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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of

PETITION TO AMEND RULE 122,
RULES OF THE SUPREME COURT

Supreme Court No. R _____

**Petition to Amend Rule 122,
Rules of the Supreme Court**

Pursuant to Rule 28, Rules of the Supreme Court, Matthew A. Walker respectfully petitions this Court to adopt amendments to Rule 122, Rules of the Supreme Court, governing recording in courtrooms, for the reasons set forth in this petition and as proposed in the contemporaneously submitted appendix.

I. Background and Purpose of the Proposed Rule Amendment.

Rule 122, Rules of the Supreme Court permits recording in a courtroom. However, this rule, and one paragraph in particular, has been misused—if not openly weaponized—by individuals who are livestreaming court hearings on the internet to intimidate and harass others who are appearing or testifying in court. Rule 122(c) states that “[e]xcept as provided in paragraphs (h) and (i) of this rule, a person who wishes to use a recording device during a proceeding must submit a written or electronic request to cover the

proceeding” to the judge. A party, victim, or witness may object to this request, *see generally* Rule 122(c)(4), (5), and the court may deny coverage under Rule 122(d).

However, Rule 122(h) states that “[a] person may use a personal audio recorder during a proceeding, but the person *must notify* the judge or the judge’s staff prior to using the device.” (Emphasis added). Specifically, “[a] person who uses a personal audio recorder *is not required to submit a request under paragraph (c) of this rule*, but a person who wishes to record or broadcast the audio portion of a proceeding with a device that is not on the person must do so.” *Id.* (emphasis added).

Read collectively, paragraphs (c) and (h) appear to allow a person to record or broadcast a proceeding without the person even needing to seek the permission of the court as long as the recording device is on their person. As a consequence, individuals attending court proceedings have been using smartphones to broadcast (i.e., livestream) proceedings without requesting permission from the court, and judges seem unsure as to whether they even have discretion to deny the request. This is particularly problematic where the livestreaming is used as a means to embarrass or harass another person, such as a victim in a criminal case, or a party seeking to have an injunction against harassment upheld¹ (the rule is also silent as to protective order proceedings specifically).

It may be argued that paragraph (h) only permits recording for personal use later, and not livestreaming, although the second sentence in the paragraph (referencing

¹ *See, e.g.*, “LANE MYERS WINS 2 CASES IN 1 DAY,” https://www.youtube.com/watch?v=r_vjYC3Ao7I&t=10494s (accessed January 10, 2025).

“broadcast”) appears to undercut that argument. If this is the case, the rule must be clarified. Arizona appellate courts provide no clarity in this regard, as paragraph (h) does not appear to have been analyzed—or even cited—in any Arizona decision. Federal courts have referenced the rule, *see, e.g., Decker v. Bales*, No. CV-16-02872-PHX-SRB, 2017 WL 6407783, at *3 (D. Ariz. Feb. 28, 2017), but have not addressed the “broadcast” component. The ubiquity of smartphones and livestreaming services have created an issue that simply did not exist even a decade ago—one that will only get worse unless courts feel empowered to address it.

In that vein, it may seem self-evident that a judge always has discretion to allow or not allow recording. This Court has cited Rule 122 to that effect. *State v. Lee*, 189 Ariz. 590, 601 (1997) (“The trial court has broad discretion in permitting electronic and photographic coverage of public judicial proceedings.”). But, again, Rule 122 does not *by its terms* give courts that level of flexibility. If a judge has discretion to permit or deny recording or livestreaming, the rule should state that. And there is no reason that the judge should not have complete control over whether that occurs in their own courtroom.

This petition recognizes that a defendant’s interest in a public trial, as well as the rights of both the public and the press to attend trials, are substantive and fundamental. *See Star Publishing Co. v. Bernini*, 228 Ariz. 490, 492 (Ct. App. 2012). However, as noted, a court retains—or should retain—broad discretion as to whether to allow “electronic and photographic coverage” of proceedings. *Lee, supra*. Nor are courtrooms considered a forum for First Amendment expressive activities. *See Sammartano v. First Judicial District Court*, 303 F.3d 959, 965–66 (9th Cir. 2002); *Zal v. Steppe*, 968 F.2d

924, 932 (9th Cir. 1992); *cf. Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 24 (2d Cir. 1984) (“public interest in television access to the courtroom does not now lie within the First Amendment”).

It may also be argued that “open court” and “broadcasting” constitute a distinction without a difference. But open court proceedings and the number of people who can attend are necessarily circumscribed by spatial limits. Descriptions that occur after the fact are more dispassionate and measured—as the judicial process itself should be. It is one thing for a victim or witness testifying to look out into a courtroom and see the defendant, but to also see faces of support, faces of law enforcement, and faces of neutral third parties simply taking in the proceedings. It is another thing entirely for the person testifying to know that the person against whom they are testifying is *personally broadcasting* the proceedings to hundreds, if not thousands, of like-minded individuals on their own YouTube channel. No fundamental right is protected in this process. And to believe that this does not have an impact on the person’s testimony—or on their decision whether to testify at all—is to deny a reality of the human condition.²

Finally, this petition does not seek to change Rule 122 to prevent recording or livestreaming in court altogether. Obviously, an audio record is required in almost every court proceeding, and many proceedings are livestreamed in the post-COVID era.

² This is equally true for a plaintiff in a protective order proceeding, particularly where the plaintiff is already a victim of harassment, as in the link cited above. It is illogical that a person who is trying to prevent harassment is put in a position where they need to expose themselves to further harassment in order simply to obtain relief through the justice system.

Livestreaming or virtual hearings can also benefit the court, litigants, and others who simply wish to take in the justice system as a matter of public record. But whether recording or livestreaming does occur must be at the sole discretion of the court—*not* at the discretion of bad-faith actors whose only interest in livestreaming is to embarrass or harass others. Moreover, it should occur only after the party to be recorded has had the opportunity to be heard on the issue, and after the judge makes findings to that effect.

“Judges should use their judicial authority to protect victims and witnesses from harassment, threats, intimidation, and harm.” *State v. Bush*, 148 Ariz. 325, 330 (1986). I respectfully urge the Court to adopt the amendments in the attached appendix. If the Court does not, I respectfully urge it to clarify, in some manner, that judges retain absolute discretion as to whether and what extent recording or livestreaming occurs in their courtrooms, and to impose any other measure it deems appropriate and necessary for the protection of participants in the justice system.

For the contents of the proposed rule amendment, please see the Appendix.

RESPECTFULLY SUBMITTED this TENTH day of JANUARY, 2025

By /s/
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