

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, as Administrative Judge for Maryland’s
Eighth Judicial Circuit; and 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
Case No. 1:19-cv-1559-RDB (Hon. Richard D. Bennett)

**BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS AND 23 MEDIA ORGANIZATIONS
IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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Counsel for Amici Curiae

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
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- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
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- Counsel has a continuing duty to update the disclosure statement.

No. 20-1094 Caption: Soderberg et al. v. Carrion et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Reporters Committee for Freedom of the Press, ALM Media, LLC, The Associated Press, Hearst Corp.,
(name of party/amicus)

The International Documentary Association, The Investigative Reporting Workshop, The Media Institute

who is _____ amicus _____, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO
2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including all generations of parent corporations:
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? YES NO
If yes, identify entity and nature of interest:
5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.
7. Is this a criminal case in which there was an organizational victim? YES NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Jennifer A. Nelson

Date: April 13, 2020

Counsel for: Amici Curiae

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Pursuant to FRAP 26.1 and Local Rule 26.1,

MPA-The Association of Magazine Media, National Press Photographers Association, National Public
(name of party/amicus)

Radio, Inc., The News Leaders Association, Online News Association

who is _____ amicus _____, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO
2. Does party/amicus have any parent corporations? YES NO
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No. 20-1094 Caption: Soderberg et al. v. Carrion et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Reveal from The Center for Investigative Reporting, The Society of Environmental Journalists, Society
(name of party/amicus)

of Professional Journalists, Undisclosed LLC

who is _____ amicus _____, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO
2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including all generations of parent corporations:
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No. 20-1094 Caption: Soderberg et al. v. Carrion et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Buzzfeed

(name of party/amicus)

who is _____ amicus _____, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO
2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including all generations of parent corporations:
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:
National Broadcasting Company (NBC)

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? YES NO
If yes, identify entity and nature of interest:
5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
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Pursuant to FRAP 26.1 and Local Rule 26.1,

Discovery, Inc., The E.W. Scripps Company, The New York Times Company
(name of party/amicus)

who is _____ amicus _____, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO
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3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? YES NO
If yes, identify entity and nature of interest:
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Pursuant to FRAP 26.1 and Local Rule 26.1,

Fox Television Stations, LLC (FTS)

(name of party/amicus)

who is _____ amicus _____, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO

2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including all generations of parent corporations:

Fox Corporation

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? YES NO
If yes, identify entity and nature of interest:
5. Is party a trade association? (amici curiae do not complete this question) YES NO
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Pursuant to FRAP 26.1 and Local Rule 26.1,

Gannett Co., Inc.

(name of party/amicus)

who is _____ amicus _____, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO
2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including all generations of parent corporations:
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:
BlackRock, Inc., the Vanguard Group, Inc.

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? YES NO
If yes, identify entity and nature of interest:
5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
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Pursuant to FRAP 26.1 and Local Rule 26.1,

Tribune Publishing Company
(name of party/amicus)

who is _____ amicus _____, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO

2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:

Alden Global Capital and affiliates own over 10% of Tribune Publishing Company's common stock; Nant Capital, LLC, Dr. Patrick Soon-Shiong, and California Capital Equity, LLC together own over 10% of Tribune Publishing Company's stock.

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? YES NO
If yes, identify entity and nature of interest:
5. Is party a trade association? (amici curiae do not complete this question) YES NO
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Pursuant to FRAP 26.1 and Local Rule 26.1,

The Washington Post
(name of party/amicus)

who is _____ amicus _____, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO

2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including all generations of parent corporations:

The Washington Post is a wholly-owned subsidiary of Nash Holdings LLC, a holding company owned by Jeffrey P. Bezos. WP Company LLC and Nash Holdings LLC are both privately held companies with no securities in the hands of the public.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? YES NO
If yes, identify entity and nature of interest:
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Signature: /s/ Jennifer A. Nelson

Date: 4/13/20

Counsel for: Amici Curiae

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STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae are the Reporters Committee for Freedom of the Press, ALM Media, LLC, The Associated Press, BuzzFeed, Discovery, Inc., The E.W. Scripps Company, Fox Television Stations, LLC, Gannett Co., Inc., Hearst Corporation, International Documentary Assn., Investigative Reporting Workshop at American University, The Media Institute, MPA - The Association of Magazine Media, National Press Photographers Association, National Public Radio, Inc., The New York Times Company, The News Leaders Association, Online News Association, Reveal from The Center for Investigative Reporting, Society of Environmental Journalists, Society of Professional Journalists, Tribune Publishing Company, The Washington Post, and Undisclosed LLC. A supplemental statement of identity and interest of amici curiae is included below as Appendix A.

