

1 GIBSON, DUNN & CRUTCHER LLP  
2 THEODORE J. BOUTROUS, JR., SBN 132099  
3 MICHAEL H. DORE, SBN 227442  
4 333 South Grand Avenue,  
5 Los Angeles, CA 90071-3197  
6 Telephone: (213) 229-7000  
7 Facsimile: (213) 229-7520

**FILED**  
SUPERIOR COURT of CALIFORNIA  
COUNTY of SANTA BARBARA

JAN 10 2005

8 Attorneys for NBC Universal, Inc.; CBS  
9 Broadcasting Inc.; Fox News Network L.L.C.;  
10 ABC, Inc.; Cable News Network LP, LLLP;  
11 The Associated Press; *Los Angeles Times*; The  
12 New York Times Company; and *USA Today*

GARY M. BLAIR, Executive Officer  
*Carrie L Wagner*  
CARRIE L WAGNER, Deputy Clerk

13 SUPERIOR COURT, STATE OF CALIFORNIA  
14 FOR THE COUNTY OF SANTA BARBARA

15 THE PEOPLE OF THE STATE OF  
16 CALIFORNIA,

17 Plaintiff,

18 vs.

19 MICHAEL JOE JACKSON,

20 Defendant.

Case No.: 1133603

**ACCESS PROPONENTS' OPPOSITION TO  
DEFENDANT'S MOTION FOR AN ORDER  
THAT THE HEARING ON THE DISTRICT  
ATTORNEY'S MOTION FOR ADMISSION  
OF ALLEGED PRIOR OFFENSES (Evid.  
Code Sections 1108, 1101(b)) AND ALL  
OTHER PRETRIAL HEARINGS ON THE  
ADMISSIBILITY OF EVIDENCE BE  
HEARD IN CHAMBERS**

Date: January 12, 2005

Time: 9:30 a.m.

Place: Department SM-8,  
Judge Rodney S. Melville

[VIA FACSIMILE]

21  
22 The Access Proponents, a group of media organizations,<sup>1</sup> respectfully file this opposition to  
23 Defendant Michael Jackson's motion to close every pretrial hearing relating to the admissibility of

24  
25 <sup>1</sup> NBC Universal, Inc.; CBS Broadcasting Inc.; Fox News Network L.L.C.; ABC, Inc.; Cable News  
26 Network LP, LLLP; The Associated Press; *Los Angeles Times*; The New York Times Company;  
27 and *USA Today*.

28  
**ACCESS PROPONENTS' OPPOSITION TO DEFENDANT'S MOTION FOR AN ORDER THAT THE HEARING ON THE  
DISTRICT ATTORNEY'S MOTION FOR ADMISSION OF ALLEGED PRIOR OFFENSES (Evid. Code Sections 1108,  
1101(b)) AND ALL OTHER PRETRIAL HEARINGS ON THE ADMISSIBILITY OF EVIDENCE  
BE HEARD IN CHAMBERS**

1 evidence during Mr. Jackson's upcoming trial, including the section 1108 hearing scheduled for  
2 January 12.<sup>2</sup> Mr. Jackson's request for blanket secrecy in these hearings flatly contradicts the  
3 California Supreme Court's decision in *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal.  
4 4th 1178 (1999), which rejected precisely the approach advocated by Mr. Jackson and established  
5 strict standards under the First Amendment and California law for closure of all or any part of a  
6 judicial hearing. Mr. Jackson inexplicably does not even try to satisfy these standards and he could  
7 not possibly do so in any event. Indeed, his sole basis for seeking blanket secrecy is his  
8 unsubstantiated assertion that openness will prejudice the jury pool, but this ignores the repeated  
9 statements of the United States Supreme Court and the Supreme Court of California that voir dire is  
10 an adequate method to screen out potential prejudice and empanel a non-biased jury.

