

# APPENDIX

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

FILED

DEC 20 2024

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

STEVEN NICHOLSON, AKA Steve  
Vincent Nicholson, AKA Steven Vincent  
Nicholson, AKA Kendal Stanley, AKA  
Sergio Steve Washington,

Defendant-Appellee.

No. 21-50028

D.C. No. 2:16-cr-00470-CJC-1  
Central District of California,  
Los Angeles

ORDER

Before: SILVERMAN, BUMATAY, and SANCHEZ, Circuit Judges.

The motion (Docket Entry No. 41) for panel reconsideration is denied, and  
the motion for reconsideration en banc is denied on behalf of the court. *See* 9th  
Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

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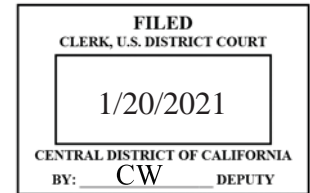
Before: SILVERMAN, BUMATAY, and SANCHEZ, Circuit Judges.

Appellant's motion (Docket Entry No. 20) for summary reversal is granted in part. We vacate the district court's order dismissing the indictment and remand to the district court to apply the specific factors outlined in this court's opinion in *United States v. Olsen*, 21 F.4th 1036 (9th Cir.), *cert. denied*, 142 S. Ct. 2716 (2022).

Appellee's motion (Docket Entry No. 34) to allow supplemental briefing is denied.

**VACATED and REMANDED.**

**JS-3**



**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

**UNITED STATES OF AMERICA,**

**Plaintiff,**

**v.**

**STEVEN NICHOLSON,**

**Defendant.**

**Case No.: CR 16-00470-CJC**

**ORDER DISMISSING WITH  
PREJUDICE CHARGES AGAINST  
DEFENDANT STEVEN NICHOLSON  
FOR VIOLATION OF SIXTH  
AMENDMENT TO THE UNITED  
STATES CONSTITUTION AND  
SPEEDY TRIAL ACT (DKT. 159)**

**I.**

The United States Constitution protects our fundamental freedoms and liberties. One of the most important rights guaranteed by the Constitution is the Sixth Amendment right of the accused to a public and speedy trial. It protects against undue and oppressive incarceration before trial and it allows the accused to defend himself against the criminal charges before evidence becomes lost or destroyed and witnesses' memories fade. But the Sixth Amendment protects much more than just the rights of the accused. It also protects the rights of all of us. It gives each of us called for jury service a voice in our

1 justice system. And it holds the government accountable to the principles of the  
2 Constitution. Without jury trials, power is abused and liberty gives way to tyranny.<sup>1</sup>  
3

4 Given the constitutional importance of a jury trial to our democracy, a court cannot  
5 deny an accused his right to a jury trial even if conducting one is difficult. This is true  
6 whether the United States is suffering through a national disaster, a terrorist attack, civil  
7 unrest, or the coronavirus pandemic that the country and the world are currently facing.  
8 Nowhere in the Constitution is there an exception for times of emergency or crisis.  
9

10 Nevertheless, the United States District Court for the Central District of California  
11 suspended jury trials indefinitely during the coronavirus pandemic, believing it is too  
12 unsafe to conduct jury trials even if significant safety precautions are in place. Most  
13 troubling, the Central District's indefinite suspension has continued for 10 months even  
14 though the state court across the street from the federal courthouse in Orange County has  
15 conducted over 130 jury trials during the pandemic, and all essential businesses in  
16 Orange County have remained open and their employees have continued to work.  
17

18 Defendant Steven Nicholson is one of many defendants before this Court who is  
19 challenging the Central District's indefinite suspension of jury trials. Mr. Nicholson  
20 believes that the Central District's indefinite suspension violates his constitutional right  
21 to a public and speedy trial under the Sixth Amendment and the Speedy Trial Act. He is  
22 correct.  
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27 <sup>1</sup> Indeed, Thomas Jefferson once stated, "I consider the trial by jury as the only anchor, ever yet  
28 imagined by man, by which a government can be held to the principles of its constitution." *From*  
*Thomas Jefferson to Thomas Paine*, National Archives (July 11, 1789), *available at*  
<https://founders.archives.gov/documents/Jefferson/01-15-02-0259>.

## II.

### A.

Federal courts in the Central District first closed due to the coronavirus pandemic on March 23, 2020. C.D. Cal. Order of the Chief Judge 20-042, In Re: Coronavirus Public Emergency, Activation of Continuity of Operations Plan (Mar. 19, 2020). They have not reopened for jury trials in the nearly 10 months since. *See* C.D. Cal. General Order No. 20-08, In Re: Coronavirus Public Emergency, Order Concerning Phased Reopening of the Court (May 28, 2020) (explaining that jury trials will resume “at a date to be determined”). On August 6, 2020, Chief Judge Philip S. Gutierrez issued an order stating explicitly what had been clear for months—jury trials in the Central District are indefinitely suspended due to the coronavirus pandemic. C.D. Cal. General Order No. 20-09, In Re: Coronavirus Public Emergency, Order Concerning Phased Reopening of the Court (Aug. 6, 2020) (“Until further notice, no jury trials will be conducted in criminal cases.”).

Some courthouse operations have continued during the pandemic. For example, from June to December, the grand jury—which has at least 16 members—gathered in person, heard witness testimony, and returned 65 indictments. (*See* Ex. 1, attached to this order.) Some courts held emergency in-person hearings. However, on December 7, 2020, the Chief Judge, in consultation with the Central District’s Executive Committee, and in light of a coronavirus surge in the region, reactivated the Central District’s Continuity of Operations Plan (“COOP”). *See* Order of the Chief Judge 20-179, In Re: Coronavirus Public Emergency, Activation of Continuity of Operations Plan (Dec. 7, 2020). The Chief Judge’s order permitted the grand jury to meet one more time, and then suspended the grand jury—for the first time since June—effective December 9, 2020 at 5:00 p.m. through and including January 8, 2021. On January 7, 2021, the COOP was

1 extended through and including January 29, 2021. Emergency in-person hearings are no  
 2 longer allowed while the COOP is activated. And although the order states that “[t]he  
 3 activation of the COOP Plan is necessary to ensure the continuous performance of  
 4 essential functions and operations of the Court,” the most essential function—conducting  
 5 jury trials—remains suspended indefinitely. *Id.* at 2.

6  
 7 Though 10 months have passed since the Central District suspended jury trials, it  
 8 remains completely uncertain when the Central District will resume them.<sup>2</sup> The Chief  
 9 Judge has stated that “decisions on resuming operations are being made in light of state  
 10 government orders.”<sup>3</sup> Those orders include California Governor Gavin Newsom’s four-  
 11 tier, color-coded system. That system does not apply to the state judiciary, nor does it  
 12 restrict essential businesses—in sectors including healthcare, emergency services, food,  
 13 energy, transportation, and communications—from operating.<sup>4</sup> Indeed, employees in  
 14 those sectors have been displaying extraordinary courage and dedication by going to  
 15 work every day during the pandemic, knowing the risks, while protecting themselves and  
 16 others as best they can. They refuse to let the coronavirus prevent them from providing  
 17 vital services and supplying essential goods to the public.

18  
 19 The Governor’s tier system applies only to non-essential businesses. That system  
 20 outlines when and how non-essential businesses may operate during the pandemic by  
 21

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22 <sup>2</sup> The General Order stated that to determine when jury trials will resume, the Chief Judge will use  
 23 “gating criteria” from the Administrative Office of the United States Courts “designed to determine local  
 24 COVID-19 exposure risks based on 14-day trends of facility exposure, community spread, and  
 25 community restrictions.” *Id.* ¶ 2. Administrative Office of the U.S. Courts, *Federal Judiciary COVID-19 Recovery Guidelines* (Apr. 24, 2020), available at <https://www.fedbar.org/wp-content/uploads/2020/04/Federal-Judiciary-COVID-19-Recovery-Guidelines.pdf>.

26 <sup>3</sup> Daily Journal, *Central District could soon begin calling jurors in Orange County* (Sept. 23, 2020),  
 27 available at <https://www.dailyjournal.com/articles/359682-central-district-could-soon-begin-calling-jurors-in-orange-county> (the “Article”).

28 <sup>4</sup> Blueprint for a Safer Economy, available at <https://covid19.ca.gov/safer-economy/>.

