proceedings remotely, and took away that right in response to one incident of recording and because it lifted its social distancing mandate. The court has since experienced a dramatic increase in COVID-19 cases, prompting it to warn the public not to come to court unless required, and encouraging parties and counsel to use LACC to make appearances.

The Chief Justice and Judicial Council of California recently recommended that courts expand remote access—even after the pandemic ends—recognizing that audio and video technology increases access to justice for litigants, creates transparency by allowing the public and media to monitor proceedings, and eliminates the need for travel.

The California Legislature recently enrolled a bill to require remote access when courtrooms are closed, noting that it was troubled by the refusal of the Los Angeles Superior Court to grant a newspaper’s request for remote access last year, requiring reporters to risk their health to attend in person. The court created RAAP three months later, but now has reverted to limiting the public and media to in-person access.

Any governmental interest in prohibiting the recording of nonconfidential proceedings is not compelling and is not served by cancellation of RAAP. The superior court does not know if a user on the LACC platform, or someone present in court, made the recording. Other steps could have been taken short of cancelling the remote access program to address the concern about recording, such as holding those who broke the law responsible or issuing further warnings.

Because the court allowed remote access and abruptly withdrew that right, the court must identify a compelling government interest that warrants the closure of remote access, and show its action was narrowly-tailored. The court has done neither, concluding that no constitutional right was affected by its cancellation of remote access.

Equal Protection. The superior court has created two classes: (1) the litigants, attorneys, and others which it allows remote access; and, (2) the public and media which may no longer have remote access.

There are differences between the classes, but they are similarly-situated because both have a constitutional right to access the courts, and each serves an integral role in the administration of justice. While the court continues to provide an option for litigants, attorneys, and others to safely participate without endangering their health and safety, the court has closed the remote access it previously allowed for the public and media. This disparate treatment burdens the exercise of a fundamental right.

Strict scrutiny is required. The superior court must show (1) its closure of remote access to the public and media was necessary to achieve a compelling government interest, and (2) its action was narrowly-tailored to serve that interest. That showing was not made on the reasons the court stated for terminating RAAP (i.e., the unauthorized recording of one hearing by unknown persons and the lifting of social distancing).

In denying the request to restore RAAP, the court never engaged in a strict scrutiny analysis. It concluded the constitutional right of access was not implicated, so no compelling government interest was identified for its cancellation of RAAP, nor did the court explain how its action was narrowly tailored to meet its interest.

Conclusion. This petition affects the rights of all members of the public and media to attend nonconfidential court proceedings in Los Angeles County courthouses. When the superior court created a program for remote access to the public and media, it could not close that program without a constitutional justification.

The pandemic is not over, and the superior court is advising against coming to court in person. Yet, that is the only option the court now allows for the public and media. Restricting their access to in-person attendance forces them to choose between risking their health to attend in person or forgoing their constitutional right of access. It is an unnecessary choice because the court can easily restore audio access.

Even when the pandemic ends, the superior court should be required to continue its remote audio program unless it shows a compelling government interest to end it and that its action is narrowly-tailored to meet that objective.

III. BACKGROUND

(A) The parties and underlying action.

The petitioner, USA TODAY, is a local-to-national digital media organization. USA TODAY filed a media request in the Los Angeles Superior Court on August 26, 2021, to reinstate RAAP for all nonconfidential proceedings in all courthouses, or provide other remote access for the public and media in the Britney Spears conservatorship proceedings.

The respondent is the Superior Court of the State of California, County of Los Angeles, which denied the media request on September 9, 2021. (PE 280-284, tab C.)¹

The real party in interest is Britney Jean Spears, who is the conservatee in the probate conservatorship action in which the media request was made.

(B) The superior court establishes remote access programs for the public and media (RAAP) and for parties, attorneys and others (LACC)

The Los Angeles Superior Court announced the creation of RAAP effective January 11, 2021, for “attorneys and members of the public, including the news media, [to] listen remotely to nonconfidential court proceedings throughout the Superior Court of Los Angeles County using the Court’s new Remote Audio Appearance Program (RAAP).” (PE 38, tab A, exhibit 1.) The program was part of the court’s effort to ensure public access during the pandemic. (*Ibid.*)

Another program, LACC, allows remote video and audio access to the court “for remote appearances in the Superior Court of California, County of Los Angeles.” (PE 48, tab A, exhibit 2.) Access is provided for probate proceedings. (*Id.*, PE 48.) LACC is provided free-of-charge because the cost recovery fee has been waived. (PE 53, tab A, exhibit 3.) Per the court, LACC “is not

¹ Citations to “PE” are to the Exhibits in Support of Petition for Writ of Mandate, followed by the page number and the exhibit number. The exhibits are part of the record that will be transmitted to this Court.

available for use by the news media or general public.” (PE 50, tab A, exhibit 2, bold removed.) The court explained: “Spectators—anyone without a role in the hearing—may participate via ... [RAAP, which] ... enables users with a smart phone, tablet or computer with internet service to establish a remote connection to courtrooms and listen to nonconfidential court proceedings. RAAP requires users to create a Court ID and password and then register for remote listen-only audio access for each hearing.” (*Id.*, PE 48.)

