REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS

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Bruce D. Brown, Executive Director

May 5, 2020

California Court of Appeal, Second District
Ronald Reagan State Building
300 S. Spring Street
2nd Floor, North Tower
Los Angeles, CA 90013

Re: *Publication request for* Fargo v. Tejas*, No. B299393*

Dear Administrative Presiding Justice Lui and Associate Justices Ashmann-Gerst and Chavez,

Pursuant to California Rule of Court 8.1120(a), the Reporters Committee for Freedom of the Press writes to request that the Court order publication of its opinion in *Fargo v. Tejas,* No. B299393 (hereinafter, the "Opinion"). As an organization that works to defend the First Amendment rights of journalists and news organizations, the Reporters Committee has a strong interest in the development of precedent addressing the public's common law and First Amendment rights of access to court records. It is the Reporters Committee's view that publication of the Opinion will aid future judicial decision-making because it explains the procedural and substantive standards that apply to courts' consideration of requests to seal and unseal court records in defamation cases. The Opinion makes three important points, each of which satisfies the standards for publication in Rule 8.1105 and will be instructive to California superior courts.

First, the Opinion should be published because it "[a]ddresses . . . an apparent conflict in the law." (Cal. Rules of Court, rule 8.1105(c)(5).) The opinion addresses a split in decisions of the Courts of Appeal regarding the appropriate appellate standard of review for First Amendment challenges to sealing orders. Previous decisions from the Courts of Appeal were divided on whether a reviewing court should apply an abuse of discretion standard or a stronger independent review or de novo standard. (*Compare In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292 [abuse of discretion standard]; *McGuan v. Endovascular Tech., Inc.* (2010) 182 Cal.App.4th 974 [abuse of discretion standard], *with People v. Jackson* (2005) 128 Cal.App.4th 1009 [independent review standard]; *Copley Press, Inc. v. Superior Court* (1998) 63 Cal.App.4th 367 [independent review standard].) Even among those appellate courts applying the more stringent standard, the case law was split over whether it is the invocation of First Amendment rights or rather the lack of testimonial evidence in the record that triggers independent review. (*Compare Jackson*, 128 Cal.App.4th at pp. 1020-21 [holding that the First Amendment triggers independent review], *with Oiye v. Fox* (2012) 211 Cal.App.4th 1036 [holding that independent review is appropriate when the trial court does not rely on declarations in making its sealing order].) The Opinion addresses both of these conflicts, discussing the case law in detail, and holds that independent review is

the appropriate standard and is triggered by the invocation of First Amendment rights. (Opn. at 10.) This will help resolve the division in the case law, creating a clear majority among Court of Appeal decisions in favor of independent review.

Second, the Opinion should be published because it "explains . . . with reasons given, an existing rule of law." (Cal. Rules of Court, rule 8.1105(c)(3).) The Opinion holds that sealing orders and orders denying unsealing motions are valid only when a trial court makes the specific findings required by Rule 2.550(d). Thus, the "trial court's failure to make the required findings renders its sealing order deficient, and the order cannot support sealing the documents at issue." (Opn. at 10.) This holding is a straightforward application of Rule 2.550(d)'s text, which states that a court "may order that a record be filed under seal only if it expressly finds facts that establish" each of five factors. (Cal. Rules of Court, rule 2.550(d).) But this portion of the Opinion is still important because it emphasizes that lower courts must consider the common law and First Amendment rights of the public and the press in deciding whether to seal records. Because the parties in a given case are not always attuned to the public's rights of access, and the press does not have the resources to intervene to oppose sealing or move to unseal in every case, it is essential for courts on their own initiative to make the findings that Rule 2.550 requires before granting sealing.

Third, the Opinion should be published because it "[i]nvolves a legal issue of continuing public interest." (Cal. Rules of Court, rule 8.1105(c)(6).) The California Supreme Court has recognized that access to judicial records is an "important question affecting the public interest." (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1190, fn. 6.) The Reporters Committee is aware of numerous requests by plaintiffs to trial courts to seal judicial records in defamation cases. (*See, e.g.*, Complaint, *Wilshire Law Firm v. Michael D.* (Los Angeles Superior Court, Apr. 26, 2018) No. BC703967; Complaint, *Wilshire Law Firm v. Sadie G.* (Los Angeles Superior Court, Apr. 25, 2018) No. BC703782); Complaint, *Etehad Law v. Inbar Anner* (Los Angeles Superior Court, Jan. 17, 2018) No. BC625332.) Yet the appellate case law on the proper balancing of interests in such cases is relatively sparse. The Opinion holds that, in a defamation case, possible harm to a plaintiff's "reputation and business prospects is not an 'overriding interest' sufficient to overcome the First Amendment right of access." (Opn. at 11–12.) This substantive holding is important because, by definition, every defamation case involves allegations of reputational harm, so to permit sealing on that basis would have broad ramifications for the right of access. The Opinion's clear statement that reputational concerns do not override the right of access is therefore a significant addition to the development of the law and critical to safeguarding the public's right of access to judicial records.

For all the foregoing reasons, the Reporters Committee respectfully requests that the Court publish its opinion in *Fargo v. Tejas*.

Respectfully,

The Reporters Committee for Freedom of the Press

PROOF OF SERVICE

I, Katie Townsend, do hereby affirm that I am, and was at the time of service mentioned hereafter, at least 18 years of age and not a party to the above-captioned action. My business address is 1156 15th St. NW, Suite 1020, Washington, DC 20005. I am a citizen of the United States and am employed in Washington, District of Columbia.

On May 5, 2020, I served copies via TrueFiling of the foregoing document: ***Publication request for Fargo v. Tejas, No. B299393***, as follows:

[x] By email or electronic delivery:

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I declare under penalty of perjury under the laws of the State of California and the United States of America that the above is true and correct.

Executed on the May 5, 2020, at Washington, D.C.

By: _____
Katie Townsend
ktownsend@rcfp.org