1 ranking each California county in one of four tiers “based on its test positivity and  
 2 adjusted case rate.” In tier 1, also known as purple or widespread, many non-essential  
 3 indoor businesses are closed. In tier 2, also known as red or substantial, some non-  
 4 essential indoor businesses are closed. In tier 3, also known as orange or moderate, some  
 5 non-essential indoor businesses are open with modifications. In tier 4, also known as  
 6 yellow or minimal, most non-essential indoor businesses are open with modifications.  
 7 The Chief Judge has stated that the Central District will start summoning jurors in Orange  
 8 County once the county reaches tier 3, and that jury trials will begin approximately 7  
 9 weeks later because “that’s how long it takes to summon jurors.” (Article at 1.)<sup>5</sup>

10  
 11 Throughout the pandemic, the government has supported the Central District’s  
 12 indefinite suspension of jury trials. This Court, however, has vehemently opposed it,  
 13 believing the indefinite suspension is unconstitutional and in violation of the Speedy Trial  
 14 Act. The Court has five times asked the Chief Judge to summon jurors for jury trials in  
 15 cases where defendants refuse to waive further time under the Speedy Trial Act. All of  
 16 the Court’s requests—including its request in this case—have been denied.<sup>6</sup>

## 17 18 **B.**

19  
 20 Defendant Steven Nicholson was indicted in 2016 with one count of being a felon  
 21 in possession of a firearm and ammunition. (Dkt. 1 [Indictment].) His first trial, which  
 22

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23 <sup>5</sup> Though Orange County was in tier 2 for months and seemed close to reaching tier 3, it has since  
 24 moved back to tier 1. On December 3, 2020, Governor Newsom issued an additional Regional Stay at  
 25 Home Order requiring “[a]ll individuals living in the Region [to] stay home or at their place of residence  
 26 except as necessary to conduct activities associated with the operation, maintenance, or usage of critical  
 infrastructure, as required by law, or as specifically permitted in th[e] order.”

27 <sup>6</sup> (Dkt. 157); *United States v. Juan Carlos Recinos*, Case No. 2:19-cr-00724-CJC, Dkt. 58 (Aug. 19,  
 28 2020); *United States v. Jeffrey Olsen*, Case. No. 8:17-cr-00076-CJC, Dkt. 68 (Sept. 3, 2020); *United*  
*States v. Ronald Bernard Ware*, Case No. 8:20-cr-00110-CJC, Dkt. 38 (Dec. 3, 2020); *United States v.*  
*Justin Marques Henning*, Case No. 8:16-cr-00029-CJC-7, Dkt. 1656 (Nov. 25, 2020).



1 began before Judge S. James Otero on January 23, 2018, resulted in a mistrial. (Dkts. 62,  
 2 66.) The jury in his second trial, which began on January 30, 2018, found Mr. Nicholson  
 3 guilty, and Judge Otero sentenced him to a term of 60 months' imprisonment. (Dkts. 79,  
 4 81, 98.) On April 30, 2020, however, the Ninth Circuit reversed Mr. Nicholson's  
 5 conviction, finding that Judge Otero had not adequately stated on the record his reasons  
 6 for denying Mr. Nicholson's request to substitute counsel. (Dkt. 123.) Mr. Nicholson's  
 7 case was then reassigned to this Court, and the mandate issued on May 22, 2020. (Dkts.  
 8 125, 132.) The Speedy Trial Act requires that Mr. Nicholson's third trial commence no  
 9 later than January 20, 2021, or his constitutional right to a public and speedy trial will be  
 10 violated.

11  
 12 On November 2, 2020, at a status conference in this case, Mr. Nicholson's counsel  
 13 stated that Mr. Nicholson wished to go forward with his trial as scheduled, and that he  
 14 was unwilling to agree to the exclusion of any further time under the Speedy Trial Act.  
 15 The government stated that although it was ready for trial, it would have to seek a  
 16 continuance given the General Order indefinitely suspending criminal jury trials in the  
 17 Central District. (*See* Dkt. 162 [Opposition] at 4.) The Court denied the government's  
 18 motion to continue the trial from January 5, 2021 to March 2, 2021, and requested that  
 19 the Chief Judge summon jurors for Mr. Nicholson's January 5, 2021 trial. (Dkt. 155.)  
 20 The Chief Judge refused to do so. (Dkt. 157.) Mr. Nicholson now moves to dismiss the  
 21 charges against him, believing that the Central District's indefinite suspension of jury  
 22 trials violates the Sixth Amendment and Speedy Trial Act. (Dkt. 159.)<sup>7</sup>

23  
 24  
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 26 <sup>7</sup> Mr. Nicholson is one of at least six defendants before the Court challenging the Central District's  
 27 indefinite suspension of jury trials. *See United States v. Juan Carlos Recinos*, Case No. 2:19-cr-00724-  
 28 CJC; *United States v. Jeffrey Olsen*, Case No. 8:17-cr-00076-CJC; *United States v. Steven Nicholson*,  
 Case No. 2:16-cr-00470-CJC-1; *United States v. Ronald Bernard Ware*, Case No. 8:20-cr-00110-CJC;  
*United States v. Justin Marques Henning*, Case No. 8:16-cr-00029-CJC-7; *United States v. Jose Reyes*,  
 Case No. 2:19-cr-00740-CJC.

### III.

“The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of [people], at all times, and under all circumstances.” *Ex parte Milligan*, 71 U.S. 2, 120–21 (1866). It “is not to be obeyed or disobeyed as the circumstances of a particular crisis in our history may suggest.” *Downes v. Bidwell*, 182 U.S. 244, 384 (Harlan, J., dissenting). It “has no provision lifting restrictions upon governmental authority during periods of emergency.” *Dennis v. United States*, 341 U.S. 494, 520 (1951) (Frankfurter, J., concurring). Rather, “[t]he People have decreed that it shall be the supreme law of the land at all times.” *Id.* Its “full operation cannot be stayed by any branch of the government in order to meet what some may suppose to be extraordinary emergencies.” *Downes*, 182 U.S. at 385 (Harlan, J., dissenting). This is because the drafters “foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law.” *Milligan*, 71 U.S. at 120.

The principle that “[g]overnment is not free to disregard the [Constitution] in times of crisis” applies in full force during this pandemic. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 69 (2020) (Gorsuch, J., concurring). Recently, the Supreme Court recognized this fundamental principle and enjoined the enforcement of an executive order issued by the Governor of New York imposing occupancy restrictions on attendance at religious services in areas heavily affected by coronavirus. It stated powerfully that “even in a pandemic, the Constitution cannot be put away and forgotten.” *Id.* at 68 (majority opinion). In its analysis of the applicants’ likelihood of success on the merits, the Supreme Court found it problematic that houses of worship—spaces where people practice their constitutional right to the free exercise of religion—faced more

1 restrictions than businesses categorized as “essential.” *Id.* at 66–67. The Supreme Court  
 2 recognized that “[s]temming the spread of COVID-19 is unquestionably a compelling  
 3 interest,” but ultimately concluded that effectuating the First Amendment’s guarantees  
 4 likely requires facing risks of infection while taking proper safety precautions rather than  
 5 trying to avoid the risks altogether. *Id.* at 67.

6  
 7 The Supreme Court has granted similar applications for relief in cases challenging  
 8 other states’ restrictions on religious spaces—including the Governor of California’s tier  
 9 system—and remanded for further consideration in light of *Roman Catholic Diocese*.  
 10 *See Harvest Rock Church v. Newsom*, 2020 WL 7061630, at \*1 (U.S. Dec. 3, 2020)<sup>8</sup>;  
 11 *High Plains Harvest Church v. Polis*, 141 S. Ct. 527 (2020) (remanding challenge to  
 12 Colorado restrictions in light of *Roman Catholic Diocese*). *Roman Catholic Diocese* has  
 13 also changed how the Ninth Circuit addresses constitutional challenges to restrictions  
 14 enacted in response to the pandemic. *Dayton Valley v. Sisolak*, 982 F.2d 1228, 1232–33  
 15 (9th Cir. Dec. 15, 2020) (concluding that *Roman Catholic Diocese* compelled the court to  
 16 conclude that church was likely to succeed on its challenge to occupancy limitations  
 17 under Free Exercise Clause); *see S. Bay United Pentecostal Church v. Newsom*, 981 F.3d  
 18 765, 766 (9th Cir. 2020) (vacating district court’s order denying motion for injunctive  
 19 relief filed by South Bay United Pentecostal Church and remanding for further  
 20 consideration in light of *Harvest Rock Church* and *Roman Catholic Diocese*).

21  
 22 The right to freely exercise religion, however, is not the only constitutional right  
 23 that must be protected during the pandemic. The right to a speedy and public jury trial  
 24 must also be protected. The Sixth Amendment provides that “[i]n all criminal  
 25

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26 <sup>8</sup> In *Harvest Rock Church*, both the district court and the Ninth Circuit had concluded that the church in  
 27 question failed to show a likelihood of success on the merits of its free exercise challenge to California’s  
 28 restrictions on religious service attendance, citing evidence in the record regarding the risk of spreading  
 the coronavirus in indoor congregant activities. *See Harvest Rock Church, Inc. v. Newsom*, 977 F.3d  
 728, 730–31 (9th Cir. 2020).

