COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT FOR THE COUNTY OF SUFFOLK

THE DISTRICT ATTORNEY FOR THE NORFOLK DISTRICT, Plaintiff,

v.

JUSTICES OF THE QUINCY DISTRICT COURT, Defendant.

TRUSTEES OF BOSTON UNIVERSITY,
d/b/a WBUR-FM and OPENCOURT, Intervenor.

No. SJ-2012-306

ANTHONY BENEDETTI, CHIEF COUNSEL,
COMMITTEE FOR PUBLIC COUNSEL SERVICES, Plaintiff,
v.

JUSTICES OF THE QUINCY DIVISION OF
THE DISTRICT COURT DEPARTMENT
OF THE TRIAL COURT OF THE COMMONWEALTH, Defendant.

TRUSTEES OF BOSTON UNIVERSITY,
d/b/a WBUR-FM and OPENCOURT, Intervenor.

No. SJ-2012-308

MEMORANDUM OF TRUSTEES OF BOSTON UNIVERSITY, D/B/A WBUR-FM AND OPENCOURT IN RESPONSE TO PETITIONS UNDER G.L. c. 211 § 3 OF THE DISTRICT ATTORNEY FOR THE NORFOLK DISTRICT AND ANTHONY BENEDETTI, CHIEF COUNSEL, COMMITTEE FOR PUBLIC COUNSEL SERVICES

Trustees of Boston University, d/b/a WBUR-FM and OpenCourt ("OpenCourt") hereby responds to the emergency petitions for relief filed in the two above-captioned actions by the District Attorney for the Norfolk District (the "Norfolk DA" or the "DA") and the Committee for Public Counsel Services ("CPCS" and sometimes, collectively with the Norfolk DA, the "Petitioners"). The Norfolk DA's and CPCS's petitions (respectively, the "Norfolk DA Petition"

and the "CPCS Petition" and sometimes, collectively, the "Petitions") concern OpenCourt's ongoing media coverage of public proceedings that take place at Quincy District Court.

The relief sought by Petitioners would dramatically limit OpenCourt's (and only OpenCourt's) ability to cover court proceedings in Quincy. An injunction barring OpenCourt from Quincy District Court Jury Room A would directly contravene the strong presumption in favor of press access to public proceedings set forth in Supreme Judicial Court Rule 1:19 ("Rule 1:19"). For the reasons set forth herein and in the accompanying Affidavit of John Davidow (the "Davidow Affidavit" or "Davidow Aff."), a copy of which is annexed hereto as Exhibit A, the Petitions should be rejected and the relief requested denied, cases brought by Petitioners against the Justices of the Quincy District Court should be dismissed, and OpenCourt should be permitted to continue to operate in Quincy District Court.

INTRODUCTION AND BACKGROUND

1. As this Court is aware, WBUR, Boston University's public radio station, was awarded a grant by the Knight Foundation to establish the OpenCourt project. For more than a year, since May 2011, OpenCourt has livestreamed and offered access to an archive of audiovisual recordings of proceedings in Quincy District Court's First Session through its website (http://www.opencourt.us). OpenCourt has also offered free WiFi to those in the gallery at the courthouse, enabling members of the public to attend and blog about court proceedings.

2. In covering proceedings in the First Session, OpenCourt has gone to great lengths to work with stakeholders at the Quincy District Court. OpenCourt developed guidelines and best practices; created signs to alert those in the courtroom of the presence of cameras; decided not to cover certain types of proceedings; conducted trainings with court personnel and others who regularly conduct business in the Quincy District Court; implemented processes to allow

attorneys, litigants, and others to request redactions to archived recordings; formed an Advisory Board with a wide-ranging membership (including representatives of the Norfolk DA's office); and created a Working Group Committee to encourage discussion of potential concerns about OpenCourt's livestreaming and archiving activities. OpenCourt took all of these steps not due to requirements imposed by the S.J.C. Judiciary-Media Committee, the Quincy District Court, or Massachusetts law but as a courtesy to those with business before the Quincy District Court. Davidow Aff. at ¶ 7.

3. OpenCourt's day-to-day operations in Quincy have proceeded smoothly and have been well-received by members of the public, who have expressed their appreciation for OpenCourt's work in facilitating a transparent judicial process. Davidow Aff. at ¶ 7. The Norfolk DA has filed dozens of motions seeking to prohibit OpenCourt from livestreaming or archiving specific proceedings. Those motions were generally denied. Davidow Aff. at ¶ 21. Two cases arising out of OpenCourt's activities in the First Session – one brought by the Norfolk DA on behalf of the Commonwealth and another brought by CPCS on behalf of a criminal defendant – reached the Supreme Judicial Court last fall; in a single consolidated decision, the Court ruled in favor of OpenCourt, holding that the District Court could not issue orders requiring redactions to OpenCourt's archived audiovisual recordings because such orders would constitute unlawful prior restraints and that OpenCourt was permitted to continue to livestream and archive proceedings in Quincy District Court. Commw. v. Barnes, 461 Mass. 644 (2012).