Amici are members of the news media and organizations that advocate on behalf of the First Amendment rights of the press and the public. Many of the amici regularly report on court proceedings and have a direct interest in ensuring that journalists and news organizations remain free from unconstitutional restrictions on their ability to publish information obtained from court records. As such, amici have a strong interest in ensuring that state laws concerning court records are consistent with the First Amendment-protected rights of journalists and the public's rights of access to judicial records.

SOURCE OF AUTHORITY TO FILE

Counsel for Plaintiffs-Appellants and Defendants-Appellees have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

FED. R. APP. P. 29(a)(4)(E) STATEMENT

Amici state that:

1. no party's counsel authored the brief in whole or in part;
2. no party or party's counsel contributed money intended to fund preparing or submitting the brief; and
3. no person, other than amici, their members or their counsel, contributed money intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

This case concerns a question of fundamental importance to the rights of the press and public: whether Maryland, by statute, may prohibit the broadcasting of publicly available judicial records.

Members of the public have enjoyed access to audio recordings of Maryland trial court proceedings for nearly 20 years. Md. Rule § 16-504. Specifically, Maryland Rule § 16-504(h) requires court officials to “make a copy” of any audio recording “available to any person upon written request.” Md. Rule § 16-504(h); *see also* Md. Rule § 16-504(h)(1) (allowing court officials to charge the “reasonable costs” of making copies of the audio recordings).

Despite the public’s access to these audio recordings, Maryland courts have repeatedly threatened to hold journalists in contempt of court for using audio recordings obtained under this court rule in their reporting, relying on Maryland Code of Criminal Procedure § 1-201 (the “Broadcast Ban”) to do so. *See, e.g.,* Danielle E. Gaines, *Testing Court Broadcasting Ban, Podcaster Informs Judge of Upcoming Project*, Maryland Matters (Apr. 9, 2019), <https://perma.cc/AGC6-ND8N> (While courts have “never imposed contempt sanctions on someone for violating the [Maryland] broadcast ban, [judges have] publicly considered doing so on multiple occasions, including when audio excerpts from the criminal trial of Adnan Syed were used in producing the *Serial* podcast.”).

The Broadcast Ban, in relevant part, provides that “a person may not record or broadcast any criminal matter, including a trial, hearing, motion, or argument, that is held in trial court or before a grand jury,” and “applies to the use of television, radio, and photographic or recording equipment.” Md. Code Ann., Crim. Proc. § 1-201 (West 2019) (stating that a person who violates the statute “may be held in contempt of court”).

Restrictions on journalists’ ability to disseminate such lawfully obtained judicial records hinders the ability of the news media to report on matters of public interest and concern. As a result, Plaintiffs-Appellants have challenged the constitutionality of the Broadcast Ban, and for good reason—as interpreted and applied by the district court below, the statute is an unlawful restriction on the news media’s protected rights. Indeed, holding journalists in contempt for publishing information released by the court itself, publicly available to anyone who requests it, would contravene nearly 80 years of constitutional law. The First Amendment soundly prohibits the punishment of a journalist for the publication of lawfully obtained information on a matter of public concern.

Additionally, amici agree with Plaintiffs-Appellants that the Broadcast Ban is a content-based prohibition on speech because it bars journalists from disseminating audio recordings from criminal proceedings in the state of Maryland to the public. Amici also highlight how this ban specifically impacts

newsgathering and reporting because it forecloses news organizations and journalists from using an entire medium of communication in their reporting. The importance of the use of audio recordings for reporting about government activities cannot be understated. Far more than the written word, or even a reenactment, audio recordings convey inflection, emotion, dramatic pauses, tone of voice, mendacity, veracity, and many other subtle communicative cues that cannot be communicated by other forms of media. Accordingly, even if the Court holds that the Broadcast Ban is content-neutral, the Court must still analyze it under the line of Supreme Court precedent applying intermediate scrutiny and striking down prohibitions on speech that foreclose entire media. As the Broadcast Ban—by its nature—fails to include ample alternative channels for communication, it necessarily also fails constitutional review, even under intermediate scrutiny.

For these reasons, amici join Plaintiffs-Appellants in urging this Court to reverse the district court's decision.

ARGUMENT

I. The Broadcast Ban hinders reporting on Maryland's judicial system, thus depriving the public of unique, newsworthy information.

By prohibiting the use of lawfully obtained recordings of criminal proceedings, the Broadcast Ban curtails the news media's ability to report fully, accurately, and in detail about what transpires in the courtroom.

