

20-1632

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Merry Reed and the Philadelphia Bail Fund

Appellees

v.

Francis Bernard, Arraignment Court Magistrate Judges, Sheila Bedford, Kevin Devlin, James O'Brien, Cateria McCabe, Robert Stack, in their Official Capacities, and President Judge Patrick Dugan, in his Official Capacity, and the Sheriff of Philadelphia

Francis Bernard, Sheila Bedford, Kevin Devlin, James O'Brien, Cateria McCabe, Robert Stack, and President Judge Patrick Dugan

Appellants

**Appeal from the February 25, 2020, Order
of the United States District Court for the Eastern
District of Pennsylvania, in Civil Action No. 19-3110**

**Brief of Appellants Arraignment Court Magistrate Judges
Francis Bernard, Sheila Bedford, Kevin Devlin, James O'Brien,
Cateria McCabe, and Robert Stack, and Philadelphia Municipal
Court President Judge Patrick Dugan**

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Subject Matter and Appellate Jurisdiction

The District Court had subject matter jurisdiction under 28 U.S.C. § 1331. Appellate jurisdiction is based on 28 U.S.C. § 1291.

Statement of the Issue for Review

Did the District Court err in concluding that Appellee the Philadelphia Bail Fund has a First Amendment right to make its own audio recordings of preliminary arraignments, when courts have uniformly held that there is no such right, and Pennsylvania's state court rules preventing recordings do not meaningfully interfere with the Bail Fund's ability to inform itself about the arraignments?

Answer: Yes.

Related Cases and Proceedings

In October 2019, a companion case raising the identical legal issues was filed in the United States District Court for the Western District of Pennsylvania against certain Magisterial District Court judges who hear preliminary arraignments in Pittsburgh. *See Stroud v. Butler, et al.*, No. 19-cv-01289 (W.D Pa.). Upon the parties' joint motion, the District Court stayed the case until this appeal is resolved. Lead counsel for the parties in *Stroud* is the same as in this case.

Concise Statement of the Case

Relevant Facts

This First Amendment case concerns the Supreme Court of Pennsylvania's statewide rules and the Philadelphia Municipal Court's local rules that prohibit attendees of criminal court proceedings from electronically recording them. Appellee the Philadelphia Bail Fund challenges those rules as violating the First Amendment.

Specifically, the Bail Fund brings an as-applied challenge, claiming that the Rules prevent it from making audio recordings of preliminary arraignments in Municipal Court.

Preliminary arraignments and bail in Philadelphia Municipal Court.

In Philadelphia, there are six Arraignment Court Magistrates ("magistrates") who preside over preliminary arraignments for individuals arrested in the city for state crimes. (Joint Appendix 58, Stipulation ¶ 6.) A magistrate is available twenty-four hours a day, seven days a week to conduct arraignments, which are held in Philadelphia's Stout Criminal Justice Center ("CJC"). (Joint Appendix 57-58, Stipulation ¶¶ 3, 7.) Preliminary arraignments are open to the

public to attend, observe, and take notes. (Joint Appendix 61, Stipulation ¶ 27.)

One function of a preliminary arraignment is to determine if an arrestee is bailable and, if so, what bail to set. Pa.R.Crim.P. 1003(D)(3)(d)(v).¹ Prior to the arraignment, Pretrial Services (a unit of the First Judicial District of Pennsylvania) interviews the arrestee at one of seven police Divisional Booking Centers where the arrestee is located to gather information relevant to the bail decision. (Joint Appendix 59, Stipulation ¶ 10); Pa.R.Crim.P. 530(A).

That information includes the factors that the magistrate uses in making a bail decision, including the defendant's criminal history, the charges, ties to the community, mental condition, drug issues, a history of flight or escape, use of false identification, and related matters that bear on whether a defendant will appear for court. *See* Pa.R.Crim.P. 523(A).

¹ This Brief will use "arraignment" and "bail hearing" interchangeably. A preliminary arraignment is distinguishable from a formal arraignment; the latter occurs after a preliminary hearing and prior to trial. *See* Pa.R.Crim.P. 57, 1004. Formal arraignments are not at issue here.

Pretrial Services provides a report to the magistrate, the arrestee and their counsel, and the prosecution prior to arraignment. (Joint Appendix 59, Stipulation ¶ 12.) The report, which contains sensitive information about the arrestee, is not publically available. Pa.R.Crim.P. 530(C). In setting bail, the magistrate considers the release criteria in Rule 523 and determines the type or combination of types of release on bail that is reasonably necessary, to ensure that the defendant will appear and comply with bail conditions. Pa.R.Crim.P. 524.

Once the arrestee is ready for arraignment, they appear via audio-visual link on a monitor in the CJC arraignment court. (Joint Appendix 59, 61, Stipulation ¶¶ 14-15, 29.) The presiding magistrate is located in the preliminary-arraignment courtroom at the CJC, along with the Commonwealth's attorney and a representative from the Defenders' Association, which represents arrestees who do not have private counsel. (Joint Appendix 59, Stipulation ¶ 14.) All participants, along with court attendees, are able to see and hear the arrestee and each other. (Joint Appendix 59, 61, Stipulation ¶¶ 14-15, 29.)

During the arraignment, the Commonwealth, the arrestee's representative, and the arrestee have an opportunity to address the

court on what bail conditions they believe are appropriate, as well as respond to any questions the bail magistrate may have. (Joint Appendix 59, Stipulation ¶ 16.) As noted above, issues that may be discussed during the arraignment include the arrestee's criminal history, the charges, ties to the community, employment status, mental condition, drug issues, a history of flight or escape, and related matters. (Joint Appendix 60, Stipulation ¶ 17); Pa.R.Crim.P. 523.

When the arraignment is over, the magistrate decides whether the arrestee is bailable and, if so, sets bail. (Joint Appendix 60, Stipulation ¶ 19.) The magistrate enters their bail decision, including the monetary amount and any conditions (if either are applicable), into the Preliminary Arraignment Reporting System ("PARS") electronic database. (Joint Appendix 60, 68, Stipulation ¶ 20, Exhibit A.) That information is then transferred into the Common Pleas Criminal Court Case Management System ("CPCMS"). (Joint Appendix 60, Stipulation ¶ 20.)

An arrestee has a right to a bail appeal, which are de novo. (Joint Appendix 61, Stipulation ¶¶ 22-24.) *See* Pa.R.Crim.P. 1011(A)(providing that a Municipal Court judge may modify bail at any time).

Consistent with Pennsylvania rules, there are no publically available transcripts of the arraignments. (Joint Appendix 61, Stipulation ¶ 26.) The state Rules of Criminal Procedure do not require a court to record open court proceedings until after a defendant has been held for court (or after the preliminary arraignment in Municipal Court). Pa.R.Crim.P. 115(a); Pa.R.Crim.P. 1012.

Municipal Court makes audio recordings of preliminary arraignments solely for internal, quality control review purposes. (Joint Appendix 61, Stipulation ¶ 26.) The court uses these recordings to address technical issues, such as the quality of the microphones. They also allow general performance monitoring of the magistrates. (Joint Appendix 116-17, Supp. Stipulation ¶¶ 2-3.)