11 "[W]hat transpires in the court room is public property." *NBC Subsidiary*, 20 Cal. 4th at  
12 1197 (quoting *Craig v. Harney*, 331 U.S. 367, 374 (1947)). Mr. Jackson's celebrity status does not  
13 change that fact. See *ABC, Inc. v. Stewart*, 360 F.3d 90 (2d Cir. 2004) (reversing trial court order  
14 closing voir dire proceedings in part because "[t]he mere fact that the suit has been the subject of  
15 intense media coverage is not . . . sufficient to justify closure" and "[t]o hold otherwise would render  
16 the First Amendment right of access meaningless; the very demand for openness would paradoxically  
17 defeat its availability"). The Court should deny Mr. Jackson's request to cast a blanket of secrecy  
18 over these important upcoming hearings.

19  
20  
21  
22  
23  
24  
25  
26  
27  
28  

---

<sup>2</sup> The District Attorney today also filed an opposition to Mr. Jackson's motion.

**ACCESS PROPONENTS' OPPOSITION TO DEFENDANT'S MOTION FOR AN ORDER THAT THE HEARING ON THE  
DISTRICT ATTORNEY'S MOTION FOR ADMISSION OF ALLEGED PRIOR OFFENSES (Evid. Code Sections 1108,  
1101(b)) AND ALL OTHER PRETRIAL HEARINGS ON THE ADMISSIBILITY OF EVIDENCE  
BE HEARD IN CHAMBERS**

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 ARGUMENT

3 I.

4 A. The Supreme Court of California in *NBC Subsidiary* Rejected the Approach To  
5 Secrecy Advocated By Mr. Jackson

6 The First Amendment and California law establish a strong presumption that everything that  
7 happens in the courtroom will be open to public view and scrutiny. See *NBC Subsidiary*, 20 Cal. 4th  
8 at 1200 (1999) (noting that a “presumption of openness inheres in the very nature of a criminal trial  
9 under our system of justice.”) (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573  
10 (1980) (plurality)); see also Cal. Code Civ. Proc. 124 (noting that with limited exceptions, “the  
11 sittings of every court shall be public”). The *NBC Subsidiary* Court explained the rationale for this  
12 presumption of openness:  
13

14 If public court business is conducted in private, it becomes impossible to expose  
15 corruption, incompetence, inefficiency, prejudice, and favoritism. For this reason  
16 traditional Anglo-American jurisprudence distrusts secrecy in judicial proceedings and  
17 favors a policy of maximum public access to proceedings and records of judicial  
18 tribunals.

19 20 Cal. 4th at 1211 n.28 (quoting *Estate of Hearst*, 67 Cal. App. 3d 777, 784 (1977)). Moreover,  
20 public access to judicial proceedings serves to

21 (i) demonstrate that justice is meted out fairly, thereby promoting public confidence in  
22 such governmental proceedings; (ii) provide a means by which citizens scrutinize and  
23 check the use and possible abuse of judicial power; and (iii) enhance the truthfinding  
24 function of the proceeding.

25 *Id.* at 1219.

26 Mr. Jackson disregards all of this and instead broadly asserts that total secrecy is justified  
27 because public access to pre-trial proceedings related to the admissibility of evidence *ipso facto* will  
28 prejudice the entire jury pool. He essentially asks the Court to restrict public access to each and  
every pre-trial admissibility hearing *because* the public is more likely to take advantage of its

ACCESS PROPONENTS' OPPOSITION TO DEFENDANT'S MOTION FOR AN ORDER THAT THE HEARING ON THE  
DISTRICT ATTORNEY'S MOTION FOR ADMISSION OF ALLEGED PRIOR OFFENSES. (Evid. Code Sections 1108,  
1101(b)) AND ALL OTHER PRETRIAL HEARINGS ON THE ADMISSIBILITY OF EVIDENCE  
BE HEARD IN CHAMBERS

1 constitutional right to know what goes on in its courts. This approach would turn the

