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February 24, 2016

Hon. Robert A. Katzmann
Chief Judge
U.S. Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

Re: Public Availability of Oral Argument Audio Recordings

Dear Chief Judge Katzmann:

I respectfully write on behalf of the Federal Courts Committee of the New York City Bar Association to suggest that the Second Circuit consider revisions to its policies regarding the availability of audio recordings of oral arguments. In particular, we urge that the Court alter its policies and begin posting recordings of oral arguments on the Court's public website as a matter of course within a reasonable time after each argument.

Our understanding is that the Court's current practice is to make recordings of oral arguments available to the public for a \$30 fee, upon a request made in writing, via ECF, or in person at the Clerk's Office, and that the request (and its satisfaction) is posted to the Court's docket for the appeal.¹ This practice is no longer consistent with the practices generally followed

¹ See <http://www.ca2.uscourts.gov/clerk/calendars/calendars.html>. We understand that, on occasion, the Court has also made video recordings available via C-SPAN's website, in cases of extraordinary public interest. See <http://www.c-span.org/search/?sponsorid%5B%5D=4652>.

by other circuits. An increasing number of federal courts of appeals — now ten — make recordings of nearly all² of their oral arguments publicly available on the courts’ websites, within a few days after argument. For the Court’s convenience, we briefly summarize the public access practices and policies of each of the other circuits in an attachment to this letter.³

In the view of our Committee, the Court’s current policy on recordings has not kept pace with evolving standards for public access to judicial proceedings, in an era in which the great majority of the federal courts of appeals have successfully implemented policies allowing free, prompt, and automatic access to recordings. We are unaware of any substantial policy served by the procedures currently in place, and there are compelling policies that weigh in favor of free public access to recordings of oral arguments.

The fee currently imposed to obtain a recording unnecessarily burdens low-income and indigent parties, their counsel, and members of the public.⁴ The requirement that practitioners or the public submit a written request for a copy of the recording delays public access to the recording. The entire administrative process from docketing requests for copies of the recording to production and distribution of the CD creates unnecessary work for the Clerk’s Office. Furthermore, docketing all requests results in public disclosure of requesters’ identities, when some requesters might prefer to keep their interest private or anonymous – indeed, this could deter some people from making the request. In view of the general availability of recordings in other circuits, we are not aware of any significant technical issue that would preclude the Court from making recordings of oral arguments more generally available.

The Federal Courts Committee believes that free, timely access to oral argument audio recordings serves important values, including transparency and fostering greater understanding of the judicial system, for members of the public and the bar alike. The Court should be aware that recordings are not only of interest to the media and the public in high profile cases, but are also of great interest to attorneys conducting research on all manner of legal issues, or preparing for oral arguments themselves. Members of our Committee have come to rely on these recordings as they have become widely available in other circuits. Moreover, statistics on the Ninth Circuit’s YouTube channel demonstrate substantial public interest in the recordings of its arguments, as they show that the public accesses most Ninth Circuit argument recordings at least several dozen times within a few months after the recordings are posted, and arguments in many

² There may be rare occasions in which the oral arguments, and the corresponding recordings, are sealed. *See, e.g.*, 4th Cir. Internal Operating Procedure 34.3 (revised Apr. 8, 2015); *cf. Press-Enter. Co. v. Superior Court*, 478 U.S. 1 (1986).

³ Additionally, the U.S. Supreme Court posts recordings of all oral arguments on its website at the end of each argument week. *See* http://www.supremecourt.gov/oral_arguments/argument_audio.aspx.

⁴ We recognize that the *amount* of the fee is set by the Judicial Conference in the Court of Appeals Miscellaneous Fee Schedule, pursuant to 28 U.S.C. § 1913, but there is nothing that *requires* the Court to impose this fee. As summarized in the attachment to this letter, ten of the thirteen courts of appeals waive this fee by providing public access to recordings on court websites, and an eleventh (the Tenth Circuit) provides free electronic recordings upon motion or letter request.

cases are accessed hundreds of times.⁵ The public demand for and interest in these recordings is clear.

We thank you and the other judges of the Court for your consideration of our proposal. The Federal Courts Committee would be pleased to provide the Court with any assistance or further information that might be helpful in evaluating or implementing our proposal.

