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.	*	

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REPLY IN SUPPORT OF MOTION TO DISMISS

Plaintiffs initiated this lawsuit with the overbroad claim that the First Amendment confers on them a right to broadcast criminal trial proceedings, so long as the broadcast is "truthful." Compl. ¶¶ 5–6, 37–39. Cases holding the opposite are legion. *See* Memo., ECF No. 23-1, at 21–23. Every court to have considered this question has held that broadcasting restrictions on criminal proceedings are constitutional. *Id*.

Plaintiffs now retreat to a narrower argument: If the Maryland courts provide copies of trial recordings to the public on request, then, according to Plaintiffs, every member of the public has a constitutional right to broadcast their copy. Opp'n, ECF No. 26, at 1 ("the *State itself* [makes] publicly available"). This narrowed construction requires dismissal of Plaintiffs' claims as to video recordings, because the Maryland Rules do not make video recordings publicly available. Md. Rule 16-504(j). And making this narrower argument does not salvage Plaintiffs' claims as to audio recordings. Plaintiffs can broadcast all of

the *information* in these recordings through reports, transcripts, summaries, or reenactments. *Cf.* Opp'n at 15 (the "publication of truthful information"). Section 1-201 is a constitutional restriction on the "manner of speech." *Am. Legion Post 7 of Durham, N.C. v. Durham*, 239 F.3d 601, 609 (4th Cir. 2001).

Plaintiffs' vagueness arguments concede that § 1-201 clearly identifies a core of prohibited conduct and assert ambiguity at the margins. Such a statute is constitutional. *Doe v. Cooper*, 842 F.3d 833, 842–43 (4th Cir. 2016). In context, the phrase "record or broadcast" has "sufficient definiteness that ordinary people can understand what conduct is prohibited." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

Plaintiffs' other procedural arguments hope this Court will not look past errant legal assertions and unfair document framing in the Complaint. But the motion-to-dismiss standard empowers this Court to see the Complaint for what it is, and to reject these claims. Plaintiffs lack Article III standing, lack prudential standing, lack any claim against court reporters, and failed to sue necessary defendants. The Complaint should be dismissed.

REPLY ARGUMENT

I. BECAUSE PLAINTIFFS CANNOT SHOW A CREDIBLE THREAT OF ENFORCEMENT UNDER A NEVER-ENFORCED STATUTE, THEY LACK STANDING.

Section 1-201 has never been enforced against anyone in its 38-year history. Memo. at 11. Plaintiffs have offered this Court no evidence to the contrary. Yet Plaintiffs insist they are scared the statute will be enforced against them. Compl. ¶¶ 24–25. This self-serving, subjective allegation is objectively unreasonable. *See Laird v. Tatum*, 408 U.S. 1,

13–14 (1972) ("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").

Because Plaintiffs cannot point to any enforcement, they point elsewhere. First, Plaintiffs assert that two letters are "repeated threats to enforce" the statute. Opp'n at 12. The letters, attached as Exhibits 3 and 4 to the Motion to Dismiss, threaten no one. The letter to Mr. Riley, ECF No. 21-5, rejects his invitation to issue an advisory opinion. The letter to HBO, ECF No. 21-4, does not threaten enforcement. In fact, § 1-201 has not been enforced against either Ms. McDonnell-Perry or HBO. This Court can read these letters for itself, even on a motion to dismiss. *Fare Deals Ltd. v. World Choice Travel.com, Inc*., 180 F. Supp. 2d 678, 683 (D. Md. 2001). Efforts to reframe the letters as "admonishing," Compl. ¶ 26, "warning," *id*., or "threats," Opp'n at 12, cannot survive review.

Next, Plaintiffs reach outside their Complaint to identify documents justifying their fear of § 1-201. Opp'n at 8–9. Plaintiffs have not alleged that they were chilled by any of these documents or that they ever read these documents. Plaintiffs' allegations of chilled speech are not enhanced by references to § 1-201 marshaled *after* they filed their Complaint. Manufacturing standing after bringing suit does not "clearly . . . allege facts demonstrating that [any Plaintiff] is a proper party to invoke judicial resolution of the dispute." *Warth v. Seldin,* 422 U.S. 490, 518 (1975).

