COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

for

SUFFOLK COUNTY

COMMONWEALTH OF MASSACHUSETTS,

PETITIONER,

v.

NORMAN BARNES,

DEFENDANT.

SJC – 11035

TRUSTEES OF BOSTON UNIVERSITY,
D/B/A WBUR-FM AND OPENCOURT,

INTERVENOR,

v.

COMMONWEALTH OF MASSACHUSETTS.

SJC – 11036

CHARLES DIORIO,

PETITIONER,

v.

FIRST JUSTICE OF THE QUINCY DIVISION
OF THE DISTRICT COURT DEPARTMENT.

SJC – 11052

ON APPEAL FROM RESERVATIONS AND REPORTS PURSUANT TO G.L. C. 211 § 3 OF DECISIONS BY THE QUINCY DISTRICT COURT

Reply Brief for the Intervenor, Trustees of Boston University, d/b/a WBUR-FM and OpenCourt

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INTRODUCTION

First Amendment jurisprudence makes clear that a prior restraint that limits a media organization's right to publish information obtained during a public proceeding in an open courtroom is presumptively unconstitutional. To overcome that presumption, a litigant must show that the interests a restraint purports to advance are sufficiently important, and that the restraint itself is narrowly tailored and likely to achieve its objectives. Neither the Commonwealth (in Barnes) nor Diorio has met that burden.

In their opening briefs, the Commonwealth and Diorio needlessly complicate the issues before this Court. Cases about courtroom access are not relevant, because the courtrooms were open to the public in both Barnes and Diorio. Hyperbolic statements about the experimental nature of the OpenCourt project, vastly overstating the purported privileges afforded to OpenCourt and the nature of its access to Quincy District Court, do not add to the analysis. Restraints on OpenCourt's right to provide access to information about public cases must be rejected.

ARGUMENT

I. The Commonwealth and Diorio Seek Prior Restraints on OpenCourt's Speech About Matters that Took Place in Open Courtrooms.

A. This Court Should Disregard Arguments about Limitations on Access and the Propriety of Cameras in the Courtroom.

Issues not raised in the petitions submitted to the Single Justice are not properly before the Court. See, e.g., Ewing v. Commonwealth, 454 Mass. 1016, 1017 (2009) (declining to address issues not before the Single Justice); Snell v. Lee, 448 Mass. 1001, 1001 (2006) (issue not presented to the Single Justice "not properly before [the court]").[1/]

The Commonwealth's petition expressly asked the Single Justice to stay the lower court's order

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[1/] Most cases in this area concern appeals from a Single Justice's ruling as opposed to petitions reserved and reported to the full court. The body of caselaw concerning petitions reserved and reported is modest, but the procedural requirements and the scope of the full court's review are similar. See Seng v. Commonwealth, 445 Mass. 536, 549 n.13 (2005) (addressing petitioner's right to counsel argument while noting that he did not raise this issue in the Superior Court, but did in his G.L. c. 211, § 3, petition).

permitting OpenCourt to post, in its online archive, an audiovisual recording of the May 27th dangerousness hearing in Barnes. Barnes Record Appendix ("Barnes R.") at 1.[2/] Diorio asks the Single Justice to prohibit OpenCourt from archiving his arraignment and questions whether livestreaming of courtroom proceedings interfered with his right to a fair trial (Diorio R.A. at 1, ¶ 1; at 7, ¶ 18), but he did not seek to close the courtroom altogether. Thus these cases do not concern press access or cameras in a courtroom under Rule 1:19; rather, they concern the propriety of barring publication of information obtained during a proceeding that was open to the press and general public.

