No. 20-1094

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRANDON SODERBERG; BAYNARD WOODS; OPEN JUSTICE BALTIMORE; BALTIMORE ACTION LEGAL TEAM; QIANA JOHNSON; LIFE AFTER RELEASE,

Plaintiffs-Appellants,

v.

HON. AUDREY J. S. CARRION, Administrative Judge for Maryland's Eighth Judicial Circuit; HON. SHEILA R. TILLERSON ADAMS, as Administrative Judge for Maryland's Seventh Judicial Circuit,

Defendants-Appellees,

and PATRICIA TRIKERIOTIS, as Court Reporter for Baltimore City; ROBIN WATSON, as Court Reporter for Prince George's County,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
The Honorable Richard D. Bennett
Case No. 1:19-cv-01559-RDB

BRIEF OF *AMICUS CURIAE* CATO INSTITUTE IN SUPPORT OF PLAINTIFFS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a non-partisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. The Cato Institute's Project on Criminal Justice was founded in 1999 and focuses on the proper role of the criminal sanction in a free society, the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers.

SUMMARY OF ARGUMENT

Plaintiffs want to republish recordings that were created by Maryland courts, were lawfully obtained, and accurately reproduce

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[1] No party or party's counsel has authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person has contributed money that was intended to fund preparing or submitting the brief, except that UCLA School of Law paid the expenses involved in filing this brief.

All parties have consented to the filing of this *amicus* brief.

government proceedings that are of interest to the public. But Maryland law forbids broadcasting such recordings of criminal proceedings, and threatens violators with contempt sanctions, including jail. *See* Md. Code Ann., Crim. Proc. § 1-201.

This Maryland cannot do. "[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 103 (1979). This rule promotes an important "function of the press"—"to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975).

Section 1-201 does not further a state interest of the highest order; indeed, it is not even narrowly tailored to further a substantial state interest. The state's asserted interest in the fairness of trials is on balance inhibited, not furthered, by diminishing media coverage and thus public scrutiny of trials, as the Supreme Court recognized in *Cox*. But even if pretrial public scrutiny may prejudice

some unusually infamous defendants, § 1-201 is unconstitutional because it is not narrowly tailored to those exceptional situations—instead, it applies to the entire recording of every case in perpetuity.

Nor does § 1-201 provide Plaintiffs with other methods of speaking that are similarly affordable, reach the same audience, and carry the same message—the elements that must be present for the government to show that the law "leave[s] open ample alternative channels for communication," *City of Ladue v. Gilleo*, 512 U.S. 43, 56-57 (1994) (internal quotation marks omitted). For instance, requiring Plaintiffs to publish or act out trial transcripts would be a poor substitute for playing the audio in, say, a podcast: a listening audience cannot read a transcript, and any reenactment of a transcript is likely to lack accuracy and verisimilitude.

And where, as here, a statute raises significant constitutional questions, courts must "avoid constitutional difficulties by adopting a limiting interpretation if such a construction is fairly possible." *Skilling v. United States*, 561 U.S. 358, 406 (2010) (internal citation omitted). This Court may do this by interpreting § 1-201(a) as bar-

ring the public only from recording or broadcasting their own transmission of the proceedings, and as exempting republishing court-approved recordings made under § 1-201(b) and made available to the public by Maryland Rule 16-504(h).

ARGUMENT

I. Restrictions on publishing information that the government has released and that the publisher lawfully obtained must pass strict scrutiny.

"Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it." *Cox Broad. Corp.*, 420 U.S. at 496. But Maryland does just that. Maryland law requires that trials be recorded, that the recordings be made available for inspection, and that recordings be copied for any person who pays the reasonable costs of duplication—yet it prohibits the broadcast of such recordings in any criminal matter held in trial court. Md. Rules 16-502(a), 16-503(a), 16-504(h); Md. Code Ann., Crim. Proc. § 1-201(a).

