No. 20-1094

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRANDON SODERBERG; BAYNARD WOODS;
OPEN JUSTICE BALTIMORE; BALTIMORE ACTION LEGAL TEAM;
QIANA JOHNSON; and 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.

On Appeal from the United States District Court
for the District of Maryland
(Richard D. Bennett, District Judge)

BRIEF OF APPELLEES

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JURISDICTIONAL STATEMENT

In this action asserting claims under 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the United States Constitution, the district court had subject matter jurisdiction under 28 U.S.C. § 1331. On January 14, 2020, the district court dismissed the complaint with prejudice. (J.A. 6, 93.) The plaintiffs timely appealed on January 27, 2020. (J.A. 6, 94.) This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUE PRESENTED FOR REVIEW

Did the district court correctly conclude that Maryland's statutory prohibition against broadcasting recordings of criminal trial court proceedings is a valid time, place, or manner restriction under the First Amendment?

STATEMENT OF THE CASE

The plaintiffs, who include three individuals and three organizations, challenge § 1-201 of the Criminal Procedure Article in the Annotated Code of Maryland, which prohibits "record[ing] or broadcast[ing] any criminal matter, including a trial, hearing, motion, or argument, that is held in trial court or before a grand jury." Md. Code Ann., Crim. Proc. § 1-201 (West 2019). They claim that the statute violates their First Amendment rights, to the extent it prevents them from broadcasting recordings of previously held criminal proceedings. The Maryland restriction on recording and broadcasting criminal proceedings regulates the same conduct as Rule 53 of the Federal Rules of Criminal Procedure, first adopted in 1946, which prohibits the "broadcasting of judicial proceedings from the courtroom." Section 1-201 also prohibits the subsequent broadcasting of recordings of criminal trial proceedings.

Maryland Law Governing Broadcast of Criminal Trial Proceedings

The Maryland General Assembly adopted § 1-201 after the State's judiciary briefly tested the feasibility of broadcasting court proceedings. In November 1980,

the Court of Appeals of Maryland issued a "Rules Order" suspending certain judicial ethics rules for 18 months to allow for a pilot program to "experiment" with "extended media coverage" of trial proceedings. (J.A. 43-47.) Then-Rule 1209 required that extended coverage by the media "be conducted so as not to interfere with the right of any person to a fair and impartial trial, and so as not to interfere with the dignity and decorum which must attend the proceedings." No extended coverage would be permitted without "written consent" of "all parties to the proceeding." (J.A. 47.)

Despite these protections, two of the Court of Appeals' seven members declined to sign the rules order and another judge filed a written dissent. (J.A. 44.) In his dissent, Judge Marvin H. Smith explained that even limited broadcasting can undermine criminal trials:

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

(J.A. 44.)

Early the next year, the Supreme Court confronted Florida's televised trials in *Chandler v. Florida*, 449 U.S. 560 (1981). The *Chandler* court saw a "danger" in extended coverage: "Inherent in electronic coverage of a trial is a risk that the very

awareness by the accused of the coverage and the contemplated broadcast may adversely affect the conduct of the participants and the fairness of the trial, yet leave no evidence of how the conduct or the trial's fairness was affected." *Chandler*, 449 U.S. at 577. But the Court held that this inherent danger did not justify an "absolute constitutional ban on broadcast coverage." Instead, the Court insisted "the states must be free to experiment" to find an appropriate balance of interests. *Id*. at 582.

Shortly after *Chandler* issued, Maryland's General Assembly decided that the risk to trial fairness posed by broadcasting was too high. Invoking its constitutional authority to "rescind, change, or modify a rule of the Court of Appeals," 66 Md. Op. Att'y Gen. 80, 82 (1981), the General Assembly in 1981 enacted what is now § 1-201 of the Criminal Procedure Article in the Annotated Code of Maryland.[1] Overruling the Court of Appeals' November 1980 Rules Order, § 1-201 provides that, with certain exceptions, "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" and any person who violates this provision "may be held in contempt of court." Md. Code Ann., Crim. Proc. § 1-201(c).[2]

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[1] Originally codified as Article 27, § 467B of the Maryland Code, *see* 1981 Md. Laws ch. 748, at 2782, the statute was recodified "without substantive change" as § 1-201 of the Criminal Procedure Article in 2001. *See* 2001 Md. Laws ch. 10, at 85-86.

[2] Unsuccessful bills seeking to amend this statute were introduced in 2006, 2007, 2008, 2009, 2016, 2017, 2019, and 2020. Maryland General Assembly, Fiscal

2008 Extended Media Coverage Study

In 2008, after study and public hearings, the Maryland Judicial Conference Committee to Study Extended Media Coverage of Criminal Trial Proceedings in Maryland published its report and recommendations.[3] The Committee determined that "the adverse impacts on the criminal justice process are real" and concluded unanimously that the current statutory prohibition on recording and broadcasting criminal trial courts should remain in effect.[4] The Committee noted that its conclusion was supported by all of those who submitted written and oral testimony to the Committee on behalf of "organizations whose constituents participate regularly in criminal trials—including the Maryland State's Attorneys' Association, the Office of the Public Defender of Maryland, the Maryland State Bar Association, and the Maryland Crime Victims Resource Center."[5]

Note, House Bill 1376, 2020 Sess., http://mgaleg.maryland.gov/2020RS/fnotes/bil_0006/hb1376.pdf (last checked June 5, 2020).

[3] *Report of the Committee to Study Extended Media Coverage of Criminal Trial Proceedings in Maryland* (Feb. 1, 2008) ("Media Coverage Report"), https://www.courts.state.md.us/sites/default/files/import/publications/pdfs/mediacoveragereport08.pdf (last visited June 5, 2020).

[4] *Id.* at 42-43.

[5] *Id.* at 2.

Public Access to Recordings

Beginning in the late 1990s, Maryland courts transitioned from the traditional court reporter-only system to audio recording of trial-court proceedings. *See* Md. Rules 16-502, 16-503.[6] In 1997, Maryland's statewide trial court of limited jurisdiction, known as the District Court, moved to an all-audio system, and permitted parties to proceedings to gain access to recordings. Md. Rule 16-504 (Michie 1998) (amending and re-codifying Md. Dist. Ct. Rule 1224 (Michie 1996), which had provided for court reporters in the District Court).

