

January 4, 2024

VIA NYSCEF

The Honorable Arthur F. Engoron
Supreme Court of the State of New York
County of New York
Part 37, General IAS Part
60 Centre Street
New York, NY 10007

**Re: Application of News Organizations for Audiovisual Coverage of Closing Arguments
in *People ex rel. James v. Trump et al.*, Index No. 452564/2022**

Dear Justice Engoron:

We write on behalf of the following news organizations: American Broadcasting Companies, Inc. d/b/a ABC News, The Associated Press, Bloomberg L.P., Cable News Network, Inc., CBS Broadcasting Inc. d/b/a CBS News, Dow Jones & Company, Inc. (publisher of *The Wall Street Journal*), NBCUniversal News Group, The New York Times Company, Newsday LLC, NYP Holdings, Inc. (publisher of the *New York Post*), Reuters News & Media Inc., and WP Company LLC (publisher of *The Washington Post*) (collectively, the “News Organizations”). The News Organizations respectfully request permission for a pool videographer to provide live and recorded coverage of the closing arguments in this matter scheduled for January 11, 2024. We have conferred with counsel for the New York Attorney General, who does not oppose this application. We have also repeatedly attempted to contact counsel for Defendants (by email and telephone), but have received no response. We note, however, that in connection with the News Organizations’ previous request to televise the opening arguments, Defendants took no position on the application. Oct. 2, 2023 Tr. at 4:2–3.

This case presents the ideal opportunity to fulfill the New York court system’s official policy of encouraging audiovisual coverage of judicial proceedings. Indeed, “it is the policy of the Unified Court System to facilitate the audio-visual coverage of court proceedings to the fullest extent permitted” by law, in order to “maintain the broadest scope of public access to the courts, to preserve public confidence in the Judiciary, and to foster public understanding of the role of the Judicial Branch in civil society.” 22 N.Y.C.R.R. § 131.1(a).

These goals, while laudable in any court proceeding, are at their zenith in this historic proceeding, where the New York Attorney General’s Office and counsel for a former President of the United States (and current presidential candidate) will be making their closing arguments as to

what extent the former President and associated persons should be held liable for fraud. The American public deserves to see and hear for themselves the arguments being made in Your Honor's courtroom. Without video coverage in the courtroom, the only video available to the public will be, at best, out-of-courtroom reporting and, at worst, political spin that may have little relationship to what actually transpired in these proceedings. This does a disservice to both the public and the court system, since it thwarts the public's ability to observe the proceedings for themselves and draw their own conclusions on the matter. Indeed, as the Supreme Court held forty years ago, "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Press-Enter. Co. v. Superior Ct.*, 464 U.S. 501, 509 (1984) (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980)); see also *People v. Boss*, 182 Misc. 2d 700, 706 (Sup. Ct. Albany Cnty. 2000) ("The denial of access to the vast majority will accomplish nothing but more divisiveness while the broadcast of the trial will further the interests of justice, enhance public understanding of the judicial system and maintain a high level of public confidence in the judiciary."). For these reasons, it is essential that the closing arguments in this historic proceeding are accurately captured on video, for the benefit of our institutions, the public, and future generations.

We recognize that this Court previously denied the News Organizations' request to televise the opening arguments in this trial, stating on the record that Your Honor was "afraid I'm constrained to deny it." Oct. 2, 2023 Tr. at 5:7. The News Organizations respectfully request that the Court reconsider that decision in connection with the closing arguments, particularly because, with the close of evidence last year, the summations by counsel are even further removed from any live witness testimony and are well outside the ban on filming witnesses. The News Organizations submit that the Court has discretion to allow audiovisual coverage of closing arguments and should favorably exercise that discretion here.

First, there is no statutory bar on audiovisual coverage of counsel's closing arguments because they are non-testimonial proceedings. New York Civil Rights Law § 52 only prohibits "televising, broadcasting, or taking of motion pictures . . . of proceedings, *in which the testimony of witnesses* by subpoena or other compulsory process is or may be taken." N.Y. Civ. Rights Law § 52 (emphasis added). The statutory ban is specifically tailored to "the preservation of the value and integrity of live witness testimony." *Courtroom Television Network LLC v. State*, 8 A.D.3d 164, 166 (1st Dep't 2004), *aff'd*, 5 N.Y.3d 222 (2005). "If a trial or other proceeding did not contemplate the introduction of compelled testimony, there would not then be a section 52 ban." *Coleman v. O'Shea*, 184 Misc. 2d 238, 240 (Sup. Ct. Nassau Cnty. 2000). As no live witness testimony may be offered during closing arguments, Section 52 simply does not apply to counsel's closing arguments at trial.