B. The Commonwealth and Diorio Undervalue the Strong Presumptions in Favor of Press Access to Public Proceedings.

Even if OpenCourt should not have been permitted to cover and broadcast/record the proceedings at issue, a prior restraint cannot be used to correct a judge's

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[2/] The Commonwealth noted, in passing, that "the dangerousness hearing should not have been streamed live; the judge should have allowed the Commonwealth's motion to turn off the live video and audio." Barnes R. at 14.

error in granting access to courts. In Oklahoma Publ'g Co. v. District Court in and for Okla. County, 430 U.S. 308 (1977), the Supreme Court held that a judge who allowed the press to be present for a hearing involving a juvenile charged with second-degree murder, despite a state statute requiring closure of the courtroom for juvenile proceedings, could not enjoin publication of the defendant's name and photograph without violating the First and Fourteenth Amendments. Id. at 309-12. Here, OpenCourt obtained information lawfully in proceedings that were open to the public. Injunctions prohibiting the publication of information OpenCourt gathered during those proceedings amount to unconstitutional prior restraints. Cf. New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (upholding the press's First Amendment rights even where the information was stolen, top-secret Defense Department documents).

Moreover, even if the issue of courtroom closure were properly before this Court, Diorio's reliance on cases upholding courtroom closures is misplaced. In re Globe Newspaper Co., 729 F.2d 47 (1st Cir. 1984), and Commonwealth v. Amral, 407 Mass. 511 (1990), involved suppression hearings, which raise unique

concerns not present in the instant case.[3/] See also Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 378 (1979) ("Publicity concerning pretrial suppression hearings such as the one involved in the present case poses special risks of unfairness.").[4/]

The cases Diorio cites to support his conclusion that press coverage will influence witnesses called to identify him are factually inapposite. In Commonwealth v. Jones, 423 Mass. 99, 102-06 (1996), this Court held that improper suggestive identification occurred when a witness brought by the district attorney to the courthouse saw one defendant, recognized by the witness

[3/] Subsection (b) of S.J.C. Rule 1:19 ("Rule 1:19") recognizes the unique nature of suppression hearings and expressly prohibits broadcasting them. S.J.C. Rule 1:19, as amended 430 Mass. 1329 (2000).

[4/] United States v. Mitchell, 2010 WL 890078 (D. Utah Mar. 8, 2010) is also distinguishable. That case, which received extensive, sustained, nationwide publicity, involved the abduction and imprisonment of a teenage girl. The court ruled that even though "judicial documents are presumptively available to the public," it was not required to make copies of videos and evidence used at a pre-trial hearing for the media. Id. at *4 (citing United States v. McVeigh, 119 F.3d 806, 811 (10th Cir. 1997)). The Mitchell analysis does not apply here, because OpenCourt is an independent press organization with its own recordings.

as a perpetrator, shackled to another defendant. Commonwealth v. Napolitano, 378 Mass. 599, 607 (1979), involved an identification that occurred while the suspect was being arraigned for an unrelated crime. Unlike Jones and Napolitano, Diorio has not identified a single witness in his case who saw OpenCourt's livestream.[5/]

Supreme Judicial Court Rule 1:19 similarly supports OpenCourt's position in these cases. The Rule allows judges to limit or temporarily suspend media coverage if it appears that such coverage will create a "substantial likelihood of harm," S.J.C. Rule 1:19(a).[6/] Judges have enormous discretion, and are entitled to great deference, when making determinations about matters in their courtrooms. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass.

[5/] Further, and as noted elsewhere, there is no archive of the July 5 proceeding, and Diorio did not attend the July 25 hearing. (OpenCourt Br., Ex. 4, ¶ 35.)

[6/] Notably, Rule 1:19 prohibits the broadcasting, televising, electronic recording, and taking photographs of particular types of proceedings (i.e., probably cause or voir dire hearings); the type of proceeding at issue in Diorio -- an arraignment -- is not among those listed. See S.J.C. Rule 1:19(b).

256, 266 (2001) ("In assessing whether a judge has abused his discretion, we do not simply substitute our judgment for that of the judge, rather, we ask whether the decision in question rest[s] on whimsy, caprice, or arbitrary or idiosyncratic notions.") (alteration in original) (internal quotation marks omitted); Commonwealth v. Cordeiro, 401 Mass. 843, 848 (1988) ("Matters pertaining to the conduct of a trial are generally discretionary and the burden is on the defendant to demonstrate prejudice justifying reversal.").