Respectfully submitted,

Ira M. Feinberg

cc: Karen Greve Milton, Circuit Executive
Catherine O'Hagan Wolfe, Clerk of Court

⁵ The Ninth Circuit has created a YouTube channel for live, same day video streaming of its arguments, and statistics at the following link show the frequency of public access to each argument: <https://www.youtube.com/user/9thcirc/videos>. The Ninth Circuit has provided the public with live audio streaming of all arguments since January 2014, and live video streaming since January 2015. *See* http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000717; http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000762

Federal Courts of Appeals: Free Access to Argument Recordings on Court Websites

First Circuit	<p>Audio recordings are available on the court's website via an RSS feed. Recordings are posted within three business days of the argument. Available archived recordings begin May 7, 2014.</p> <p>http://www.ca1.uscourts.gov/sign-opinions-and-oral-argument-feed</p>
Third Circuit	<p>Audio recordings are available on the court's website. Recordings are posted within three business days of the argument. Available archived recordings begin Feb. 15, 2007.</p> <p>http://www.ca3.uscourts.gov/oral-argument-recordings</p>
Fourth Circuit	<p>Audio recordings are available on the court's website. Recordings are posted within one business day of the argument. Available archived recordings begin May 10, 2011.</p> <p>https://www.ca4.uscourts.gov/LocalRules/LocalRules.3.24.html http://www.ca4.uscourts.gov/oral-argument/listen-to-oral-arguments</p>
Fifth Circuit	<p>Audio recordings are available on the court's website. Recordings are posted the same day as the argument. Available archived recordings begin May 21, 2008.</p> <p>http://www.ca5.uscourts.gov/oral-argument-information/oral-argument-recordings</p>
Sixth Circuit	<p>Audio recordings are available on the court's website. Recordings are posted within 24 hours of the argument. Available archived recordings begin July 23, 2013.</p> <p>http://www.ca6.uscourts.gov/internet/court_audio/courtaudio.htm</p>
Seventh Circuit	<p>Audio recordings are available on the court's website. Recordings are posted the same day as the argument. Available archived recordings begin Jan. 2002.</p> <p>http://media.ca7.uscourts.gov/oralArguments/oar.jsp</p>
Eighth Circuit	<p>Audio recordings are available on the court's website. Recordings are posted the same day as the argument. Available archived recordings begin Jan. 2000.</p> <p>http://media.ca8.uscourts.gov/cgi-bin/sessions.pl</p>
Ninth Circuit	<p>Recordings are available on the court's website. Audio and video are streamed live during argument on a YouTube channel, and recordings are posted on the Court's own website within one business day of the argument. Available archived audio recordings generally begin Sept. 2007, and video recordings begin Jan. 2015.</p> <p>http://www.ca9.uscourts.gov/media/ https://www.youtube.com/user/9thcirc/videos</p>

D.C. Circuit	Audio recordings are available on the court's website. Recordings are posted the same day as the argument. Available archived recordings begin Sept. 10, 2007. https://www.cadc.uscourts.gov/recordings/recordings.nsf/
Federal Circuit	Audio recordings are available on the court's website. Recordings are posted the same day as the argument. Available archived recordings begin Jan. 9, 2006. http://www.cafc.uscourts.gov/oral-argument-recordings

Federal Courts of Appeals: Free Access to Argument Recordings On Motion

Tenth Circuit	Audio recordings are available on the court's website only rarely. A party or non-party may move formally or by letter for a copy of any argument recording and "must state the reason or reasons access is sought." If the panel grants the motion or request, "the clerk will be directed to forward the mp3 recording via email." The request for a recording is noted in the case docket, and all counsel of record are notified. 10th Cir. L. R. 34.1(E)(1). https://www.ca10.uscourts.gov/clerk/news/oral-argument-audio-recordings-14-1504-little-sisters-poor-v-burwell-14-6026-southern
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Federal Courts of Appeals: Access to Argument Recordings For a Fee On Request

Second Circuit	Audio recordings are available online only rarely, via C-SPAN's website. In other cases, a request for a CD of a recording may be made in writing, via ECF, or in person at the clerk's office. The fee is \$30. The request for a recording is noted in the case docket, and all counsel of record are notified. http://www.c-span.org/search/?sponsorid%5B%5D=4652 http://www.ca2.uscourts.gov/clerk/calendars/calendars.html
Eleventh Circuit	Audio recordings are not available online. A request for a CD of a recording may be made in writing. The fee is \$30. The request for a recording is noted in the case docket, and all counsel of record are notified. 11th Cir. Internal Operating Procedure 16. http://www.ca11.uscourts.gov/cd-recordings-oral-arguments