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10
11 UNITED STATES DISTRICT COURT
12 EASTERN DISTRICT OF CALIFORNIA
13 FRESNO DIVISION

14 American Civil Liberties Union of Southern
California, First Amendment Coalition,
15 Kilah Oats, Lotisha Davidson, Tanisha
Brown, Tameca Spriggs and Janie Randle

16 Plaintiffs,

17 v.

18 Tamarah Harber-Pickens, in her official
19 capacity as Court Executive Officer of the Kern
County Superior Court, Judith K. Dulcich, in
20 her official capacity as Presiding Judge of the
Kern County Superior Court, and Donny
21 Youngblood, Sheriff of Kern County, in His
22 Official Capacity,

23 Defendants.

Case No. 1:20-cv-00889-DAD-JLT

**NOTICE OF EX PARTE
MOTION AND EX PARTE
MOTION FOR TEMPORARY
RESTRAINING ORDER;
MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT THEREOF**

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NOTICE OF MOTION AND MOTION

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PLEASE TAKE NOTICE that, as soon as they may be heard, Plaintiffs will and hereby do move, pursuant to Fed. R. Civ. P. 65(b) and Civil Local Rule 231, for a temporary restraining order restraining Defendants Tamarah Harber-Pickens, in her official capacity as Court Executive Officer of the Kern County Superior Court, Judith K. Dulcich, in her official capacity as Presiding Judge of the Kern County Superior Court, and Donny Youngblood, in his official capacity as Sheriff of Kern County, together with their agents, assistants, successors, employees, and all persons acting in concert or cooperation with them, or at their direction or under their control from preliminarily, during the pendency of this action, and permanently thereafter, from continuing to enforce the March 23, 2020 standing order and practice and policy of denying the public access to judicial proceedings occurring in the Kern County Superior Court, except as deemed permissible following an appropriate case-by-case adjudication, without providing some limited in-person access consistent with social distancing and a viable alternative mechanism for the public to remotely access all civil and criminal court proceedings, including trials, that would otherwise be public under the law.

The motion is supported by the following Memorandum of Points and Authorities, by the Complaint for Injunctive and Declaratory Relief, and by declarations of the Plaintiffs and their attorneys; the declarations are filed contemporaneously with this Memorandum.

Pursuant to Civil L.R. 231(a), on June 26, 2020 at 10:10 a.m., counsel for Plaintiffs emailed Defendants to inform them Plaintiffs would move for a temporary restraining order. In addition, once pleadings were ready, Plaintiffs' Counsel e-mailed copies of (1) the Complaint for Injunctive and Declaratory Relief on June 26 at 10:10 am; and on June 28 at ~9:15 pm, emailed: (2) the Motion for Temporary Restraining Order; (3) Declarations ISO the Motion for Temporary Restraining Order; and (4) [Proposed] Order for Temporary Restraining Order to Counsel for Defendant Sheriff Youngblood and the Court Executive Officer and Public Affairs Officer of the Court. As of ~9:15 pm on June 28, despite two requests, the Court has not yet advised Plaintiffs what entity represents the Court.

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TABLE OF CONTENTS

- I. INTRODUCTION 1
- II. SUMMARY OF FACTS 2
 - A. Plaintiff First Amendment Coalition’s Attempts to Avoid Litigation 2
 - B. Plaintiffs’ Denial of Access – Even After Defendants’ Purported Policy Change 4
- III. DEFENDANTS MUST BE TEMPORARILY RESTRAINED FROM ENFORCING THE MARCH 23 STANDING ORDER AND ENFORCING THEIR POLICIES AND PRACTICES BANNING PUBLIC ACCESS TO COURT PROCEEDINGS 5
 - A. Plaintiffs Are Likely to Succeed on the Merits Because Defendants’ Ban on Public Access Violates Plaintiffs’ Rights of Access under the First Amendment 6
 - 1. The Right of Access to Civil and Criminal Court Proceedings is Fundamental and Presumptive under the First Amendment 6
 - a. Defendants Cannot Satisfy the Strict Requirements for Denying Access to the Public 7
 - b. There Exist Less Restrictive Alternatives to Complete Closure of the Court 8
 - 2. Absent Immediate Injunctive Relief, Plaintiffs Will Continue to Be Irreparably Harmed 11
 - B. At A Minimum, Plaintiffs Raise “Serious Questions” 12
 - C. The Balance of Equities Weighs Heavily in Favor of Plaintiffs 12
 - D. A Temporary Injunction Will Serve the Public Interest 13
 - E. Given the Facts of This Case, the Bond Requirement Should Be Waived or At Least Set at a Nominal Amount 14
- IV. CONCLUSION 16

Table of Authorities

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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757 F.3d 1053 (9th Cir. 2014)6

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705 F.2d 1143 (9th Cir. 1983)7

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393 U.S. 175 (1968).....11

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523 F. Supp. 2d 1005 (N.D. Cal. 2007)14

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457 U.S. 596 (1982).....5

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812 F.2d 1151 (9th Cir. 1987)12

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572 F.3d 1067 (9th Cir. 2009)15

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5	851 F.2d 673 (3rd Cir. 1988)	6
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 and Closures”8

