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October 23, 2019

Via FedEx

Hon. Laura S. Ripken
Circuit Court for Anne Arundel County
P.O. Box 71
8 Church Circle
Annapolis, MD 21404-0071

Re: Press Coalition Request for Pool Television Camera Coverage of *State of Maryland v. Jarrod Ramos*, Case No. C-02-CR-18-001515

Dear Judge Ripken:

On behalf of a coalition of nine local, state, and national press organizations (together, the "Press Coalition"), and pursuant to Maryland Rule 16-604, we write to request your permission to provide pooled television coverage of the upcoming trial in *State v. Ramos*, Case No. C-02-CR-18-001515.[1]

Nearly 40 years ago, the Maryland Court of Appeals recognized that "the trial of a criminal case must be open to the public absent an overriding interest articulated in findings." *News American Div., Hearst Corp. v. State*, 294 Md. 30, 37 (1982) (alterations, internal marks, and citations omitted). This holding cited and followed on the heels of the U.S. Supreme Court's landmark decision in *Richmond Newspapers, Inc. v. Virginia*, which concluded that the explicit protections for free speech, freedom of the press, and the right to petition the government guaranteed in the First Amendment, carry with them an implied right of access for the press and public to attend and observe court proceedings. 448 U.S. 555 (1980).

In reaching this decision, the Supreme Court observed that "[w]hen a shocking crime occurs, a community reaction of outrage and public protest often follows. Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for

[1] This request is made on behalf of WBAL, WBFF, WJLA, WJZ, WMAR, WRC/WZDC, WTTG, WUSA, and *The Washington Post*.

community concern, hostility, and emotion." *Id.* at 571. But these "aspects of the administration of justice cannot function in the dark." *Id.* Rather, the Court explained, "it is important that society's criminal process satisfy the appearance of justice, and the appearance of justice can best be provided by allowing people to observe it." *Id.* at 572 (internal marks and citations omitted).

A shocking crime took place last year just outside of Annapolis: On June 28, 2018, a gunman entered the offices of the *Capital Gazette* and killed five people. The Maryland community reacted with concern and outrage at this mass shooting. Maryland established June 28 as "Freedom of the Press Day," and in his proclamation the Governor stated that "as we honor those we lost and all who have lost their lives in the pursuit of informing our citizens, we recognize the vital role that the freedom of the press has in our democracy and our duty to honor and protect this constitutional right."

The press community reacted with concern and emotion as well. Journalists from across the country volunteered in the *Capital Gazette* newsroom to ensure that, as one *Gazette* journalist memorably tweeted on the day of the attack, the organization could continue "putting out a damn paper tomorrow."

The State is now prosecuting Jarrod Ramos for allegedly carrying out this shooting. It has charged him with five counts of murder, one count of attempted murder, six counts of assault, and eleven counts of illegal use of a firearm. Ramos has pleaded not guilty and not criminally responsible on all charges. His trial is scheduled to begin on November 4, 2019.

With that day approaching, the Press Coalition respectfully seeks this Court's permission to establish pool camera coverage and broadcast the "open processes of justice" in this trial of extraordinary local, state, and national significance. If the public is to meaningfully exercise the right to observe this criminal trial, that right must be more than theoretical, and it must be available to more than just those who can fit into the courtroom.

The Press Coalition is aware that Section 1-201 of the Maryland Rules of Criminal Procedure ("Section 1-201") ostensibly bans the use of television, radio, and photographic or recording equipment during a criminal trial. But as discussed below, the State's *per se* prohibition on cameras in all criminal trials conflicts with key First Amendment protections for public access to courts and does not represent modern Maryland jurisprudence. To vindicate the right of access under the First Amendment, the Court should permit the Press Coalition to record and telecast these trial proceedings.

I. Section 1-201 Conflicts With The Presumption Of Access To Court Proceedings

The First Amendment requires that criminal trials are open to the press and public absent compelling and clearly articulated reasons for closure. *Richmond Newspapers*, 448 U.S. at 580 & n.17; *Baltimore Sun Co. v. Colbert*, 323 Md. 290, 297-98 (1991). The First Amendment further authorizes courts to limit the public's constitutional right of access to judicial proceedings only based on findings that (1) closure serves an "overriding interest"; (2) "closure of the courtroom will prevent such prejudice"; and (3) "reasonable alternatives to closure cannot protect the asserted values." *Colbert*, 323 Md. at 302 (citations omitted).

