

# RECORDING VIRTUAL JUSTICE: CAMERAS IN THE DIGITAL COURTROOM

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*With in-person hearings limited during the COVID-19 pandemic, many courts pivoted to proceedings held over the telephone or on virtual platforms like Zoom. It appears these proceedings are here to stay, with various benefits having been realized from remote access to the courts.*

*Remote hearings have, however, given rise to constitutional questions. This Essay focuses on one emerging issue: courts' ability to prohibit the press and the public from recording or disseminating these proceedings. While the constitutionality of recording and broadcasting restrictions inside the real-world courtroom is established, little consideration was given to the extension of these rules to the remote context. That is problematic, given that certain justifications for restricting cameras in the courtroom—e.g., preserving “order and decorum”—disappear when proceedings are broadcast. The justifications that remain likely cannot support the categorical bans many courts have in place. Therefore, courts should craft new rules carefully tailored to the digital environment.*

## INTRODUCTION

In June 2020, former United Auto Workers President Gary Jones pleaded guilty to embezzling union funds during a hearing held via Zoom in the Eastern District of Michigan.<sup>1</sup> It was a high-profile case and the hearing attracted national media coverage. Later that day, an article appeared on *The New York Times*' website that included a screenshot of the hearing.<sup>2</sup> The picture showed Jones speaking, with Judge Paul D. Borman, a court reporter, and an Assistant U.S. Attorney listening.<sup>3</sup>

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1. Press Release, United States Department of Justice, Former UAW President Gary Jones Pleads Guilty to Embezzlement, Racketeering, and Tax Evasion (June 3, 2020), <https://www.justice.gov/usao-edmi/pr/former-uaw-president-gary-jones-pleads-guilty-embezzlement-racketeering-and-tax-evasion> [https://perma.cc/C2ZK-AN5S].

2. Neal E. Boudette, *Former U.A.W. President Gary Jones Pleads Guilty*, N.Y. TIMES (June 3, 2020), <https://web.archive.org/web/20200603213305/https://www.nytimes.com/2020/06/03/business/gary-jones-uaw-pleads-guilty.html> [https://perma.cc/W7Z4-LEJN].

3. *Id.*

Court officials were not pleased. Citing district rules that prohibit photography of judicial proceedings,<sup>4</sup> the district suspended three *Times* employees from attending the court's virtual proceedings for ninety days.<sup>5</sup>

With in-person operations limited during the COVID-19 pandemic, many state and federal courts pivoted to remote proceedings held over the telephone and on virtual platforms like Zoom.<sup>6</sup> Recognizing various benefits of the transition, including increased public access,<sup>7</sup> many courts plan to continue using remote technologies after the pandemic subsides.<sup>8</sup>

Remote access comes with certain rules. Often, these include restrictions on the recording and dissemination of court broadcasts.<sup>9</sup> Violators can face steep penalties, including sanctions<sup>10</sup> and, in some instances, criminal charges.<sup>11</sup>

The focus of this Essay is the constitutionality of these restrictions.<sup>12</sup> While courts' ability to regulate photography and broadcasting *inside* the courtroom is established,<sup>13</sup> little consideration has been given to the extension of these rules to people observing hearings *outside* courtroom walls.

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4. E.D. Mich. LR 83.32(e)(2) (prohibiting photographs and video recordings "in connection with any Judicial Proceeding").

5. Emma Cueto, *NYT Staffers' Court Access Suspended Over Zoom Screenshot*, LAW360 (June 26, 2020, 5:20 PM), <https://www.law360.com/articles/1287214/nyt-staffers-court-access-suspended-over-zoom-screenshot> [<https://perma.cc/9V85-6Q3R>].

6. *See, e.g.*, Eric Scigliano, *Zoom Court Is Changing How Justice Is Served*, ATLANTIC (Apr. 13, 2021), <https://www.theatlantic.com/magazine/archive/2021/05/can-justice-be-served-on-zoom/618392/> [<https://perma.cc/V4KB-EN6X>].

7. *Id.* (discussing how Michigan Supreme Court Chief Justice Bridget M. McCormack said remote hearings have made courts more accessible and transparent).

8. *See, e.g.*, Ross Todd, *Zoom Court, in One Form or Another, Is Here to Stay: 'Your Clients Want This'*, LAW.COM (Apr. 26, 2021, 7:30 AM), <https://www-law-com.fls.idm.oclc.org/2021/04/26/zoom-court-in-one-form-or-another-is-here-to-stay-your-clients-want-this-292-86852/> [<https://perma.cc/R7RJ-4GCY>] (reporting judges in Florida, New Jersey, and Washington will continue to utilize virtual proceedings).

9. *See infra* Part II.A.

10. *See, e.g.*, *Participating in a Zoom Video Conference*, U.S. DIST. CT. MIDDLE DIST. LA., <https://www.lamd.uscourts.gov/zoom> [<https://perma.cc/346K-VFSK>] (last visited Apr. 21, 2022).

11. *See, e.g.*, *Virtual Courtroom*, N.J. CTS., [https://www.njcourts.gov/virtual\\_court.html](https://www.njcourts.gov/virtual_court.html) [<https://perma.cc/C2LT-U6EA>] (last visited Apr. 21, 2022) (warning unauthorized use of streamed court proceedings can be a violation of the New Jersey Anti-Piracy Act).

12. The restrictions raise other issues beyond the scope of this Essay. For one, the rules many courts rely on to support the bans are inapplicable in the remote context. *See* Matthew Schafer, *Lack of Access to Remote Court Proceedings Is Inexcusable*, LAW360 (Nov. 16, 2020, 5:27 PM), <https://www.law360.com/articles/1328481/lack-of-access-to-remote-court-proceedings-is-inexcusable> [<https://perma.cc/6C7T-MQF6>]. It is also questionable whether courts can, consistent with due process, exercise personal jurisdiction to consistently enforce the restrictions. *See* *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 565–66 (1976) (recognizing the "need for in personam jurisdiction . . . presents an obstacle to a restraining order that applies to publication at large . . .").