(C) A recording was made of the conservatorship hearing on June 23, 2021, but the court does not know if it was someone on RAAP, LACC, or in the courtroom

On June 23, 2021, Britney Spears made a statement during a conservatorship hearing. The probate court warned those listening on RAAP that recording was prohibited. (PE 60:12-19, tab A, exhibit 4.) When Ms. Spears was asked whether she wanted the courtroom closed she said: “I think they’ve done a good job at -- at exploiting my life in the way that they’ve done, um, my life, and I feel like it should be an open court hearing, and they should listen and, um hear what I have to say”. (PE 65:21-25, tab A, exhibit 4.)

It was the desire of Ms. Spears for the statement to be made public because she was unable to effectively express her desire to end the conservatorship otherwise. Earlier, the court-appointed attorney for Ms. Spears, Samuel D. Ingham III, argued against the attempt by conservator of the estate, James P. Spears, to seal records in the conservatorship. In an objection

filed September 2, 2020, Mr. Ingham explained why public access to information on the conservatorship was protective of Ms.

Spears:

... BRITNEY strongly believes it is consistent not only with her personal best interests but also with good public policy generally that the decision to appoint a new conservator of her estate be made in as open and transparent a manner as possible. The sealing motion is supposedly being brought by her father to ‘protect’ BRITNEY’s interests, but she is adamantly opposed to it. [¶¶]

BRITNEY’s conservatorship has attracted an unprecedented level of scrutiny from mainstream media and social media alike. Far from being a conspiracy theory or a ‘joke’ as JAMES reportedly told the media, in large part this scrutiny is a reasonable and even predictable result of JAMES’ aggressive use of the sealing procedure over the years to minimize the amount of meaningful information made available to the public. Whatever merits his strategy might have had years ago when BRITNEY was trying to restart her career, at this point in her life when she is trying to regain some measure of personal autonomy, BRITNEY welcomes and appreciates the informed support of her many fans. Although the sealing motion is supposedly for her ‘protection’, BRITNEY herself is vehemently opposed

to this effort by her father to keep her legal struggle hidden away in the closet as a family secret.

The moment that JAMES obtained from this Court the power to handle BRITNEY's affairs on her behalf, he surrendered a large measure of privacy as to the manner in which he exercises that power. Transparency is an essential component in order for this Court to earn and retain the public's confidence with respect to protective proceedings like this one. In this case, it is not an exaggeration to say that the whole world is watching.

(PE 299:18-24 & PE 305:5-26, tab G.)

During the hearing of June 23, 2021, the probate court became aware that someone had recorded the statement, and advised:

I understand that there has been an issue with RAAP, that apparently somebody was recording the proceedings in violation of the order that I made this morning, so we're going to shut RAAP down right now.

So please disable the RAAP immediately. That's also very concerning, because I specifically said that there was not supposed to be any recordings, and that happened nonetheless. So I want counsel and Ms. Spears to be aware of that, so I made an order this morning that there is not to be any recording, and somebody – and I don't know whether

it's one person or more than one person – violated the order.

(PE 95:4-15, tab A, exhibit 4.)

Although the probate court implied that someone on RAAP violated the rule against recording, there was no way for the court to make that determination during the hearing. The Los Angeles Superior Court has identified no one who it believes recorded the hearing. It is unknown whether the June 23 recording occurred by someone on RAAP because the court simultaneously provided an audio feed of the hearing to three platforms (i.e., RAAP, LACC, and telephone). The recording could have been made by one of the eleven attorneys on LACC or the phone line, or someone in the courtroom.

(D) The superior court announces the cancellation of RAAP the next day because of the recording and due to its lifting of social distancing in its courthouses

The following day, June 24, 2021, the Los Angeles Superior Court eliminated RAAP by news release:

Effective June 28, the Court will no longer offer the Remote Audio Attendance Program (RAAP) to listen remotely to courtroom proceedings. The Court implemented this temporary program during the pandemic *recognizing there may be abuses of the Court's orders prohibiting recording, filming, and distribution of proceedings*. Widespread breaches by the public in a recent court proceeding highlighted

the need to return to in-person, open courtroom proceedings, which is a welcome development. (PE 100, tab A, exhibit 5, italics added.)