Even worse, none of these documents shows a risk of enforcement. Plaintiffs point to (1) a form attached to Defendants' motion to dismiss, (2) an 11-year-old report on media in the courts that notes the existence of § 1-201, and (3) page 20 of a journalism handbook,

which identifies and describes § 1-201. Opp'n at 8–9. Each document notes that § 1-201 exists, but none shows an enforcement action or a credible risk of sudden enforcement.

Plaintiffs then point to evidence that *other people* have adjusted their conduct to comply with § 1-201. Opp'n at 9 (highlighting that an author for The Daily Record elected to reprint a transcript). But these other people—the ones Plaintiffs claim are actually affected by § 1-201—have not brought suit. In an effort to demonstrate that their subjective fear of enforcement is reasonable, Plaintiffs repeat the mistake of relying on standing someone else might have.

Last, Plaintiffs contend that, to deprive Plaintiffs of standing, Defendants must formally disavow enforcement of § 1-201. Opp'n at 10. In support, they cite cases in which *newly enacted* laws were held lively enough to justify pre-enforcement standing so long as they have not been disavowed. *Id*. at 12 (citing *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 299–303 (1979); *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988)). But § 1-201 isn't a newly enacted statute; it is nearly four decades old. Courts in this Circuit have already distinguished these "newly enacted" cases from cases about old statutes. *Doe v. Duling*, 782 F.2d 1202, 1206 (4th Cir. 1986) ("[t]he total absence of prosecutions in this context establishes that appellees have 'no fears of prosecution except those that are imaginary'"); *Rothamel v. Fluvanna Cty.*, Va., 810 F. Supp. 2d 771, 780 (W.D. Va. 2011) ("ordinance, having been recently adopted, was not moribund"); *Hoffman v. Hunt*, 845 F. Supp. 340, 346 (W.D.N.C. 1994) ("so new that [they] ha[ve] yet

to be fully enforced"). Plaintiffs do not have standing to challenge 38-year-old, never-enforced statute merely because it has not been disavowed.

Plaintiffs fail to describe a "threat of injury that is 'credible,' not 'imaginary or speculative.'" *Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013) (quoting *Babbitt*, 442 U.S. at 298). They do not describe a "threat" at all. And "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). Plaintiffs seek an advisory opinion from this Court. This Court should decline the invitation.

II. PLAINTIFFS ALSO LACK PRUDENTIAL STANDING.

The prudential standing requirement exists to avoid court intervention in "generalized grievances more appropriately addressed in the representative branches." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004). Plaintiffs concede that Maryland's legislature has recently considered rewriting § 1-201, Opp'n at 11, but insist this Court should act first, *id*. at 13, which would frustrate the very purpose of the prudential standing doctrine.

Plaintiffs offer three arguments, none of which can carry the day. First, Plaintiffs reiterate that they are not trying to assert the rights of others. Opp'n at 13. They note that "Plaintiffs are asserting their *own* rights to disseminate recordings in their *own* possession." *Id*. This response is debatable, and it muddles the distinction between Plaintiffs' standing arguments and Plaintiffs' merits arguments. Plaintiffs are not asserting their *own* credible

fear of enforcement based on threats to *them*. And Plaintiffs' choice not to bring as-applied challenges demonstrates the generalized nature of their grievance.

