IN THE COURT OF APPEALS OF MARYLAND

No. 48
September Term, 2021

ADMINISTRATIVE OFFICE OF THE COURTS, ET AL.,
Petitioners,

v.

ABELL FOUNDATION,
Respondent.

BRIEF OF *AMICI CURIAE*

THE PUBLIC JUSTICE CENTER, THE CLINICAL LAW PROGRAM AT THE UNIVERSITY OF MARYLAND SCHOOL OF LAW, THE CIVIL ADVOCACY CLINIC OF THE UNIVERSITY OF BALTIMORE SCHOOL OF LAW, THE LEGAL DATA & DESIGN CLINIC OF THE UNIVERSITY OF BALTIMORE SCHOOL OF LAW, THE BALTIMORE ACTION LEGAL TEAM, COMMON CAUSE MARYLAND, AND THE MDDC PRESS ASSOCIATION

IN SUPPORT OF RESPONDENT, BY WRITTEN CONSENT

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STATEMENT OF INTEREST

The **Public Justice Center ("PJC")** is a non-profit civil rights and anti-poverty legal organization established in 1985. PJC uses impact litigation, public education, and legislative advocacy through a race equity lens to accomplish law reform for its clients. Its Appellate Advocacy Project expands and improves representation of disadvantaged persons and civil rights issues before the Maryland and federal appellate courts. The PJC has a demonstrated commitment to ensuring that the purpose of the Public Information Act, and related rules, is realized. *See, e.g.*, *Balt. Action Legal Team v. Off. of State's Att'y of Balt. City*, 265 A.3d 1187 (Md. Ct. Spec. App. 2021) (*amicus*); *Md. Dep't of State Police v. Dashiell*, 443 Md. 435 (2015) (*amicus*); *Ireland v. Shearin*, 417 Md. 401 (2010); *City of Balt. Dev't Corp. v. Carmel Realty Assocs.*, 395 Md. 299 (2006) (*amicus*); *Massey v. Galley*, 392 Md. 634 (2006). The Statements of Interest of co-*Amici* are contained in the attached Appendix.

INTRODUCTION

Trust in judicial outcomes is possible only because judges labor under the scrutiny of the public eye. Jeremy Bentham—the 18th century legal philosopher most associated with the axiom of "open justice"—famously wrote that "[p]ublicity is the very soul of justice." Jeremy Bentham, Draught of a New Plan for the Organisation of the Judicial Establishment in France 25 (1790). That was because publicity holds judicial feet to the proverbial fire: "It is the keenest spur to exertion, and the surest of all guards against improbity. It keeps the Judge himself while trying, under trial." *Id.* Around the same time, the Count of Mirabeau, Honoré Gabriel Riqueti—who, like Bentham, influenced

the thinking behind the U.S. Constitution—echoed that principle: "Give me whatever judge you will; partial, corrupt, my enemy even, if you must; these things will trouble me little, so long as what he does, he is only able to do it in the face of the public." Burkhard Hess & Ana K. Harvey, *Open Justice in Modern Societies*, *in* Open Justice: The Role of Courts in a Democratic Society 19 & n.53 (Burkhard Hess & Helene R. Fabri eds., 2019).

At the risk of sounding highfalutin, we bring these lofty proclamations to the Court's attention because, in this case, they are not mere artifacts of history. *See United States v. Mitchell*, 551 F.2d 1252, 1258 (D.C. Cir. 1976) ("This common law right is not some arcane relic of ancient English law. To the contrary, the right is fundamental to a democratic state."). The Court must apply the open justice principle to the contemporary legal landscape. As courts face fraying trust in judicial self-governance, this appeal requires the Court to apply its own rules governing the openness of its own materials. For such a delicate analysis, Maryland law requires a broad construction favoring disclosure. The Court should acknowledge there is a policy of obscuring the identities of District Court judges on the CaseSearch platform and, therefore, affirm that the Court's rules on judicial records require disclosure.

ARGUMENT

I. Preserving open justice in the digital age is necessary to preserve public trust in the judiciary.

As the lower court recognized, any member of the public could enter a courtroom and obtain, through observation, the same information contained within the Edit Table. *See Admin. Off. of the Courts v. Abell Found.*, 252 Md. App. 261, 258 A.3d 998, 999

(2021). Thus, the Judiciary's policy of obscuring the identities of judges on CaseSearch serves only to prevent convenient online access to otherwise public information. Such a policy is incompatible with the following principles, which establish that Maryland's judicial records rules require disclosure of the Edit Table.

A. Open justice is a defining attribute of democratic courts because it keeps the judiciary accountable to the public.

In transparency cases, this Court and the Supreme Court have looked to the history of open justice. *See generally Balt. Sun Co. v. Mayor & City Council of Balt.*, 359 Md. 653, 660–64 (2000). "[O]ne of the most conspicuous features of English justice" was free public access to judicial proceedings, which "appears to have been the rule in England from time immemorial." *Id.* (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 n.17 (1980)). "Thus, the common law from its inception was wedded to the . . . tradition of publicity." *Gannett Co. v. DePasquale*, 443 U.S. 368, 419 (1979) (Blackmun, J., concurring). The tradition then migrated to colonial America, sometimes being formally codified into law. *Richmond*, 448 U.S. at 567–68 (citing a 1677 New Jersey law requiring courts be open to the public, "that justice may not be done in a corner nor in any covert manner").