4. It was never intended that OpenCourt's coverage in Quincy would be limited to the First Session, and the project always envisioned covering jury trials. Davidow Aff. at ¶ 6. Throughout late-2011 and early-2012, OpenCourt worked with the Quincy District Court and with Jefferson Audio Video Services (a/k/a/ "JAVS") – which provides audio and video services

to courts around the country (and records the official audio transcript for many courts throughout the Commonwealth, including the Quincy District Court) – to install a four-camera setup in Quincy District Court Jury Room A to facilitate OpenCourt's coverage of trials. Davidow Aff. at ¶¶ 8-10. OpenCourt also worked with JAVS to develop a custom audio mix, similar to the mix that JAVS uses to create the Court's official audio record in Jury Room A but omitting the desktop microphones at counsel tables from the mix. Davidow Aff. at ¶ 11. By developing this custom mix, OpenCourt ensured there is little possibility that privileged conversations between attorneys and clients are captured and broadcast / archived by OpenCourt. Id.

5. Throughout this process, OpenCourt regularly sought input from its Advisory Board and consulted with its Working Group Committee about a wide range of issues, including everything from logistical concerns about camera and microphone placement to substantive concerns about OpenCourt's potential impact on jurors, victims, witnesses, lawyers, and others who participate in proceedings in Jury Room A. Davidow Aff. at ¶ 12. During a meeting on May 30, 2012, OpenCourt offered members of its Working Group Committee (including representatives from the Norfolk DA and CPCS) the opportunity to listen through headphones to its audio mix in Jury Room A and to offer comments and suggestions about OpenCourt's then-planned launch. Davidow Aff. at ¶ 12-13.

6. In allowing OpenCourt to cover trial proceedings in Quincy's Jury Room A, First Justice Mark S. Coven in the Quincy District Court exercised his discretion under Massachusetts law to manage administrative matters in the courtroom, consistent with the strong presumption in favor of access under Rule 1:19. Based at least in part on feedback from stakeholders who regularly practice in Quincy – including feedback solicited during the aforementioned May 30th meeting – Justice Coven developed a set of general guidelines (the "June 25th Guidelines") and

determined that OpenCourt's operations in Jury Room A would be subject thereto.[1] Of course, Quincy District Court Justices hearing cases in Jury Room A will always have the opportunity to consider and review OpenCourt's access on a case-by-case (and, indeed, witness-by-witness) basis as questions about OpenCourt's operations arise day-to-day, subject to Rule 1:19.

PROCEDURAL HISTORY

7. In early-July, Petitioners filed separate cases in the Norfolk Superior Court, asking that the Court issue preliminary injunctions preventing the Justices of the Quincy District Court from allowing OpenCourt to livestream and archive proceedings in Jury Room A. OpenCourt was not served with papers in either proceeding but ultimately received a copy of papers filed by the Norfolk DA, moved to intervene, and filed an opposition thereto. OpenCourt's opposition consisted of an Emergency Motion (a copy of which is annexed hereto as Exhibit B), a Memorandum of Law (a copy of which is annexed hereto as Exhibit C) and Affidavit of Christopher T. Bavitz (a copy of which is annexed hereto as Exhibit D).

8. As set forth in those opposition papers, OpenCourt did not address the procedural posture of the case or the appropriateness of the means employed by the Norfolk DA to raise his concerns about OpenCourt (i.e., a civil lawsuit seeking injunctive relief against judges). For purposes of its opposition, OpenCourt addressed the merits of the Norfolk DA's position that the Justices of the Quincy District Court were improperly permitting OpenCourt to cover proceedings in Jury Room A in the context of a standard four-factor preliminary injunction analysis, as advocated by the Norfolk DA.

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[1] OpenCourt does not herein defend or endorse the June 25th Guidelines, some of which seem to unduly restrict OpenCourt's right to publish information that it lawfully obtains in open and public proceedings and to treat OpenCourt in a manner different from other media organizations. See Davidow Aff. at ¶ 14.

9. Following a hearing on July 12, 2012 (the "July 12th Hearing"), the Norfolk Superior Court issued an order dated July 12, 2012 (a copy of which is annexed hereto as Exhibit E), which order was amended on July 16, 2012 (a copy of which amended order is annexed hereto as Exhibit F) (the "Amended Order"). As set forth in the Amended Order, the Norfolk Superior Court allowed OpenCourt to intervene and denied Petitioners' requests for preliminary injunctive relief in light of the fact that the appropriate means for Petitioners to seek review of the Quincy District Court's decision was pursuant to M.G.L. c. 211, § 3.

