public," and that the Sixth Amendment's public trial right similarly conferred no "special benefit on the press." *Id.* at 609-10.

The significance of the First Amendment discussion in *Warner Communications* was substantially limited just two years later. In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), the Court squarely held for the first time that the First Amendment's express protections of free speech, freedom of the press, and the right to petition the government carry with them an implied right of *public* access to certain government proceedings and records.

As it had in *Warner Communications,* the Court said that "media representatives enjoy the same right of access as the public," but held for the first time that the First Amendment affirmatively conveys a right of access in some situations. *Id.* at 573. The specific issue presented was the right to attend a criminal trial, which the Court found protected by the First Amendment because "without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and 'of the press could be eviscerated.'" *Id.* at 580 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)).

The recognition of a First Amendment access right was hailed at the time as a "watershed" event, *id.* at 582 (Stevens, J., concurring), that affirmed the structural role the First Amendment plays in our democracy. *See, e.g.*, Christopher C. Spencer, *Public Right of Access to Criminal Trials: Richmond Newspapers, Inc. v. Virginia*, 94 Harv. L. Rev. 149 (1980). In three subsequent cases, taken and decided in short order following *Richmond Newspapers*, the Supreme Court developed an analysis for identifying when the First Amendment access right exists. *See Globe Newspaper*, 457 U.S. at 606-07; *Press-Enterprise Co. v. Super. Ct.*, 464 U.S. 501, 505-11 (1984) (*Press-Enterprise I*); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8-10 (1986) (*Press-Enterprise II*).

These seminal decisions define the scope of the constitutional access right in two ways. First, they articulate a test to identify the existence of the access right based on "experience and logic," considering whether a type of proceeding has traditionally been open to the public and whether public access contributes to the proper functioning of the governmental process at issue. *See Press-Enterprise II*, 478 U.S. at 9; *Press-Enterprise I*, 464 U.S. at 505; *Globe Newspaper*,

457 U.S. at 605; *Richmond Newspapers*, 448 U.S. at 582-84 (Stevens, J., concurring); *see also El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147, 149-50 (1993). Second, two of these decisions hold that the First Amendment access right applies to the transcripts of proceedings that are themselves subject to the constitutional access right, without separately considering the "experience and logic" of access to the transcripts. In *Press-Enterprise I*, the Court found a constitutional violation in the sealing of the transcript of closed jury selection proceedings without the factual findings required to overcome the First Amendment access right. 464 U.S. at 513. In *Press-Enterprise II*, the Court held that the trial court violated the First Amendment access right by refusing to unseal the transcript of a closed hearing. 478 U.S. at 13-14.

Since these decisions defined the constitutional access right, this Court has also held that the right extends to certain judicial records as well as judicial proceedings. The same year *Press Enterprise II* was handed down, this Court held that "the First Amendment right of access *applies to documents* filed in connection with plea hearings and sentencing hearings in criminal cases, as well as to the hearings

themselves." *In re Washington Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986). Over the subsequent decades, this Court repeatedly reaffirmed the holding that judicial records are subject to a constitutional right of public access. *See, e.g.*, *Doe v. Public Citizen*, 749 F.3d 246, 267 (4th Cir. 2014) (First Amendment access rights extend to judicial opinions); *Fisher v. King*, 232 F.3d 391, 396 (4th Cir. 2000) (First Amendment access rights apply to "documents submitted in [criminal] trials"); *In re Charlotte Observer*, 882 F.2d 850, 852 (4th Cir. 1989) (First Amendment access rights apply to closure and sealing orders); *Rushford v. New Yorker Magazine Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) (First Amendment access rights apply to documents submitted in connection with summary judgment motions). Since *Richmond Newspapers*, other circuits have also uniformly held that the First Amendment right of access does indeed apply to a variety of judicial records.[1]