The news release included an order rescinding social distancing requirements in all county courthouses, and reassuring that LACC “ ‘will remain a staple in our Court into the future, offering less expensive and convenient alternatives to in-person appearances.’ ” (PE 98-99, tab A, exhibit 5.)

(E) The elimination of RAAP restricted public and media access for the hearing on July 14, 2021

The next conservatorship hearing was July 14, 2021. There were 18 attorneys, parties, and interested persons on record for the hearing, all of whom appeared via LACC or telephone per the transcript except for three. (PE 102-103, tab A, exhibit 6.) This included several participants who are not parties or counsel for a party. (*Id.*, at PE 103:26-28; 118:17-119:23.)

No remote access was permitted for the public or media. To cover the hearing, a reporter from USA TODAY appeared in person and arrived early to ensure a seat would be available. (PE 32, tab A, Puente declaration, ¶ 5.) No electronic devices could be used in the courtroom, so the reporter had to take notes by hand and wait for a break to dictate to USA TODAY editors what happened in court. (See PE 60:12-19, tab A, exhibit 4 [court instructions that notes must be taken by pencil and paper].) The lead reporter for the story, Maria Puente in Virginia, received those notes for her coverage. The process was slow, expensive, inconvenient, and provided less information than was available

when remote access was provided for the prior hearing. (PE 32-33, tab A, Puente declaration, ¶¶ 6-9.)

(F) A resurgence of COVID-19 cases occurred after eliminating RAAP, prompting the court to warn against in-person appearances

When the court announced the elimination of RAAP on June 24, conditions relating to the pandemic were improving. Due to an uptick in COVID-19 cases, the superior court tweeted on August 5, 2021, urging the public “to come to court in person only when required.” (PE 256-258, tab B, exhibits 10-11.) Per a statement by the court on August 13, 2021, the “‘public health threat posed by the COVID-19 virus remains present in Los Angeles County’ ” (PE 260, tab B, exhibit 12), and the court “encourage[s] parties to make remote appearances whenever possible...” (*id.*, at PE 261).

Conditions worsened. In an order filed August 26, 2021, the court found that “Los Angeles County has experienced a dramatic increase in reported COVID-19 cases...” after the court lifted its social distancing mandate on June 28, 2021. (PE 264:14-15, tab B, exhibit 13.) Because “COVID transmission remains high in LA County”, the court extended certain criminal and juvenile deadlines on September 13, 2021. (PE 288, tab E, capitalization removed.)

(G) The need for remote access remains high

The court’s elimination of RAAP burdens the right of access on the public and media, especially those located outside of Los Angeles, in favor of those who live and work close to the

courthouse. Cancellation of RAAP also disadvantages those with mobility limitations who cannot easily attend in person, which unnecessarily burdens those individuals with having to travel to court for in-person attendance in busy courthouses when remote access could easily be restored.

No disruption to court proceedings would occur by reinstating remote audio access. It is not like earlier times when bulky video and audio equipment was needed to capture images or sounds from inside the courtroom. RAAP lets the public and media silently observe.

The public and media who are able to appear in person must risk exposure to the COVID-19 virus by traveling to court and sit in a crowded courtroom, when the court is asking the public not to come to court because of the recent spike in exposures to the virus.

(H) The Chief Justice and Judicial Council recommend that courts expand remote access rather than return to pre-pandemic operations

On August 16, 2021, the Judicial Council of California issued a report on the importance of remote access, recommending that courts “expand and maximize remote access on a permanent basis for most court proceedings and should not roll back the increased access to the courts made possible by remote technology to pre-pandemic levels of in-person operations.” (PE 166, tab A, exhibit 7.)

The report quotes a statement by the Chief Justice from 2013 that court “[a]ccess should be physical, remote, and equal.”

(PE 168, tab A, exhibit 7, italics removed.) Per the report, “[r]emote access to the courts can increase equity, fairness, and transparency for both the public and the media.” (*Ibid.*) “The need for remote access to the courts is likely to increase significantly in the coming months as California pursues more equity and inclusion initiatives and works to manage the anticipated rise in evictions.” (*Id.*, at PE 169.)

The benefits of remote access are discussed in the report. “[The] reduction in the number of individuals who had to travel to courthouses reduced traffic and air pollution and will continue to have a positive climate impact going forward. Remote proceedings allowed pro bono attorneys and legal aid providers to serve more clients with greater efficiency, and increased transparency and access to court proceedings for the public and the media.” (PE 169, tab A, exhibit 7.) The report recommended:

- California courts should *expand and maximize remote access* on a permanent basis for most proceedings and *should not default to pre-pandemic levels of in-person operations*.
- The Judicial Council should encourage and support courts to substantially expand remote access through all available technology and should work to promote consistency in remote access throughout the state to ensure that Californians have equal access to the courts while providing flexibility to meet local needs.