The justifications cited for publicity focused on judicial oversight more so than the rights of the parties or public education. "[T]he function of publicity at common law" was understood "not in terms of individual liberties but in terms of the effectiveness of the trial process." *Gannett*, 443 U.S. at 421–22. Public access "was an effective check on judicial abuse, since publicity made it certain that 'if the judge be partial, his partiality

and injustice will be evident to all by-standers.'" *Id.* (quoting Matthew Hale, The History of the Common Law of England 343, 345 (6th ed. 1820)). "[I]t gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged . . . decisions based on secret bias or partiality." *Richmond*, 448 U.S. at 569. Maryland law, too, regards the open justice standard as a check on the judiciary. *See, e.g.*, *Balt. Sun v. Thanos*, 92 Md. App. 227, 234 (1992) ("[P]ublic access plays a positive, indeed critical, role in ensuring the fairness of our judicial system."); *Journal Newspapers, Inc. v. Maryland*, 54 Md. App. 98, 109 (1983) ("If the policeman has misbehaved and as a result has caused valuable evidence to become forfeit, . . . the public has a compelling interest in these things and thus a right to observe the decisional process.").

Bentham posited that publicity was the primary check on the judiciary, "without which all other checks on misuse of judicial power became ineffectual." *Gannett*, 443 U.S. at 422; *Richmond*, 448 U.S. at 566–73. Thus, Bentham saw the public as an "interested party" in every case; "[w]hile litigation is often styled as a triangle, with the judge at the apex dealing with opposing plaintiffs and defendants," it really "ought to be a square, with a fourth line required to denote the audience." Judith Resnik, *The Functions of Publicity and of Privatization in Courts and their Replacements*, *in* Open Justice, *supra*, at 192. In this way, publicity is what makes our courts democratic. "The aspect of 'the democratic' of interest here is how courts provide opportunities for the public to watch state actors in action, as they accord (or fail to provide) litigants, lawyers, and witnesses dignified treatment." *Id.* at 193, 208 (". . . enabl[ing] the public to assess the decision-makers" and "sit in judgment of judges and of the state that empowered them.").

Finally, because open justice allows public oversight, it also legitimates judicial outcomes. "[T]he appearance of justice can best be provided by allowing people to observe it." *Richmond*, 448 U.S. at 572. Justice Breyer once cautioned that, even when judges make the right decisions according to law, the benefits of justice only flow if those judges are also "perceived by everyone around them to be deciding according to law, rather than according to their own whim or in compliance with the will of powerful political actors." Stephen Breyer, *Judicial Independence in the United States*, 40 St. Louis U. L.J. 989, 996 (1996). A quarter-century later, Justice Breyer remained concerned about this foundational basis for the Court's legitimacy: "For if the public comes to see judges as merely 'politicians in robes,' its confidence in the courts, and in the rule of law itself, can only decline." Stephen Breyer, The Authority of the Court and the Peril of Politics 63 (2021).

B. The judiciary is facing a crisis of public confidence, making transparency even more essential.

American separation-of-powers has always required an independent judiciary. "[A]ll possible care is requisite to enable [the judiciary] to defend itself against [the other branches]. . . . [T]he general liberty of the people can never be endangered . . . so long as the judiciary remains truly distinct." The Federalist No. 78 (Alexander Hamilton).

But judicial independence creates tension with the parallel system of checks and balances. The judiciary is uniquely empowered to police itself. *See generally* Dana A. Remus, *The Institutional Politics of Federal Judicial Conduct Regulation*, 31 Yale L. & Pol'y Rev. 33, 34–54 (2012). And courts continue to proactively guard their power to

self-regulate, as several examples from the federal judiciary in recent decades show. *See* Carolyn A. Dubay, *Public Confidence in the Courts in the Internet Age*, 40 Campbell L. Rev. 531, 534 & n.12, 550 (2018) (citing the formation of an internal workgroup on sexual harassment in response to a workplace scandal in 2017; the 2006 "Breyer Report" justifying only internal reforms to implementation of the Judicial Conduct and Disability Act, "which allows the federal judiciary to be entirely self-policing"; and the judiciary's longstanding opposition to a judicial Inspector General's office). That power is a double-edged sword in terms of public trust: independence protects against political influence but leaves judges and judicial policy less accountable to democratic oversight.