[1] *See, e.g.*, *United States v. DeJournett*, 817 F.3d 479, 484-85 (6th Cir. 2016) (plea agreements); *United States v. Ochoa-Vasquez*, 428 F.3d 1015, 1030 (11th Cir. 2005) (plea colloquies, sentencing memoranda, and downward-departure motions); *In re Providence Journal Co., Inc.*, 293 F.3d 1, 10 (1st Cir. 2002) (constitutional right generally applies to documents submitted in the prosecution and defense of criminal proceedings); *United States v. Smith*, 123 F.3d 140, 146 (3d Cir. 1997) (records of a criminal proceeding); *Washington Post v. Robinson*, 935 F.2d 282, 287-88 (D.C. Cir. 1991) (plea agreement); *In re Search*

These holdings all recognize the existence of a constitutional right of public access that *Warner Communications* did not contemplate and did not squarely address. The district court plainly erred in reading that case as eliminating any need for it to consider whether Maryland's restrictions on the dissemination of audio transcripts of court proceedings can be squared with the public's right of access to judicial records under the First Amendment.

B. Maryland's Audio Recordings Are Judicial Records Subject to the First Amendment Public Access Right

Once the insignificance of *Warner Communications* to this case is recognized, the existence of a First Amendment right of access to Maryland's audio recordings cannot seriously be questioned. Almost all proceedings held in open court before a trial judge in Maryland are electronically recorded. *See* Md. Rule 16-502 (in district courts, which oversee lower-level civil and criminal proceedings, "all trials, hearings,

---

Warrant for Secretarial Area Outside Office of Gunn, 855 F.2d 569, 573 (8th Cir. 1988) (documents filed in support of search warrant applications); *In re N.Y. Times Co.*, 828 F.2d 110, 114 (2d Cir. 1987) (suppression motion papers); *United States v. Peters*, 754 F.2d 753, 763 (7th Cir. 1985) (trial exhibits); *CBS, Inc. v. U.S. Dist. Ct.*, 765 F.2d 823, 825 (9th Cir. 1985) (documents filed in pretrial proceedings and post-trial sentencing records).

testimony, and other proceedings before a judge in a courtroom shall be recorded verbatim in their entirety"); 16-503 (same in circuit courts). These recordings are created and maintained by the Maryland courts, and court officials are required to "make a copy" of any audio recording "available to any person upon written request." Md. Rule 16-504(h) ("Right to Obtain Copy of Audio Recording").

In the district courts, these audio recordings are the *only* verbatim record of what transpired in a proceeding that is available to a non-party. An individual may obtain a written transcript "*only* when the person making the request has appealed a District Court judgment in a civil case where the amount of the claim is more than $5,000," but "[a]nyone may request a copy of an audio recording of a case, regardless of whether the individual making the request was a party in that case."[2]

Maryland does not consider these audio recordings "official" transcripts for certain purposes, but the recordings nonetheless constitute judicial records subject to the First Amendment access right. While this Court has "never explicitly defined 'judicial records,' it is

[2] *Transcripts and Recordings*, DISTRICT CT. MD., https://www.courts.state.md.us/district/selfhelp/transcriptsrecordings (emphasis in original).

commonsensical that judicially authored or created documents are judicial records." *United States v. Appelbaum*, 707 F.3d 283, 290 (4th Cir. 2013). And this Court repeatedly has recognized that records actually used during or reflecting the results of judicial proceedings qualify as judicial records because the right of access to such documents is "a necessary corollary of the capacity to attend the relevant proceedings." *Doe v. Public Citizen*, 749 F.3d at 267 (right applies to judicial opinions); *see also In re Associated Press*, 172 F. App'x 1, 3 (4th Cir. 2006) (right applies to records filed in connection with criminal proceedings); *Rushford*, 846 F.2d at 253 (right applies to documents filed in connection with summary judgment motion); *In re Washington Post Co.,* 807 F.2d at 390 (right applies to documents filed in connection with plea and sentencing hearings).