Perhaps revealing their effort at third-party standing, Plaintiffs then argue that they can bring an action based on the rights of others. Opp'n at 13–14. They argue that the court can consider whether others would "refrain from constitutionally protected speech." *Id*. (citing *Am. Booksellers*, 484 U.S. at 392–93). The Supreme Court has permitted this exception only when (1) the plaintiffs suffered direct harm, and (2) the First Amendment injury to the affected non-plaintiff parties (book buyers) stemmed from enforcement against the plaintiff (a bookstore). *Am. Booksellers*, 484 U.S. at 392–93; *see Harris v. Evans*, 20 F.3d 1118, 1124 (11th Cir. 1994) (summarizing *Am. Booksellers*: "bookstores have third-party standing to assert First Amendment rights of adult book buyers in challenging statute prohibiting display of written or visual material harmful to minors because enforcement of statute against bookstores would limit adults' access to protected materials"). As the Ninth Circuit correctly noted, "A court may adopt [the] somewhat relaxed approach to justiciability [in *American Booksellers*], only upon a showing that the plaintiff 'is immediately in danger of sustaining a direct injury as a result of an executive or legislative action.'" *Alaska Right to Life Political Action Comm. v. Feldman*, 504 F.3d 840, 851 (9th Cir. 2007) (quoting *Laird*, 408 U.S. at 12–13) (internal marks omitted). *American Booksellers* does not stand for the proposition that First Amendment plaintiffs can circumvent standing requirements by pointing to alleged harm to others.

Second, Plaintiffs argue that they need not wait for the statute to be enforced before they can mount a challenge, because other pre-enforcement challenges have succeeded. Opp'n at 12–13. This dodges the question of standing altogether. A plaintiff who is under an imminent and credible threat of prosecution may challenge the policy before enforcement, but the Plaintiffs cannot demonstrate an imminent and credible threat of prosecution under this never-enforced statute. Even if "enforcement is not a prerequisite to challenging the law," Opp'n at 13, *standing* is required.

Third, Plaintiffs discount the federalism concerns raised by litigating a state-court contempt procedure and a state statute in federal court. Opp'n at 14; *see* Memo. at 13–14 (explaining 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)"). Statutory interpretation, state rules, and unique federalism concerns surrounding contempt proceedings all militate in favor of dismissal.[1] The question is not whether "a state court would be better equipped to decide the *federal* constitutional questions." Opp'n at 14. The

[1] These same considerations suggest that this Court should abstain from asserting jurisdiction under the *Pullman* doctrine. *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941). Plaintiffs' claims hinge on the proper interpretation of a Maryland statute, Opp'n at 27–32, so a state interpretation of "broadcast" could moot or substantially limit Plaintiffs' federal constitutional claim. *Skipper v. Hambleton Meadows Architectural Review Comm.*, 996 F. Supp. 478, 482 (D. Md. 1998) ("[A]bstention under *Pullman* rests upon three rationales: (1) the avoidance of friction between federal and state courts; (2) the avoidance of erroneous interpretations of state law; and (3) the avoidance of unnecessary constitutional rulings."). Or this Court could certify the question of § 1-201's interpretation to the Court of Appeals of Maryland "[g]iven the policy-intensive nature of this inquiry [and] the lack of on-point Maryland precedent." *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135, 145 (4th Cir. 2019).

question is whether the state courts are competent to adjudicate claims at the intersection of state and federal law. They are, especially when the federal questions hinge on the interpretation of a state statute. *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990).

Plaintiffs' arguments illustrate that Plaintiffs want to stand in the shoes of other people who may have standing to sue. But the law does not allow generalized third-party standing, and Plaintiffs cannot skip the standing analysis just because their suit is brought before enforcement. Plaintiffs' generalized grievances about the possible effect of a four-decade-old contempt statute are best brought to Maryland's legislature or to Maryland's courts, and the prudential standing doctrine requires that this case be dismissed.

III. PLAINTIFFS HAVE NO CLAIM AGAINST COURT REPORTERS.

As a purely legal matter, court reporters cannot bring contempt actions. Memo. at 14–15. Plaintiffs do not challenge this legal reality. Instead, Plaintiffs argue that the court reporters, like "any person," can "ask prosecutors to bring contempt charges." Opp'n at 35. On this theory, Plaintiffs argue that the court reporters' "active involvement" in handing out audio recordings makes them uniquely likely to report violations. *Id.*

This theory of the case against the court reporters is troubling. There is no relief Plaintiffs could obtain from this Court that would prevent the court reporters from "ask[ing]" something of prosecutors. In pursuit of their own First Amendment freedoms, Plaintiffs now appear to argue in favor of a gag order preventing court reporters from communicating with prosecutors.