1 prosecutions, the accused shall enjoy the right to a speedy and public trial, by an  
 2 impartial jury.” U.S. Const. amend. VI; *see* U.S. Const. art. III, § 2, cl. 3 (“The Trial of  
 3 all Crimes, except in Cases of Impeachment, shall be by Jury.”). The right to a speedy  
 4 trial “has roots at the very foundation of our English law heritage” and “is one of the  
 5 most basic rights preserved by our Constitution.” *Klopper v. State of N.C.*, 386 U.S. 213,  
 6 224, 226 (1967). Indeed, “[e]xcept for the right of a fair trial before an impartial jury, no  
 7 mandate of our jurisprudence is more important” than a defendant’s right to a speedy  
 8 trial. *Furlow v. United States*, 644 F.2d 764, 769 (9th Cir. 1981). The Sixth Amendment  
 9 protects defendants by minimizing oppressive pretrial incarceration and ensuring  
 10 evidence needed to prove the defense remains available at the time of trial. *See Klopper*,  
 11 386 U.S. at 222; *id.* at 226–27 (Harlan, J., concurring); *United States v. Loud Hawk*,  
 12 474 U.S. 302, 312 (1986). It also protects the public by giving the people a voice,  
 13 ensuring the government has the evidence needed to prosecute, and holding leaders  
 14 accountable to the Constitution. *See Barker v. Wingo*, 407 U.S. 514, 519 (1972) (“In  
 15 addition to the general concern that all accused persons be treated according to decent  
 16 and fair procedures, there is a societal interest in providing a speedy trial which exists  
 17 separate from, and at times in opposition to, the interests of the accused.”); *United States*  
 18 *v. Lloyd*, 125 F.3d 1263, 1268 (9th Cir. 1997) (“[T]he right to a speedy trial belongs not  
 19 only to the defendant, but to society as well.”); *United States v. Caparella*, 716 F.2d 976,  
 20 981 (2d Cir. 1983) (“It must be remembered that a speedy trial is not only viewed as  
 21 necessary to preserve the rights of defendants. Just as significant is the protection it  
 22 accords to society’s interest in bringing criminals to justice promptly.”).

23  
 24 “The guaranty of trial by jury contained in the Constitution was intended for a state  
 25 of war as well as a state of peace; and is equally binding upon rules and people, at all  
 26 times and under all circumstances.” *Milligan*, 71 U.S. at 3. The constitutional right  
 27 “d[oes] not yield to emergency.” *Nebbia v. People of New York*, 291 U.S. 502, 545  
 28 (1934) (describing the holding in *Milligan*). Courts must always be vigilant to protect

1 and enforce it. They cannot, as the Central District has done here, shelter in place and  
 2 suspend it. *See Roman Catholic Diocese*, 141 S. Ct. at 71 (Gorsuch, J., concurring)  
 3 (“[W]e may not shelter in place when the Constitution is under attack.”). Indeed, courts  
 4 have “[n]o higher duty . . . than to exert [their] full authority to prevent all violation of the  
 5 principles of the Constitution.” *Downes*, 182 U.S. at 382 (Harlan, J., dissenting).

#### 6 7 A.

8  
 9 The government asserts that the Speedy Trial Act permits the Central District’s  
 10 indefinite suspension of jury trials. But nothing in the Speedy Trial Act excuses the  
 11 Central District’s indefinite suspension. Congress enacted the Speedy Trial Act in 1974  
 12 in order to make effective the Sixth Amendment’s guarantee of a speedy trial. Pub. L.  
 13 No. 93-619; *see Furlow*, 644 F.2d at 798–69 (describing the Speedy Trial Act as the  
 14 Sixth Amendment’s “implementation”). The Act requires that a defendant’s trial begin  
 15 within 70 days of the filing of the indictment or the defendant’s initial court appearance,  
 16 whichever is later. 18 U.S.C. § 3161(c)(1). “The Act recognizes, however, that  
 17 legitimate needs of the government and of a criminal defendant may cause permissible  
 18 delays.” *United States v. Daychild*, 357 F.3d 1082, 1090 (9th Cir. 2004). The  
 19 government argues that two types of permissible delay are relevant here.

20  
 21 First, the Speedy Trial Act provides that certain periods of time may be excluded  
 22 from the 70-day deadline. For example, a court may exclude periods of delay resulting  
 23 from competency examinations, interlocutory appeals, pretrial motions, the unavailability  
 24 of essential witnesses, and delays to which the defendant agrees. 18 U.S.C.  
 25 § 3162(h)(1)–(6). The specific category of excludable delay relevant here is a sort of  
 26 catchall category allowing exclusion of time when a judge finds “that the ends of justice  
 27 served by taking such action outweigh the best interest of the public and the defendant in  
 28 a speedy trial.” 18 U.S.C. § 3162(h)(7)(A). Congress intended the “ends of justice”

1 provision to be “rarely used.” *United States v. Nance*, 666 F.2d 353, 355 (9th Cir. 1982)  
2 (quoting the Act’s legislative history). To ensure that broad discretion does not  
3 undermine the Act’s important purpose, Congress enumerated factors that courts must  
4 consider in determining whether to grant an “ends of justice” continuance. *Id.*; *see*  
5 *United States v. Clymer*, 25 F.3d 824, 829 (9th Cir. 1994) (explaining that “the ‘ends of  
6 justice’ exclusion . . . may not be invoked in such a way as to circumvent the time  
7 limitations set forth in the Act”). Those factors include “[w]hether the failure to grant  
8 such a continuance in the proceeding would be likely to make a continuation of such  
9 proceeding impossible, or result in a miscarriage of justice.” 18 U.S.C.  
10 § 3161(h)(7)(B)(i).

11  
12 Second, the Speedy Trial Act provides that when a defendant is to be retried  
13 following an appeal, the court retrying the case may extend the period for retrial from 70  
14 days up to 180 days “if unavailability of witnesses or other factors resulting from passage  
15 of time shall make trial within seventy days impractical.” 18 U.S.C. § 3161(e). “The  
16 Speedy Trial Act does not itself provide standards for determining when a factor results  
17 from the passage of time or even when such a factor renders trial impractical . . .  
18 suggest[ing] that Congress intended to afford experienced trial judges considerable  
19 discretion in making such determinations.” *United States v. Shellef*, 718 F.3d 94, 105  
20 (2d Cir. 2013). Determinations of whether holding a trial is impractical are therefore  
21 subject to “case-by-case review rather than . . . categorical pronouncements.” *Id.*

22  
23 Contrary to the government’s assertion, neither of these provisions justifies the  
24 Central District’s indefinite suspension of jury trials during this pandemic.

25  
26 //

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1.  
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3 Continuances under the “ends of justice” exception are appropriate if without a  
4 continuance, holding the trial would be *impossible*. 18 U.S.C. § 3161(h)(7)(B)(i). This  
5 exception has been used in response to natural disasters and other exigencies, but only  
6 where the triggering exigency made the criminal jury trial a physical and logistical  
7 impossibility. In *Furlow*, the Ninth Circuit upheld a district court’s order finding 14 days  
8 excludable where Mount Saint Helens erupted 2 days before the scheduled trial date. 644  
9 F.2d at 767–69. The court began its discussion by noting that “[a] close reading of the  
10 Speedy Trial Act . . . reveals no reference to the interruptions of nature.” *Id.* However,  
11 the court explained that the eruption created a “cloud of volcanic dust,” and was an  
12 incident “of worldwide significance” and “earth-shaking effect” that inflicted a  
13 “paralyzing impact on surrounding geographies, including the location of the court where  
14 the [defendant] was scheduled for trial.” *Id.* at 767. The eruption “obviously interrupted  
15 transportation [and] communication,” and “affect[ed] the abilities of jurors, witnesses,  
16 counsel, [and] officials to attend the trial.” *Id.* at 767–68. Since physical circumstances  
17 precluded holding a jury trial, and “[t]he district court preserved the procedural  
18 safeguards and specified a trial date rather than a *sine die* continuance,” the court held  
19 that the 14-day continuance did not result in a speedy-trial violation. *Id.* at 769.