(PE 169, tab A, exhibit 7, italics added.)

(I) The Governor states that remote access must become a basic service offered by courts

In approving the state budget this year, the Governor explained the need for courts to provide remote access, even after the pandemic ends:

Remote access must become a basic service rather than a temporary way to address barriers to the courts during the pandemic. Californians expect to access important government services through the use of technology and court services and processes should be no different. The Administration, working with the Legislature and Judicial Council, is committed to resolving this issue over the coming months in recognition that allowing remote proceedings will maximize courts' ability to provide equal, safe, and reliable access to justice and court services.

(California State Budget, 2021-22, p. 130.)²

(J) The Legislature criticizes the Los Angeles Superior Court's requirement that reporters attend court in person during the pandemic

A bill passed the California legislature (AB 716) to amend Code of Civil Procedure section 124, to (1) require remote access to proceedings if a court closes, and (2) prohibit courts from

² < <http://www.ebudget.ca.gov/2021-22/pdf/Enacted/BudgetSummary/FullBudgetSummary.pdf> > (visited 9/17/2021.)

denying in-person attendance when remote access is available, unless exclusion is needed to protect the health and safety of the public or court personnel. (PE 315-316, tab H.) The bill was enrolled on September 15, 2021. (*Id.*, PE 315.)

The Assembly Floor Analysis of the bill on September 10, 2021, describes this “troubling” incident:

Despite the apparent availability of relatively simple online or telephonic streaming, there were troubling instances of courts denying reasonable requests to access remote proceedings. For example, during the height of the pandemic, the *Ojai Valley News* requested access to proceedings in the Los Angeles Superior Court, since the court was already providing remote access to parties and witnesses. Not wanting to send its reporters to the courthouse – where they would sit in an enclosed space with other observers and potentially contribute to the spread of COVID – the newspaper requested to monitor the trial through the already existing and operating remote system. The Court denied the request, arguing that the remote system was only for facilitating participation of parties and witnesses. When the newspaper cited the First Amendment and state law making all judicial proceedings presumptively public, the Los Angeles County Court responded that the reporters could have intended in-person proceedings, which satisfied the First Amendment and statutory right to

public access. (Los Angeles Superior Court letter to Jack Lerner, et.al. October 8, 2020.) Assuming, for the sake of argument, that the Court was correct in its constitutional analysis, the incident nonetheless raises an important question of public policy.

(PE 318, tab H.)

(K) The superior court denied the request by USA TODAY to restore RAAP or provide any other form of remote access to the public or media

On September 9, 2021, the court issued a minute order denying the request to restore remote access to the public and media. (PE 280-284, tab C.) The order explains the background of RAAP and LACC:

In response to the COVID-19 pandemic, the Court implemented RAAP to supplement in-person courtroom attendance options while courtroom capacity was limited due to social distancing requirements. Indeed, the court implemented RAAP as an emergency measure to specifically counter the impact of social distancing capacity restrictions raised by the COVID-19 pandemic balanced against the court's desire to maintain its public form. The court did so understanding the increased risk of abuses and violations by users, but also understanding that the program was a temporary compromise. RAAP was cancelled in June of 2021, when social distancing guidelines were lifted

(following LA County Department of Public Health and Cal-OSHA guidance) and LASC courtroom capacities were again normalized, returning to pre-pandemic levels. The Court also notes that audio recordings of a hearing in this matter have been made and published, apparently over RAAP, in violation of this Court's orders and in violation of RAAP terms of usage.

LACC, the Court's remote appearance system, was also implemented on an expedited basis in response to the pandemic. LACC allows attorneys, parties, and witnesses, who are specifically registered as such, to participate in proceedings remotely. Unlike RAAP, it allows users to see, communicate and interact with each other, and is not available for use by spectators.

(PE 280-281, tab C.)

With the lifting of social distancing, the court said, "approximately 65 seats are available for members of the media and public to attend proceedings in the instant matter." (PE 281, tab C.) "At the last hearing on July 14, 2021, all members of the media who wanted to attend in person were accommodated; the Court is aware of only a few public spectators who could not attend due to capacity limitations." (PE 281, tab C.)