The recordings are not used for any judicial purpose related to a particular arraignment: they are neither filed of record nor used in making a judicial determination or decision related to a particular case. (Joint Appendix 117, Supp. Stipulation ¶ 5.) Further, they are not processed through the Court's Digital Recording Program, which is used to create official transcripts of other proceedings in Municipal Court. (Joint Appendix 117, Supp. Stipulation ¶ 6.)

Arraignment and bail information available to the public after the arraignment.

Following the preliminary arraignment, court documents related to the preliminary arraignment are filed in the public court record for that case, including the bail bond, bail appeal report (if applicable), the criminal complaint, and the preliminary hearing subpoena for the arrestee. (Joint Appendix 62, 72-88, Stipulation ¶ 33, Exhibits B-E.)

The bail bond, bail appeal report, and hearing subpoena all contain the bail set in the case and any other bail conditions. (Joint Appendix 72-83, Stipulation, Exhibits B-D.) These documents are available to the public to review at the CJC for free and to obtain copies for a fee (copies are also available by mail upon request). (Joint Appendix 62, Stipulation ¶ 34.)

In addition, docket sheets for every case, which includes arraignment information, are available free on the internet. (Joint Appendix 63, 85, Stipulation ¶¶ 35-37, Exhibit F.) The docket sheet also contains bail information, including when it was set, by what magistrate, the type (cash, unsecured, etc.), the amount, and bail posting status and date, along with upcoming court dates. (Joint Appendix 85, Stipulation, Exhibit F.)

Both the Administrative Office of Pennsylvania Courts and the First Judicial District are able to produce bulk data requests for every single arraignment in Municipal Court for a selected period for a fee. (Joint Appendix 63-64, Stipulation ¶¶ 39-44.) A requestor does not need to know anything about a particular case to obtain information about it: they may simply ask for every arraignment for a particular date or period. (Joint Appendix 63, Stipulation ¶ 41.) The bulk data provided for each case includes roughly four dozen fields for each case, including information related to bail (including type, amount, whether it was posted, the security type, and so on); the defendant (including race, gender, age, residence zip code); the criminal charges; the judge or magistrate; and more. (Joint Appendix 100, Stipulation, Exhibit J.)

The Philadelphia District Attorney's Office compiles statistical information on bail amount by offense category since 2014, in both raw and proportional values, that is available on its website and updated every day. (Joint Appendix 64, Stipulation ¶ 45.)

Pennsylvania's rules on recording court proceedings.

The Supreme Court of Pennsylvania has the authority to promulgate rules of procedure and judicial administration. Pa. Const.

Art. V, § 10(c). Municipal Court has the power to adopt local rules affecting the court's administration. Pa.R.J.A. 103.

Pennsylvania's Rules of Criminal Procedure prohibit audio or video recordings of any judicial proceeding by anyone other than an official court stenographer. Pa.R.Crim.P. 112(C). Pennsylvania's Rules of Judicial Administration provide that judges shall prohibit recording and photography (among other things) in a courtroom and areas immediately surrounding a courtroom. Pa.R.J.A. 1910. Consistent with these rules, Municipal Court has promulgated a local rule stating that arraignment court magistrates shall prohibit recordings. *See* Phila.M.C.R.Crim.P.A.C.M. 7.09.²

In addition, it is a criminal offense for anyone to record a proceeding within a judicial facility or areas surrounding a judicial

² The Rules are akin to Federal rules that prohibit recordings. *See* Fed.R.Crim.P. 53 ("Except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.") The Eastern District has a standing order addressing the same, which covers this Court. *See* June 3, 2019, Standing Order, available at https://www.ca3.uscourts.gov/sites/ca3/files/EDPA_StandingOrder_PersonalElectronicDevices.pdf (retrieved on April 27, 2020).

facility without court approval, the presiding judicial officer's approval, or as provided by court rule. 18 Pa.C.S.A. § 5103.1.

Appellee the Philadelphia Bail Fund's ability to report on arraignments and bail.

The Bail Fund is able to attend and report on bail hearings: it sends volunteers into bail hearings to observe and gather information, which it uses to produce public reports and advocate for its positions. (Joint Appendix 66-67, Stipulation ¶¶ 58-61.)³ It uses social media posts and meets with officials, using the information it collects through its access to arraignment court. (Joint Appendix 56, 67, Stipulation ¶¶ 2, 61.) Further, former Plaintiff Merry Reed has attended various bail hearings at the Criminal Justice Center to compile information for the publication, *The Declaration*. (Joint Appendix 48, Complaint ¶¶ 42-43.)⁴

³ For example, the Bail Fund participated in producing a 41-page report on arraignments in October 2018 and issued a press release on arraignments, among other reports. (Joint Appendix 67, Stipulation ¶¶ 59-60.)

⁴ Plaintiff Reed withdrew from this case by a Stipulation of Dismissal filed on December 19, 2019. (Dist. Ct. Doc. 37.)

Claims and requested relief.

The Bail Fund claims that Pa.R.Crim.P. 112(C), Pa.R.J.A. 1910, and Municipal Court Arraignment Court Magistrate Local Rule 7.09 are unconstitutional as applied to it because they prohibit it from audio recording preliminary arraignments in the Municipal Court, in violation of the First Amendment. (Joint Appendix 52, Complaint, Prayer for Relief.) Thus, the Bail Fund sought a declaration that the cited rules are unconstitutional as applied to it. (Joint Appendix 52, Complaint, Prayer for Relief.) Judicial Appellants are sued in their respective official capacities only.⁵

Procedural history.

The Bail Fund started this case by filing a Complaint on July 17, 2019. Co-defendant the Sheriff of Philadelphia was also sued. Following oral argument on the Judicial Appellant and the Sheriff's respective Motions to Dismiss, the parties agreed to have the Court dismiss the Motions without prejudice, and the parties would file cross-motions for

⁵ An official capacity suit against a public official is really against the government entity the person is a part of. *Hafer v. Melo*, 502 U.S. 21, 26 (1991). In this case, the claims against the Judicial Appellants are really against Municipal Court.

summary judgment. (Dist. Ct. Docs. 24-25, 30.) A Stipulation of undisputed facts was filed on December 11, 2019, and a Supplemental Stipulation was filed on January 6, 2020. (Joint Appendix 54, 116, Dist. Ct. Docs. 31, 42.) The Bail Fund also filed a Declaration with its summary judgment motion. (Joint Appendix 121.) The parties filed respective Motions for Summary Judgment on December 20th. (Dist. Ct. Docs. 38-40.)

Ruling Presented for Review

The District Court granted the Bail Fund's Motion for Summary Judgment and denied Judicial Appellants' Motion for Summary Judgment by Order of February 25, 2020. The court held that Rules 112(C), 1910, and 7.09 were unconstitutional under the First Amendment as applied to bail hearings in Municipal Court as long as Municipal Court does not make available to the Bail Fund "official audio recordings or transcripts[.]"