20  
21 Similarly, a New York district court applied the ends of justice exception to  
22 exclude a 20-day period after the September 11, 2001 terrorist attacks. *United States v.*  
23 *Correa*, 182 F. Supp. 2d 326, 327 (S.D.N.Y. 2001). In that case, the pretrial conference  
24 had been set for September 11, 2001, less than half a mile from the World Trade Center.  
25 *Id.* However, after the attacks, the courthouse was evacuated and the jail where the  
26 defendant was detained was locked down for security reasons. *Id.* The courthouse,  
27 United States Attorney’s office, and jail were “closed to all non-emergency personnel for  
28 nearly a week.” *Id.* Even when they reopened, telephone, fax, and internet access were

1 disrupted at all three locations. *Id.* Lawyers without access to their offices were less able  
 2 to communicate effectively with the court and other counsel. *Id.* Law enforcement  
 3 agents, including those working on that specific case, were “massively redeployed to  
 4 emergency service work and the pressing needs of the terrorist attack.” *Id.* “Security  
 5 concerns and staffing difficulties at the [jail], which ha[d] also suffered dislocation of  
 6 critical electronic and communications systems, [made] it virtually impossible, and  
 7 clearly imprudent, to transport prisoners to [c]ourt.” *Id.* Given that these numerous  
 8 complications made holding a jury trial actually impossible, the court concluded that the  
 9 ends of justice would be served by excluding the 20-day period after the attacks.<sup>9</sup>

10  
 11 Although there is no question that the current pandemic is serious, conducting a  
 12 jury trial during the pandemic is clearly not impossible. Unlike in the cases where the  
 13 ends of justice exception has been applied in the wake of a natural disaster or other  
 14 exigency, travel and communications continue to function. *See Furlow*, 644 F.2d at  
 15 767–69; *Correa*, 182 F. Supp. 2d at 327. Some aspects of the practice of law may be less  
 16 convenient during this time, but it remains possible to perform necessary trial  
 17 preparations, access the courthouse, and conduct the trial.<sup>10</sup> *See Furlow*, 644 F.2d at  
 18 767–69; *Correa*, 182 F. Supp. 2d at 327.

19  
 20 Indeed, if one had any doubt about the possibility of conducting a jury trial during  
 21 the pandemic, one need look no further than the state court across the street from the  
 22

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23 <sup>9</sup> Other cases confirm that *actual impossibility* is key to applying the ends of justice exception. *See*  
 24 *United States v. Richman*, 600 F.2d 286, 294 (1st Cir. 1979) (finding no Speedy Trial Act violation  
 25 where trial was continued three weeks after the “paralyzing . . . Blizzard of ‘78” that made it so that  
 26 “[t]rial could not commence on” the scheduled date); *United States v. Scott*, 245 Fed. Appx. 391  
 (5th Cir. 2007) (concluding without substantial analysis that there was no Speedy Trial Act violation  
 where some delay was attributable to Hurricane Katrina).

27 <sup>10</sup> Sufficient courthouse staff are also available to facilitate a trial. Indeed, Mr. Nicholson’s status on  
 28 bond means that even less courthouse staff will be required to facilitate his trial than would be needed to  
 hold a trial for a defendant in custody.



1 Orange County federal courthouse where Mr. Nicholson's retrial would have occurred  
 2 had the Central District not prohibited it. The Orange County Superior Court resumed  
 3 jury trials, with appropriate precautionary measures, *nearly 8 months ago*. The state  
 4 court did not hold any criminal jury trials in April or May of 2020 because of the  
 5 pandemic. However, from June to the middle of November 2020, it held 130 jury trials,  
 6 including both criminal and civil jury trials. (*See* Exs. 2 and 3, attached to this order.)  
 7 Notably, a consistent 50–60% of potential Orange County jurors have been reporting to  
 8 fulfill their civic duty during this time. (*Id.*)

9  
 10 Make no mistake, the Orange County Superior Court has faced and continues to  
 11 face many challenges when conducting jury trials during the pandemic. There have been  
 12 and will be delays in the trial proceedings whenever a defendant, a witness, an attorney,  
 13 or a juror tests positive for the coronavirus and has to be quarantined.<sup>11</sup> But the Orange  
 14 County Superior Court has managed and continues to manage the challenges of  
 15 conducting a jury trial during the pandemic, protecting everybody associated with the  
 16 jury trials the best that it can.<sup>12</sup> It has never occurred to the Orange County Superior  
 17 Court to surrender to those challenges and indefinitely suspend the Sixth Amendment.

18  
 19 <sup>11</sup> In light of the recent surge in coronavirus cases in Orange County, the Orange County Superior Court  
 20 decided to extend the statutory time period for holding criminal jury trials “by not more than 30 days in  
 21 cases in which the statutory deadline otherwise would expire from January 11, 2021 to February 5,  
 22 2021.” (Ex. 4, attached to this order.) The Orange County Superior Court extended the statutory  
 23 deadline for this limited period to avoid having to dismiss a case if an in-custody defendant could not be  
 24 transported to the courthouse because of a quarantine at the Santa Ana Jail, or if it turns out there is a  
 25 temporary shortage of jurors. The Orange County Superior Court, however, fully intends to hold  
 26 criminal jury trials during the surge. In stark contrast, the Central District indefinitely suspended them  
 27 long before the surge, in fact nearly 10 months before it.

28 <sup>12</sup>The Orange County Superior Court has accomplished this by taking numerous careful measures to  
 ensure safety. It accommodates social distancing by staggering times for juror reporting, trial start,  
 breaks, and concluding for the day, seating jurors during trial in both the jury box and the audience area,  
 marking audience seats, and using dark courtrooms as deliberation rooms. It also regularly disinfects  
 the jury assembly room and restrooms, provides facial coverings, uses plexiglass shields in courtrooms,  
 and requires trial participants to use gloves to handle exhibits. (*Olsen*, Case No. 8:17-cr-00076-CJC,  
 Dkt. 67, Ex. 2 at 1–10, 13–25, 34.) Of course, similar safety precautions would have been in place for  
 Mr. Nicholson's retrial had the Central District allowed this Court to hold one.

1 Quite frankly, the Court is at a loss to understand how the government can  
 2 continue to support the Central District’s indefinite suspension of jury trials when the  
 3 government itself has convened the grand jury in the very same courthouse where Mr.  
 4 Nicholson’s retrial would have occurred had the Central District not prohibited it. From  
 5 June 24, 2020 through December 9, 2020, the grand jury—which has at least 16 people  
 6 on it—regularly convened in person in the very Orange County federal courthouse in  
 7 which Mr. Nicholson seeks to have his jury trial. The grand jury heard testimony from  
 8 witnesses, deliberated together, and returned 65 indictments in that time with no  
 9 coronavirus outbreak. (*See* Ex. 1.) Nevertheless, the government somehow contends that  
 10 it was impossible to conduct a jury trial during all of these months in the exact same  
 11 courthouse.<sup>13</sup>

12  
 13 The government continues to cite the Chief Judge’s General Order to support its  
 14 position that the ends of justice exception should be applied to exclude further time under  
 15 the Speedy Trial Act. The government’s continued reliance on the General Order is  
 16 misplaced. The General Order—issued after a majority vote of district judges in this  
 17 district—does not say that conducting a jury trial is *impossible*. Rather, it states only that  
 18 the pandemic has rendered conducting jury trials *unsafe*. The General Order and the  
 19 government note that people continue to be infected, hospitalized, and—tragically—die  
 20 due to the coronavirus, and that holding jury trials will likely put people at an increased  
 21 risk of contracting the coronavirus. C.D. Cal. General Order No. 20-09 ¶ 6.a. The Court,  
 22 of course, acknowledges the public health risk the coronavirus poses to people. *See*  
 23 *Roman Catholic Diocese*, 141 S. Ct. at 68 (“Members of this Court are not public health  
 24 experts, and we should respect the judgment of those with special expertise and  
 25

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26 <sup>13</sup> Tellingly, although the Central District suspended the grand jury citing dangers posed by the recent  
 27 surge, its suspension was not immediate. Rather, the Central District suspended the grand jury effective  
 28 two days after the date of the Central District’s order—just enough time for the grand jury to convene in  
 person one last time before the suspension, despite the dangers cited, and return 6 additional  
 indictments. (*See* Ex. 1.)

responsibility in this area.”). The Court also is acutely aware of the statistics of how many people continue to be infected, hospitalized, and—tragically—die due to the coronavirus every day, all across the country. But the Constitution does not turn on these considerations. Instead, to protect the fundamental right to a speedy trial guaranteed by the Sixth Amendment, the Constitution requires that a trial only be continued over a defendant’s objection if holding the trial is *impossible*. And holding Mr. Nicholson’s retrial during the pandemic is not impossible. The Orange County Superior Court has proven this to be the case.