2 First Amendment upside down.

3 In fact, Mr. Jackson's proposal is remarkably similar to the approach that the California  
4 Supreme Court struck down in *NBC Subsidiary*. *NBC Subsidiary* also involved "prominent figures  
5 in the entertainment industry," and the high-profile case similarly attracted intense media coverage.  
6  
7 20 Cal. 4th at 1181. Like this Court, the trial court in *NBC Subsidiary* was understandably concerned  
8 about protecting the parties' fair trial rights and ensuring that "the litigants appear before a fair and  
9 impartial jury untainted by information obtained that was not presented to the jury." *Id.* at 1183.<sup>3</sup>  
10 To address this concern, the trial court "issued orders excluding the public and the press from all  
11 courtroom proceedings held outside the presence of the jury, and sealing the transcripts of those  
12 proceedings." *Id.* at 1181. The court justified this approach on the ground that "it's a higher profile  
13 case, . . . [and] the information, unlike other cases, all the information is being disseminated in the  
14 news media." *Id.* at 1184-85 (quoting trial court); *see also id.* at 1182 (trial court justified closure  
15 because "I do not want to have a situation I have seen in other cases where the press reports  
16 something that was out of the presence of the jury and then, somehow, someone reads it").  
17

18 The California Supreme Court *rejected* the trial court's approach, holding that: "Neither the  
19 high court cases, nor their progeny . . . suggest that closure is appropriate merely because standard  
20 alternatives short of closure (such as cautionary admonitions and instructions) cannot be guaranteed  
21 to preclude jurors from learning of inadmissible material." *Id.* Thus, the Court deemed insufficient  
22 to justify closure "the trial court's generalized conjecture that the jurors might violate their oaths and  
23 allow themselves to be exposed to press coverage, and that their deliberations might be tainted  
24  
25

26 <sup>3</sup> *NBC Subsidiary* involved a jury that was already empanelled but not sequestered.  
27  
28

**ACCESS PROponents' OPPOSITION TO DEFENDANT'S MOTION FOR AN ORDER THAT THE HEARING ON THE  
DISTRICT ATTORNEY'S MOTION FOR ADMISSION OF ALLEGED PRIOR OFFENSES (Evid. Code Sections 1108,  
1101(b)) AND ALL OTHER PRETRIAL HEARINGS ON THE ADMISSIBILITY OF EVIDENCE  
BE HEARD IN CHAMBERS**

1 irreparably by that exposure.” *Id.* at 1225. And despite the intense publicity, the Court found that  
2 there was no basis for concluding that alternatives to closure, such as “frequent and specific  
3 admonitions and instructions, coupled with careful voir dire of the jurors and/or other measures,  
4 would not have constituted an adequate and less restrictive alternative to closure of all the  
5 proceedings that were held outside the presence of the jury.” *Id.* at 1225; *see also* *Mu’Min v.*  
6 *Virginia*, 500 U.S. 415, 430 (1991) (“Under the constitutional standard . . . the relevant question is  
7 not whether the community remembered the case, but whether the jurors . . . had such fixed opinions  
8 that they could not judge impartially the guilt of the defendant.”) (internal quotations omitted).

9  
10 In short, “as the high court made clear in *Press-Enterprise II* . . . , ‘The First Amendment right  
11 of access cannot be overcome by the conclusory assertion that publicity *might* deprive the defendant  
12 of [a fair trial].’ (Italics added.)” *NBC Subsidiary*, 20 Cal. 4th at 1225.<sup>4</sup> Mr. Jackson’s