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 2020)8

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Kern County is keeping judicial proceedings –including jury trials– secret from family members. This is a grave violation of the First Amendment and Plaintiffs face continuing irreparable harm if Defendants are permitted to continue to exclude them from the courthouses. Even one secret proceeding is too many. Defendants have denied Plaintiffs access to at least a dozen public hearings, and this denial is ongoing. Open judicial proceedings are “one of the most enduring and exceptional aspects of Anglo-American justice.” *Phoenix Newspapers, Inc. v. U. S. Dist. Ct.*, 156 F.3d 940, 946 (9th Cir. 1998). Indeed, the tradition of public access to court proceedings—and in particular, criminal proceedings—dates back centuries, such that “a presumption of openness inheres in the very nature of a criminal trial under our system of justice.” *Richmond Newspapers v. Virginia*, 448 U.S. 555, 573 (1980). The United States Supreme Court has time and again recognized the public’s presumptive First Amendment right of access to court proceedings, holding that it is essential not only to the proper functioning of the judiciary, but also to the very health of our representative form of government, for while “[p]eople in an open society do not demand infallibility from their institutions, . . . it is difficult for them to accept what they are prohibited from observing.” *Id.* at 572.

When it began, the coronavirus pandemic rendered physical access to courts all but impossible for the general public. However, courts fashioned practical solutions to this problem, using telephone and video access to fulfill the public’s First Amendment rights. As Kern County enters phase three of its reopening, residents can now go to restaurants, gyms, casinos, museums, bowling alleys and arcades,¹ but are still unable to vindicate their First Amendment right of access to court proceedings. Plaintiffs do not contend that unlimited physical access should be provided. The public-health crisis legitimately prevents that. However, many courts across the state and country have figured out ways to provide limited in-person physical access, consistent with social distancing and public health guidelines, and/or remote access to court proceedings. It

¹ Karen Hua, KGET.com, *12 more sectors open in Kern County: gyms, bars, and more* (June 8, 2020), <https://www.kget.com/health/coronavirus/12-more-sectors-reopen-in-kern-county-gyms-bars-and-more/>

1 is far past the reasonable time for Defendants to do the same.

2 Instead, more than three months after shuttering its doors to the public, Defendants
3 Tamarah Harber-Pickens, in her official capacity as Court Executive Officer of the Kern County
4 Superior Court, Judith K. Dulcich, in her official capacity as Presiding Judge of the Kern County
5 Superior Court (the “Court Defendants”), and Donny Youngblood, in his official capacity as
6 Sheriff of Kern County (collectively, “Defendants”), continue to exclude Plaintiffs from court
7 proceedings, including criminal trials and civil and criminal proceedings. Although the public
8 has a clear First Amendment right to attend these proceedings, Plaintiffs have been repeatedly
9 prevented from accessing them.

10 The urgency of the situation intensified when Defendants resumed jury trials the week of
11 May 26th, with no apparent in-person or remote access for the public. Public access is
12 particularly important now given the long overdue focus on the disparate treatment of Black and
13 Brown people by the criminal legal system. Plaintiffs include five Black women whose family
14 members are Black men being prosecuted in Kern County. Four Plaintiffs are mothers who were
15 denied access to their son’s hearings. As Plaintiff Tanisha Brown explains: “During this period
16 of intense police violence and misconduct, it is really important that I’m in the court to make
17 sure the police and prosecutors don’t railroad my son, a young Black man who’s never been in
18 trouble. I want to make sure that he doesn’t accept charges or a plea deal that he shouldn’t
19 accept, and that the court doesn’t take the opportunity of an empty courtroom to throw excessive
20 charges at him.” Declaration of Tanisha Brown, ¶ 6.

21 Plaintiffs thus bring this action challenging the legality of the Court Defendants’ March
22 23rd standing order and the Defendants’ policies and practices denying public access to Kern
23 County Superior Court. This Court should find the March 23rd order invalid; immediately
24 enjoin its further implementation; and enjoin Defendants’ policies and practices resulting in the
25 deprivation of Plaintiffs’ clear right of access.

26 **II. SUMMARY OF FACTS**

27 **A. Plaintiff First Amendment Coalition’s Attempts to Avoid Litigation**

28 There can be no doubt that the coronavirus pandemic presents extraordinary challenges to

1 court administration. Many courts have restricted in-person access, but Kern County has *denied*
2 access to Plaintiffs, even after its purported re-opening.

3 Plaintiffs attempted to resolve this matter amicably to no avail. On May 27, 2020,
4 Plaintiff First Amendment Coalition (“FAC”), along with other groups supporting court
5 transparency, sent a letter to the Court Defendants, documenting the lack of public access to
6 court proceedings and requesting that the Court Defendants revise their March 23 standing order
7 restricting “access to any and all courthouses . . . to those persons required to appear in person
8 for a court hearing” with no allowance for the public to observe any of the proceedings. FAC
9 asked the Court Defendants to put in place a simple way for the public and press to meaningfully
10 access civil and criminal proceedings during the pandemic. Declaration of Virginia LaRoe
11 (“LaRoe Decl.”), ¶ 19, Ex. J. The initial response was favorable but incomplete. *See id.*, Ex. K.

