No. _____

In The
Supreme Court of the United States

CHRIS NOEL TAGUNICAR,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Petition For A Writ Of Certiorari To The California Superior Court, Appellate Division, County Of San Mateo

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Sixth Amendment guarantees a criminal defendant a public trial. In *Presley v. Georgia*, 558 U.S. 209 (2010) (per curiam), this Court held that excluding the public from *voir dire* of prospective jurors in a criminal trial violated the Sixth Amendment. This Court in *South Bay United Pentecostal Church v. Newsom*, 592 U.S. ___, 141 S.Ct. 716 (2021) struck down California's total ban on indoor religious worship services during the COVID-19 pandemic. The Court protected one of our nation's core Bill of Rights values, the First Amendment right to the free exercise of religion. The same pandemic led a California trial court to impose a total ban on the "public" aspect of a criminal trial. The exclusion of the public from petitioner's trial touches upon another of our nation's core Bill of Rights values, the Sixth Amendment right to a public trial. The questions presented are:

(1) Does the Sixth Amendment public trial right mean that members of the public have a right to be physically present in the courtroom during the trial, including during the COVID-19 pandemic?

(2) May a criminal defendant assert the media's First Amendment right to be physically present in the courtroom during trial?

PARTIES TO THE PROCEEDING

Petitioner Chris Noel Tagunicar was the defendant in the California superior court proceedings and appellant in the superior court appellate division and court of appeals proceedings. Respondent People of the State of California was the plaintiff in the superior court proceedings and the respondent in the superior court appellate division and court of appeals proceedings.

RELATED CASES

- *People of the State of California v. Chris Noel Tagunicar*, No. 19-NF-00704-A, Superior Court of California for the County of San Mateo. Judgement entered May 14, 2021.
- *People of the State of California v. Chris Noel Tagunicar*, No. 21-AD-000009, Appellate Division of the Superior Court of California for the County of San Mateo. Judgment entered December 15, 2022.
- *People of the State of California v. Chris Noel Tagunicar*, No. A167063, California Court of Appeal, First Appellate District, Division Three. Judgment entered February 14, 2023.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
RELATED CASES	ii
PETITION FOR A WRIT OF CERTIORARI	1
RULING AND ORDERS BELOW	1
JURISDICTION	1
RELEVANT CONSTITUTIONAL PROVISIONS	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	3
I. Sixth Amendment Public Trial Guarantee Does Not Permit the Public's Exclusion from the Courtroom During Jury Trial	4
A. The Public Trial Guarantee	4
B. No Justification Was Shown for Excluding the Public	7
1. No Overriding Interest Demonstrated	8
2. Closing the Courtroom Was Overbroad	9
3. Audio Was Not a Reasonable Alternative	10
4. Findings Inadequate to Support Closure	11

TABLE OF CONTENTS—Continued

Page

II. Banning the Public and Media from the Courtroom Violated Petitioner's First Amendment Rights 12

CONCLUSION 15

APPENDIX

California Superior Court Appellate Division Decision, dated December 15, 2022 ..... App. 1

Order of the Appellate Division of the California Superior Court for the County of San Mateo Denying Appellant's Petition for Rehearing and Application for Certification, dated January 17, 2023 ..... App. 11

Order of the California Superior Court for the County of San Mateo Denying Defendant's Second Mistrial Motion, dated April 12, 2021 .... App. 13

Order of the California Superior Court for the County of San Mateo Denying Defendant's First Mistrial Motion, dated April 9, 2021 .... App. 25

Order of the California Superior Court for the County of San Mateo Denying Defendant's Public Trial Demand (In Limine Motion No. 8), dated March 26, 2021 and April 6, 2021 ..... App. 33

Order of the California Court of Appeal for the First Appellate District Denying Transfer, dated Feb. 14, 2023 ..... App. 38

Defendant's In Limine Motion No. 8 re Public Trial Demand, filed March 26, 2021 ..... App. 39

TABLE OF CONTENTS—Continued

Page

Trial Minutes for April 6-7, 2021 of the California Superior Court for the County of San Mateo ..... App. 58

Defendant's First Mistrial Motion, filed April 8, 2021 ..... App. 68

Defendant's Second Mistrial Motion, filed April 12, 2021 ..... App. 72

Oral Argument before the Appellate Division of the California Superior Court for the County of San Mateo, dated October 14, 2022 ..... App. 90

