

No. 19-874

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IN THE  
**Supreme Court of the United States**

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WILLIAM ALAN PESNELL AND CHRISTOPHER  
HOLDER, THROUGH HIS CURATOR, GARY HOLDER,  
*Petitioners,*

v.

JILL SESSIONS, CLERK OF COURT, JENNIFER  
BOLDEN, CERTIFIED DIGITAL REPORTER, AND  
THE JUDGES OF THE 26th JUDICIAL DISTRICT  
COURT: MICHAEL O. CRAIG, JEFF R. THOMPSON,  
JEFF COX, E. CHARLES JACOBS, MICHAEL  
NERREN, AND PARKER O. SELF,  
*Respondents.*

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On Petition for a Writ of Certiorari to the Louisiana  
Second Circuit Court of Appeal

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BRIEF IN OPPOSITION OF  
RESPONDENT JENNIFER BOLDEN

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## I. Introduction.

Petitioners urge that the transcript of a criminal trial is (or may be) inaccurate.<sup>1</sup> They seek audio recordings of the trial. Their chosen device for securing these is a public-records request. But their use of that device was thwarted by a statute making the recordings *not* public records.

Petitioners respond by challenging the constitutionality of the statute.<sup>2</sup> However, Petitioners

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<sup>1</sup> Petition for Writ of Certiorari (“Pet.”) 9 (§ C) (referring to “affidavits of . . . witnesses who attested . . . that [an] objection made in closing argument was not in the transcript”). *See also id.* 14 (last para.) (referring to affidavits alleging “that the transcript did not include a material objection, response and ruling made during . . . closing arguments”, and appearing to tie the objection to prejudicial comments) & 15 (para. 2) (objection & comments). The criminal case is *State v. Holder*, No. 191,414 (La. 26 J.D.C., 2014).

<sup>2</sup> Petitioners also purport to challenge the constitutionality of a “local rule of the 26<sup>th</sup> Judicial District Court in and for Bossier Parish”. Pet. i, at nos. 1 & 2 (identical language). But Petitioners never *identify* the rule or its content. *See id.* 2-4 (listing “statutes ordinances and regulations involved in the case” (capitalization & italic font suppressed) and nowhere listing the rule), 7-8, at no. 3 (referring only to “a local court rule”), 8, at no. 4 (referring only to “the local rule”), 8 (at no. 5) (referring only to “the local rule”), 8 (first para. after the numbered items) (referring only to “the local court rule”), 11, at no. 11 (referring only to “the local court rule”), 11 (after the numbered items) (referring only to “the local court rule”), 12 (para. 1) (referring only to “the local court rule”), 14, at no. 1 (reprising the language of i, at no. 1, which refers only to a “local rule of the 26<sup>th</sup> Judicial District Court in and for Bossier Parish”), 22-23, at no. 2 (reprising the language of i, at no. 2, which refers only to a “local rule of the 26<sup>th</sup> Judicial District Court in and for Bossier Parish”), & 27-28 (referring only to “the 26<sup>th</sup> Judicial District court’s local rule”, to “the rule”, and again

are not just members of the general public—they are the convicted criminal defendant, and counsel for the defendant in an ancillary proceeding. The convicted defendant, Christopher Holder (“Holder”), seeks relief on appeal or other post-conviction relief.<sup>3</sup> Counsel in the ancillary proceeding, William Alan Pesnell (“Pesnell”), seeks information bearing on Holder’s right to inherit.<sup>4</sup> Petitioners have not shown that

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to “the rule”). This Court cannot invalidate a rule that is not before it. Moreover, Petitioners themselves say that the putative rule played no role in their failure to secure the recordings: they say that “[i]n denying the requests, the defendants cited and relied solely on La. R.S. 44:4(47)”. *Id.* 18 (penult. para.) (footnotes omitted).

Respondent Bolden, accordingly, takes the purported challenge to a local rule to be idle. She will respond to the constitutional challenge to the statute, but is unable to address the purported challenge to an unidentified rule—except to note that constitutional issues attaching to *any* rule need no more be reached than constitutional issues attaching to the statute. She respectfully reserves her right to supplement if this Court should permit Petitioners to supplement by identifying the rule.

<sup>3</sup> See Pet. i, at no. 2 (saying that “the convicted defendant act[ed] to obtain evidence in his case for purposes of appeal and/or post-conviction relief”). *Cf. id.* 15 (para. 2) (referring to Holder’s rights under the Public Records Law “during his post-conviction relief periods”), 23 (para. 2) (“Christopher Holder has a right to obtain evidence pertinent to his case for post-conviction relief purposes”), & 26 (identifying, as among the interests at stake, “a criminal defendant’s interests against deprivations of liberty”).