12 On June 5, 2020, FAC and Plaintiffs’ counsel responded, urging the Court to immediately
13 revise its March 23 standing order, outline a transparent process for public access consistent with
14 social distancing, ensure remote access to public proceedings taking place via video or
15 teleconference and expand remote access to all proceedings that are lawfully public. *See id.*, Ex.
16 L. FAC stressed the urgency given the resumption of criminal trials. *See id.*

17 On June 10, the Managing Attorney responded. The Court did not offer to provide audio
18 access or revise its March 23rd standing order, but indicated “members of the media and the
19 public will be authorized by the Presiding Judge or the assigned judicial officer to attend all
20 scheduled hearings in-person, provided they wear face coverings and maintain the required
21 physical distancing of at least six feet.” LaRoe Decl., Ex. M. Members of the public were to
22 submit a request to attend a criminal proceeding through the attorney of record in the criminal
23 case. For those members of the public who “do not have access to the attorney of record, they
24 may make a request at the courthouse security screening area. Security personnel have been
25 instructed to contact the judicial officer to obtain clearance for the individuals to attend the
26 desired proceeding.” *Id.* The Court indicated it was conducting some limited hearings via
27 GoToMeetings and remote access could be requested —though the court recently removed this
28 information from its website. *See id.* ¶¶ 19– 20.

1 **B. Plaintiffs’ Denial of Access—Even After Defendants’ Purported Policy**
2 **Change**

3 Despite the Court Defendants’ purported change in policy, Defendants continue to deny
4 access to the courthouse to Plaintiffs and the public. **Tanisha Brown’s** son, Avion Hunter, was
5 arrested while protesting police brutality against Black people in Bakersfield, California.
6 Declaration of Tanisha Brown ¶ 2. He was beaten so badly that he was hospitalized. *Id.*
7 Defendants denied Brown the right to attend her son’s arraignment on June 10, 2020. *Id.* ¶ 3.
8 She is worried about what will happen to her son, a young Black man who has never been in
9 trouble, if she is not there to watch the court and prosecutor. *Id.* ¶ 6.

10 Defendants denied **Janie Randle** the ability to attend her son’s hearings on May 18, June
11 3 and his preliminary hearing on June 18, 2020. Declaration of Janie Randle, ¶¶ 3–7. Her son’s
12 next court date is Monday, June 29, 2020. *Id.* ¶ 11. She is worried that if she cannot be there to
13 bear witness “that my son, a Black man, will be wrongfully convicted like so many other Black
14 men. It is wrong that, when the whole country is crying out against police brutality against
15 Black people, the Kern County courts are closed with no accountability to the public.” *Id.* ¶ 9.
16 **Tameca Spriggs** has been denied access to her son’s jury trial, which according to the Court’s
17 website, began on June 1st. Declaration of Tameca Spriggs, ¶ 6; *see* Declaration of Kathleen
18 Guneratne, ¶ 7. Similarly, **Lotisha Davidson** and **Kilah Oats** have been denied access to
19 Trevon Foreman’s criminal proceedings on June 5, June 15 and June 22, 2020. Declaration of
20 Lotisha Davidson, ¶¶ 3–6; Declaration of Kilah Oats, ¶¶ 4–8. According to the Court’s website,
21 Foreman’s case is calendared for jury trial. *See* Guneratne Decl. ¶ 4. Most recently, on June 22,
22 2020, Oats informed the Deputy at the screening area that she was told she could gain entry by
23 asking a Sheriff’s Deputy at the courthouse to talk to the judge. The Deputy told her this was
24 “incorrect and the judge could not grant her any access to the courthouse.” *See* Oats Decl. ¶ 8.

25 Defendants denied **Rosa Lopez**, who launched ACLU So Cal’s Kern County Courtwatch
26 program, access to judicial proceedings occurring in the 1415 Truxtun Avenue courthouse,
27 which holds felony arraignments and civil proceedings, on June 2, June 10, June 18 and on June
28 22, 2020. Declaration of Rosa Lopez, ¶¶ 6–17. Lopez was likewise denied access to the 1215

1 Truxtun Avenue courthouse, which holds misdemeanor arraignments and civil proceedings as
2 recently as June 22. *Id.* ¶¶ 6, 15, 17.² When Lopez went to the 1415 Truxton Courthouse on
3 June 18, 2020, she saw a notice stating “[i]f you are not an attorney, party, defendant or
4 subpoenaed witness you should not enter the Courthouse and you should return home.” *Id.* ¶ 8.
5 There was an additional notice outside of the courthouse that appeared to be a copy of the
6 Court’s March 23 standing order explaining the court was closed to the public. *See id.* ¶ 9.

7 Similarly, Defendants informed **First Amendment Coalition** there was no way to
8 physically or remotely attend court proceedings on May 27, 2020 and failed to provide requested
9 remote access to proceedings on June 2. LaRoe Decl., ¶¶ 11–18. As of June 24, 2020, however,
10 instructions on how to request remote access do not even appear on the Court’s website. *Id.* ¶
11 20.

12 **III. DEFENDANTS MUST BE TEMPORARILY RESTRAINED FROM ENFORCING**
13 **THE MARCH 23 STANDING ORDER AND ENFORCING THEIR POLICIES AND**
14 **PRACTICES BANNING PUBLIC ACCESS TO COURT PROCEEDINGS**

15 A temporary restraining order preserves the status quo and prevents irreparable harm
16 until a hearing can be held on a preliminary injunction application. *See Granny Goose Foods,*
17 *Inc. v. Brotherhood of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 439 (1974). On a motion
18 for a temporary restraining order, the plaintiff “must establish that he is likely to succeed on the
19 merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the
20 balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v.*
21 *Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Stuhlbarg Int’l Sales Co. v. John D. Brush &*
22 *Co., Inc.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001) (noting that preliminary injunction and
23 temporary restraining order standards are “substantially identical”). A temporary restraining
24 order may issue where “serious questions going to the merits [are] raised and the balance of
25 hardships tips sharply in [plaintiff’s] favor.” *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127,
26 1131 (9th Cir. 2011) (internal citation omitted). To succeed under the “serious question” test,

27 _____
28 ² Defendants permitted Lopez entry to the 1215 Truxton Avenue courthouse on June 18, but denied her entry to the same courthouse four days later. Lopez Decl., ¶ 8.