Diorio's bare allegation that his arraignment hearing deprived him of his right to a fair trial and the assistance of counsel is insufficient to support the relief he seeks. "Without adequate factual support, a motion to limit media presence at a trial must fail." Commonwealth v. Clark, 432 Mass. 1, 9 (2000) (upholding the Single Justice's determination that there were insufficient findings to support a limit on electronic media in the courtroom of a murder trial). See also Guidelines on the Public's Right of Access to Judicial Proceedings and Records, Supreme Judicial Court Judiciary-Media Committee, http://www.mass.gov/

courts/sjc/docs/pubaccess.pdf (Mar. 15, 2000) (citing Hearst Corp. v. Justices of the Superior Court, SJ-96-0076 (Feb. 29, 1996) (Greaney, J.) (Canon 3(A)(7)(a) "favors coverage by the broadcast media, indeed creates a strong presumption in that direction, [and therefore] limitation of coverage must have a well-documented showing of a substantial likelihood of harm or harmful consequences.")).

The possibility of prejudice cannot substitute for a showing of actual prejudice. See Commonwealth v. Cross, 33 Mass. App. Ct. 761, 762-63 (1992) (trial court did not err in allowing electronic media into the courtroom when defendant failed to produce evidence of actual jury distraction). Claims of possible harm cannot justify the exclusion of electronic media from an arraignment hearing in light of Rule 1:19's presumption for openness and the deference granted judges who make factual determinations about the risk of prejudice.

II. Neither the Sixth Amendment Nor the Privacy Rights of Witnesses and Victims Justify the Particular Forms of Restraint at Issue in This Case.

As discussed above, the Commonwealth and Diorio conflate courtroom closure and Rule 1:19 analyses with the completely different analysis that applies to a

prior restraint. But the alleged interests at stake do not justify prior restraints, and the OpenCourt project compromises neither a defendant's Sixth Amendment rights nor the privacy of minor victims or witnesses.

Diorio's assertion that his Sixth Amendment right to a fair trial is more important than the media's First Amendment right to communicate information is flawed as a matter of constitutional jurisprudence and is inconsistent with a long line of this Court's decisions. His argument fails for several reasons. First, there is no evidence that OpenCourt's coverage prejudiced Diorio. Second, because of a technical malfunction, Diorio's July 5 hearing was not archived on the OpenCourt website. (OpenCourt Br., Ex. 4, ¶ 35.) Third, the resolution of the OpenCourt video is simply insufficient to allow for the identification of any individual who is captured on film. And finally, OpenCourt does not compete with the audience drawn to mainstream media, such as television, radio, and print newspapers. (OpenCourt Br., Ex. 4, ¶¶ 35-37.)

This Court has adopted a strict standard when evaluating the impact of potentially adverse publicity upon a defendant's Sixth Amendment right to a fair

trial. Factors to consider include the influence, if any, of the media on the trial; the size of the community exposed to the media; the content of news stories; the length of time between peak media coverage and trial; and evidence from the verdict itself that the jury's exposure to media coverage had an impact on the verdict. Commonwealth v. Toolan, 460 Mass. 452, 463 (2011) (citing Skilling v. United States, 561 U.S. ___, 130 S.Ct. 2896, 2913-16 (2010)). The Toolan court "likewise identified the nature of the publicity (whether 'extensive *and* sensational') as a highly significant factor." 460 Mass. at 464 (emphasis in original) (citing Commonwealth v. Morales, 440 Mass. 536, 540 (2003)). Here, the complete absence of "extensive and sensational" publicity attributable to OpenCourt, or its influence on Diorio's right to a fair trial, is fatal to his claim.

The mere fact that a defendant's case has received media coverage is, without more, insufficient to support a Sixth Amendment claim. Commonwealth v. Leahy, 445 Mass. 481, 493 (2005) (absence of "indication that the pretrial publicity was so pervasive" that juror impartiality was impossible); Morales, 440 Mass. at 540 (extensive publicity does not establish "presumptive

prejudice" unless it can be shown that "it was impossible to impanel an impartial jury"); Commonwealth v. Seabrooks, 433 Mass. 439, 442 (2001) (Sixth Amendment right to a fair trial does not "require that jurors have no prior knowledge of the alleged crime; jurors can reach impartial decisions in the face of significant hostile publicity surrounding a case"); Boston Herald, Inc. v. Sharpe, 432 Mass. 593, 610-11 (2000) (same); (Commonwealth v. Colon-Cruz, 408 Mass. 533, 551 (1990) ("A defendant's right to a fair and impartial jury does not require that jury members have no prior knowledge of the crime.").

