



NEW YORK
CITY BAR

COMMITTEE ON FEDERAL COURTS

HARRY SANDICK

CHAIR

hsandick@pbwt.com

ARIEL RUDOFISKY

SECRETARY

arudofsky@pbwt.com

COMMUNICATIONS AND MEDIA LAW COMMITTEE

MATTHEW SCHAFFER

CHAIR

mlschafer@gmail.com

AMANDA LEVINE

SECRETARY

alevine830@gmail.com

January 28, 2022

Hon. Debra Ann Livingston
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 Livingston:

We write on behalf of the Federal Courts Committee and Communications and Media Law Committee (together, the “Committees”) of the New York City Bar Association (“City Bar”) to respectfully renew the City Bar’s 2019 request for the Second Circuit to consider amending its procedures to make available to the public, on a routine basis, video streaming of its oral arguments in civil matters in which all parties are represented by counsel.¹

In 2016, the City Bar wrote to Chief Judge Robert Katzmann 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.² Shortly after the 2016 letter, the Court modified its procedures and began providing 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. In 2019, we wrote to Chief Judge Katzmann to ask that the Court provide live video streaming of

¹ 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.

About the Association

The mission of the New York City Bar Association, which was founded in 1870 and has 25,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.

oral arguments in civil matters in which all parties are represented by counsel.³ At the time, Chief Judge Katzmann declined to do so.

Given the ongoing COVID-19 pandemic, the Committees believe that a renewed request is appropriate at this time. 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, as well as increased public appetite to observe the Court's proceedings. At least with respect to civil appeals, there are compelling policies that weigh in favor of 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

In March 2020, the Court began hearing all oral arguments over a teleconference platform, with the audio of all oral arguments livestreamed and a link of the livestream available on the Court's website. In August 2021, Your Honor announced that oral arguments will be conducted in person at the Thurgood Marshall U.S. Courthouse, with remote exceptions provided for good cause. Recently, in light of the surge in COVID-19 cases, You Honor announced that beginning January 4, 2022, oral arguments will be once again conducted remotely by teleconference. The courtroom is closed to the public, but the Court is continuing to offer livestream audio of the oral arguments.

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, updated Oct. 1, 2019). 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 logistical challenges created by the ongoing pandemic, which has demonstrated both the increased need for creative technological solutions, and the

² See Letter to Hon. Robert A. Katzmann, re: Public Availability of Oral Argument Audio Recordings, Feb. 24, 2016, available at: https://www2.nycbar.org/pdf/report/uploads/5_20073050-LettertoChiefJudgeKatzmannonPublicAvailabilityofOralArgumentAudioRecordingsFEDCOURT2.25.16.pdf. (All sites last visited Jan. 27, 2022).

³ See Letter to Hon. Robert A. Katzmann, re: Live Video Streaming of Oral Argument, Oct. 23, 2019, available at: https://s3.amazonaws.com/documents.nycbar.org/files/2019538-VideoStreaming2ndCircuit_FINAL10.23.19.pdf.

Court's ability to offer these solutions while maintaining the integrity of its proceedings. This Court already has a YouTube channel established for livestream audio of oral arguments, and it would not be a significant technical adjustment to begin offering livestream video on this channel. In addition, just as the Court now makes available archived audio recordings of arguments, the Court could make available archived video of arguments. Further, events since March 2020 have only cemented the important role of video streaming in a host of other relevant contexts, ranging from congressional hearings to speeches by candidates for office.

The public demand for and interest in these recordings is clear. As the Court is no doubt aware, it has long been recognized that under our Constitution, “[w]hat transpires in the court room is public property.” *Craig v. Harney*, 331 U.S. 367, 374 (1947). This is not a mere formalism; it is central to the fabric of our democracy: “Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 596 (1980) (Brennan, J., concurring in judgment) (citation and marks omitted). As the Supreme Court explained, underlying the right of access “is the common understanding that ‘a major purpose of th[e] [First] Amendment was to protect the free discussion of governmental affairs[.]’” *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 604 (1982). Meaningful access to judicial proceedings thus “ensure[s] that this constitutionally protected ‘discussion of governmental affairs’ is an informed one.” *Id.* at 605.

