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October 23, 2019

Hon. Robert A. Katzmann  
Chief Judge  
U.S. Court of Appeals for the Second Circuit  
Thurgood Marshall U.S. Courthouse  
40 Foley Square  
New York, NY 10007

**Re: Live Video Streaming of Oral Argument**

Dear Chief Judge Katzmann:

I respectfully write on behalf of the Federal Courts Committee of the New York City Bar Association to suggest that the Second Circuit consider amending its procedures to make available to the public, on a routine basis, live video streaming of its oral arguments in civil matters in which all parties are represented by counsel.<sup>1</sup>

In 2016, this Committee wrote to Your Honor to ask that the Court begin posting audio recordings of oral arguments on the Court's public website as a matter of course within a reasonable time after each argument. Shortly thereafter, the Court modified its procedures and now provides these recordings to the public, for no charge, on its website. As a result of the Court's decision, countless litigants, lawyers, members of the media, and members of the public have been afforded the opportunity to hear argument before this Court.

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<sup>1</sup> We are aware that Federal Rule of Criminal Procedure 53 has been construed by this Court and others to prohibit the broadcasting of judicial proceedings in criminal cases.

Live video streaming is the inevitable and logical next step in increased public access to judicial proceedings. It will keep pace with the evolving standards of public access to government proceedings. With the notable exception of criminal appeals (where broadcasting is currently prohibited), there are compelling policies that weigh in favor of live video streaming of oral arguments: it will advance the important values of transparency and greater understanding of the judicial system, for members of the public and the bar alike.

## **I. THE COURT'S CURRENT PROCEDURES**

This Court's current policy with respect to video coverage of oral argument is set forth in the Second Circuit Guidelines Concerning Cameras in the Courtroom ("Camera Coverage Guidelines"), Appendix to Local Rules of the Second Circuit, Part B (adopted Mar. 27, 1996). The Camera Coverage Guidelines address the question of when and how appellate arguments in the Second Circuit are made available for broadcast. Under these guidelines, civil and non-pro se matters already may be broadcast upon request by the "news media," defined to mean "any person or entity regularly engaged in the gathering and dissemination of news." Educational institutions are also permitted to broadcast argument. The panel assigned to hear a particular argument retains the sole discretion to permit or reject an application to broadcast oral argument. The only amendment to the Camera Coverage Guidelines that would be necessary under our proposal would be to permit live streaming without a request from the news media.

## **II. WHY THE COURT SHOULD ADOPT LIVE VIDEO STREAMING**

We respectfully suggest that the rationale for limiting video broadcasts to instances of prior request has been overtaken by events, such as the development of the internet and the ubiquity of video streaming in a host of other relevant contexts ranging from congressional hearings to speeches by candidates for office. When the Camera Coverage Guidelines were promulgated, the internet was in its infancy and blogging and podcasting did not exist. YouTube was not created until 2005. These technological and cultural changes have increased access to and interest in debates on matters of public concern in ways that the Court could not have imagined in 1996 when the Camera Coverage Guidelines were promulgated.

The public demand for and interest in these recordings is clear. Oral argument is not only of interest to the media and the public in high profile cases, but are also of great interest to litigants in other cases pending before this Court and other courts. Oral argument is also a resource for attorneys conducting research on all manner of legal issues, or preparing for oral arguments themselves. Given the limited space in the courtroom and anteroom for observers, even when a member of the public wishes to see an oral argument, there is no guarantee that he or she will be able to do so. Finally, the capability for live video streaming of oral argument already exists: when there are more observers than seats in the Courtroom, additional observers can sit and watch video of the argument from the Court's anteroom and, in some instances, from further overflow rooms set up elsewhere in the courthouse. Under our proposal, this video stream would be made available to the general public, whether or not they were able to travel to the Thurgood Marshall Courthouse.