<sup>4</sup> *Id.* 6 (last para.) (“William Alan Pesnell acted as a successor counsel of record for Christopher Holder in Probate.... The ruling in that case was contrary to the interests of Christopher Wayne Holder”) & 7 (“Accordingly, . . . William Alan Pesnell sent a letter to the Clerk of Court requesting a copy of the data file in . . . State of Louisiana v. Christopher Holder”). →

their status as defendant and counsel do not provide them with tools capable of confirming or disconfirming the accuracy of the trial transcript. Accordingly, no court need now decide the constitutional questions.

In this Court, “[n]o rule of practice . . . is better settled than ‘never to anticipate a question of constitutional law in advance of the necessity of deciding it’”.<sup>5</sup> For this reason, Petitioners’ application for a writ of certiorari should be denied.

Petitioners’ failure to show that they could not otherwise confirm or disconfirm the accuracy of the transcript also means that they have not shown that they have sustained any harm. This Court “will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation”.<sup>6</sup> This is an independently sufficient reason Petitioners’ application should be denied.

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*See also id.* 15-16 (“William Alan Pesnell was the counsel for Christopher Holder in the succession proceeding”).

<sup>5</sup> *Communist Party of United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 71-72 (1961) (Frankfurter, J., for the Court), quoting *Liverpool, N.Y. & Phila. S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885), and citing *Arizona v. California*, 283 U.S. 423 (1931) & *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288[, 346-47] (1936) (Brandeis, J., concurring). *See also* the cases cited at *Ashwander* 347. For a recent case, *see City of S. Miami v. Desantis*. No. 19-cv-22927-BLOOM/Louis, 2019 U.S. Dist. LEXIS 214078, at \*57 (S.D. Fla. Dec. 12, 2019) (referring to “the well-established rule that a court is never to ‘anticipate a question of constitutional law in advance of the necessity of deciding it’”, quoting *Johnson v. Sikes*, 730 F.2d 644, 649 (11th Cir. 1984)).

<sup>6</sup> *Ashwander*, *supra* note 5, at 347 (Brandeis, J., concurring), citing *New York ex rel. Hatch v. Reardon*, 204 U.S. 152 (1907), *Heald v. District of Columbia*, 259 U.S. 114, 123

## II. Petitioners Challenge La. R.S. 44:4(47)(a).

La. R.S. tit. 44, chapt. 1 is the Louisiana Public Records Law.<sup>7</sup> Section 44:4 lists records to which “[t]his Chapter shall not apply”. Section 44:4(47)(a) includes in the list

the physical medium or contents of any electronic storage device . . . in the custody or under the control of a judge, clerk of court, official court reporter, deputy official court reporter, or certified electronic reporter and which are produced, made, or used by an official court reporter, deputy official court reporter, free lance reporter, or certified electronic reporter in any court of record of the state during any proceedings before that court to report the proceedings or for the purpose of transcribing into typewriting those portions of the proceeding required by law or the court to be transcribed.<sup>8</sup>

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(1922), *Sprout v. South Bend*, 277 U.S. 163, 167 (1928), *Concordia Fire Ins. Co. v. Illinois*, 292 U.S. 535, 547 (1933), *Tyler v. Judges of the Court of Registration*, 179 U.S. 405 (1900), & *Hendrick v. Maryland*, 235 U.S. 610, 621 (1915).

<sup>7</sup> La. R.S. 44:1.1.

<sup>8</sup> Cf. Pet. 17-18.

Accordingly, if it is constitutional, section 44:4(47)(a) makes the recordings sought by Petitioners not public records.<sup>9</sup>

Petitioners present three questions—two challenging the constitutionality of La. R.S. 44:4(47)(a) and one pertaining to burdens of proof.<sup>10</sup>

### **III. The Three Questions.**

#### **A. This Court Should Not Take Up the Issues Posed by Petitioners' First Question.**

Petitioners first ask whether, in barring “public access to the digital recording of a public murder trial”, La. R.S. 44:4(47) is “consistent with the First, Fifth, Sixth and Fourteenth Amendments of the United States Constitution”.<sup>11</sup>

But Petitioners are not just members of the public. They are the convicted defendant in the “public murder trial” and counsel to the convicted defendant in an ancillary proceeding. They therefore had the normal tools of discovery in criminal and civil actions available to them.<sup>12</sup>

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<sup>9</sup> It is undisputed that transcription was required by law or the court.