The public's immense interest in seeing and hearing what transpires in a criminal courtroom is exemplified by the growing popularity of investigative documentaries, reenactments, and podcasts covering legal issues. *See, e.g.*, Susan Simpson, *The Unlikely Role of True Crime Podcasts in Criminal Justice Reform*, Quartz (Oct. 14, 2017), <https://perma.cc/8KX2-U7TP>. In Maryland alone, recordings of criminal proceedings have played a significant role in acclaimed podcasts such as *Serial* and *Undisclosed*, as well as the documentary *The Case Against Adnan Syed*. *Id.*

The appeal of these podcasts and documentaries extends beyond mere entertainment. As a host for *Undisclosed* noted: “[T]he most compelling true crime documentaries have the ability to shed new light on inequalities in the U.S. justice system—bringing attention to issues of race, religion, and socio-economic class, while reigniting audiences with an intimate discussion of old cases.” Simpson, *supra*. Reporting of this type has even succeeded in prompting courts to revisit convictions through the discovery of new evidence. *See* Jessica Ferri, *9 True-Crime Documentaries That Changed The Case Forever*, The Lineup (Aug. 1, 2018), <https://perma.cc/GU6J-8CSZ>.

Audio recordings of criminal proceedings provide particularly powerful, accurate information about the criminal justice system. Further, podcasts and documentaries are both especially compelling media for in-depth reporting on

criminal trials, because they allow members of the public to see or hear what transpired in a courtroom through audio or visual recordings. Indeed, many of the most successful podcasts and documentaries covering criminal trials have relied heavily on audio recordings of criminal proceedings. For example, the first season of investigative podcast *Serial* used audio from a Maryland criminal courtroom extensively to “effectively call[] upon the audience to question fairness in the criminal justice process, opening the door for questions of biases, witness manipulation, prosecutorial misconduct, ineffective assistance of counsel, and questionable evidence.” Simpson, *supra*; see also Lillian Reed, *Why Has Maryland Court Trial Footage of ‘Serial’ Subject Adnan Syed Rarely Been Broadcast?*, Baltimore Sun (Mar. 12, 2019), <https://perma.cc/UXL5-2VNA>.

Similarly, the third season of *Serial* extensively relied on audio recordings of courtroom proceedings to reveal the inner workings of a county courthouse in Cleveland, Ohio. Tana Ganeva, *How the ‘Serial’ Podcast Exposes Epic Dysfunction in Cleveland’s Criminal Justice System*, Rolling Stone (Nov. 17, 2018), <https://perma.cc/6FQP-VQ9E>. The podcast included troubling audio recordings of courtroom proceedings, including those of a judge who “threaten[ed] black defendants with jail time if they have more children and blithely thr[ew] around racist tropes about broken black families and drug use.” *Id.*; see also *You’ve Got Some Gauls*, *Serial* (Sept. 20, 2018) at 8:25-9:00,

<https://perma.cc/SNQ9-HY75>. The inclusion of these audio recordings made *Serial*'s narrative "all the more unbelievable because you're *listening* to people act." Ganeva, *supra* (emphasis in original).

In Maryland, a 2016 news broadcast featured alarming footage of a Charles County judge who ordered a criminal defendant tased in his courtroom. The judge was later removed from the bench and sentenced in federal court to probation. *Former Judge Pleads Guilty to Violating Tased Defendant's Civil Rights*, ABC (Apr. 2, 2016), <https://perma.cc/8CVB-8A38>. And in 2019, a Baltimore attorney testifying in a legislative hearing played footage showing the perjured testimony of a corrupt Baltimore police officer. Danielle E. Gaines, *Defense Attorney Sickens Member of State Panel With His Tales of Police Corruption*, Maryland Matters (Jun. 12, 2019), <https://perma.cc/6DPQ-66AQ>. The attorney's "footage and compilation of statistics, along with the personal stories of how officers' actions affected his clients' lives for years, brought the work of [the Commission to Restore Trust in Policing] into stark focus" *Id.*; see also *Cops on a crime spree*, Reveal (June 2, 2018) at 0:00-19:04, <https://perma.cc/VFT2-NYJV> (detailing operations of the now-defunct Gun Trace Task Force of the Baltimore City Police Department).

