IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern Division)

BRANDON SODERBERG, *et al*.,	*	
Plaintiffs,	*	
v.	*	No: 1:19-cv-01559-RDB
HON. W. MICHEL PIERSON, *et al*.,	*	
Defendants.	*	

* * * * * * * * * * * * *

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

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INTRODUCTION

On May 19, 1981, Governor Harry Hughes signed into law House Bill 231. 1981 Md. Laws ch. 748. To guard against threats to the right of criminal defendants to a fair trial, the statute provides that, except in limited circumstances, "a person may not record or broadcast any criminal matter, including a trial, hearing, motion, or argument, that is held in a trial court or before a grand jury." Md. Code Ann., Crim. Proc. § 1-201(a) (LexisNexis 2018). "A person who violates this section may be held in contempt of court." *Id.* § 1-201(c).

For 38 years, Criminal Procedure § 1-201 has thus limited the way the public and the press publicly convey information about criminal trials. In this facial, pre-enforcement challenge to § 1-201, six plaintiffs contend that the statute is void for vagueness and the prohibition on broadcasting violates the First Amendment. Compl. ¶¶ 45, 51. But the plaintiffs cannot identify anyone who has been held in contempt under § 1-201.

Several procedural and jurisdictional defects require dismissal. Plaintiffs lack standing to bring a facial challenge because they have not alleged and cannot show any concrete and particularized harm or credible fear of enforcement. *Doe v. Duling*, 782 F.2d 1202, 1206 (4th Cir. 1986); Fed. R. Civ. P. 12(b)(1). Plaintiffs' claims against the defendant court reporters must fail, because court reporters do not enforce § 1-201. Md. Rule 15-206; Fed. R. Civ. P. 12(b)(6). And the plaintiffs' failure to sue the criminal defendants whose trials plaintiffs seek to broadcast would unfairly force this Court to adjudicate the rights of absent-but-indispensable parties. Fed. R. Civ. P. 12(b)(7), 19(b).

Plaintiffs' First Amendment arguments fail to state a claim, because the prohibition on broadcasting does not burden conduct protected by the First Amendment. The First Amendment does not guarantee a right to broadcast a criminal trial. In enacting § 1-201, Maryland reasonably concluded that the rights of criminal defendants to a fair trial outweigh the desire of reporters to broadcast recordings of criminal trials. In the face of these fairness concerns, arguments favoring broadcasting "are credible policy arguments in favor of television, [but] they are not arguments of constitutional proportions." *Estes v. Texas*, 381 U.S. 532, 589 (1965) (Harlan, J., concurring).

Because plaintiffs do not enjoy a First Amendment right to broadcast criminal proceedings, their pre-enforcement vagueness claim succeeds only if § 1-201 is vague in all its applications. It is not. Plaintiffs' own allegations acknowledge the core conduct regulated by the statute.

FACTS AND PROCEDURAL BACKGROUND

The Legislative History

On November 10, 1980, the Court of Appeals of Maryland issued a "Rules Order" suspending for 18 months certain judicial ethics rules to allow an "experiment of extended media coverage." Ex. 1. Over Judge Smith's dissent,[1] the Court enacted Rule 1209, which governed "extended coverage" of trial proceedings. Md. Rule 1209 (1983 Supp.) (Ex. 2).

[1] "[B]y virtue of seeing on television excerpts from various trials [the public] will believe that all trials are televised . . . . I fear that as a result of this false impression citizens will be reluctant to testify in court. . . . [A] genuinely reluctant witness often makes a poor witness, as those truly experienced in the trial of cases know. [And] when people desire to avoid testifying they often become very "forgetful" of what they have seen and heard. . . . I see this as having potentially adverse effects on the administration of justice." Ex. 4.

The Rule required that "[e]xtended coverage shall be conducted so as not to interfere with the right of any person to a fair and impartial trial, and so as not to interfere with the dignity and decorum which must attend the proceedings." *Id*., Rule 1209(b)(5). The Rule also required "written consent" of "all parties to the proceeding." *Id*., Rule 1209(d).

Early the next year, the Supreme Court issued its decision in *Chandler v. Florida*, 449 U.S. 560 (1981). The Court saw a "danger" in extended coverage: "Inherent in electronic coverage of a trial is a risk that the very awareness by the accused of the coverage and the contemplated broadcast may adversely affect the conduct of the participants and the fairness of the trial, yet leave no evidence of how the conduct or the trial's fairness was affected." *Chandler*, 449 U.S. at 577. Concluding that this inherent danger did not justify an "absolute constitutional ban on broadcast coverage," the Court permitted the states to "experiment" in reaching an appropriate balance of interests. *Id*. at 813.

But Maryland's legislature decided not to experiment with the fairness of its criminal trials.[2] Invoking its constitutional authority to "rescind, change, or modify a rule of the Court of Appeals," 66 Op. Md. Att'y Gen. 80, 82 (1981) (internal marks omitted), the General Assembly passed what is now § 1-201.[3] The precise text of § 1-201 was

[2] The legislative bill file for 1981's House Bill 231, which would enact § 1-201's predecessor statute, shows that the Legislature was aware of the *Chandler* decision.

[3] The statute was originally codified as Article 27, § 467B of the Maryland Code. 1981 Md. Laws ch. 748, at 2782. It was moved to § 1-201 of the Criminal Procedure article as part of Maryland's general recodification effort. 2001 Md. Laws ch. 10, at 85.

modified without substantive change when it was re-codified in 2001. 2001 Md. Laws ch. 10, at 85–86. It has not been amended since.[4]

Civil and Criminal Contempt

Maryland's courts exercise their inherent contempt power, *Ex parte Maulsby*, 13 Md. 625, 634 (1859), in accordance with procedural requirements in statute and rule. *See* Md. Code Ann., Cts. & Jud. Proc. § 1-202 (LexisNexis 2013); Md. Rules, title 15, ch. 200. Contempt may be either direct or constructive, and civil or criminal. A direct contempt occurs "in the presence of a judge or so near to the judge as to interrupt the court's proceedings," and constructive contempt is any other contempt. Md. Rule 15-202.

Because civil contempt "is intended to preserve and enforce the rights of private parties to a suit and to compel obedience to orders and decrees," civil contempt proceedings "coerce future compliance." *State v. Roll*, 267 Md. 714, 727 (1973). "[A] penalty in a civil contempt must provide for purging"—the contemnor can comply with the court's order to remove the coercive sanction. *Id*. By contrast, "the penalty imposed in a criminal contempt is punishment for past misconduct" and therefore the penalty "may be purely punitive." *Id*.