This Court and others courts of appeal have repeatedly held that the First Amendment right of access extends specifically to transcripts of public judicial proceedings. *See Fisher*, 232 F.3d at 397; *United States v. Antar*, 38 F.3d 1348, 1360 (3d Cir. 1994); *U.S. v. Valenti*, 987 F.2d 708, 714 (11th Cir. 1993); *United States v. Edwards*, 823 F.2d 111, 113 (5th Cir. 1987); *see also Level 3 Communs., LLC v. Limelight*

Networks, Inc., 611 F. Supp. 2d 572, 573 (E.D. Va. 2009). As one court put it, "[i]t would be an odd result indeed were we to declare that our courtrooms must be open, but that transcripts of the proceedings occurring there may be closed, for what exists of the right of access if it extends only to those who can squeeze through the door?" *Antar*, 38 F.3d at 1360.

The constitutional right of access to verbatim records of what transpires in court is important because it "facilitates the openness of the proceeding itself by assuring the broadest dissemination." *Id.* "Publicity of such records, of course, is necessary in the long run so that the public can judge the product of the courts in a given case." *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 203 F.3d 291, 303 (4th Cir. 2000). Public access to transcripts of proceedings also protects the legitimacy of the legal system, because "[a]ny step that withdraws an element of the judicial process from public view makes the ensuing decision look more like a fiat and requires rigorous justification." *Doe v. Public Citizen*, 749 F.3d at 266 (quoting *Hicklin Eng'g, L.C. v. Bartell*, 439 F.3d 346, 348 (7th Cir. 2006)).

The audio recordings of criminal proceedings routinely made by Maryland courts, preserved by the court clerk and made available to the public like any other record on the docket, are judicial records subject to this First Amendment access right. Indeed, the audio transcripts made by the Maryland courts are often the only record available to a non-party that discloses exactly what occurred in a district court proceeding. *See* pp. 11-12*, supra*. Even when a written transcript is available, it is significantly less expensive to obtain a copy of the court-made audio transcript, at around $20 to $40 for each ninety-minute CD compared to over $1,000 for the typical written transcript of a full-day proceeding.[3]

Just as with a written transcript, access to these audio transcripts functions as a "'a necessary corollary of the capacity to attend the relevant proceedings.'" *Doe v. Public Citizen*, 749 F.3d at 267 (quoting *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93 (2d Cir. 2004). The audio recordings are thus subject to the same First Amendment access rights as written transcripts.

---

[3] *See CD Order Form*, PRINCE GEORGE'S COUNTY CIR. CT., https://www.princegeorgescourts.org/DocumentCenter/View/74/CD-Transcript-Order-Form-PDF ($20 per CD); *Request for Copy of Digital Recording*, BALTIMORE CITY CIR. CT., http://www.baltimorecitycourt.org/wp-content/uploads/2016/12/Audio-Request-Form.pdf ($40 per date).

C. The First Amendment Access Right Includes the Right To Copy and Disseminate a Judicial Record

When the First Amendment access right attaches to a court record it becomes a *public* record. This necessarily means it can be copied and disseminated publicly—attributes inherent in the very meaning of "public." *See, e.g.*, *Public*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/public (defining "public" as "1. exposed to general view: open"); *Public,* New Oxford American Dictionary, Oxford University Press, 3 ed. (2010) (defining "public" to mean "open to or shared by all the people of an area or country"). Consistent with this meaning, the Supreme Court explained long ago that transcripts of public judicial proceedings can be published to the world at large, as a matter of right:

> A trial is a public event. What transpires in the court room is public property. If a transcript of the court proceedings had been published, we suppose none would claim that the judge could punish the publisher for contempt.

Craig v. Harney, 331 U.S. 367, 374 (1947) (reversing order of contempt for publishing news reports about a trial that cast the judge in an unfavorable light).