In Commonwealth v. Jackson, 388 Mass. 98, 108 (1983), this Court considered the "totality of circumstances" in concluding that the defendant's Sixth Amendment rights had not been compromised, and noted that the newspaper articles defendant had submitted in support of his claim "were generally factual in nature, and were not inflammatory." Id. at 109. It is difficult to imagine more factual, non-inflammatory media coverage than that provided by a video of a court proceeding.

As a practical matter, even if Diorio's July 5 hearing had been archived, OpenCourt's video recordings, with no close-ups or unusual camera angles, do not provide images of sufficient clarity or quality to allow observers to identify defendants. http://opencourt.us// In contrast, a clear, sharply defined photograph of Diorio that accompanied several newspaper stories that appeared on or around July 5, offer the reader an indelible and precise image.[7/]

Diorio's reliance on Commonwealth v. Perkins, 450 Mass. 834 (2008) and Commonwealth v. Downey, 65 Mass. App. Ct. 547 (2006), and 58 Mass. App. Ct. 591 (2003) , does not advance his Sixth Amendment argument. Those cases involved counsel who wore hidden microphones during trial to create an audio recording for a

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[7/] Man Wanted in 2 States Surrenders After Standoff in Braintree, CBS Boston (July 3, 2011), http://boston.cbslocal.com/2011/07/03/man-wanted-in-3-states-surrenders-after-standoff-in-braintree/; Registered Sex Offender Arrested in Boston Police Standoff, ABC7.com (July 3, 2011), http://abclocal.go.com/kabc/story?section=news/local/inland_empire&id=8229194; and Braintree Standoff with Sex Offender with Gun, PatriotLedger.com (July 3, 2011), http://www.patriotledger.com/mobile/x1860258315/Braintree-standoff-with-sex-offender-with-gun

documentary. In Perkins, notwithstanding counsel's conflict of interest, the defendant's motion for a new trial was denied because he consented to the arrangement. 450 Mass. at 854. The rulings in both cases were limited to the impropriety of covert recordings, were decided on conflict of interest and attorney-client privilege grounds, and are completely unlike the concerns at issue in this case.

Diorio alleges that the live broadcast of his arraignment hearing also deprived him of his right to the assistance of counsel because the court's microphones subverted the attorney-client relationship. While OpenCourt does not minimize the importance of attorney-client privileged conversations, the sensitivity of the court-owned microphones is simply not within OpenCourt's control. Because the transcript of each proceeding is available from the court as a public record, potential breaches of confidentiality are implicated even in the absence of OpenCourt. Furthermore, Diorio overstates the gravity of the situation when straightforward remedies, such as turning away from the microphone to whisper, are available.

The Commonwealth's reliance on Demery v. Arpaio, 378 F.3d 1020 (9th Cir. 2004), cert. denied 545 U.S. 1139 (2005) is also inapposite. That case involved pre-trial detainees whose due process rights were violated by publication of a video stream that displayed them in holding cells and intake areas generally closed to the public. Id. at 1029. Here, OpenCourt is streaming live video and audio, with the full knowledge of all participants, from a quintessentially open area - the courtroom.

Protecting a defendant's Sixth Amendment rights does not — and as a matter of law cannot — require suppression of a publisher's First Amendment rights. A defendant's interests can ordinarily be vindicated by alternatives far less restrictive of First Amendment liberty than those proposed by the Commonwealth and Diorio.