"In order to accommodate attendees at the anticipated September 29, 2021, hearing, the Court has sent out a *public inquiry* regarding the number of people who plan to attend the

hearing. It does not appear that USA Today intends to send its reporters to attend in person; public access in the form of courtroom attendance is not at issue in this Request.” (PE 281, tab C, italics added.) Unlike the news releases mentioned in this petition (that were posted to the court’s website and distributed via bar organizations and social media), the inquiry the court references in its ruling was not posted on its website or otherwise distributed to the public. A document entitled Media Advisory was apparently sent to select members of the media on September 7, 2021, asking them to indicate their interest in attending the September 29 hearing in person. (PE 286, tab D.) The notice warns: “**NOT FOR PUBLICATION OR BROADCAST.**” (*Id.*, emphasis and capitalization in original).³

Those who were furnished the Media Advisory had 48 hours to respond, until September 9 at 5:00 p.m. (PE 286, tab D.) The court issued its ruling the same day at 3:00 p.m. (PE 280, tab C.) The court did not provide the number of media outlets that responded to its survey. Nor did the court state the number of registrants for RAAP at the June 23 hearing to show how many members of the public and media participated remotely for that hearing, who would presumably exercise the same privilege on September 29 if remote access is restored.

³ There was no violation by USA TODAY of the court’s admonition against distribution of its Media Advisory. Counsel obtained the notice after 5:00 pm on September 9, 2021, from a source other than USA TODAY, and is not aware if any USA TODAY representatives received the notice or responded.

The court concluded that the constitutional right of access was not affected by its cancellation of RAAP:

In this case, USA Today has not been excluded from accessing any portion of the public proceedings, and therefore, there has been no total or partial ‘closure.’ Like everyone else, its reporters may attend proceedings in person should they desire to do so. The court’s cancellation of remote audio is not the equivalent of specific exclusion from a portion of the proceedings giving rise to constitutional analysis. Until the pandemic, physical access was not only adequate, but the only kind of access available. Constitutional analysis is not triggered every time public attendance is rendered somehow less convenient, e.g., when proceedings are transferred from one courtroom to another with less capacity, or a request for more or different chairs in a courtroom is denied.

Because the cancellation of RAAP does not constitute a courtroom ‘closure’ for the purposes of First Amendment public access analysis, no findings of a substantial countervailing interest are required. (PE 282, tab C.)

Regarding equal protection, the court stated it “is not aware of any authority which suggests that members of the public and media must have the same form of access to court proceedings as do court participants. Indeed, they historically

have not: spectators have never been allowed past the bar, the railing or partition that separates them from attorneys and witnesses, in a courtroom. And attorneys in the state have had the exclusive use of telephonic appearance services in civil matters for years.” (PE 282, tab C.) “Nor is the Court aware of any authority that suggests principles of equal protection are violated when local reporters have greater ability to attend proceedings in person insofar as other reporters must travel to do so. USA Today cites to none.” (*Ibid.*)

(L) A petition for writ of mandate was summarily denied

The denial of the request to reinstate RAAP was challenged by petition for writ of mandate to the Court of Appeal, Second District. The court denied the petition on September 21, 2021, stating: “The court has read and considered the petition for writ of mandate filed September 17, 2021. The petition is denied.” (Order filed 9/21/2021.)

IV. DISCUSSION

This Court should review the decision by the Los Angeles Superior Court to maintain its closure of remote access to the public and media. A grant of review will allow this Court to determine whether the superior court’s restriction on the exercise of the constitutional right of access to in-person attendance unduly burdens that right, and whether the right to equal protection is fulfilled when the superior court grants remote access to one class but not to the public and media.

The superior court needs to operate with transparency but is requiring the public and media to risk their health to observe court proceedings when the court can easily restore audio access passes constitutional scrutiny. No compelling interest justified the closure of the remote audio program, and the court's cancellation of the program was not narrowly-tailored to meet any interest it has in restricting access to public proceedings.

(A) The First Amendment and the California Constitution provide a right for the public and media to attend nonconfidential court proceedings

The First Amendment to the U.S. Constitution, which applies to states through the Fourteenth Amendment, provides that “Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble.” (U.S. Const., 1st and 14th amendments.) Under the federal constitution, a qualified right of access exists for the public and media to attend certain governmental proceedings. (*Press-Enterprise Co. v Superior Court* (1986) 478 U.S. 1, 9 [preliminary hearing sufficiently similar to a criminal trial to require same public and media access].) This right “extends beyond the context of criminal proceedings and encompasses civil proceedings as well. [Citations.]” (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1207 [public and media had right of access to proceedings outside the jury in civil action for damages by Sandra Locke against Clint Eastwood].)