Particularly troubling, the General Order’s suspension of jury trials is indefinite. The Order states that the Central District will determine when to resume jury trials using “gating criteria [that] is designed to determine local COVID-19 exposure risks based on 14-day trends of facility exposure, community spread, and community restrictions.” C.D. Cal. General Order 20-09 ¶ 2. However, the Ninth Circuit has repeatedly admonished that “an ends of justice exclusion must be ‘specifically limited in time.’” *United States v. Ramirez-Cortez*, 213 F.3d 1149, 1154 (9th Cir. 2000) (quoting *Lloyd*, 125 F.3d at 1268); *see Furlow*, 644 F.2d at 769 (noting that a *sine die* continuance would be unacceptable). In keeping with this requirement, the periods of time courts excluded under the Speedy Trial Act due to previous natural disasters and other exigencies were brief and definite. *See Furlow*, 644 F.2d at 768 (14 days); *Correa*, 182 F. Supp. 2d at 329 (20 days); *Richman*, 600 F.2d at 294 (3 weeks). In contrast, even after *10 months* without jury trials, the Central District’s suspension of jury trials remains indefinite. The gating criteria—which are completely untethered to the constitutional implications of a criminal defendant’s right to a speedy trial—do not make sufficiently certain what is otherwise an unacceptably uncertain end date.

Moreover, an “ends of justice” exclusion must be justified with reference to specific factual circumstances in the particular case as of the time the delay is ordered.

1 *Ramirez-Cortez*, 213 F.3d at 1154 (concluding that an ends of justice continuance was  
 2 not sufficiently justified where the judge made no inquiry into the actual need for a  
 3 continuance in the particular case, instead checking off boxes on pre-printed forms  
 4 without making findings on statutory factors, and the record showed that the judge “was  
 5 granting blanket continuances”). By its very nature, the General Order does not justify  
 6 delays as of the time they are ordered in any particular case. *See United States v. Pollock*,  
 7 726 F.2d 1456, 1461 (9th Cir. 1984) (stating that the “ends of justice” exclusion “was to  
 8 be based on specific underlying factual circumstances” and “cannot be invoked without  
 9 specific findings in the record”). Simply stated, the General Order is repugnant to the  
 10 Sixth Amendment and contrary to the “ends of justice.”

11  
 12 Nor does the California Governor’s color-coded tier system fix the constitutional  
 13 problems with the Central District’s indefinite suspension of jury trials. Apparently, the  
 14 Central District is now relying on that system to determine when jury trials will resume.  
 15 That system is for non-essential businesses. It does not apply to state courts, let alone  
 16 federal courts. *See Roman Catholic Diocese*, 141 S. Ct. at 69 (Gorsuch, J., concurring)  
 17 (denouncing the assumption that what happens in constitutionally protected spaces “just  
 18 isn’t as ‘essential’ as what happens in” other spaces). The California Governor’s color-  
 19 coded tier system is of no consequence to the constitutional analysis here. “Courts and  
 20 their procedural safeguards are indispensable to our system of government.” *Duncan v.*  
 21 *Kahanamoku*, 327 U.S. 304, 322 (1946). The constitutional right to a public and speedy  
 22 trial is and always will be essential.<sup>14</sup>

23  
 24  
 25 <sup>14</sup> Recently, the Chief Judge of the Ninth Circuit, Sidney R. Thomas, recognized that the operations of  
 26 the federal court, including conducting jury trials, are essential. In a letter to the Governor of California  
 27 requesting that all federal judges and employees in California, including those in the Central District, be  
 28 included in the state’s early priority phase of the coronavirus vaccination program, Chief Judge Thomas  
 stated the judges and employees are “frontline” workers who perform essential constitutional functions  
 and that they work “in courtrooms and in chambers where they have regular contact with court users,  
 jurors and the public as they perform their essential duties.”

1 In the Court's view, it is not a question of *if* the Court should have held Mr.  
 2 Nicholson's criminal jury trial during the coronavirus pandemic, but a question of *how*  
 3 the Court should have held it. If it is not impossible to hold criminal jury trials in the  
 4 state court across the street from the federal courthouse where Mr. Nicholson seeks to be  
 5 tried, it was clearly not impossible to hold a criminal jury trial for Mr. Nicholson. The  
 6 right to a speedy trial is one of the most basic and important rights preserved by our  
 7 Constitution. *Klopfer*, 386 U.S. at 224; *Furlow*, 644 F.2d at 769. The Central District  
 8 never should have denied him his right to one.

## 10 2.

12 Extensions under the Speedy Trial Act may also be warranted when holding an  
 13 earlier trial is "impractical." The Speedy Trial Act allows courts to extend the period for  
 14 a retrial after appeal from 70 to up to 180 days "if unavailability of witnesses or other  
 15 factors resulting from passage of time shall make trial within seventy days impractical."  
 16 18 U.S.C. § 3161(e). The government does not argue that any witnesses are unavailable  
 17 or provide any reason particular to this case why holding Mr. Nicholson's retrial within  
 18 70 days is impractical. Indeed, the government admitted that if the Central District had  
 19 summoned jurors for the retrial, it would have been ready to proceed.

21 The government relies only on the pandemic to argue that holding Mr. Nicholson's  
 22 retrial at this time is impractical. However, the challenges of the pandemic do not make  
 23 conducting Mr. Nicholson's retrial within 70 days impractical. As previously explained,  
 24 it is not impossible to hold a retrial during the pandemic. It is also not impractical to do  
 25 so. The Constitution does not succumb to considerations of safety, risk, and difficulty.  
 26 *See Roman Catholic Diocese*, 141 S. Ct. at 67–68; *Downes*, 182 U.S. at 384 (Harlan, J.,  
 27 dissenting). Even if it is difficult to effectuate the Constitution's guarantees, courts must  
 28

1 confront and overcome those difficulties, not surrender to them. *See Milligan*, 71 U.S. at  
 2 3.<sup>15</sup>

3  
 4 That is precisely what the Orange County Superior Court and providers of essential  
 5 services in Orange County have done for months now. After closing for two months at  
 6 the beginning of the pandemic, the Orange County Superior Court held over 130 jury  
 7 trials and continues to conduct them. (*See* Exs. 2–4.) The Internal Revenue Service, the  
 8 Social Security Administration, and other federal agencies in Orange County have been  
 9 open and their employees have continued to work. Police, firefighters, and other first  
 10 responders in Orange County have all continued to work. Hospitals and medical offices  
 11 in Orange County have been open to patients and the medical professionals have  
 12 continued to work. Grocery stores, hardware stores, and all essential businesses in  
 13 Orange County have been open and their employees have continued to work.<sup>16</sup> Yet the  
 14 federal courthouse in Orange County somehow still remains indefinitely closed for jury  
 15 trials.

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16  
 17  
 18 <sup>15</sup> Not surprisingly, the Central District’s suspension of jury trials has taken its toll on the fair  
 19 administration of justice in the district. A growing backlog in trials and sentencings has led to such  
 20 severe overcrowding in jails that people charged with crimes in California, with families and lawyers in  
 21 California, are being transported without notice to Arizona because there is simply no longer bed space  
 22 in the Central District to house them. *See, e.g., United States v. Joshua Jenkins*, Case No. 2:20-cr-  
 23 00068-CJC-1, Dkt. 41 (September 2, 2020 Order granting immediate transfer from Arizona back to  
 24 California). These moves impede not only defendants’ right to a speedy trial, but also their right to  
 25 effective assistance of counsel. Even more disturbing is the fact that the government is now offering  
 26 favorable deals to defendants to incentivize them to plead guilty. Due to high pretrial and pre-  
 27 sentencing caseloads, it has authorized AUSAs to offer two-level variances under the Sentencing  
 28 Guidelines to many defendants so long as they waive their right to in-person hearings, and sign plea  
 agreements and enter pleas quickly. *See, e.g., United States v. Manuel Ignacio Ruiz*, Case No. 5:20-cr-  
 00019-CJC-6, Dkt. 540 (September 17, 2020 plea agreement). In other words, the government is now  
 offering very favorable plea deals based not on the defendant’s individual circumstances, but rather on  
 exigencies manufactured by the Central District’s refusal to resume jury trials during the pandemic.

<sup>16</sup> Even under the Governor’s recent Regional Stay At Home Order, schools and childcare in Orange  
 County remain open with precautions, shopping centers and retail stores operate with limited capacity,  
 and outdoor recreational facilities are open for physically distanced outdoor exercise.