Recently, fraying public confidence in the judiciary has entered the mainstream political discourse. *See, e.g.*, Tara L. Grove, *The Supreme Court's Legitimacy Dilemma*, 132 Harv. L. Rev. 2240, 2251–69 (2019) ("[I]t is striking how many commentators—including prominent constitutional scholars, a former Attorney General, and current members of Congress—have recently questioned the legitimacy of the United States Supreme Court."); Benjamin H. Barton, Inst. for the Advancement of the Am. Legal Sys., *American (Dis)Trust of the Judiciary* 2–3 (Sept. 2019), https://iaals.du.edu/sites/default/files/documents/publications/barton_american_distrust_of_the_judiciary.pdf (collecting evidence of decreasing public trust in judicial systems). That puts even greater pressure on courts to self-regulate with integrity, as Chief Justice Roberts felt compelled to emphasize this year, quoting President and Chief Justice Taft: "The agitation with reference to the courts, the general attacks on them, . . . all impose upon us, members of the Bar and upon judges of the courts and legislatures, the duty to remove, as far as

possible, grounds for just criticism of our judicial system." *See* C.J. John G. Roberts, Jr., 2021 Year-End Report on the Federal Judiciary 5 (2021), https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf.

Transparency allows courts to counterbalance these trends and facilitate greater public confidence. *See, e.g.*, U.S. Courts, Strategic Plan for Federal Judiciary 9–12 (Sept. 2020), https://www.uscourts.gov/sites/default/files/federaljudiciary_strategicplan2020.pdf ("Transparency . . . helps foster public trust and confidence"); Conference of State Ct. Admins., *White Paper on Promoting a Culture of Accountability and Transparency* (Dec. 2008), https://cosca.ncsc.org/__data/assets/pdf_file/0015/23523/2008whitepaper-performancemeasurement-final-dec5-08.pdf ("[A]ccountability and transparency are critical to judicial governance and to the preservation and strengthening of an independent judiciary."). "While citizens have direct recourse (through voting) to communicate with the legislative and executive branches, they have less direct recourse with the judicial branch . . .; open access to court records arms citizens with knowledge about how the laws are interpreted and applied." Lisa von Wiegen & Shannon M. Oltmann, *How the Current U.S. Online Court Record System Exacerbates Inequality*, 112 L. Libr. J. 257, 261 (2020). "Openness thus enhances" not only the fairness of the courts in practice, but also "the appearance of fairness so essential to public confidence in the system." *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984).

Yet courts have been slow to adapt to changing expectations of open access in the digital age. *See* Jason Tashea, *How the U.S. Can Compete with China on Digital Justice Technology*, Brookings Inst. (Oct. 25, 2021), https://www.brookings.edu/techstream/how

-the-u-s-can-compete-with-china-on-digital-justice-technology. State courts "are experimenting with digital technologies, but at a slow and painstaking pace." *Id.* ("[In 2015], 26 state court systems could not provide data on how many cases were filed and disposed of in a year—the most basic of data points.").

Too often, courts actively resist the transparency gains that technology could be yielding. For example, technological changes made hosting records on the federal judiciary's PACER platform dramatically inexpensive, yet the judiciary staunchly litigated against free access to PACER for years until settling with plaintiffs after trial and appellate losses. *See Nat'l Veterans Legal Servs. Prog. v. United States*, 968 F.3d 1340, 1352–58 (Fed. Cir. 2020); Cheryl Miller, *Judiciary Reaches Tentative Settlement in PACER Fee Dispute*, Law (Nov. 16, 2021), https://www.law.com/nationallawjournal/2021/11/16/judiciary-reaches-tentative-settlement-in-pacer-fee-dispute. The federal judiciary also formally opposed two bipartisan bills that would have made PACER free to the public and extended discrimination and whistleblower protections to its employees. Jacqueline Thomsen, *Rejecting Opposition from Judiciary, House Passes Bill to Make PACER Free*, Law (Dec. 8, 2020), https://www.law.com/nationallawjournal/2020/12/08/rejecting-opposition-from-judiciary-house-passes-bill-to-make-pacer-free; U.S. Courts, Press Release, *Judiciary Informs Congress of its Opposition to Bill* (Aug. 25, 2021), https://www.uscourts.gov/news/2021/08/25/judiciary-informs-congress-its-opposition-bill. Rather than dragging their collective feet, courts must embrace technology to meet modern perceptions of open justice and thus maintain the public trust.

By shrouding judicial decisionmakers in secrecy on the public-facing online records platform, Maryland courts resist the convenient transparency facilitated by electronic records. This Court should recognize that such a policy exists and, rather than condoning it, hold that the Edit Table must be disclosed.

C. The transparency required for open justice develops along with technology.

This case turns on the *extent* to which case information is made available online. When considering such questions, courts cannot satisfy their transparency obligations with traditional records access alone, while treating their electronic records as a mere supplement, bonus, or gift. Instead, the increasing integration of technology across society makes broad online access a necessary component of open justice.