The court authorized the Bail Fund to make its own audio recordings within 45 days if Municipal Court does not make available to the Bail Fund "official audio recordings or transcripts[.]" The February 25th Order also granted Sheriff of Philadelphia's summary judgment on

the Bail Fund's claim for attorney's fees and costs, denied its summary judgment motion against the Bail Fund otherwise, and dismissed as moot the Sheriff's indemnity crossclaim against Judicial Appellants.

By Order of April 7, 2020, upon the parties' joint motion, the District Court vacated a portion of its February 25th Order and extended the original 45 day period until June 9, 2020. (Joint Appendix 125, Dist. Ct. Doc. 58.)

Standard of Review

This Court exercises plenary review from a grant of summary judgment. *Gorum v. Sessoms*, 561 F.3d 179, 184 (3d Cir. 2009).

“Summary judgment is appropriate only where, drawing all reasonable inferences in favor of the nonmoving party, there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law.” *Melrose, Inc. v. City of Pittsburgh*, 613 F.3d 380, 387 (3d Cir. 2010). In cases involving First Amendment issues, this Court must independently examine the entire record. *Id.*

Summary of the Argument

Settled law has held for decades that there is no First Amendment right to make audio recordings of court proceedings. Instead, the right is a right of access to attend and report. The courts have left the issue of audio recordings to states to decide as a policy issue – not a constitutional issue.

The question under this Court's precedent is whether the Rules meaningfully interfere with the Bail Fund's ability to inform itself about the arraignments. They do not. The Bail Fund is able to attend and report on arraignments, obtain court filings, access dockets, and obtain data compilations for every arraignment. Its inability to make audio recordings and post audio clips online does not meaningfully interfere with its ability to inform itself about arraignments.

Next, that official transcripts of arraignments do not exist does not abrogate the bedrock case law that there is no right to make recordings. The cases holding that no First Amendment right exists to make audio recordings did not base their holdings on whether a transcript existed. Indeed, almost none mention a transcript.

Finally, Pennsylvania has made a reasonable policy decision consistent with that established law to mitigate the potential prejudice to criminal defendants and to ensure the decorum of court proceedings. Alleviating prejudice to a defendant is – as the United States Supreme Court holds – the “central aim” of criminal proceedings. Arraignments are ripe with prejudicial information, including a defendant’s criminal history, the nature of the current charge, a history of flight or escape, use of false identification, and related factors. Broadcasting a defendant’s own words discussing such prejudicial, inadmissible evidence risks the central aim of criminal proceedings. The Rules both address this prejudice (along with maintaining decorum and proper court administration) and allow the public access to court, the ability to report on arraignments, and access to court filings and information.

Argument

- A. Settled, longstanding law holds that there is no First Amendment right to make audio recordings of court proceedings: only the right to attend, observe, and report, which the Bail Fund has done and may continue doing.**

The unwavering law for decades is that the First Amendment protects a right of access to attend, observe, and report on judicial proceedings. When it comes to allowing attendees to make their own recordings or broadcast proceedings, however, courts have refused to extend the First Amendment that far. They instead hold that the issue is not a constitutional question, but a policy decision for each judicial system.

The Pennsylvania Supreme Court and Municipal Court have made a policy decision, pursuant to their affirmative constitutional duty to ensure that defendants receive a fair trial, to not allow court attendees to make audio recordings of court proceedings. This decision mitigates prejudice to defendants and preserves courtroom decorum, as well as allowing judicial officers to focus on carrying out their judicial duties.

Nonetheless, the Bail Fund seeks to extend the First Amendment right of access into a right to make its own electronic audio recordings

of court proceedings regardless of these policy decisions.⁶ Yet, aside from the District Court in this case, no court holds that such a right exists. Instead, courts uniformly hold the opposite, as set forth below.

The Bail Fund attempts to avoid the settled law and long-standing principles by instead trying to paint a picture that preliminary arraignments in Philadelphia are “largely hidden from public view” with an “absence of any public record,” and, therefore, they should be able to make audio recordings to put on the internet. (Joint Appendix 39, Complaint ¶¶ 3-4.) But the reality is different. Indeed, the Bail Fund and the public can:

- attend and observe every preliminary arraignment in Municipal Court;
- take notes and report on every arraignment;
- obtain bail information from the bail bond and other documents that are filed immediately after the arraignment;

⁶ Because this is an as-applied challenge, the Bail Fund must show that the Rules as applied to it in a particular circumstance violated its constitutional rights. *United States v. Marcavage*, 609 F.3d 264, 273 (3d Cir. 2010).

- obtain the criminal complaint immediately after the arraignment;
- access the online dockets, which include bail information, for every case after the arraignment; and
- obtain bulk data from the case management system on roughly four dozen fields pertinent to bail for every arraignment for any period.

The Bail Fund's First Amendment right of access to attend arraignments and obtain information has not been violated: the Rules do not meaningfully interfere with its ability to inform itself of the proceedings. Thus, it is able to exercise its qualified First Amendment right to attend criminal trials and related proceedings. *See Waller v. Georgia*, 467 U.S. 39, 44 (1984); *Richmond Newspapers, Inc. v. Virginia*, 464 U.S. 190, 203 (1983); *United States v. United States*

v. Moussaoui, 205 F.R.D. 183, 185 (E.D. Va. 2002)(quoting *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 610 (1978)).⁷

Municipal Court allows the public, press, and the Bail Fund's volunteers to attend arraignments and report on them as they see fit. Hence, the Bail Fund has its protected right to access.

- 1. Case law is consistent: the First Amendment protects the right to attend, observe, and report on criminal court proceedings only.**

Courts have consistently held that the press and public have no right to record or broadcast court proceedings. Neither the Supreme Court nor any circuit court has held that the First Amendment encompasses a right to electronically record proceedings.

The Supreme Court has addressed the recording of criminal proceedings, and it has never held that the press or public have a constitutional right to record them. Indeed, its discussions of the issue are to the contrary. In *Nixon v. Warner Communications, Inc.*, the court rejected a claim that releasing audio tapes played at a trial is required,

⁷ Although the media has a role in disseminating information to the public, its right to access is no greater than the public's right. *PG Pub. Co. v. Aichele*, 705 F.3d 91, 99 (3d Cir. 2013)(citing *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972)), *cert. denied*, 569 U.S. 1018 (2013).

despite the claim that the releasing them would allow people to form judgments as to their meaning “based on inflection and emphasis.” The court stated: “there is no constitutional right to have [live witness] testimony recorded and broadcast.” 435 U.S. 589, 610 (1978).

Three years later, the Supreme Court favorably quoted the Florida Supreme Court’s holding that while the due process clause “does not prohibit electronic media coverage of judicial proceedings *per se*, by the same token, we reject the argument . . . that the first and sixth amendments to the United States Constitution mandate entry of the electronic media into judicial proceedings.” *Chandler v. Florida*, 449 U.S. 560, 569 (1981)(quoting *Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So.2d 764, 774 (Fla. 1979)). The court went on to hold that while there was no inherent due process denial in allowing criminal proceedings to be televised, it was up to the states to decide whether to allow broadcasting. *Id.* at 578-80.