13. *See* CHARLES A. WRIGHT ET AL., 3B FEDERAL PRACTICE AND PROCEDURE § 861 (4th ed. 2021) (stating the constitutionality of such prohibitions in the courtroom "seems perfectly clear").

This Essay proceeds in three parts. Part I examines the First Amendment right of access to attend court proceedings, along with Supreme Court precedent on cameras in the courtroom. Part II provides an overview of the recording and broadcasting restrictions applied to remote court proceedings. It then turns to the right of the press to publish lawfully obtained information and a recent challenge to a remote recording ban. Part III concludes that categorical restrictions on the recording of remote court proceedings likely violate the First Amendment. It then proposes a fact-specific approach that allows judges to preserve privacy interests without unnecessarily burdening First Amendment rights.

## I. ACCESS AND CAMERAS IN THE COURTROOM

The Supreme Court has interpreted the First Amendment to provide the press and the public with a right of access to attend certain court proceedings. The Court has not, however, said whether this includes the right to bring a camera inside the courtroom. Various rules have emerged to fill this void, drawing constitutional challenges. The resulting lower court rulings provide some guiding principles for such restrictions.

### A. *The Right of Access*

The Supreme Court recognized the right of access for the first time in the 1980 decision, *Richmond Newspapers v. Virginia*.<sup>14</sup> In this “watershed” ruling,<sup>15</sup> the Court held a right of access to criminal trials was implicit in the First Amendment’s protections of free speech and freedom of the press.<sup>16</sup> The plurality opinion emphasized the “centuries-old history of open trials,” a tradition it said provided assurances of fairness and the appearance of justice.<sup>17</sup>

Subsequent cases have confirmed a First Amendment right of access to criminal trials and trial-like proceedings, which cannot be denied except for “compelling” reasons.<sup>18</sup> In *Globe Newspaper Co. v. Superior Court*,<sup>19</sup> the Supreme Court held unconstitutional a Massachusetts law that excluded the public from certain criminal trials.<sup>20</sup> There, the Court found the right of access exists because it ensures an informed “discussion of governmental affairs.”<sup>21</sup> Two years later, in *Press-Enterprise Co. v. Superior Court*,<sup>22</sup> the Court vacated a judicial order closing jury selection.<sup>23</sup> Returning to

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14. 448 U.S. 555, 577 (1980).

15. *Id.* at 582 (Stevens, J., concurring).

16. *Id.* at 580. The Court has suggested the right of access also applies to civil proceedings. *See id.* at 599 (Stewart, J., concurring) (stating the press and the public have “a right of access to trials themselves, civil as well as criminal”).

17. *Id.* at 575.

18. *Id.* at 598 (Brennan, J., concurring).

19. 457 U.S. 596 (1982).

20. *Id.* at 598.

21. *Id.* at 604–05.

22. 478 U.S. 1 (1986).

23. *Id.* at 6.

principles articulated in *Richmond Newspapers*, the Court stated that openness “enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.”<sup>24</sup>

Discussion of the right of access has, however, been largely absent from Supreme Court decisions addressing the presence of cameras in the courtroom. The Court’s last notable decision on cameras in courtrooms came in 1981, shortly after *Richmond Newspapers*. The Court in *Chandler v. Florida*<sup>25</sup> considered whether its decision over a decade earlier in *Estes v. Texas*<sup>26</sup> resulted in a per se constitutional ban on televising criminal trials.<sup>27</sup> The Court in *Estes* reversed the swindling conviction of a Texas businessman, with a majority of justices finding that television coverage in the trial court created sufficient distraction to violate the defendant’s due process rights.<sup>28</sup> The Court in *Chandler* said *Estes*’s holding was limited to the circumstances of that case,<sup>29</sup> in which the proceedings were “utterly corrupted” by press coverage.<sup>30</sup> The *Chandler* court declined to impose a per se ban on cameras in the courtroom, finding no evidence that all trials would be tainted by the television coverage.<sup>31</sup>

Despite having decided *Richmond Newspapers* just six months earlier, the *Chandler* opinion did not cite that ruling or consider the nature of the right of access generally.<sup>32</sup>

### B. The Gap Fillers

Lacking further guidance from the Court, policy makers, lower courts, and individual judges have established diverging rules regarding cameras in the courtroom.

At the federal level, Rule 53 of the Federal Rules of Criminal Procedure prohibits “the taking of photographs in the courtroom” during criminal proceedings and “the broadcasting of [criminal] proceedings from the courtroom.”<sup>33</sup> It has been observed that Rule 53’s primary purpose is to maintain an “orderly, dignified environment, free from ancillary distractions.”<sup>34</sup>

Additionally, each federal district court has its own local rules or judicial orders regulating the recording and broadcasting of both civil and criminal

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24. *Id.* at 9.

25. 449 U.S. 560 (1981).

26. 381 U.S. 532 (1965).

27. *Id.*

28. *Id.* at 540–41.

29. *Chandler*, 449 U.S. at 572–73.

30. *Id.* at 573 n.8.

31. *Id.* at 574.

32. The only reference to a right of access is in a summary of the Florida Supreme Court’s holding in the case. *Id.* at 569.