10. During the July 12th Hearing, counsel for the Justices of the Quincy District Court reached an agreement with the Norfolk DA and CPCS to prevent OpenCourt from recording proceedings in Jury Room A until such time as a Single Justice of this Court had an opportunity to hear Petitioners' requests for relief (the "Agreement"). OpenCourt objected to the Agreement, insofar as it prevents a single media organization – i.e., OpenCourt – from covering open public proceedings pursuant to Rule 1:19. The Amended Order notes the fact of the Agreement and OpenCourt's objection thereto. See Exhibit F, Amended Order at p. 9. In light of the Agreement, which continues to bar OpenCourt from Jury Room A each day it remains in effect, OpenCourt respectfully requests the Single Justice's prompt consideration of the Petitions and OpenCourt's response thereto.

ARGUMENT

I. The Relief Sought by Petitioners – an Injunction Preventing OpenCourt from Recording Any and All Proceedings in Quincy District Court's Jury Room A – Runs Counter to Rule 1:19's Strong Presumption in Favor of Camera Access to Courtrooms in the Commonwealth.

11. Petitioners' core substantive argument is that the Quincy District Court erred when it authorized OpenCourt to begin livestreaming and archiving proceedings in Jury Room A. This argument lacks merit. OpenCourt is a news media organization, entitled to a strong

presumption in favor of access pursuant to Rule 1:19. Trial judges are entitled to deference with respect to matters concerning the administration and management of their courtrooms – including decisions about cameras, provided they act in accordance with Rule 1:19's presumption that cameras are permitted. Petitioners attempt, by arguing in the abstract, to demonstrate that the Justices' decision was wrong. Without establishing harm in a particular case, their requests for relief must be denied.

12. Courts in the Commonwealth have inherent powers protected under Article 30 of the Massachusetts Declaration of Rights that are "essential to the function of the judicial department, to the maintenance of its authority, or to its capacity to decide cases." Querubin v. Commw., 440 Mass. 108, 114 (2003) (quoting Gray v. Comm'r of Revenue, 422 Mass. 666, 672 (1996)). "A trial judge has the power and a corresponding responsibility to control the 'proceedings, the conduct of participants, the actions of officers of the court and the environment of the court,' which is 'absolutely necessary for a court to function effectively and do its job of administering justice.'" Commw. v. Scionti, 81 Mass. App. Ct. 266, 276 (2012) (quoting Commw. v. O'Neil, 418 Mass. 760, 764 (1994)).

13. Moreover, Rule 1:19 contains a presumption in favor of access for cameras and other recording devices. Rule 1:19 provides that a judge "shall permit broadcasting, televising, electronic recording, or taking photographs of proceedings open to the public in the courtroom by the news media for news gathering purposes and dissemination of information to the public" (emphasis added), subject to exceptions in specific cases not relevant to Petitioners' request for a total ban. S.J.C. Rule 1:19.[2] The burden is on the party opposing media coverage to file a motion to exclude cameras from the courtroom. S.J.C. Rule 1:19(h).[3]

[2] An amended Rule 1:19 – scheduled to go into effect this September – similarly requires trial judges to permit cameras while simultaneously empowering them to "limit or temporarily suspend such access by

II. The S.J.C.'s Decision in Barnes Does Not Require that the S.J.C. Promulgate Guidelines (or that Guidelines Promulgated by the Quincy District Court be Approved by the S.J.C.) Before OpenCourt Can Continue to Operate in Quincy District Court.

14. Petitioners rely on quotations taken out of context from the S.J.C.'s recent decision in Commonwealth v. Barnes in a vain effort to bar a single media organization – OpenCourt – from Jury Room A. In Barnes, Petitioners argued that judges should have the authority to order media organizations to redact recordings that they lawfully make during open, public proceedings prior to their publication. Barnes, 461 Mass. at 645-646. The S.J.C. held that

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the news media if it appears that such coverage will create a substantial likelihood of harm to any person or other serious harmful consequence," and "impose other limitations necessary to protect the right of any party to a fair trial or the safety and well-being of any party, witness or juror, or to avoid unduly distracting participants or detracting from the dignity and decorum of the proceedings." Amended S.J.C. Rule 1:19, ¶ 2.