This Court long ago recognized that courts may craft rules that limit the press’ access to information without violating the First Amendment. *See Tribune Review Pub. Co. v. Thomas*, 254 F.2d 883, 885 (3d Cir. 1958)(holding that a Pennsylvania court rule prohibiting the

taking of photographs in and about the courthouse to be a valid exercise of judicial authority and did not violate the right to access). Other circuit courts have also held that there is no First Amendment right to record or broadcast a proceeding.

A leading case is the Eleventh Circuit's decision on whether news organizations have a First Amendment right to record and broadcast federal criminal trials. *See United States v. Hastings*, 695 F.2d 1278 (11th Cir. 1983), *cert. denied*, 461 U.S. 931 (1983). The challenge there was to Federal Rule of Criminal Procedure 53, which – like the Rules at issue here – prohibits broadcasting and recording courtroom proceedings. The court relied on Supreme Court case law in holding that the First Amendment does not encompass a right to record court proceedings. *Id.* at 1280-81 (analyzing Supreme Court case law). Instead, it concluded that Rule 53 was a valid “time, place, and manner” restriction. *Id.* at 1283-84.

Other circuits are consistent in holding the same. *See Conway v. United States*, 852 F.2d 187, 188 (6th Cir. 1988)(holding that Rule 53 does not violate the First Amendment), *cert. denied*, 488 U.S. 943 (1988); *United States v. Beckham*, 789 F.2d 401, 414-15 (6th Cir.

1986)(holding that no fundamental right is implicated where the public and press had the opportunity to hear the playing of taped conversations in court, despite the court's refusal to allow both copies and transcripts of the tapes to be released); *Radio & Television News Ass'n of Southern California v. U.S. Dist. Ct. for Cent. Dist. of California*, 781 F.2d 1443, 1447 (9th Cir. 1986)(holding that the media's right to gather information is no more than a right to attend a criminal trial and report on their observations); *United States v. Edwards*, 785 F.2d 1293, 1296 (5th Cir. 1986)(upholding Rule 53 and stating that there is no "abridgement of the freedom of press" as long as the press can send representatives to trials and report on them); *United States v. Kerley*, 753 F.2d 617, 622 (7th Cir. 1985)(upholding Rule 53); *United States v. Yonkers Bd. of Educ.*, 747 F.2d 111, 113 (2d Cir. 1984)(rejecting a reporter's First Amendment argument that since he "relies heavily on his tape recorder, he is effectively excluded" from court if he could not use it; the court held that the Amendment protects only the "physical presence at trials"); *Combined Communications Corp. v. Finesilver*, 672 F.2d 818, 821 (10th Cir. 1982)(upholding local rule banning recording devices); *see also Rice v. Kempker*, 374 F.3d 675, 679 (8th Cir.

2004)(stating that “courts have universally found that restrictions on videotaping and cameras do not implicate the First Amendment guarantee of public access.”).

District courts have been equally harmonious in holding that there is no First Amendment right to record court proceedings, except for the District Court below. Those cases include *Soderberg v. Pierson*, 2020 WL 206619, at *13 (D. Md. 2020)(holding that Maryland’s broadcast ban of criminal proceedings was a valid time, place, and manner restriction and did not violated the First Amendment), *appeal pending*, No. 20-1094 (4th Cir.); *Shavlik v. Snohomish Co. Superior Court*, 2019 WL 2616631, at *7 (W.D. Wash. 2019)(collecting cases and holding that the media’s First Amendment right is limited to attending proceedings and reporting their observations); *United States v. Nabaya*, 2017 WL 1424802, at *2 (E.D. Va. 2017)(upholding challenge to a local court rule that prohibited recording devices at arraignment and pretrial hearings); *McKay v. Federspiel*, 22 F.Supp.3d 731, 736 (E.D. Mich. 2014)(upholding a state court electronics ban that the plaintiff claimed violated his constitutional rights to record proceedings and matters of public concern in a government center); *Moussaoui*, 205 F.R.D. at 185

(noting that the Fifth, Sixth, Seventh and Eleventh Circuits have held that the First Amendment “does not include a right to televise, record or otherwise broadcast federal criminal trial proceeding”); and *United States v. Hernandez*, 2000 WL 36741162, at *2 (S.D. Fla. 2000)(holding that the First Amendment right is a “right to attend, rather than a license allowing cameras or tape-recorders into the courthouse[.]”); see generally *Whiteland Woods, L.P. v. Township of West Whiteland*, 1997 WL 653906, at *5 (E.D. Pa.1997)(collecting cases)(stating that the First Amendment “does not guarantee the right to record or broadcast live testimony or other trial proceedings” and is “not violated by absolute bans on video cameras or still-picture cameras in courtrooms”), *aff’d*, 193 F.3d 177 (3d Cir. 1999).

2. The District Court’s legal reasoning departs from this uniform law.

Instead of utilizing this well-established, unanimous case law, the District Court took an alternative approach to create novel First Amendment law. It cobbled together cases that:

- did not involve the right to make audio recordings of court proceedings;

- involved video recording law enforcement in public areas;
and
- dealt with a court's decision in a specific case to preclude the press from an open court proceeding and sealed transcripts of that proceeding.

In doing so, the District Court came to a unique conclusion: that a court has an affirmative duty to *create* judicial records that it would not have otherwise created, and must provide the press and public with these newly created records.⁸ If it does not do so, then the press and public may claim an abridgment of First Amendment rights that they otherwise would not have had and can start recording and broadcasting those recordings. The District Court framed the issue too broadly and went far afield of even the Bail Fund's arguments, and, respectfully, led to an erroneous conclusion.

⁸ To create official transcripts equivalent to those used in other Municipal Court proceedings as the District Court ordered would entail hiring additional technical personnel to ensure the transcripts reliability and accuracy. This would be an additional expense requiring Municipal Court to include in its annual budget request to the City of Philadelphia.

The District Court began its analysis by citing cases involving the closure of courtrooms, which is not applicable here as arraignments are open to the public. (Joint Appendix 15-17, Dist. Ct. Op. at 9-11.) The court then turned to access to “judicial records.” (Joint Appendix 19-20, Dist. Ct. Op. at 13-14.) “Judicial records” are those that have been “filed with the court or otherwise somehow incorporated or integrated into a district court’s adjudicatory proceedings.” *In re Avandia Mktg.*, 924 F.3d 662, 672 (3d Cir. 2019). There is no dispute that the Bail Fund has access to all “judicial records.” Moreover, the Bail Fund did not base its First Amendment claim on a lack of access to “judicial records.” Rather, the District Court wove this unrelated case law on accessing preexisting judicial records into this case.

Next, the lower court looked at this Court’s decision in *Fields v. City of Philadelphia*, 862 F.3d 353 (3d Cir. 2017), which involved video recording police activity in public areas, for guidance. Finally, the District Court analyzed this Court’s decision in *Whiteland Woods, L.P. v. Township of West Whiteland*, 193 F.3d 177 (3d Cir. 1999), in which this Court denied a First Amendment claim involving the plaintiff’s inability to videotape a township meeting.