In Nebraska Press Association v. Stuart, 427 U.S. 539 (1976) (discussed extensively in OpenCourt's primary brief), a trial court order prohibited press reporting of prejudicial news pertaining to a brutal and highly publicized murder. The Supreme Court, reversing, found that the trial court's conclusion about the impact of

the expected publicity on prospective jurors "was of necessity speculative, dealing . . . with factors unknown and unknowable." 427 U.S. at 563. That case, and its progeny in federal courts and in this Court, compel the conclusion that alternatives to ensure a fair trial must be attempted before a restraint on publication may issue. Mere exposure to the facts of the case, including prejudicial information, does not automatically disqualify a juror from rendering an impartial verdict. Id. at 565, 568-69; id. at 599-601 and n.23 (Brennan, J., concurring).

The Commonwealth's reliance on Safford Unified Sch. Dist. No. 1 v. Redding, 129 S.Ct. 2633 (2009), does not advance its claim that OpenCourt violated the privacy of the minor victim in Barnes. That case addressed Fourth Amendment, not First Amendment concerns. It had nothing to do with the media, press, or speech: rather, it concerned a strip search of an adolescent girl while searching for contraband prescription medication. Id. at 2638. The Commonwealth has taken a partial quotation out of context to support a completely unrelated proposition.

The Commonwealth's assertion that a prior restraint against OpenCourt is justified because the privacy interests of the victim in Barnes exceed the media's First Amendment right to communicate information fails for several reasons. First, the information that the Commonwealth seeks to protect was stated on the public record in an open courtroom, and the First Amendment gives the public the right to "report . . . with impunity" any information spoken in open court. United States v. Quattrone, 402 F.3d 304, 313 (2nd Cir. 2005). Second, other, more widely distributed media organizations have reported on the issues that the Commonwealth seeks to protect, and a prior restraint against OpenCourt would fail to secure the privacy interests of the victim, and thus would not advance a state interest of the highest order. Lastly, there are at least two less restrictive methods that could protect the victim's privacy interests: the Commonwealth could follow OpenCourt's guidelines and report to OpenCourt the privacy information that it wishes OpenCourt to redact, and OpenCourt has voluntarily agreed to redact

the identifying information without a prior restraint. (OpenCourt Br., Ex. 5, ¶¶ 18-21.)[8/]

III. OpenCourt Is an Independent Media Organization, Not an Arm of the Court, and its First Amendment Rights Cannot Be Conditioned.

Diorio argues that OpenCourt is so entangled with the Quincy District Court that the legal analysis governing impoundment of court records, and not prior restraints, should apply to its activities. This argument is wrong as a matter of law and has no support in the record.

[8/] The Commonwealth claims that OpenCourt "live-streamed and posted to the Internet a prosecutor's personal information" and failed to exercise diligent oversight about the content of its archive. Barnes Br., p. 44. Thus, "rectifying that error cost the Commonwealth sizeable time and resources better spent elsewhere." Id. n. 41. These specious claims are unsupported by the record: a clerk asked a prosecutor what town she lived in. Her response was inaudible. Instead of asking OpenCourt, or its counsel, to delete the conversation from the archive, the Commonwealth filed a motion with the Court. Judge Coven ordered that OpenCourt delete the "name and personal information of victim." OpenCourt removed the offending conversation, which neither involved a victim nor included identifying information about a prosecutor, from the archive. See Barnes R.A. 53-63.

Diorio cites Rust v. Sullivan, 500 U.S. 173 (1991), for the proposition that "speakers entangled with the government can be prevented from speaking without invoking prior restraint." (Diorio Br. at 40.) Rust was decided under a spending power analysis and has absolutely no bearing on this case. 500 U.S. at 197-98. The plaintiffs were physicians who wanted to discuss abortion with their patients in violation of the terms of their Title X government funding. Id. at 181. The Supreme Court held that the government could not restrict free speech about abortion, but it could decline to pay for such speech with public funds. Id. at 198. The government made no effort to obtain court orders restraining the doctors' speech generally, as the Commonwealth and Diorio seek. Rather, it asserted control over the professional services doctors provided when they were being paid by the government. Id. at 198-99.