In other words, the open justice principle's common law roots do not mean that courts can satisfy the standard with common-law-levels of public access. For public confidence, transparency is in the eye of the beholder. The open justice standard develops along with societal norms and public expectations. *See* von Wiegen & Oltmann, *supra*, at 264 ("[A]ccess [cannot] be understood in isolation" but is "mediated by the social milieu of individuals"). However robust existing transparency practices may be, they are not worth much if people nevertheless perceive their courts as black boxes because they cannot access judicial information in the same way they access information about virtually everything else in their life.

That is, online. The Conference of State Court Administrators released initial guidance for migrating court records online in 2002. Lynn E. Sudbeck, *Placing Court*

Records Online: Balancing Judicial Accountability with Public Trust and Confidence, 51 S.D. L. Rev. 81, 92–93 (2006). So it has long been clear that "court systems can become transparent only when court files are maintained in relational electronic formats and the public has free, technologically unfettered access to their contents." Lynn M. LoPucki, *Court-System Transparency*, 94 Iowa L. Rev. 481, 484 (2009). But digital technology has continued its rapid development since the early aughts. The intervening years have seen the rise of social media and "big data"—"the catchphrase for computer-powered analysis of large information sets"—in our daily lives. Stephen J. Schultze, *The Price of Ignorance*, 106 Geo. L.J. 1197, 1214 (2018).

Public norms and expectations have developed in tandem, and the public's access to judicial records must keep pace. *See* Schultze, *supra*, at 1225 ("History teaches that courts must offer the *greatest access possible* given practical constraints and any counterbalancing fundamental interests.") (emphasis added). In colonial Virginia, the community feared a loss of access when court proceedings moved from the public square to a new, brick courthouse; but the "move[] from tavern to courthouse" was ultimately embraced because "legal professionals introduced ever-improving technologies for preserving and reporting what transpired." *Id.* at 1220–21. The contemporary public, "[l]ike the residents of Hanover County," will object if new court systems are not as transparent as the old ones. *See id.*

Undeniably, digitized court records are different in kind from those of paper. "With electronic court records, the information in a court's files can be searched, sorted, and combined with other information without any need to maintain the record's

connection to a specific case." David S. Ardia, *Privacy and Court Records: Online Access and the Loss of Practical Obscurity*, 2017 U. Ill. L. Rev. 1385, 1398 (2017). And digitization necessarily enables instantaneous dissemination and data aggregation. *Id.* This phenomenon has been dubbed the "loss of practical obscurity." *Id.*

But these changes mirror how society is changing overall, across public institutions. There is no world in which courts could meaningfully achieve open justice in the digital age while avoiding the implications of how information is used on the internet. "The information genie already has been released from the lamp, and we cannot return to a simpler time when court records, although open to the public, were stored in the practical obscurity of the clerk's office in the county courthouse." Barry T. Albin, Supreme Court of N.J., Report of the Supreme Court Special Committee on Public Access to Court Records ii (2007), https://www.njcourts.gov/pressrel/2009/pr090722a-c.pdf. Rather, the public's trust depends on the judiciary's development along with the rest of public life. By resisting these developments, the judiciary slides backwards on transparency as society forges ahead. Here in 2022, "what exists of the right of access if it extends only to those who can squeeze through the [courtroom] door?" *United States v. Antar*, 38 F.3d 1348, 1360 (3d Cir. 1994).

In tech parlance: the implications of digitized court information are a feature, not a bug. To maintain public trust and achieve meaningful transparency, courts must allow "for public data to benefit from the same innovation and dynamism that characterize private parties' use of the internet." David Robinson et al., *Government Data and the Invisible Hand*, 11 Yale J.L. & Tech. 160, 161 (2009). "Big data technology would help

researchers and journalists separate the forest from the trees, identify and inform structural features of the Judiciary, and engender a feeling among the public that the courts are legitimate and accountable." Schultze, *supra*, at 1226. By granting the public "the raw materials of democratic justice at their fingertips," the judiciary can "recapture some of the transparency that existed in an era when 'court day' was a community event rather than a cloistered and esoteric exercise by specialists." *Id.* And because the public increasingly expects that kind of online transparency from its institutions, the open justice principle requires the judiciary to provide it.

Here, in light of these principles, there is no sound justification for making the public's online records platform less transparent than open courtrooms on the issue of the identity of the decisionmaker. To uphold the foregoing values, the Edit Table must be subject to disclosure.

II. A policy that makes Maryland courts less accessible online than they are in person violates principles of open justice.

A. Maryland courts, too, are attempting to keep pace with technology and transparency expectations.

The Maryland Judiciary is mindful of these connections between technology, transparency, and legitimacy. The Judiciary emphasized technological developments in its most recent year-end report. *See* C.J. Mary E. Barbera, Maryland Judiciary 2019 Strategic Plan Update 1, 5, 7, 48 (2020), https://www.courts.state.md.us/sites/default/files/import/publications/annualreport/2019strategicplanupdate.pdf (describing construction of "state-of-the-art" courthouses, text notification systems, an online "document assembly tool" for pro se litigants, and remote language interpretation). "We will

continue to build on the Judiciary's clear and steady vision to be an efficient, innovative, and accessible court system and to serve the people with integrity and transparency." *Id.* at 48.