At that time, Maryland's trial courts of general jurisdiction, known as circuit courts, could authorize recordings of proceedings, in which case parties and stenographers would be afforded access to the recordings, Md. Rule 16-406 (Michie 1998), but proceedings were still recorded verbatim by court reporters, Md. Rule 16-404(d) (Michie 1998). The rule providing access to recordings was then rewritten in 2005 to provide copies of audio recordings to "any person upon written request and the payment of reasonable costs, unless payment is waived by the court." Md. Rule 16-406 (LexisNexis 2006). Then, in 2016, the rules were rearranged and

[6] Acting under its constitutional authority to adopt "rules and regulations concerning the practice and procedure in and the administration of" the courts, Md. Const. art. IV, § 18, the Court of Appeals of Maryland has promulgated 20 titles of rules. Title 16 of the Maryland Rules regulates court administration.

reworked. Under this revision, each circuit court could record proceedings and make the recordings available to the public. Md. Rule 16-503.

Due to the 2016 revision, an entire chapter of Rules now regulates the "recording of proceedings," Md. Rules tit. 16, ch. 500, and another chapter regulates "extended coverage" of court proceedings, such as real-time broadcasting for civil cases, Md. Rules tit. 16, ch. 600. The recordings of proceedings are "under the control of the court" and access to the official recording itself is limited. Md. Rule 16-504(a). A member of the public may obtain copies of most court audio recordings or listen to and view video recordings at the courthouse. Md. Rules 16-504(h), (i). Copies of video recordings are provided only to judges, judicial and attorney ethics investigators, parties and their attorneys, or transcriptionists, Md. Rule 16-504(i), but no copies of recordings are provided when a proceeding is "closed pursuant to law," another rule provides for sealing or shielding, or "as ordered by the court," Rule 16-504(h)(1).

Procedural History of this Case

In May 2019, 38 years after the Maryland General Assembly enacted § 1-201, the plaintiffs challenged the constitutionality of the statute by suing two circuit court administrative judges and two court reporters. The complaint alleges that, for varying reasons, the plaintiffs wish to broadcast—via podcasts, documentaries, and public meetings—recordings they acquired from the Maryland courts, and that their

fear of enforcement of the prohibition in § 1-201 has prevented them from using the recordings as they would like. (J.A. 15-20.) Count I of the complaint asserts that § 1-201's restriction of broadcasting violates the First Amendment and Count II, which has been abandoned on appeal, asserts that the statute's text is unconstitutionally vague under the Fourteenth Amendment. (J.A. 23-28.)

Defendants moved to dismiss the complaint for lack of standing; for failure to join, as necessary parties, the criminal defendants prosecuted in the recorded proceedings; and for failure to state a claim upon which relief may be granted. (J.A. 5-6; ECF No. 23.) After full briefing, the district court granted the motion and dismissed the complaint for failure to state a claim. (J.A. 60-61.) Although the court determined that the plaintiffs had alleged a chilling effect on their speech sufficient to establish Article III standing (J.A. 67) and that the criminal defendants were not necessary parties (J.A. 78), it concluded that the complaint failed to state a claim against the court reporter defendants "because court reporters do not play a role in the initiation or enforcement of contempt proceedings." (J.A. 73.)

Reviewing the First Amendment claim, the court rejected the plaintiffs' characterization of the broadcast ban "as a complete prohibition on the publication or dissemination of truthful information" (J.A. 79), and for that reason, the court declined to apply "complete prohibition" case law that would require such a prohibition to be justified by a showing of "a need to further a state interest of the

highest order" (J.A. 82-84). Instead, consistent with decisions of federal circuit courts that have addressed the constitutionality of the broadcast ban in Rule 53 of the Federal Rules of Criminal Procedure, the district court analyzed Maryland's restriction on broadcasting as a time, place, and manner regulation and found Maryland's restriction to be content neutral. (J.A. 84-86.) Applying intermediate scrutiny and finding especially persuasive the Eleventh Circuit's recognition of substantial government interests in its analysis of Rule 53, the district court concluded that the Maryland broadcast ban likewise "furthers all of these substantial government interests" (J.A. 86 (citing *United States v. Hastings*, 695 F.2d 1278, 1283 (11th Cir. 1983))), is narrowly tailored to achieve these interests (J.A. 87), and leaves open ample channels of communication (J.A. 86).

Finally, the district court concluded that § 1-201, which "covers a whole range of easily identifiable and constitutionally proscribable . . . conduct" (J.A. 92 (citation omitted)), is not void for vagueness (J.A. 89-92).

The court dismissed the complaint with prejudice (J.A. 93), and this appeal followed (J.A. 94). On appeal, the plaintiffs press only their First Amendment claims against only the defendant judges.

SUMMARY OF ARGUMENT

Maryland's prohibition on recording and broadcasting criminal trials and grand jury proceedings—including the broadcasting of audio and video recordings

of those proceedings—is a valid time, place, and manner restriction under the First Amendment. Section 1-201 does not restrict the possession or sharing of *information* that could be gleaned from audio and video recordings. Instead, it limits only one mode of transmitting information: broadcasting. The statute does not prevent or punish "the publication of truthful information," *Smith v. Daily Mail Publ'g Co*., 443 U.S. 97, 102 (1979), because it leaves any person free to transmit the same information about a criminal trial through transcription, description, or reenactment. The law restricts only the manner of publication; it is not an outright ban on conveying information.

This limitation protects the fairness of Maryland's criminal trials. It helps guard against the harm to the trial process that would result from the distraction of jurors and the intimidation of witnesses, if they knew that their participation in criminal trials might be televised on the nightly news, *see Estes v. Texas*, 381 U.S. 532, 545-547 (1965), or disseminated worldwide on the internet, "available in perpetuity for unlimited viewing, further dissemination, and easy manipulation," *Mirlis v. Greer*, 952 F.3d 51, 56 (2d Cir. Mar. 3, 2020). "[T]he very awareness by the accused of the coverage and the contemplated broadcast may adversely affect the conduct of the participants and the fairness of the trial," but elude any potential remedy because it would "leave no evidence of how the conduct or the trial's fairness was affected." *Chandler v. Florida*, 449 U.S. 560, 577 (1981). In balancing the

litigants' fairness interests against the public's interest in accessing information about trials, "the states must be free to experiment." *Id*. at 582.