33. FED. R. CRIM. P. 53.

34. *United States v. Cicilline*, 571 F. Supp. 359, 363 (D.R.I. 1983), *aff’d*, 740 F.2d 952 (1st Cir. 1984).

court proceedings.<sup>35</sup> These local rules, which have the “force of law,”<sup>36</sup> often track Rule 53 or the policy of the Judicial Conference of the United States.<sup>37</sup> The Judicial Conference, an advisory body for the federal courts, discourages cameras in courtrooms, expressing concern about an “intimidating effect” on witnesses and jurors.<sup>38</sup>

States generally have been more receptive to cameras inside courtrooms. At least forty-five states allow the press to record some trial-level proceedings, subject to certain conditions.<sup>39</sup> Each of these states gives judges the discretion to deny electronic media coverage,<sup>40</sup> although some require judges denying coverage to make written findings of fact.<sup>41</sup> Several states also require consent from the parties, victims, or witnesses.<sup>42</sup>

Utah is one of the most recent states to overhaul its rules, approving a change in 2012 to allow cameras inside trial courts.<sup>43</sup> A Utah state courts spokesperson said the change would “substantially open the courts,” while then-Utah State Supreme Court Justice Jill N. Parrish said it would help move the courts “into the next era.”<sup>44</sup>

### C. Courthouse Case Law

Rules and judicial orders regulating cameras inside the courtroom have been subject to numerous First Amendment challenges.<sup>45</sup> These cases have generally been framed as involving one of two rights: the right of access or the right to gather and receive information.

The right of access framing is demonstrated by the Eleventh Circuit’s 1983 decision, *United States v. Hastings*.<sup>46</sup> There, news organizations challenging

35. See Nancy S. Marder, *Cameras in the Courtroom: An Ill-Advised Policy*, AM. BAR ASS’N LITIG. J. (Spring 2021), [https://www.americanbar.org/groups/litigation/publications/litigation\\_journal/2020-21/spring/cameras-the-courtroom-illadvised-policy/](https://www.americanbar.org/groups/litigation/publications/litigation_journal/2020-21/spring/cameras-the-courtroom-illadvised-policy/) [<https://perma.cc/Q5F5-X9KL>] (stating no federal district court allows cameras in the courtroom).

36. *Hollingsworth v. Perry*, 558 U.S. 183, 191 (2010).

37. WRIGHT, *supra* note 13.

38. JUD. CONF. U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (1994), [uscourts.gov/sites/default/files/1994-09\\_0.pdf](https://uscourts.gov/sites/default/files/1994-09_0.pdf) [<https://perma.cc/56QG-TAN9>].

39. Mitchell T. Galloway, Note, *The States Have Spoken: Allow Expanded Media Coverage of the Federal Courts*, 21 VAND. J. ENT. & TECH. L. 777, 791 (2019).

40. *Id.* at 796.

41. See *Cameras in the Courts State By State Guide*, RADIO TELEVISION DIGIT. NEWS ASS’N, [https://www.rtdna.org/content/cameras\\_in\\_court](https://www.rtdna.org/content/cameras_in_court) [<https://perma.cc/RC8W-WQZA>] (last visited Apr. 21, 2022).

42. Galloway, *supra* note 39, at 794.

43. UTAH CODE JUD. ADMIN 4-401.01.

44. Emiley Morgan, *New Rule Allows TV Cameras, Electronic Devices in Utah Courtrooms*, DESERETNEWS (Nov. 19, 2012, 4:17 PM), <https://www.deseret.com/2012/11/19/20510042/new-rule-allows-tv-cameras-electronic-devices-in-utah-courtrooms> [<https://perma.cc/EP4U-VFF7>].

45. See *Soderberg v. Pierson*, No. CV 19-1559, 2020 WL 206619, at \*9 (D. Md. Jan. 14, 2020), *vacated and remanded sub nom.* *Soderberg v. Carrion*, 999 F.3d 962 (4th Cir. 2021) (collecting cases).

46. 695 F.2d 1278 (11th Cir. 1983).

Rule 53 argued the right of access includes a right to record and broadcast from the courtroom, meaning cameras could only be denied for compelling reasons.<sup>47</sup> The Eleventh Circuit rejected that argument, calling it a “tortured reading” of *Richmond Newspapers* and its progeny.<sup>48</sup>

Considering how to evaluate Rule 53, the court decided it was a limitation on the right of access, resembling a “time, place, and manner” restriction on protected speech.<sup>49</sup> The court drew from Justice Potter Stewart’s concurring opinion in *Richmond Newspapers*.<sup>50</sup> There, Justice Stewart said that just “as a legislature may impose reasonable time, place, and manner restrictions upon the exercise of First Amendment freedoms, so may a trial judge impose reasonable limitations upon the unrestricted occupation of a courtroom by representatives of the press and members of the public.”<sup>51</sup>

Accordingly, the Eleventh Circuit adopted a test that considered whether a courtroom camera restriction is reasonable and promotes “significant governmental interests.”<sup>52</sup> Finding Rule 53 passed this test, the court said the rule was supported by various significant interests,<sup>53</sup> including preserving “order and decorum in the courtroom.”<sup>54</sup>

Most courts subsequently evaluating courtroom camera restrictions have taken a similar approach, upholding the rules as valid limitations on the manner of access.<sup>55</sup>

Recently, some challengers have argued a right to record judicial proceedings exists independent of the right of access. The plaintiff in the 2014 case, *McKay v. Federspiel*,<sup>56</sup> relied on a line of circuit court rulings that recognized a First Amendment right to record police officers performing their duties in public places.<sup>57</sup> Those circuit courts found the right to record

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47. *See id.* at 1280.

48. *Id.*

49. *Id.*

50. *See id.* at 1282 n.11.

51. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 600 (1980) (Stewart, J., concurring).

52. *Hastings*, 695 F.2d at 1282. It is unclear precisely what level of scrutiny the *Hastings* court thought was appropriate. *See* Richard H. Frank, Comment, *Cameras in the Courtroom: A First Amendment Right of Access*, 9 HASTINGS COMM’NS. ENT. L.J. 749, 784 n.215 (1986) (noting confusion as to whether it is intermediate scrutiny under the prevailing time, place, and manner test or “whether the proper level of scrutiny is minimal under a reasonableness test”).