This argument is also boundless. It would justify impleading and gagging those who listen to Plaintiffs' podcasts or documentaries. The listeners also qualify as "any person," and they would know long before the court reporters that criminal proceedings had been broadcasted. If being in the category "any person" makes someone a viable defendant, then Plaintiffs have asserted an unchecked right to sue—and take discovery from—literally anyone. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 (1992) (reversing the holding below that "*anyone* can file suit"). That is an unreasonable reading of Maryland's contempt rules and a misuse of this Court's authority.

Plaintiffs have no claim against the court reporters, because the court reporters cannot enforce § 1-201 against them as a matter of law. Md. Rules 15-205(b), 15-206(b). Impleading the court reporters was unreasonable, and claims against the court reporters should be dismissed.

IV. PLAINTIFFS FAILED TO IMPLEAD INDISPENSABLE PARTIES.

Plaintiffs assert a First Amendment right to fill the internet with images and sounds of criminal trial participants, including those of the criminal defendants in each case. The statute Plaintiffs challenge, when combined with Maryland's contempt rules, give the criminal defendants enforcement authority. But Plaintiffs want to litigate away these criminal defendants' rights without naming them as parties in this action. That is inequitable, and because Plaintiffs have not provided information necessary to implead (or even notify) these defendants, Rule 19 requires dismissal.

None of Plaintiffs' responses to this contention deal with this inequity. First, citing no authority, Plaintiffs argue that the criminal defendants have no interests to vindicate. Opp'n at 33. Plaintiffs are mistaken. *Presley v. Georgia*, 558 U.S. 209, 213 (2010) ("[T]he right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information"). And because Plaintiffs have not named them, this Court has no way of knowing whether the affected criminal defendants may still have fair-trial rights in retrials triggered by direct appellate review or habeas proceedings.

Second, Plaintiffs argue that the absence of criminal defendants in *Daily Mail*, *Cox Broadcasting*, and *Florida Star* justifies the absence of criminal defendants here. Opp'n at 33. None of these cases dealt with a statutory right that could be enforced by the criminal defendants themselves. None of these cases purported to adjudicate the rights of criminal defendants. They are inapt.

Third, Plaintiffs argue that Maryland must not care about the rights of criminal defendants, because the public can obtain copies of audio recordings from the courthouse. Opp'n at 33. But courthouse-controlled individual disclosure—unlike limitless broadcasting—takes these rights seriously. When the Court can supervise the dissemination of copies, it can react to misuse of the copies or seal sensitive files. If, instead, Plaintiffs have an unbridled First Amendment right to broadcast recordings in their possession, then the Court loses the ability to act in the public interest.

Fourth, Plaintiffs demand that Defendants provide evidence that the criminal defendants would want to vindicate their rights in this forum. Opp'n at 34. Plaintiffs have not disclosed who any of the criminal defendants are, so that is impossible. Plaintiffs may find it "counterintuitive" that criminal defendants might care whether their trials are broadcasted, but the Supreme Court disagrees: "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." *Estes v. Texas*, 381 U.S. 532, 550 (1965). An unpopular criminal defendant may reasonably object to a broadcaster's effort to turn infamy into spectacle through limitless broadcasting rights. Section 1-201 gives that defendant recourse and Plaintiffs want to strike down this recourse without notifying the affected defendants. That is unfair and merits dismissal under Rule 19.