Section 1-201 is narrowly tailored to further this interest in fair trials and allows ample freedom to report on trial proceedings. Whatever burden is imposed by § 1-201 serves to diminish the threat of harm to the criminal trial process and to participants in those proceedings. The statute bans only methods of communication that reproduce and disseminate participants' images and voices from inside the courtroom—the methods most likely to trigger "'insidious influences" on '"the administration of justice'" and "cause actual unfairness," as described by the Supreme Court in *Estes*, 381 U.S. at 541, 545 (citation omitted), and by other courts since. When viewed alongside the fair trial interests protected by the Fifth, Sixth, and Fourteenth Amendments—"the paramount right of the defendant to a fair trial," *Chandler*, 449 U.S. at 566—any burden the statute places on speech and news reporting is relatively minimal, because § 1-201 leaves open ample alternative channels of communication. The plaintiffs and others remain free to transcribe, describe, or reenact proceedings to convey whatever information they please.

Plaintiffs' amici make a new, unpreserved argument that the public's First Amendment right of access to the courts contains a media right to copy and distribute—that is, broadcast—any judicial record, including audio recordings. Courts have never recognized a First Amendment right to broadcast criminal trials.

Though some federal courts have found a common-law right to distribute federal judicial records, the federal common law does not supersede state laws like § 1-201. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

The district court correctly applied the pertinent legal framework to uphold § 1-201 as a constitutional manner restriction. This Court should affirm.

ARGUMENT

I. THE STANDARD OF REVIEW IS DE NOVO.

This Court reviews the grant of a motion to dismiss de novo. *Matherly v. Andrews*, 859 F.3d 264, 274 (4th Cir. 2017).

II. MARYLAND'S RESTRICTION ON BROADCASTING CRIMINAL TRIAL COURT PROCEEDINGS IS A CONTENT-NEUTRAL REGULATION OF THE TIME, PLACE, AND MANNER OF SPEECH.

A. Under the First Amendment, Restrictions on Broadcasting Court Proceedings Are Analyzed as Time, Place, and Manner Restrictions.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const., amend. I. But "the government may impose reasonable restrictions on the time, place, or manner of protected speech provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" *Ward v. Rock Against Racism*, 491 U.S. 781,

791 (1989) (quoting *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293 (1984)).

Restrictions on broadcasting court proceedings, like Federal Rule of Criminal Procedure 53, are analyzed under this framework because they "do not absolutely bar the public and the press from any portion of a criminal trial; rather, they merely impose a restriction on the *manner* of the media's news gathering activities." *Hastings*, 695 F.2d at 1282. Indeed, under Rule 53 or § 1-201, "[t]he press is free to attend the entire trial, and to report whatever they observe." *Id*.; *see also Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 19 n.5, 25 (2d Cir. 1984) (Winter, J., concurring) (A local rule prohibiting "radio or television broadcasting from the courtroom or its environs, during the progress of or in connection with judicial proceedings" "is a legitimate time, place or manner restriction on otherwise protected speech"). The overwhelming weight of authority approves these broadcasting restrictions and treats them as manner restrictions.[7] *See Rice v.*

[7] The plaintiffs contend on page 40 of their brief that these cases are inapt because Federal Rule of Criminal Procedure 53 applies only to live broadcasts. That supposed distinction is not necessarily correct. *See, e.g.*, *United States v. McDougal*, 103 F.3d 651, 657 (8th Cir. 1996) (holding that denying access to videotaped witness testimony used at trial "comports with Rule 53"); *United States v. McVeigh*, 931 F. Supp. 753, 755 (D. Colo. 1996) ("[T]he ready access to the sound recordings has resulted in the functional equivalent of a broadcast of the court proceedings in violation of Rule 53."). And as the district court correctly noted, "[t]he federal circuit [court] cases finding Rule 53 or a state counterpart constitutional did not rely

Kempker, 374 F.3d 675, 681 (8th Cir. 2004); *Conway v. United States*, 852 F.2d 187 (6th Cir. 1988) (per curiam); *United States v. Kerley*, 753 F.2d 617 (7th Cir. 1985); *Hastings*, 695 F.2d at 1278; *United States v. Moussaoui*, 205 F.R.D. 183 (E.D. Va. 2002).

B. The Maryland Broadcast Restriction Is a Content-Neutral Manner Regulation.

Because the Maryland restriction on broadcasting criminal trial court proceedings limits only one method of reporting, and not the information or content of reporting, it is a manner restriction properly analyzed under this framework. (J.A. 82.) As the district court correctly observed, § 1-201 "is not a total prohibition on the publication of information that is conveyed in criminal proceedings." (J.A. 83.) The statute does not interfere with the plaintiffs' right to publish truthful information; it merely limits *how* they convey the information. Thus, under the well-established "time, place, and manner" doctrine, § 1-201 is "a permissible time, place, and manner regulation of speech." *American Legion Post 7 of Durham, N.C. v. Durham*, 239 F.3d 601, 611 (4th Cir. 2001).

That is, "[a]ll we have [here] is a limitation on the manner of news coverage." *Kerley*, 753 F.2d at 620-21. Plaintiffs "remain free to publish the information they glean from attending or listening to the criminal recordings provided by the courts."

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on any particular phrasing of the Rule." (J.A. 29.) The constitutionality of Rule 53 does not depend on its limited regulation of broadcasting "from the courtroom."

(J.A. 83.) "[T]he media can do everything but" broadcast the criminal trial proceedings. *Kerley*, 753 F.2d at 621. Both the plaintiffs who represent media interests and those who do not can describe, transcribe, or reenact any portion of the proceeding to convey the same information they might convey by broadcasting.