[3] The Norfolk DA argues that OpenCourt is "enmesh[ed]" with the Quincy District Court and has an "unorthodox" relationship therewith, thus suggesting that OpenCourt requires special guidelines beyond what Rule 1:19 provides. Norfolk DA Petition at ¶ 17. The Norfolk DA (then proceeding on behalf of the Commonwealth) and CPCS (then proceeding on behalf of its client, Charles Diorio) made this same argument in Barnes, suggesting that close ties between OpenCourt and the Quincy District Court permitted the Court to issue prior restraints that would otherwise violate the First Amendment. The S.J.C. expressly rejected that argument:

> The Quincy District Court's cooperation with OpenCourt is not extensive enough to permit us to draw the conclusions urged by the Commonwealth and Diorio. OpenCourt is a project of WBUR-FM, a private entity. OpenCourt and WBUR-FM employ their own production staff and OpenCourt retains the recordings it makes on its own Web site, rather than a court Web site. WBUR-FM paid for the camera and audio cable OpenCourt needed to secure its video and audio feeds; the Quincy District Court did not. Although the Commonwealth and Diorio both allege that OpenCourt enjoys exclusive access to court proceedings, OpenCourt only records hearings that are open to the public and other media organizations. To the extent that OpenCourt is operating in a manner different from any other media organization, OpenCourt states that it is the only news medium that has requested permission to broadcast live by streaming video recording.

Barnes, 461 Mass. at 653. The Norfolk DA suggests in the Norfolk DA Petition that the fact that counsel for the Justices of the Quincy District Court deferred to OpenCourt to make arguments in Norfolk Superior Court about the substance of OpenCourt's claim of a right to record in Jury Room A evidences this unorthodox enmeshment. Norfolk DA Petition at ¶ 17. In fact, the opposite is true – because OpenCourt is an independent media organization, it is entirely appropriate that OpenCourt should assert its own rights to access under Rule 1:19.

the order sought by the DA would constitute a prior restraint in violation of settled First Amendment precedent. Id. at 662-663. The S.J.C. went on to suggest in its decision that the S.J.C.'s Judiciary-Media Committee should promulgate guidelines specific to OpenCourt. Id. at 661-62. But, the S.J.C. was clear that "[w]e will not require OpenCourt to suspend its operations pending the preparation, submission, and approval of these project guidelines" (emphasis added). Id. at 662.

15. CPCS specifically argues in the CPCS Petition that, pursuant to Barnes, Justice Coven was "required" to submit the June 25th Guidelines to the S.J.C.'s Judiciary-Media Committee for approval. CPCS Petition at ¶ 15. There is absolutely no such requirement in Barnes.

16. The S.J.C. further noted in Barnes that:

> We expect, however, that in the interim, OpenCourt, like all news media organizations, will work with the court system, prosecutors' offices, and the defense bar to safeguard the rights of criminal defendants as well as those of witnesses and alleged victims of crime. "The extraordinary protections afforded by the First Amendment carry with them something in the nature of a fiduciary duty to exercise the protected rights responsibly. . . . It is not asking too much to suggest that those who exercise First Amendment rights in newspapers or broadcasting enterprises direct some effort to protect the rights of an accused to a fair trial by unbiased jurors." Nebraska Press Ass'n v. Stuart, 427 U.S. at 560.

Regarding the S.J.C.'s citation to Nebraska Press Ass'n v. Stuart, it is fair to say OpenCourt could not have done more to "exercise [its] protected rights responsibly" than it has done in rolling out its coverage in the Quincy District Court First Session and, subsequently, in preparing to cover proceedings in Jury Room A. See generally, Davidow Aff.

III. Petitioners Will Not Be Harmed if the Relief They Seek is Denied, as Justices in Quincy District Court Will Be Able to Evaluate OpenCourt's Presence in Jury Room A on a Case by Case Basis.

17. Notwithstanding Petitioners' suggestions to the contrary, a decision to deny their requests for injunctive relief will not irreparably harm the Norfolk DA, the CPCS, or the as-yet unidentified individuals whose interests they purport to represent. The Justices of the Quincy District Court will always have the ability, subject to the presumptions in favor of camera access set forth in Rule 1:19, to make decisions about whether or not to permit OpenCourt to operate a camera in Jury Room A, just as they have that ability with respect to other media organizations. The June 25th Guidelines merely inform and streamline the process of making determinations under Rule 1:19 and give effect to the presumptions set forth in the Rule.

18. If a case arises in Jury Room A that presents a genuine issue about whether recording a particular witness or piece of testimony might impact the DA's ability to try a case or CPCS's ability to defend it, the trial judge hearing the case can make a determination at that time. There is no need to delve into the hypothetical scenarios raised by Petitioners. Indeed, Petitioners effectively challenge the S.J.C.'s policy determination in adopting Rule 1:19 rather than offering meaningful challenges to OpenCourt's operation in any given case. Petitioners would prefer that the S.J.C. rules favored exclusion of cameras and placed the burden on media organizations to demonstrate a need for access; Rule 1:19 provides for the opposite.