53. *Hastings*, 695 F.2d at 1283–84.

54. *Id.*

55. *Soderberg v. Pierson*, No. CV 19-1559, 2020 WL 206619, at \*11 (D. Md. Jan. 14, 2020), *vacated and remanded sub nom.* *Soderberg v. Carrion*, 999 F.3d 962 (4th Cir. 2021) (collecting cases). Courts have, however, been inconsistent in the level of scrutiny that is applied. *See Whiteland Woods, L.P. v. Twp. W. Whiteland*, 193 F.3d 177 (3rd Cir. 1999) (observing that some analyze recording prohibitions under “standards similar to those applied to time, place, and manner restrictions on speech in a public forum,” while others require restrictions “be content-neutral and reasonable, the standards applied to speech in a nonpublic forum”).

56. No. 14-CV-10252, 2014 WL 7013574 (E.D. Mich. Dec. 11, 2014), *aff’d*, 823 F.3d 862 (6th Cir. 2016).

57. *Id.* at \*8.

lies within the right of the press to gather information and the public's right to receive information and ideas.<sup>58</sup>

Declining to extend this right to record to the courtroom, the district court in *McKay* said the courtroom is not a “public place.”<sup>59</sup> Rather, it said the courtroom is a “nonpublic forum” where First Amendment rights “are at their constitutional nadir.”<sup>60</sup>

Although camera restrictions inside the courtroom appear to be on solid constitutional footing, courts have struck down rules that swept further to regulate activities of the press taking place *outside* the courtroom. The Seventh Circuit's 1970 decision in *Dorfman v. Meiszner*<sup>61</sup> is illustrative. There, the court considered a challenge to a Northern District of Illinois local rule that prohibited photography and broadcasting in the “courtroom and its environs.”<sup>62</sup> The rule defined “environs” to include several floors inside a combined courthouse and federal office building, as well as a plaza and sidewalks around the building.<sup>63</sup>

The Seventh Circuit invalidated the ban insofar as it applied to floors without courtrooms, a first-floor lobby, and areas outside the building.<sup>64</sup> While the court said reasonable measures can be taken to prevent the interruption of judicial proceedings, there was no “foreseeable noise or commotion” in those areas that would be disruptive.<sup>65</sup> Protecting the “integrity of the courtroom,” the court said, “offers no justification for such a broad scope of exclusion.”<sup>66</sup>

Other courts have similarly held judicial orders prohibiting press activities that were not disruptive to the courtroom to be unconstitutional.<sup>67</sup> Taken together, these precedents suggest restrictions that reach beyond the courtroom and ban activities that do not interfere with judicial proceedings may violate the First Amendment.

## II. THE RISE OF REMOTE PROCEEDINGS

Over the past two years, courts have adopted remote technologies in ways not seen before, moving hearings and trials from real-world courtrooms to virtual ones. This part begins by examining the typical restrictions that courts have placed on the recording and broadcasting of proceedings. It then

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58. *See, e.g., Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011).

59. *McKay*, 2014 WL 7013574, at \*8.

60. *Id.* at \*9.

61. 430 F.2d 558 (7th Cir. 1970).

62. *Id.* at 560.

63. *See id.*

64. *See id.* at 561–62.

65. *Id.* at 562.

66. *Id.* at 563.

67. *See, e.g., United States v. Columbia Broad. Sys., Inc.*, 497 F.2d 102, 107 (5th Cir. 1974) (invalidating a ban on sketches); *Arkansas Democrat-Gazette v. Zimmerman*, 341 Ark. 771, 785 (2000) (finding unconstitutional an order prohibiting photographs of individuals as they entered and left the courthouse).

examines each aspect of the bans individually, beginning with broadcasting and then turning to recording.

### A. The Typical Ban

Following the March 2020 outbreak of the novel coronavirus in the United States, many courts closed to facilitate social distancing.<sup>68</sup> To keep the justice system moving, numerous courts resorted to video conference platforms—technologies many courts had otherwise been slow to adopt.<sup>69</sup> To facilitate public access, courts distributed dial-in numbers for hearings,<sup>70</sup> made available Zoom links,<sup>71</sup> and live-streamed hearings on YouTube.<sup>72</sup>

The links and dial-in numbers were often accompanied by a warning that recording and further dissemination of the proceeding were prohibited.<sup>73</sup> These restrictions generally relied on existing rules—often the court’s own local rules. This is illustrated by a public notice distributed by the Southern District of Florida, which states: “Participants are reminded of the prohibitions regarding photographing, recording and broadcasting Court proceedings (Local Rule 77.1, provided below). This prohibition applies to hearings held telephonically or using any video platform such as Zoom or WebEx.”<sup>74</sup> Neither the local rule nor the public notice distinguishes between types of proceedings, and thus can be applied indiscriminately.<sup>75</sup>

The Southern District of Florida, like other courts, did not provide an independent justification for the ban. Given the reliance on existing rules, however, it may be assumed the rationale is similar. Traditionally, courts have found three interests advanced by bans on cameras in the courtroom:

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68. See Susan A. Banders & Neil Feigenson, *Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom*, 68 *BUFF. L. REV.* 1275, 1275 (2020).

69. See *id.*

70. See, e.g., *Epic Games, Inc. v. Apple Inc.*, U.S. DIST. CT. N. DIST. CAL., <https://cand.uscourts.gov/cases-e-filing/cases-of-interest/epic-games-inc-v-apple-inc/> [https://perma.cc/5B5W-MHT4] (last visited Apr. 21, 2022).