Because the statute does not restrict the dissemination of specific information, it is also content-neutral, a part of the analysis that the plaintiffs no longer dispute.[8] Section 1-201 is indifferent to the identity of the speaker or the information communicated, so it is "content neutral on its face." *Cahaly v. Larosa*, 796 F.3d 399, 405 (4th Cir. 2015) (quoting *Reed v. Town of Gilbert, Ariz.,* 576 U.S. 155, __, 135 S. Ct. 2218, 2228 (2015)).

C. The District Court Correctly Declined to Apply Case Law on the Absolute Prohibition of Specific Information.

To avoid the content-neutral manner regulation analysis, the plaintiffs try to distinguish § 1-201 from other broadcasting restrictions, so that some other doctrine might apply. To that end, they emphasize that the recordings they seek to broadcast are "publicly available," because members of the public can obtain the recordings from Maryland courthouses. Plaintiffs' Br. at 14. They then rely heavily on the Supreme Court's First Amendment cases that discuss "publicly available"

[8] On appeal, the plaintiffs no longer contest § 1-201's content-neutrality. The district court rejected their argument that § 1-201 is content-based because it affects only criminal proceedings but not other court proceedings. (J.A. 85.)

information. *Id*. at 14-18. But the cases the plaintiffs cite involved the absolute prohibition of certain *information*, such as someone's name, and § 1-201 does not contain a similar prohibition on information. (J.A. 82-83.)

For example, the statute at issue in *Florida Star*, "ma[de] it unlawful to print, publish, or broadcast in any instrument of mass communication the name of the victim of a sexual offense." 491 U.S. 524, 526 (1989) (internal quotation marks omitted). This piece of information—"the name"—was unpublishable in any form. In identifying precedent, the *Florida Star* court, *id.* at 530-31, chose three cases about absolute prohibitions on the dissemination of names in any form: *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 471 (1975) ("the name or identity of a rape victim"); *Oklahoma Publ'g Co. v. District Court in and for Oklahoma County*, 430 U.S. 308, 308 (1977) ("the name or picture of a minor child in connection with a juvenile proceeding") (internal marks omitted); and *Daily Mail*, 443 U.S. at 98 ("the name of any youth charged as a juvenile offender"). Unlike § 1-201, the laws challenged in these cases barred the publication of specific information in any form.

The plaintiffs seek to invoke these inapt cases under the label of the "*Daily Mail* rule," Plaintiffs' Br. at 17, but that rule, by its own terms, does not apply here. As the plaintiffs assert, "if a member of the press or the public '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.'" *Id*. at 16 (quoting *Daily Mail*, 443 U.S. at 103). Section 1-201 passes this test, because it does not "punish publication of . . . information." On the contrary, it allows the publication of any publicly available information from criminal proceedings, and prohibits only the broadcasting of the proceedings themselves, whether "live" or in the form of a recording.

In attempting to justify their reliance on these absolute-prohibition cases, the plaintiffs do not identify any substantive information about a criminal trial that they are prevented from communicating. Instead, they merely argue that "written transcripts" do not convey all of the sensory impressions one might draw from a recording. Plaintiffs' Br. at 37. Even if that is true, nothing in § 1-201 prevents the plaintiffs or anyone else from *describing* these impressions or *reenacting* the proceeding, thereby highlighting for their target audience the nonverbal or intangible characteristics of trial proceedings, such as "a judge's tone, a witness's hesitation, or a lawyer's inflection." Plaintiffs' Br. at 37.

Amici argue more forcefully that reporting is an insufficient substitute for broadcasting an audio or video recording. The Reporters Committee for Freedom of the Press and others argue from real-world examples that "includ[ing] audio recordings in published media . . . produce[s] uniquely impactful reporting" (ECF No. 39 at 10), and the Cato Institute contends that the *Serial* podcast might have attracted a smaller audience had it not played back trial audio (ECF No. 34 at 11).

But amici do not contend that the audio conveys some unique piece of information that cannot be communicated through reporting or by using the tools that journalists have employed successfully throughout the nearly four decades that § 1-201 has been in effect. Amici's own eloquent advocacy disproves their point, because it demonstrates that the information in audio recordings can be effectively described in text. (ECF No. 39 at 8-10.) Amici describe exactly what happened in courtrooms, what judges said, and how those words affected listeners—all the *information* this Court would glean from listening to the portions of the podcast amici describe. Even if listening to the podcast is more compelling or entertaining, amici have effectively communicated relevant information from the podcast in writing.

So, too, with trials. Effective reporting can convey all the information someone might glean from watching or listening to a portion of the trial. In fact, according to a study commissioned by the Federal Judicial Center to examine how the media used courtroom recordings obtained during a federal judiciary pilot program, in the 90 televised news stories studied, "[o]n average, reporters *narrated* 63% of all courtroom footage," so that "most footage was accompanied by a reporter's narration rather than the story being told through the words and actions of

the participants."[9] Thus, the courtroom recording "was typically used to reinforce a verbal presentation, rather than to add new and different material to the report."[10] Even if a media report presented without an excerpt from a courtroom recording of trial proceedings is less than ideal from the perspective of the reporter or the organization she represents, the media's interest in having more "impactful reporting" (ECF No. 39 at 10), must yield to the Constitution's guarantee of fair trials for criminal defendants. As Judge Edward R. Becker, then Chief Judge of the Third Circuit, testified before Congress on behalf of the Judicial Conference of the United States, if expanded media coverage "can result in real and irreparable harm to a citizen's right to a fair and impartial trial, it is unacceptable to say that the harm is not great or that it is outweighed by the public good" served by the coverage or the desire "to provide entertaining backdrop for news reporters"; rather, courts "cannot tolerate . . . even a little bit of unfairness because that would be inconsistent with our sacred trust."[11]

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[9] Molly Treadway Johnson and Carol Krafka, *Electronic Media Coverage of Federal Civil Proceedings* at 34, 36 (Federal Judicial Center, 1994) (emphasis added), https://www.fjc.gov/sites/default/files/2012/elecmediacov.pdf.

[10] *Id.* at 36.