<sup>10</sup> Pet. i.

<sup>11</sup> *Id.*, at no. 1 (emphasis added).

<sup>12</sup> It is sometimes said that there is no *criminal* discovery. *See generally* James A. Rountree, ABA Minimum Standards for Criminal Justice – A Student Symposium, *Louisiana and Criminal Discovery*, 33 LA. L. REV. 596 (1973). Rountree notes, however, that *Brady v. Maryland*, 373 U.S. 83 (1963) requires “prosecutorial ‘disclosure’” and comments that “[i]t is difficult . . . to conceive of a duty to disclose without a corresponding right to discover”. Rountree 607. He also notes

**i. Christopher Holder’s Desire for Post-Conviction Relief Does Not Permit this Court to Reach a Constitutional Question.**

In particular, La. C.Cr.P., tit. XXXI-A (arts. 924-930.9) governs post-conviction relief. Article 930 provides that “[a]n evidentiary hearing for the taking of testimony or other evidence shall be ordered whenever there are questions of fact which cannot properly be resolved pursuant to Articles 928 [providing for dismissal upon the pleadings] and 929 [providing for summary disposition]”. Article 930 is the natural vehicle through which, for purposes of post-conviction relief, a convicted defendant might challenge the accuracy of a trial transcript—but it is absent from Petitioners’ petition.

Art. 930 requires that the court “shall” order a hearing whenever there are unresolved questions of fact—and clearly the court is to aim at a resolution of those questions. There are many ways in which a court discharging that mandate might, for litigants,

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that decisions bearing on criminal discovery have turned on the Public Records Law, but comments that this is strange: “Strangely, the decision as to whether the defendant is entitled to evidence before trial has turned on a consideration of the Public Records Act.” *Id.* 602 (footnote omitted).

Petitioners say that the refusals of the lower courts to make the recordings a public record “create a ‘star chamber’ where the proceedings can be manipulated without public review, and without recourse to a substantially affected defendant”. Pet. 13-14. An irony of their approach is that it increases the risk they deplore—or at least a similar risk. If criminal discovery turns on the Public Records Law, *most* evidence will be unavailable to criminal defendants.

confirm or disconfirm the accuracy of a transcript—for example, by listening to recordings *in camera*, or by securing consent for a special master to do so.<sup>13</sup> These ways do not require that the recordings be made *generally* available. They are avenues that must be tried before a constitutional question about general availability can be reached.

### ***ii. William Alan Pesnell’s Desire for Christopher Holder to Inherit Does Not Permit this Court to Reach a Constitutional Question.***

Similarly, La. C.C.P., bk. VI (arts. 2811-3500) governs probate procedure. Article 2824 provides that, in contradictory proceedings, “issues of fact shall be determined on the trial thereof only by evidence introduced as in ordinary cases”.

La. C.C.P., bk. II (arts. 851-2080) governs ordinary cases. Article 1461 provides for the production of “documents or electronically stored information”. Article 1462 sets out the procedure for requests for production of documents. Article 1469 provides for motions to compel discovery. And article 1463 provides that “[a]rticles 1461 and 1462 do not preclude an independent action against a person not a party for production of documents and things . . .”

These articles are the natural vehicles through which a convicted defendant might secure evidence for use in determining whether he possesses a right to inherit—but they are absent from Petitioners’ petition. The use of these articles does not require

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<sup>13</sup> See La. R.S. 13:4165 (providing for special masters). On information and belief, the respondent judges in this case have *proposed* a special master but Petitioners will not consent.

that the evidence be made *generally* available. They are avenues that must be tried before a constitutional question about general availability can be reached.

### ***iii. Petitioners’ Status as Members of the Public Does Not Permit this Court to Reach a Constitutional Question.***

Petitioners argue that they are not *only* a convicted defendant and counsel in an ancillary proceeding—they argue that they (or at least Pesnell) are *members of the public* who are asserting a public interest in the recordings being sought. “William Alan Pesnell is a member of the public in good standing ... Moreover, he has a heightened interest in the fairness and proper operation of the judicial system . . .”<sup>14</sup>

However, Holder and Pesnell *qua* members of the public are in the same position as Holder and Pesnell *qua* litigants protecting private interests. If the ordinary tools of discovery suffice to protect the private interests they will also suffice to protect the public interests.<sup>15</sup> Accordingly, it remains true that there is no necessity of deciding the constitutional questions.<sup>16</sup>

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<sup>14</sup> Pet. 16 (para. 1).