While courts since *Richmond Newspapers* have had little need to address the rights to copy and disseminate that are inherent in the constitutional right of access to judicial records, even at common law judicial records can freely be copied and disseminated absent findings that a proper justification exists to limit the right. *See, e.g.*, *United States v. Mitchell*, 551 F.2d 1252, 1260 (D.C. Cir. 1976) (tape recorded evidence subject to the public's common law right to inspect judicial records), *rev'd on other grounds sub nom. Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589 (1978). Thus, for example, both the Second and Third Circuits have held that the common law right of access to judicial records conveys a qualified right to copy and broadcast videotape evidence, without addressing the implications of the First Amendment right. *See United States v. Martin*, 746 F.2d 964, 973 (3d Cir. 1984); *Application of Nat'l Broad. Co., Inc.*, 635 F.2d 945, 950 (2d Cir. 1980). The common law, they recognized, itself requires a "strong presumption in favor of public inspection and copying" that allows the media also to

broadcast judicial records when they are in videotape format. *Application of Nat'l Broad. Co., Inc.*, 635 F.2d at 952.[4]

In short, because Maryland's audio recordings are subject to the First Amendment right of public access, their public dissemination can only be properly limited when the standards governing the constitutional access right are satisfied.

II. MARYLAND'S BLANKET PROHIBITION AGAINST DISSEMINATION OF ITS AUDIO TRANSCRIPTS VIOLATES THE FIRST AMENDMENT ACCESS RIGHT

As Appellants demonstrate, Section 1-201 cannot survive the strict scrutiny required whenever a state actor seeks to prevent the press from disseminating true newsworthy information. *See* Appellants' Br. at 41-43; *see e.g.*, *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975). Indeed, when Section 1-201 is applied to prevent the press from disseminating audio tapes lawfully in their possession, it constitutes a prior restraint in violation of their First Amendment rights. *See Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 559 (1976).

[4] Some courts have concluded that the right to copy and disseminate judicial records is only a common law right, by misreading *Warner Communications* the same manner as the district court did here. *See, e.g., Belo Broad. Corp.*, 654 F.2d at 427; *Beckham*, 789 F.2d at 408; *United States v. Edwards*, 672 F.2d 1289, 1292 (7th Cir. 1982).

Viewed through either lens, the law is patently unconstitutional. It also violates the public's First Amendment right of access to judicial records.

Strict constitutional standards must be satisfied before imposing any limitation on the public's First Amendment access right. Because the audio transcripts at issue are subject to that constitutional right, Maryland cannot simply decide that it will no longer make them available to the public. Nor can it prevent their public use and dissemination without a case-by-case showing of a substantial probability of harm to a compelling governmental interest.

A. The First Amendment Access Right Can Only Properly Be Limited Based On a Case-by-Case Determination That The Constitutional Standards Have Been Satisfied

The Supreme Court has made clear that the First Amendment access right, while not absolute, can be limited only where there exists a substantial probability that public access will harm an overriding governmental interest and no alternative to closure will protect against that harm. *See, e.g.*, *Press Enterprise II*, 478 U.S. at 13-14; *Press Enterprise I,* 464 U.S. at 10. To satisfy this constitutional standard, this Court requires three steps to be taken before any limitation of the access right can be upheld:

> First, the public must be given notice of any request to limit the access right and afforded a reasonable opportunity to voice objections. *In re Washington Post Co.*, 807 F.2d at 390; *see also Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 288 (4th Cir. 2000); *In re Knight Pub. Co.*, 743 F.2d 231, 234 (4th Cir. 1984).
>
> Second, "less drastic alternatives" to a denial of the access right must be considered in every case. *Doe v. Public Citizen*, 749 F.3d at 272; *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 66 (4th Cir. 1989); *In re Knight Pub. Co.*, 743 F.2d at 234; *see also Press-Enterprise II*, 478 U.S. at 13-14 (faulting the California Supreme Court for failing to consider "alternatives short of complete closure").
>
> Third, any limitation of the access right must be based on factual findings sufficient to justify the limitation and that explain why less drastic alternatives would not work. *In re Washington Post Co.*, 807 F.2d at 392; *see also Richmond Newspapers*, 448 U.S. at 580-81 (closure unconstitutional where there were no findings to support closure and no inquiry into alternative solutions).

