

Dear Maryland Supreme Court,

The undersigned write to express our opposition to the proposed amendments in the Rules Committee's Two Hundred and Thirteenth Report to the Supreme Court.

We are individuals and organizations including attorneys, advocates, journalists, teachers, organizers, activists, voters, and community members. We—and all Marylanders—have a strong interest in preserving and protecting the public's right of access to judicial proceedings and records. This access ensures the proper functioning of the judicial system through public accountability, and upholds civic values by promoting understanding and trust in the judiciary. The United States Supreme Court has long recognized that public attention to judicial proceedings “serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.”¹ This Court has recognized the same for more than a century.²

The changes proposed by the Rules Committee (hereinafter “the proposed Amendments”) serve to avoid public scrutiny and negate its beneficial effects by denying copies of official recordings of criminal court proceedings to members of the community and the press. This would constitute a major step backward for court transparency and make Maryland's court system an outlier at a moment when most states are actively expanding public access to courts. The proposed Amendments, should they take effect, will erode public understanding and confidence in the workings of Maryland's criminal courts.

The proposed Amendments would violate the First Amendment

The proposed Amendments are particularly concerning because they purport to respond to the District of Maryland's recent decision in *Soderberg v. Carrión*.³ The federal court found that Section 1-201's prohibition on dissemination of lawfully obtained recordings of criminal proceedings (commonly known as the “Broadcast Ban”) violates the First Amendment. In so doing, the court determined that preventing broadcast does not advance state interests:

It does precious little to protect witnesses against intimidation, harassment, and violence, as it does not prevent the widespread publication of their names, their images, and the verbatim content of their testimony. It is far more expansive than necessary to achieve its desired

¹ *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975).

² See, e.g., *Dutton v. State*, 123 Md. 373, 389 (1914).

³ No. RDB-19-1559, 2022 U.S. Dist. LEXIS 222645 (D. Md. Dec. 9, 2022).

ends, as it restricts the publication of official recordings in all criminal proceedings held in trial court—even where there are no manifest concerns that a subsequent broadcast might undermine the fairness of the trial or endanger its witnesses. And there are already less restrictive means available to the State to pursue these objectives, as the Maryland Rules authorize judges to shield sensitive material from trial transcripts and official recordings on a case-by-case basis.⁴

The court concluded that the Broadcast Ban “sweeps far too broadly, burdening freedoms of expression and of the press in circumstances where it offers no meaningful benefit to the State.”⁵

In defiance of the federal court’s findings, the proposed Amendments seek to revive the Broadcast Ban in an even *more restrictive* form by preventing members of the press and public from obtaining recordings of criminal proceedings in the first place. The “Reporter’s Note” explains that this change is intended to address concerns “about the ability of an individual to obtain and broadcast potentially sensitive portions of a criminal proceeding, such as testimony of a victim of sexual assault, as well as the possibility of witness intimidation.” But the proposed Amendments fail for the same reasons as the original Broadcast Ban: they burden speech by restricting public access, do not protect witnesses, and apply in situations where there are no concerns about witness security or trial integrity, including long-closed proceedings and hearings that feature no juries or witnesses. Moreover, they are unnecessary to address unusually sensitive circumstances; courts are already empowered to redact or restrict access to sensitive materials on a case-by-case basis. In short, the proposed Amendments seek to seal the criminal courts within a black box, with no cognizable benefit.

For these reasons, the proposed Amendments would violate the First Amendment. The audio recordings constitute an official verbatim record—often the *only* verbatim record—of what happens in Maryland courts. “A trial is a public event. What transpires in the court room is public property.”⁶ The official records of these proceedings are also public property; they are subject to the constitutional right of

⁴ *Id.*, 2022 U.S. Dist. LEXIS 222645, at *4.

⁵ *Id.*, 2022 U.S. Dist. LEXIS 222645, at *52.

⁶ *Craig v. Harney*, 331 U.S. 367, 374 (1947)

public access to judicial documents.⁷ And access to copies of the recordings is “a necessary corollary of the capacity to attend the relevant proceedings.”⁸

It is of little recourse that a person may listen to these recordings, alone, under observation, in a room at the courthouse. As the Third Circuit has said, “[i]t would be an odd result indeed were we to declare that our courtrooms must be open, but that transcripts of the proceedings occurring there may be closed, for what exists of the right of access if it extends only to those who can squeeze through the door?”⁹

Any restriction on access, like that included in the proposed Amendments, therefore “requires rigorous justification.”¹⁰ There must be a *substantial probability* that access—including obtaining copies of public records—will cause harm to a compelling governmental interest, and any restrictions must be narrowly tailored to serve that interest.¹¹ For the same reasons that the federal court found the Broadcast Ban to fail constitutional scrutiny, the proposed Amendments do as well.