71. See, e.g., Judge Alan D Albright, United States District Court for the Western District of Texas, *Standing Order Governing Proceedings – Patent Cases* (Nov. 17, 2021), <https://www.txwd.uscourts.gov/wp-content/uploads/Standing%20Orders/Waco/Albright/Standing%20Order%20Governing%20Proceedings%20in%20Patent%20Cases%2011721%20copy%201.pdf> [https://perma.cc/F8UE-GTZ9].

72. See, e.g., *Texas Court Live Streams*, TX. JUD. BRANCH, <http://streams.txcourts.gov> [https://perma.cc/F8UE-GTZ9] (last visited Apr. 21, 2022).

73. See, e.g., *Guidelines for Zoom Courtroom Proceedings*, U.S. DIST. CT. CENT. DIST. CAL., <https://www.cacd.uscourts.gov/clerk-services/courtroom-technology/zoom-courtroom-proceedings> [https://perma.cc/2H4W-EPJJ] (last visited Apr. 21, 2022) (recording is “strictly prohibited”).

74. *Public Notice: Prohibition Against Recording, Photographing or Broadcasting Court Hearings*, U.S. DIST. CT. SOUTHERN DIST. FLORIDA (updated Dec. 1, 2020), <https://www.flsd.uscourts.gov/sites/flsd/files/20-12-01%20Noble%20-%20COVID%20Memo%20re%20Public%20Access%20to%20Hearings%20-%20Prohibition%20on%20Broadcasting%20-%20FINAL.pdf> [https://perma.cc/6L2Y-MDVP].

75. Local Rule 77.1 prohibits “photographing, audio- or video- recording, broadcasting or televising within the environs of any place of holding court in the District.” S.D. Fla. Loc. R. 77.1.



preserving order and decorum in the courtroom; the defendant's right to a fair trial; and an "institutional interest in procedures designed to increase the accuracy of the essential truth-seeking function of the trial."<sup>76</sup> Courts have also recognized an interest in protecting the privacy of witnesses and jurors. In *National Public Radio, Inc. v. Klavans*,<sup>77</sup> for example, a district court found that concerns about exposing witnesses to harassment were "undeniably pressing."<sup>78</sup>

### B. Broadcasting and Recording Rights

When examining the restrictions for remote proceedings, it is helpful to consider recording and broadcasting separately. Supreme Court case law suggests a rule that prohibits *broadcasting* remote proceedings would be unconstitutional in most situations.<sup>79</sup> That shifts focus to the narrower question: whether courts can constitutionally ban the *recording* of these hearings.

#### i. Broadcasting Bans

The Supreme Court in *Smith v. Daily Mail Publishing Co.*<sup>80</sup> said that when truthful information about a matter of public significance is lawfully obtained, the government cannot punish its publication "absent a need to further a state interest of the highest order."<sup>81</sup> Simply put, this is a high bar. As the Court later explained, the punishment of truthful information will "seldom . . . satisfy constitutional standards."<sup>82</sup>

Recent cases confirm the *Daily Mail* rule applies to the dissemination of recordings of judicial proceedings. In January 2021, the Fourth Circuit considered a Maryland law that banned the broadcast of court-made recordings, which could be requested by the public.<sup>83</sup> The court held that review of Maryland's law under the *Daily Mail* standard was "clearly required" when the recordings were lawfully obtained.<sup>84</sup> Following the ruling, a district court judge in a separate case found Maryland's law likely unconstitutional to the extent it prohibited National Public Radio's use of trial recordings in a podcast.<sup>85</sup>

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76. *United States v. Hastings*, 695 F.2d 1278, 1283 (11th Cir. 1983); *see also* Cathy Packer, *Should Courtroom Observers Be Allowed to Use Their Smartphones and Computers in Court? An Examination of the Arguments*, 36 AM. J. TRIAL ADVOC. 573, 578–79 (2013) (identifying arguments against cameras in the courtroom).

77. No. 21-2247, 2021 WL 4197661 (D. Md. Sept. 15, 2021).

78. *Id.* at \*7.

79. *See infra* Part II.B.i.

80. 443 U.S. 97 (1979).

81. *Id.* at 103.

82. *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) (citing *Daily Mail*, 443 U.S. at 102).

83. *Soderberg v. Carrion*, 999 F.3d 962, 964–65 (4th Cir. 2021).

84. *Id.* at 969.

85. *Nat'l Pub. Radio, Inc. v. Klavans*, No. 21-2247, 2021 WL 4197661, at \*1 (D. Md. Sept. 15, 2021).

## ii. Recording Bans

Accepting that a naked ban on the broadcasting of remote court proceedings would be unconstitutional except in rare cases, the question remains whether courts can prohibit observers from recording proceedings. If so, any recordings will have been unlawfully obtained, effectively taking them outside the *Daily Mail* rule.

An initial test came in July 2020, when attorney Nicholas Somberg filed a lawsuit challenging Michigan state court rules that prohibited the recording of virtual court proceedings.<sup>86</sup> Somberg, who had taken a screenshot of a hearing streamed on YouTube, contended that he had a First Amendment right to record livestreamed proceedings.<sup>87</sup>

Upholding the recording ban, the district court cited *McKay*'s finding that there is no right to record judicial proceedings inside a courtroom.<sup>88</sup> The court agreed that courtrooms are "nonpublic" forums, different from other public spaces.<sup>89</sup> The court rejected Somberg's argument that *McKay* was distinguishable because his screenshot was taken "far outside the courtroom."<sup>90</sup> Finding no difference between in-person and virtual hearings for the purpose of a right to record, the court said the virtual hearing was conducted "as if it were . . . within the four walls of the courtroom."<sup>91</sup>

The district court in January 2022 certified the issue for an interlocutory appeal to the Sixth Circuit,<sup>92</sup> noting no other federal court has addressed whether there is a First Amendment right to record live broadcasts of court proceedings.<sup>93</sup>

## III. THE CONSTITUTIONALITY OF REMOTE RECORDING BANS

As the court in *Somberg v. Cooper*<sup>94</sup> indicated, restrictions on recording remote court proceedings raise novel constitutional questions.<sup>95</sup> This part analyzes these bans and concludes they likely violate the First Amendment when applied on a blanket basis to all court proceedings. It then suggests a fact-intensive, tailored approach for judges to apply.