Finally, ProPublica used courtroom audio recordings in a 2019 investigative report on South Carolina's magistrate judge system. Joseph Cranney, *These*

Judges Can Have Less Training Than Barbers but Still Decide Thousands of Cases Each Year, ProPublica (Nov. 27, 2019), <https://perma.cc/WAS2-U48U>. The story shed light on the state's unique magistrate court system, in which politically appointed magistrate judges, many of whom are not licensed attorneys, handle hundreds of thousands of misdemeanor criminal cases and civil disputes annually. *Id.* The investigative report, which was interspersed with embedded audio of criminal proceedings, uncovered instances of serious judicial errors or misconduct in 30 of the South Carolina's 46 counties. *Id.*

In short, the ability to include audio recordings in published media allows journalists to produce uniquely impactful reporting. The Broadcast Ban, which impermissibly prohibits the use of these public court records in journalists' reporting, hinders such vital reporting on matters of critical public interest.

II. The Broadcast Ban violates the public's rights of access to judicial records and impermissibly restricts the publication of lawfully obtained information on a matter of public concern.

Among Plaintiffs-Appellants are members of the news media who seek to use lawfully obtained judicial records, made public by the court itself, to report on criminal proceedings and trials. These journalists serve as surrogates for the public, disseminating critical information about criminal proceedings in Maryland courtrooms for the public's benefit. The Broadcast Ban, as interpreted by the

district court below, improperly infringes on this vital, constitutionally recognized role of the news media.

Under the First Amendment, both the public and the press enjoy a qualified right to attend criminal trials. *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 603 (1982) (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 558–81 (1980) (plurality opinion)); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 & n.4 (4th Cir. 1988). Such openness has long been considered “one of the essential qualities of a court of justice” because it offers the public “assurance that the proceedings [are] conducted fairly to all concerned, and it discourage[s] perjury, the misconduct of participants, and decisions based on secret bias or partiality.” *Richmond Newspapers*, 448 U.S. at 569.

Although the right of access to court proceedings applies with equal force to all members of the public, access by the media is especially important because the press serves as a conduit of information to the public. *See Richmond Newspapers*, 448 U.S. at 573 (members of the press “function[] as surrogates for the public” by reporting on judicial matters to the public at large). “[A]n untrammelled press [is] a vital source of public information,’ ... and an informed public is the essence of working democracy.” *Minn. Star & Trib. Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 585 (1983) (citations omitted); *see also In re Oliver*, 333 U.S. 257, 271 (1948) (“Without publicity, all other checks are insufficient: in comparison of

publicity, all other checks are of small account.”); *Roth v. United States*, 354 U.S. 476, 484 (1957) (explaining that the media provides the public with information necessary to “assure unfettered interchange of ideas” which enable “political and social changes desired by the people”).

With regards to documents or materials filed in a criminal proceeding, including trial transcripts, public access derives from two independent sources: the common law and the First Amendment. See *Virginia Dept. of State Police v. Washington Post*, 386 F.3d 567, 575 (4th Cir. 2004). The common law presumes a right of the public to inspect and copy “all ‘judicial records and documents.’” *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 178, 180 (4th Cir. 1988) (quoting *Nixon v. Warner Comm’ns, Inc.*, 435 U.S. 589, 597 (1978)). The common law right of access to judicial records “can be rebutted if countervailing interests heavily outweigh the public interests in access.” *Rushford*, 846 F.2d at 253.

In contrast to the common law, “the First Amendment guarantee of access has been extended only to particular judicial records and documents.” *Stone*, 855 F.2d at 180. When the First Amendment provides a right of access, a district court may restrict such access “only on the basis of a compelling governmental interest, and only if the denial is narrowly tailored to serve that interest.” *Id.*; see also *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 15 (1986). Regardless of whether

the right of access arises from the First Amendment or the common law, it “may be abrogated only in unusual circumstances.” *Stone*, 855 F.2d at 182.

This Court has observed that the public right of access extends to the transcript of a criminal proceeding and an audio tape that is the original record of that proceeding. *See United States v. Davis*, 648 F. App’x 295, 297 (4th Cir. 2016) (per curiam) (quoting *Smith v. U.S. Dist. Court Officers*, 203 F.3d 440 (7th Cir. 2000)). And, although this Court in *Davis* did not have occasion to specify whether the public’s right of access attaches under the common law or First Amendment, at least one district court in this Circuit has concluded in the context of written trial transcripts that “trial transcripts presumably would be entitled to protection under the First Amendment, [in addition to the common law].” *United States v. Cousins*, 858 F. Supp. 2d 614, 617 n. 4 (E.D. Va. 2012) (citing *In re Washington Post Co.*, 807 F.2d 383 (4th Cir. 1986)). Such a determination is logical and supported by amici here. Indeed, as the Third Circuit has held, “[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.” *United States v. Antar*, 38 F.3d 1348, 1360–61 (3d Cir. 1994) (holding that “[t]his strong [common law] presumption of access to records, including transcripts, provides independent support for the conclusion that the First Amendment right of access must extend equally to transcripts as to live proceedings.”).