19. The Norfolk DA argues that "[u]nder Rule 1:19 requests are made well before the scheduled trial or court proceeding date, thus making it possible for judges and appellate courts to give careful, case-by-case, and advance consideration to requests or motions to allow or deny recording." See Norfolk DA Petition at ¶ 14. Of course, this is not always true – media organizations frequently cover court proceedings that arise on short notice, and courts,

prosecutors, defense attorneys, and media organizations are well-equipped to handle requests for access on short notice (and the S.J.C. to handle emergency Single Justice petitions arising out of such requests). See Davidow Aff. at ¶ 16. But, even accepting that Petitioners will want sufficient advanced notice to file motions with the Court seeking to restrict OpenCourt's access in certain appropriate cases, Petitioners themselves are in possession of the information necessary for them to make decisions about whether and when to so move. Davidow Aff. at ¶ 19. The Norfolk DA and CPCS know what cases are upcoming on their dockets. OpenCourt, as a general matter, does not. If Petitioners know of a case that will be heard in a day or a week or a month as to which they believe OpenCourt's coverage will be problematic, they can file motions under Rule 1:19(h).

20. This entire line of argument by the Norfolk DA and CPCS demonstrates that the issue here is not whether Petitioners have sufficient advanced notice of cases in which the hypothetical problems they describe are actually likely to arise; the issue is that Petitioners do not want OpenCourt in the courtroom for any case. Indeed, the Petitions suggest that Petitioners intend to file motions in virtually every case that comes up in Jury Room A. See Norfolk DA Petition at ¶ 16(b); CPCS Petition at ¶ 26-27 ("Finally, it is improbable in the OpenCourt context that the petitioner, intending to challenge the live-steaming of a trial, could comply with Rule 1:19(h) . . . to move for an order barring recording and requiring notice to various parties . . . ."). Petitioners' belief that OpenCourt should not, as a general matter, be permitted to record in Jury Room A runs contrary to Rule 1:19.

IV. If the Single Justice Chooses to Address the Hypothetical Concerns Expressed by Petitioners, Those Concerns are Unwarranted and do Not Justify the Relief Petitioners Seek.

A. Petitioners Ignore the Experience of OpenCourt in the First Session and the Absence of Evidence that OpenCourt's Camera Caused Disruptions of the Sort Petitioners Speculate Will Occur in Jury Room A.

21. As set forth above, the Single Justice can reject the Petitions without delving into the hypothetical scenarios expressed by Petitioners simply by deferring to the Justices of the Quincy District Court to address specific questions about OpenCourt's cameras as they arise in specific cases, in accordance with Rule 1:19. But, even if one were to consider the abstract concerns raised by Petitioners (which are phrased in broad strokes, and without a single citation), those concerns do not justify the relief that Petitioners seek. Petitioners have presented no evidence that OpenCourt's presence in fact impairs the operation of the Quincy District Court. For example, the Petitioners speculate that victims and witnesses may be reluctant to testify and that prosecutions may be hampered if trials are recorded. See, e.g., Norfolk DA Petition at ¶ 16; CPCS Petition at ¶ 24. But, since May 2011 (when OpenCourt began livestreaming from Quincy District Court), prosecutors have filed dozens of motions to shut down OpenCourt in all manner of proceedings citing precisely the kinds of concerns that the DA raises herein. The vast majority of those motions were denied. Davidow Aff. at ¶ 21. The DA fails to identify even one instance in which the denial of those motions led to disruptions of the sort he speculates might arise in Jury Room A. The absence of evidence to support the District Attorney's concerns is fatal to his attempt to justify a general ban.[4]

[4] In light of OpenCourt's experience in Quincy District Court's First Session, CPCS's statement that it is "probable that defense witnesses will decide not to testify," CPCS Petition at ¶ 25 (emphasis added), seems hyperbolic at best.

B. The Norfolk DA Miscites the United States Supreme Court's Decision in Estes and Ignores its Subsequent Decision in Chandler.

22. The Norfolk DA cites Estes v. Texas, 381 U.S. 532 (1965) to support the proposition that there is inherent prejudice to defendant and witnesses by televising a trial. See Norfolk DA Petition at ¶ 16(a). In relying on Estes, the DA misstates the date on which it was decided and entirely ignores a later Supreme Court case that essentially abrogates the key findings on which the Norfolk DA relies.

23. In Estes, a criminal defendant was convicted of swindling in the District Court for the Seventh Judicial District of Texas. The conviction was upheld by the Texas Court of Criminal Appeals. The Supreme Court, in a 5-4 decision, reversed the defendant's conviction, holding that he was deprived of his Fourteenth Amendment right to due process due to the highly publicized and sensationalized televising of his trial. Justice Clark, in his opinion, opined that the mere presence of cameras in the courtroom had detrimental psychological effects on jurors, witnesses, judges, and the defendant. Although the Court did not find actual prejudice to Estes, it held the circumstances were inherently suspect and sufficient to overturn the conviction. Estes, 381 U.S. at 544.[5]

24. The Norfolk DA erroneously states that Estes was decided in 1976; in fact, it was decided in 1965. See Norfolk DA Petition at ¶ 16(a). This date is important, as the Supreme Court's opinion in Estes was limited to address the "crude" state of television coverage in the mid-1960s. See, e.g., Petition of Post-Newsweek Stations, Florida, Inc., 370 So. 2d 764, 773 (Fla. 1979) ("The Court [in Estes] expressly limited its opinion to the crude state of the television art existing in 1965 and acknowledged the advent of technological advances."). Indeed, the

[5] Justice Stewart noted in dissent that, to the contrary, there was no evidence to indicate cameras had an adverse effect on any right guaranteed to Estes by the United States Constitution. See Id. at 602 (Stewart, J., dissenting).