Mixing these cases together, the District Court concluded that there is an “essential nexus” between the Bail Fund’s right of access and its ability to record judicial proceedings. (Joint Appendix 29, Dist. Ct. Op. at 23.) In doing so, it departed from bedrock law and cast aside the policy decisions that the Supreme Court of Pennsylvania and Municipal Court have made in administering their court systems.

This Court’s *Whiteland Woods* decision, however, holds that the issue is properly framed as whether the Rules: 1) restrict access, or 2) merely (and permissibly) restrict the manner in which access occurs. Thus, do they meaningfully interfere with the Bail Fund’s ability “to inform itself of the proceeding?” The Rules here do not.

B. The Rules do not meaningfully interfere with the Bail Fund’s ability to inform itself about preliminary arraignments – it may attend, report, and obtain a wealth of data about every arraignment.

In determining whether limits on electronic devices in the courtroom violate the right to access, the *Whiteland Woods* holding is instructive, but for different reasons than the District Court used it for. There, this Court held that the “critical question regarding a content-neutral restriction on the time, place, or manner of access to a government proceeding is whether the restriction meaningfully

interferes with the public’s ability to inform itself of the proceeding: that is, whether it limits the underlying right of access rather than regulating the manner in which that access occurs.” *Whiteland Woods, L.P.*, 193 F.3d at 183.⁹

Here, the Bail Fund’s right of access has not been meaningfully interfered with. First, it is able to attend proceedings, take notes, and report on them. Indeed, the Bail Fund has volunteers attend arraignments to observe and gather information, which it uses to produce public reports both online and in writing. (Joint Appendix 57, Stipulation ¶ 3.)¹⁰ It uses social media posts and meets with government officials about the bail system, using the information it collects through its access to court. (Joint Appendix 57, Stipulation ¶ 3;

⁹ The Rules are content-neutral.

¹⁰ Including the Bail Fund’s involvement in a 41-page report on arraignments in October 2018, among other reports. (Joint Appendix 67, Stipulation ¶¶ 59-60.) The Bail Fund also currently posts “Daily Bail Reports” that include “the percentage of bail and other release conditions set each day, number of cases where bail was posted, number of cases where public counsel was assigned, highest and lowest bail amount, and average bail amount.” <https://www.phillybailfund.org/daily-bail-reports> (retrieved on April 27, 2020).

Joint Appendix 40, 49, Complaint ¶¶ 9, 46.) Further, Reed was able to attend preliminary arraignments to compile information for the publication, *The Declaration*. (Joint Appendix 11, Complaint ¶¶ 42-43.) In short, the Bail Fund's ability to report on arraignments, educate the public, and advocate for its position belies its claim that it cannot report, comment on, and "spur debate" over bail.

Second, additional means exist to obtain information about bail at arraignments in addition to attending hearings. One way is to access the publically available bail documents filed with the court after a preliminary arraignment, which include the bail bond, bail appeal report (if applicable), criminal complaint, and preliminary hearing subpoena. (Joint Appendix 62, 72-88, Stipulation ¶¶ 33-34, Exhibits B-E.) Bail information is included on the bail bond, the preliminary hearing subpoena, and the bail appeal.

In addition, dockets, which also include bail information, for every case are available on-line for free after a preliminary hearing.¹¹ (Joint

¹¹ Docket sheets for Pennsylvania criminal cases, which include bail information, are accessible through the Commonwealth's Unified Judicial System Web Portal through the Common Pleas Case

Appendix 63, Stipulation ¶¶ 35-37.) Thus, in contrast to the Bail Fund’s assertion, the public does not have to contemporaneously document a “vast amount of information” about a case in real time during the arraignment. (Joint Appendix 50, Complaint ¶ 51.) Instead, they can take notes on what is said, and then get documents and dockets immediately after the arraignment that have more information about the defendant, the charges, the bail set, and so forth.

Another way the Bail Fund can obtain information is through data compilations of almost 50 fields of information pertinent to bail for every arraignment in Municipal Court for any selected period. (Joint Appendix 63-64, Stipulation ¶¶ 39-44.) These reports contain a wealth of information related to bail, the defendant (including race, gender, age, residence zip code), the charges, the judge, and so on. (Joint Appendix 100, Stipulation, Exhibit J.) Also, the Philadelphia District Attorney’s Office compiles statistical information on bail amount by offense category since 2014, in both raw and proportional values. (Joint Appendix 64, Stipulation ¶ 45.)

Management System. (Joint Appendix 63, 85, Stipulation ¶¶ 35-37, Exhibit F.)

The bulk data available to the public provides more readily available information about arraignments in Municipal Court (and throughout Pennsylvania) than the public could obtain for federal court arraignments and proceedings.¹² Thus, the public's ability to monitor and obtain objective facts about arraignments is not "hidden from public view," as the Bail Fund claims. Nor is there an "absence of any public record" of the proceedings.

The Bail Fund contends that access to audio records would allow it to insert audio clips into its website and social media platforms, thereby highlighting the "human elements" and the "tone and tenor" of the arraignments. (Joint Appendix 64-65, Complaint ¶¶ 47-49.) Of course, the Bail Fund's assertions could also be made about other media: inserting pictures and videos of the courtroom, the defendant, and the other participants would also highlight the "human aspects."

¹² While there is a fee for these bulk reports, there are fees for a multitude of court records, including transcripts, access to PACER in the federal courts, and so on. Indeed, if there were official transcripts of arraignments in Municipal Court, there would be a charge to obtain them, as there is with other Municipal Court transcripts.

Yet the unique features of each do not create a First Amendment right where none exists.¹³

Next, any claim that Judicial Appellants must allow audio recording because not everyone can attend proceedings does not make recording constitutionally mandated. To the contrary, “the inability of every interested person to attend the trial in person or observe it through the surrogate of the media does not raise a question of constitutional proportion,” but rather raises a “question of social and political policy best left to the United States Congress and the Judicial Conference of the United States.” *Moussaoui*, 205 F.R.D. at 186.

Likewise, audio recordings are not required to provide a further check on the judicial process. Justice Harlan noted that “it is impossible to believe that the reliability of a trial as a method of finding facts and determining guilt or innocence increases in relation to the size of the crowd watching it.” *Estes v. Texas*, 381 U.S. 532, 595 (1965)(Harlan, J.,

¹³ The Second Circuit put it succinctly: “[if] ‘[o]ne picture is worth more than ten thousand words,’ the argument that appellant makes for a right to record could be made with equal force for a right to photograph. Yet, it is well settled that, insofar as courtroom proceedings are concerned, the latter right is not guaranteed by the Constitution.” *Yonkers Bd. of Educ.*, 747 F.2d at 113.

concurring). Instead, the “presence of interested spectators, attorneys, jurors and a judge” satisfies the safeguards of a public trial and the integrity of those proceedings. *Moussaoui*, 205 F.R.D. at 186. *See also Yonkers Bd. of Educ.*, 747 F.2d at 113 (dismissing the plaintiff’s claim that his asserted right to record was strengthened by the “public’s right to know.”).