Plaintiffs do not want to broadcast live during ongoing judicial proceedings, nor do they want to make their own recordings for later use. Thus, this case is different from the many previous cases

that limit newsgathering and sharing during a trial. *See, e.g.*, *Conway v. United States*, 852 F.2d 187, 188-89 (6th Cir. 1988) (per curiam) (rejecting a request to broadcast and photograph an upcoming trial); *United States v. Edwards*, 785 F.2d 1293, 1294, 1296 (5th Cir. 1986) (per curiam) (rejecting a journalist's request to telecast, broadcast, and record upcoming trial proceedings); *United States v. Kerley*, 753 F.2d 617, 617-18, 622 (7th Cir. 1985) (rejecting a pretrial request to photograph, record, and broadcast proceedings in the courtroom); *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 17, 23-34 (2d Cir. 1984) (rejecting a cable news network's request to televise a federal trial); *United States v. Hastings*, 695 F.2d 1278, 1279 (11th Cir. 1983) (rejecting a request to use electronic audio-visual recording devices during an upcoming trial). Rather, Plaintiffs want only to republish audio and video that was previously created by the court and that they lawfully obtained. *See* JA 11-12 ¶¶ 10-11; JA 15-18 ¶¶ 20-23.

"[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitu-

tionally punish publication of the information, absent a need to further a state interest of the highest order." *Daily Mail*, 443 U.S. at 103; *see also Florida Star v. B.J.F.*, 491 U.S. 524, 533-37 (1989). Here, like in *Daily Mail* and *Florida Star*, the government has released information to members of the public, but it has forbidden the recipients from speaking about it. *Daily Mail*, 443 U.S. at 98-100; *Florida Star*, 491 U.S. at 526-28. In doing so, it has ignored "a less drastic means than punishing truthful publication" for vindicating its interest in preventing dissemination of trial recordings: declining to make those recordings public in the first place. *Florida Star*, 491 U.S. at 534.

The Constitution does not compel the state to create or release recordings of all court proceedings. But once Maryland released the recordings, it cannot then prohibit people from using them in their speech unless such a prohibition passes the strict scrutiny applied in cases such as *Florida Star*.

II. Section 1-201 cannot be upheld as a time, place, and manner restriction because it does not leave open ample alternative channels of communication.

The district court concluded that the broadcast ban was content-

neutral, JA 84, which means that it can be upheld if it is "narrowly tailored to serve a significant governmental interest"—but only if it also "leave[s] open ample alternative channels for communication of the information." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). To qualify as leaving open ample alternative channels, a restriction must leave speakers with alternative methods of communicating that reach the same audience, that are affordable, and that are not likely to carry a significantly different message than the one the speaker prefers to speak. *See City of Ladue*, 512 U.S. at 56-57; *Linmark Assocs., Inc. v Willingboro Twp.*, 431 U.S. 85, 93 (1977) (pointing to similar factors with regard to a commercial speech restriction, which was also evaluated under intermediate scrutiny). Each of Plaintiffs' alternatives to broadcasting the trial recordings is more expensive, reaches a different audience, or fails to carry the intended message.

In a radio program, podcast, documentary, or community meeting, Plaintiffs could hire actors to read the trial transcript, but this would undermine the speaker's intended message, because the audience could reasonably doubt that the recreation is accurate.

Plaintiffs are not aiming to create docudramas; the substance and effectiveness of their message relies on its strict accuracy and credibility. Actor portrayals are naturally less credible than the actual recording.

Hiring even one actor also costs money; and plaintiffs would likely have to hire multiple actors to play the lawyers, the witnesses, and the judge. Actual Maryland court recordings, on the other hand, are available for the cost of copying the recording.

Plaintiffs could distribute copies of the trial transcript or publish the transcript on a website, but this could be more expensive and would reach a different (and likely much smaller) audience. Speakers like plaintiffs Open Justice Baltimore, the Baltimore Action Legal Team, and Qiana Johnson—who want to use the recordings at community events, JA 16-18 ¶¶ 21-22—would have to pay to make copies of the transcript for everyone. Then they would have to hope that the audience actually reads the transcript.

In audio and video presentations, a transcript would also reach a smaller audience. Podcasts and radio shows have broad reach be-

cause, unlike reading, they can be enjoyed while commuting or performing chores—stopping these other tasks or waiting until later, and then finding the trial transcript at a second location, requires extra effort that few listeners would take.

It would be even more inadequate for Plaintiffs to provide instructions on how to request the recording directly from the court. Not only would each audience member have to go to the court or its website; each member would also have to pay for the recording, something few listeners are likely to do (especially if they are used to hearing the podcast or radio program itself for free).

In a documentary, Plaintiffs could display text from the transcript on the screen, but large blocks of text break the flow of the documentary's narration, thus making the documentary less effective and potentially alienating much of its audience. Even if viewers do not just turn off the text-filled documentary, they will likely pay less attention to scrolling text than they would to an actual trial recording. As a result, fewer people will receive the message the speaker is intending to send.