Curtailing public access to court recordings would harm Marylanders and put Maryland out of step with a national trend toward legal system transparency

Beyond their unconstitutionality, the proposed Amendments seek to curtail public access at a time when awareness of court proceedings in the criminal legal system is both growing and as critically important as ever. The Judicial Conference of the United States, for example, recently agreed to expand its audio streaming project to include 35 federal courts that will post audio recordings of proceedings online.¹² As amici curiae in the *Soderberg* litigation noted, “[a]udio recordings of criminal proceedings provide particularly powerful, accurate information about the criminal justice system,” and “the ability to include audio recordings in published media allows journalists to produce uniquely impactful reporting.”¹³ The proposed Amendments

⁷ *Fisher v. King*, 232 F.3d 291, 396 (4th Cir. 2000); see also, e.g., *Smith v. United States Dist. Court Officers*, 203 F.3d 440, 441 (7th Cir. 2000) (public has a right of access to audio recordings of criminal proceedings, even where a transcript is subsequently made).

⁸ *Doe v. Public Citizen*, 749 F.3d 246, 266 (4th Cir. 2014).

⁹ *United States v. Antar*, 38 F.3d 1248, 1360 (3d Cir. 1994); see also, e.g., *United States v. Martin*, 746 F.2d 964, 973 (3d Cir. 1984) (right of access includes right to copy and broadcast evidence); *Application of Nat'l Broad Co., Inc.*, 635 F.2d 945, 950 (2d Cir. 1980) (same).

¹⁰ *Doe*, 749 F.3d at 267.

¹¹ *In re Washington Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986).

¹² *Judicial Conference Adopts Transparency Measures*, United States Courts, March 15, 2022, available at <https://www.uscourts.gov/news/2022/03/15/judicial-conference-adopts-transparency-measures>

¹³ *Brief of Amici Curiae the Reporters Committee for Freedom of the Press and 23 Media Organizations*, pp. 7, 10, *Soderberg v. Carrión*, 999 F.3d 962 (4th Cir. 2021).

would prevent this. The inability of members of the press and public to obtain and disseminate official recordings and listen to recordings that others have obtained would keep the public in the dark and promote mistrust about what is happening in criminal courts.

This is particularly true given the process that this Court has undertaken to implement these Rules on an emergency basis over the holidays. There is no emergency. Copies of audio recordings have been obtained by members of the public in Maryland for 20 years. Despite the Broadcast Ban, recordings have been used in media and played in public. In the *Soderberg* case, the state was unable to present the federal court with *any* evidence that public access and dissemination of audio recordings of court proceedings has ever caused any harm, in Maryland or anywhere else. To the contrary, their use in Maryland and elsewhere has shed light on injustices that courts have subsequently been able to correct.¹⁴

The adoption of the proposed Amendments would cause harm to the people of Maryland, with no corresponding benefit. It would put state courts in breach of bedrock constitutional rights and would be a major step backward for the public's right of access to the courts. We urge the Court to (1) reject the proposed Amendments, (2) refrain from pushing through other similar Rules changes on an unnecessary emergency basis, and (3) uphold the public's constitutional right of access to the courts by enhancing—rather than curtailing—the public's ability to obtain and share recordings of court proceedings.

Thank you for your consideration.

Signed,

Seth Wayne, Senior Counsel

Shelby Calambokidis, Counsel

**The Institute for Constitutional Advocacy and Protection
Georgetown University Law Center***

Adam Holofcener, Executive Director

Maryland Volunteer Lawyers for the Arts

¹⁴*Brief of Amici Curiae the Reporters Committee for Freedom of the Press and 23 Media Organizations*, pp. 8-10, *Soderberg v. Carrión*, 999 F.3d 962 (4th Cir. 2021).

Bruce D. Brown
Katie Townsend
Lisa Zycherman
Reporters Committee for Freedom of the Press

Zach Zwagil, Co-Founder
Open Justice Baltimore

Qiana Johnson, Executive Director
Afeni Evans
Nicole Hanson-Mundell
Life After Release

Dr. Carmen R. Johnson, Founder
Helping Ourselves to Transform

Brandon Soderberg
Journalist

Baynard Woods
Journalist

Iman Freeman, Executive Director
Baltimore Action Legal Team

David A. Schulz
**Media Freedom & Information Access Clinic
Abrams Institute
Yale Law School***

Debra Gardner, Legal Director
Public Justice Center

Leon Vainikos, General Counsel
The Baltimore Banner

Scott Hechinger, Founder & Executive Director
Zealous

Dr. Carmen R. Johnson, Director
Jade Alice Eaton
William A. Haines
Courtwatch PG

Joanne Antoine, Executive Director
Common Cause Maryland

Yanet Amanuel, Public Policy Director
American Civil Liberties Union of Maryland

Ryan C. Downer, Director of Litigation
Civil Rights Corps

Raj Jayadev, Coordinator
Silicon Valley Debug

Rebecca Brown, Director of Policy
Innocence Project

Shawn Armbrust, Executive Director
Mid-Atlantic Innocence Project

Nancy Soreng, President
League of Women Voters of Maryland

* Academic institution for identification purposes only.