### III. THE CURRENT PRACTICES IN FEDERAL AND STATE APPELLATE COURTS

There is a clear trend toward greater media access in federal and state court. All federal circuit courts, and nearly all of the appellate courts of states within this circuit, already make audio (or, in certain instances, video) recordings of past oral arguments available in all cases.<sup>2</sup> Courts are now beginning to offer live video streaming of arguments at their own initiative. On the state side, the New York Court of Appeals and all four Appellate Divisions provide access to live video webcasts of every argument as a matter of course.<sup>3</sup> In New York, criminal cases as well as civil cases are broadcast. On the federal side, the Ninth Circuit does the same, and the D.C. Circuit now provides live audio of all its proceedings, without any apparent limitation to non-criminal cases.<sup>4</sup> Within the last year, the Fourth Circuit and the Seventh Circuit also each experimented with live video streaming in single cases.<sup>5</sup> Similarly, this Court has permitted live video or audio broadcasts of arguments at the request of news media in recent cases attracting heightened public interest.<sup>6</sup>

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<sup>2</sup> First Circuit: <http://www.ca1.uscourts.gov/sign-opinions-and-oral-argument-feed> (audio); Second Circuit: [http://www.ca2.uscourts.gov/oral\\_arguments.html](http://www.ca2.uscourts.gov/oral_arguments.html) (audio); Third Circuit: <http://www.ca3.uscourts.gov/oral-argument-recordings> (audio and limited video); Fourth Circuit: <http://www.ca4.uscourts.gov/oral-argument/listen-to-oral-arguments> (audio); Fifth Circuit: <http://www.ca5.uscourts.gov/oral-argument-information/oral-argument-recordings> (audio); Sixth Circuit: [http://www.opn.ca6.uscourts.gov/internet/court\\_audio/aud1.php](http://www.opn.ca6.uscourts.gov/internet/court_audio/aud1.php) (audio); Seventh Circuit: <http://media.ca7.uscourts.gov/oralArguments/oar.jsp> (audio); Eighth Circuit: [www.ca8.uscourts.gov/oral-arguments](http://www.ca8.uscourts.gov/oral-arguments) (audio); Ninth Circuit: <https://www.ca9.uscourts.gov/media/> (audio and video); Tenth Circuit: <https://www.ca10.uscourts.gov/clerk/oral-argument-recordings> (audio); Eleventh Circuit: <http://www.ca11.uscourts.gov/oral-argument-recordings-page> (audio); D.C. Circuit: <https://www.cadc.uscourts.gov/recordings/recordings.nsf/> (audio); Federal Circuit: <http://www.cafc.uscourts.gov/oral-argument-recordings> (audio); N.Y. Court of Appeals: <https://www.nycourts.gov/ctapps/OA-Archives.htm> (video); N.Y. First Department: <http://www.courts.state.ny.us/courts/AD1/index.shtml> (video); N.Y. Second Department: [http://www.nycourts.gov/courts/ad2/oral\\_argument\\_archives.shtml](http://www.nycourts.gov/courts/ad2/oral_argument_archives.shtml) (video); N.Y. Fourth Department: <https://ad4.nycourts.gov/go/live/channel.asp?channel=on-demand> (video); Connecticut Supreme Court: <https://www.jud.ct.gov/supremecourt/Audio/OralArgumentsAudio.aspx> (audio); and Vermont Supreme Court: <https://www.vermontjudiciary.org/supreme-court/audio-recordings-oral-arguments> (audio). (All links in this report were last visited on October 22, 2019.)

<sup>3</sup> Court of Appeals: <https://www.nycourts.gov/ctapps/live.html>; First Department: <http://wowza.nycourts.gov/ad1/ad1.php>; Second Department: <http://wowza.nycourts.gov/ad2/ad2.php>; Third Department: <http://wowza.nycourts.gov/ad3/ad3.php>; and Fourth Department: <https://ad4.nycourts.gov/go/live/channel.asp?channel=SLG>.

<sup>4</sup> Ninth Circuit: [https://www.ca9.uscourts.gov/media/live\\_oral\\_arguments.php](https://www.ca9.uscourts.gov/media/live_oral_arguments.php); and D.C. Circuit: <https://www.cadc.uscourts.gov/internet/home.nsf/Content/Announcement+-+November+8%2C+2017+-+Policy+Regarding+Live+Audio+Streaming+of+Arguments>.