George W. Prescott Publ'g Co. v. District Court, 428 Mass. 309 (1998), presents a better analogy, because its holding is not obscured by issues about government funding. In Prescott Publishing a district court judge prohibited a newspaper from publishing names, addresses, or photographs of child victims or child witnesses as a

condition of access to the courtroom. Id. at 310. This Court held that "[t]he judge's order was, and is, an unlawful prior restraint on the press. There is a particularly high burden of justification where, having opened the proceedings and the court records in [these] cases to the public, the judge sought to restrict the press from reporting fully on the cases." Id. at 311. The restraints that the Commonwealth and Diorio seek to place on OpenCourt are similar in nature, and equally unlawful.

Diorio further asserts, without support, that OpenCourt's records are official court documents because they were produced with the court's collaboration and permission, and that "there is no prior restraint in redacting a court document." (Diorio Br. at 41.) The Commonwealth similarly argues that the archive recordings were made through the "superintendence" of the court because OpenCourt used the court's electricity and courtroom space while producing them. (Barnes Br. at 39-40.)[9/]

[9/] The Commonwealth's characterization of counsel for OpenCourt's communications with Judge Coven as (continued)

OpenCourt's archives are not public records. The general public has no inherent right to access them. OpenCourt has previously exercised its right to make the archives available; to withhold them; or to redact them at its own discretion and in accordance with its own internal policies. (OpenCourt Ex. 5, ¶ 20; Ex. 6, ¶ 12.) In this regard, OpenCourt is no different from any other private company that publishes records of court proceedings, such as Westlaw, LexisNexis, or the Courtroom View Network. Like OpenCourt, these groups organize and index materials, add reportage and commentary, and transmit information.

No media organization can obtain footage of a court proceeding unless it works with the court to make use of

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(continued)
"extra-record" is incorrect. Extra-record communications occur "when a fact finder discusses factual matters of a case with a nonparty in the absence of one or more parties." Commonwealth v. O'Brien, 423 Mass. 841, 855 n.1 (1996). Here, OpenCourt's communications to Judge Coven pertained exclusively to legal issues involving the First Amendment. Counsel for the Commonwealth were copied on all of those communications. Barnes R. at 66-67, 72-73. These communications did not jeopardize the fairness of the Barnes proceeding or compromise the rights of the Commonwealth, the defendant, or the minor victim.

space and amenities within the courthouse. Traditional notions of a free press would be substantially weakened by finding, as Diorio urges, that the minimum necessary steps to obtain a recording are also sufficient to convert that recording into government property.

IV. The "Experimental" Nature of the OpenCourt Project Has No Bearing on the Constitutional Analysis that Should Be Applied When Assessing a Prior Restraint.

The Commonwealth's frequent attempts to disparage OpenCourt as an "experimental" project — as if that were an inferior category of news media — do not alter the applicable First Amendment analysis: when a media outlet is allowed to observe a public proceeding, its right to communicate about that proceeding cannot be constrained. George W. Prescott Publ'g Co., 428 Mass. at 311 ("There is a particularly high burden where, having opened the proceedings and the court records to the public, the judge sought to restrict the press from reporting fully on the cases.")

Open Court is "experimental" insofar as it is designed to "help speed media innovation by field testing the most promising new technologies in specific geographic communities." (OpenCourt Br., Ex. 5, ¶ 6.) But that does not alter the analysis, notwithstanding

the Commonwealth's unsupported claim that "prior restraint analysis does not apply to an ongoing experiment . . . that is unsanctioned by the legislature, court rule, standing order, or judicial decision." (Barnes Br. at 42-43.) The Commonwealth bears the burden of showing that First Amendment protections are "staggered" for different types of media – a burden it cannot carry. The law of prior restraint makes no distinction regarding speech that occurs in furtherance of an experimental pilot project or a traditional, established media outlet. See Reno v. American Civil Liberties Union, 521 U.S. 844, 870 (1997) ("[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny, that should be applied to [the Internet].") Once information is lawfully obtained in a public proceeding, publication of that information can be restricted only if the restraint is narrowly tailored and absolutely necessary to achieve an interest of the highest order. See Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175, 183-84 (1968).