Appellant's Petition for Transfer, dated January 30, 2023 ..... App. 101

TABLE OF AUTHORITIES

Page

CASES

District of Columbia v. Heller, 554 U.S. 570 (2008) 6

Duncan v. Louisiana, 391 U.S. 145 (1968) 4

Estes v. State of Texas, 381 U.S. 532 (1965) 5, 13

Gannett Co. v. DePasquale, 443 U.S. 368 (1979) 5

Gibbons v. Ogden, 9 Wheat. 1 (1824) 6

Globe Newspaper Co. v. Superior Court of Norfolk County, 457 U.S. 596 (1982) 8, 10, 12, 13

In re Oliver, 333 U.S. 257 (1948) 5

Nebraska Press Assn. v. Stuart, 427 U.S. 539 (1976) 12

People v. McRae, 47 Misc.3d 619, 8 N.Y.S.3d 549 (2015) 14

Presley v. Georgia, 558 U.S. 209 (2010) i

Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (*Press-Enterprise I*) 5, 7, 8, 15

Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) (*Press-Enterprise II*) 13, 14

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) 11, 13

Roman Catholic Diocese of Brooklyn v. Cuomo, 592 U.S. ___, 141 S.Ct. 63 (2020) 8

South Bay United Pentecostal Church v. Newsom, 592 U.S. ___, 141 S.Ct. 716 (2021) i

TABLE OF AUTHORITIES—Continued

Page

State v. Williams, 328 S.W.3d 366 (Mo.App. W.D.2010) 14

United States v. Allen, 34 F.4th 789 (9th Cir.2022) 11

United States v. Sprague, 282 U.S. 716 (1931).....6

Waller v. Georgia, 467 U.S. 39 (1984) 8, 9, 15

Williams v. Florida, 399 U.S. 78 (1970).....6

CONSTITUTIONAL PROVISIONS

U.S. Const., amend. I ..... i, 2-4, 12-15

U.S. Const., amend. VI.....i, 2-4, 14, 15

U.S. Const., amend. XIV 4, 6, 12

STATUTES

28 U.S.C. § 1257(a).....1

RULES OF COURT

Cal. Rules of Ct., rule 8.500.....1

DICTIONARIES

www.merriam-webster.com/dictionary 11

2 S. Johnson, Dictionary of the English Language (6th ed.) (1785) 7

PETITION FOR A WRIT OF CERTIORARI

Petitioner Chris Noel Tagunicar respectfully petitions for a writ of certiorari to review the judgment of the Appellate Division of the Superior Court of California for the County of San Mateo, in Case No. 21-AD-000009.

RULING AND ORDERS BELOW

The ruling of the Appellate Division of the Superior Court of California for the County of San Mateo is unpublished. App. 1. The order of the California Court of Appeal denying transfer is unpublished. App. 38. A summary denial of transfer from the Appellate Division of the Superior Court of California to the Court of Appeal of California is not reviewable by the Supreme Court of California. Cal. Rules of Ct., rule 8.500, subd. (a)(1) ["A party may file a petition in the Supreme Court for review of any decision of the Court of Appeal . . . except the denial of a transfer of a case within the appellate jurisdiction of the superior court."].

JURISDICTION

The California Court of Appeal denied transfer on February 14, 2023. App. 38. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The First Amendment states in relevant part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

The Sixth Amendment states in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial. . . ."

STATEMENT OF THE CASE

1. On March 26, 2021, during the COVID-19 pandemic, a misdemeanor jury trial commenced before the Honorable Judge Jeffrey R. Finigan. App. 1, 21, 39.

2. During in limine proceedings, the Court denied petitioner's motion to allow public access to the trial, allowing only audio access. App. 33-37.

3. The prosecution case-in-chief began on April 6, 2021. App. 58-67. The next day, a member of the public was denied entry to the courtroom during the trial, causing petitioner to move for mistrial. App. 68-71.

4. On April 12, 2021, petitioner brought a second mistrial motion on the public trial issue, which was also denied. App. 72-89.

5. The jury convicted petitioner of eight misdemeanor violations. On appeal, petitioner claimed the trial court erred by excluding the public from his trial. Oral argument was conducted on October 14, 2022.