In addition to public access to judicial records and proceedings, the First Amendment affords the critical protection, recognized in a long line of Supreme Court jurisprudence, that the press cannot be punished for publishing or broadcasting truthful information of public concern that the press obtained legally absent a need of the “highest order,” *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 103 (1979), a standard that the Supreme Court has never found to have been met. *See Bridges v. California*, 314 U.S. 252, 265–66 (1941) (the First Amendment’s protections for freedom of the press “were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society.”).

Indeed, the Supreme Court has time and again rejected efforts to punish or restrain journalists who publish information lawfully obtained from sources. *See, e.g., Bartnicki v. Vopper*, 532 U.S. 514, 534 (2001) (holding that a journalist may not be punished for broadcasting an audio recording illegally recorded by a third party and left in a source’s mailbox, who in turn provided the tape to the journalist); *Florida Star v. BJJF*, 491 U.S. 524, 526 (1989) (holding that a rape victim may not recover civil damages from newspaper for the publication of her name when the sheriff’s department inadvertently release it in violation of a Florida statute); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (“Once true information is disclosed in public court documents open to public inspection, the

press cannot be sanctioned for publishing it.”). Here, the Broadcast Ban purports to restrict the dissemination of judicial records that have been made available to the public *by the court itself*, representing an even more egregious violation of this line of Supreme Court jurisprudence.

Whether in the context of a prior restraint or punishment after publication, courts around the country, including this Court, have recognized this axiomatic principle: When the news media lawfully obtains truthful information about a matter of public concern, the First Amendment protects the right to publish that information. *See, e.g., Ashcraft v. Conoco*, 218 F.3d 288, 303 (4th Cir. 2000) (holding that a news organization may not be held in contempt for reporting on sealed court records which a court clerk provided to the journalist by mistake). This protection is crucially important when, as here, a prohibition bars news organizations from using a particular media—audio recordings—in their reporting. As discussed *infra* Section III, audio recordings can convey information, including inflection and tone, and a sense of immediacy that cannot be conveyed through the written word or even a dramatic reenactment. These unique characteristics of audio recording are legally relevant as there are no alternative means of conveying this same information to the listener, which would invalidate the Broadcast Ban even under intermediate scrutiny.

The Broadcast Ban, as interpreted and applied by the district court, impermissibly burdens journalists' ability to report on Maryland court proceedings, a restraint that is even more egregious given that it restricts dissemination of judicial records subject to the public's First Amendment and common law rights of access to judicial records. Accordingly, this Court should reverse the district court's decision.

III. Medium-specific regulations on speech, like the Broadcast Ban, pose unique and significant constraints on news reporting and should be invalidated even if the Court construes the Broadcast Ban as a content-neutral regulation.

As discussed above, *see supra* Section I, audio recordings convey unique information that cannot be communicated through the written word alone, contrary to the district court's holding that publishing the transcript or reenacting the proceedings "convey[s] the same information." JA 87. Indeed, as one federal district court observed, audio (and visual) information can add "a material dimension to one's impression of particular news events," *Cable News Network, Inc. v. American Broadcasting Cos.*, 518 F. Supp. 1238, 1245 (N.D. Ga. 1981) (granting injunction lifting ban on all television news media from press pool), and the news media's ability to broadcast audio-visual media in reporting stories is important in conveying certain information that cannot be imparted through other classes of media.

Amici agree with Plaintiffs-Appellants that the Broadcast Ban is a content-based restriction on protected speech that should be analyzed under strict scrutiny, because it applies only to recordings of criminal court proceedings. This is particularly true given that all of the cases relied upon by the district court found that regulations governing journalists' use of audio-visual recording equipment to *contemporaneously* document court proceedings were content neutral. In contrast, the Broadcast Ban restrains the *future* use of existing audio and video recordings in news reporting after the conclusion of a case. *See* JA 88 (citing *United States v. Hastings*, 695 F.2d 1278, 1280 (11th Cir. 1983) (denying application to the trial court for order allowing use of electronic audio-visual equipment *during* trial)); *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 17 (2d Cir. 1984) (denying affirmative right to film and broadcast a federal trial); *United States v. Kerley*, 753 F.2d 617, 617–18 (7th Cir. 1985) (denying request to film person's own trial); *United States v. Edwards*, 785 F.2d 1293, 1294 (5th Cir. 1986) (rejecting challenge to the constitutionality of a ban on recording from courtroom); *Conway v. United States*, 852 F.2d 187, 188 (6th Cir. 1988) (rejecting request by journalists for right to record trial); *Rice v. Kempker*, 374 F.3d 675, 677–78 (8th Cir. 2004) (rejecting challenge to no-camera policy at executions). The fact that these cases are all limited to restrictions on contemporaneous recording and broadcasting is highly relevant because the restrictions at issue in these cases