Consistent with this difference in purpose, civil and criminal contempt have different procedures. To hold someone in constructive criminal contempt, the court or a

[4] During the 2019 legislative session, two bills were introduced to limit § 1-201's effect. One had no action taken except its introduction, 2019 Md. H.B. 853, and the other was reported unfavorably by the House Judiciary Committee after a hearing, 2019 Md. H.B. 756. *See* Judiciary Committee, *Voting Record, 2019 Session*, HB756 (Mar. 12, 2019), available at http://mgaleg.maryland.gov/2019RS/votes_comm/hb0756_jud.pdf.

prosecutor must open a new criminal case, subject to rules of criminal procedure. Md. Rule 15-205. Petitions for civil contempt, by contrast, are brought in the case in which the contempt arises. Md. Rule 15-206.

Alleged Facts

Plaintiffs allege that each of them "has lawfully obtained copies of certain court recordings . . . from proceedings that occurred in open court." Compl. ¶ 20. Plaintiffs Soderberg and Woods "intend to use [audio and video] recordings in their documentary film" and in "other reporting projects." Compl. ¶ 21. Plaintiffs Open Justice Baltimore and Baltimore Action Legal Team have "audio recordings" and "plan to post the recordings online, play them at community events . . ., share them on social media, and potentially include them in podcasts." *Id.* ¶ 22. Plaintiffs Qiana Johnson and Life After Release have "audio recordings" obtained from the court reporter for cases in which "Ms. Johnson was invited to address the court on behalf of criminal defendants," and they seek to "post the recordings on their websites and play them at meetings." *Id.* ¶ 23. All plaintiffs allege that they have refrained from using their respective recordings as described for fear that they would be held in contempt under § 1-201. *Id.* ¶¶ 20, 24, 25.

Plaintiffs allege that their fear is "well founded" because the Circuit Court for Baltimore City has (1) "publicly considered holding [a podcast producer] in contempt" in 2016; (2) "sent a letter to a cable television network admonishing the network for including video footage of [criminal] proceedings in a documentary"; and (3) "sent [a] letter to a . . . journalist warning her that it would be unlawful for her to include courtroom audio on her

podcast." *Id*. ¶ 26. *See* Exs. 3, 4. Plaintiffs do not allege that § 1-201 has ever been enforced or contempt proceedings brought under the statute.

Plaintiffs then sought advisory opinions about § 1-201 from Administrative Judges Pierson and Tillerson Adams but were unsuccessful.[5] *Id*. ¶¶ 27–31. Four plaintiffs sent a letter seeking an advisory opinion from Judge Pierson concerning the application of § 1-201 to their intended conduct, the interaction between § 1-201 and the First Amendment, the state interests justifying § 1-201. *Id*. ¶¶ 28, 29. The other two plaintiffs sent a similar letter to Judge Tillerson Adams. *Id*. ¶¶ 30, 31.

LEGAL STANDARD

Resolving a motion under Rule 12(b)(1) depends on the nature of the challenge. *Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009). If the motion is a "facial" challenge, "the facts alleged in the complaint are taken as true, and the motion must be denied if the complaint alleges sufficient facts to invoke subject matter jurisdiction." *Id*. If instead, the motion challenges the truth of jurisdictional facts in the complaint, the court can determine the facts (including through an evidentiary hearing), resolve the factual dispute, and resolve jurisdiction. *Id*.

Under Rule 12(b)(6), the court accepts all well-pleaded allegations in the complaint as true and construes the facts and reasonable inferences derived therefrom in the light most favorable to the plaintiff. *Venkatraman v. REI Sys., Inc.*, 417 F.3d 418, 420 (4th Cir. 2005). To survive, "a complaint must contain sufficient factual matter, accepted as true, to 'state

[5] "[A]dvisory opinions" are "a long forbidden practice in [Maryland]." *State Center, LLC v. Lexington Charles Ltd. P'ship*, 438 Md. 451, 591 (2014).

a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "[I]n determining whether to dismiss the complaint," the court may consider documents attached to the motion to dismiss that are "integral to and explicitly relied on in the complaint," *American Chiropractic v. Trigon Healthcare*, 367 F.3d 212, 234 (4th Cir. 2004) and "[w]hen the bare allegations of the complaint conflict with" those "exhibits or other documents," "the exhibits or documents prevail." *Fare Deals Ltd. v. World Choice Travel.com, Inc.*, 180 F. Supp. 2d 678, 683 (D. Md. 2001).

A Rule 12(b)(7) motion for failure to join an indispensable party requires a two-step inquiry. First, the court must ask "whether a party is necessary to a proceeding because of its relationship to the matter under consideration pursuant to Rule 19(a)." *Owens-Ill., Inc. v. Meade*, 186 F.3d 435, 440 (4th Cir. 1999). "If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b). "[T]he burden is on the moving party to 'show that the [entity] who was not joined is needed for a just adjudication.'" *Riesett v. Baltimore*, CIV.A. GLR-13-1860, 2013 WL 5276553, at *2 (D. Md. Sept. 18, 2013) (quoting *Am. Gen. Life & Accident Ins. Co. v. Wood*, 429 F.3d 83, 92 (4th Cir. 2005)) (second internal mark in original).

ARGUMENT

The complaint should be dismissed for lack of standing under Rule 12(b)(1), for failure to state a claim under Rule 12(b)(6), and for failure to join an indispensable party under Rule 12(b)(7).

I. PLAINTIFFS LACK STANDING TO CHALLENGE A LAW THAT HAS NEVER BEEN ENFORCED.

Plaintiffs have not been injured by the presence of § 1-201 in the Criminal Procedure Article. No plaintiff has been the subject of a contempt proceeding under § 1-201. Indeed, there has never been a § 1-201 contempt proceeding against *anyone*. Plaintiffs' only asserted injury is that their free-speech rights have been "chilled" by this never-enforced statute. Because this alleged "severe chilling effect," Compl. ¶ 24, is insufficient to establish standing to challenge the statute, this Court lacks jurisdiction.

A. In a Pre-Enforcement Challenge Invoking the First Amendment, Plaintiffs Must Show a Credible Threat of Prosecution, Not Just Subjectively Chilled Speech.

"To establish Article III standing, a plaintiff must show (1) an 'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'likel[ihood]' that the injury 'will be redressed by a favorable decision.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157-58 (2014) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). "The party invoking federal jurisdiction bears the burden of establishing standing." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 411-12 (2013) (internal quotation omitted).

Under this test, a plaintiff may seek "pre-enforcement review" of a statute, but only "under circumstances that render the threatened enforcement sufficiently imminent." *Susan B. Anthony List*, 573 U.S. at 159. The pre-enforcement plaintiff must prove "an intention to engage in a course of conduct arguably affected with a constitutional interest"

that is "proscribed by a statute" and "a credible threat of prosecution" under the statute. *Id.* (citation omitted).

"Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm; 'the federal courts established pursuant to Article III of the Constitution do not render advisory opinions.'" *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972) (quoting *United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 89 (1947)). The threat of prosecution must be a specific threat: "clear precedent requir[es] that the allegations of future injury be particular and concrete." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 109 (1998). To separate "particular and concrete" threats from "imaginary or speculative ones," courts often focus on government action. *See Benham v. Charlotte, N.C.*, 635 F.3d 129, 135 (4th Cir. 2011) ("Government action will be sufficiently chilling when . . .").

Plaintiffs satisfy none of these tests. Plaintiffs do not allege they have been threatened with prosecution, but only that *other people* have been notified that their conduct is regulated by § 1-201. Compl. ¶ 26. Plaintiffs cannot sue because *someone else* has standing. The complaint does not allege that any of the plaintiffs have been threatened with prosecution, so no plaintiff faces a "particular and concrete" threat. Instead, plaintiffs speculate about future enforcement and "speculative" allegations of threatened enforcement do not convey standing.

B. Absent a Credible Threat of Prosecution, Standing Requires a "Non-Moribund" Criminal Statute.

If a plaintiff cannot show that a government threatened prosecution, the only remaining path to standing is through a narrow exception for lively "non-moribund" criminal statutes: "When a plaintiff faces a credible threat of prosecution under a criminal statute he has standing to mount a pre-enforcement challenge to that statute. A non-moribund statute that 'facially restrict[s] expressive activity by the class to which the plaintiff belongs' presents . . . a credible threat, and a case or controversy thus exists in the absence of compelling evidence to the contrary." *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999) (citations omitted). A statute is "moribund" if it "has rested in dormancy without any historical prosecutions." *Hoffman v. Hunt*, 845 F. Supp. 340, 346 (W.D.N.C. 1994). This path to standing is foreclosed when there is a "total absence of prosecutions," because a plaintiff challenging such a statute would have "no fears of prosecution except those that are imaginary or speculative." *Duling*, 782 F.2d at 1206.

This exception cannot support the plaintiffs' claim to standing because § 1-201 is not a criminal statute, it is moribund, and there is a complete absence of prosecutions. The challenged statute is in the Criminal Procedure article, not the Criminal Law article. By its own terms, it is enforceable only by contempt. The nature of a contempt action is determined after "a contempt has occurred." *Fisher v. McCrary Crescent City, LLC*, 186 Md. App. 86, 114 (2009). Civil contempt "preserve[s] and enforce[s] the rights of private parties" and "compel[s] obedience to orders entered primarily for their benefit." *Bryant v. Howard Cty. Dep't of Soc. Servs. ex rel. Costley*, 387 Md. 30, 46 (2005). For this reason,

civil contempt proceedings are "remedial and coercive in nature" and "are intended not to punish for past misconduct inflicted against the court but to force present or future compliance with the court's orders." *Id*. Here, a contempt proceeding designed to bring a contemnor into compliance with the statute—to stop the broadcasting of criminal proceedings— could be brought as a constructive civil contempt.

Even if criminal contempt proceedings could be brought to enforce a violation of § 1-201, the plaintiffs' claim would fail because the statute is moribund. Courts have found unenforced statutes non-moribund only when they are "so new that [they] ha[ve] yet to be fully enforced." *Hoffman*, 845 F. Supp. at 347; *see Rothamel v. Fluvanna Cty., Va.*, 810 F. Supp. 2d 771, 780 (W.D. Va. 2011) ("The County ordinance, having been recently adopted, was not moribund"); *see also Duling*, 782 F.2d at 1206 ("the Does face only the most theoretical threat of prosecution"). The supposition that, after 38 years, these plaintiffs will be the first-ever alleged contemnors in a § 1-201 contempt proceeding is mere speculation and cannot justify standing.

In essence, the plaintiffs seek an advisory opinion from this Court about the relationship between a never-enforced state procedural statute and the Constitution—the same advisory opinion they sought from the administrative judges. But the Constitution prohibits this Court from issuing an advisory opinion. Because the plaintiffs lack standing, this Court lacks jurisdiction, and the complaint should be dismissed.

C. This Court Should Decline to Find Standing Under the "Prudential Standing" Doctrine.

Even if plaintiffs establish constitutional standing, this Court should still decline to hear their case under the "prudential standing" doctrine. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125 (2014). "[P]rudential standing encompasses 'the general prohibition on a litigant's raising another person's legal rights [and] the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches.'" *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004). This doctrine avoids the court "decid[ing] abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." *Elk Grove*, 542 U.S. at 12 (citation omitted).

Each of these considerations weighs in favor of dismissal. First, plaintiffs seek to litigate "another person's legal rights," *id.*, because their standing theory hinges on letters to *other people*. They claim that letters to "the producers of *Serial*," "a cable television network," and "a different journalist" justify their fear of enforcement of § 1-201. Compl. ¶ 26. But the individuals and businesses who have dealt with the application of § 1-201 are not suing here. This is the type of suit prudential standing seeks to avoid.

Second, plaintiffs seek "adjudication of generalized grievances more appropriately addressed in the representative branches." *Elk Grove*, 542 U.S. at 12. Plaintiffs raise policy arguments about why wider circulation of court recordings would benefit the public and the courts. Compl. ¶¶ 1-4, 6, 16-18, 42. These "are credible policy arguments in favor of

television, [but] they are not arguments of constitutional proportions." *Estes*, 381 U.S. at 589 (Harlan, J., concurring). Policy arguments should be directed to the Maryland legislature. *Westfarm Assocs. Ltd. P'ship v. Washington Suburban Sanitary Comm'n*, 66 F.3d 669, 680 (4th Cir. 1995). If enforcement of § 1-201 ever leads to a contempt proceeding, Maryland courts can adjudicate any First Amendment issues. "[S]tate courts have the solemn responsibility, equally with the federal courts 'to guard, enforce, and protect every right granted or secured by the constitution of the United States.'" *Steffel v. Thompson*, 415 U.S. 452, 460–61 (1974) (quoting *Robb v. Connolly*, 111 U.S. 624, 637 (1884)). If these plaintiffs ever face a contempt proceeding, their claims can be "more appropriately addressed" by the state court. *Elk Grove*, 542 U.S. at 12.

Third, "other governmental institutions may be more competent to address the questions" raised in the complaint. *Id.* Interpreting, applying, and limiting § 1-201 requires an analysis of state-law contempt rules and doctrines. Maryland's courts have a significant interest in their own contempt procedures and expertise in interpreting and administering them. That is why "a federal court should [abstain] from adjudicating a challenge to a State's contempt process." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 13 (1987). "A State's interest in the contempt process, through which it vindicates the regular operation of its judicial system, so long as that system itself affords the opportunity to pursue federal claims within it, is surely an important interest." *Juidice v. Vail*, 430 U.S. 327, 335 (1977). Indeed, if there were an ongoing contempt proceeding against these plaintiffs, this Court would decline jurisdiction under the doctrine of *Younger* abstention. *Nivens v. Gilchrist*, 319 F.3d 151, 153 (4th Cir. 2003); *see generally Younger v. Harris*,

401 U.S. 37 (1971). It would be inconsistent with this Court's usual deference on state-law contempt issues to preempt the state court on these issues.