App. 90-100. The Appellate Division of the Superior Court disagreed and affirmed the judgment. App. 1.

6. The Appellate Division denied petitioner's request to certify the case to the Court of Appeal of California for the First Appellate District. On February 14, 2023, the California Court of Appeal denied transfer. App. 11-12, 38.

REASONS FOR GRANTING THE WRIT

During the COVID-19 pandemic, the trial court excluded the public from the courtroom, ruling that audio access satisfied the Sixth Amendment public trial guarantee. This is like the Founding Fathers having agreed that the public trial guarantee was satisfied by the opportunity for the public to eavesdrop at the closed door of a courtroom during trial.

Audio cannot capture when a judge, lawyer or witness winks, gives a thumbs-up signal, shrugs their shoulders, mimes a throat slash, or frowns. None of these gestures are captured by an audio link. They could not be observed by the public or the press. The public and the media have a right to see how judges and government counsel operate, how witnesses react to questioning and what happens to a criminal defendant in the courtroom. To have a criminal trial conducted in public is an important value. See App. 93.

A second reason for granting the writ is petitioner's assertion of the First Amendment rights of the

press, which petitioner did from the start. App. 39-49, 51-57. A criminal defendant has a Sixth Amendment right to insist on the public's access to the courtroom during trial. Not everyone is able to attend, due to work or family obligations, or sheer distance from the trial venue. The press, when in attendance, become the public's agent. Hence, a criminal defendant should be allowed to assert the First Amendment rights of the press in having a public trial.

I. Sixth Amendment Public Trial Guarantee Does Not Permit the Public's Exclusion from the Courtroom During Jury Trial

A. The Public Trial Guarantee

The Sixth Amendment directs, in relevant part, that [i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . . " This right is enforceable against the states as part of the due process guarantee of the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968).

> . . . a trial is public, in the constitutional sense, when a courtroom has facilities for a reasonable number of the public to observe the proceedings, which facilities are not so small as to render the openness negligible and not so large as to distract the trial participants from their proper function, when the public is free to use those facilities, and when all those who attend the trial are free to report what they observed at the proceedings.

Estes v. State of Texas, 381 U.S. 532, 584 (1965) (Warren, C.J., concurring opinion).

The right to a public trial serves two important interests. First, it protects those who are accused of a crime by helping to ensure that the innocent are not unjustly convicted and that the guilty are given a fair trial. *In re Oliver*, 333 U.S. 257, 270, fn. 25 (1948). Second, "there is a strong societal interest in public trials. Openness in court proceedings may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, cause all trial participants to perform their duties more conscientiously, and generally give the public an opportunity to observe the judicial system." *Gannett Co. v. DePasquale*, 443 U.S. 368, 383 (1979); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984) (*Press-Enterprise I*).

In *Press-Enterprise I*, this Court explained the value of open trials:

> The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.

Ibid.; italics in original; citation omitted.

In construing a constitutional provision, a court must look for its meaning. *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (*Heller*). In interpreting a constitutional text, courts are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *United States v. Sprague*, 282 U.S. 716, 731 (1931); see also *Gibbons v. Ogden*, 9 Wheat. 1, 188 (1824).

> When this Court is called upon to consider the meaning of a particular provision of the Bill of Rights—whether in a case arising from a state court or a federal one—it is necessary to look to the specific language of the provision and the intent of the Framers when the Bill of Rights itself was adopted. This approach is necessary, not because the Framers intended the Bill of Rights to apply to the States when it was proposed in 1789, but because the application of those provisions to the States by the Fourteenth Amendment requires that the original intent be the governing consideration in state as well as federal cases.

Williams v. Florida, 399 U.S. 78, 108, fn. 2 (1970) (Black, J., conc. and diss.).

The meaning of the term "public" at the time of the framing of the Bill of Rights is without controversy. Samuel Johnson's Dictionary of the English Language, the same language authority relied upon by the Court in *Heller* (at p. 581), defines "public" as "open for

general entertainment," and provides an example: "The income of the commonwealth is raifed on fuch as have money to fpend at taverns and publick houfes." 2 S. Johnson, Dictionary of the English Language 419 (6th ed.) (1785) (original spelling maintained).