Estes Court expressly noted the significant impact that then-upcoming technological advances might have on television coverage of court proceedings:

> It is said that the ever-advancing techniques of public communication and the adjustment of the public to its presence may bring about a change in the effect of telecasting upon the fairness of criminal trials. But we are not dealing here with future developments in the field of electronics. Our judgment cannot be rested on the hypothesis of tomorrow but must take the facts as they are presented today.

Estes, 381 U.S at 551-52; see also id. at 540 ("When the advances in these arts permit reporting by printing press or by television without their present hazards to a fair trial we will have another case.") In addition, Justice Harlan's concurrence in Estes expressly notes the benefits to be derived from state experimentation with electronic media coverage: "Forbidding this innovation . . . would doubtless impinge upon one of the valued attributes of our federalism by preventing the States from pursuing a novel course of procedural experimentation." Id. at 587 (Harlan, J., concurring).

25. By the late-1970s and into the early-1980s, the United States Supreme Court revisited its holding in Estes, noted that Estes does not stand for the proposition that cameras in the courtroom cause inherent prejudice, and held that a court may permit radio, television, and photographic coverage of a criminal trial without interfering with a defendant's constitutional rights. In Chandler v. Florida, 449 U.S. 560 (1981), defendants were convicted of conspiracy to commit burglary, grand larceny, and possession of burglary tools, and their conviction was affirmed by the Florida District Court of Appeals over defendants' objections that the televising of their trial denied them a fair and impartial trial. In affirming the conviction, the Supreme Court held that:

> Whatever may be the "mischievous potentialities [of broadcast coverage] for intruding upon the detached atmosphere which should always surround the judicial process," Estes v. Texas, 381 U.S. at 587, at present no one

> has presented empirical data sufficient to establish that the mere presence of the broadcast media [in the courtroom] inherently has an adverse effect on that process.

Chandler, 449 U.S. at 578-79. The Court in Chandler refuted the precedential value of Estes in several ways. First, the Chandler Court noted of Estes that "Chief Justice Warren and Justices Douglas and Goldberg joined Justice Clark's opinion announcing the judgment, thereby creating only a plurality." Chandler, 449 U.S. at 570-71. While Justice Harlan provided the fifth vote necessary in support of the judgment in Estes, the Court in Chandler noted that Harlan expressly limited his concurrence in a separate opinion, "subject . . . to the reservations and only to the extent indicated in this opinion." Id. at 571 (internal quotation marks omitted). The Chandler Court also noted that, like OpenCourt, the safeguards Florida implemented in its camera program significantly aided in avoiding problems like those articulated in Estes and that, even in 1981, "many of the negative factors found in Estes" were "less substantial factors today than they were at [the time of Estes]." Id. at 576. Thus, the Norfolk DA's citation to Estes, misstating the date of the Supreme Court's decision by a decade and ignoring the same Court's later decision in Chandler, is disingenuous at best.

26. Furthermore, even though the Supreme Court has not yet recognized an affirmative First Amendment right to televise judicial proceedings, this Court's ruling in Barnes demonstrates how the ability to record court proceedings is intertwined with issues of access to the courts and prior restraint. The presumption in favor of camera access set forth in Rule 1:19 serves the same ends of courtroom access and public awareness of the function of the judiciary, and that presumption should not lightly be disregarded. In that respect, Rule 1:19 is similar to another rule of court, Rule 7 of the Uniform Rules on Impoundment Procedure. Although Rule 7 states that documents in civil cases may be impounded on a showing of "good cause," and

although the Supreme Judicial Court has not recognized a First Amendment right of access to documents in civil cases, the Court has recognized that Rule 7 incorporates a strong common law presumption of access to these documents in parallel to the constitutional right of access to documents in criminal cases::

> The presumption of access facilitates "the citizen's desire to keep a watchful eye on the workings of public agencies," permits the media to "publish information concerning the operation of government," Nixon v. Warner Communications, Inc., [435 U.S. 589, 598 (1987)], and supports the public's right to know "whether public servants are carrying out their duties in an efficient and law-abiding manner." George W. Prescott Publ. Co. v. Register of Probate for Norfolk County, [395 Mass. 274, 279 (1985)], quoting Attorney Gen. v. Collector of Lynn, 377 Mass. 151, 158 (1977). Access to otherwise unrestricted records of judicial proceedings may therefore be viewed as an essential component of the general principle of publicity: "the public often would not have a `full understanding' of the proceeding and therefore would not always be in a position to serve as an effective check on the system" if it were denied access to judicial records. Globe Newspaper Co. v. Pokaski, 868 F.2d 497, 502 (1st Cir. 1989). See New Bedford Standard-Times Publ. Co. v. Clerk of the Third Dist. Court of Bristol, 377 Mass. 404, 417 (1989) (Abrams, J., concurring) ("greater access to information about the actions of public officers and institutions is increasingly recognized as an essential ingredient of public confidence in government").