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86. *Somberg v. Cooper*, No. 20-cv-11917, 2022 WL 263039, at \*1 (E.D. Mich. Jan. 26, 2022).

87. *Id.* at \*2.

88. *Id.* at \*6.

89. *Id.*

90. *Id.* at \*8.

91. *Id.* at \*6.

92. *Id.* at \*8.

93. *Id.* The Sixth Circuit denied Somberg's petition for leave to appeal in April without addressing the merits of his arguments. *In re Somberg*, No. 22-0101, 2022 WL 1164852, at \*1 (6th Cir. Apr. 20, 2022).

94. No. 20-cv-11917, 2022 WL 263039 (E.D. Mich. Jan. 26, 2022).

95. *See supra* Part II.B.ii.

*A. Blanket Recording Bans Fail Intermediate Scrutiny*

As discussed in Part I, most courts that have considered camera restrictions inside the physical courtroom have treated them as a limitation on access to court proceedings, resembling a “time, place, and manner” regulation.<sup>96</sup> Likewise, a ban on the recording of remote proceedings could be analyzed as a “manner” restriction on the First Amendment right of access.

Alternatively, such a ban could be viewed as a limitation on speech, involving a right to record. While the *Somberg* court refused to recognize a right to record judicial proceedings,<sup>97</sup> its reasoning is not entirely convincing.<sup>98</sup> But even if such a right were recognized, it could be subject to “time, place, and manner” restrictions.<sup>99</sup> Therefore, under either theory, the analysis should be similar.

A content-neutral<sup>100</sup> time, place, and manner restriction is subject to intermediate scrutiny.<sup>101</sup> The restriction will be upheld only if it is “narrowly tailored to serve a significant government interest” and leaves “open ample alternative channels of communication.”<sup>102</sup> As indicated, courts have found that courtroom decorum, trial fairness, and participants’ privacy are significant interests justifying camera restrictions in the courtroom.<sup>103</sup> Even granting those interests are significant, categorical recording bans in the remote context are not narrowly tailored to serve those interests.<sup>104</sup>

Concerns that recording devices and cameras will disrupt the courtroom decorum recall *Estes*.<sup>105</sup> There, the courtroom was “a mass of wires, television cameras, microphones and photographers.”<sup>106</sup> Justices found the

96. *See supra* Part I.C.

97. *See supra* Part II.B.ii.

98. Numerous judges and commentators agree that Supreme Court precedent suggests the act of making a recording is protected speech. *See, e.g.*, *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1207 (D. Utah 2017) (finding the Court “likely would conclude that making a recording” can be protected by the First Amendment). And the contexts in which a right to record is recognized are not as narrow as the *Somberg* court suggests. This right has been extended to situations beyond filming police officers in public places, including recording operations inside a private agricultural facility and documenting health violations in a school. *Id.* at 1207–08.

99. *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011).

100. A restriction is content neutral when “it is justified without reference to the content of the regulated speech.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

101. *Soderberg v. Pierson*, No. 19-1559, 2020 WL 206619, at \*11 (D. Md. Jan. 14, 2020), *vacated and remanded sub nom.* *Soderberg v. Carrion*, 999 F.3d 962 (4th Cir. 2021). No court has found that Rule 53 is content-based. *See id.* (collecting cases).

102. *Ward*, 491 U.S. at 791 (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

103. *See supra* Part II.A.

104. *See Schafer, supra* note 12 (explaining that issues related to decorum, distraction, and juror bias do not arise when a person records digital hearings outside the courtroom).

105. *Estes v. Texas*, 381 U.S. 532, 536–37 (1965); *see also* *Packer, supra* note 7675, at 579 (discussing the *Estes* court’s view of the disruption caused by cameras).

106. *Estes*, 381 U.S. at 550.

media activity created a “considerable disruption”<sup>107</sup> and a “carnival atmosphere” inside the courtroom.<sup>108</sup>

The same problems do not arise when the press remotely records a court proceeding. There are no camera wires snaked across the courtroom floor<sup>109</sup> and no risk of any other “distractions inherent in the tools of the news media trades.”<sup>110</sup> From her newsroom or home office, a reporter can take a screenshot without intruding on the court proceeding. Like *Dorfman*, there is no “foreseeable noise or commotion” that could cause a disruption.<sup>111</sup> Concerns about courtroom decorum, therefore, cannot justify remote recording restrictions.

It is also questionable whether remote recordings jeopardize the defendant’s right to a fair trial or impair the fact-finding process. Here, some justices in *Estes* worried cameras could distract jurors or change witnesses’ behavior.<sup>112</sup> Those concerns, however, were tied to the press injecting television cameras into the courtroom setting,<sup>113</sup> which the plurality opinion said can create a “cause celebre.”<sup>114</sup> When a hearing is held virtually, the court has already made cameras part of the proceeding. If participants’ attention is going to be “captured by the camera,”<sup>115</sup> the damage has already been done. Any additional recording outside the presence of the parties is unlikely to significantly change behaviors.<sup>116</sup>

It has also been suggested that trials may be less fair because some witnesses or jurors will be intimidated knowing they may be photographed or otherwise recorded.<sup>117</sup> Here too, the impact of recording during a remote proceeding is likely minimal. For one, the words of witnesses and jurors are transcribed and preserved in publicly available court records, where they can be read—and republished—at any time.<sup>118</sup>

107. *Id.* at 536.