"Public" meant members of the public were present on the spot. They could see, hear, smell, taste, if you will. There were no phones or internet back in 1789 to provide audio access. Besides, audio access does not allow a member of the public to see, smell or taste. And one may not even hear everything on an audio feed. An audio link does not render a trial "public" as that term was understood by those who drafted and voted on the Bill of Rights.

Given the importance of public trials to both the accused and the public, there is a presumption of openness in the courtroom that "may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press Enterprise I, supra*, 464 U.S., at 510.

B. No Justification Was Shown for Excluding the Public

This Court has identified four requirements necessary to justify the public's exclusion from a criminal trial: (1) the existence of an overriding interest that is 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 v. Georgia*, 467 U.S. 39, 48 (1984) (*Waller*).

"[T]he State's justification in denying access must be a weighty one." *Globe Newspaper Co. v. Superior Court of Norfolk County*, 457 U.S. 596, 606 (1982). "[I]t must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Id.*, at 607. The trial court must consider available alternatives. "Absent consideration of alternatives to closure, the trial court could not constitutionally close the [proceedings]." *Press Enterprise I, supra*, 464 U.S., at 511.

None of the *Waller* factors that permit barring the public and the media from the courtroom have been met here.

1. No Overriding Interest Demonstrated

Reported cases indicate only two interests for which the right to an open trial may give way: "the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." *Waller, supra*, 467 U.S., at 45. Neither interest is implicated here. The contrary is true, as petitioner insisted, he could obtain a fair trial only if the public is allowed to be present in the courtroom.

"Stemming the spread of COVID-19 is unquestionably a compelling interest." *Roman Catholic Diocese of*

Brooklyn v. Cuomo, 592 U.S. ___, 141 S.Ct. 63, 67 (2020) (per curiam).

The *Waller* court cautioned that "[s]uch circumstances will be rare, however, and the balance of interests must be struck with special care." *Waller, supra*, 467 U.S., at 45. If the COVID-19 threat to public health was indeed that compelling an interest to override the presumption of an open trial, then this begs the question why any of the remaining participants (judge, jurors, counsel, clerk, court reporter, bailiff, and witnesses) were still present in the courtroom? If COVID-19 truly was such a compelling, overriding interest, then no one should have been in that courtroom. The COVID-19 public health concern militates in favor of continuing the trial until it no longer poses a threat to anyone, not just the excluded members of the public and the media.

2. Closing the Courtroom Was Overbroad

If the trial court can fashion ways to seat the parties, their counsel and investigators, the court staff and the judge, despite the ongoing COVID-19 pandemic, then the Court could also have accommodated members of the public who wished to attend. Granted, there may be a need to limit the numbers. That is acceptable but physical exclusion is not.

The closure was not narrowly tailored, as that *Waller* factor was extinguished by the trial judge's comment that had the court known that Mr. Wine (the

excluded member of the public) was trying to attend the trial, the court would have accommodated him, and would do the same from that point forward. App. 27, 30. But, by then, the constitutional damage had been wrought.

Also, it must be borne in mind that the right to a public trial is always limited because it is impossible to seat a thousand San Mateo County residents in a courtroom, or even a hundred. Hence, size limitations are always imposed but that is a far cry from total public exclusion, which the trial court imposed at the in limine proceedings. A narrowly tailored ruling would have been to limit the number of public and media spectators without putting that number at zero, as did the trial court.

3. Audio Was Not a Reasonable Alternative

An audio feed for which one has to apply falls short of the purpose of an open trial. "Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole." *Globe Newspaper Co. v. Superior Court of Norfolk County, supra*, 457 U.S., at 606; footnote omitted. The public and media must be able to see what the judge does, what the prosecutor does, what the jurors do. A pause in the proceedings can be pregnant with meaning. The audio version of that would completely miss the point. "[T]he appearance of justice can best be provided by

allowing people to observe it." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980). The meaning of "observe" includes "watching," not merely listening to an audio feed. See https://www.merriam-webster.com/dictionary/observe. Chief Justice Burger quoted Justice Powell in describing the "right of access" in attending criminal trials as "to hear, see, and communicate observations concerning them. . . . " *Richmond Newspapers, Inc. v. Virginia, supra*, at 576; citation omitted. The Chief Justice did not limit his discussion to "hearing only."