These alternative communication methods may also exacerbate

the government's concern (discussed in more detail in Part III) that public scrutiny threatens the trial's truth-seeking function, by making trial participants fear how their words will be represented in the media. Actors may take artistic license with the transcript, representing the witnesses' statements in a more exaggerated way than the witnesses said them. The public may thus end up basing its opinions on these inaccurate representations—which may worry many trial participants more than the danger that the public will hear the participants' actual words.

The popular podcast *Serial*, whose producers were threatened with contempt for violating § 1-201, illustrates why a transcript alone is not an adequate alternative channel. *See* JA 9 ¶ 26. In *Serial*, journalists aimed to tell the story of Adnan Syed in a way that gave the public a new perspective on whether trials are reliable and whether Mr. Syed is guilty. *See* Sarah Larson, *What "Serial" Really Taught Us*, New Yorker (Dec. 18, 2014), https://www.newyorker.com/culture/sarah-larson/serial-really-taught-us ("[W]hat we've been listening to is not a murder mystery: it's a deep exploration of

the concept of reasonable doubt, and therefore an exposé, if unwittingly so, of the terrible flaws in our justice system. . . . And Adnan Syed is just the tip of the iceberg."). To do that effectively, journalists broadcast audio of Mr. Syed's trial, in violation of § 1-201. Because *Serial* had such a compelling and entertaining format, it was downloaded 40 million times as of December 23, 2014, near the end of the first season. Amy Roberts, *The 'Serial' Podcast: By the Numbers*, CNN (Dec. 23, 2014), https://www.cnn.com/2014/12/18/showbiz/feat-serial-podcast-btn/index.html. If, instead, the podcast had read the transcript aloud to listeners, the product would have been less interesting, likely decreasing the size of the audience—and the remaining listeners would have lost the ability to hear each witness, thus undermining their ability to evaluate both Mr. Syed's guilt and the functioning of their criminal justice system.

III. Whether Section 1-201 is judged under intermediate or strict scrutiny, it cannot pass such scrutiny.

In any event, whether § 1-201 must be necessary to serve an interest of the highest order under *Florida Star*, or need only be narrowly tailored to a substantial government interest under *Clark*

(despite its failure to leave open ample alternative channels), § 1-201 cannot satisfy either test.

A. Prohibiting republication of courtroom audio after the proceedings have ended is not narrowly tailored to achieve a substantial interest.

The district court concluded that "a ban on broadcasting criminal proceedings furthers the following substantial government interests: (1) ensuring fair trials for the accused; (2) preserving order and decorum in the courtroom; and (3) 'an institutional interest in procedures designed to increase the accuracy of the essential truth-seeking function of the trial.'" JA 86 (quoting *Hastings*, 695 F.2d at 1283). But this prohibition on republishing the entirety of court-provided recordings in all criminal cases, even after the trial has ended, is not narrowly tailored to achieve these interests.

1. Republication of court-created recordings will not impair a defendant's ability to receive a fair trial.

American court proceedings take place in public. That necessarily creates some risk that information from pretrial proceedings may eventually influence future jurors, or that witnesses might be reluctant to say certain things that they know will be publicized.

But this has not been seen as a substantial enough concern to justify speech restrictions. A court, for instance, generally cannot bar "reporting or commentary on judicial proceedings held in public" in order to guarantee a defendant's fair trial right, except in extraordinary cases, *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 570 (1976); concerns about prejudicing jurors, for instance, are generally handled through probing *voir dire*, not through speech restrictions, *id.* at 602. Likewise, the broadcast of a trial recording is not likely to pose any greater threat to the fairness of a trial.

Moreover, if some jurors or witnesses may be concerned that a broadcast would commit their exact words to a publicly accessible permanent record, that is equally true of the trial recordings and transcripts made by the court. Nevertheless, the public likewise has a right to access such court records. *See Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978). Republishing trial recordings would at most marginally increase these effects on trials, especially because Maryland already chooses to create the recordings and make them available to any person who requests them.

Indeed, when the court creates its own recording and then releases it, as it does in Maryland, this gives the court ample ability to protect the defendant from undue prejudice. When a court finds that certain portions of a recording "should and lawfully may be shielded from public access and inspection," the court "shall direct that appropriate safeguards be placed on that portion of the recording." Md. Rule 16-504(g). Indeed, even entire recordings may be withheld from the public when proceedings are closed to the public or when "ordered by the court." *See* Md. Rule 16-504(h)(1); *see also* Md. Rule 16-504(i). Thus, when a recording is released to the public, this reflects the court's judgment that there is nothing in the recording that particularly jeopardizes the defendant's rights.