Thus, the Bail Fund’s inability to make audio recordings and post them online does not meaningfully interfere with its ability to inform itself about arraignments. The Rules do not limit access – they simply regulate the manner of access, consistent with a court’s ability to construct rules related to manner of access, which is what courts may do and have done for decades. *See Tribune Review Pub. Co.*, 254 F.2d at 885.

The Bail Fund’s policy arguments are just that: policy arguments. They do not create a First Amendment right to record proceedings. The Bail Fund’s arguments are better directed to the state rules committee, which has the authority to make recommended changes to the procedural rules to the Supreme Court of Pennsylvania. *See Soderberg*, 2020 WL 206619, at *13 (stating “the social and political policy of the

Maryland Broadcast Ban is best left to the General Assembly of Maryland.”)

C. The lack of official transcripts do not create a new constitutional right: the Bail Fund is still able to exercise its right of access and meaningfully inform itself about arraignments.

The cases holding that no First Amendment right exists to make audio recordings did not base their holdings on whether a transcript existed. Indeed, almost none mention a transcript. Instead, they focused on whether the right of access encompassed a right to make audio recordings. While a few of those cases referenced the availability of transcripts (including *Yonkers Board of Education* and *Soderberg*) those references were tangential to the holdings. Notably, those cases did not hold that because there is no First Amendment right to record as long as a transcript exists.¹⁴

¹⁴ Besides, just a transcript would not solve the Bail Fund’s claimed need for audio to provide the “human elements” and “tone and tenor.” Further, the Bail Fund’s argument that these factors require a new constitutional right could be made about a hearing even where a transcript exists: having a written transcript does not allow the highlighting of the human elements and a proceeding’s tone and tenor that the Bail Fund seeks.

The District Court tied its holding to the lack of transcripts, and did so by relying on this Court's decision in *United States v. Antar*, 38 F.3d 1348 (3d Cir. 1994). But *Antar* involves facts that are not present here. In *Antar*, newspapers challenged a trial court's decision to prevent reporters from attending jury voir dire proceedings and in sealing the transcript of the proceedings. Thus, the trial court meaningfully interfered with the plaintiff's ability to access judicial proceedings. The case at bar is not that case: the Bail Fund and the public are able to attend arraignments. Their right of access is uninhibited.

In addition, in *Antar* the sealed voir dire transcript was a "judicial record" subject to the right of access. *Id.* at 1351. Here, conversely, the issue of "judicial records" is irrelevant: no judicial records exist that are withheld from the Bail Fund. Notably *Antar* does not hold that a court must create a record that does not exist. See *Cincinnati Enquirer v. Cincinnati Bd. of Educ.*, 249 F.Supp.2d 911, 917 (S.D. Ohio 2003)(holding that there is no First Amendment right to force the government to create a record that does not exist). The Bail Fund and the public have access to judicial records that document every arraignment. Thus, this is not a denial of judicial records case – the Bail Fund has never made that claim.

To support its holding that the lack of transcripts mandate a new First Amendment right, the District Court looked to the Second Circuit decision of *Yonkers Board of Education*, stating that it “touched upon the existence of an official reporting system as one of the reasons not to allow the public to make recordings.” (Joint Appendix 23, Dist. Ct. Op. at 17.) Respectfully, this overstates the importance the Second Circuit placed on the availability of an official reporting system, though. The reporting system was simply a reason that was “added to” the Second Circuit’s analysis. *Yonkers Bd. of Educ.*, 747 F.2d at 114. It was not the foundation for the court’s holding. The court’s holding was grounded on the First Amendment’s guarantee of a right to attend and observe, and the rule preventing a reporter from using a tape recorder was a reasonable time, place, and manner restriction. *Id.*

Finally, the District Court gave undue weight to the fact that the Municipal Court makes internal recordings of arraignments for quality control purposes. These recordings for internal administrative and technical reasons are irrelevant here. They are neither filed in a case nor relied on in making a judicial determination. Thus, they are not judicial

records subject to the right of access (and the Bail Fund has not brought such a claim, anyway). *See In re Avandia Mktg.*, 924 F.3d at 672.

All in all, that the Bail Fund cannot use audio clips to insert into its reports or an online article does not meaningfully restrict its access to court – regardless of whether a transcript exists. The Bail Fund has been able to report on arraignments, may continue to do so, and utilize the wealth of additional resources available to buttress its reporting. The Rules simply regulate the manner of access in a way to protect defendants’ rights to a fair trial, preserve decorum, and ensure that the public has a First Amendment right of access to attend, report, and obtain judicial filings.

D. The Rules reasonably protect a criminal defendant’s right to a fair trial, which is the paramount interest in criminal cases, as well as courtroom decorum, while allowing the public full right of access to court proceedings.

The Supreme Court of Pennsylvania and Municipal Court’s policy decisions to restrict audio recordings are reasonable decisions to mitigate potential prejudice to defendants and to the court system, which as the United States Supreme Court holds, is the “central aim” of criminal proceedings.

The state Rules apply to preliminary arraignments not only in Municipal Court, but also in all court proceedings throughout Pennsylvania. These Rules are consistent with both federal rules and other states' rules limiting the ability of court attendees to make their own recordings, which the Pennsylvania courts have promulgated in their authority to administer the judicial system. *See Combined Communications Corp.*, 672 F.2d at 821 (upholding a local rule banning recording devices, and holding that “[t]he courtroom and courthouse premises are subject to the control of the court, and courts may impose restrictions upon media access to courtrooms and courthouse premises when necessary to protect and facilitate the proper administration of the judicial system”).

The United States Supreme Court acknowledges that “adverse publicity can endanger” a defendant’s ability to receive a fair trial. *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 378 (1979). For that reason, courts have an “affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity.” *Id.* Indeed, the “central aim of a criminal proceeding must be to try the accused fairly,” and the “public-

trial guarantee” is for a defendant’s benefit, not the public’s. *Waller*, 467 U.S. at 46 (addressing the Sixth Amendment right to a public trial).

The Supreme Court warns of the particular danger that judges and courts must be aware of with regard to pretrial proceedings:

Publicity concerning the proceedings at a pretrial hearing, however, could influence public opinion against a defendant and inform potential jurors of inculpatory information wholly inadmissible at the actual trial. The danger of publicity concerning pretrial suppression hearings is particularly acute, because it may be difficult to measure with any degree of certainty the effects of such publicity on the fairness of the trial.

Gannett Co., Inc., 443 U.S. at 378.

Bail hearings – like suppression hearings – often contain prejudicial evidence that would be inadmissible during a trial, including the defendant’s criminal history, the charges, ties to the community, mental condition, drug issues, history of flight or escape, and related matters. Courts, therefore, “should show heightened concern about the threat that the public dissemination of such inadmissible evidence would have on the accused right to a fair trial.” *In re Globe Newspaper Co.*, 729 F.2d 47, 59 (1st Cir. 1984). Indeed, the First Circuit notes that a defendant’s “privacy and fair trial interests” are at their “zenith

during the bail hearings, since they have not yet had an opportunity to test the material admitted at the hearings.” *Id.*

Further, as the Supreme Court recognizes, trying to “measure with any degree of certainty the effects of such publicity on the fairness of the trial” is difficult. *Gannett Co., Inc.*, 443 U.S. at 378. Thus, in light of recognized prejudices and the difficulty in trying to measure those effects, the Pennsylvania courts have acted to allay these concerns ahead of time.