The factual findings required to justify a limitation of the constitutional access right must demonstrate a *substantial probability* that openness will cause harm to a *compelling* governmental interest. *In re Washington Post Co.*, 807 F.2d at 392-93; *see also, e.g.*, *Richmond Newspapers*, 448 U.S. at 581; *Press-Enterprise II*, 478 U.S. at 13-14; *Antar*, 38 F.3d at 1359-60 (3d. Cir. 1994). They must also show that the access restriction is *narrowly tailored*—even "legitimate and substantial" governmental interests "cannot be pursued by means that broadly stifle fundamental personal liberties, when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). Any

access limitation must thus be no broader than necessary to protect the threatened interest. *See, e.g.*, *Globe Newspaper,* 457 U.S. at 606-07; *Press-Enterprise II*, 478 U.S. at 13-14; *Va. Dep't of State Police v. Washington Post*, 386 F.3d 567, 575 (4th Cir. 2004); *Goetz*, 886 F.2d at 60; *In re Washington Post Co.*, 807 F.2d at 390.

This governing standard must be met before the public's right to access, copy and disseminate the audio recordings of Maryland trials can be limited. As applied to Section 1-201, these standards plainly are not met:

- Section 1-201 affords no notice and no opportunity to be heard before banning the broadcasting of any specific audio recording, even of a matter completed long ago.
- No less-restrictive alternative to a flat prohibition on any dissemination of any part of the recording of a judicial proceeding is considered.
- As applied to all audio recordings Section 1-201 does not materially protect any compelling interest—Maryland defends the rule as protecting "fair criminal trials," *see* Defendants' Memorandum in Support of Motion to Dismiss at 14, but makes no showing of how this interest is threatened by a broadcast of a completed proceeding.

Section 1-201 fundamentally violates the First Amendment right of access because it applies on a blanket basis to *all* recordings of any proceedings—a fact that, alone, renders it unconstitutional. In *Globe*

Newspaper, the Supreme Court struck down a Massachusetts law that similarly restricted access rights on a blanket basis, requiring a courtroom to be closed any time a minor victim of a sex crime was called to testify. *See* 457 U.S. at 602. The Court acknowledged that the State's interest in "safeguarding the physical and psychological well-being of a minor" was "a compelling one," but found mandatory closure insufficiently protective of the constitutional access right. *Id.* at 607.

The *Globe Newspaper* Court identified a number of factors that might be relevant to the decision to limit access to a sex victim's testimony, such as the "victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives." *Id.* at 608. Given the range of factors to be assessed and the competing interests served by the access right, the Court held that a limitation of the access right must generally be imposed on a "case-by-case basis" to ensure that the constitutional access right is abridged only where actually "necessary to protect the State's interest." *Id.* at 609; *see also Press Enterprise II,* 478 U.S. at 9-10 (First Amendment access right can only be limited based on the

particularized facts of an individual case); *In re Washington Post Co.*, 807 F.2d at 392.

Section 1-201 violates the First Amendment access right for much the same reasons as the Massachusetts law in *Globe Newspaper*—it may be intended to protect compelling interests that are often present, but Maryland is protecting those interests in an overbroad, constitutionally impermissible manner.

B. No Justification Exists for Applying Section 1-201 To Bar Dissemination of All Audio Recordings

Section 1-201 was enacted for a specific and limited purpose: to bar press cameras from the courtroom and prohibit electronic media coverage of ongoing proceedings. As the district court recognized, the law emerged amid concerns that "[t]here would be a real threat to the integrity of the trial process if the television industry and trial judges were allowed to become partners in the staging of criminal proceedings." JA 78 (quoting *Estes v. State of Tex.*, 381 U.S. 532, 573 (1965) (Warren, C.J., concurring)).