108. *Id.* at 577 (Warren, C.J., concurring).

109. *Id.* at 536.

110. *United States v. Cicilline*, 571 F. Supp. 359, 362 (D.R.I. 1983), *aff’d*, 740 F.2d 952 (1st Cir. 1984).

111. *Dorfman v. Meiszner*, 430 F.2d 558, 562 (7th Cir. 1970).

112. *Estes*, 381 U.S. at 546; *see also id.* at 591 (Harlan, J., concurring) (suggesting television cameras may make some witnesses “cock[ier]”).

113. *See Packer, supra note 7675*, at 580–81; Brief for Cato Institute as Amici Curiae Supporting Plaintiffs-Appellants at 17, *Soderberg v. Carrion*, 999 F.3d 962 (4th Cir. 2021) (No. 20-1094), 2020 WL 2061066 (explaining the *Estes* court’s focus was “the effect of the media obtrusively placing their own television cameras in the courtroom”).

114. *Estes*, 381 U.S. at 545.

115. Laralyn M. Sasaki, Note, *Electronic Media Access to Federal Courtrooms: A Judicial Response*, 23 U. MICH. J.L. REFORM 796, 788–89 (1990) (quoting the Honorable Nauman S. Scott, a former judge in the Western District of Louisiana).

116. *See Justin Marceau & Alan K. Chen, Free Speech and Democracy in the Video Age*, 116 COLUM. L. REV. 991, 1060 n.322 (2016) (explaining *Estes*’ rationale justifies “banning open, but not secret,” recordings of courtroom proceedings).

117. *See, e.g., United States v. Moussaoui*, 205 F.R.D. 183, 187 (E.D. Va. 2002).

118. *See, e.g., Soderberg v. Pierson*, No. 19-1559, 2020 WL 206619, at \*12 (D. Md. Jan. 14, 2020), *vacated and remanded sub nom. Soderberg v. Carrion*, 999 F.3d 962 (4th Cir. 2021) (acknowledging the public can read trial transcripts and publish that information); *see also*

Further, the proceedings will already have been broadcast by the court. In doing so, the court has made these individuals' images and voices "available to anyone in the world."<sup>119</sup> The potential a juror's picture could later appear in news reports is unlikely to be significantly more intimidating.

For similar reasons, it is debatable whether remote recording bans significantly advance courts' interest in protecting the privacy of trial participants. To be sure, protecting witnesses or jurors from harassment and shielding the identities of certain parties, such as children, can be a significant interest.<sup>120</sup> But once the court has thrown the "virtual doors . . . wide open,"<sup>121</sup> the impact of a recording or further dissemination of the proceeding is lessened.<sup>122</sup>

To the extent that privacy and trial fairness may still be compromised by remote recordings, blanket restrictions are a loose fit to those concerns. A "complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil."<sup>123</sup> When remote recordings bans are applied categorically, they affect all proceedings, even though privacy and trial fairness concerns may arise only in some proceedings. In other words, not every recording would be an "*appropriately targeted evil*."<sup>124</sup>

Consider the plea hearing of Jones, the former United Auto Workers president. When Jones pleaded guilty to embezzling union funds, no witnesses were present and no trial was forthcoming. The only thing left was for Jones to be sentenced. As such, trial fairness was not an issue. Nor could there be any legitimate privacy concern.<sup>125</sup>

Many other proceedings likewise lack the presence of witnesses and do not raise privacy or fairness concerns. Criminal arraignments, status conferences, and bail hearings are a few examples.<sup>126</sup> Others may include motion to dismiss and similar pre-trial hearings that usually feature only

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Brief for Cato Institute as Amici Curiae Supporting Plaintiffs-Appellants, *supra* note ~~113~~112, at 13 (trial transcripts commit participants "exact words to a publicly accessible" record).

119. *Moussaoui*, 205 F.R.D. at 187.

120. *Id.*

121. Opinion and Order at 1, *King v. Whitmer*, No. 20-13134 (E.D. Mich. July 14, 2021), ECF No. 153.

122. *See Arkansas Democrat-Gazette v. Zimmerman*, 20 S.W.3d 301, 309 (Ark. 2000) (finding "no overriding state interest" warranting photography ban when proceedings were open to the public).

123. *Frisby v. Schultz*, 487 U.S. 474, 485 (1988).

124. *Id.* (emphasis added).

125. *See Aldrich v. Ruano*, 952 F. Supp. 2d 295, 303–04 (D. Mass. 2013) (finding it "utterly implausible" a defendant had an expectation of privacy while talking in an open courtroom).

126. Some judges express concerns about pretrial publicity from camera coverage creating an unfair trial. *See, e.g., Reed v. Bernard*, 976 F.3d 302, 322 (3d Cir. 2020), *reh'g en banc granted, opinion vacated*, 984 F.3d 273 (3d Cir. 2021), and *vacated*, No. 20-1632, 2021 WL 1897359 (3d Cir. May 4, 2021) (Krause, J., dissenting) (suggesting that recordings of bail hearings increase the risk of prejudicial pretrial publicity). But the Supreme Court has indicated those issues can be addressed in *voir dire*. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 602 (1976) (Brennan, J., concurring) (stating a judge can use *voir dire* to protect a defendant's fair trial rights).

attorney argument. In short, courts have imposed “broad prophylactic”<sup>127</sup> restrictions that sweep far beyond any legitimate concerns of protecting privacy and trial fairness.

### *B. Blanket Recording Bans Also Are Not Reasonable*

Some courts have evaluated courtroom camera rules using the more lenient standard “applied to speech in a nonpublic forum.”<sup>128</sup> For many of the reasons discussed, blanket remote recording bans are suspect even under this approach.