The Ninth Circuit Court of Appeals reversed a judgment of conviction because the trial court had excluded the public and provided audio access only. *United States v. Allen*, 34 F.4th 789, 792-793 (9th Cir.2022) (*Allen*). The *Allen* court deemed the measure a "total closure" that was "not narrowly tailored." *Id.*, at 797, 800. The defendant in *Allen* had acquiesced to video-streaming of his trial. *Id.*, at 792. Petitioner, however, insisted on his constitutional right of a public trial. The trial court rejected petitioner's suggestion for a bigger courtroom (2M) or an alternate venue, such as the Event Center where jury selection had taken place, even though the trial court implicitly acknowledged that both were reasonable alternatives. App. 30.

4. Findings Inadequate to Support Closure

By reversing course mid-trial, the trial court admitted that it had erred in constitutional fashion. App.

27, 30. This admission also eroded any support for the court's earlier findings that COVID-19 prevented the public from being present in the courtroom.

II. Banning the Public and Media from the Courtroom Violated Petitioner's First Amendment Rights

The First 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, and to petition the Government for a redress of grievances." The Fourteenth Amendment renders this provision applicable to the States. *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 556 (1976).

"Of course, this right of access to criminal trials is not explicitly mentioned in terms in the First Amendment." *Globe Newspaper Co. v. Superior Court of Norfolk County, supra*, 457 U.S., at 604; footnote omitted. The Court explained that " . . . the Framers were concerned with broad principles, and wrote against a background of shared values and practices. The First Amendment is thus broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights." *Ibid.*; citations omitted. Said the Court:

> Underlying the First Amendment right of access to criminal trials is the common understanding that "a major purpose of that Amendment was to protect the free discussion

> of governmental affairs." (Citation.) By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican form of self-government.

Ibid.

"Thus to the extent that the First Amendment embraces a right of access to criminal trials, it is to ensure that this constitutionally protected 'discussion of governmental affairs' is an informed one." *Id.*, at 604-605.

Chief Justice Burger wrote: "In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees." *Richmond Newspapers, Inc. v. Virginia, supra*, 448 U.S., at 575. Furthermore, the First Amendment right to assemble includes the public doing so in a courtroom. *Id.*, at 577-578.

"The right to an open public trial is a shared right of the accused and the public, the common concern being the assurance of fairness." *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 7 (1986) (*Press-Enterprise II*). Members of the media "are entitled to the same rights as the general public" when it comes to courtroom access. *Estes v. State of Texas, supra*, 381 U.S., at 540. Given that this Court has described the rights at issue as "shared rights," implicitly a criminal defendant has First Amendment standing.

A criminal defendant is a member of the public also. Said one New York court:

> . . . the People are able to argue in favor of the societal, First Amendment right to an open courtroom, as would the defense be able to so argue. If the parties to this proceeding cannot argue in favor of this societal right, who could? While large media organizations at times ask to intervene when these issues arise, and argue in favor of open courtrooms, it is not reasonable to deputize the media as the only enforcers of the public's right. The vast majority of criminal trials begin and end without ever becoming of interest to the media. That should not be the deciding factor on whether there is anyone to argue in favor of the public's right to an open trial.

People v. McRae, 47 Misc.3d 619, 622, 8 N.Y.S.3d 549, 552 (2015).

A Missouri court noted that "[t]he United States Supreme Court's public-trial cases have not yet reached the issue of whether a criminal defendant may raise the public's First Amendment right to a public trial, or whether the defendant is limited to the Sixth Amendment to claim a violation of the right to a public trial." *State v. Williams*, 328 S.W.3d 366, 371 (Mo.App. W.D.2010). Petitioner's case presents the Court with the opportunity to address this issue.

Often, tension arises when the defendant in a criminal case seeks to close the courtroom and the media want access. See *Press-Enterprise II, supra*, 478 U.S., at 7 [the defendant requested a closed preliminary hearing; the media sought access to the transcript of the preliminary hearing]. This is not the case here,

as petitioner wanted a public trial, both as the accused (Sixth Amendment) and as a member of the public (First Amendment).

The First Amendment analysis is very similar to that under the Sixth Amendment. *Press Enterprise I* provides us with the analytical framework: overriding interest; narrowly tailored to serve that interest; reasonable alternatives to be considered; and based on findings. *Press Enterprise I, supra*, 464 U.S., at 510-511. Worded differently, the *Press Enterprise I* test examines the same factors as *Waller*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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