By contrast, the Administrative Rules specifically allow audiovisual coverage of non-testimonial proceedings. See 22 N.Y.C.R.R. §§ 29.2–3, 131.1(a)–(c). As such, New York State courts routinely allow audiovisual coverage of such proceedings, *including counsel's closing arguments in a trial*. For example, in *People v. Olivo*, the Westchester County Court allowed a

pool video camera to record “opening and closing statements” in a criminal trial.¹ *People v. Olivo*, Indictment No. 07-1664, 2006 WL 8418870, at *1 (Westchester Cnty. Ct. Sept. 12, 2008). Audiovisual coverage of “sentencing” proceedings is also allowed (unless testimony is taken). *People v. Ashdown*, 12 Misc. 3d 836, 838 (Sup. Ct. Rensselaer Cnty. 2006). Notably, audiovisual coverage has been permitted in this very courthouse, such as pool filming of “oral argument” on a habeas petition. *Nonhuman Rights Project, Inc. v. Stanley*, Index No. 152736/2015, NYSCEF Doc. No. 52 (Sup. Ct. N.Y. Cnty. May 21, 2015). Moreover, the New York Court of Appeals and every Appellate Division department regularly provide live and recorded streams of oral arguments.²

Counsel’s closing arguments in this bench trial are the very type of non-testimonial proceeding that may be filmed and telecast in this State. Evidence in this case closed last year, and no further testimony will be taken. See N.Y. C.P.L.R. 4016(a) (“At the close of all the evidence on the issues tried, an attorney for each such party may make a closing statement . . .”). Indeed, a “closing argument in a bench trial can closely approximate an appellate oral argument,”³ which is all the more reason to follow the lead of the New York appellate courts—and the *Olivo* and *Nonhuman Rights* courts—in allowing audiovisual coverage of such arguments. In sum, the closing arguments are *not* “proceedings, in which the testimony of witnesses by subpoena or other compulsory process is or may be taken.” N.Y. Civ. Rights Law § 52. There is thus no statutory ban on filming counsel’s closing arguments.⁴

Second, the Administrative Rules vest this Court with discretion to permit audiovisual coverage of the closing arguments, and the Court should exercise its discretion to permit such

¹ The *Olivo* court imposed limited conditions on audiovisual coverage of the opening and closing statements, ordering that jurors could not be filmed and the footage could not be aired until after the jury rendered a verdict. The considerations animating these restrictions do not apply to the bench trial here.

² See New York State Court of Appeals, YOUTUBE, <https://www.youtube.com/@newyorkstatecourtofappeals7445>; Appellate Division, First Department, YOUTUBE, <https://www.youtube.com/@NYSAD1>; Appellate Division, Second Department, <https://www.nycourts.gov/courts/ad2/>; Appellate Division, Third Department, <https://nycourts.gov/ad3/>; Appellate Division, Fourth Department, *Oral Arguments*, <https://ad4.nycourts.gov/go/live/>.

³ Thomas A. Mauet, *Bench Trials*, 28 A.B.A. SEC. PUB. LITIG., no. 4, Summer 2002, at 13, 19; see also Claire P. Gutekunst, *Final Arguments in Jury and Bench Trials*, in 4A COM. LITIG. IN N.Y. STATE CTS. § 52:1 (Robert L. Haig ed., 4th ed. 2023) (“In bench trials, the parties may make final oral arguments to the judge after the close of the evidence . . .”).

⁴ Even if it were unclear whether Section 52 applied to closing arguments, the Court has every reason to resolve that question in favor of allowing audiovisual coverage, particularly given that, to date, the parties have not objected to the coverage. With the parties notified in advance of the News Organizations’ request, and none raising an objection, there is no basis for any party to appeal or otherwise question the filming of the closing arguments. See *People v. Ross*, 89 A.D.3d 495, 495 (1st Dep’t 2011) (“By failing to object, or by failing to make specific objections on the same grounds raised on appeal, defendant did not preserve his challenges to the prosecutor’s summation, and we decline to review them in the interest of justice.” (citation omitted)).

coverage. Part 131 allows the “presiding trial judge” to “permit[]” audiovisual coverage of judicial proceedings upon an application by the news media. 22 N.Y.C.R.R. § 131.3(a). In determining the application, the judge “shall consider all relevant factors,” including:

- (1) the type of case involved; (2) whether the coverage would cause harm to any participant; (3) whether the coverage would interfere with the fair administration of justice, the advancement of a fair trial, or the rights of the parties; (4) whether the coverage would interfere with any law enforcement activity; (5) whether the proceedings would involve lewd or scandalous matters; (6) the objections of any of the parties, victims or other participants in the proceeding of which coverage is sought; (7) the physical structure of the courtroom and the likelihood that any equipment required to conduct coverage of proceedings can be installed and operated without disturbance to those proceedings or any other proceedings in the courthouse; and (8) the extent to which the coverage would be barred by law in the judicial proceeding of which coverage is sought.