The Commonwealth attempts to undermine the legitimacy of OpenCourt by comparing it to other pilot programs that exist under legislation or court order. (Barnes br. 26 n. 21). This argument lacks merit. The

Commonwealth references pilots spearheaded by the judiciary that govern litigating parties and the procedures they may voluntarily or, in some instances, are required to follow. See, e.g., Business Litigation Session Pilot Project, http://www.mass.gov/courts/press/superior-bls-pilot-project.pdf; Appeals Court Docketing Pilot Project, http://www.mass.gov/courts/appealscourt/pilot-project.html. None of these programs administer procedures for non-party, independent, privately-operated entities like OpenCourt. The Commonwealth's reliance upon the pilot programs of the Massachusetts courts distracts, rather than illuminates the analysis.

But pilot programs in other states reflect a growing trend favoring cameras in the courts. The Commonwealth cites programs (in Connecticut, Indiana, Minnesota, and in the United States District Court of Massachusetts), all of which operate under their own unique guidelines. While some are more expansive than others, they all point in the direction of making courtrooms more accessible. See Capitol Records, Inc. v. Alaujan, 593 F. Supp. 2d 319, 322 (D. Mass. 2009) ("[I]n general the public should be permitted and encouraged to observe the operation of its courts in the

most convenient manner possible . . . .") (citations omitted); In re Pilot Project for Elec. News Coverage of Ind. Trial Courts, 895 N.E.2d 1161 (Ind. 2006) (authorizing limited pilot project to broadcast video and audio coverage in certain trial courtrooms); In re Modification of Canon 3A(7) of The Minn. Code of Judicial Conduct, 441 N.W.2d 452 (Minn. 1989) (reinstating an existing pilot project to create audio and video recordings of trial proceedings).

The fact that projects in other jurisdictions operate under different guidelines has no bearing on the prior restraint analysis. OpenCourt is operating under guidelines that authorize it to livestream and archive courtroom proceedings on the Internet. Like any other media outlet, if OpenCourt is allowed to attend courtroom proceedings, it must be allowed to communicate them to the public.

V. The Massachusetts Statutes Cited in the Commonwealth's Brief Have No Bearing on the Cases Before this Court.

The Commonwealth cites a wide range of Massachusetts statutes in an effort to draw support for its position. Most are irrelevant, and none add to the analytical framework.

The Commonwealth first cites to G.L. c. 119 to support its assertion that information allegedly identifying the victim in Barnes was made confidential by statute. Barnes Br. at 13, n.7. But that statute pertains to "CHINS" (Children In Need of Supervision) petitions, see G.L. c. 119, § 39E, and to criminal proceedings against juveniles, G. L. c. 119, § 65 – from which the public is excluded. In Barnes, of course, the victim was neither a child in need of supervision nor a juvenile charged with a crime. This statute has no bearing.

The Commonwealth also cites a range of statutes to support a claim that the legislature has "acted forcefully to protect crime victims and their rights to confidentiality and safety," Barnes Br. at 19-20, and urges this Court to conclude that the district judge's decision to allow a redacted archive in Barnes was in derogation of the legislature's mandate. Only two of the statutes the Commonwealth cites are even remotely relevant, but they are inapplicable.

G.L. c. 258B, § 3(h), authorizes victims and witnesses of their right to request confidentiality. This statute also authorizes a court to bar public

officials from disclosing confidential information about the victim or witness. But that statute restricts communications by law enforcement agencies, lawyers, and court officers. It does not restrict the media.

The Commonwealth also relies, erroneously, on G.L. c. 265, § 24C, which criminalizes the disclosure or publication of the name of "any individual identified as an alleged victim" of sexual assault. That statute has the effect of impounding records containing such information. Here, OpenCourt's voluntary redaction procedures did more to protect the Barnes victim's identity than the actions of other media outlets who are not targeted by the Commonwealth.