In *Estes,* the Supreme Court overturned a prominent financier's swindling conviction on the grounds that the dramatic and intrusive televising of his trial violated his Fourteenth Amendment due process

rights. *Estes*, 381 U.S. at 535. The Court's plurality opinion emphasized the "untoward situation" of a pretrial hearing "televised live and repeated on tape in the same evening, reaching approximately 100,000 viewers," a courtroom that "was a mass of wires, television cameras, microphones, and photographers," and a trial that "resulted in a public presentation of only the State's side of the case." *Id.* at 550-51; *see also Sheppard v. Maxwell*, 384 U.S. 333, 352-55 (1966) (discussing the deprivation of proper judicial decorum at issue in *Estes* caused by cameras in the courtroom); *Murphy v. Florida*, 421 U.S. 794, 798-99 (1975) (same); *Nebraska Press Ass'n*, 427 U.S. at 552 (noting that the due-process violation found in *Estes* was based in part on the volume of publicity during the trial).

In *Chandler v. Florida*, 449 U.S. 560, 562 (1981), the Court revisited the *Estes* ruling in holding that states could permit camera coverage of trials under proper conditions. *Chandler* upheld an experimental program for televising trials in Florida and indirectly affirmed a 1978 resolution by the Conference of State Chief Justices that "allow[ed] the highest court of each state to promulgate standards

and guidelines regulating radio, television, and other photographic coverage of court proceedings." *Id.* at 564.

It was in this context that the Maryland courts began considering whether to permit broadcast coverage of their proceedings. After collecting information about electronic coverage of trials in Florida and other states, the Public Awareness Committee of the Maryland Judicial Conference in April 1980 recommended that Maryland also begin experimenting with camera coverage of trial proceedings.[5] In November 1980, the Maryland Court of Appeals accepted that recommendation, and suspended the canons of judicial conduct and ethical rules that prohibited the use of cameras in the courtroom. *See* JA 43-46 (Rules Order (Md. Nov. 10, 1980)). At the same time, it launched an eighteen-month experiment permitting pooled microphone and camera coverage for certain court proceedings. JA 47-52 (Maryland Rule of Procedure 1209 (Michie 1977, 1983 supp.) (now Md. Rule 16-109)).

---

[5] *See* Public Awareness Committee of the Maryland Judicial Conference, *Report on the Proposed Modification of the Maryland Canons of Judicial Ethics To Permit Extended Media Coverage of Court Proceedings*, at 1-2 (1980) (on file with the Thurgood Marshall State Law Library).

Pushback from the Maryland Legislature was swift and clear. Maryland lawmakers promptly passed what is now codified as Section 1-201 specifically to halt the courts' experiment with camera coverage of ongoing proceedings. *See* 1981 Md. Laws ch. 748, at 2782.[6] As the Maryland Attorney General explained to the Governor, the law was "intended to supersede Rule 1209" and was permissible because there was no constitutional right to electronically record or televise trials. Letter from Stephen H. Sachs, Attorney General, Maryland, to Harry Hughes, Governor, Maryland (May 14, 1981) (on file with the Thurgood Marshall State Law Library); *see also* David C. Fuellhart, *Editorial*, WPOC/FM93 Nationwide Communications Inc. (Jan. 17, 1981) (on file with the Thurgood Marshall State Law Library) (describing the legislation as an effort to "ban cameras and microphones from state courtrooms").

It bears emphasis that the clear legislative purpose was to prevent media cameras in the courtroom and electronic media coverage of

[6] As the enacted legislation explained, its purpose was "prohibiting the recording or broadcasting, by the use of certain equipment, of certain trial court proceedings . . . ." 1981 Md. Laws ch. 748, at 2782. In 2001, this statute was recodified, without substantive change, as Section 1-201. *See* 2001 Md. Laws ch. 10, at 85.

ongoing proceedings, not to prevent the recording of trials for other purposes. The statute itself affirmatively authorized the courts to make electronic recordings. *See* 1981 Md. Laws ch. 748, at 2783 (exempting from the prohibition "the use of electronic or photographic equipment approved by the court for the perpetuation of a court record").