Id. § 131.3(d).⁵

Here, all these factors point in favor of permitting audiovisual coverage of counsel’s closing arguments:

- (1) This case is a bench trial on the State’s civil claims of commercial fraud by a former President and associated persons, and is of monumental significance to the public.
- (2) Coverage will not harm any participant, and, to date, no party has raised any objection to the coverage.
- (3) Coverage will not interfere with the trial in any way, and instead will bolster public confidence in the administration of justice.
- (4) Coverage will not interfere with any law enforcement activity. If the Court deems it necessary, the News Organizations will ensure that the pool videographer has any required security clearances or other credentials.
- (5) The proceeding does not involve lewd or scandalous matters.
- (6) To date, no party or participant has objected to coverage.
- (7) The single requested videographer and their equipment will be unobtrusive and will not disturb the proceedings in any way.⁶

⁵ Part 29 sets forth similar factors for the “designee of the Chief Administrator” (here, the presiding trial judge under Part 131) to consider before permitting audiovisual coverage:

- (1) there will be no detraction from the dignity or decorum of the courtroom or courthouse;
- (2) there will be no compromise of the safety of persons having business in the courtroom or courthouse; (3) there will be no disruption of court activities; (4) there will be no undue burden upon the resources of the courts; and (5) granting of permission will be consistent with the constitutional and statutory rights of all affected persons and institutions.

22 N.Y.C.R.R. § 29.1(a). For the same reasons, these factors are also satisfied here.

⁶ See *Courtroom Television Network, LLC v. State*, 1 Misc. 3d 328, 368 (Sup. Ct. N.Y. Cnty. 2003) (“There is no dispute that [a] small, silent, remote-controlled camera utilizing only natural light, does not present the physical problems of television coverage which beset a bygone era.”), *aff’d*, 8 A.D.3d 164 (1st Dep’t


(8) Coverage of closing arguments is not barred by Section 52 or any other law, as explained above.

The important goals animating the First Amendment right of access and Part 131 of the Administrative Rules—to instill public trust in and understanding of judicial proceedings—would unquestionably be furthered by audiovisual coverage of closing arguments in this historic case involving the State’s claims that a former President (and current presidential candidate) and associated persons engaged in persistent fraud. Audiovisual coverage of the closing arguments will ensure that the public can break through the filter of spin or interested points of view, by seeing and hearing for themselves the actual arguments being advanced in court. Unfiltered access to these arguments is critical to preserve public confidence in and understanding of the New York courts, as well as to foster a well-informed body politic.⁷

For all these reasons, the News Organizations respectfully request permission for one pool videographer to film the closing arguments in this important case. If it would assist the Court in reaching its decision, counsel for the News Organizations will make themselves available for any hearing or conference on this matter at any time. We thank the Court for its consideration of this application.

Respectfully submitted,

Davis Wright Tremaine LLP

By: 
Robert D. Balin
Jeremy Chase
Raphael Holoszyc-Pimentel

cc: Counsel of Record (via NYSCEF)
Al Baker, Communications Director, Unified Court System (via email)

2004), *aff'd*, 5 N.Y.3d 222, 234 (2005) (noting “the technological improvements to audiovisual equipment, which renders its presence in courtrooms less obtrusive”). While *Courtroom Television* upheld the constitutionality of Section 52’s ban on audiovisual coverage of *witness testimony* (which the News Organizations do not necessarily concede was correct), the court did not cast any doubt on the permissibility of audiovisual coverage of non-testimonial proceedings. Further, the court expressly recognized that technological advancements have minimized or eliminated any physical disruption caused by cameras, which have only improved in the two decades since.

⁷ In recognition of these significant public interests, a Georgia court recently provided a live and recorded stream—and allowed pooled media to do the same on an ongoing basis with their own feed—of criminal proceedings against former President Trump and others. See Order Allowing Recording Device Pursuant to Rule 22 on Recording of Judicial Proceedings, *State v. Trump*, No. 23SC188947 (Ga. Super. Ct. Fulton Cnty. Sept. 13, 2023); Judge Scott McAfee, *Motions Hearing 23SC188947*, YOUTUBE (Sept. 6, 2023), <https://www.youtube.com/watch?v=4smFxkeFR0w>.