1 If it is not impractical for the Orange County Superior Court to conduct over 130  
 2 jury trials, and if it is not impractical for every essential business in Orange County to  
 3 remain open and for their employees to continue to work, it is not impractical to hold a  
 4 jury trial for Mr. Nicholson. Admittedly, the pandemic creates numerous challenges to  
 5 conducting a jury trial. There will be starts and stops. There will be delays. Significant  
 6 attention and caution will have to be devoted to safety and protection. But none of those  
 7 challenges justify the Central District's indefinite suspension of a constitutional right.  
 8 "Even if the Constitution has taken a holiday during this pandemic, it cannot become a  
 9 sabbatical." *Roman Catholic Diocese*, 141 S. Ct. at 70 (Gorsuch, J., concurring).<sup>17</sup>

## 11 B.

13 In light of the Central District's violation of Mr. Nicholson's constitutional right to  
 14 a public and speedy trial, the question then becomes what the remedy should be for the  
 15 Central District's violation. The law is clear on this issue. When a defendant is not  
 16 brought to trial within the 70-day time limit (minus all properly excludable periods of  
 17 delay) and brings a motion to dismiss, the court *must* dismiss the indictment. 18 U.S.C.  
 18 § 3162(a)(2); *see United States v. Medina*, 524 F.3d 974, 980 (9th Cir. 2008); *Lloyd*,  
 19 125 F.3d at 1265 ("If retrial following an appeal does not commence within seventy days,  
 20 not counting excludable delays, the indictment must be dismissed either with or without  
 21 prejudice."); *United States v. Tertrou*, 742 F.2d 538, 540 (9th Cir. 1984) (explaining that  
 22 if Congress' strict time requirements in the Speedy Trial Act "are not met, the courts have  
 23 no discretion but to dismiss"). The strictness of this remedy highlights the importance of

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25 <sup>17</sup> If the Central District had permitted this Court to hold Mr. Nicholson's retrial during the recent surge  
 26 in coronavirus cases in Orange County, the Court might have had to take several days to conduct jury  
 27 selection or perhaps even postpone it for a few weeks if it turned out there was a temporary shortage of  
 28 jurors. But this is all academic now. The Central District has indefinitely suspended jury trials and has  
 no intention of resuming them until Orange County reaches tier 3, when some non-essential businesses  
 can open indoors with modifications. One can only speculate when the Central District will resume jury  
 trials, but it is an absolute certainty that the Central District will not be resuming them any time soon.

1 the right it protects. *See Lloyd*, 125 F.3d at 1268 (“Congress designed the Speedy Trial  
 2 Act in part to protect the public’s interest in the speedy administration of justice, and it  
 3 imposed the sanction of dismissal under § 3162 to compel courts and prosecutors to work  
 4 in furtherance of that goal.”). The Court therefore has no choice but to dismiss the  
 5 indictment against Mr. Nicholson.

6  
 7 The only question remaining is whether to dismiss the indictment with or without  
 8 prejudice. “In determining whether to dismiss the case with or without prejudice, the  
 9 court shall consider, among others, each of the following factors: [1] the seriousness of  
 10 the offense; [2] the facts and circumstances of the case which led to the dismissal; and  
 11 [3] the impact of a reprosecution on the administration of this chapter and on the  
 12 administration of justice.” 18 U.S.C. § 3162(a)(2).<sup>18</sup> A court’s decision of whether to  
 13 dismiss the charges with or without prejudice depends on a “careful application” of these  
 14 factors to the particular case. *Clymer*, 25 F.3d at 831.

15  
 16 Admittedly, the first factor—the seriousness of the offense—weighs in favor of a  
 17 dismissal without prejudice. Though the crime of which Mr. Nicholson is accused—  
 18 being a felon in possession of a firearm—is far from the most serious of federal crimes, it  
 19 is still serious. *See Medina*, 524 F.3d at 986–87 (explaining that serious crimes weigh in  
 20 favor of dismissal without prejudice). Mr. Nicholson concedes as much. (*See Mot.* at 6  
 21 [arguing that the alleged offense is “serious, but that is not determinative”]). And as the  
 22 Court explained at the first sentencing, the firearm Mr. Nicholson possessed “had a  
 23 magazine capable of holding 31 bullets,” and “is the type of weapon that can be used to  
 24

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25 <sup>18</sup> Both the government and Mr. Nicholson provide the Court with a separate analysis to determine  
 26 whether Mr. Nicholson’s Sixth Amendment right was violated (as opposed to his rights under the  
 27 Speedy Trial Act). They cite *Barker v. Wingo*, a case decided before the Speedy Trial Act was enacted,  
 28 which explains that courts should balance the “[l]ength of delay, the reason for the delay, the  
 defendant’s assertion of his right, and prejudice to the defendant.” 407 U.S. at 530; *see Doggett v.*  
*United States*, 505 U.S. 647, 651 (1992). The analysis of these factors parallels the analysis the Court  
 makes under the Speedy Trial Act so there is no need for the Court to conduct a separate analysis.



1 harm or hurt or kill many people at one time.” (Dkt. 119.) However, this factor does not  
2 outweigh the other two factors the Court must consider.

3  
4 Most important in this case are the facts and circumstances leading to dismissal.  
5 The Central District decided to indefinitely suspend jury trials during this pandemic.  
6 Faced with the question of whether to continue that policy, it has time and again decided  
7 to do so. It made its decisions knowing that holding a jury trial in Orange County is  
8 possible. It made its decisions knowing that the Orange County Superior Court is able to  
9 conduct jury trials. It made its decisions knowing that a grand jury convened in the  
10 Orange County federal courthouse for months during the pandemic with no reported  
11 coronavirus outbreak. It made its decisions knowing that all essential service providers  
12 and businesses have remained open and their employees continue to work. Its decisions  
13 were knowingly and willfully made. The primary factor driving the Central District’s  
14 decision is the risk that people might get sick from the coronavirus. But its decision was  
15 made with little or no regard for the constitutional right to a public and speedy trial.  
16 Indeed, in his order denying the Court’s request to summon jurors for Mr. Nicholson’s  
17 trial (and the orders he cites therein), the Chief Judge made no mention of the  
18 Constitution at all.

19  
20 The Central District’s constitutional violation was also not merely technical. *See*  
21 *Medina*, 524 F.3d at 987 (affirming dismissal without prejudice where district court  
22 found the violations of the Speedy Trial Act were “technical, rather than substantive”).  
23 Nor was it isolated and unwitting. *See United States v. Taylor*, 487 U.S. 326, 342 (1988)  
24 (indicating that dismissal with prejudice is appropriate where there is “something more  
25 than an isolated unwitting violation”); *Medina*, 524 F.3d at 987 (explaining that a  
26 “culture of poor compliance” with the Speedy Trial Act would weigh in favor of  
27 dismissing with prejudice); *United States v. Ramirez*, 973 F.2d 36, 39 (1st Cir. 1992)  
28 (“The expansiveness of such a STA violation risk makes it important for a court to

1 correct for the sake of deterrence and more painstaking vigilance.”). Rather, it was a  
2 substantive policy decision—reimplemented each time it was reconsidered—to suspend  
3 the constitutional rights of Mr. Nicholson and every other defendant unwilling to waive  
4 time. *See Taylor*, 487 U.S. at 339 (finding that even “a truly neglectful attitude” toward  
5 the Speedy Trial Act could weigh in favor of dismissing with prejudice); *Medina*,  
6 524 F.3d at 987; *Ramirez*, 973 F.2d at 39 (explaining that violations “caused by the court  
7 or the prosecutor” weigh in favor of granting a dismissal with prejudice).

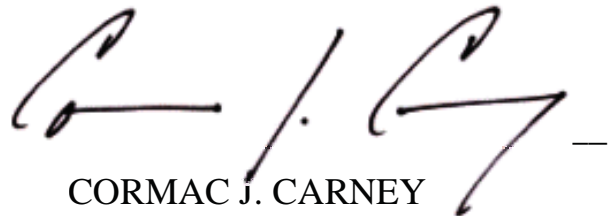
8  
9 Finally, barring reprosecution in this case by dismissing with prejudice is the only  
10 sanction with enough teeth to create any hope of deterring additional delay in the  
11 resumption of jury trials and avoiding further dismissals of indictments for violations of  
12 defendants’ constitutional rights to a public and speedy trial. *See Taylor*, 487 U.S. at 342  
13 (“It is self-evident that dismissal with prejudice always sends a stronger message than  
14 dismissal without prejudice, and is more likely to induce salutary changes in procedures,  
15 reducing pretrial delays.”). A dismissal without prejudice, on the other hand, allows the  
16 government simply to go before the grand jury, obtain a new indictment, and proceed as  
17 if no constitutional violation ever occurred. *See* 18 U.S.C. § 3288 (permitting the  
18 government to obtain a new indictment within six calendar months of the date of the  
19 dismissal, “which new indictment shall not be barred by any statute of limitations”);  
20 *United States v. Bert*, 814 F.3d 70, 86 (2d Cir. 2016) (“The fact that the government must  
21 reindict the defendant is not a particularly strong deterrent.”). In effect, there would be  
22 no adverse consequences from the Central District’s knowing and willful decision to  
23 violate Mr. Nicholson’s constitutional right to a public and speedy trial. Such a  
24 meaningless result would “send exactly the wrong signal” and foster in the future “a  
25 cavalier regard, if not a concerted disregard” of the Constitution. *Ramirez*, 973 F.2d at  
26 39; *see Bert*, 814 F.3d at 86 (encouraging courts to consider “the likelihood of repeated  
27  
28

violations and whether there are potential administrative changes prompted by this violation”).<sup>19</sup> This Court will not let that happen.