1 plaintiffs must show that they are likely to suffer irreparable injury and that an injunction is in
2 the public's interest. *Id.* at 1135.

3 Moreover, when First Amendment rights are involved, the presumed "status quo" is the
4 condition in which a person is free to exercise his or her First Amendment rights. *See*
5 *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 562 (1975). Generally, an injunction
6 that prohibits a governmental body from enforcing an unlawful rule, law or policy will be seen as
7 a prohibitory, rather than mandatory, injunction. *See Ariz. Dream Act Coal. v. Brewer*, 757 F.3d
8 1053, 1061 (9th Cir. 2014).

9 **A. Plaintiffs Are Likely to Succeed on the Merits Because Defendants' Ban on**
10 **Public Access Violates Plaintiffs' Rights of Access under the First Amendment**

11 Given the strong presumption of access, Plaintiffs can show a strong likelihood of
12 success on the merits. At a minimum, this unconstitutional conduct raises "serious questions."

13 **1. The Right of Access to Civil and Criminal Court Proceedings is**
14 **Fundamental and Presumptive under the First Amendment**

15 The public's right of access to court proceedings is integral to our democratic system.
16 "As with other branches of government, the bright light cast upon the judicial process by public
17 observation diminishes possibilities for injustice, incompetence, perjury, and fraud." *Littlejohn*
18 *v. BIC Corp.*, 851 F.2d 673, 678, 682 (3rd Cir. 1988). The openness of the judicial process
19 "should provide the public with a more complete understanding of the judicial system and a
20 better perception of its fairness." *Id.* at 678. Public access thus enhances both the basic fairness
21 and the appearance of fairness of the judicial system. *Press-Enterprise Co. v. Superior Court*,
22 464 U.S. 501, 508 (1984) ("*Press-Enterprise I*").

23 The U.S. Supreme Court has repeatedly affirmed the public's First Amendment right to
24 attend criminal proceedings. *See, e.g., Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 7–10,
25 (1986) ("*Press-Enterprise II*") (preliminary hearings); *Press Enterprise I*, 464 U.S. at 509–13
26 (voir dire); *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 606 (1982) (testimony during
27 trial); *Richmond Newspapers*, 448 U.S. at 589 (public trial). Since these decisions, the First
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1 Amendment right of access has been extended to civil cases. *See, e.g. Courthouse News Serv. v.*
2 *Planet*, 750 F.3d 776, 785– 87 (9th Cir. 2014) (civil proceedings); *NBC Subsidiary (KNBC-TV),*
3 *Inc. v. Super. Ct.*, 20 Cal. 4th 1178, 1212 & n.25 (1999) (civil proceedings and trials).

4 **a) Defendants Cannot Satisfy the Strict Requirements for**
5 **Denying Access to the Public**

6 Our constitution strongly disfavors court secrecy. Where there is a First Amendment
7 right of access, that right can only be overcome on a *case-by-case* basis, by way of an
8 adjudicative process where the party seeking secrecy satisfies a stringent three-part Ninth Circuit
9 test. *See United States v. Brooklier*, 685 F.2d 1162, 116–69 (9th Cir. 1982). Under the three-
10 part test, the party seeking to restrict access must prove: “(1) closure serves a compelling
11 interest; (2) there is a substantial probability that, in the absence of closure, this compelling
12 interest would be harmed; and (3) there are no alternatives to closure that would adequately
13 protect the compelling interest.” *Phoenix Newspapers*, 156 F.3d at 949 (citing *Oregonian Publ’g*
14 *Co. v. U.S. Dist. Ct.*, 920 F.2d 1462, 1466 (9th Cir. 1990)).

15 The proponent denying access must satisfy all three prongs of this test. *Brooklier*, 685
16 F.2d at 1168–69; *accord Associated Press v. U.S. Dist. Ct.*, 705 F.2d 1143, 1145–46 (9th Cir.
17 1983); *Oregonian Publ’g Co.*, 920 F.2d at 1466–67. Even after a court finds the burden has been
18 met, the court must make specific findings such that a reviewing court can determine that access
19 was properly denied. *Phoenix Newspapers*, 156 F.3d at 946–47. Conclusory assertions of an
20 interest are insufficient. *Id.* at 950; *Oregonian Publ’g*, 920 F.2d at 1465; *Brooklier*, 685 F.2d at
21 1169.