2. Recordings created by the court do not disrupt the order and decorum of judicial proceedings.

The Court in *Estes v. Texas*, 381 U.S. 532, 548 (1965), expressed concern about the impact of television cameras on the "solemn decorum of court procedure." In *Estes*, "at least 12 cameramen were engaged in the courtroom throughout the hearing taking motion and still pictures and televising the proceedings. Cables and wires were snaked across the courtroom floor, three microphones were on

the judge's bench and others were beamed at the jury box and the counsel table." *Id.* at 536. "[T]he activities of the television crews and news photographers led to considerable disruption of the hearings." *Id.* But no similar concerns are created by republishing court-created recordings, which involves no unnecessary intrusions into the courtroom.

Estes also stressed the "national notoriety" of the prosecution at the heart of that case. *Id.* at 535. Indeed, Justice Harlan, the critical fifth vote, joined the majority opinion only insofar as it applied to notorious defendants, explicitly reserving the question whether broadcasting would violate the due process rights of an ordinary defendant. *Id.* at 590 (Harlan, J., concurring) ("The probable impact of courtroom television on the fairness of a trial may vary according to the particular kind of case involved. . . . The Estes trial was a heavily publicized and highly sensational affair. I therefore put aside all other types of cases . . . ."). Under the *Marks* rule, Justice Harlan's opinion is controlling. *See Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no

single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.") (internal quotation marks and citation omitted). Yet § 1-201 sweeps far beyond a prohibition on broadcasting the trials of notorious defendants who may face a possibility of prejudice, and instead covers the vast majority of trials that are unlikely to garner significant contemporaneous public attention.

3. Republication of recordings will not jeopardize the accuracy of the essential truth-seeking function of the trial.

The district court justified § 1-201 on the grounds that the government has an interest in "procedures designed to increase the accuracy of the essential truth-seeking function of the trial," JA 86—but of course, publicity itself is one such procedure.

The premise of our system of public trials and court hearings is that public access to information about criminal trials promotes "the fairness of trials" through "the beneficial effects of public scrutiny upon the administration of justice." *Cox Broad. Corp.*, 420 U.S.

at 495. Public scrutiny makes it more likely that government officials act properly in administering justice, because they know that the public is watching and will criticize behavior that seems unfair or improper. And public scrutiny ensures that voters are able to consider whether the administration of justice is fair, and to take this into account in electing district attorneys, judges, and legislators.

Indeed, the Eleventh Circuit case that the district court cited to support this third interest (*Hastings*) viewed this third interest as being the same as the first two interests, "stated another way." 695 F.2d at 1283. Thus, a restriction that is not narrowly tailored to the government's interest in fair trials or courtroom decorum, such as § 1-201, is also unlikely to be narrowly tailored to the interest in the truth-seeking function of trials.

The district court cited *Estes* to explain how republishing could compromise the truth-seeking function. JA 86. But the Court's concerns in *Estes* focus on the effect of the media obtrusively placing their own television cameras in the courtroom. *See Estes*, 381 U.S. at 544-50 (outlining the unconscious effects of television cameras in

the courtroom on jurors, witness testimony, the judge's attention, and the public's perception of the defendant). Plaintiffs merely wish to use recordings that the court system itself has chosen to unobtrusively create.

B. Redactions, where necessary, are a more narrowly tailored means of accomplish any interests the government may have.

The recordings that plaintiffs seek to use are not a live broadcast of proceedings. The court system creates the recordings, and controls them before release. The court therefore has ample opportunity to redact sensitive information, much like with a transcript, without prohibiting republication of the recordings.

The government thus has the "power to forestall or mitigate the injury caused by [the information's] release," such as by "classify[ing] certain information, [and] establish[ing] and enforc[ing] procedures ensuring its redacted release." *Florida Star*, 491 U.S. at 534. Yet instead of taking such a narrowly tailored approach, § 1-201 categorically restricts the speech—reaching beyond the narrow range of material that the government could properly redact from

court records, and instead covering the rebroadcast of all parts of all criminal proceedings, indefinitely.