As the Maryland judiciary innovates to improve its processes and meet public expectations, it must do the same for its records practices. Maryland was among the first states to develop a framework for electronic records after studies, reports, and public comment that spanned from 2001 to 2005. *See* Sudbeck, *supra*, at 106–09. In those rules, Maryland "adopted the default presumption that remote electronic public access" should at least "mirror access at the courthouse." Robert P. Deyling, *Privacy and Public Access to the Courts in an Electronic World*, Reynolds Cts. & Media L.J., Feb. 2012, at 5, 12 (citing Md. Rule 16-1008). Then, in 2006, the judiciary proudly launched its CaseSearch platform, "a Web source for free public access" to case records, which "immediately became an invaluable resource for," and "[i]mmensely popular" with, the public. C.J. Robert M. Bell, Year End Report 2006-2007 9 (2008), https://www.courts.state.md.us/sites/default/files/import/publications/annualreport/reports/2007/areport06-07.pdf ("Response has been overwhelmingly positive."). The judiciary expected CaseSearch would create new ways of accessing and using court records. *See id.*

The functionality of CaseSearch has not changed much since the early-to-mid-aughts, though. And in the intervening years, the public has only grown more accustomed to and expecting of robust and convenient online access to public information. For example, when the Judiciary considered a new rule for removing certain records from CaseSearch after five years, advocates pointed out how the public

now relies on CaseSearch being part of the Judiciary's transparency framework. *See, e.g.*, Rebecca Snyder, Editorial, *Balance Empathy with the Public's Right to Know*, Balt. Sun (Mar. 24, 2017), https://www.baltimoresun.com/maryland/carroll/opinion/ph-cc-snyder-mddc-032517-20170324-story.html. As the MDDC Press Association explained, "access to CaseSearch is a vital tool that helps individual reporters cover the court system," with the breadth of records "giving all citizens the opportunity to . . . assess patterns within the court systems." *See id.* By contrast, "[m]oving access only to courthouse information systems benefits those who are more familiar with courts and who can do their research during normal business hours." *Id.* Thus, "[a] rule change that makes remote access to court records less convenient would be a major setback for transparency." *Id.*

Given Maryland's default presumption of equivalent online access, CaseSearch's widespread popularity, and the Judiciary's intention to innovate, the Court should interpret its records rules broadly in favor of increasing transparency and public access to information on CaseSearch. A contrary approach would contradict both Maryland law and the Judiciary's stated policy goals. *See, e.g.*, Md. Courts, Strategic Plan for the Maryland Judiciary 2015-2020 (2015), https://www.courts.state.md.us/sites/default/files/import/judicialcouncil/pdfs/strategicplan.pdf (stating—as to goal #5, "Be Accountable"—the judiciary plans to "[m]ake our processes more transparent, allowing the public to see what we do and how long it takes to do it"; "[i]mprove the public's access to data," including things like "case flow statistics"; and "[i]nform the public about court records: what information is included, what is accessible, and how to access court records").

B. Maryland law and judicial policy require disclosure of the Edit Table.

Virtually every relevant indication of statutory and regulatory intent and purpose counsels in favor of disclosure here. As a starting point, this Court considers the open justice principle not merely for historical color but as a binding rule with legal consequence. *See Balt. Sun Co.*, 359 Md. at 661 (applying the "common law right to inspect and copy judicial records and documents"). "What transpires in the courtroom is public property," and the burden is on the courts to justify closure. *Id.*

Likewise, the rules presumptively favor disclosure and must be construed broadly to that end. *See State v. WBAL-TV*, 187 Md. App. 135, 156 (2009) ("[The Title 16 rules] clearly reflect the common law presumption of the openness of court records that, as a general rule, can only be overcome by a 'special and compelling reason.'"). In particular, "a judicial record that is kept in electronic form" should be "open to inspection to the same extent that the record would be open to inspection in paper form." Md. Rule 16-918(a).

Committee reports further establish the rules' purpose. *See, e.g.*, Md. Ad Hoc Comm. on Elec. Access to Court Records ("the Committee"), Report of the Committee on Access to Court Records (2002), https://www.courts.state.md.us/sites/default/files/import/access/finalreport2-05.pdf. The Committee weighed concerns about the "easier, faster and broader dissemination that is possible with electronic court records," but still decided on a policy "intended to *maximize* public access to court records." *See id.* at 6–9 (emphasis added). The rules were intended to expand access relative to paper.