22 Here, Defendants have failed to apply the stringent case-by-case standard required to
23 justify court secrecy. Importantly, Defendants would fail the *Brooklier* test under any
24 application. Even on a case-by-case basis, Defendants cannot demonstrate a current, compelling
25 state interest in court closure. Defendants advance two interests in closure: the first, the public
26 health rationale articulated in the March 23 order, does not justify failing to provide remote
27 access. Moreover, even if on March 23rd there was a compelling interest in denying the public
28 physical access to the courthouse, that interest no longer exists given that Kern County is

1 currently in Phase 3 of reopening. Phase 3 reopening reflects a governmental policy decision to
2 reopen casinos, malls and nail salons: if these can be opened, how can there still be a compelling
3 governmental interest in shuttering the courthouse? The second rationale, that limiting access
4 preserves the “the integrity of the record,” can easily be addressed by social distancing coupled
5 with remote access. *See* LaRoe Decl., ¶ 9, Ex. E. Here, however, Defendants are not merely
6 limiting access, they are *denying* access to Plaintiffs. As the Supreme Court has repeatedly
7 explained, it is court secrecy that destroys the integrity of the judicial process. *See Press*
8 *Enterprise I*, 464 U.S. at 508 (“The value of openness lies in the fact that people not actually
9 attending trials can have confidence that standards of fairness are being observed; the sure
10 knowledge that *anyone* is free to attend gives assurance that established procedures are being
11 followed and that deviations will become known.”)

12 **b) There Exist Less Restrictive Alternatives to Complete Closure**
13 **of the Court**

14 In view of the pandemic, Plaintiffs of course are not seeking *unlimited* physical access to
15 all court proceedings. Plaintiffs recognize the need to follow public health guidance. But there
16 are two viable less restrictive alternatives: limited physical access consistent with social
17 distancing and public health requirements and video or telephonic remote access.

18 First, as numerous courts demonstrated, as early as March, providing telephonic access to
19 civil and criminal proceedings is achievable without disrupting the many other obligations of the
20 court. For example, the Eastern District of California promulgated a notice that “the court is
21 providing for members of the general public to listen to court proceedings still being held, by
22 telephone or digital audio connection.”³ Similarly, the director of the United States

23 _____
24 ³ *See* U.S. Dist. Ct., E.D. Cal., “Information Regarding COVID-19 and Court Operations,
25 Restrictions, and Closures”, [http://www.caed.uscourts.gov/caednew/index.cfm/news/covid-19-](http://www.caed.uscourts.gov/caednew/index.cfm/news/covid-19-courthouse-closure-and-court-hearing-information/)
26 [courthouse-closure-and-court-hearing-information/](http://www.caed.uscourts.gov/caednew/index.cfm/news/covid-19-courthouse-closure-and-court-hearing-information/) (last visited June 1, 2020); *see also* U.S. Dist.
27 Ct., N.D. Cal., “Notice Regarding Press and Public Access to Court Hearings; Information on
28 Observing Court Proceedings Held by Videoconference” (updated May 6, 2020)
[https://www.cand.uscourts.gov/notices/notice-regarding-press-and-public-access-to-court-](https://www.cand.uscourts.gov/notices/notice-regarding-press-and-public-access-to-court-hearings-april-3-2020/)
[hearings-april-3-2020/](https://www.cand.uscourts.gov/notices/notice-regarding-press-and-public-access-to-court-hearings-april-3-2020/) (conducting hearings via teleconference or video conference, ensuring
public access).

(cont’d)

1 Administrative Office of the Courts noted on March 29, 2020, that the Executive Committee of
2 the Judicial Conference approved a temporary exception to the general policy forbidding the
3 broadcasting of proceedings in federal courts, “to allow a judge to authorize the use of
4 teleconference technology to provide the public and the media audio access to court
5 proceedings” during the pandemic.⁴

6 California courts have similarly provided public access to judicial proceedings. Santa
7 Clara Superior Court on April 27, 2020 began providing telephonic access to all criminal
8 proceedings. LaRoe Decl. ¶ 22. Shortly thereafter, the court provided public telephonic access
9 to other departments in Civil, Family and Probate proceedings.⁵ *Id.* On April 24, 2020,
10 Alameda County Superior Court began providing telephonic access to civil and criminal
11 proceedings, amending its local rules to require such access.⁶ *Id.* ¶ 23. Superior courts in
12 Sacramento County, Orange County and Humboldt County are all livestreaming their
13 proceedings.⁷ And although not a court, the Judicial Council of California has likewise provided
14 a listen only public dial-in line for their recent emergency meetings.⁸

15 ⁴ United States Courts, “Judiciary Authorizes Video/Audio Access During COVID-19
16 Pandemic” (Mar. 31, 2020), [https://www.uscourts.gov/news/2020/03/31/judiciary-authorizes-
videoaudio-access-during-covid-19-pandemic](https://www.uscourts.gov/news/2020/03/31/judiciary-authorizes-videoaudio-access-during-covid-19-pandemic).

17 ⁵ Superior Court of California, County of Santa Clara, *Temporary Courtroom Public Access
Telephone Lines to Listen to Court Proceedings*,
18 http://www.sccourt.org/general_info/contact/pubaccess_phones.shtml
(last visited June 23, 2020).

19 ⁶ Local Rules of the Superior Court of California, County of Alameda, Rule 1.7a, “Emergency
20 Rule re Public Access to Court Proceedings During COVID-19 Crisis” (Apr. 23, 2020), available
21 at [http://www.alameda.courts.ca.gov/Resources/Documents/Emergency%20Rule%201.7a%20-
%20NEW%20April%202023.pdf](http://www.alameda.courts.ca.gov/Resources/Documents/Emergency%20Rule%201.7a%20-%20NEW%20April%202023.pdf).