There can be no dispute that the public and press have a right of access to the upcoming trial proceedings in the *Ramos* case. The extraordinary interest in this matter, and the tragic events that led to this prosecution, call out for press and public observation.

There also can be no dispute that the means now exist, through television, for all Marylanders and others across the country to observe this trial, consistent with the First Amendment right of access for the public to attend the trial in person. Under *Richmond Newspapers* and its progeny, and with the technology now available, the Court should afford all citizens that right. As courts have noted, the First Amendment access right "can be fully vindicated ***only*** if the opportunity for personal observation is extended to persons other than those few who can manage to attend the trial in person." *United States v. Criden*, 648 F.2d 814, 822 (3d Cir. 1981) (emphasis added).

We acknowledge that the Court may, consistent with the First Amendment and Maryland law, restrict the televising of portions of the trial. The legal presumptions of access, however, are overcome only after careful consideration, on a case-by-case basis, and only where identifiable, specific, and compelling risks have been identified and articulated. As the U.S. Supreme Court explained in striking down a state law categorically restricting public access to certain trial court proceedings, "In individual cases, and under appropriate circumstances, the First Amendment does not necessarily stand as a bar to the exclusion from the courtroom of the press and general public . . . . But a mandatory rule, requiring no particularized determinations in individual cases, is unconstitutional." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 611 n.27 (1982).

Section 1-201 is a categorical ban on *all* recording of *any* portion of a criminal trial. For this reason it represents the type of "mandatory rule, requiring no particularized determinations in individual cases" that contravenes the principles of presumptive public access to court proceedings. *See, e.g.*, *People v. Boss*, 701 N.Y.S.2d 891, 895 (Sup. Ct. 2000) ("This court is not holding there is an unfettered right to televise all aspects of every proceeding. However, this court does find that . . . an absolute ban on audio-visual coverage in the courtroom, is unconstitutional.").

II. Section 1-201 Also Conflicts With The Right To Record Public Officials In Public Places

The Supreme Court also recognizes that the First Amendment "protects the paramount public interest in a free flow of information to the people concerning public officials." *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964). Courts have accordingly held that the "First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest." *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000); *see also Mills v. PPE Casino Resorts Md., LLC*, 2017 U.S. Dist. LEXIS 70373, at *13 (D. Md. May 8, 2017) (the "First Amendment right to record" the activities of "police officers performing their official duties" is "well-supported by the relevant caselaw").

These same First Amendment interests have led courts to strike down restrictions on the public's right to document what happens inside the courtroom. *E.g.*, *United States v. CBS*, 497 F.2d 102, 107 (5th Cir. 1974) (vacating district court's order prohibiting in-court sketches during high-profile criminal trial). Indeed, the case law is clear that the public's right to record the activities of public officials in public places is subject only to "reasonable time, place, and manner restrictions." *Fields v. City of Phila.*, 862 F.3d 353, 360 (3d Cir. 2017) (citation omitted). Such restrictions must: (1) be "justified without reference to the content of the regulated speech"; (2) be "narrowly tailored to serve a significant governmental interest"; and (3) "leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

For one, Section 1-201 cannot satisfy this demanding test because it is overinclusive. *See McCullen v. Coakley*, 573 U.S. 464, 486 (2014) ("For a content-neutral time, place, or manner regulation to be narrowly tailored, it must not burden substantially more speech than is necessary to further the government's legitimate interests." (internal marks and citation omitted)). A *per se* ban on any recording of any portion of any criminal trial plainly prohibits more speech than necessary to ensure any "significant governmental interest." *Cf. In re Application & Affidavit for a Search Warrant*, 923 F.2d 324, 329 (4th Cir. 1991) ("The reason that fair trials can coexist with media coverage is because there are ways to minimize prejudice to defendants without withholding information from public view.").