<sup>15</sup> Compare suits in which the government is a party. The government is then in the same position as a private litigant, and the rules of discovery apply. *See, e.g., Exxon Shipping Co. v. United States Dep’t of Interior*, 34 F.3d 774, 776 n.4 (9th Cir. 1994), citing *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 (1958) & *Mosseller v. United States*, 158 F.2d 380 (2d Cir. 1946).

<sup>16</sup> *See supra* note 5 & accompanying text.

***iv. Petitioners Do Not Show that they have been Harmed.***

Petitioners—whether criminal defendant *qua* defendant, lawyer *qua* lawyer, or defendant or lawyer *qua* member of the public—have not shown that the ordinary tools of discovery do not suffice to protect the interests they assert. For this reason, they have also not shown that they have been harmed.<sup>17</sup>

**B. This Court Should Not Take Up the Issues Posed by Petitioners' Second Question.**

***i. Petitioners Do Not Show that the Ordinary Tools of Discovery Do Not Suffice to Protect the Asserted Interests.***

Petitioners' second question rests on a presupposition: that La. R.S. 44:4(47) “bar[s] access to the digital recording of a public murder trial [not to the public generally but] to *the convicted defendant*”.<sup>18</sup> Petitioners then ask whether this purported bar is “consistent with the Sixth[] and Fourteenth Amendments to the United States Constitution, where the convicted defendant acts to obtain evidence in his case for purposes of appeal and/or post-conviction relief”.<sup>19</sup>

But we have already seen that the convicted defendant has the ordinary tools of criminal

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<sup>17</sup> See *supra* note 6 & accompanying text.

<sup>18</sup> Pet. i, at no. 2 (emphasis added).

<sup>19</sup> *Id.*

procedure at his disposal.<sup>20</sup> These are the natural ways of securing evidence for appeal or other post-conviction relief. The presupposition is therefore false: in making the recordings not *public records*, section 44:4(47) does not bar access to the convicted defendant.

Further, as we have also already seen, Petitioners must avail themselves of ordinary criminal procedure before they can raise constitutional questions about the status of the recordings as not public records.<sup>21</sup> But ordinary criminal procedures are absent from Petitioners' petition. Accordingly, there is no necessity of deciding the constitutional questions.

### ***ii. Petitioners Do Not Show that they have been Harmed.***

Because Petitioners do not show that ordinary criminal procedures do not suffice to protect the asserted interests, Petitioners do not show that they have been harmed.<sup>22</sup>

### **C. No Issue is Posed by the First Part of Petitioners' Third Question.**

Petitioners' third question divides into two. The first part asks whether "a state can alter the burdens of the parties for determinations of the validity of statutes impairing fundamental rights".<sup>23</sup>

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<sup>20</sup> *Supra* 6-7 (§ i).

<sup>21</sup> See *supra* note 5 & accompanying text.

<sup>22</sup> See *supra* note 6 & accompanying text.

<sup>23</sup> Pet. i, at no. 3.

We have seen that there is no necessity of deciding constitutional questions. Accordingly, if the rights at issue are *constitutional* rights, the question of who has the burden does not arise. This remains true if the rights are extra-constitutional—since Petitioners have failed to allege that they have been harmed.

However, it is also true that Petitioners make no argument that La. R.S. 44:4(47) *does* impair a fundamental right.<sup>24</sup>

The list of fundamental rights and liberty interests—which includes the rights to marry, to have children, to direct the education and upbringing of one’s children, to marital privacy, to use contraception, to bodily integrity, to terminate one’s pregnancy, and possibly the right to refuse unwanted lifesaving medical treatment, . . . is short and the Supreme Court has expressed very little interest in expanding it.<sup>25</sup>

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<sup>24</sup> The more usual word, rather than “impair”, is “burden”. Respondent uses “impair”, here and below, only to conform to Petitioners’ usage and to avoid confusion between the burdening of a right and the burden of proof. No distinction between impairment and burdening is intended.

<sup>25</sup> *Seal v. Morgan*, 229 F.3d 567, 574-75 (6th Cir. 2000), *citing Washington v. Glucksberg*, 521 U.S. 702, 720, 721 (1997). No further item appears in the *Seal* list. *See also Logan v. Township of W. Bloomfield*, No. 16-cv-10721, 2018 U.S. Dist. LEXIS 127692, at \*21-\*22 (E.D. Mich. July 31, 2018) (*quoting Seal*).