22 ⁷ Superior Court of California, County of Sacramento, “Access to Court Proceedings by General
Public Restricted” (Mar. 30, 2020), available at
23 [file:///C:/Users/agilbert/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/9491Y
75F/Sacramento%20public-access-order-033020.pdf](file:///C:/Users/agilbert/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/9491Y75F/Sacramento%20public-access-order-033020.pdf); The Superior Court of California, County
24 of Orange, *Courtroom Live Streaming*, available at [https://www.occourts.org/media-
relations/LiveStream.html?fbclid=IwAR2TWXezu-
tqKp0uE9SxZPs9q_s8a5iX9_LvYxM0G76ZEslkrrECCxly9A](https://www.occourts.org/media-relations/LiveStream.html?fbclid=IwAR2TWXezu-tqKp0uE9SxZPs9q_s8a5iX9_LvYxM0G76ZEslkrrECCxly9A) (last visited May 8, 2020);
25 Superior Court of California, County of Humboldt, “Public Hearings”, available at
26 <https://www.humboldt.courts.ca.gov/> (last visited May 8, 2020)

27 ⁸ See California Courts, Newsroom, “Judicial Council Meeting” (Apr. 6, 2020),
<https://newsroom.courts.ca.gov/calendar/judicial-council-meeting-20200403>; California Courts,
28 News Release, “Judicial Council to Hold Special Meeting Amid COVID-19 Pandemic” (Mar.

(cont’d)

1 Many courts similarly situated to Kern have therefore adapted the technology used for
2 remote access, with no apparent burden in terms of cost or staffing. *See, e.g.*, LaRoe Decl., ¶¶
3 21–24. Nevertheless, Defendants have failed to implement such procedures in most proceedings.
4 Although the Court Defendants indicated on June 10 that there are a limited number of
5 departments where the public can request remote access, these 11 courtrooms do not come close
6 to including all civil and criminal departments in the 7 courthouses in Kern County.⁹ The two
7 Metro Division courthouses alone have 31 departments.¹⁰ As of June 24, however, the Court’s
8 website does not include any information regarding the availability of remote access. *See* LaRoe
9 Decl., ¶ 20. And as Plaintiffs have made clear, Defendants have denied them in-person access to
10 public hearings and trials without any alternative remote access.

11 Second, limited public access, consistent with public health guidance, is now also a viable less
12 restrictive alternative to both the ban on public access contained in the March 23 Order¹¹ and the
13 current practice of routinely denying entry. For example, Contra Costa County Superior Court
14 resumed jury trials the week of May 26. Consistent with social distancing, the court allowed
15 limited in-person attendance to these trials as well as other public proceedings, while also
16 providing audio livestreaming and/or free public dial-in lines for members of the public to access
17 the proceedings.¹² *See* LaRoe Decl. ¶ 24.

18 On May 2, 2020, Kern County rescinded its public health order that closed many business
19 establishments and implemented phase 3 of its reopening plan allowing people to go to gyms,
20 casinos and other businesses subject to certain public health measures. In their June 10 letter, the

21 _____
22 26, 2020), <https://newsroom.courts.ca.gov/news/judicial-council-to-hold-special-meeting-amid-covid-19-pandemic>.

23 ⁹ *See* Superior Court of California, County of Kern, “Criminal Department”,
24 <https://www.kern.courts.ca.gov/divisions/criminal> (last visited June 24, 2020).

25 ¹⁰ Superior Court of California, County of Kern, “Courthouse Maps”,
<https://www.kern.courts.ca.gov/general/maps> (last visited June 24, 2020).

26 ¹¹ Plaintiffs are not challenging the validity of the public health rationale for barring physical
27 access in March when the Court issued its order, only its validity going forward given the
reopening reflected in both state and county policies, which include allowing for the reopening
of gyms, casinos, museums, and bowling alleys.

28 ¹² *See* Superior Court of California, County of Contra Costa County, “Courtroom Calendars”),
<https://www.cc-courts.org/calendars/court-calendars.aspx> (last visited June 24, 2020).

1 Court Defendants included specific instructions for how members of the public may go about
2 requesting in-person access, either through the attorney of record or at the courthouse security
3 screening area. *See* LaRoe Decl., ¶ 19, Ex. M. This information was thereafter included on the
4 Court’s website. *See id.* ¶ 19. Announcing this change in policy is an implicit concession that
5 limited in-person access is a viable less restrictive alternative to court closure. In light of these
6 available alternatives, there is no legitimate basis to infringe Plaintiffs’ First Amendment right to
7 access court proceedings.

8 In light of these available alternatives, Defendants’ denial of in-person and remote access
9 to court proceedings does not satisfy any of the three prongs of the *Brooklier* test.

10 **2. Absent Immediate Injunctive Relief, Plaintiffs Will Continue to Be**
11 **Irreparably Harmed**

12 It is well established that “[t]he loss of First Amendment freedoms, for even minimal
13 periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347,
14 373 (1976); *see also, e.g., New York Times Co. v. U. S.*, 403 U.S. 713, 724–25 (1971) (Brennan,
15 J., concurring); *Carroll v. President and Com’rs of Princess Anne*, 393 U.S. 175, 183 (1968);
16 *Woody v. Georgia*, 370 U.S. 375, 391–92 (1962). Each hearing and trial that occurs without the
17 opportunity for Plaintiffs to attend and support their loved ones represents an irreparable injury.
18 Plaintiff Spriggs, who moved to Kern County from Las Vegas just to support her son during his
19 trial, has already been denied access to almost four weeks of her son’s jury trial—a trial that is
20 ongoing, so every day she is denied access is a violation.
21 Plaintiffs, and the public generally, have been deprived of their constitutional right of access to
22 court proceedings for nearly three months. This injury is ongoing and irreparable. Defendants
23 have been provided multiple opportunities, over many weeks, to remedy this deprivation through
24 the simple means of allowing Plaintiffs entry consistent with social distancing and providing
25 telephonic access to the public and press, as many other courts have done. Upon reopening the
26 Court, the Court Defendants have claimed that the public is allowed in if they are wearing face
27 masks and observing social distancing practices. In practice, however, this is not so, as
28 Defendants have repeatedly denied Plaintiffs in-person access despite Plaintiffs requesting access