13  
14  
15  
16 <sup>4</sup> *See Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 563-64 (1976) (invalidating prior restraint  
17 prohibiting the press from publishing accounts of a “widely reported murder of six persons” in a  
18 small rural town because, *inter alia*, the lower courts had given insufficient consideration to  
19 alternatives such as postponement of the trial, “searching questioning of prospective jurors . . . to  
20 screen out those with fixed opinions as to guilt or innocence; . . . [and] the use of emphatic and  
21 clear instructions on the sworn duty of each juror to decide the issues only on evidence presented  
22 in open court.”); *Murphy v. Florida*, 421 U.S. 794, 795, 800 (1975) (holding that, despite  
23 “extensive press coverage,” and the fact the defendant’s “flamboyant lifestyle made him a  
24 continuing subject of press interest,” voir dire indicated “no such hostility to petitioner by the  
25 jurors who served in his trial as to suggest a partiality that could not be laid aside”); *see also*  
26 *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1054-55 (1991) (opinion of Kennedy, J., joined by  
27 Marshall, Blackmun, and Stevens, JJ.) (“Empirical research suggests that in the few instances  
28 when jurors have been exposed to extensive and prejudicial publicity, they are able to disregard it  
and base their verdict upon the evidence presented in court . . . . *Voir dire* can play an important  
role in reminding jurors to set aside out-of-court information and to decide the case upon the  
evidence presented at trial.”); *Columbia Broad. Sys., Inc. v. United States Dist. Court*, 729 F.2d  
1174, 1179 (9th Cir. 1984) (“Recent highly publicized cases indicate that even when exposed to  
heavy and widespread publicity many, if not most, potential jurors are untainted by press  
coverage.”).

1 unsubstantiated claims ignore the Court's ability to employ voir dire in a manner that protects both  
2 his right to a fair trial and the public's right of access to judicial proceedings and records.<sup>5</sup>

3 **B. The NBC Subsidiary Standards Prohibit Blanket Closure Of These Hearings**  
4 **And Require That Maximum Public Access Be Afforded**

5 The *NBC Subsidiary* Court held that the "'presumption of openness may be overcome only by  
6 an overriding interest based on findings that closure is essential to preserve higher values and is  
7 narrowly tailored to serve that interest.'" 20 Cal. 4th at 1204 (quoting *Press-Enterprise I*, 464 U.S. at  
8 510; see also *Globe Newspaper*, 457 U.S. at 606-07 ("Where . . . the state attempts to deny the right  
9 of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is  
10 necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.")  
11 (emphasis omitted).

12 *NBC Subsidiary* detailed the required findings necessary to overcome the presumption of  
13 openness, and held that a court, before closing a hearing, must "expressly find" that

14 (i) there exists an overriding interest supporting closure and/or sealing; (ii) there is a  
15 substantial probability that the interest will be prejudiced absent closure and/or  
16 sealing; (iii) the proposed closure and/or sealing is narrowly tailored to serve the  
overriding interest; and (iv) there is no less restrictive means of achieving the  
overriding interest."

17 *Id.* at 1217-18 (emphasis in original) (footnotes omitted).

18 These findings apply only to the specific hearing at issue, and additional findings are required  
19 before a court may close hearings to be held in the future. See *NBC Subsidiary*, 20 Cal. 4th at 1217-  
20 18 (holding that a trial court must first provide "notice to the public of the contemplated closure," and  
21 that "before substantive courtroom proceedings are closed or transcripts are ordered sealed, a trial  
22 court must hold a hearing"). Mr. Jackson's attempt to secure a blanket pass from public scrutiny of  
23 every future admissibility hearing thus has no merit because it ignores the strict and particularized  
24

25 <sup>5</sup> The Access Proponents likewise oppose the parties' requests to seal documents related to the  
26 District Attorney's motion for admission of alleged prior offenses, and any other motions to seal  
27 documents filed since the Access Proponents filed their last opposition on December 15, 2004.

1 requirements of the First Amendment. *See id.*; cf. *Associated Press v. District Court*, 705 F.2d 1143,  
2 1147 (9th Cir. 1983) (“[O]rders that seal each and every document filed impermissibly reverse the  
3 ‘presumption of openness’ that characterizes criminal proceedings ‘under our system of justice.’”) (quoting  
4 *Richmond Newspapers, Inc.*, 448 U.S. at 573). Presumptive secrecy for hearings not yet  
5 scheduled on motions not yet briefed is patently overbroad, as even Mr. Jackson concedes when he  
6 admits that “partially closed hearings” would be sufficient. *See Mot.* at 4.