The California Constitution provides a “more protective, definitive and inclusive of rights to expression of speech” than its

federal counterpart. (*Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899, 908.) These rights are guaranteed:

- “A law may not restrain or abridge liberty of speech or press.” (Cal. Const., art. I, § 2, subd. (a).)
- “The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good.” (*Id.*, § 3, subd. (a).)
- “The people have the right of access to information concerning the conduct of the people’s business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.” (*Id.*, § 3, subd. (b)(1).)

Code of Civil Procedure section 124 mandates that hearings be open to the public, except for certain proceedings under the Family Code or where state law allows closure. (Code Civ. Proc., § 124 [“Except as provided in Section 214 of the Family Code or any other provision of law, the sittings of every court shall be public.”].) In *NBC Subsidiary*, the California Supreme Court interpreted Code of Civil Procedure section 124 and held that the right of public and media access applies to “ordinary civil trials and proceedings”. (*NBC Subsidiary, supra*, 20 Cal.4th at pp. 1212 & 1213, fn. 30.)

(B) Termination of RAAP violated the free speech rights of the public and media under our federal and state constitutions

No case law has been found on a right to remote access because prior litigation involved restrictions on in-person attendance. Here, the superior court provided the public and media the option of exercising their right of access by remote means, until it closed that channel. The analysis would be different had the court not permitted remote access to the public and media. Once it gave that right, it could not take it away without passing constitutional scrutiny.

As the Supreme Court explained: “Where ... the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.” (*Globe Newspaper Co. v. Superior Court for Norfolk County* (1982) 457 U.S. 596, 606 [statute excluding public from trials involving sex offenses against minors was overly broad and unconstitutional].)

In *Waller v. Georgia* (1984) 467 U.S. 39, these requirements must be met to justify the exclusion of the public from a court proceeding: (1) the existence of an overriding interest likely to be prejudiced absent the closure; (2) the closure is narrowly tailored, i.e., no broader than necessary to protect that interest; (3) no reasonable alternatives to closing the proceeding are available; and (4) the trial court must “make findings adequate to support the closure.” (*Waller, supra*, 467 U.S. at p. 48 [closure of

suppression hearing in criminal case unconstitutional]; accord, *People v. Woodward* (1992) 4 Cal.4th 376, 383.) “The court cannot determine the application of the above principles in the abstract; they must be determined by reference to the facts of the particular case. [Citation.]” (*People v. Scott, supra*, 10 Cal.App.5th at p. 530.)

Findings are also required by the California Constitution to support state action limiting court access: “A statute, court rule, or other authority adopted after the effective date of this subdivision 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.” (Cal. Const., art. I, § 3, subd. (b)(2) [added Nov. 5, 1974, last amended June 4, 2014 by Stats. 2013, S.C.A. 3, § 1].)

- (1) *Elimination of RAAP was a partial closure of the court, unduly restricting the right of access previously granted to the public and media*

Although the physical courthouses remain open for the public and media to access, the court has taken away remote access. When it provided remote access, the court substantially increased the number of participants who could listen to proceedings. The elimination of RAAP was a partial closure of the court that restricts the right of access previously enjoyed by the public and media.

(2) *Findings were not made to justify the closure of remote access when RAAP was terminated*

The decision to terminate RAAP was made on June 24, 2021, one day after the recording incident took place in the conservatorship hearing. The court stated on June 24, 2021, that it was cancelling RAAP because it was a “temporary program during the pandemic” and “[w]idespread breaches by the public in a recent court proceeding highlighted the need to return to in-person, open courtroom proceedings, which is a welcome development.” (PE 100, tab A, exhibit 5.) To the extent those were findings, the news release does not demonstrate a compelling government interest that warrants the limitation on access.

In the minute order denying the request by USA TODAY to restore RAAP (PE 280, tab C), the court did not explain why the elimination of social distancing measures for its courthouses necessitated the discontinuance of RAAP. Cancelling RAAP is contrary to the recommendations of the Judicial Council against returning to pre-pandemic operations and encouraging courts to continue providing remote access to the public and media. (PE 169, tab A, exhibit 7.) Remote access serves the governmental interests in providing transparency, access to justice, and reduces the need to travel. (*Ibid.*) The Governor also stated in approving the state budget that remote access should be a basic service, not a temporary measure during the pandemic. (See III(I), *supra.*)

The court stated in its minute order that RAAP was a temporary program (PE 280, tab C); but, in announcing the creation of RAAP, the court did not say the program was

temporary. No end date or other conditions were stated for when the program would terminate. (PE 38-40, tab A, exhibit 1.) The court said “RAAP will be the preferred option for public access to courtroom proceedings.” (*Id.*, PE 39.)

No finding was made that the court lacks the technological capacity to reinstate RAAP, or that it would cost anything to continue operating the program.