V. PLAINTIFFS' LIMITED FIRST AMENDMENT ARGUMENT STILL DOES NOT STATE A CLAIM.

A. Section 1-201 Is a Constitutional Restriction on the Manner of Speech.

Section 1-201 limits one *mode* of transmitting information: broadcasting. Anyone can transmit the same information in other ways, whether through transcripts, reporting, or reenactments. Limitations like this on the "time, place, and manner" in which information is conveyed are evaluated under their own standard. Memo. at 22; *Am. Legion*, 239 F.3d at 609. Yet Plaintiffs mischaracterize § 1-201 as "seek[ing] to prevent the dissemination of information," so that they can invoke a line of cases dealing with the "publication of truthful information." Opp'n at 15. Plaintiffs already attempted this argument in the Complaint, Compl. ¶¶ 5, 38–39, which is why Plaintiffs' cases were distinguished in the

motion to dismiss. Memo. at 24–25. Plaintiffs nevertheless repeat these "truthful information" arguments in the Opposition and insist that § 1-201's manner restriction is a prohibition on disseminating information. Opp'n at 15–17, 19–23. These arguments are no more effective the second time.

The cases to which Plaintiffs cling involved absolute prohibitions on the publication of certain information *in any form*. The statute at issue in *Florida Star*, the case on which Plaintiffs principally rely, "ma[de] it unlawful to print, publish, or broadcast in any instrument of mass communication the name of the victim of a sexual offense." *Florida Star*, 491 U.S. at 526 (internal quotation marks omitted); *see* Opp'n at 15–17. This piece of information, "the name," was unpublishable in any form. In identifying applicable precedent, the *Florida Star* court chose three cases about absolute prohibitions on the dissemination of names in any form: *Cox Broadcasting*, 420 U.S. 469 (1975); *Oklahoma Publishing*, 430 U.S. 308 (1977); and *Daily Mail*, 443 U.S. 97 (1979). *Id*. at 530–31.

These absolute-prohibition cases do not apply here; a different doctrine is used to evaluate "reasonable limitations" on the "time, place, and manner" of speech. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293–294 (1984). Every federal judicial circuit, including the Fourth, applies this standard when government restricts *how* information is transmitted, not *whether* information is transmitted.[2] Nearly 2,500 federal

[2] *McGuire v. Reilly*, 260 F.3d 36, 43 (1st Cir. 2001) ("Judicial review takes on a different cast when a statute does not regulate speech *per se*, but, rather, restricts the time, place, and manner in which expression may occur"); *Marty's Adult World of Enfield, Inc. v. Enfield, Conn.*, 20 F.3d 512 (2d Cir. 1994); *Marcavage v. Philadelphia, Penn.*, 271 Fed. Appx. 272 (3d Cir. 2008); *Occupy Columbia v. Haley*, 738 F.3d 107 (4th

judicial opinions indexed by Westlaw contain the phrases "time, place, and manner restriction" and "First Amendment," yet Plaintiffs cite none of them and instead argue that "the *Daily Mail* framework applies no matter what method of information-dissemination the government seeks to restrict." Opp'n at 24. Plaintiffs are mistaken.

To justify reliance on their absolute-prohibition cases, Plaintiffs argue only that "written transcripts" do not contain all of the same information as a recording. Opp'n at 24. Perhaps not, but that is what reporting is for. Even if one cannot deduce "a judge's tone, a witness's hesitation, or a lawyer's inflection" from the transcript, a reporter can describe them or an actor can reenact them. Plaintiffs cannot show that § 1-201 acts as an absolute bar on communicating information, so their reliance on *Daily Mail* is misplaced.