Similarly, the recent report recommending reorganization of Title 16 provides insight into the rules' purpose. *See* Standing Comm. on Rules of Prac. & Proc., Two Hundred and Second Rules Committee Report (2020), https://www.mdcourts.gov/sites/default/files/rules/reports/202ndreport.pdf. The report noted that "[m]uch has changed" since 2004, acknowledging that "practical obscurity" has "shrunk significantly" under the electronic regime. *Id.* at 2–3. Nevertheless, it expressly found this development to be in harmony with the rules' purpose: "All of this was properly viewed as a benefit, providing both efficiency and transparency in judicial administration." *Id.* The report affirms that the purpose of the rules remains the same. The rules, while distinct from the MPIA, "hew[] closely nonetheless to the overarching premise that the traditional openness of judicial records should be maintained and that judicial records should be presumed to be open to public inspection, subject only to the legitimate security and privacy rights of those who are the subject of those records." *Id.*

Here, the Court must resolve a purely legal question of statutory interpretation. In so doing, the Court must construe its rules broadly in favor of their purpose. *See Admin. Off. of the Courts v. Abell Found.*, 252 Md. App. 261, 258 A.3d 998, 1002 (2021) ("As with a statute, we interpret and apply the text of the Maryland Rules to effectuate their purposes and objectives."). The express and longstanding purpose of the judicial records rules is to facilitate open justice and presumptively allow access to court records online. The Court should therefore acknowledge the policy of obscuring the identities of judges in CaseSearch results from the District Court of Baltimore City, justifying disclosure of the Edit Table. *See id.* at 1003.

Any opposing rationale would betray the open justice principle and the Judiciary's own stated policy. The lower court correctly framed its inquiry on the premise that the current policy makes electronic records regressive in transparency. *Id.* at 999 (Marylanders "can walk into the District Court in Baltimore City, take a seat in a courtroom, and watch a judge hear and decide that day's docket," but if they "try to look up those same cases on the Judiciary's CaseSearch website, the identity of the judge" is obscured). Such an outcome violates the rule that electronic records should at least maintain the transparency status quo, *see* Md. Rule 16-918(a), let alone their intended effect of *improving* accessibility. Indeed, a person could theoretically obtain the information contained within the Edit Table by studiously attending in person court proceedings or reviewing paper court files and comparing to CaseSearch records to crack the Edit Table code. The current policy, then, serves only as an *obstacle* to online access of otherwise public information. *Cf. Antar*, 38 F.3d at 1360 ("[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, . . .").

That outcome is especially likely to injure the public's trust and confidence in their courts. The rules favor transparency specifically to enable public observation of judges. *See* Md. Ad Hoc Comm. on Elec. Access to Court Records, Constitutional and Common Law Rights of Access to Court Records 2 (2001), https://www.courts.state.md.us/sites/default/files/import/access/legala7-5-01.pdf ("In performing the essential functions of our court systems, participants must be aware of an unbroken public gaze, the possibility of challenge, the demand for accuracy and truthfulness."); *see also id.* at 3

(Public access "fosters an appearance of fairness" and "permits the public to participate in and serve as a check upon the judicial process") (quoting *Globe Newspaper v. Superior Court*, 457 U.S. 596, 605–06 (1982)). A rule that serves only to make doing so more difficult online than in person—specifically as to the identity of the decisionmaker—creates the worst possible appearance of the courts' intentions.

It makes no difference that the record requested here relates to judicial administration as opposed to an individual case. *See* Md. Ad Hoc Comm., *supra*, Constitutional and Common Law Rights, at 12 ("[O]n the flip side, the constitutional right of access to court records has been held to extend not just to court records filed in a particular case, but also to compilations of data drawn from the records of numerous cases."); *id.* at 5 ("The importance of this functional or structural role of the presumption of open courts cannot be understated."). The public's interest includes "observing the workings of its judicial and criminal justice *systems*," so the public has "a right to observe the decisional *process*." *Journal Newspapers*, 54 Md. App. at 109 (emphases added). "Indeed, in a democratic society, these matters are likely to be of even greater interest than the guilt or innocence of a particular defendant." *Id.*

Thus, transparency in the administration of justice cannot be meaningfully distinguished from the transparency of any given hearing. *See* Peter Winn, *Judicial Information Management in an Electronic Age*, 3 Fed. Cts. L. Rev. 135, 171 (2009) ("[I]f the work product of an agent belongs to the principal and the courts are agents of the public, then the aggregate data generated by the courts clearly belongs to the public[.]"). Besides, when electronic records facilitate insight into judicial administration that would

be impossible via paper, that is exactly the kind of transparency increase the rules intended to foster. Rather than providing a basis for closure, "aggregate data in court files should be used . . . to promote greater understanding and opportunity for civil involvement in the judicial process." *Id.* at 169, 174.

C. There are no countervailing interests weighing against disclosure.

The only interests the rules consider as opposing disclosure are the privacy, safety, and security of the subjects of the records. *See* Md. Rule 16-902. Given that this request concerns the identity of sitting judges—public officials checked primarily by transparency—those considerations are of little if any weight here.

We recognize, however, that the Court may feel some ambivalence about how data reflecting the administration of justice is being used. And we acknowledge that public interest groups are growing more creative and resourceful in using court data. *See, e.g.*, Md. Volunteer Lawyers Serv., *Client Legal Utility Engine*, https://cluesearch.org; Open Just. Balt., *Case Explorer*, https://mdcaseexplorer.com.