[11] Testimony of the Honorable Edward R. Becker before the Senate Judiciary Committee's Subcommittee on Administrative Oversight and the Courts, 106th Congress, Second Session, Hearing on Allowing Cameras and Electronic Media in the Courtroom (Sept. 6, 2000), https://www.govinfo.gov/content/pkg/CHRG-106shrg73484/html/CHRG-106shrg73484.htm.

The arguments of the plaintiffs and amici provide no reason to jettison almost forty years of jurisprudence developing the "time, place, and manner" doctrine and applying it to broadcasting restrictions. Plaintiffs' Br. at 36.

III. MARYLAND'S PROHIBITION ON BROADCASTING CRIMINAL TRIAL COURT PROCEEDINGS IS A CONSTITUTIONALLY VALID TIME, PLACE, AND MANNER RESTRICTION.

"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." *American Legion*, 239 F.3d at 609 (citing *Clark*, 468 U.S. at 293); *Hastings*, 695 F.2d at 1282 (applying the same analysis in a right-to-televise case).[12] Maryland's broadcasting restriction satisfies all three elements of this test.

A. Section 1-201 Furthers Maryland's Substantial Interest in Fair Criminal Trials.

"A fair trial in a fair tribunal is a basic requirement of due process." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 551 (1976). Maryland's commitment to this basic requirement runs deep. Articles 20 through 24 of Maryland's Declaration of Rights protect the rights of criminal defendants. Article 20 emphasizes the fact-

[12] To meet its burden under the intermediate scrutiny test, the State may "resort to a wide range of sources, such as legislative text and history, empirical evidence, case law, and common sense, as circumstances and context require." *United States v. Carter*, 669 F.3d 411, 418 (4th Cir. 2012); *see also Carandola v. Bason*, 303 F.3d 507, 516 (4th Cir. 2002) (a government may rely on an evidentiary foundation set forth in other cases).

finding mission of a trial, by declaring "[t]hat the trial of facts, where they arise, is one of the greatest securities of the lives, liberties and estate of the People." Maryland rightly treasures the fairness of its trials and loathes threats to the fact-finding process.

Broadcasting is just such a threat. "Unlike Broadway plays, trials are not conducted for the purpose of entertaining or enlightening an audience. The participants' roles are real, not feigned, and their performances, if such they be called, are, or should be, for the primary benefit of the judge and the jury." *United States v. Yonkers Bd. of Educ.*, 747 F.2d 111, 113 (2d Cir. 1984). Neither the jury nor the judge benefits from broadcasting.

Instead, broadcasting harms jurors. "[T]he televised jurors cannot help but feel the pressures of knowing that friends and neighbors have their eyes upon them." *Estes*, 381 U.S. at 545. "The awareness of the fact of telecasting . . . is felt by the juror throughout the trial. We are all self-conscious and uneasy when being televised. Human nature being what it is, . . . a juror's . . . mind will be preoccupied with the telecasting rather than with the testimony." *Id*. at 546. New media multiplies this preoccupation when jurors learn that their face, conduct, and voice may appear not just on the evening news, but in perpetuity through films, podcasts, and on-demand streaming services.

Broadcasting also harms witnesses:

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

Id. at 547. Even if a defendant cannot point to an instance of prejudice flowing from the effect of broadcasting on witnesses, "we all know from experience that they exist." *Id*. "This is not to say that all participants in the trial would distort it by deliberately playing to the television audience, but some undoubtedly would." *Id*. at 566 (Warren, C.J., concurring). And some will avoid being participants to protect themselves and their families. In the words of one of Maryland's leading prosecutors, "[e]very day," he and his colleagues "have to beg and cajole witnesses to ignore stories [of murders of witnesses] and come to court," and "[t]hat job would be exponentially more difficult if potential witnesses knew their testimony might be recorded and broadcast."[13] "Witnesses who fear for their safety, and the safety of their families, have a disturbing tendency to develop memory problems," and "[t]he prospect of having their testimony broadcast is sure to have an additional amnesiac

[13] Written testimony of Scott D. Shellenberger, State's Attorney for Baltimore County, quoted in *Report of the Committee to Study Extended Media Coverage of Criminal Trial Proceedings in Maryland*, at 43 (Feb. 1, 2008), https://www.courts.state.md.us/sites/default/files/import/publications/pdfs/mediacoveragereport08.pdf (last visited June 5, 2020).

effect."[14] As Judge Smith observed 40 years ago when Maryland's experimentation with broadcasting began, "when people desire to avoid testifying they often become very 'forgetful' of what they have seen and heard." (J.A. 44.)

The inevitable focus on high profile trials while they are ongoing, on appeal, or otherwise on the public's mind exacerbates these harms. "The necessity for sponsorship weighs heavily in favor of the televising of only notorious cases . . . and invariably focuses the lens on the unpopular or infamous accused." *Estes*, 381 U.S. at 550. This focus on notoriety exacerbates the judiciary's deep concern about effects on "cases arising from state prosecutions." *Id*. at 560 (Warren, C.J., concurring). So in cases with the highest stakes, the fairness-depriving effect of broadcasting on jurors and witnesses is at its apex, and broadcasting will happen most often in cases with the highest stakes.

These high-stakes cases then make other cases less fair. After-the-fact broadcasting (or routine broadcasting) of criminal trials affects not just the trial participants, but also *future* jurors, witnesses, and defendants. If broadcasting becomes the norm, every trial participant would enter the trial knowing they could wind up on TV or be streamed on any device at any time. "[T]he televising of trials would not only have an effect on those participating in the trials that are being

[14] *Id.*

televised, but also on those who observe the trials and later become trial participants." *Id*. at 574 (Warren, C.J., concurring).

The district court properly considered these effects and goals in relying on the governmental interests underpinning Rule 53 identified by the Eleventh Circuit in *Hastings*: (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." (J.A. 86 (quoting *Hastings*, 695 F.2d at 1283).) "The third interest is embodied by the Supreme Court's concerns in *Estes v. Texas*, wherein the Court noted 'television's probable adverse impact on jurors, witnesses, and other trial participants.'" (J.A. 86 (quoting *Hastings*, 695 F.2d at 1283 (citation omitted))). Because evidence of a governmental interest may be found in "a wide range of sources, such as legislative text and history, empirical evidence, case law, and common sense, as circumstances and context require," *Carter*, 669 F.3d at 418—and because Rule 53, *Estes*, and *Chandler* all preceded Maryland's enactment of § 1-201—the district court was correct to rely on each of these sources.