For another, Section 1-201 is underinclusive. *See Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2375 (2018) (underinclusive speech restrictions cannot satisfy narrow tailoring). As long as the courtroom remains open to the public during criminal trials (as it must), any information disclosed during those hearings may be freely disseminated to the public. Moreover, Maryland permits the press and public to record criminal *appellate* proceedings and *civil* trials. *See* Section 1-201(a)(1); Md. Rule 16-603.

Narrow tailoring simply cannot be satisfied by a regime in which the press is permitted to broadcast a defendant's direct challenge to his criminal conviction on appeal, as well as his collateral challenge to his conviction in a habeas action, but not the trial in which he was convicted in the first place.

Section 1-201 is not a "reasonable time, place, and manner" restriction on the First Amendment right to record public officials carrying out their duties in public places, because it is not narrowly tailored to advance any significant governmental interest. For this reason as well, the Court should permit the televising of this trial.

III. Section 1-201 Does Not Reflect Modern Right-Of-Access Jurisprudence

Maryland enacted Section 1-201 in 1981, just one year after the U.S. Supreme Court recognized in *Richmond Newspapers* the First Amendment right of access to criminal trials, and one year before the Maryland Court of Appeals followed suit in *News American*. No doubt because of this expanding recognition for constitutional access principles, Maryland's ban on criminal trial broadcasting has effectively been a nullity from the start.

The State has expressly asserted in other pending litigation – namely, a federal lawsuit challenging Section 1-201 on First Amendment grounds – that "there has never been a § 1-201 contempt proceeding against *anyone*." State's Mem. in Supp. of its Mot. to Dismiss, *Soderberg v. Pierson*, No. 1:19-cv-01559-RDB (D. Md. July 18, 2019), Dkt. 23-1 at 8 (emphasis in original). Indeed, the State argues in that lawsuit that Section 1-201 "is moribund," and that those plaintiffs cannot challenge the law in federal court because "[t]he supposition that, after 38 years, these plaintiffs will be the first-ever alleged contemnors in a § 1-201 contempt proceeding is mere speculation and cannot justify standing." *Id.* at 11. The State therefore recognizes that, although Section 1-201 remains on the books, it has no practical force.

It also is no coincidence that Section 1-201 emerged shortly after the Supreme Court decided in *Chandler v. Florida* that "broadcast coverage" of a criminal trial does ***not*** "inherently" result in "a denial of due process." 449 U.S. 560, 581 (1981). The Maryland rule instead reflects the outdated rule of *Estes v. Texas*, where the Supreme Court anachronistically characterized "the television camera [as] a powerful weapon." 381 U.S. 532, 549 (1965).

Today, through the use of a camera that emits no sound, inconspicuously placed away from the participants, with no additional lighting required, and with few, if any, wires or technicians in sight, the press routinely records criminal trials without disturbing the proceedings. Indeed, Justice Harlan predicted this very state of affairs in his dispositive concurring opinion in *Estes*, recognizing that "the day may come" when television cameras

could safely be admitted in court because "all reasonable likelihood that [their] use in courtrooms may disparage the judicial process" would have dissipated. 381 U.S. at 595-96. That day already has come in many states. For Maryland, that day should be today.

* * *

We can assure the Court that, should it grant this request, the presence of a camera in the courtroom will be non-disruptive. Through a cooperative pooling arrangement, the Press Coalition (and all other media outlets who agree to participate) will employ a single, stationary camera, which produces no noise and requires no lighting other than existing courtroom lighting. It will be placed away from the proceedings and wiring will be unobtrusive. Microphones will be small and never operated in such a way as to record conversations between attorneys and clients; they will capture no part of the proceedings that are not part of the public record. The camera will not film jurors, and the pool will abide by any and all other instructions the Court issues regarding camera coverage.

We sincerely thank you for taking the time to consider this request. Please do not hesitate to contact us if we can provide the Court with additional information or assistance of any kind.

Very truly yours,

BALLARD SPAHR LLP

By: _____
Charles D. Tobin*
Maxwell S. Mishkin (MD Atty. No. 1412170229)

Counsel for the Press Coalition

cc: Mr. Scott A. Poyer, Clerk of the Court (*via FedEx*)
All members of the Press Coalition (*via email*)

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* Admitted only in the District of Columbia, Virginia, and Florida.