Courts generally have used one of two analysis in reviewing limits on electronic devices in the courtroom: 1) time, place, and manner restrictions, or 2) a forum analysis. *Whiteland Woods, L.P.*, 193 F.3d at 182. Although the District Court did not use a forum analysis, principles from both tests have been used by courts examining similar recording rules.¹⁵

In determining whether the First Amendment protects a right of expression on government property under a forum analysis, the court

¹⁵ In the District Court, the Judicial Appellants argued that the proper analysis is right of access. Judicial Appellants but also explored the issue using a forum analysis given that there was ambiguity on what grounds the Bail Fund anchored its argument on.

must first examine the nature of the forum in which the speech is restricted – whether the forum is public or nonpublic. *Pomicter v. Luzerne Co. Convention Ctr. Auth.*, 939 F.3d 534, 539-40 (3d Cir. 2019).

Courtrooms are nonpublic forums. *See Huminski v. Corsones*, 396 F.3d 53, 91 (2d Cir. 2005)(collecting cases); *Mezibov v. Allen*, 411 F.3d 712, 718 (6th Cir. 2005), *cert. denied*, 547 U.S. 1111 (2006); *Berner v. Delahanty*, 129 F.3d 20, 26 (1st Cir. 1997), *cert. denied*, 523 U.S. 1023 (1998). Thus, “the First Amendment rights of everyone . . . are at their constitutional nadir.” *Kraska v. Clark*, 2015 U.S. Dist. LEXIS 109843 (M.D. Pa. 2015)(quoting *Mezibov*, 411 F.3d at 718); *see also Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1071 (1991)(“It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to ‘free speech’ an attorney has is extremely circumscribed”).¹⁶

¹⁶ In *Richmond Newspapers, Inc. v. Virginia*, the Supreme Court noted that a courtroom is a “public place where the people generally – and representatives of the media – have a right to be present.” 448 U.S. 555, 578 (1980). Yet the court did not hold that a courtroom is a public forum – it was not conducting a forum analysis. Moreover, the court simply stated that the public and media have a “right to be present,” which is also not an issue here. Three years later, the court held that merely because the public is allowed to “come and go at will” in a place does not make it a public forum. *See United States v. Grace*, 461 U.S. 171, 177 (1983).

Because courtrooms are nonpublic forums, the government has more “flexibility to craft rules limiting speech.” *Pomicter*, 939 F.3d at 540. It may reserve a nonpublic forum for its “intended purposes, communicative or otherwise,” provided that the regulation on speech is “reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.” *Id.*

The reasonableness question turns on whether the government’s policy is “reasonable in light of the purpose served by the forum.” *Id.* at 541. The government’s burden is “light” and a “low bar”: it need provide only a legitimate explanation based on the forum’s purposes and surrounding circumstances. *Id.* at 541, 543. When it comes to reasonableness, the regulation need not be the “most reasonable or the only reasonable regulation possible” – it just needs to be reasonable. *Id.* Accordingly, whether “other strategies” could be used is irrelevant, and there is no need for restrictions to be narrowly tailored. *Id.* at 545.

Given that many courts prevent attendees from making audio recordings and have for decades, this Court may make a “commonsense inference” based upon record evidence of the courtroom’s purpose – to conduct preliminary arraignments – that the limitations on recordings

are reasonable. *See Pomicter*, 939 F.3d at 543 (“If the restrictions are reasonably explained, accord with the evidence or commonsense, and are connected to the purpose of the forum, we are constrained to be lenient in our review.”)

Importantly, the government does not have to wait until “havoc is wreaked” to restrict access. *Id.* Instead, it may act ahead of time to prevent possible issues, like those set forth below. Thus, Pennsylvania’s prophylactic rules to mitigate against prejudice is not only constitutionally permitted – it’s good policy.

The Supreme Court of Pennsylvania and Municipal Court have acted ahead of time to mitigate the potential prejudice to defendants, while still allowing the public and media access to court. That is a policy decision within those courts’ discretion. *See Chandler*, 449 U.S. at 574.

- 1. Preliminary arraignments and bail hearings are ripe with potentially prejudicial information that could affect a defendant’s right to a fair trial.**

During bail hearings, many factors are considered that can have prejudicial effects on a defendant’s right to obtain a fair trial. These include the defendant’s criminal history, the nature of the current charge, drug abuse issues, mental condition, a history of flight or

escape, use of false identification, and related factors.¹⁷ Having a defendant's own words discussing such prejudicial, inadmissible evidence broadcast online risks the right to a fair trial.

The detrimental nature of such information is why the American Bar Association and other federal courts have recognized that information such as a "prior criminal record," a defendant's "confessions, admissions, or statements," and a defendant's refusal to submit to a test or examination (and the outcome of such tests) are "substantially likely to be considered materially prejudicial to ongoing criminal proceedings." *See* ABA Model Rules of Professional Conduct 3.6, cmt; *see also* E.D. Pa. LCrR. 53.1; M.D. Pa. LR 83.2; W.D. Pa. LCrR. 83.C. While these rules apply to attorneys in a case, they are instructive because they recognize that similar information (criminal record, history of flight, confessions and statements, and so on) discussed at a preliminary arraignment can be prejudicial.

Thus, to allow dissemination of audio recordings of a defendant's own words about these matters would endanger a defendant's right to a

¹⁷ The prejudicial nature of such information is also reflected in the state rule limiting access to information that pretrial services obtains from defendants. *See* Pa.R.Crim.P. 530(C).

fair trial. A person could post audio of a defendant admitting to prior criminal acts, drug abuse, escape, and other matters that would not be admissible at trial, thereby prejudicing a right to a fair trial. Indeed, a defendant may inadvertently discuss the crimes that they are charged with.¹⁸

This is why the District Court's contention that an arrestee's privacy at a bail hearing is not more compelling than at later stages in the proceedings, where transcripts are produced, is incorrect. Those later proceedings do not involve the release of a defendant's words spoken in their own voice. While the media can report on all this information now by observing criminal court proceedings, limiting it to reporting as opposed to rebroadcasting a defendant's own admissions to inadmissible and prejudicial information is a policy choice to help safeguard against potential prejudice.