1 at the security screening area. As recently as June 18th, the Court’s March 23 Order remained
2 prominently displayed at the courthouse entrance. What’s more, there remains no way for
3 Plaintiffs to remotely access their loved ones’ court proceedings. Absent injunctive relief, the
4 First Amendment rights of the Plaintiffs and the public will continue to be irreparably harmed.

5 **B. At A Minimum, Plaintiffs Raise “Serious Questions”**

6 Even if this court should determine that Plaintiffs have not demonstrated a likelihood of
7 success on the merits under any of the alternative bases set forth above, they at least raise
8 “serious questions” that involve a “fair chance of success on the merits.” *See Gilder v. PGA*
9 *Tour, Inc.*, 936 F.2d 417, 422 (9th Cir. 1991) (internal citations omitted). “Serious questions”
10 are those that are “substantial, difficult and doubtful, as to make them a fair ground for litigation
11 and thus for more deliberative investigation.” *Id.* (quoting *Hamilton Watch Co. v. Benrus Watch*
12 *Co.*, 206 F.2d 738, 740 (2d Cir. 1953)).

13 Constitutional issues are typically “serious questions.” *See, e.g., Jacobsen v. U. S. Postal*
14 *Service*, 812 F.2d 1151, 1154 (9th Cir. 1987) (whether removal of newspaper racks from spaces
15 near post offices meets constitutional standard for “time, place, manner” restrictions is a “serious
16 question”). Where, as here, Plaintiffs and the general public are being excluded wholesale from
17 many judicial proceedings and trials, in contrast to the practices of other major courts, questions
18 of access under the First Amendment are serious.

19 **C. The Balance of Equities Weighs Heavily in Favor of Plaintiffs**

20 In light of the clear irreparable injury to Plaintiffs, the balance of equities tips heavily in
21 favor of Plaintiffs. Were a temporary restraining order to issue, Defendants would only need to
22 adopt one of the numerous procedures used by other courts in California, both state and federal,
23 that have successfully provided telephonic and limited in-person access to civil and criminal
24 proceedings. Defendants will therefore suffer little injury. In fact, they have already claimed to
25 utilize GoToMeetings in a few of their departments and allow for attorneys and parties to
26 remotely appear for hearings. And the many courts that have quickly adapted the technology
27 used to provide remote public access have done so with no apparent burden in terms of cost or
28

1 staffing. What’s more, Kern County is now in its phase 3 of reopening, meaning residents of
2 Kern County can go to restaurants, gyms, casinos, museums, bowling alleys and arcades.¹³ If
3 other business establishments in Kern County have figured out a way to reopen safely, there is
4 no reason why Defendants cannot do the same.

5 Plaintiff ACLU So Cal has been unable to accomplish or further the mission of their
6 Courtwatch program, which monitors court proceedings to ensure fairness in the treatment of
7 Black and Brown criminal defendants. Plaintiff FAC has similarly been thwarted in its mission
8 to promote court access for the public and press, part of its broader mission to increase civic
9 engagement and government transparency. Plaintiffs Oats, Davidson, Brown, Spriggs and
10 Randle have missed opportunities to support their loved ones during their criminal hearings and
11 trials, and by their presence hold the court, prosecutors and jurors accountable to the public.
12 Each day that passes, and each hearing that occurs without the opportunity for public access
13 serves an irreparable injury to Plaintiffs and the many Californians with an interest in the Court’s
14 administration of justice.

15 Plaintiffs acknowledge that Defendants also have an interest in the safety and health of
16 the public, as well as in the Court’s ability to effectively manage its many functions in light of
17 the coronavirus crisis. However, those interests will not suffer if the temporary restraining order
18 is granted, in part because the solution sought here, some form of limited physical access and
19 telephonic or video access, is minimally intrusive and not labor-intensive, as evidenced by the
20 successful deployment of such access in numerous other courts. Given the success that other
21 courts have had in facilitating such access while simultaneously carrying out the court’s other
22 business, Defendants can protect Plaintiffs’ and the public’s First Amendment rights without
23 significant harm to other interests. The balance of interests here tips so sharply in favor of
24 Plaintiffs that it also satisfies the more demanding balancing that accompanies the “serious
25 questions” standard.

26
27 ¹³ Karen Hua, KGET.com, *12 more sectors open in Kern County: gyms, bars, and more* (June 8,
28 2020), <https://www.kget.com/health/coronavirus/12-more-sectors-reopen-in-kern-county-gyms-bars-and-more/>.

1 **D. A Temporary Injunction Will Serve the Public Interest**

2 The public interest inquiry primarily addresses the impact on non-parties rather than
3 parties. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009). The plaintiff bears the
4 initial burden of showing that the injunction is in the public interest. *See id.* The court can then
5 consider whether the likely consequences of the injunction on the public outweigh the benefit.