First, preliminarily, courts should have nothing to fear from open-source access to their data, even in the aggregate, and its use is unequivocally a public good. *See* Winn, *supra*, at 169–74; *see, e.g.*, Will Rhee, *Evidence-Based Federal Civil Rulemaking: A New Contemporaneous Case Coding Rule*, 33 Pace L. Rev. 60 (2013) (explaining how court data aggregation could be put to use for civil procedure rulemaking). Second, regardless, such concerns are not a lawful consideration when resolving disclosure requests. *See* Md. Rule 16-924. Still, for the following reasons, any ambivalence is unwarranted here.

It is and has been the policy of the Maryland Judiciary that the public right to judicial transparency extends equally to "bulk data." Back in 2001, states were taking divergent approaches to bulk data. *See* Sudbeck, *supra*, at 93; Deyling, *supra*, at 20–21. In the electronic records Committee's first report, it expressed concern about "the constantly growing list of users of electronic access to the courts' databases." Deyling, *supra*, at 20. The Committee proposed limiting requests to no more than 10 records at a time. *Id.* It also proposed—for requests of "data compilations"—requiring disclosure of "the affiliation or association of the person" requesting the data, an explanation of the "intended use," and a description of "to whom the data will be distributed or disclosed." *Id.*

The public response "was swift and mainly negative," with "a vast amount of unfavorable comment" from varied interest groups. *Id.* at 21. "This led the chief judge to appoint an 'expanded task force'" to reassess, and the newly formed task force—"in stark contrast to the earlier committee that included only judges and court officials"—concluded that access should not be conditioned on motivation or purpose. *Id.* The provisions addressing bulk requests "were eliminated," and it was these recommendations that were adopted in 2004. *Id.* Thus, not only is it Maryland policy to not consider purpose, but that rule arose specifically to reject concerns about the use of bulk data.

Further, concern about public-facing data aggregation risks the Judiciary's perceived neutrality. From the outset of electronic court records, "the heaviest users by far have been information resellers—credit rating agencies, legal information vendors

and the like." Peter W. Martin, *Online Access to Court Records—From Documents to Data, Particulars to Patterns*, 53 Villanova L. Rev. 855, 867 (2008). "This is not by chance; the system has unmistakably been shaped to meet the needs of this business sector." *Id.* ("[T]he engine driving the spread of remote access" was the federal bankruptcy courts, "a critical information source for the credit industry"). The information unlocked by digitization "holds immense value in the world of commerce," and resellers "have grown in number, size, sophistication, and profitability in the 'Internet Age.'" *Id.* Data aggregation has always existed alongside electronic records, and its primary application is in resale to private interests for profit.

This phenomenon plays out in Maryland. *See* Deyling, *supra*, at 21 (noting that the opposition to the 2001 bulk data policy included "commercial data compilers"). *Amicus* the Public Justice Center knows from its experience representing tenants in its Human Right to Housing Project that vendors resell bulk data from Maryland's electronic court records. For example, the PJC has obtained "tenant screening" reports on its clients compiled by the company CoreLogic Rental Property Solutions, which contain data on landlord-tenant cases beyond what is available on CaseSearch. *See generally* Michele Gilman, Data & Soc'y, Poverty Lawgorithms 30–33 (Sept. 2020), https://datasociety.net/wp-content/uploads/2020/09/Poverty-Lawgorithms-20200915.pdf (explaining how companies like CoreLogic compile and resell electronic court records to landlords investigating potential tenants).

The Maryland Judiciary anticipates and facilitates this practice. *See id.* at 35 ("[S]ome states allow bulk sales of court data to commercial buyers[.]"). As just one

example, one of the Judiciary's standardized forms explains: "The Maryland Judiciary provides information about civil judgments and satisfactions recorded and indexed in the District Court of Maryland on a subscription basis." D. Ct. of Md., *Obtaining Civil Judgment and Satisfaction Data*, https://www.courts.state.md.us/sites/default/files/court-forms/district/forms/acct/dca107.pdf/dca107.pdf. The District Court "distribute[s] the initial 12-year data report through a ShareFile link sent to the subscriber by email" at an initial cost of $2,775, with updates available for $500 per month. *Id.*

We do not suggest any nefariousness on the Judiciary's part. Indeed, the Committee "intend[ed] to include businesses that obtain bulk data from courts and sell that data . . ., with value added, to customers such as prospective employers and landlords." Md. Ad Hoc Comm., 2002 Report, *supra*, at 8–9. Nor do we raise the practice—in this case—to express our opposition to it.