B. Section 1-201 Is Content Neutral and Adequately Tailored.

Section 1-201 restricts broadcasting criminal trial recordings no matter what was said at trial. The restriction does not care what message any speaker in the trial conveyed or what message a broadcast would convey to its audience. The law "on its face" does not "draw[] distinctions based on the message a speaker conveys," so it is content neutral. *Lucero v. Early*, 873 F.3d 466, 470 (4th Cir. 2017) (quoting *Reed v. Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015)). "[A] content-neutral regulation directed at the time, place, or

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Cir. 2013); *Encore Videos, Inc. v. San Antonio*, 330 F.3d 288 (5th Cir. 2003); *Hucul Advert., LLC v. Gaines*, 748 F.3d 273 (6th Cir. 2014); *MacDonald v. Chicago*, 243 F.3d 1021 (7th Cir. 2001); *Rice v. Kempker*, 374 F.3d 675 (8th Cir. 2004); *Galvin v. Hay*, 374 F.3d 739 (9th Cir. 2004); *Citizens for Peace in Space v. Colo. Springs*, 477 F.3d 1212 (10th Cir. 2007); *DA Mortg., Inc. v. Miami Beach*, 486 F.3d 1254 (11th Cir. 2007); *A.N.S.W.E.R. Coal. (Act Now to Stop War & End Racism) v. Basham*, 845 F.3d 1199, 1213 (D.C. Cir. 2017).

manner of protected speech is ordinarily subject to intermediate scrutiny." *Ross v. Early*, 746 F.3d 546, 552 (4th Cir. 2014) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)); *see* Memo. at 22. In other words, "[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*, 239 F.3d at 609.

Plaintiffs' only argument applicable to this framework is that § 1-201 is not content-neutral.[3] They argue that because the restriction applies only to "*criminal* matter[s]," it is a content-based restriction and "necessarily turns on the content of the broadcast." Opp'n at 23 (citing *Reed*, 135 S.Ct. at 2227). But content neutrality is evaluated based on the "communicative content" of the restricted speech—the "topic discussed or the idea or message expressed." *Reed*, 135 S.Ct. at 2226–27; *see Wag More Dogs Liab. Corp. v. Cozart*, 680 F.3d 359, 366 (4th Cir. 2012) (announcing a three-part test focusing on "the message the speech conveys"). And § 1-201 does not discriminate on that basis. The participants in the criminal proceeding could have discussed *any* topic or expressed *any* message, and the statute reaches the same result: No broadcasting.

The statute is also narrowly tailored to disfavor a particular evil—the deleterious effect of broadcasting criminal trial proceedings. Interested members of the public can

[3] Fair criminal trials are "a substantial government interest," even if Plaintiffs don't believe fair criminal trials are an "interest of the highest order." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 551 (1976) ("A fair trial in a fair tribunal is a basic requirement of due process"); *cf.* Opp'n at 18. And Plaintiffs retain ample alternative channels of communicating the same information.

review or obtain copies of the recordings, but the recordings cannot be beamed into living rooms with the nightly news. This limited public disclosure carefully balances the public interest in information with trial participants' interests in fair trials. In deciding whether to use the First Amendment to undermine such a balancing effort, this Court "must be ever on [its] guard, lest [it] erect [its] prejudices into legal principles." *Chandler*, 449 U.S. at 579 (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). That is, this Court should not use the First Amendment to end states' efforts at controlled or otherwise limited disclosure of recordings that states can constitutionally refuse to distribute.

Plaintiffs' response on § 1-201's tailoring does not address whether it is "narrowly tailored" to encourage fair trials. Plaintiffs argue that other laws are more narrowly tailored, Opp'n at 21–22, but § 1-201 need not use the least restrictive means of serving a government interest, so this argument is irrelevant. Plaintiffs also confusingly argue that § 1-201 is "too narrow," because it does not restrict broadcasting of appellate arguments or *habeas corpus* proceedings. Opp'n at 22. This argument ignores the extensive discussion in *Estes* about how the televising and publicizing of the sights and sounds of the criminal trial itself cause prejudice to creep into criminal trials. *See generally* Memo. at 19–22; *United States v. Moussaoui*, 205 F.R.D. 183, 187 (E.D. Va. 2002) ("the witness' knowledge that his or her face or voice may be forever publicly known"). Appellate arguments and *habeas corpus* proceedings do not play back the underlying trial or rebroadcast those sights and sounds.