Boston Herald, Inc. v. Sharpe, 432 Mass. 593, 606 (2000). Accordingly, the S.J.C. has held that Rule 7's standard of "good cause" is rigorous, taking into account the same considerations as the First Amendment analysis for impounding documents in criminal cases. Sharpe, 593 Mass. at 605 n. 24.

C. Petitioners Ignore Evidence that Cameras in Courtrooms Generally do not have the Disruptive Impacts Petitioners Speculate they Will Have in Jury Room A.

27. The DA and CPCS entirely ignore not just Chandler but the long history of cameras in courtrooms since the late-1970s and early-1980s (much of which was catalyzed by the Supreme Court's decision in Chandler) and the enormous amount of research and data that

have been released in the past thirty years, much of which further undercut Petitioners' concerns. The very cameras at issue in Chandler were part of an extensive two-year experiment in which Florida state courts analyzed the effects of cameras in the courtroom so as to promulgate a revised version of their "Cameras in the Courtroom" Statue. See Petition of Post-Newsweek Stations, Florida, Inc., 370 So. 2d 764, 766-69 (Fla. 1979) (reporting the results of a survey of over 2,750 participants in the Florida experiment and finding physical disruptions due to cameras were minimal if present at all). Assumptions that trial participants – including lawyers, judges, witnesses, and jurors – would grandstand or posture or otherwise be distracted due to presence of electronic media, proved to be "unsupported by any evidence"; there was "no appreciable difference" between exposure to print media and exposure to electronic media vis-à-vis exposure of witnesses and jurors to pretrial publicity; and decisions about curtailment of electronic media in particular cases was best left to the "sound discretion of the presiding judge." Id. at 775-79.

28. A similar study in California found that "[m]ost judges, attorneys and jurors said that the media coverage did not affect behavior of the various participants." Susan E. Harding, Cameras and the Need for Unrestricted Electronic Media Access to Federal Courtrooms, 69 S. Cal. L. Rev. 827, 842 (1996). The California survey results mirror those of other states and the federal courts: cameras in courtrooms have virtually no impact upon jurors, witnesses, judges, counsel, or courtroom decorum. Kelli L. Sager & Karen N. Frederiksen, Televising the Judicial Branch: In Furtherance of the Public's First Amendment Rights, 69 S. Cal. L. Rev. 1519, 1545 (1996).

29. State studies from Arizona, Hawaii, Kansas, Maine, Massachusetts, Nevada, New Jersey, New York, Ohio and Virginia have similarly indicated that there is virtually no negative impact on courtroom proceedings resulting from electronic media coverage. Harding, 69 S. Cal.

L. Rev. at 842.[6] These studies generally concluded that "fears about witness distraction, nervousness, distortion of testimony, fear of harm and reluctance to testify with electronic media present were for the most part unfounded." Id.

30. During the summer of 1992, Court TV conducted a study focusing on judges' reactions to the presence of cameras in the courtroom. By that time, Court TV had covered one-hundred criminal and civil trials in twenty-eight state systems and some federal civil cases. All seventy of the judges who responded to the survey said that the presence of the cameras in the courtroom had not impeded the judicial process. Several judges remarked that they forgot the camera was even there. Sixty percent of the judges who responded thought the presence of Court TV's cameras and its reporting "helped convey the events of the trial in a way that contributed to public understanding of the legal system." See Anton R. Valukas et al., Cameras in the Courtroom: An Overview, 13 Comm. Law 1, 20 (Fall 1995).

31. In 1994, the Federal Judicial Center published a report on electronic media coverage of civil proceedings. Molly Treadway Johnson and Carol Krafka, Electronic Media Coverage of Federal Civil Proceedings: An Evaluation of the Pilot Program in Six District Courts and Two Courts of Appeals, Fed. Judicial Ctr., available at http://www.fjc.gov/public/pdf.nsf/lookup/elecmediacov.pdf/$file/elecmediacov.pdf (last visited July 12, 2012). Under a pilot program adopted in September 1990 by the Judicial Conference of