In terminating RAAP, the court relied on its governmental interest in enforcing the rule against recording or broadcasting court proceedings. (See Cal. Rules Ct., rule 1.150.) There is no compelling need to prevent the recording of public proceedings. (Discussed at IV(B)(3), *infra.*) Whatever interest exists in prohibiting recording, the court did not explain how cancellation of the entire program due to one incident was necessary to protect that interest. The court does not know if the recording was made by a RAAP user; it could have been one of the participants on LACC or someone in the courtroom. The findings acknowledge that the court does not know who made the recordings. It is speculation that the violation occurred “apparently over RAAP....” (PE 280, tab C.)

(3) *No compelling government interest exists in preventing the recording or broadcasting of public proceedings*

The court rule regarding broadcasting and recording of proceedings states the governmental interest: “The judiciary is responsible for ensuring the fair and equal administration of justice. The judiciary adjudicates controversies, both civil and

criminal, in accordance with established legal procedures in the calmness and solemnity of the courtroom.” (Cal. Rules Ct., rule 1.150(a).) Although the government has an interest in the orderly administration of justice, that interest is not absolute. A “clear and present danger” must be shown to prohibit the exercise of free speech rights. (*Pennekamp v. Florida* (1946) 328 U.S. 331 (66 S.Ct. 1029, 1032.)

There is no blanket prohibition in the California Rules of Court against recording and broadcasting of nonconfidential court proceedings; rule 1.150 states these activities “may be permitted as circumscribed in [rule 1.150 of the California Rules of Court] if executed in a manner that ensures that the fairness and dignity of the proceedings are not adversely affected. This rule does not create a presumption *for or against* granting permission to photograph, record, or broadcast court proceedings.” (Cal. Rules Ct., rule 1.150(a), italics added.) Because the law is neutral on whether to grant or deny permission to record and broadcast, it cannot be said that the government has a compelling interest in preventing that activity. No government interest exists to override the right of access.

Concerns about recording confidential court proceedings do not exist here, because the court may exclude the public and media from having remote access to any portion of the hearing that is confidential, just as it would close the courtroom, leaving no risk of recording.

The Judicial Council report on remote access states the government’s interest in providing transparency to the public and

media of its operations, and encourages courts to continue providing remote access even after the pandemic is over. (PE 169, tab A, exhibit 7.) However, the Los Angeles Superior Court has stated that it is returning to pre-pandemic conditions by cancelling RAAP. (PE 100, tab A, exhibit 5.)

(4) *Eliminating RAAP was an overly broad reaction that infringed upon the right of the public and media to access the court*

Even where the government purpose is “legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.” (*Shelton v. Tucker* (1960) 364 U.S. 479, 81 S.Ct. 247, 252.) The government’s stated interest in regulating recording and broadcasting of court proceedings is to ensure “the fair and equal administration of justice ... in the calmness and solemnity of the courtroom.” (Cal. Rules Ct., rule 1.150(a).) Those are important goals, which can be accomplished without taking away remote access.

The judge presiding over the hearing may have been justified in turning off RAAP access during the proceeding when it learned of the rule violation, so it could prevent further recording until it could investigate the matter. The subsequent abolishment of remote access by the court’s administrative action was an overreaction. The court was not justified in removing remote access to the public and media, while maintaining that privilege for parties, counsel, witnesses, and others. Denying the public and media the right to remotely access the proceedings

through RAAP in all cases based on one incident punished the public and media for misconduct that might have been caused by a participant on LACC. The reaction was hostile to the public and media's vital role in the administration of justice.

When a recording or broadcast is made of public proceedings in violation of rule 1.150, the court may punish the offenders. That is constitutionally permissible because the state action is content-neutral. If the government's aim was to prevent recording, it did not accomplish it by abolishing RAAP. The risk of illegal recording exists with LACC participants, and even with those attending in person. Therefore, denying remote access does not address the evils the court was trying the address.

The court could have investigated the violation of rule 1.150 and punished the offenders as a remedy and to dissuade others from violating the rule, but the court has not stated publicly if it has attempted to do so, or even if it knows who broke the rules. The court could have issued additional warnings against the recording and advertised the punishment available if someone is caught, as deterrents against future violations. The effectiveness of those narrowly-tailored remedies were not tested by the court. Instead, it shut down remote access for everyone in all cases.

Because the court has no compelling interest in preventing the recording and broadcasting of public proceedings, and its remedy was not narrowly-tailored to serve its interest, the cancellation of RAAP violated our federal and state constitutions.