Consistent with this Court's "judicially self-imposed limits on the exercise of federal jurisdiction," it should decline jurisdiction for lack of prudential standing. *Allen v. Wright*, 468 U.S. 737, 751 (1984).

II. PLAINTIFFS HAVE NOT STATED A CLAIM AGAINST THE COURT REPORTER DEFENDANTS.

The claims against Ms. Trikeriotis and Ms. Watson should be dismissed. By law, Ms. Trikeriotis and Ms. Watson, two court reporters, have nothing to do with initiating contempt proceedings. Citing no legal authority, the complaint asserts that Ms. Trikeriotis and Ms. Watson are "responsible for initiating contempt proceedings under § 1-201." Plaintiffs are wrong, and their unsubstantiated legal conclusion is entitled to no deference.

Contempt proceedings in Maryland courts are governed by title 15, chapter 200 of the Maryland Rules. When "contempt [is] committed in the presence of the judge presiding in court," Md. Rule 15-202, that "direct" contempt justifies "summary imposition of sanctions," Md. Rule 15-203. Depending on the nature of the constructive contempt, contempt proceedings may be initiated by the court, a party to the action, a State's Attorney, the Attorney General, the State Prosecutor, or an agency enforcing spousal or child support laws. Md. Rules 15-205(b), 15-206(b). This is an exhaustive list, *Zetty v. Piatt*, 365 Md. 141, 163 (2001), and court reporters are not on the list. Plaintiffs' claims to the contrary are entitled to no deference when resolving a motion to dismiss. This Court does not

"accept as true a legal conclusion couched as a factual allegation." *Anand v. Ocwen Loan Servicing, LLC*, 754 F.3d 195, 198 (4th Cir. 2014).

Thus, the plaintiffs' claim that court reporters can initiate contempt proceedings is, at best, an errant legal conclusion. That the plaintiffs have not prayed for any relief against the court reporters further demonstrates that they are not proper parties to this action. Compl. at 22–23 (seeking declarations about a statute and attorneys' fees). Because court reporters play no role in the initiation of contempt proceedings, the plaintiffs have failed to a cause of action against the court reporters, and these claims should be dismissed.

III. PLAINTIFFS HAVE FAILED TO JOIN INDISPENSABLE DEFENDANTS.

Plaintiffs have selected two administrative judges and two court reporters as defendants. The Administrative Judges might be proper defendants—they have enforcement authority under Maryland Rules 15-205 and 15-206. But there are many other possible enforcers (including any judge of the circuit court), and the plaintiffs' failure to sue some of those enforcers is sufficiently prejudicial to justify dismissing this action. The most important parties, without whom this litigation should not proceed, are the parties to the underlying criminal cases, who may have unique interests in the outcome of this case.

"Federal Rule of Civil Procedure 12(b)(7) requires dismissal for failure to join a party deemed indispensable under Rule 19." *Loring v. South Air Charter Co., Ltd.*, CV PX 16-3844, 2018 WL 3122440, at *5 (D. Md. June 26, 2018); *see Caldwell Mfg. Co. v. Unique Balance Co.*, 18 F.R.D. 258, 265 & n.24 (S.D.N.Y. 1955) (dismissal is appropriate in action seeking declaratory relief). This Court resolves the indispensability of a party in two steps. "First, the district court must determine whether the party is "necessary" to the

action under Rule 19(a)." *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Rite Aid of S.C., Inc.*, 210 F.3d 246, 249 (4th Cir. 2000). When a party is "necessary, the court "must then determine whether the party is 'indispensable' to the action under Rule 19(b)." *Id*.

The criminal defendants, as parties to the underlying case, can bring civil contempt proceedings against the plaintiffs to be adjudicated by a judge, but not necessarily the administrative judge. Md. Rule 15-206(b)(2). Without the criminal defendants, this Court cannot afford the plaintiffs complete relief. *See generally Pasternak & Fidis, P.C. v. Wilson*, GJH-14-01307, 2014 WL 4826109, at *4 (D. Md. Sept. 23, 2014) (summarizing when judgments can bind nonparties). And the criminal defendants likely have unique personal and constitutional interests in their privacy to vindicate, which are not "adequately represented by" the Judge Defendants. *Taylor v. Sturgell*, 553 U.S. 880, 894 (2008).

Ordinarily, a missing necessary party is not a fatal flaw, as this Court may order joinder. Fed. R. Civ. P. 19(a)(2). But the plaintiffs have made ordering joinder impossible by failing to plead "the name, if known, of any person who is required to be joined if feasible but is not joined." Fed. R. Civ. P. 19(c)(1). The complaint does not even disclose the cases the plaintiffs seek to broadcast, so this Court cannot identify the defendants on its own.[6] That forces this Court to ask "whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b).

[6] This raises another prudential reason for finding that Plaintiffs lack standing. If this was not a pre-enforcement challenge for an unenforced statute, Plaintiffs' legal claims could arise in a context where the affected criminal defendants could be notified—it could be a hearing in the criminal defendant's case. *See* Md. Rule 15-206(a).

Proceeding without these criminal defendants would be inequitable. Rendering a judgment that permits the unbridled broadcasting of someone's criminal trial without giving that person notice and an opportunity to be heard "prejudice[s] that person." Fed. R. Civ. P. 19(b)(1). That prejudice cannot be lessened by a narrowly tailored judgment. Fed. R. Civ. P. 19(b)(2). After all, the plaintiffs' prayed relief—constitutional immunity from contempt—is fatally inconsistent with preserving the rights of criminal defendants to seek the same contempt. And the plaintiffs retain an adequate remedy if their claim is dismissed, Fed. R. Civ. P. 19(b)(4); they can refile with the necessary information about the criminal defendants or they can assert their claims as defenses if they are ever served a § 1-201 contempt petition.

But litigating the privacy and procedural interests of the criminal defendants in their absence deprives them of "notice and an opportunity to be heard"—the "fundamental" guarantees of "due process." *Washington v. Clarke*, 1:12-CV-1400 GBL/IDD, 2013 WL 6157877, at *3 (E.D. Va. Nov. 22, 2013) (citing *Mullane v. Central Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950)). This case should not proceed without them.

IV. PLAINTIFFS' FIRST AMENDMENT RIGHT TO ATTEND, REVIEW, AND REPORT ON COURT PROCEEDINGS DOES NOT EXTEND TO BROADCASTING COURT RECORDINGS.

Even if the plaintiffs had standing, their First Amendment claims would fail, because although plaintiffs can report on criminal trials with impunity, they do not have a constitutional right to broadcast the faces and voices of defendants, witnesses, victims, judges, or jurors who participate in a criminal trial.