regulated speech in a discrete “place” and at a particular “time” and in a specific “manner”: namely, the use of audio-visual recording media to capture the sights and sounds in a courtroom during a court proceeding or at an execution. The Broadcast Ban, however, has the effect of preventing journalists from ever broadcasting recordings of criminal court proceedings at any point in the future, thus completely foreclosing the use of this class of media in reporting.

However, even if the Court holds that the Broadcast Ban is content-neutral—which it is not—and subject to intermediate scrutiny, it still fails. The dissemination of an audio recording of an event is different in kind—not merely degree—in its ability to convey information to the public. This is so relative to the written word alone. Given that the Broadcast Ban forecloses the use of an entire media in news reporting—audio recordings of criminal proceedings—it must be analyzed under the Supreme Court’s jurisprudence concerning medium-specific restrictions on speech.

In *City of Ladue v. Gilleo*, the Supreme Court noted that its “prior decisions have voiced particular concern with laws that foreclose an entire medium of expression.” 512 U.S. 43, 55 (1994). The *Gilleo* Court cited decisions striking down a permitting requirement for pamphleteering, *Lovell v. City of Griffin*, 303 U.S. 444, 452–53 (1938); banning handbills in public streets, *Jamison v. Texas*, 318 U.S. 413, 417 (1943); prohibiting door-to-door solicitation, *Martin v. City of*

Struthers, 319 U.S. 141, 147–48 (1943); and barring live entertainment in commercial establishments throughout a locality, *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 67–68 (1981). In doing so, the Court noted that *even when content-neutral*, “prohibitions foreclosing entire media [are] completely free of content or viewpoint discrimination,” but still pose a “danger” to “freedom of speech [that] is readily apparent—by eliminating a common means of speaking, such measures can suppress too much speech.” *Gilleo*, 512 U.S. at 55.

Indeed, the Supreme Court’s decision in *Gilleo* rests squarely on the special communicative power of the medium at issue in that case: the use of residential signs to convey political, religious, or ideological messages. *Id.* at 56 (“Displaying a sign from one’s own residence often carries a message quite distinct from placing the same sign someplace else, or *conveying the same text or picture by other means.*”) (emphasis added). Much as the district court below reasoned when suggesting that printing a bare transcript or even reenactment would “convey the same information,” the City of Ladue unsuccessfully argued in *Gilleo* that alternative modes of communication existed, namely, “hand-held signs, letters, handbills, flyers, telephone calls, newspaper advertisements, bumper stickers, speeches, and neighborhood or community meetings.” *Id.* (internal quotation marks and citations omitted). The Court found that none of these alternatives were

“adequate substitutes” because of the unique communicative impact of the medium of residential signage:

Precisely because of their location, such signs provide information about the identity of the “speaker.” As an early and eminent student of rhetoric observed, the identity of the speaker is an important component of many attempts to persuade. A sign advocating “Peace in the Gulf” in the front lawn of a retired general or decorated war veteran may provoke a different reaction than the same sign in a 10-year-old child's bedroom window or the same message on a bumper sticker of a passing automobile. An espousal of socialism may carry different implications when displayed on the grounds of a stately mansion than when pasted on a factory wall or an ambulatory sandwich board.

Id. at 56–57 (footnote omitted).¹

In sum, that audio communications convey *more and different* information than a transcript or reenactment is directly relevant to this Court’s inquiry under intermediate scrutiny. In the context of a time, place, and manner restriction, the government’s ability to restrict expressive conduct is “very limited.” *United States v. Grace*, 461 U.S. 171, 177 (1983). The restriction must be (1) content-neutral, (2) serve a “significant” government interest, and (3) leave open ample alternative channels of communication. *Id.* (finding prohibition of signs, banners, or communicative “devices” on public sidewalks around the Supreme Court

¹ Notably, Justice O’Connor wrote separately to express her view that the regulation “on its face” draws content distinctions and that she would have applied strict scrutiny. *Id.* at 60 (O’Connor, J., concurring).

unconstitutional). Importantly, the Court in *Grace* also noted that, “Additional restrictions such as an *absolute prohibition on a particular type of expression* will be upheld only if narrowly drawn to accomplish a compelling government interest.” *Id.* (emphasis added).