Section 1-201 is a constitutional limitation on the manner of speech. Because the Opposition ignores the entire "time, place, and manner" doctrine, Plaintiffs have offered no reason to strike down the limitation in § 1-201. The Complaint should be dismissed.

VI. SECTION 1-201 IDENTIFIES A CLEARLY DEFINED CORE OF PROHIBITED CONDUCT AND DOES NOT ENCOURAGE ARBITRARY OR DISCRIMINATORY ENFORCEMENT.

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 contend that the word "broadcast" is undefined and, thus, so vague as to leave the press and the public without a "principled standard to govern their conduct." Compl. ¶ 48; Opp'n at 27.

That argument cannot bear the weight Plaintiffs would place on it. Statutes that "require[] a person to conform his conduct to an imprecise but comprehensible normative standard" are not unconstitutionally vague. *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971). Those statutes have "'a constitutional "core' in the sense that they 'apply without question to certain activities,' even though their application in marginal situations may be a close question." *Doe v. Cooper*, 842 F.3d 833, 842–43 (4th Cir. 2016) (quoting *Parker v. Levy*, 417 U.S. 733, 755–56 (1974)).

Plaintiffs have: (1) conceded that broadcasting includes the transmission of audio or audio-visual content through radio or television; and (2) acknowledged that using courtroom video in a documentary film and courtroom audio in a podcast is prohibited by the statute. Opp'n at 27; Compl. ¶ 26; Memo. Exs. 3, 4. Thus, the statute covers a "range

of easily identifiable and constitutionally proscribable" core conduct. *Parker*, 417 U.S. at 760. Given the common meaning of the verb "broadcast"—"to make widely known" and "to send out or transmit (something, such as a program) by means of radio or television or by streaming over the Internet"—transmitting audio and video recordings of a criminal matter by radio, television, cable, satellite, internet, or other means is an identifiable core of prohibited conduct. Merriam-Webster Dictionary, broadcast, https://www.merriam-webster.com/dictionary/broadcast (last visited Aug. 30, 2019).

Because § 1-201 includes a core of clearly identifiable conduct it has "sufficient definiteness that ordinary people can understand what conduct is prohibited." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The statute is not, therefore, impermissibly vague in all of its reasonable applications. And when there are "a substantial number of situations to which [a statute] might be validly applied," the Court will not strike it down on a facial challenge. *Parker*, 417 U.S. at 760.

The existence of marginal applications such as Plaintiffs' proposed playing of an audio recording at a community event does not render the statute "standardless" or unconstitutionally vague. Compl. ¶¶ 22-23. That is because a "statute need not spell out every possible factual scenario with 'celestial precision' to avoid being struck down on vagueness grounds." *United States v. Whorley*, 550 F.3d 326, 334 (4th Cir. 2008). "[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward*, 491 U.S. at 794. And "fair notice doesn't require certainty about every hypothetical situation," *Capital Associated Indus., Inc. v. Stein*, 922

F.3d 198, 211 (4th Cir. 2019), as "[c]lose cases can be imagined under virtually any statute." *United States v. Williams*, 553 U.S. 285, 305–06 (2008).

Plaintiffs respond by pointing to hypothetical situations designed to test the limits of "broadcast" such as whether a journalist could "embed a recording in an online article subject to a paywall." Opp'n at 28. But "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid 'in the vast majority of its intended applications.'" *Hill v. Colorado*, 530 U.S. 703, 733 (2000) (citation omitted). And ambiguity in a single term does not make a statute "standardless" or otherwise unconstitutional. *Green v. Raleigh*, 523 F.3d 293, 306 (4th Cir. 2008) (rejecting claim that different understandings of the term "picketing" provided no definitive standard); *Hill*, 530 U.S. at 721–22 (explaining that "[t]he regulation of ... expressive activities," such as "picketing" or "demonstrating," is clear, and citing to Webster's Third New International Dictionary for the plain meaning of "demonstrate" and "picket"); *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); *Grayned v. Rockford*, 408 U.S. 104, 111 (1972) (concluding that the term "adjacent" in a criminal ordinance set "a sufficiently fixed place" in which certain actions were prohibited).