- (C) The right of the public and media to equal protection under our federal and state constitutions was denied by terminating remote access to them, while affording that right to other participants

The Fourteenth Amendment to the U.S. Constitution provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” (U.S. Const., 14th amendment.) It guarantees no minimum of protection, but requires that persons similarly situated receive equal treatment. (*Skinner v. Oklahoma* (1942) 316 U.S. 535, 62 S.Ct. 1110, 1112.) The government may make a reasonable classification of persons and other activities, if not arbitrary, based on a difference in the classes that substantially relates to a legitimate objective. (*People v. Health Laboratories of North America* (2001) 87 Cal.App.4th 442, 447.)

The California Constitution expressly prohibits the denial of equal protection of the laws. It prevents special privileges or immunities to particular citizens or classes of citizens not granted to all (Cal. Const., art. I, § 7, subd. (b)); requires uniform operation of general laws (*id.*, art. IV, § 16, subd. (a)); and bars local or special laws when a general statute can be made (*id.*, subd. (b)).

There is a two-tier test for whether a classification is constitutional. “In ordinary equal protection cases not involving suspect classifications or the alleged infringement of a fundamental interest, the classification is upheld if it bears a rational relationship to a legitimate state purpose. ... But if the statutory scheme imposes a suspect classification, *such as ... a*

classification which infringes on a fundamental interest ..., the classification must be closely scrutinized and may be upheld only if it is necessary for the furtherance of a compelling state interest.” (*Weber v. City Council of Thousand Oaks* (1973) 9 Cal.3d 950, 958., italics added.)

When the court terminated RAAP, it created two classifications of access: one for parties, counsel, witnesses, and others it allows to attend court proceedings (who may do so remotely by audio and video via LACC); and another for the public and media (who may not attend remotely and must appear in person to observe). This was evident at the July 14, 2021, hearing where most appeared via LACC or telephone. (PE 102-103, tab A, exhibit 6.) The court allowed the ACLU and an attorney for an “unidentified interested party” (*id.*, PE 103:26-28) to appear remotely, while it banned remote access to the public and media. Reporters who live or work outside Los Angeles and California are disadvantaged because traveling to the courthouse to view proceedings in person is not viable. (PE 33, tab A, Puente decl., ¶ 7.)

Eliminating RAAP infringes on the fundamental interest of the public and media to access court proceedings, and provides privileges and immunities to a particular class to the exclusion of others similarly situated. Therefore, the court must demonstrate that its cancellation of remote access to the public and media, while it provides remote access to others, is necessary to serve a compelling state interest.

There are differences between the two classes, but each has a constitutional right to access the court for nonconfidential proceedings. The parties and counsel have due process right to attend, and the public and media have a free speech right to do the same. Providing access to one group but not the other does not advance a legitimate objective. The termination of RAAP for the public and media does not eliminate or substantially reduce the chance of proceedings being recorded. Per the July 14, 2021 hearing transcript, there were 18 participants on record, only three of whom appeared in person. If the court's aim was to prevent recording, it would have taken away LACC access to everyone. Instead, it continued to provide video and audio access to a favored class, while punishing the public and media because unknown person(s) violated the rule against recording a public proceeding once.

Media outlets are now burdened with having to send a reporter to Los Angeles to view the proceedings in person, which creates an unnecessary expense and a health risk to the reporter and the public due to the pandemic, especially for those based outside of California like USA TODAY. By comparison, remote access is provided to other participants through LACC for free starting September 7, 2021. There are few seats available in the courtroom, with heavy demand by the public and media to attend. Remote access would reduce the need for reporters to choose between traveling to Los Angeles to appear in person or forgo observing the hearing.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

COURT OF APPEAL – SECOND DIST.

FILED

Sep 21, 2021

DANIEL P. POTTER, Clerk

mreal Deputy Clerk

USA TODAY,

Petitioner,

v.

THE SUPERIOR COURT OF
LOS ANGELES COUNTY,

Respondent;

BRITNEY JEAN SPEARS,

Real Party in Interest.

B315096

(Super. Ct. No. BP108870)

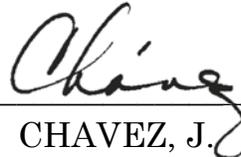
ORDER

THE COURT:

The court has read and considered the petition for writ of mandate filed September 17, 2021. The petition is denied.



ASHMANN-GERST, Acting P.J.



CHAVEZ, J.



HOFFSTADT, J.

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PROOF OF SERVICE

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: 5941 Variel Avenue, Woodland Hills, California 91367.

On **October 1, 2021**, I served the foregoing document described as **PETITION FOR REVIEW** upon the following:

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Executed on October 1, 2021 at Woodland Hills, California.

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

/s/

Annais Alba

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