More fundamentally, the Commonwealth's suggestion that privacy rights recognized by a state legislature can trump constitutional principles is incorrect. The First Amendment does not permit statutory privacy laws to be used against media organizations that publish accurate information lawfully obtained from the courts. See Florida Star v. B.J.F., 491 U.S. 524, 541 (1989) (Florida's rape shield law could not constitutionally be applied to punish the media for publishing true information inadvertently revealed by a

police report); see also Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 102 (1979) (similar statute unconstitutional as applied to the press). "[W]here the government itself provides information to the media, it is most appropriate to assume that the government had, but failed to utilize, far more limited means of guarding against dissemination than the extreme step of punishing truthful speech." Florida Star, 491 U.S. at 538. The Court noted that it had never found that privacy concerns should surpass the strong presumption in favor of the press's right to publish, id. at 530, 537, particularly where narrower means were available to protect the information.

VI. Electronic Access to the Courts Serves the Public Interest.

Media access to judicial proceedings advances a number of interests that are central to a healthy democracy: it (1) "affords citizens a form of legal education," (2) "promotes confidence in the fair administration of justice," (3) "enhance[s] the performance of all involved," (4) protects judges and litigants from the risks of dishonesty, and (5) provides an outlet for community hostility and emotion. Richmond Newspapers Co. v. Virginia, 448 U.S. 555, 569-73

(1980); see also Globe Newspaper Co. v. Pokaski, 868 F.2d 497, 502 (1st Cir. 1989) (explaining public interest in court access).

Each of these interests is directly advanced by enabling the public and press to observe court proceedings electronically. Camera access uniquely facilitates public acceptance of unexpected or unpopular results. Henry Schleiff, Cameras in the Courtroom: A View in Support of More Access, Human Rights, Vol. 28, Issue 4, Fall 2001 at 14-25). Camera access also makes it possible for journalists to follow distant proceedings and facilitates more accurate and comprehensive reporting.

For these reasons, First Amendment analysis recognizes that the public

> should be permitted and encouraged to observe the operation of its courts *in the most convenient manner possible*, so long as there is no interference with the due process, the dignity of litigants, jurors and witnesses, or with other appropriate aspects of the administration of justice.

Hamilton v. Accu-Tek, 942 F. Supp. 136, 137-38 (E.D.N.Y. 1996) (emphasis added); see also Pokaski, 868 F.2d at 504 (recognizing that the press "cannot be restricted to

report on only those judicial proceedings that it has sufficient personnel to cover contemporaneously"). Indeed, the policies promoted by camera access are uniquely advanced over the Internet, where the absence of space constraints allows the public to observe, at any time, full gavel-to-gavel coverage.

Massachusetts has authorized cameras in its courts since 1980. See J. Connolly, Cameras in the Courtrooms of Massachusetts, 66 Mass. L. Rev. 187, 190 (1981). The OpenCourt project is a modest extension of that policy and helps fulfill the larger benefits served by expanding access to public proceedings.

CONCLUSION

Technology now allows an unobtrusive, practical and affordable way for people to see and hear exactly what has transpired in the courtroom. OpenCourt's live-stream and archive benefit the public by making information available through direct observation of courtroom proceedings.

Once information has become known to the public, only the most extraordinary circumstances can justify restrictions on the right to disseminate it. Neither the Commonwealth nor Charles Diorio have identified any

harm attributable to direct observation of courtroom proceedings on the Internet that justify the limitations they seek to impose on the First Amendment rights of OpenCourt.

Respectfully Submitted,

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

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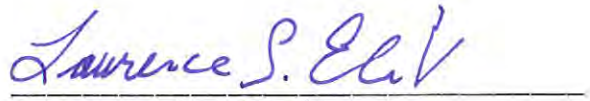
October 28, 2011

CERTIFICATION

Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure, counsel for intervenor certifies that this brief complies with the relevant rules that pertain to the filing of briefs, specifically Mass. R. A. P. 16(a), 16(b), 16(d), 16(g), 16(h), 16(k), 17, 19(a), 19(b), and 20, as applicable.

Respectfully Submitted,

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



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CERTIFICATE OF FILING AND SERVICE

I, Lawrence S. Elswit, hereby certify that, on October 28, 2011, the foregoing Brief for Intervenor Trustees of Boston University, d/b/a WBUR and OpenCourt, was served by e-mail and FedEx on the individuals listed below:

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