As the district court observed, the effect on Maryland's prospective jurors, witnesses, and defendants is a proper subject of state regulation. (J.A. 88.) The Supreme Court elected not to find a violation of the First, Sixth, or Fourteenth Amendment when Florida created broadcasting procedures, in part because finding

such a broad right would prevent states like Florida from serving as Justice Brandeis's laboratories of democracy. *Chandler*, 449 U.S. at 579. By the same token, finding a First Amendment right to unlimited broadcasting disrupts Maryland's ongoing experiment. Because the effect of broadcasting criminal trials is a delicate, fact-bound policy issue that may change over time, a court "must be ever on [its] guard, lest [it] erect [its] prejudices into legal principles." *Chandler*, 449 U.S. at 579.[15]

B. Section 1-201 Is Narrowly Tailored to Further Maryland's Legitimate Interest in Providing Fair Trials.

A content-neutral regulation is narrowly tailored if it does not "burden substantially more speech than is necessary to further the government's legitimate interests." *McCullen v. Coakley*, 573 U.S. 464, 466 (2014) (internal quotation marks omitted). This narrow-tailoring requirement is not a high bar; "the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'"

[15] Plaintiffs quote *Chandler* for the proposition that "[a]n absolute constitutional ban on broadcast coverage of trials cannot be justified simply because there is a danger that, in some cases, prejudicial broadcast accounts of pretrial and trial events may impair the ability of jurors to decide the issue of guilt or innocence uninfluenced by extraneous matter." Plaintiffs' Br. at 19-20. But the *Chandler* court was discussing an "absolute [federal] constitutional ban" that would serve as "an absolute ban on state experimentation." *Chandler*, 449 U.S. at 573-4. *Chandler* does not hold that States are prohibited from banning broadcasting. It merely holds that the federal Constitution's provisions do not themselves effect a ban on broadcasting. *Id*. at 583.

Ward, 491 U.S. at 799 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)). "To be valid, the regulation 'need not be the least restrictive or least intrusive means of serving the government's interests,'" but "the government still may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Reynolds v. Middleton*, 779 F.3d 222, 226 (4th Cir. 2015) (quoting *McCullen*, 573 U.S. at 466).

Section 1-201 does not "burden substantially more speech than is necessary." *McCullen*, 573 U.S. at 466. It burdens only one mode of communication (broadcasting a recording of the proceeding) and only for criminal trial court proceedings. The statute regulates both ongoing and concluded trials, because the long-term, systemic effect on future or prospective witnesses and jurors from increased broadcasting can arise from any broadcasting. *Estes*, 381 U.S. at 574 (Warren, C.J., concurring). Regulating the broadcasting of concluded trials is especially necessary if there might be another trial in the same case because of an appeal or collateral challenge. The statute does not, however, regulate the broadcasting of appeals, which makes sense because the trial fairness issues that arise from the stress put on witnesses and jurors do not arise in purely legal argument presented on appeal. Indeed, § 1-201 is so narrowly tailored that the plaintiffs call it "under-inclusive." Plaintiffs' Br. at 27-28.

Turning to the other side of the same coin, the plaintiffs argue that the law is over-inclusive because § 1-201 applies to old cases, low-profile cases, and preliminary hearings with no witnesses. (*Id*. at 25.) As for old cases, "the televising of trials would not only have an effect on those participating in the trials that are being televised, but also on those who observe the trials and later become trial participants." *Estes*, 381 U.S. at 574 (Warren, C.J., concurring). As for low-profile cases, broadcasting (or the background assumption that trials will be broadcast) can affect witnesses or jurors the same way.[16] And as for preliminary hearings or motions hearings, the portion of § 1-201 that applies to broadcasting non-trial hearings does not "burden substantially more speech than is necessary." *McCullen*, 573 U.S. at 466. The criminal defendant or a witness may be present at one of these hearings, and there may be fact-finding, so an exception for hearings would risk the exact harm the statute regulates. Maryland's legislators might also have reasonably determined that adding a purely-legal-hearing exception to the statute would make it cumbersome or harder to implement. In any event, plaintiffs have not alleged that

[16] The Cato Institute notes that, under the *Marks* rule, *see Marks v. United States*, 430 U.S. 188 (1977), the Supreme Court has not technically decided whether broadcasting the trial of an "ordinary defendant" would violate the defendant's due process rights. (ECF No. 34 at 15.) But Maryland can elect to give ordinary defendants more than the absolute minimum due process enshrined in the federal constitution. *Goss v. Lopez*, 419 U.S. 565, 574 (1975) (the federal Due Process Clause requires "minimum procedures").

they seek to broadcast a recording of such a hearing. Section 1-201 need not be the least restrictive means of protecting the judicial process. And because there are so many other ways to convey the same information, the burden on speech from preventing the broadcasting of pretrial hearings is small.

Plaintiffs also suggest, without justification, that Maryland's law cannot be narrowly tailored because it is unique. Plaintiffs' Br. at 29-30. This suggestion misunderstands the tailoring requirement for manner restrictions. Because a State's restriction on the manner of speech need not be the least restrictive option, *Reynolds*, 779 F.3d at 226, many different policies—even unique ones—are potentially constitutional.[17] Moreover, invalidating one state's statute because it is unlike those in other states would conflict with the Supreme Court's insistence that "the states must be free to experiment" with how they choose to regulate the broadcasting of court proceedings. *Chandler*, 449 U.S. at 582.

C. Section 1-201 Leaves Open Ample Alternative Channels of Communication.

Plaintiffs remain free to transcribe, describe, or reenact court proceedings through any channel—print articles, reports, blogs, broadcasts, podcasts, public

[17] Echoing the same misunderstanding, plaintiffs argue that "Maryland courts have at their disposal several less restrictive alternatives," such as "*voir dire*." (Plaintiffs' Br. at 26.) The availability of voir dire did not assuage the Supreme Court's concerns when it catalogued the harms of broadcasting in *Estes*. Nor does voir dire of potential jurors offer any way to address the concerns regarding witnesses.

presentations, YouTube videos, tweets, or TikToks. Yet they contend that § 1-201 fails to leave open ample alternative channels of communication. Plaintiffs' Br. at 41-43. They are mistaken.