Rather, we highlight here the dire risk to the public trust should the Judiciary even appear to actively facilitate access for the profit of private industry while actively impeding data aggregation for public use. The open justice principle's most vital purpose is checking the courts, thereby engendering public confidence. That purpose is existentially jeopardized by optics suggesting the Judiciary seeks to evade transparency's accountability function. The Court should adhere to its policies by disregarding any reservations about community groups' use of court data, thereby avoiding the appearance that the courts favor business access over public access. *Cf.* Liz M. Johnson, *How the North Carolina Supreme Court Severed Open Access to Data Necessary for Government Transparency and Accountability*, 7 Wake Forest J. of L. & Pol'y 447, 448, 482–85

(2017) (criticizing state court's decision precluding public electronic access to court records database: "By allowing this greater limitation to accessing court records in the aggregate, the [court] has made research into public accountability virtually impossible.").

Instead, to satisfy the modern standard of open justice and fulfill Maryland's ongoing efforts to bring its judiciary into the digital age, the Court should affirm that the Edit Table is subject to disclosure.

CONCLUSION

"The generation that made the nation thought secrecy in government one of the instruments of Old World tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know what their government is up to." *EPA v. Mink*, 410 U.S. 73, 106 (1973) (Douglas, J., dissenting) (quoting Henry Steele Commager, *The Defeat of America*, N.Y. Rev. of Books, Oct. 1972)).

Free and open access to court records on CaseSearch could be a 21st century vindication of this principle. Shrouding the identity of judicial decisionmakers on CaseSearch is a violation of it. Ultimately, all considerations point to the same conclusion: Maryland law is incompatible with any rationale for finding the Edit Table could be lawfully withheld. The Court would discredit its own judicial policies and violate the public's trust by concluding otherwise. Instead, the Court should honor its ambitions to innovate and grow along with public expectations into the digital age.

"A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy, or, perhaps both. Knowledge will forever

govern ignorance: and a people who means to be their own Governors, must arm themselves with the power which knowledge gives." *Id.* at 610–11 (quoting Letter to W. T. Barry, Aug. 4, 1822, 9 The Writings of James Madison 103 (Hunt ed.1910)). *Amici curiae* respectfully urge this Court to affirm the decision of the Court of Special Appeals.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 6,227 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

/s/ Michael R. Abrams
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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Rule 20-201(g), on March 4, 2022, the foregoing Brief of *Amici Curiae* in Support of Respondent was served via the MDEC File and Serve Module, and that, pursuant to Rule 8-502(c), two copies each were mailed, postage prepaid, first-class, to:

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APPENDIX

The Clinical Law Program at the University of Maryland Carey School of Law, established in 1973, represents individuals, families, communities, and organizations in Maryland who cannot afford or access an attorney. Through litigation, legislative and policy advocacy, public education, and alternative dispute resolution, student attorneys and supervising attorneys in the Clinical Law Program work to improve lives, communities, institutions, systems, and the law. The Clinical Law Program is interested in this case specifically because our clinics regularly submit requests to governmental agencies pursuant to the MPIA. Public record disclosure is critical to ensuring governmental transparency and accountability—particularly to the most vulnerable and marginalized—as well as to pursuing justice on behalf of our clients and similarly situated individuals and communities.

The Civil Advocacy Clinic of the University of Baltimore School of Law represents low-income Marylanders on a wide range of civil litigation and law reform matters, including issues regarding housing, consumer law, public benefits, workers' rights, and open government.

The Legal Data & Design Clinic of the University of Baltimore School of Law ("LDDC") engages in "digital advocacy" by applying technology and principles of data and design to solve real-world legal problems. The LDDC seeks to harness an understanding of the law and data analysis to address client needs, using innovative tools to assist in litigation, lobbying, law reform, and public education, often in the context of

the criminal legal system. The LDDC has an interest in ensuring that the purpose of the judicial records rules is realized.

The **Baltimore Action Legal Team ("BALT")** is a community lawyering organization that formed in April 2015 in response to a call from community organizations for legal assistance. BALT transitioned from providing emergency response services during the Baltimore Uprising to working towards addressing structural causes of its symptoms. This work includes close partnerships with community organizations in presenting legal education, policy advocacy, and legal representation. BALT operates under 501c3 status. BALT has an interest in this case because of its commitment to transparency in the justice system and enabling transparency for the community.

Common Cause Maryland is a state office of Common Cause, a national nonpartisan nonprofit organization with more than 1 million members and supporters nationally and more than 25,300 members and supporters in Maryland. Common Cause Maryland is dedicated to making government at all levels more representative, transparent, open, and responsive to the interests of ordinary people. Common Cause Maryland has a demonstrated commitment to ensuring that the purpose of the Public Information Act is realized.

The Maryland-Delaware-District of Columbia ("MDDC") Press Association was founded in 1908 as the Maryland Press Association for weekly newspapers and throughout its development merged with other press associations in Delaware and Washington D.C. MDDC exists to serve the diverse needs of its news media members in

areas of common concern. Among them are professional training and development, legislative representation, and First Amendment issues. MDDC has an interest in this case because public records are critical tools to shine light on government and public bodies in order to provide transparency in the democratic process. Because journalists are among the many requesters of public records, MDDC wants to ensure the proper interpretation and enforcement of the MPIA.