A. Plaintiffs Have No First Amendment Right to Broadcast Criminal Trial Recordings.

"[N]o constitutional provision guarantees a right to televise trials," not even "[t]he free speech and press guarantees of the First and Fourteenth Amendments." *Estes*, 381 U.S. at 588 (Harlan, J., concurring). Barring broadcasting does not create a First Amendment problem, because "[s]o long as the television industry . . . is free to send representatives to trials and report on those trials . . ., there is no abridgment of the freedom of the press." *Id*. at 585 (Warren, C.J., concurring). The First Amendment likewise contains no right to distribute or broadcast court tapes and transcripts. *United States v. Beckham*, 789 F.2d 401, 409 (6th Cir. 1986). The public has "a right to *attend* trials, not a right to view them on a television screen." *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 23 (2d Cir. 1984).

Every federal circuit court to confront a First Amendment challenge to Federal Rule of Criminal Procedure 53, which likewise prohibits the "broadcasting of judicial proceedings," has rejected the challenge. *Conway v. United States*, 852 F.2d 187, 188 (6th Cir. 1988) (per curiam); *United States v. Edwards*, 785 F.2d 1293, 1296 (5th Cir. 1986) (per curiam); *United States v. Kerley*, 753 F.2d 617, 622 (7th Cir. 1985); *United States v. Hastings*, 695 F.2d 1278, 1284 (11th Cir. 1983), *cert. denied*, 461 U.S. 931 (1983).[7] State courts agree: "[T]here is no United States Supreme Court case or Pennsylvania case which

[7] *See also* United States Courts, *History of Cameras in Courts*, https://www.uscourts.gov/about-federal-courts/judicial-administration/cameras-courts/history-cameras-courts (last checked July 15, 2019) (recounting the history of the federal judiciary's broadcasting rules).

suggests that this right of access includes a right to televise, record, or otherwise broadcast judicial proceedings." *Com. v. Davis*, 635 A.2d 1062, 1066 (Pa. Super. Ct. 1993); *see Santiago v. Bristol*, 709 N.Y.S.2d 724, 726 (App. Div. 2000) ("The right of access, however, is not the right to broadcast"). Plaintiffs have an unfettered ability to attend trials, as secured by the First Amendment, and that ends this case. *See* 66 Op. Md. Att'y Gen. 80, 84 (1981) (concluding that § 1-201 does not infringe a First Amendment freedom).

B. Section 1-201 Protects the Rights of the Accused to Fair Trials—a Paramount Government Interest.

Even if the plaintiffs had a First Amendment interest to vindicate, their claims would fail, because § 1-201 protects the due process interests of criminal defendants in a fair trial. In evaluating the reasonableness of broadcasting efforts, a court should "enforce the principles that from time immemorial have proven efficacious and necessary to a fair trial." *Estes*, 381 U.S. at 541. "A fair trial in a fair tribunal is a basic requirement of due process." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 551 (1976). Broadcasting criminal trials chips away at that fairness by influencing all parts of the trial.

Broadcasting has a detrimental effect on jurors. "[T]he televised jurors cannot help but feel the pressures of knowing that friends and neighbors have their eyes upon them." *Estes*, 381 U.S. at 545. "The awareness of the fact of telecasting . . . is felt by the juror throughout the trial. We are all self-conscious and uneasy when being televised. Human nature being what it is, . . . a juror's . . . mind will be preoccupied with the telecasting rather than with the testimony." *Id*. at 546. This preoccupation would be multiplied if the plaintiffs' new media efforts mean that jurors come to understand that their face, conduct,

and voice may be broadcast not just on the evening news, but in perpetuity through films, podcasts, and on-demand streaming services.

Broadcasting also has a detrimental effect on witnesses:

> The impact upon a witness of the knowledge that he is being viewed by a vast audience is simply incalculable. Some may be demoralized and frightened, some cocky and given to overstatement; memories may falter, as with anyone speaking publicly, and accuracy of statement may be severely undermined. Embarrassment may impede the search for the truth, as may a natural tendency toward overdramatization.

Id. at 547. Even if a particular defendant cannot point to a particular instance of prejudice flowing from the effect of broadcasting on witnesses, "we all know from experience that they exist." *Id*. "This is not to say that all participants in the trial would distort it by deliberately playing to the television audience, but some undoubtedly would." *Id*. at 566 (Warren, C.J., concurring).

These effects are exacerbated by the media's inevitable focus on high profile trials while they are ongoing, on appeal, or otherwise on the public's mind. "The necessity for sponsorship weighs heavily in favor of the televising of only notorious cases . . . and invariably focuses the lens upon the unpopular or infamous accused." *Id*. at 550. This focus on notoriety abuts the judiciary's deep concern about effects on "cases arising from state prosecutions." *Id*. at 560 (Warren, C.J., concurring). So in cases with the highest stakes, the fairness-depriving effect of broadcasting on jurors and witnesses is amplified, and broadcasting will happen most often in cases with the highest stakes.

These fairness interests are systemic, because after-the-fact broadcasting (or routine broadcasting) of criminal trials affects future jurors, witnesses, and defendants to create

more unfairness. If broadcasting becomes the norm, every trial participant would enter the trial with this awareness. "[T]he televising of trials would not only have an effect on those participating in the trials that are being televised, but also on those who observe the trials and later become trial participants." *Id*. at 574 (Warren, C.J., concurring).

These invidious fairness concerns are the proper subject of state regulation. The Supreme Court elected not to find a First, Sixth, or Fourteenth Amendment violation when Florida created broadcasting procedures, in part because finding such a broad right would prevent Florida from serving as Justice Brandeis's "laboratory" of democracy. *Chandler*, 449 U.S. at 579. Conversely, finding a First Amendment right to unlimited broadcasting undermines Maryland's ongoing experiment with limited public disclosure. *See* Compl. ¶ 43 (emphasizing Maryland's "*publicly available* court recordings"). The publicizing of criminal trials is a delicate, fact-bound policy issue, so the Court "must be ever on [its] guard, lest [it] erect [its] prejudices into legal principles." *Chandler*, 449 U.S. at 579. Here, that means letting Maryland regulate the broadcasting of its court recordings.

"Unlike Broadway plays, trials are not conducted for the purpose of entertaining or enlightening an audience. The participants' roles are real, not feigned, and their performances, if such they be called, are, or should be, for the primary benefit of the judge and the jury." *United States v. Yonkers Bd. of Educ.*, 747 F.2d 111, 113 (2d Cir. 1984). Plaintiffs propose a method of making trials less fair so that they can entertain and enlighten the public. Established law forecloses their claim.