The district court recognized this focus of the drafters of Section 1-201. It identified the governmental interests the law sought to protect as "(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 *United States v. Hastings*, 695 F.2d 1278, 1283 (11th Cir. 1983)). Each of these interests may be furthered by prohibiting cameras and electronic media coverage of an ongoing proceeding; none is advanced in any meaningful way by a rule barring the subsequent dissemination of audio recordings of completed proceedings.

The district court pointed to cases upholding Federal Rule of Criminal Procedure 53 as support for the constitutionality of Section 1-201, because Rule 53 similarly prohibits photographic, radio, and

camera coverage of criminal proceedings. JA 60, 79. Tellingly, every decision upholding the constitutionality of Rule 53 cited by the district court involved an application to provide camera coverage of an *ongoing* proceeding. *See Conway v. United States*, 852 F.2d 187 (6th Cir. 1988) (per curiam); *United States v. Edwards*, 785 F.2d 1293 (5th Cir. 1986); *United States v. Kerley*, 753 F.2d 617 (7th Cir. 1985); *United States v. Hastings,* 695 F.2d 1278 (11th Cir. 1983); *United States v. Moussaoui,* 205 F.R.D. 183 (E.D. Va. 2002), *see also Rice v. Kempker,* 374 F.3d 675 (8th Cir. 2004) (constitutional challenge to Missouri Department of Corrections' prohibition on videotaping or recording executions referenced in district court opinion); *Westmoreland v. Columbia Broadcasting System*, *Inc.*, 752 F.2d 16 (2d Cir. 1984) (court rule prohibited cable news network from recording and distributing live televised coverage of civil libel trial). None involved the application of the rule to prevent the use of recorded material from closed proceedings.

At least one state court has construed its rule regarding the broadcasting of court proceeding as addressing electronic media coverage of ongoing proceedings, but not authorizing restrictions on the

later use of previously recorded material. *See, e.g.*, *KFMB-TV Channel 8 v. Mun. Court,* 221 Cal. App. 3d 1362, 1367-68 (Ct. App. 1990).

The district court was wrong to conclude that the interests Maryland says are protected by Section 1-201 justify its blanket limitation on the dissemination of audio recordings that are subject to the First Amendment access right. Just as in *Globe Newspaper*, a number of factors need to be assessed to conclude that the media's use of the electronic recording of a specific case would create a substantial probability of harm to a compelling interest. Maryland has not justified its blanket ban and Section 1-201, as it is being applied, violates the public's First Amendment right of access to judicial records.

CONCLUSION

Beyond its failure to apply the well-established constitutional protection for the publication of true, newsworthy information, the district court's decision should be reversed because Section 1-201 violates the First Amendment right of access.

Dated: April 13, 2020

Respectfully submitted,

/s/ David Schulz
David A. Schulz
(Counsel of Record)

Alexandra Dudding (student intern)
Julu Katticaran (student intern)
Zoe Rubin (student intern)
MEDIA FREEDOM AND
INFORMATION ACCESS CLINIC[7]
Yale Law School
127 Wall St.
New Haven, CT 06511
(203) 436-5824
david.schulz@yale.edu

[7] This brief was prepared largely by Yale Law School students Sasha Dudding, Julu Katticaran, and Zoe Rubin. The brief does not purport to express the school's institutional views, if any.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume, typeface, and type-style requirements of Federal Rule of Appellate Procedure 32(a). This brief contains 6,099 words, excluding the parts of the document exempted by Rule 32(f), and was prepared in fourteen-point Century Schoolbook font, a proportionally spaced typeface, using Microsoft Word.

__/s/ David Schulz_____
David A. Schulz
Counsel for Amicus Floyd Abrams Institute for Freedom of Expression

.