Every court to consider a contention like the plaintiffs' has rejected it. Barring broadcasting does not create a First Amendment problem, because "[s]o long as the television industry" or other producers of other media are "free to send representatives to trials and report on those trials . . ., there is no abridgment of the freedom of the press." *Estes*, 381 U.S. at 585 (Warren, C.J., concurring). The public has "a right to *attend* trials, not a right to view them on a television screen." *Westmoreland*, 752 F.2d at 23. Indeed, the plaintiffs' argument would undermine every case that has found Federal Rule of Criminal Procedure 53 valid. *Conway*, 852 F.2d at 188; *United States v. Edwards*, 785 F.2d 1293, 1296 (5th Cir. 1986) (per curiam); *Kerley*, 753 F.2d at 622; *Hastings*, 695 F.2d at 1284.[18] State courts have reached similar conclusions. *See, e.g.*, *Commonwealth v. Davis*, 635 A.2d 1062, 1066 (Pa. Super. Ct. 1993) ("[T]here is no United States Supreme Court case or Pennsylvania case which suggests that this right of access includes a right to televise, record, or otherwise broadcast judicial proceedings."); *Santiago v.*

[18] *See also* United States Courts, *History of Cameras in Courts*, https://www.uscourts.gov/about-federal-courts/judicial-administration/cameras-courts/history-cameras-courts (last checked June 5, 2020) (chronicling the federal judiciary's broadcasting rules).

Bristol, 709 N.Y.S.2d 724, 726 (App. Div. 2000) ("The right of access, however, is not the right to broadcast.").

Faced with this body of case law, the plaintiffs' brief at page 42 points to a decision far afield from the subject of broadcasting court proceedings, *Linmark Assocs., Inc. v. Willingboro Township*, 431 U.S. 85 (1977).[19] In *Linmark*, residents were prohibited from placing "For Sale" signs on their homes. *Id.* at 86. Because newspaper advertising and real-estate-agent listing is vastly more expensive than hanging a sign on your house, the Supreme Court wrote that "serious questions exist as to whether the ordinance 'leave(s) open ample alternative channels for communication.'" *Id*. at 93. Even so, the Court did not rely on those "serious questions"; instead, it held that the prohibition was content-based, because it banned only certain signs conveying a certain message. *Id*. at 93-94. ("If the ordinance is to be sustained, it must be on the basis of the township's interest in regulating the content of the communication, and not on any interest in regulating the form.").

Linmark does not apply, because unlike Maryland's statute, Willingboro's ordinance was a content-based regulation. Moreover, the Supreme Court has already cabined its discussion in *Linwood*, undermining the plaintiffs' argument: "Although the Court has shown special solicitude for forms of expression that are much less

[19] Plaintiffs did not rely on *Linmark* in the district court. *Soderberg v. Pierson*, No. 1:19-cv-01559-RDB, ECF No. 26 (Aug. 2, 2019).

expensive than feasible alternatives and hence may be important to a large segment of the citizenry, this solicitude has practical boundaries." *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 812 n.30 (1984) (citing, *inter alia*, *Kovacs v. Cooper*, 336 U.S. 77, 88-89 (1949)); *see Kovacs*, 336 U.S. at 88-99 ("That more people may be more easily and cheaply reached by sound trucks . . . is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open."). The test is not whether reciting, describing, or reenacting court proceedings is more expensive; it is whether the plaintiffs' "ability to communicate effectively is threatened." *Id*. at 812. Section 1-201 poses no such threat.

The plaintiffs have not alleged or argued that describing or reciting trial proceedings is so expensive as to make it infeasible. Centuries of good trial reporting confirm otherwise. The plaintiffs cannot even show that describing a trial (which they may attend in person or review afterward for free) is more expensive than purchasing and broadcasting an audio recording. Viewed from any reasonable perspective, § 1-201 affords the plaintiffs constitutionally adequate access to court proceedings and ways to convey information about those proceedings.

Still, the plaintiffs argue from cases about documenting police misconduct that recordings lack "reasonably adequate substitutes" that can preserve and convey the same information. Plaintiffs' Br. at 43. Unlike day-to-day policing, however,

criminal trials create an elaborate factual and verbatim record established under a judge's supervision, through a process designed to preserve information about what happened in ways that can prove or disprove claims or hypotheses about the disputed events. *Cf. Fields v. City of Philadelphia*, 862 F.3d 353, 359 (3d Cir. 2017) ("Access to information regarding public police activity is particularly important"); *ACLU v. Alvarez*, 679 F.3d 583, 605 (7th Cir. 2012) ("ACLU wants to openly audio record police officers"). Even if video recordings are necessary to document policing, broadcasting proceedings is not necessary to inform the public about criminal trials. In setting public policy, the Maryland legislature determined that the risks to trial fairness posed by broadcasting were too significant. Other methods of informing the public are available and effective. As the Second Circuit recently observed, "[t]hat the substance of the desired content is publicly available in some format (*i.e.*, a transcript) tends . . . to cut against the public interest in the release of the content in a different form (*i.e.*, video), since the primary public interest—general availability of the relevant information—has already been served." *Mirlis*, 952 F.3d at 65.

Plaintiffs' amici take a different tack. The Cato Institute argues that every alternative to broadcasting is too ineffective and too expensive. (ECF No. 34 at 6-11.) For example, Cato contends, citing nothing, that reenactments require expensive actors (one for each person in the courtroom) and become inauthentic. *Id.*

at 7. Amici do not explain why the plaintiffs—which include organizations with many members—would need to hire actors to recite back lines from a trial. Even if the reenactment's audience "could reasonably doubt that the recreation is accurate," the recreation conveys the same information that broadcasting a recording would. Cato similarly complains that showing lines of transcript during a documentary interferes with the documentary's "flow," which would "alienat[e] its audience," but its brief fails to address why a voiceover reading from the transcript would not convey the same information.