C. Section 1-201 Is Adequately Tailored to the Interests it Protects.

Section 1-201 does not restrict plaintiffs' ability to convey information about what happened in a criminal trial, but only *how* the plaintiffs convey that information. The statute, therefore, properly balances the ability of the media to report on trial proceedings with the State's interest in ensuring a fair trial. Because this content-neutral restriction promotes the State's interest in fair trials, and provides ample "opportunities for the communication of thought," *Hastings*, 695 F.2d at 1282, it is a constitutional restriction on the manner in which information is communicated, not the content of the information.

Section 1-201 is content-neutral, and it permits conveyance of the same message or information through reporting. Section 1-201 neither discriminates based on the content or the speech or the point of view of the person broadcasting; it prohibits all broadcasting of the regulated recordings. That is, § 1-201 is "justified without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

"A content-neutral regulation of the time, place, and manner of speech is generally valid if it furthers a substantial government interest, is narrowly tailored to further that interest, and leaves open ample alternative channels of communication." *Am. Legion Post 7 of Durham, N.C. v. Durham*, 239 F.3d 601, 609 (4th Cir. 2001) (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)); *Hastings*, 695 F.2d at 1282 (applying the same analysis in a right-to-televise case). Restrictions on broadcasting criminal trials serve a substantial governmental interest—guaranteeing fair trials for the accused. *See* Section IV(B), *supra*. And there are other unabridged "opportunities for the communication of thought." *Hastings*, 695 F.2d at 1282. Here, the plaintiffs could

describe the events and testimony at trial, read back transcripts, or reenact court proceedings. These modes of communication contain exactly the same information; they just communicate that information in a different format.

That leaves only the question of tailoring. A content-neutral regulation is narrowly tailored if it does not "burden substantially more speech than is necessary to further the government's legitimate interests." *McCullen v. Coakley*, 573 U.S. 464, 466 (2014) (internal quotation marks omitted). "To be valid, the regulation 'need not be the least restrictive or least intrusive means of serving the government's interests,'" but "the government still may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Reynolds v. Middleton*, 779 F.3d 222, 226 (4th Cir. 2015) (quoting *McCullen*, 573 U.S. at 466).

Section 1-201 does not "burden substantially more speech than is necessary." *McCullen*, 573 U.S. at 466. It burdens only one mode of speech (broadcasting a recording of the proceeding) and only for criminal trials. The statute regulates both ongoing and concluded trials, because the long-term, systematic effect on future or prospective witnesses and jurors from increased broadcasting can arise from any broadcasting. *Estes*, 381 U.S. at 574 (Warren, C.J., concurring). Regulating the broadcasting of concluded trials is especially necessary if there might be another trial in the same case because of an appeal or collateral challenge. The statute does not, however, regulate the broadcasting of appeals, which makes sense—the trial fairness issues that arise from the stress put on witnesses and jurors do not extend to purely legal argument presented on appeal. Section 1-201 would

be less restrictive if it only limited "*live* broadcasts," Compl. ¶ 43, but the Constitution does not require "the least restrictive" possible statute. *Reynolds*, 779 F.3d at 226.

Similarly, § 1-201 is consistent with First Amendment cases concerning the publication of truthful information. Yes, "state action to punish the publication of truthful information seldom can satisfy constitutional standards." *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001); *see Florida Star v. B.J.V.*, 491 U.S. 524, 533 (1989) ("state officials may not constitutionally punish publication of [truthful] information, absent a need to further a state interest of the highest order"). Section 1-201 does not prohibit "the publication of truthful information," because the plaintiffs remain free to publish the same information in another form. *Cf. Bartnicki*, 532 U.S. at 526 (statute prohibited *any* "'use' of the contents of an illegal interception"); *Florida Star*, 491 U.S. at 526 (statute prohibited *any* publication disclosing "name of the victim of a sexual offense"). And § 1-201's restriction on the manner in which information is conveyed serves a fundamental due process purpose—ensuring fair criminal trials—which is a deeply rooted liberty interest. Fair trials are "this country's constitutional goal." *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (quoting *Pointer v. Texas*, 380 U.S. 400, 405 (1965)).

Bartnicki and *Florida Star* are also inapplicable because they apply to "punishments" in the form of criminal prosecution. Rather than effect a punishment, civil contempt promotes compliance with a court order. "If it is a civil contempt the sanction is *coercive* and must allow for purging, but if it is criminal, it is *punitive* and must be determinate." *Roll*, 267 Md. at 730 (emphasis added). Because a court's effort to coerce compliance with a regulation or order is not a punishment, civil contempt does not

implicate *Bartnicki*. Using court orders and the contempt procedure to preserve the fair administration of criminal trials does not run afoul of the prohibition against punishing the truthful publication of information-protected by the First Amendment. The complaint should be dismissed.

V. PLAINTIFFS HAVE NOT STATED A VOID-FOR-VAGUENESS CLAIM UPON WHICH RELIEF MAY BE GRANTED.

Although the complaint alleges that the term "broadcast" is so vague as to deprive the public of fair notice of the prohibited conduct, the complaint's allegations demonstrate that plaintiffs can clearly identify acts prohibited by the statute. That is because the statute provides adequate notice to the public of the prohibition against broadcasting criminal proceedings and of the enforcement of such violations through the court's contempt power.

A. The Void-for-Vagueness Legal Framework.

A statute is unconstitutionally vague under the Due Process Clause if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Martin v. Lloyd*, 700 F.3d 132, 136 (4th Cir. 2012) (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)).

When considering a facial void-for-vagueness challenge like this one, a court must look to see whether the challenged statute involves constitutionally protected conduct, and if it does not, the plaintiff must demonstrate the law is impermissibly vague in all of its reasonable applications. *Village of Hoffman Estates v. Flipside, Hoffman Estates Inc*., 455 U.S. 489, 494-95 (1982). That high standard is premised on the understanding that a

"plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 735–36 (D.C. Cir. 2016) (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18–19 (2010)). Facial challenges are disfavored because they often rest on speculation, are contrary to the principles of judicial restraint, and "short circuit" the democratic process. *Wa. State Grange v. Wa. State Republican Party*, 552 U.S. 442, 450-51 (2008).

In *Johnson v. United States*, the Supreme Court questioned this long-established analytical framework noting that past "holdings squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp," citing two cases where the Court found statutes unconstitutionally vague despite the existence of a conceivable extreme application where the statute would be valid. 135 S.Ct. 2551, 2561 (2015) (noting that "charging someone a thousand dollars for a pound of sugar would surely be unjust and unreasonable" and "spitting in someone's face would surely be annoying."). A harmonious reading of *Johnson* and *Hoffman Estates* establishes that unreasonable, outlier applications of a challenged statute are insufficient to overcome a facial void for vagueness challenge.[8] Still, the plaintiff must demonstrate the law is impermissibly vague in all of its *reasonable* applications.