The Fourth Circuit's analysis of whether a gag order applied to social media postings in *In re Murphy-Brown, LLC*, 907 F.3d 788, 800 (4th Cir. 2018), likewise offers no support for Plaintiffs' assertion that § 1-201 is "standardless." *See* Opp'n at 28. Change in technology can raise questions about the applicability of a statute, but changes in

technology do not create vagueness; they create *ambiguity* that courts routinely resolve using the canons of statutory interpretation. "There will be gray areas in the interpretation of many statutes, and sometimes there will be inconsistency in the outcomes of marginal cases, but this is part and parcel of the process of statutory construction that is integral to our common law legal system." *Martin v. Lloyd*, 700 F.3d 132, 137 (4th Cir. 2012).

Plaintiffs also note that they sought "clarification" of whether their proposed conduct violated § 1-201 by sending correspondence to Administrative Judges Pierson and Tillerson Adams. Opp'n at 30; Compl. ¶¶ 28–31. But Maryland law expressly prohibits such advisory opinions. *State Center, LLC v. Lexington Charles Ltd. P'ship*, 438 Md. 451, 591 (2014). And the proper method for determining "any question of construction or validity arising under the . . . statute . . . and obtain[ing] a declaration of rights, status, or other legal relations" is in a state declaratory judgment action. Md. Code Ann., Cts. & Jud. Proc. § 3-406 (LexisNexis 2013). Plaintiffs' errant claim that this lawsuit is their sole recourse to ascertain "what they must do to avoid imprisonment," Opp'n at 30, ignores this option. And the Fourth Circuit has already rejected a similar action "to gain a determination as to whether a proposed [action] is legal under" a state statute. *Martin*, 700 F.3d at 137. Plaintiffs have a 38 "year long track record at their disposal and could not cite to a single instance in which [the State] had instituted the kind of criminal prosecution that concerns them. To the extent this statutory scheme may give rise to abuse in the future, [they] are free to bring an as-applied challenge. However, there is little basis for the facial challenge they bring here." *Martin*, 700 F.3d at 139.

Plaintiffs then press this Court for a construction of § 1-201 limited to "extended coverage" by television, radio, photographic or recording equipment. Opp'n at 30–32. This argument unfairly freezes the words of the statute in time. When § 1-201 was enacted in 1981, court proceedings were not recorded by the court; the record of a proceeding was the court stenographer's notes and any transcript prepared from those notes. In enacting § 1-201, the legislature necessarily contemplated the use of the existing technology to record and broadcast. Over the next 38 years, Maryland trial courts instituted a program of recording court proceedings. *See* Md. Rule 16-503(a)(1). But the statute today prohibits the same conduct it did then—recording and broadcasting—and it may be applied to modern methods of broadcasting. "Words in statutes can enlarge or contract their scope as other changes, in law or in the world, require their application to new instances or make old applications anachronistic." *West v. Gibson*, 527 U.S. 212, 218 (1999).

Plaintiffs also suggest the word "broadcast" could reach reading transcripts or reenacting court proceedings. Opp'n at 32. Neither the text of the statute nor principles of statutory construction support this reading. Plaintiffs' reliance on a federal trial court opinion about live tweeting from a courtroom, *id*., does not shed light on the meaning of "broadcast" in § 1-201 because other Maryland rules already prohibit the use of an electronic device "to receive, transmit, or record sound, visual images, data, or other information" inside a courtroom. Md. Rule 16-208(b)(2)(E)(i).

Section 1-201 is sufficiently precise to give Plaintiffs and others fair notice of what conduct is prohibited. It is therefore constitutional.

CONCLUSION

The Complaint should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 30, 2019, I served a copy of this Reply on all parties entitled to service by filing it in this Court's CM/ECF system.

/s/ Joseph Dudek
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