IV. SECTION 1-201 DOES NOT INTERFERE WITH THE PUBLIC'S RIGHT OF ACCESS TO THE COURTS.

Two amici contend that § 1-201 should be invalidated because it deprives the public of its right to access the courts. (ECF No. 39 at 10-16; ECF No. 38.) The plaintiffs did not preserve this issue for review in this Court. *See In re Under Seal*, 749 F.3d 276, 287 (4th Cir. 2014) ("[I]f a party wishes to preserve an argument for appeal, the party must press and not merely intimate the argument during the proceedings before the district court."). The plaintiffs did not litigate it in the district court, perhaps because they have already *accessed* the audio they hope to broadcast.[20] And neither the plaintiffs nor amici cite any authority that "allows an

[20] Plaintiffs argued only that they have a "right of access" under Maryland Rule 16-504 to acquire a copy of court recordings (J.A. 11-12), not that § 1-201 impairs the public's right of access to the courts..

amicus to interject into a case issues which the litigants, whatever their reasons might be, have chosen to ignore." *Lane v. First Nat. Bank of Bos.*, 871 F.2d 166, 175 (1st Cir. 1989).

More to the point, the public's right of access does not include a right to broadcast. The district court correctly noted that the right of access "is constitutionally satisfied when some members of both the public and the media are able to 'attend the trial and report what they have observed.'" (J.A. 81 (quoting *Moussaoui*, 205 F.R.D. at 185, which quotes *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 610 (1978))).

In *Nixon*, the Supreme Court spoke unequivocally: "there is no constitutional right to have . . . testimony recorded and broadcast." 435 U.S. at 610. Yet the Floyd Abrams Institute for Freedom of Expression retells the history of *Nixon* as if it recognized the right the Court rejected. (ECF No. 38 at 5-11.) In the Institute's retelling, once a court decides to record witness testimony for its own purposes, the recording becomes a judicial record, and the press earns a constitutional right to copy and distribute (broadcast) the record. (*Id*. at 16-18.) Acknowledging a lack of authority ("courts since [1980] have had little need to address . . ."), the Institute

then contends that the common-law right to copy and distribute judicial records prohibits statutes like § 1-201.[21] (*Id*. at 17-18.)

That argument conflates constitutional law with federal common law, then attempts to impose federal common law on the Maryland courts. But federal common law, including any common-law right to distribute judicial records, does not govern the States or their courts. "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). "Congress has no power to declare substantive rules of common law applicable in a state, ... [a]nd no clause in the Constitution purports to confer such a power upon the federal courts." *Id*.; *see Hernandez v. Mesa*, 140 S. Ct. 735, 742 (Feb. 25, 2020) (adhering to *Erie R. Co. v. Tompkins*' restriction of federal common law). Federal "[s]upervision over either the legislative or the judicial action of the states is in no case permissible except as

[21] Another amicus stops short of the Institute's argument. The brief of the Reporters Committee for Freedom of the Press and others shows that both the First Amendment and federal common law give the public and the press access to courts and judicial records. (ECF No. 39 at 12-13.) But rather than assert a common-law right to broadcast court recordings, the Committee falls back to the *Daily Mail* line of cases about "publishing or broadcasting truthful information." Again, because the plaintiffs can publish or broadcast the same truthful information without broadcasting the recording, the *Daily Mail* cases do not apply. *See* Section II(C), *supra*.

to matters by the constitution specially authorized or delegated to the United States." *Baltimore & O.R. Co. v. Baugh*, 149 U.S. 368, 401 (1893).

Because "there is no constitutional right to have . . . testimony recorded and broadcast," *Nixon*, 435 U.S. at 610, and because the federal common law governs only federal judicial records, the public's First Amendment (or Sixth Amendment) right of access to the courts is satisfied by providing *access to the courts*, not through broadcasting court proceedings. It is undisputed that Maryland provides the required public access to its courts.

The Institute's argument also fails under Maryland law. Maryland's "common law rule that court proceedings, records, and documents are open to the public" applies "except to the extent that the principle has been modified by legislative enactments or decisions by [the Court of Appeals of Maryland]." *Baltimore Sun Co. v. Mayor & City Council of Baltimore*, 359 Md. 653, 662 (2000). Any common law right of access in Maryland cannot include a right to broadcast, because § 1-201 is a legislative enactment that restricts the broadcasting of criminal trial court proceedings.

With limited exceptions, Maryland makes recordings of its criminal proceedings open to public attendance or after-the-fact inspection for free. Md. Rule 16-504(i). Anyone may purchase one of the recordings at cost for home consumption. Md. Rule 16-504(h). Maryland's one condition—that recipients not

broadcast the recordings—is a reasonable restriction on how the recipients inform others about the proceeding and is, therefore, constitutional.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B). It contains 8,614 words, excluding the parts exempted by Rule 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Rule 32(a)(6). It uses proportionally spaced 14-point Times New Roman font prepared in Microsoft Word 365.

/s/ Joseph Dudek
Joseph Dudek

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRANDON SODERBERG, *et al*.,	*	
Plaintiffs-Appellants,	*	
v.	*	No 20-1094
HON. AUDREY J.S. CARRION, *et al*.,	*	
Defendants-Appellees.	*	

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CERTIFICATE OF SERVICE

I certify that on June 5, 2020, I served the Brief of Appellees on all parties by copying their counsel on an email to 4cca-filing@ca4.uscourts.gov. Service was accomplished by email under this Court's procedure for filing into its CM/ECF system during system emergencies. U.S. Ct. App. for the Fourth Circuit, *eFiling Contacts*, https://www.ca4.uscourts.gov/caseinformationefiling/efiling-contacts (last visited June 5, 2020); *see* Fed. R. App. P. 25(c)(2). Use of this emergency system was necessary because from 8:00 p.m. to 9:30 p.m. on June 5, 2020, this Court's CM/ECF website (ecf.ca4.uscourts.gov) refused to connect to Google Chrome, Internet Explorer, or Microsoft Edge.

/s/ Joseph Dudek
Joseph Dudek