[8] Just like the District of Columbia Circuit, this Court need not resolve the "full implications of *Johnson*," to determine that the plaintiffs' facial challenge must fail. *U.S. Telecom*, 825 F.3d at 736. Even if the elevated bar for facial challenges in *Hoffman Estates* does not apply, § 1-201 clearly identifies knowable prohibited conduct that satisfies due process requirements.

A facial challenge also fails if the challenged law has a "plainly legitimate sweep." *United States v. Comstock*, 627 F.3d 513, 518 (4th Cir. 2010) (quoting *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 202 (2008)). Statutes effecting "civil rather than criminal penalties" are viewed more favorably "because the consequences of imprecision are qualitatively less severe." *Hoffman Estates*, 455 U.S. at 498-99. "The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment." *Id*. at 498.

B. Plaintiffs' Due Process Challenge Fails Because a Facial Challenge Based on Vagueness Can Succeed Only If the Law Is Impermissibly Vague in All its Reasonable Applications.

Where, as here, the challenged statute does not concern constitutionally protected conduct, the plaintiffs must allege and prove that the law is impermissibly vague in all of its reasonable applications. Because the First Amendment does not convey a right to broadcast criminal trials, a statute that prohibits the "record[ing] or broadcast[ing of] any criminal matter," does not involve constitutionally protected conduct. *Estes*, 381 U.S. at 539-40.

Decisions of the Fifth, Sixth, Seventh and Eleventh Circuits upholding Federal Rule of Criminal Procedure 53 confirm the constitutionality (and the undisputedly valid and reasonable application of) a prohibition against broadcasting. *Conway*, 852 F.2d at 188; *Edwards*, 785 F.2d at 1296; *Kerley*, 753 F.2d at 622; *Hastings*, 695 F.2d at 1284. For example, both Federal Rule 53 and § 1-201 fairly prohibit the "broadcasting of [criminal] judicial proceedings from the courtroom," even if § 1-201 also regulates other conduct.

Plaintiffs have not alleged that § 1-201 is incapable of any valid reasonable application, and indeed, this core application defies any such assertion. Instead, they forecast the application of the statute to proposed future events: podcasts, films, posting the audio on websites, and the broadcasting of audio recordings at community events. Compl. ¶¶ 21–23. On its face, the complaint fails to state a vagueness claim.

As explained above, the legislative history confirms that Maryland's Legislature made reasonable policy decisions in prohibiting the broadcasting on criminal trials. *See* pp. 2–4, *supra*. Because § 1-201, which protects the right to a fair trial, has a "plainly legitimate sweep," any facial vagueness challenge must fail. *Washington State Grange*, 552 U.S. at 449.

C. Section 1-201 Identifies a Clearly Defined Core of Prohibited Conduct and Does Not Encourage Arbitrary and Discriminatory Enforcement.

Even if § 1-201 abutted constitutionally protected conduct, or if *Johnson* signaled a retreat from the high bar set forth in *Hoffman Estates*, the statute would survive vagueness scrutiny. Plaintiffs failed to allege facts demonstrating that (1) a person of ordinary intelligence lacked fair notice of what conduct is prohibited or (2) the statute is "so standardless that it authorizes or encourages seriously discriminatory enforcement." *Martin*, 700 F.3d at 135 (citation omitted); *see Grayned v. Rockford*, 408 U.S. 104, 108–109 (1972).

This assessment of vagueness entails two inquiries: First, the law must apply to an identifiable "core" of prohibited conduct. *Hoffman Estates*, 455 U.S. at 497; *Martin*, 700 F.3d at 137; *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 370-71 (4th Cir. 2012).

Second, the law must "establish minimal guidelines to govern . . . enforcement." *United States v. Lanning*, 723 F.3d 476, 482 (4th Cir. 2013) (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974)).

1. Section 1-201 Proscribes an Identifiable and Understandable Core of Prohibited Conduct.

So long as a statute regulates an identifiable core of prohibited conduct, it will not be considered void for vagueness even if it includes an imprecise term. In other words, a statute is not vague if "it requires a person to conform his conduct to an imprecise but comprehensible normative standard"; it is vague only if "no standard of conduct is specified at all." *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971).

Courts do not strike down laws for vagueness due to hypothetical applications of a word that might lead to an ambiguous application of the law, *Hill v. Colorado*, 530 U.S. 703, 733 (2000), and "do not hold legislators to an unattainable standard when evaluating enactments in the face of vagueness challenges," *Wag More Dogs*, 680 F.3d at 371. "[B]ecause we are condemned to the use of words, we can never expect mathematical certainty from our language." *Id.* (internal quotation marks omitted). Thus, "[a] statute need not spell out every possible factual scenario with 'celestial precision' to avoid being struck down on vagueness grounds." *United States v. Hager*, 721 F.3d 167, 183 (4th Cir. 2013) (quoting *United States v. Whorley*, 550 F.3d 326, 334 (4th Cir. 2008)). The Court, therefore, "must ask whether the government's policy is 'set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply

with'" and may apply "[d]ictionary definitions and old-fashioned common sense [to] facilitate the inquiry." *Wag More Dogs*, 680 F.3d at 371 (citations omitted).

Plaintiffs contend that the word "broadcast," in and of itself, is inherently ambiguous. Compl. ¶ 48. But the "prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision." *Rose v. Locke*, 423 U.S. 48, 49 (1975). "Many statutes will have some inherent vagueness, for in most English words and phrases there lurk uncertainties." *Id.* at 49-50 (internal quotes and alterations omitted). *See Cox v. Louisiana*, 379 U.S. 559, 568 (1965) ("lack of specificity in a word such as 'near'" did not render the loitering statute unconstitutionally vague).

Plaintiffs have also failed to plead facts that, if proven, would show that "vagueness permeates" the law. *Chicago v. Morales*, 527 U.S. 41, 55 (1999). To the contrary, the plaintiffs' own allegations clearly demonstrate an identifiable "core" of prohibited conduct. Section 1-201 states that a person may not "record or broadcast any criminal matter, including a trial, hearing, motion, or argument, that is held in trial court or before a grand jury." Plaintiffs acknowledge that the use of video footage in a documentary and courtroom audio in a podcast have been identified as conduct prohibited by the statute. Compl. ¶ 26. And like the restriction set forth in Federal Rule of Criminal Procedure 53, broadcasting a criminal trial from the courthouse whether by radio, television, live streaming or otherwise clearly falls within the ambit of the statute.

The definition of "broadcast" also adds clarity. "Broadcast," when used as a transitive verb, has multiple definitions: "2: to make widely known; and 3: to send out or

transmit (something, such as a program) by means of radio or television or by streaming over the Internet." Merriam-Webster Dictionary, *broadcast*, https://www.merriam-webster.com/dictionary/broadcast (last visited July 15, 2019). Cases interpreting courts' "broadcasting" restrictions have relied on both definitions. *See In re Sentencing*, 219 F.R.D. 262, 265 (E.D.N.Y. 2004) (citing *Webster's Third International Dictionary* (1967) as defining "broadcast" as the "act of making widely known" or "radio or television transmission especially for general use").