Petitioners make no argument that any of *these* rights is impaired by a statute whose only import is that trial recordings are not public records.<sup>26</sup> If any *is* impaired, the impairment is only incidental—and Petitioners similarly make no argument that a merely incidental impairment of a fundamental right shifts the burden of proof to the State.<sup>27</sup> They do assert that the burden shifted because they had made a “prima facie case”.<sup>28</sup> But, in the absence of any identification of the right, any characterization of the nature of the impairment (whether direct or incidental), and any exploration of the effect of that sort of impairment on that identified right, this assertion is empty.

Indeed, so confused is Petitioners’ treatment of burden-shifting that they seem to believe the burden shifted because their *prima facie* case established *standing*. They say that “the *prima facie* case of the petitioners in the trial court was established”, and immediately thereafter say, of themselves: “They had *standing*”.<sup>29</sup> They then just refer to “the statute at issue”, reprise their bald assertion that the statute impairs “fundamental rights”, and conclude that, if the burden was ever on them, it shifted.<sup>30</sup>

Thereafter, Petitioners’ brief on their third question retreats from even purporting to discuss fundamental rights and burden-shifting. It instead points out that the case implicates, not fundamental

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<sup>26</sup> See Pet. 25-28 (briefing Petitioners’ third question but nowhere mentioning any of these rights).

<sup>27</sup> See *id.*

<sup>28</sup> *Id.* 25 (para. 3, sent. 1).

<sup>29</sup> *Id.* 25 (para. 3, sents. 1 & 2).

<sup>30</sup> *Id.* 25 (para. 3, sents. 3-5).

rights, but *important interests*.<sup>31</sup> And it argues, not that the burden shifted, but that, *if* it shifted, the State did not meet the burden.<sup>32</sup>

#### **D. Louisiana's Second Circuit Court of Appeal Correctly Decided the Issue Posed by the Second Part of Petitioners' Third Question.**

The second part of Petitioners' third question asks whether "the State of Louisiana applied the proper burden in the case at bar".<sup>33</sup> The trial court imposed the burden of proof on the constitutional questions on Petitioners: it "sustained the exceptions of no cause of action based on *Plaintiffs'* failure to prove that La. R.S. 44:4(47) is unconstitutional".<sup>34</sup> The Second Circuit Court of Appeal did not reverse the trial court.<sup>35</sup>

Because there is no necessity of deciding the constitutional questions, the question of who has the burden does not arise.<sup>36</sup> The Second Circuit was

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<sup>31</sup> *Id.* 26 (para. 2) (comparing various public and private interests).

<sup>32</sup> *Id.* 27-28 (claiming, *e.g.*, at 27 (para. 1, last sent.), that "neither the defendants below nor the State have proposed anything that would support the statute at issue").

<sup>33</sup> Pet. i, at no. 3.

<sup>34</sup> Pet. 19a (para. 2) (emphasis added) (Opinion by the Second Circuit Court of Appeal).

<sup>35</sup> *Id.*

<sup>36</sup> As the Second Circuit recognized. It felt that "[a]ny opinion from this court regarding the constitutionality of La. R.S. 44:4(47) would constitute an advisory opinion". *Id.* The court treated the issues alleged under the Louisiana Constitution and those alleged under the U.S. Constitution together. *See id.* 17a (last para.) (referring to "the overlap of

therefore correct in leaving the ruling of the trial court undisturbed.

However, it is also true that, if the issue arose, the Second Circuit would have been correct in sustaining the trial court. Statutes come with a presumption of constitutionality, which it is a challenger's burden to rebut.<sup>37</sup> The burden may shift when the challenger makes a *prima facie* showing of constitutional infirmity. But we have seen that Petitioners merely assert, and do not argue, that they made such a showing.<sup>38</sup> There would therefore be no argument, even if the issue arose, that the Second Circuit erred in leaving the burden where the trial court placed it—on Plaintiffs.

*Carolene Products* is an analogous and classic Fifth Amendment case. This Court noted that, since no plausible Fifth Amendment violation was suggested, “we might rest decision wholly on the presumption of constitutionality”.<sup>39</sup>

#### **IV. Conclusion.**

For the foregoing reasons, Petitioners' petition for a writ of certiorari should be denied.

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constitutional considerations under U.S. Const. Amend. I, V, VI and XIV and La. Const. art. I §§ 2, 7, 16 and 19”).

<sup>37</sup> *Heller v. Doe*, 509 U.S. 312, 320 (1993) (“A statute is presumed constitutional, and ‘the burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it’” (internal cross-reference omitted), quoting (with internal quotation marks omitted) *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

<sup>38</sup> *Supra* 10-13 (§ C).

<sup>39</sup> *United States v. Carolene Products Co.*, 304 U.S. 144, 148 (1938).

Respectfully submitted,

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