Though amici again believe the Broadcast Ban is a content-based restriction, as with the residential sign ordinance in *Gilleo*, the Broadcast Ban fails even under intermediate scrutiny as to the third prong—specifically its “ample alternative channels” requirement. Here, not only are alternative channels not “ample,” they are non-existent. There is simply no way for a news organization or journalist to convey the same information—inflection, tone, timing, sarcasm, dissembling, and other subtle verbal cues—through alternative classes of media. While amici respectfully submit that a restraint on broadcasting publicly available recordings from criminal court proceedings is clearly content based and cannot survive strict scrutiny, it should still also fail under the “ample alternative channels of communication” prong of intermediate scrutiny analysis alone.

CONCLUSION

For all of these reasons, amici respectfully request that the judgment of the district court be reversed and Defendants-Appellees’ motion to dismiss be denied.

Dated: April 13, 2020

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² Counsel wish to thank law students Mary Maerz and William Tucker, class of 2020, for their invaluable contributions to this brief. The brief does not express the institutional views of the University of Virginia School of Law.

APPENDIX A

SUPPLEMENTAL STATEMENT OF IDENTITY OF AMICI CURIAE

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

ALM Media, LLC publishes over 30 national and regional magazines and newspapers, including *The American Lawyer*, *The National Law Journal*, *New York Law Journal* and *Corporate Counsel*, as well as the website Law.com. Many of ALM's publications have long histories reporting on legal issues and serving their local legal communities. ALM's *The Recorder*, for example, has been published in northern California since 1877; *New York Law Journal* was begun a few years later, in 1888. ALM's publications have won numerous awards for their coverage of critical national and local legal stories, including many stories that have been later picked up by other national media.

The Associated Press ("AP") is a news cooperative organized under the Not-for-Profit Corporation Law of New York. The AP's members and subscribers

include the nation's newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 280 locations in more than 100 countries. On any given day, AP's content can reach more than half of the world's population.

BuzzFeed is a social news and entertainment company that provides shareable breaking news, original reporting, entertainment, and video across the social web to its global audience of more than 200 million.

Discovery, Inc. is a global leader in real life entertainment, serving a passionate audience of superfans around the world with content that inspires, informs and entertains. Available in 220 countries and nearly 50 languages, Discovery's portfolio of premium brands includes Discovery Channel, HGTV, Food Network, TLC, Investigation Discovery, Travel Channel, Motor Trend, Animal Planet, and Science Channel, as well as OWN: Oprah Winfrey Network in the U.S., Discovery Kids in Latin America, and Eurosport, the leading provider of locally relevant, premium sports and Home of the Olympic Games across Europe. Discovery reaches viewers on all screens, including TV Everywhere products such as the GO portfolio of apps and Discovery Kids Play; direct-to-consumer streaming services such as Eurosport Player and Motor Trend OnDemand; and digital-first and social content from Group Nine Media and a strategic alliance with the PGA Tour to create the Global Home of Golf.

The E.W. Scripps Company serves audiences and businesses through local television, with 60 television stations in 42 markets. Scripps also owns Newsy, the next-generation national news network; podcast industry leader Stitcher; national broadcast networks Bounce, Grit, Escape, Laff and Court TV; and Triton, the global leader in digital audio technology and measurement services. Scripps serves as the long-time steward of the nation's largest, most successful and longest-running educational program, the Scripps National Spelling Bee.

Directly and through affiliated companies, **Fox Television Stations, LLC**, owns and operates 28 local television stations throughout the United States. The 28 stations have a collective market reach of 37 percent of U.S. households. Each of the 28 stations also operates Internet websites offering news and information for its local market.

Gannett is the largest local newspaper company in the United States. Our 260 local daily brands in 46 states and Guam — together with the iconic USA TODAY — reach an estimated digital audience of 140 million each month.

Hearst is one of the nation's largest diversified media, information and services companies with more than 360 businesses. Its major interests include ownership of 15 daily and more than 30 weekly newspapers, including the San Francisco Chronicle, Houston Chronicle, and Albany Times Union; hundreds of magazines around the world, including Cosmopolitan, Good Housekeeping, ELLE,

Harper's BAZAAR and O, The Oprah Magazine; 31 television stations such as KCRA-TV in Sacramento, Calif. and KSBW-TV in Monterey/Salinas, CA, which reach a combined 19 percent of U.S. viewers; ownership in leading cable television networks such as A&E, HISTORY, Lifetime and ESPN; global ratings agency Fitch Group; Hearst Health; significant holdings in automotive, electronic and medical/pharmaceutical business information companies; Internet and marketing services businesses; television production; newspaper features distribution; and real estate.