Oral arguments are 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. The Court's current policy of closing the courtroom to the public, while an understandable and reasonable safety measure, drastically limits access to the public. Moreover, the capability for video streaming (either live or as an archive recording) 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. This video stream would once again allow the general public to view, rather than simply hear, oral arguments.

III. THE CURRENT PRACTICES IN FEDERAL AND STATE APPELLATE COURTS

Since the beginning of the COVID-19 pandemic, the Supreme Court and all 13 federal circuits now provide a livestream of oral arguments, with the Ninth Circuit providing live video.⁴ The Supreme Court offers a live audio feed of oral arguments and provides a recording of the audio on the Court's website later in the day. Remote participation is expected of arguing attorneys who receive a positive COVID test. Several Justices, including Justice Stephen Breyer, Justice Sonia Sotomayor, Justice Neil Gorsuch, and Justice Brett Kavanaugh have participated in oral arguments remotely.

⁴ See *Live Video Streaming of Oral Arguments and Events*, U.S. CTS. FOR THE NINTH CIR., <https://www.ca9.uscourts.gov/media/live-oral-arguments> (last visited Jan. 18, 2022).

Even outside of COVID-19 procedures, there is a clear trend toward greater public access to 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.⁵ This Court has permitted live video or audio broadcasts of arguments at the request of news media in recent cases attracting heightened public interest.⁶ The Ninth Circuit, in addition to providing live video streaming, also regularly posts videos of oral arguments to its website, without any apparent limitation to non-criminal cases. 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.⁷ 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.⁸ In New York, criminal cases as well as civil cases are broadcast.

⁵ First Circuit: <https://www.ca1.uscourts.gov/oralargsrss> (audio); Second Circuit: http://www.ca2.uscourts.gov/oral_arguments.html (audio); Third Circuit: <http://www.ca3.uscourts.gov/oral-argument-recordings> (audio and 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 (audio); Seventh Circuit: <http://media.ca7.uscourts.gov/oralArguments/oar.jsp> (audio and limited video); Eighth Circuit: <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-recording-archiv> (audio); Eleventh Circuit: <http://www.ca11.uscourts.gov/oral-argument-recordings-page> (audio and limited video); 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: <https://www.nycourts.gov/courts/AD1/Archives/index.shtml> (video); N.Y. Second Department: http://www.nycourts.gov/courts/ad2/oral_argument_archives.shtml (video); N.Y. Third Department: <https://www.nycourts.gov/ad3/AD3archive.html> (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).

⁶ Pursuant to the Camera Coverage Guidelines, this Court granted C-SPAN's request to live stream audio of oral argument in *Trump v. Comm. on Fin. Servs.*, No. 19-1540 (2d Cir. Aug. 23, 2019), and live stream video of oral argument in *Vidal v. Trump*, No. 18-485 (2d Cir. Jan. 25, 2019). The Second Circuit has made similar accommodations in past cases—such as *Roman Cath. Archdiocese of N.Y. v. Sebelius*, No. 14-427 (2d Cir. Jan. 25, 2015), and *ACLU v. Clapper*, No. 14-42 (2d Cir. Sept. 2, 2014)—and denied requests for live streaming in others, such as *Herrick v. Grindr LLC*, 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.

⁷ See *Channel for the United States Court of Appeals for the Ninth Circuit*, YOUTUBE, <https://www.youtube.com/channel/UCeIMdiBTNTpeA84wmSRPDPg> (last visited Jan. 18, 2022).

⁸ 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>.

IV. CONCLUSION

Given the growing necessity of and public support for 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, and should make available archived video recordings of arguments. We thank Your Honor and the other judges of the Court for your consideration of our proposal. The Committees 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
Ariel Rudofsky, Secretary
Federal Courts Committee

Matthew Schafer, Chair
Amanda Levine, Secretary
Communications and Media Law Committee

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