7 Closing the entire section 1108 hearing scheduled for January 12 would also fail to meet the  
8 First Amendment’s requirement of narrow tailoring. The Court has released public versions of the  
9 briefs, so it is clear that some of the issues, including the legal arguments, to be addressed at the  
10 hearing are not substantially likely to prejudice Mr. Jackson’s right to a fair trial. Indeed, aside from  
11 his unfounded assertion that press coverage will create unfair prejudice, Mr. Jackson offers no  
12 explanation why his motion satisfies any of the factors articulated in *NBC Subsidiary* and why the  
13 presumption of openness does not apply to some, if not all, of the Court’s upcoming hearing  
14 regarding the admissibility of evidence. These are key proceedings for the public to understand what  
15 is going on in the official proceedings of this case, and while “[p]eople in an open society do not  
16 demand infallibility from their institutions, . . . it is difficult for them to accept what they are  
17 prohibited from observing.” *Press-Enterprise II*, 478 U.S. at 13 (quoting *Richmond Newspapers*,  
18 448 U.S. at 572 (plurality)). The Court, therefore, should deny Mr. Jackson’s attempt to impose  
19 blanket secrecy on the January 12, 2005 hearing, and all future hearings regarding admissibility of  
20 evidence.

21  
22  
23  
24  
25  
26  
27  
28  

---

ACCESS PROPONENTS' OPPOSITION TO DEFENDANT'S MOTION FOR AN ORDER THAT THE HEARING ON THE  
DISTRICT ATTORNEY'S MOTION FOR ADMISSION OF ALLEGED PRIOR OFFENSES (Evid. Code Sections 1108,  
1101(b)) AND ALL OTHER PRETRIAL HEARINGS ON THE ADMISSIBILITY OF EVIDENCE  
BE HEARD IN CHAMBERS

1 DATED: January 10, 2005

Respectfully submitted,

2 GIBSON, DUNN & CRUTCHER LLP  
3 Theodore J. Boutros, Jr.  
4 Michael H. Dore

5 By:   
6 Theodore J. Boutros, Jr.

7 Attorneys for NBC Universal, Inc.;  
8 CBS Broadcasting Inc.; Fox News Network L.L.C.;  
9 ABC, Inc.; Cable News Network LP, LLLP;  
10 The Associated Press; *Los Angeles Times*; The New  
11 York Times Company; and *USA Today*

12  
13  
14 mjfacts.com

15  
16  
17 mjfacts.com

18  
19  
20 mjfacts.com

21  
22  
23 mjfacts.com

24  
25  
26 mjfacts.com

27  
28  
29 mjfacts.com

30  
31  
32 mjfacts.com

33  
34  
35 mjfacts.com

**ACCESS PROPONENTS' OPPOSITION TO DEFENDANT'S MOTION FOR AN ORDER THAT THE HEARING ON THE  
DISTRICT ATTORNEY'S MOTION FOR ADMISSION OF ALLEGED PRIOR OFFENSES (Evid. Code Sections 1108,  
1101(b)) AND ALL OTHER PRETRIAL HEARINGS ON THE ADMISSIBILITY OF EVIDENCE  
BE HEARD IN CHAMBERS**

36  
37  
38 mjfacts.com

39  
40  
41 mjfacts.com



**CERTIFICATE OF SERVICE  
BY FAX AND REGULAR MAIL**

I, **Jess Fernandez**, hereby certify as follows:

I am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and am not a party to this action; my business address is Gibson, Dunn & Crutcher LLP, 333 South Grand Avenue, Los Angeles, California 90071, in said County and State; I am employed in the office of Michael H. Dore, a member of the bar of this Court, and at his direction, on January 10, 2005, I served the following:

**ACCESS PROPONENTS' OPPOSITION TO DEFENDANT'S MOTION FOR AN ORDER THAT THE HEARING ON THE DISTRICT ATTORNEY'S MOTION FOR ADMISSION OF ALLEGED PRIOR OFFENSES (Evid. Code Sections 1108, 1101(b)) AND ALL OTHER PRETRIAL HEARINGS ON THE ADMISSIBILITY OF EVIDENCE BE HEARD IN CHAMBERS**

on the interested parties in this action, by the following means of service:

**BY MAIL:** I placed a true copy in a sealed envelope addressed as indicated below, on the above-mentioned date. I am familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Thomas W. Sneddon District Attorney Santa Barbara County 1105 Santa Barbara Street Santa Barbara, CA 93101-2007 Attorneys for Plaintiffs	Tel.: (805) 568-2300 Fax: (805) 568-2398
Thomas A. Mesereau, Jr. Collins, Mesereau, Reddock & Yu LLP 1875 Century Park East, 7th Floor Los Angeles, CA 90067 Attorneys for Defendant Michael Jackson	Tel.: (310) 284-3120 Fax:
Robert Sanger Sanger & Swysen, Lawyers 233 E. Carrillo Street, Suite C Santa Barbara, CA 93001 Co-Counsel for Defendant Michael Jackson	Tel.: (805) 962-4887 Fax: (805) 963-7311

**ACCESS PROPONENTS' OPPOSITION TO DEFENDANT'S MOTION FOR AN ORDER THAT THE HEARING ON THE DISTRICT ATTORNEY'S MOTION FOR ADMISSION OF ALLEGED PRIOR OFFENSES (Evid. Code Sections 1108, 1101(b)) AND ALL OTHER PRETRIAL HEARINGS ON THE ADMISSIBILITY OF EVIDENCE BE HEARD IN CHAMBERS**

1  **BY FACSIMILE:** From facsimile number (213) 229-7520, I caused each such document to  
2 be transmitted by facsimile machine, to the parties and numbers indicated below. No error  
3 was reported by the machine.

4 Thomas W. Sneddon 5 District Attorney 6 Santa Barbara County 7 1105 Santa Barbara Street 8 Santa Barbara, CA 93101-2007 9 Attorneys for Plaintiffs	Tel.: (805) 568-2300 Fax: (805) 568-2398
10 Thomas A. Mesereau, Jr. 11 Collins, Mesereau, Reddock & Yu LLP 12 1875 Century Park East, 7th Floor 13 Los Angeles, CA 90067 14 Attorneys for Defendant Michael Jackson	Tel.: (310) 284-3120 Fax:
15 Robert Sanger 16 Sanger & Swysen, Lawyers 17 233 E. Carrillo Street, Suite C 18 Santa Barbara, CA 93001 19 Co-Counsel for Defendant Michael Jackson	Tel.: (805) 962-4887 Fax: (805) 963-7311

20  I am employed in the office of Michael H. Dore, a member of the bar of this court, and that the  
21 foregoing document(s) was(were) printed on recycled paper.

22  (STATE) I declare under penalty of perjury under the laws of the State of California that  
23 the foregoing is true and correct.

24  (FEDERAL) I declare under penalty of perjury that the foregoing is true and correct.

25 I certify under penalty of perjury that the foregoing is true and correct, that the foregoing  
26 document(s), and all copies made from same, were printed on recycled paper, and that this Certificate  
27 of Service was executed by me on January 10, 2005, at Los Angeles, California.

28   
Jess Fernandez

10838221\_1.DOC

**ACCESS PROponents' OPPOSITION TO DEFENDANT'S MOTION FOR AN ORDER THAT THE HEARING ON THE  
DISTRICT ATTORNEY'S MOTION FOR ADMISSION OF ALLEGED PRIOR OFFENSES (Evid. Code Sections 1108,  
1101(b)) AND ALL OTHER PRETRIAL HEARINGS ON THE ADMISSIBILITY OF EVIDENCE  
BE HEARD IN CHAMBERS**