The International Documentary Association (IDA) is dedicated to building and serving the needs of a thriving documentary culture. Through its programs, the IDA provides resources, creates community, and defends rights and freedoms for documentary artists, activists, and journalists.

The Investigative Reporting Workshop, based at the School of Communication (SOC) at American University, is a nonprofit, professional newsroom. The Workshop publishes in-depth stories at investigativereportingworkshop.org about government and corporate accountability, ranging widely from the environment and health to national security and the economy.

The Media Institute is a nonprofit foundation specializing in communications policy issues founded in 1979. The Media Institute exists to

foster three goals: freedom of speech, a competitive media and communications industry, and excellence in journalism. Its program agenda encompasses all sectors of the media, from print and broadcast outlets to cable, satellite, and online services.

MPA – The Association of Magazine Media, (“MPA”) is the industry association for magazine media publishers. The MPA, established in 1919, represents the interests of close to 100 magazine media companies with more than 500 individual magazine brands. MPA’s membership creates professionally researched and edited content across all print and digital media on topics that include news, culture, sports, lifestyle and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

The National Press Photographers Association (“NPPA”) is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA’s members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

National Public Radio, Inc. (NPR) is an award-winning producer and distributor of noncommercial news, information, and cultural programming. A privately supported, not-for-profit membership organization, NPR serves an audience of 30 million people who listen to NPR programming and newscasts each week via more than 1000 noncommercial, independently operated radio stations, licensed to more than 260 NPR members and numerous other NPR-affiliated entities. In addition, NPR is reaching an expanding audience via its digital properties, including podcasts (which see about 19 million unique users each month), social media, mobile applications, and NPR.org (which sees about 37 million unique visitors each month).

The New York Times Company is the publisher of *The New York Times* and *The International Times*, and operates the news website nytimes.com.

The News Leaders Association was formed via the merger of the American Society of News Editors and the Associated Press Media Editors in September 2019. It aims to foster and develop the highest standards of trustworthy, truth-seeking journalism; to advocate for open, honest and transparent government; to fight for free speech and an independent press; and to nurture the next generation of news leaders committed to spreading knowledge that informs democracy.

The Online News Association is the world's largest association of digital journalists. ONA's mission is to inspire innovation and excellence among

journalists to better serve the public. Membership includes journalists, technologists, executives, academics and students who produce news for and support digital delivery systems. ONA also hosts the annual Online News Association conference and administers the Online Journalism Awards.

Reveal from The Center for Investigative Reporting, founded in 1977, is the nation's oldest nonprofit investigative newsroom. Reveal produces investigative journalism for its website <https://www.revealnews.org/>, the Reveal national public radio show and podcast, and various documentary projects. Reveal often works in collaboration with other newsrooms across the country.

The Society of Environmental Journalists is the only North-American membership association of professional journalists dedicated to more and better coverage of environment-related issues.

Society of Professional Journalists (“SPJ”) is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

Tribune Publishing Company is one of the country's leading media companies. The company's daily newspapers include The Baltimore Sun and the Capital Gazette in Maryland, as well as the Chicago Tribune, New York Daily News, Sun Sentinel (South Florida), Orlando Sentinel, Hartford Courant, The Morning Call, the Virginian Pilot and Daily Press. Popular news and information websites, including www.baltimoresun.com, complement Tribune Publishing's publishing properties and extend the company's nationwide audience.

WP Company LLC d/b/a The Washington Post is a news organization based in Washington, D.C. It publishes The Washington Post newspaper and the website www.washingtonpost.com, and produces a variety of digital and mobile news applications. The Post has won 47 Pulitzer Prizes for journalism, including awards in 2018 for national and investigative reporting.

Undisclosed LLC is a company that produces podcasts on wrongful convictions and other criminal justice matters, and has covered numerous criminal cases in Maryland.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief of amici curiae complies with:

- 1) the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 5,728 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as calculated by the word-processing system used to prepare the brief; and
- 2) 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 it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Times New Roman.

/s/ Jennifer A. Nelson
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Counsel of Record
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
FIRST AMENDMENT CLINIC

Dated: April 13, 2020
Washington, DC

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
APPEARANCE OF COUNSEL FORM

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COUNSEL FOR: Reporters Committee for Freedom of the Press and 23 Media Organizations

_____ as the
 (party name)

appellant(s) appellee(s) petitioner(s) respondent(s) amicus curiae intervenor(s) movant(s)

/s/ Jennifer A. Nelson

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