IV. Courts cannot require agreement to republication restrictions as a condition for releasing recordings.

Some courts apparently require people who get recordings to sign an agreement not to broadcast the recordings as a condition of lawfully obtaining them. *See, e.g.*, JA 68. But a waiver of First Amendment rights is enforceable only if (1) it is made knowingly and voluntarily, and (2) "under the circumstances, the interest in enforcing the waiver is not outweighed by a relevant public policy that would be harmed by enforcement." *Overbey v. Mayor of Baltimore*, 930 F.3d 215, 223 (4th Cir. 2019). "[T]he second prong is decisive as a matter of law." *Id.*

Here, the "public policy that would be harmed by enforcement" is the policy of protecting the press's role in "guarantee[ing] the fairness of trials and . . . bring[ing] to bear the beneficial effects of public scrutiny upon the administration of justice." *Cox Broad. Corp.*, 420 U.S. at 492. Plaintiffs intend to use the recordings for precisely the public scrutiny contemplated in *Cox Broadcasting*, in their "reporting projects," in "their efforts to educate the public and increase

transparency within Baltimore's legal system," and to "highlight the impact of their participatory-defense work and teach others how to become effective community advocates." JA 16-18 ¶¶ 21-23. And on the other side of the balance, the government's "interest in enforcing any waiver" is weak, for reasons given in Part III.

This Court, however, might not need to reach this question, to the extent that it concludes § 1-201 itself is unconstitutional as applied to Plaintiffs (see Parts I-III) or should be interpreted as not applying to Plaintiffs (see Part V). And in any event the question whether particular Plaintiffs expressly agreed to the restrictions, as a condition of access, is a factual matter that ought not be resolved at the pleading stage.

V. Alternatively, the canon of constitutional avoidance requires that the Maryland law be construed only to prohibit live broadcast and recording.

Where a statute raises significant constitutional questions, courts must "avoid constitutional difficulties by adopting a limiting interpretation if such a construction is fairly possible." *Skilling*, 561 U.S. at 406 (internal citation omitted). Two interpretations of § 1-

201 are fairly possible here, but only one—the one accepted by the district court—raises serious constitutional questions.

Section 1-201 provides that,

> (a)(1) Except as provided in subsection (b) of this section, a person may not record or broadcast any criminal matter . . . that is held in trial court . . . .
>
> (b) Subsection (a) of this section does not apply to the use of electronic or photographic equipment approved by the court . . . (2) to perpetuate a court record.

The paired verbs "record or broadcast" in § 1-201(a)(1) should be read to refer to the two possible means by which a private entity may itself capture audio or video in the courtroom—by recording for the future ("record") or broadcasting it live ("broadcast")—and not to later distribution of a court-created recording made under § 1-201(b). Indeed, § 1-201(b) makes clear that "Subsection (a) . . . does not apply to the use of electronic or photographic equipment approved by the court . . . to perpetuate a court record." This exception is not limited only to the § 1-201(a)(1) prohibition on "record[ing]"; it equally applies to the § 1-201(a)(1) prohibition on "broadcasting." Broadcasting recordings created through "the use of electronic or photographic equipment approved by the court" should thus be treated as permitted by subsection (b).

So read, the statute prevents the disruption of trials by media outlets using bulky and conspicuous recording or broadcasting equipment in the court. *See Estes*, 381 U.S. at 536. It ensures the court can make redactions for privacy permitted by Maryland court rules. *See* Md. Rule 16-504(g). And it avoids the First Amendment problems discussed in Parts I-IV.

CONCLUSION

The First Amendment protects the publication of lawfully obtained information of public interest, unless a restriction on such publication is necessary to achieve a compelling governmental interest. And "punishing the press for its dissemination of information which is already publicly available is relatively unlikely to advance the interests in the service of which the State seeks to act." *Florida Star*, 491 U.S. at 535. Section 1-201's ban on recording or broadcasting is not narrowly tailored to achieve the government's goals, nor does it provide ample alternative channels of communication. Alternative tools, such as redactions, can better serve the goals of fair trials.

An agreement not to rebroadcast would also be unenforceable even were the agreement a condition to legally obtaining the recording when, as here, the public policy harmed by enforcement outweighs the interest in enforcing the waiver. And because of all this, this Court should avoid the constitutional challenge by reading § 1-201's "broadcast" prohibition as covering only live broadcast from the courtroom.

Respectfully Submitted,

s/ Eugene Volokh

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4156 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2016 in 14-point Century Schoolbook.

Dated: April 10, 2020

s/ Eugene Volokh
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief *Amicus Curiae* with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on April 10, 2020.

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Dated: April 10, 2020

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