[6] Harding notes that in the Florida and New Jersey experiments, over ninety percent of responding jurors said that the presence of electronic media had "no effect on their ability to judge the truthfulness of witnesses." Harding, 69 S. Cal. L. Rev. at 843. A study conducted by the University of Minnesota concluded that across the three conditions in the experiment (electronic media coverage, print media coverage and no media coverage), jurors perceived witness testimony as "comparably believable, planned, rehearsed, spontaneous, and excited." A similar conclusion was reached in a 1991 New York study, with the majority of jurors responding that witness credibility was "not at all" affected by camera coverage; see also Christo Lassiter, TV or Not TV - That Is the Question, 86 J. Crim. L. & Criminology 928, 968-70 (1996).

the United States, media representatives used electronic media to cover all or part of a civil proceeding in one of the pilot courts. The report found, among other things, that judges and attorneys with experience with electronic media coverage observed small or no effects of camera presence on participants in the proceedings, courtroom decorum, or the administration of justice. Id. at 7, 38-42; see also Harding at 840.

V. The Norfolk DA States that the Relief It Seeks is In the Public Interest; in Fact, the Public Interest Strongly Favors OpenCourt and Media Access to Courtrooms in the Commonwealth.

32. The Norfolk DA argues that the public interest favors granting the extraordinary injunctive relief he seeks. Precisely the opposite is true. OpenCourt employs digital technology to foster open courts with the idea that a more transparent judiciary makes for a stronger democracy. It encourages participation by members of the public in courtrooms itself by providing free WiFi services. And, it fosters a genuine interest in and feeds a need for information about what happens inside courtrooms around the country by providing its streams and recordings to online viewers.

33. The S.J.C. has already offered its own guidance on OpenCourt's work in the Quincy District Court:

> It is desirable that [judicial proceedings] should take place under the public eye . . . because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.

Barnes, 461 Mass. at 650 (citing Republican Co. v. Appeals Court, 442 Mass. 218, 222 (2004), quoting Cowley v. Pulsifer, 137 Mass. 392, 394 (1884) (Holmes, J.), and citing Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 508-509 (1984) ("openness enhances appearance of fairness

essential to public confidence in criminal justice system")). It is axiomatic that open public proceedings are in the public interest:

> Openness in court proceedings not only gets to the truth more readily, but also results in all those connected with the trial-parties, counsel, witnesses, jurors and judges-performing their functions more conscientiously . . . . Criminal proceedings conducted in secret have had from time immemorial an odious tinge that carries with it a scent of grave injustice reminiscent of the Spanish Inquisition and the English Star Chamber. In marked contrast to the openness in which the common law jury functioned, the Lords of the Star Chamber proceeded as inquisitors. A defendant's trial was based on charges made by persons whose identities were not disclosed, and he could be examined under torture, with the ultimate decision left to a court sitting without a jury.

United States v. Cojab, 996 F.2d 1404, 1407 (2d Cir. 1993) (internal citations omitted). The United States Supreme Court has held that "[o]penness in court proceedings may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, cause all trial participants to perform their duties more conscientiously, and generally give the public an opportunity to observe the judicial system." Gannett Co., v. DePasquale, 443 U.S. 368, 383 (1979); see also Barnes, 461 Mass. at 644 ("one purpose of First Amendment right of press access to criminal trials is to ensure effective participation of citizens in self-government and informed discussion of governmental affairs") (citing Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604-05 (1982)); Joseph W. Hatchett, Arguments Against Cameras Have Proven To Be Wrong, The Florida Bar News, available at http://www.floridabar.org/divcom/jn/jnnews01.nsf/Articles/9395EE5CD0473BE78525757F006E35AA (last visited July 26, 2012) ("News summaries of court, legislative, and executive proceedings have always been thought sufficient to keep the public informed. Adding pictures to events as they occur cannot subtract from the educational process. Having pictures of important activities, especially after historic events, is priceless.")

34. The OpenCourt project's core mission is a public service mission, and prohibiting OpenCourt from covering proceedings in Jury Room A does not promote the public interest.

CONCLUSION

For the foregoing reasons, OpenCourt respectfully requests:

(a) that Petitioners be denied their requests for injunctive relief; and

(b) that the cases pending before the Norfolk Superior Court be dismissed.

REQUEST FOR ORAL ARGUMENT

OpenCourt respectfully requests that this matter be scheduled for oral argument at the earliest possible opportunity.[7]

Respectfully submitted,

Trustees of Boston University,
d/b/a WBUR-FM, and OpenCourt,
By its attorneys,

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Date: July 27, 2012

[7] OpenCourt thanks Cyberlaw Clinic law student interns Marc Pellegrino (Benjamin N. Cardozo School of Law) and Luis Zambrano (Berkeley Law) for their valuable contributions to this memorandum.

CERTIFICATE OF SERVICE

I, Christopher T. Bavitz, hereby certify that I served a true copy of the above document upon counsel of record this 27th day of July 2012 by first-class mail, postage prepaid, to the following addressees:

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In addition, as a courtesy, I sent copies by electronic mail.

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