A 2002 Advisory Committee note to Federal Rule of Criminal Procedure 53 provides further evidence of that shared understanding of the term. Because "broadcasting" is adequately defined by "judicial interpretation," and because modern media may make an exhaustive list of broadcasting techniques prohibitive, the Committee elected to remove the word "radio" from the Rule's prohibition on broadcasting. Removing specific references to modes of broadcasting did not effect a "substantive change," because "[g]iven modern technology capabilities, the Committee believed that a more generalized reference to "broadcasting" is appropriate. Fed. R. Crim. P. 53 advisory committee's note to 2002 amendment.

These definitions and the Advisory Committee's note demonstrate that the internet has expanded and continues to expand the ways in which prohibited broadcasting may occur. Changes in technology do not, however, create vagueness; they create ambiguity that courts routinely resolve using the canons of statutory interpretation. A statute does not become unconstitutionally meaningless just because new technologies may expand the set of things that fall within the term.

The Maryland courts have not had occasion to interpret the word "broadcast" in § 1-201 (and have declined to issue advisory opinions in violation of well-established precedent). This undermines the plaintiffs' vagueness claim for two reasons. First, the lack of published case law concerning a 38-year old statute underscores the fact that no contempt proceedings have been brought to enforce the statute. Plaintiffs have not alleged that any misunderstanding of the word "broadcast" has given rise to a contempt proceeding at any point over its 38-year history. Second, the dearth of enforcement actions and corresponding case law reflects an apparent stability in the law over the decades. The lack of contempt proceedings provides an indication that the law is not vague and, moreover, that the plaintiffs are not under a credible threat of prosecution. *See Richmond Med. Ctr. for Women v. Gilmore*, 144 F. 3d 326, 328 (4th Cir. 1998).

To save a potentially vague state statute, a "federal court must 'consider any limiting construction that a state court or enforcement agency has proffered.'" *Martin*, 700 F.3d at 136 (quoting *Hoffman Estates*, 455 U.S. at 494 n.5). Because § 1-201 is enforced through the court's contempt power (and not by an executive agency that could promulgate interpretive regulations), a limiting construction may develop through case law. The court's procedures for obtaining courtroom audio and video recordings confirm the court's understanding that the statutory prohibition against "broadcasting" applies equally to broadcasting of recordings inside and outside a courtroom. Ex. 4. ("By my signature, I acknowledge that Maryland Criminal Procedure Article 1-201 provides that a person may not broadcast any proceeding in a criminal matter, and I agree that this recording will not be broadcast").

Citing case law that holds that a sentencing provision may violate due process if it fails to provide fair notice of the penalty that applies to the prohibited conduct, *Thomas v. Davis*, 192 F.3d 445, 455 (4th Cir. 1999), plaintiffs allege that § 1-201 is unconstitutionally vague because it does not specify whether a contempt sanction would be civil or criminal. Compl. ¶ 49. The standards used in determining whether contempt is civil or criminal are well established in Maryland case law. *See, e.g.*, *Sheets v. Hagerstown*, 204 Md. 113, 119 (1954) ("It is plain that whether a contempt be civil or criminal, direct or constructive, the requirements of due process are satisfied if one accused is informed of the charge against him and given a fair and reasonable opportunity to present, and have an unprejudiced consideration of, his defense."). The legislature was not obligated to distill the court's inherent contempt power into the statute, and the application of those common law precepts is not "standardless." *Martin*, 700 F.3d at 136. If judicial interpretation left statutes unconstitutionally vague, every statutory ambiguity would be fatal.

Nor is there a drastic difference between the two modes of contempt that would undermine fair notice. In both criminal and civil contempt proceedings, a full range of sanctions, including incarceration, may apply. Md. Rule 15-207(d); Md. Rule 15-206(c) (procedures where incarceration is sought to compel compliance with the court's order in a constructive civil contempt proceeding); Md. Rule 15-204(d) (procedures for initiating a constructive criminal contempt proceeding). Although similar sanctions may be employed in either civil or criminal contempt, the remedial or punitive purpose of the sanction is determined by the nature of the contempt and the proceeding.

Section 1-201 provides fair notice to the public about the category of conduct it regulates and the mechanism for enforcement. Its use of the word "broadcast" and its invocation of the court's contempt power are reasonable legislative choices, not unknowable, standardless restrictions. Plaintiffs' claims to the contrary fail.

2. Section 1-201 Does Not Encourage Arbitrary or Discriminatory Enforcement.

The void-for-vagueness doctrine also requires that a criminal statute not encourage arbitrary and discriminatory enforcement.[9] *Hoffman Estates*, 455 U.S. at 498. To meet this requirement, a criminal statute must "establish minimal guidelines to govern law enforcement." *Goguen*, 415 U.S. at 574. But when the terms of a regulation are clear and not subject to attack for vagueness, the plaintiff bears a high burden to show that the standards used by officials enforcing the statute nevertheless give rise to a vagueness challenge. *Wag More Dogs*, 680 F.3d at 372 (citation omitted). The court evaluates alleged vagueness in the enforcement of an otherwise-valid statute only "if and when a pattern of unlawful favoritism appears." *Id.* (internal quotations omitted). "Until this occurs, however," a plaintiff pressing such a challenge will have "failed to demonstrate that the ordinance [ ] [is] unconstitutional." *Id.*

Here, the plaintiffs do not allege that the statute poses a risk of arbitrary and discriminatory enforcement. Where the prohibition on broadcasting has been in effect

[9] Although § 1-201 is not a criminal statute, courts have generally applied the same two-prong test to regulations and civil statutes, although perhaps less stringently. *Wag More* Dogs, 680 F.3d at 371.

since 1981 without a single known contempt proceeding, plaintiffs cannot demonstrate a pattern of enforcement, much less discriminatory enforcement. Moreover, to the extent that such enforcement invokes the inherent contempt power of the court, it is subject to the Maryland Rules governing contempt proceedings and Maryland case law defining its application. *See General Motors Corp. v. Seay*, 388 Md. 341, 344 (2005) ("As we have often said, the Maryland Rules are 'precise rubrics' which are to be strictly followed").

This challenge to § 1-201 rises and falls on whether "broadcast" is unconstitutionally vague. It is not. Because plaintiffs have not alleged and cannot prove that the law is impermissibly vague in all of its reasonable applications, and further because § 1-201 contains an identifiable "core" of prohibited conduct and no alleged record of enforcement, Plaintiff's pre-enforcement vagueness challenge must be dismissed.

CONCLUSION

The Complaint should be dismissed.

Respectfully submitted,

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