#### IV.

Federal judges are given lifetime appointments to support and defend the Constitution and laws of the United States. They must never abandon them.<sup>20</sup> In this case, the Central District’s indefinite suspension of jury trials during the coronavirus pandemic violated Mr. Nicholson’s right to a public and speedy trial under the Sixth Amendment and the Speedy Trial Act. Accordingly, this Court now must dismiss the charges against Mr. Nicholson, and dismiss them with prejudice.

DATED: January 20, 2021



CORMAC J. CARNEY  
UNITED STATES DISTRICT JUDGE

<sup>19</sup> That the district judges and the government did not act with malice does not change this analysis. *See Ramirez*, 973 F.2d at 39 (“Even though the oversight was accomplished without malice, that does not ameliorate the gravity of its effects.”); *Bert*, 814 F.3d at 80 (affirming that “a finding of ‘bad faith’ is not a prerequisite to dismissal with prejudice”).

<sup>20</sup> To quote George Washington, “The Constitution is the guide which I never will abandon.” From George Washington to Boston Selectmen, National Archives (July 28, 1795), *available at* <https://founders.archives.gov/documents/Washington/05-18-02-0305>.

# EXHIBIT 1

**INDICTMENTS RETURNED IN SOUTHERN DIVISION****June 24, 2020 through December 9, 2020**

	<b>Date Indictment Filed</b>	<b>Case Number</b>	<b>Case Name</b>	<b>Notes</b>
1	June 24, 2020	8:20-cr-00077-JLS	USA v. Martinez, et al.	
2		8:20-cr-00078-DOC	USA v. Jorgo	
3		8:20-cr-00079-JVS	USA v. Staples	
4		8:20-cr-00002(A)-DOC	USA v. Le, et al.	1 <sup>st</sup> Superseding Indictment
5	REDACTED	REDACTED	REDACTED	Filed Under Seal
6	REDACTED	REDACTED	REDACTED	Filed Under Seal
7		5:20-cr-00123-JGB	USA v. Renteria	
8		5:20-cr-00124-JGGB	USA v. Gil-Carranza, et al.	
9		8:20-cr-00083-DOC	USA v. Do	
10		8:20-cr-00084-DOC	USA v. Tran, et al.	
11	July 22, 2020	8:20-cr-00091-JVS	USA v. Memije	
12		5:20-cr-00132-JGB	USA v. Moore, et al.	
13		8:20-cr-00090-JLS	USA v. Nunez	
14		8:20-cr-00089-JLS	USA v. Rangel	
15		2:19-cr-00756(A)-JAK	USA v. Ryan, et al.	1 <sup>st</sup> Superseding Indictment
16	REDACTED	REDACTED	REDACTED	Filed Under Seal
17		8:20-cr-00097-JLS	USA v. Villa	
18		5:20-cr-00138-PA	USA v. Garcia	
19		8:19-cr-00208(A)-DOC	USA v. Pongsamart	1 <sup>st</sup> Superseding Indictment
20		8:20-cr-00098-JLS	USA v. Gonzalez	
21	August 12, 2020	8:20-cr-00104-DOC	USA v. Flores	
22		8:20-cr-00105-JVS	USA v. Fernandez	
23		8:20-cr-00106-JVS	USA v. Spagnolini	
24		8:20-cr-00107-JLS	USA v. Kuhns	
25		8:20-cr-00108-JVS	USA v. Anderson	
26	REDACTED	REDACTED	REDACTED	Filed Under Seal
27	Sept. 16, 2020	8:20-cr-00133-AB	USA v. Lewis, et al.	
28		8:20-cr-00134-SVW	USA v. Ramirez	
29		8:20-cr-00135-ODW	USA v. Chacon	
30		8:20-cr-00136-SVW	USA v. Mitchell	
31		8:20-cr-00137-DSF	USA v. Van Dyke	
32	REDACTED	REDACTED	REDACTED	Filed Under Seal
33	REDACTED	REDACTED	REDACTED	Filed Under Seal
34	Sept. 30, 2020	8:20-cr-00140-VAP	USA v. Hicks	
35		8:20-cr-00141-JAK	USA v. Jeffries	
36		5:20-cr-00186-DMG	USA v. Jones	
37		5:20-cr-00187-PA	USA v. Lawhead	
38		8:20-cr-00142-SB	USA v. Wampler	
39	REDACTED	REDACTED	REDACTED	Filed Under Seal
40	REDACTED	REDACTED	REDACTED	Filed Under Seal
41	REDACTED	REDACTED	REDACTED	Filed Under Seal



	Date Indictment Filed	Case Number	Case Name	Notes
42	October 14, 2020	8:20-cr-00152-JVS	USA v. Swain	
43		8:20-cr-00153-CJC	USA v. Pham	
44		8:20-cr-00154-PA	USA v. Arias	
45	REDACTED	REDACTED	REDACTED	Filed Under Seal
46	REDACTED	REDACTED	REDACTED	Filed Under Seal
47	October 28, 2020	8:20-cr-00160-RGK	USA v. Chavez, et al.	
48		8:20-cr-00161-PA	USA v. Talamantes	
49		8:20-cr-00162-SB	USA v. Rangel	
50	November 4, 2020	8:20-cr-00169-JVS	USA v. Miramontes	
51		8:20-cr-00170-CJC	USA v. Hall	
52	REDACTED	REDACTED	REDACTED	Filed Under Seal
53	REDACTED	REDACTED	REDACTED	Filed Under Seal
54		8:20-cr-00177-DSF	USA v. Vargas-Fentanes	
55		8:20-cr-00178-MWF	USA v. Garcia	
56		8:20-cr-00179-GW	USA v. Oquendo	
57	December 2, 2020	8:20-cr-00183-JVS	USA v. Crow	
58		8:20-cr-00184-CJC	USA v. Lee	
59	REDACTED	REDACTED	REDACTED	Filed Under Seal
60	December 9, 2020	8:20-cr-00189-GW	USA v. Zermeno	
61		8:20-cr-00190-PA	USA v. Hall	
62		8:20-cr-00191-JFW	USA v. Procopio	
63		8:20-cr-00192-VAP	USA v. Cerda	
64		8:20-cr-00193-RGK	USA v. Roche	
65	REDACTED	REDACTED	REDACTED	Filed Under Seal

# **EXHIBIT 2**

**Jury Trials Completed in Orange County Superior Court**

MEASURE		CY 2020						
		JUN	JUL	AUG	SEP	OCT	*NOV	TOTAL
Jury Trials	Civil	n/a	n/a	n/a	4	10	5	19
	Criminal - Felony	4	4	15	14	6	3	46
	Criminal - Misdemeanor	11	9	12	13	10	10	65
	<b>TOTAL</b>	<b>15</b>	<b>13</b>	<b>27</b>	<b>31</b>	<b>26</b>	<b>18</b>	<b>130</b>
Court Trials	Civil	n/a	n/a	n/a	4	10	5	19
	Criminal - Felony	0	1	0	0	1	6	8
	Criminal - Misdemeanor	0	0	0	1	0	2	3
	Mental Health	15	7	20	7	9	10	68
	Probate	7	13	8	6	8	3	45
	<b>TOTAL</b>	<b>22</b>	<b>21</b>	<b>28</b>	<b>18</b>	<b>28</b>	<b>26</b>	<b>143</b>
* Count totals include all cases that began/initiated during the respective reporting month.								
* November 2020 total is for a partial month, covering 11/01/01 thru 11/13/20.								