Under the nonpublic forum standard, a restriction must be “reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”<sup>129</sup> While the government is not required to choose the least restrictive alternative, a “failure to select . . . simple available alternative[s] suggests that the ban it has enacted is not reasonable.”<sup>130</sup>

In adopting categorical remote recording bans, courts have ignored several simple alternatives. For example, courts worried about images of jurors appearing in news reports can avoid broadcasting those images. Courts control the cameras during remote proceedings, allowing them to decide what is made available. Another alternative is to restrict public access to audio feeds, providing video only to trial participants.<sup>131</sup>

Courts could also be more selective about which proceedings are broadcast. While the COVID-19 pandemic made online hearings necessary, in-person operations have resumed. Courts concerned about privacy or fairness could hold the proceedings most likely to raise these issues—e.g., trials—in a physical courtroom, where the constitutionality of camera restrictions is not debated.

### *C. A Tailored Solution*

Given the speed with which courts adjusted to the pandemic, it is not surprising that more careful consideration was not given to the rules for live broadcasts. But this has created serious problems.

An obvious fix is to abandon remote proceedings, confining activities to the physical courtroom. This appears unlikely, particularly because

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127. *Grayned v. City of Rockford*, 408 U.S. 104, 119–20 (1972).

128. *Whiteland Woods, L.P. v. Twp. of W. Whiteland*, 193 F.3d 177, 182 (3rd Cir. 1999). A similar approach is possible if a court has recognized a right to record court proceedings. See *Somberg v. Cooper*, No. 20-cv-11917, 2021 WL 263039, at \*4 (E.D. Mich. Jan. 26, 2022) (finding a courtroom is a “nonpublic” forum while analyzing a right to record).

129. *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 46 (1983).

130. *Tucker v. Cal. Dep’t of Educ.*, 97 F.3d 1204, 1216 (9th Cir. 1996) (citing *Multimedia Publ’g Co. of S.C., Inc. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154, 161 (4th Cir. 1993)).

131. Some courts already take this approach. See Ryan Davis, *In A First, Game Controller Patent Case Kicks Off On Zoom*, LAW360 (Jan. 25, 2021, 10:14 PM), <https://www.law360.com/articles/1338857/in-a-first-game-controller-patent-case-kicks-off-on-zoom> [<https://perma.cc/6M9Y-27J4>] (trial participants were provided video access in patent trial, while only an audio feed was available to the public).

attorneys, litigants, and judges find these proceedings to be valuable.<sup>132</sup> Accordingly, courts should write new rules that are tailored to address concerns about privacy and trial fairness.

Utah state court rules can provide a guide. Utah courts presume that electronic media coverage is allowed in any judicial proceeding open to the public.<sup>133</sup> This presumption can be overcome only if a judge finds compelling reasons to restrict such coverage,<sup>134</sup> considering factors like prejudice to parties' rights and whether the coverage creates safety risks.<sup>135</sup>

Similarly, any rule on remote hearings should start with a presumption that recording is allowed once the court has broadcast the proceeding, either online or by phone. Recording should be prohibited only when the judge finds it would cause actual harm.<sup>136</sup> Stated differently, parties seeking to restrict recording should have to show that, even after the court has broadcast a proceeding, their privacy and/or fair trial rights would be compromised by a recording.

This likely would be a difficult hurdle to clear, although not impossible. For example, the government may be able to show there is something uniquely harmful about an image of an undercover law enforcement witness remaining on the internet indefinitely, as compared to a time-limited live broadcast.

Unlike blanket restrictions, this fact-specific approach is closely fitted to courts' privacy and fairness interests. It allows judges to address legitimate concerns as they arise, without unnecessarily burdening First Amendment rights. It also gives appropriate respect to the principle that "[w]hat transpires in the court room is public property."<sup>137</sup>

Undoubtedly, a fact-specific approach is less efficient than a categorical ban. In some situations, courts and the parties would spend additional time and resources addressing an issue not central to the outcome of the case. But as the Supreme Court has recognized, the "prime objective of the First Amendment is not efficiency."<sup>138</sup> Convenience should not limit the openness that enhances the "fairness so essential to public confidence in the [legal] system."<sup>139</sup>

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132. See, e.g., Jack Karp, *Judges Say Zoom Hearings, Public Access, Backlogs Will Last*, LAW360 (Apr. 30, 2021, 4:30 PM), <https://www.law360.com/pulse/articles/1380526/judges-say-zoom-hearings-public-access-backlogs-will-last> [<https://perma.cc/97EE-RDBY>] (quoting a judge as saying "Zoom hearings have been . . . a phenomenal change").

133. UTAH CODE JUD. ADMIN 4-401.01(2).

134. *Id.*

135. *Id.*

136. See Marceau & Chen, *supra* note 116, at 1060–61 (suggesting "individual claims of a right to record a particular [court] proceeding" should "be answered with a direct assertion of how the recording would impair the parties' rights").

137. *Craig v. Harney*, 331 U.S. 367, 374 (1947); see also Schafer, *supra* note 12 (suggesting this principle is the "starting point" for courtroom rules).

138. *McCullen v. Coakley*, 573 U.S. 464, 495 (2014).

139. *Press-Enter. Co. v. Superior Ct.*, 464 U.S. 501, 508 (1984).

## CONCLUSION

Remote proceedings are growing in the legal system. It is important that courts take a thoughtful approach when implementing rules within this new context. Categorical bans on the recording and dissemination of live broadcasts fail to do that. Sweeping restrictions, unsupported by many of the justifications for restricting camera access inside the courtroom, raise serious First Amendment issues. Courts should draft new rules that are specific to the remote context and carefully tailored to address non-speculative concerns about privacy and trial fairness.