6 The Ninth Circuit has consistently recognized the significant public interest in upholding
7 First Amendment rights. *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009);
8 *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir.2014); *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d
9 959, 974 (9th Cir. 2002); *Americans for Prosperity Foundation v. Harris*, 182 F. Supp. 3d 1049,
10 1059 (C.D. Cal. 2016) (internal citations omitted), *reversed and vacated on other grounds in*
11 *Americans for Prosperity Found. v. Becerra*, 903 F.3d 1000 (9th Cir. 2018). “[I]t is always in
12 the public interest to prevent the violation of a party’s constitutional rights.” *Melendres v.*
13 *Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (internal citation omitted). As such, “the
14 requirement that issuance of a preliminary injunction be in the ‘public interest’ usually is deemed
15 satisfied when it is clear that core constitutional rights would remain in jeopardy unless the court
16 intervened.” *Coll. Republicans at San Francisco State Univ. v. Reed*, 523 F. Supp. 2d 1005,
17 1012 (N.D. Cal. 2007).

18 Here, the Court Defendants have purported to allow public access by including
19 instructions on the Court’s website as to how the public may request such access, but in practice,
20 Defendants have continued to deny the general public any such access. The public thus has
21 suffered, and continues to suffer, irreparable injury with each passing day that Defendants
22 enforce the March 23 standing order and continue to implement policies barring access. A
23 temporary injunction is in the public interest.

24 **E. Given the Facts of This Case, the Bond Requirement Should Be Waived or**
25 **At Least Set at a Nominal Amount**

26 The injunction bond under Rule 65(c) of the Federal Rules of Civil Procedure is merely a
27 security device. Plaintiffs are not asking Defendants to hire more staff or install new technology;
28 to the contrary, they are simply asking that Defendants be required to cease enforcing the March

1 23 standing order closing the courthouse to the public and cease their policy and practice of
2 refusing to permit members of the public from attending court proceedings in person, consistent
3 with social distancing and public health guidelines. Plaintiffs are further asking that the Court
4 implement a free, telephonic dial-in or other form of remote access for those members of the
5 public who are unable to attend in-person allowing Plaintiffs and the public to listen to court
6 proceedings telephonically, consistent with what other courts have done.

7 Because Defendants do not risk monetary damage from a temporary restraining order
8 requiring them to cease enforcement of their unconstitutional policies, no security in the form of
9 a bond requirement is necessary, and Plaintiffs respectfully request that the bond requirement be
10 waived or at least set at a nominal amount. Federal Rules of Civil Procedure 65(c) “invests the
11 district court ‘with discretion as to the amount of security required, *if any.*’” *Jorgensen v.*
12 *Cassiday*, 320 F.3d 906, 919 (9th Cir. 2003) (internal citations omitted) (emphasis in original).
13 Thus, a court has discretion to require only a nominal bond or to waive the bond entirely. “The
14 district court may dispense with the filing of a bond when it concludes there is no realistic
15 likelihood of harm to the defendant from enjoining his or her conduct.” *Johnson v. Couturier*,
16 572 F.3d 1067, 1086 (9th Cir. 2009) (citing *Jorgensen*, 320 F.3d at 919); *see also Save Our*
17 *Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1126 (9th Cir. 2005) (“[W]e have affirmed the district
18 court’s approval of nominal bonds in public interest cases.”).

19 In addition, courts will waive bond requirements where plaintiff was “pursuing litigation
20 that would vindicate important constitutional rights.” *Thomas v. Cty. of Riverside Sheriff’s*
21 *Dep’t*, 2011 WL 13224841, at *26 (C.D. Cal. July 7, 2011) (internal citations omitted); *Mercer,*
22 *Fraser Co. v. Cnty. of Humboldt*, 2008 WL 4344523, at *2 (N.D. Cal. Sept. 22, 2008) (holding
23 “that the preliminary injunction will require defendant to incur little or no monetary costs and
24 that the injunction is sought to vindicate constitutional rights and the public interest, so no bond
25 or security will be imposed under Fed. R. Civ. Pro. 65(c)”; *Doctor John’s, Inc. v. City of Sioux*
26 *City*, 305 F. Supp. 2d 1022, 1043-44 (N.D. Iowa 2004) (“[R]equiring a bond to issue before
27 enjoining potentially unconstitutional conduct by a government entity simply seems
28 inappropriate, because the rights potentially impinged by the governmental entity’s actions are of

1 such a gravity that protection of those rights should not be contingent upon an ability to pay.”).
2 Here, Plaintiffs ask that the court waive the bond requirement.

3 **IV. CONCLUSION**

4 Now is no time for government secrecy, especially from judicial institutions we rely on to
5 vindicate our rights. For all of the foregoing reasons, Plaintiffs respectfully request that their Ex
6 Parte Motion for a Temporary Restraining Order be granted, and that Defendants be temporarily
7 enjoined from enforcing the March 23 standing order and their policies and practices of denying
8 public access to all proceedings that would otherwise be public under California law, and further
9 directed to provide, at a minimum, free telephonic access and some amount of limited in-person
10 access to such proceedings consistent with social distancing and public health guidelines.

11
12 Dated: June 28, 2020

Respectfully submitted,

13
14 s/ Kathleen Guneratne
Kathleen Guneratne

15
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17
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