<sup>5</sup> The Fourth Circuit authorized a live audio stream of oral argument in *IRAP v. Trump*, No. 17-2231 (4th Cir. Dec. 8, 2017), and the Seventh Circuit authorized a live video stream of oral argument in *Doe v. Purdue University*, No. 17-3565 (7th Cir. Sept. 18, 2018).

<sup>6</sup> Pursuant to the Camera Coverage Guidelines, this Court recently granted C-SPAN's request to live stream audio of oral argument in *Trump v. Committee on Financial Services*, No. 19-1540-cv (Aug. 23, 2019), and live stream video of oral argument in *Vidal v. Trump*, No. 18-485-cv (2d Cir. Jan. 25, 2019). A request for live audio streaming (but not video streaming) was recently granted in *Trump v. Vance*, No. 19-3204-cv (2d Cir.), which will be argued on October 23, 2019. The Second Circuit has made similar accommodations in past cases—such as *Roman Catholic Archdiocese of N.Y. v. Sebelius*, No. 14-427-cv (2d Cir. Jan. 25, 2015), and *ACLU v. Clapper*, No. 14-42-cv (2d Cir. Sept. 2, 2014)—and denied requests for live streaming in others, such as *Herrick v. Grindr*, No. 18-396 (2d Cir. Jan. 7, 2019). Case-by-case decisions to preclude live streaming would be permitted under the policy proposed in this letter.

Statistics on the Ninth Circuit’s YouTube channel demonstrate substantial public interest in the recordings of its arguments, as they show that the public accesses most Ninth Circuit argument recordings at least several dozen times within a few months after the recordings are posted, and arguments in many cases are accessed hundreds of times.<sup>7</sup>

#### **IV. THE POTENTIAL FOR LEGISLATIVE CHANGE**

On September 13, 2018, the House Judiciary Committee approved the Judiciary ROOM Act of 2018, which would have required among other things that “each hearing of a court of appeals shall be made available for viewing on the internet through streaming video” within two years of enactment.<sup>8</sup> The bill ultimately was not enacted in the last session of Congress but its passage by the Judiciary Committee is a further indication that there is considerable legislative and public support for live video streaming.<sup>9</sup> Indeed, on September 26, 2019, the House Judiciary Committee held another hearing on the subject and appears poised to re-introduce legislation in the current session of Congress that would require live streaming of oral argument in all federal circuit courts.

#### **V. CONCLUSION**

Given the growing legislative and public support for live video streaming, the Court should implement a live video policy akin to that already available in the Ninth Circuit and in New York state courts.

We thank Your Honor and the other judges of the Court for your consideration of our proposal. The Federal Courts Committee would be pleased to provide the Court with any assistance or further information that might be helpful in evaluating or implementing our proposal.

Respectfully submitted,  
Harry Sandick, Chair of Federal Courts Committee

cc: Michael D. Jordan, Circuit Executive  
Catherine O’Hagan Wolfe, Clerk of Court

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<sup>7</sup> See generally YouTube, Channel for the United States Court of Appeals for the Ninth Circuit, <https://www.youtube.com/channel/UCeIMdiBTNTpeA84wmSRDPDg> (last visited Apr. 30, 2019).

<sup>8</sup> Judiciary Reforms, Organization and Operational Modernization (ROOM) Act of 2018, H.R. 6755, 115th Congress § 301(a), (b) (2018), available at <https://www.congress.gov/bill/115th-congress/house-bill/6755/text>.

<sup>9</sup> In a letter to then-Speaker Paul Ryan dated November 6, 2018, the Judicial Conference of the United States stated that this provision was “unnecessary for the courts of appeals” because the Judicial Conference has in the past “strongly urged each circuit judicial council to adopt an order reflecting its decision to authorize the taking of photographs and radio and television coverage of appellate court proceedings.” Our request in this letter is that the Court should act pursuant to this authority to modify its policy to permit something akin to what Congress considered in recent sessions. The Judicial Conference also endorsed the idea that any such live streaming statute contain an “opt-out” provision that allowed the presiding judge to determine, either on the motion of a party or *sua sponte*, that live streaming in a particular case would violate the due process rights of a party to the proceeding or is otherwise not in the interests of justice. The Camera Coverage Guidelines already incorporate such a provision.