**Juror Reporting Statistics in Orange County Superior Court**

	Jurors Summoned	Jurors Asked to Report	Jurors Reported	% Reported
<b>April</b> (Court Closed)	36,212	0	0	0%
<b>May</b> (Court Closed)	42,850	0	0	0%
<b>June</b>	40,378	3,057	1,943	64%
<b>July</b>	61,716	2,047	1,265	62%
<b>August</b>	54,008	4,381	1,971	45%
<b>September</b>	58,077	4,709	2,865	61%
<b>Totals</b>	<b>293,241</b>	<b>14,194</b>	<b>8,044</b>	<b>57%</b>



**CENTRAL JUSTICE CENTER - JURY TRIALS HELD = 9**

Date	Day of the Week	Total # Targeted	Total # Called-In	Total # Attended	Total # FTA	FTA RATE	APPEARANCE RATE
11/1/2020	Sunday						
11/2/2020	Monday (AM)	160	276	197	79	29%	71%
11/3/2020	Tuesday (AM)	40	88	45	43	49%	51%
11/3/2020	Tuesday (PM)	45	107	52	55	51%	49%
11/4/2020	Wednesday (AM)	120	233	124	109	47%	53%
11/4/2020	Wednesday (PM)	120	296	135	161	54%	46%
11/5/2020	Thursday	30	88	52	36	41%	59%
11/6/2020	Friday	0	0	0	0	0%	0%
11/7/2020	Saturday						
11/8/2020	Sunday						
11/9/2020	Monday	0	0	0	0	0%	0%
11/10/2020	Tuesday	120	255	156	99	39%	61%
11/11/2020	Wednesday						
11/12/2020	Thursday	55	130	67	63	48%	52%
11/13/2020	Friday	30	60	39	21	35%	65%
11/14/2020	Saturday						
11/15/2020	Sunday						
11/16/2020	Monday (AM)	40	90	49	41	46%	54%
11/16/2020	Monday (PM)	40	90	49	41	46%	54%
11/17/2020	Tuesday	115	275	149	126	46%	54%
11/18/2020	Wednesday	70	198	111	87	44%	56%
11/19/2020	Thursday	40	100	54	46	46%	54%
11/20/2020	Friday	0	0	0	0	0%	0%
11/21/2020	Saturday						
11/22/2020	Sunday						
11/23/2020	Monday	0	0	0	0	0%	0%
11/24/2020	Tuesday	0	0	0	0	0%	0%
11/25/2020	Wednesday	0	0	0	0	0%	0%
11/26/2020	Thursday						
11/27/2020	Friday						
11/28/2020	Saturday						
11/29/2020	Sunday						
11/30/2020	Monday	80	192	119	73	38%	62%
	<b>TOTALS</b>	<b>1,105</b>	<b>2,478</b>	<b>1,398</b>	<b>1,080</b>	<b>44%</b>	<b>56%</b>

**WEST JUSTICE CENTER - JURY TRIALS HELD = 7**

Date	Day of the Week	Total # Targeted	Total # Called-In	Total # Attended	Total # FTA	FTA RATE	APPEARANCE RATE
11/3/2020	Tuesday	40	79	54	25	32%	68%
11/4/2020	Wednesday	40	77	49	28	36%	64%
11/5/2020	Thursday	40	76	47	29	38%	62%
11/9/2020	Monday (AM)	40	80	49	31	39%	61%
11/9/2020	Monday (PM)	40	86	46	40	47%	53%
11/10/2020	Tuesday (AM)	40	83	57	26	31%	69%
11/10/2020	Tuesday (PM)	40	86	52	34	40%	60%
11/12/2020	Thursday	40	77	44	33	43%	57%
11/17/2020	Tuesday	40	87	59	28	32%	68%
11/18/2020	Wednesday (AM)	40	75	47	28	37%	63%
11/18/2020	Wednesday (PM)	40	83	51	32	39%	61%
	<b>TOTALS</b>	<b>440</b>	<b>889</b>	<b>555</b>	<b>334</b>	<b>38%</b>	<b>62%</b>

**HARBOR JUSTICE CENTER - JURY TRIALS HELD = 3**

Date	Day of the Week	Total # Targeted	Total # Called-In	Total # Attended	Total # FTA	FTA RATE	APPEARANCE RATE
11/2/2020	Monday	40	79	44	35	44%	56%
11/3/2020	Tuesday	40	74	41	33	45%	55%
11/12/2020	Thursday	40	73	43	30	41%	59%
	<b>TOTALS</b>	<b>120</b>	<b>226</b>	<b>128</b>	<b>98</b>	<b>43%</b>	<b>57%</b>

# **EXHIBIT 3**



## Superior Court of California County of Orange

### News Release

Oct. 20, 2020

Public Information Office  
Contact: Kostas Kalaitzidis, 657-622-7097  
PIO@occourts.org

### Orange County Superior Court Celebrates Special Juror Appreciation Week October 26–30, 2020

**Santa Ana, CA** – The Orange County Superior Court will celebrate and recognize our county’s citizens who answered the call of duty and stepped up to serve on juries during the pandemic, with a special Juror Appreciation Week from October 26 to October 30.

“The fact that we held 100 jury trials since the partial reopening of the Court in May is a testament to the commitment of our citizens to the Constitution and our shared values. Jurors are an integral part of our justice system, they guarantee the right to a trial where all can be heard and judged by their peers,” said **Orange County Presiding Judge Kirk Nakamura**. “We could not have provided access to justice through jury trials during this pandemic if not for the great response of our citizens,” he added.

The Court resumed criminal trials in May, kicking off the “**Safe Access to Justice Initiative**,” a program designed to assure strict enforcement of safety precautions in order to protect jurors and all members of the public who enter Court facilities.

“I was impressed by the way everyone went out of their way to do their best during these trying COVID times,” said **Jodi Greenbaum, an Orange County citizen**, who answered the call to serve our community as a juror. “First, Judge Cynthia Herrera set a professional and caring tone by speaking to us about our duty as jurors. Twice, Judge Jeannie Joseph called us in to tell us that even though we weren’t chosen as jurors, we served an important purpose,” Ms. Greenbaum added.

“It wasn’t just the judges. Everyone in the courthouse showed kindness, from the deputies at the entrance to the workers, who smiled, cleaned down the courtroom and explained simple directions as if they were doing it for the first time,” she stressed.

**Judge Thomas Delaney**, who leads the “**Safe Access to Justice Initiative**,” noted the Court’s commitment to keeping everyone healthy and safe. “As we conduct jury trials, we are also implementing strict cleaning procedures and physical distancing protocols to support the health and wellness of everyone that enters Court facilities,” he said.

Meanwhile, the Court is capitalizing on the use of technology to significantly reduce the number of jurors summoned to serve.

“We are using cutting edge technology and data analysis to create efficiencies that will allow the Court to reduce the overall number of jurors needed to provide access to justice,” said **Court Executive Officer and Jury Commissioner David Yamasaki**. “We will be able to reduce the numbers of jurors

summoned to the point that fairly soon, any citizen who serves in Orange County can expect to be called to serve no more than once every two years.”

As the pandemic is continuing to hamper Court operations, and to alleviate concerns regarding physical distancing, the Court recently implemented a mobile device self-check-in process for jurors. “Our jurors may now choose to skip the check-in line altogether and have a seat directly in the jury assembly room,” said **Jury Services Manager Pete Hernandez**, adding “By accessing a dedicated Court network for jurors on their mobile device, they can self-check-in for service and obtain access to the free WiFi. All they need to use is their 9-digit juror ID number that is printed on their summons. It’s as simple as that.”

In pre-COVID times, millions of Californians statewide participated in jury service. Last year:

- About 9 million people were summoned to jury service, over 652,000 in Orange County alone;
- Over 4 million prospective jurors were eligible and available to serve;
- Approximately 80 percent of prospective jurors completed service in one day; and
- In Orange County, more than 900 jury trials (criminal and civil) were held in the past few years.

The recognition and appreciation for jurors usually takes place the second week of May, established as Juror Appreciation Week by a special resolution passed by the California Legislature in 1998 to acknowledge the important contributions of citizens who devote their time and effort in making the cherished right of trial by jury a reality. The pandemic forced the Court to forego the planned celebrations in May and move them to October.

For more information on jury service, visit [www.occourts.org](http://www.occourts.org) and click on “Jury Service,” or visit the [Jury Service section](#) of the California Courts website.

# # #

# **EXHIBIT 4**





1 statutory deadline otherwise would expire from 1/11/2021 to 2/5/2021, inclusive. (Gov.  
2 Code, § 68115(a)(10).)

3 It is the intent of this Order to provide the maximum length of constitutionally  
4 permitted continuance days authorized by the January 7, 2021 Order of Chief Justice Tani  
5 Cantil-Sakauye issued in response to the January 5, 2021 Request for a Judicial Emergency  
6 Order made by the Court. Any conflicts in the above language are to be resolved in favor of  
7 granting the lengthier of the continuance options.  
8

9  
10 THIS ORDER IS EFFECTIVE IMMEDIATELY.

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13 Dated: 1/7/2021

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15 Erick L. Larsh, Presiding Judge  
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