Indeed, the Bail Fund highlights the difference between hearing someone's voice as opposed to reading their words: it alleges that audio

¹⁸ The Bail Fund's October 2018 Bail Watch Report notes that defendants have been witnessed discuss the underlying facts of the criminal charges during an arraignment. (Joint Appendix 67, Stipulation ¶ 59, <https://perma.cc/9Y29-W4SA>, at page 25.)

recordings “fundamentally change” the reporting’s substance and convey the “human aspects” more “powerfully” than can be done in writing. (Joint Appendix 48, Complaint ¶ 43.) Judicial Appellants agree: spoken words from a defendant can be much more powerful than if they are in writing. It is this type of prejudice that the Pennsylvania courts seek to avoid – the impact on a defendant’s ability to receive a fair trial is increased if that defendant’s own words and voice are broadcast on the internet and elsewhere, tainting public opinion about the defendant before they have their day in court. *See Gannett Co., Inc.*, 443 U.S. at 378 (trying to “measure with any degree of certainty the effects of such publicity on the fairness of the trial” is difficult).¹⁹

Moreover, a defendant and their counsel may be unwilling to discuss mental health, drug-related issues, and other relevant bail factors if they know that the media may rebroadcast their statements, which would affect the bail decision by limiting the relevant information that the magistrate needs. *Cf. McKay v. Federspiel*, 2014 WL 7013574, at *6 (E.D. Mich. 2014)(recognizing that a witness may be less

¹⁹ Whether the Bail Fund’s recorders are silent does not alleviate this prejudice.

forthcoming if their answers were being recorded), *aff'd on other grounds*, 823 F.3d 862 (6th Cir. 2016). The District Court's conclusion here that this argument is undercut by Municipal Court's internal recording misses a distinguishing point: those recordings are not released to the public. What the Bail Fund intends to do here – post audio clips on the internet – is poles apart.

These potential prejudices are the type that the Supreme Court warned about in *Gannett Co., Inc.*, and they are the type that the Pennsylvania Supreme Court, Municipal Court, and courts through the state and federal systems have tried to mitigate by making a policy decision in their roles in administering their courts.

2. The Rules preserve courtroom decorum and reduce burdens on judicial officers and court staff.

In addition to mitigating the potential prejudice to criminal defendants, the Rules also allay the burdens on the magistrates and court officials, who have to monitor court attendees to ensure that the devices are silent, that they capture only audio as opposed to video, and so on. In having a preventative rule, Pennsylvania has made a

reasonable policy decision to avoid these issues, allowing the magistrates to focus on the proceedings, and ensure decorum.²⁰

That recordings can be made in “less disruptive” ways is irrelevant: there is no First Amendment right to record to begin with. Further, whether the devices are silent does not reduce the burden on judicial officers and court staff having to monitor who in the gallery may be simply audio recording as opposed to video recording or taking pictures.

The Bail Fund’s extensive policy arguments about whether the Rules are reasonable highlights the downfall of its argument. The United States Supreme Court and other courts have already concluded that whether to allow recordings is a policy choice for each court system to make – not a constitutional question.

In sum, there is no First Amendment right to record courtroom proceedings. The question, instead, is left to each court and judicial

²⁰ Moreover, it cannot be assumed that other persons or entities will make audio recordings for simply reporting on proceedings. Attendees would have free reign to record audio and then easily publish it on the internet and elsewhere for prejudicial reasons. Municipal Court and the magistrates tasked with conducting arraignments cannot ascribe the intent, purpose, or motive to every courtroom observer before a violation takes place and a defendant’s own words are out in public.

system as a policy matter – as the Supreme Court recognized in *Chandler*. The Pennsylvania Supreme Court and Municipal Court have made reasonable policy decisions consistent with longstanding case law that mitigates potential prejudice, ensures the decorum of court proceedings, and allows judicial officers to focus on their vital judicial tasks, while still ensuring the public and media’s access to court and to court filings and information. What is more, the other branches in Pennsylvania’s government have made the same policy decision by criminalizing unauthorized court recording.

E. The District Court’s decision has far-reaching statewide impact on over 500 magisterial district courts in Pennsylvania.

Finally, even though the District Court’s decision is technically limited to Philadelphia Municipal Court, its decision has an impact on all 500-plus Magisterial District Courts throughout the Commonwealth. Rule of Criminal Procedure 112 and Rule of Judicial Administration 1910 apply in every Pennsylvania court. And while courts of common pleas transcribe court hearings and trials, magisterial district courts do not. *See Pa.R.Crim.P. 115(a)*(only court proceedings after the equivalent of a preliminary hearing must be recorded or transcribed). Thus, the

lower court's holding that the Municipal Court either transcribe preliminary arraignments or allow audio recordings will effectively apply to every magisterial district court in Pennsylvania: these courts do not make official transcripts of arraignments and preliminary hearings.

Magisterial district courts generally do not possess the recording equipment necessary to create transcripts. The cost of requiring official transcription for every magisterial district court in Pennsylvania would be exorbitant. Moreover, these courts rely almost solely on county funding, which would necessitate individual requests to counties to fund recording capabilities. *See* 42 Pa.C.S.A. § 3722 (counties must provide to magisterial courts “all necessary accommodations, goods and services which by law have heretofore been furnished by the county.”)²¹

Thus, essentially, if the District Court's legal conclusion is upheld, every magisterial district court will conceivably have to allow attendees to make audio recordings. Unlike in Philadelphia and Pittsburgh, preliminary arraignments in the rest of Pennsylvania do not occur in

²¹ Municipal Court, as an entity of the First Judicial District, relies on funding from the City of Philadelphia.

centralized courthouses in courtrooms dedicated only to arraignments. Magisterial district courts are scattered throughout the state, almost all without sheriffs in the building or even close by. Thus, the magisterial district judges – in addition to having to tend to their judicial duties – have to police who may be simply making an audio recording versus a video recording.

Also, arraignments in these courts do not necessarily occur at set times – they may happen in-between civil, traffic, or other cases, which leads to administrative issues. For example, judges would have to determine whether attendees have stopped recording an arraignment because there may be another case about to start for which there is no right to record, such as a civil case. In a busy courtroom, that would be not only challenging, but would impede the effective administration of the judicial system and erode decorum.

Conclusion

Judicial Appellants respectfully request that this Honorable Court reverse the District Court's Order granting summary judgment in the Bail Fund's favor and remand this case to the District Court for an order granting Judicial Appellants' Motion for Summary Judgment and denying the Bail Fund's summary judgment motion. *See Nazay v. Miller*, 949 F.2d 1323, 1328 (3d Cir. 1991).

Respectfully submitted,

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Certifications

1. The undersigned counsel certifies that he is a member in good standing of the Bar of this Court.
2. The Brief contains 9862 words, not including the Title Page, Table of Contents, Table of Authorities, and Certificates. Certification is based on the word processor used to prepare the Brief.
3. The electronic brief's text is identical to the text in the paper copies filed with the Court.
4. A virus detection program has been run on the electronic brief filed in this Court and no virus has been detected. The virus protection program used is McAfee Virus Scan – Enterprise Version.

s/Michael Daley
MICHAEL DALEY, ESQUIRE

Certificate of Service

The undersigned certifies that on May 1, 2020, he caused the foregoing *Brief of Appellant* to be served upon Appellee by CM/ECF.

s/Michael Daley
MICHAEL DALEY, ESQUIRE

20-1632

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

Merry Reed and the Philadelphia Bail Fund

Appellees

v.

Francis Bernard, Arraignment Court Magistrate Judges, Sheila Bedford, Kevin Devlin, James O'Brien, Cateria McCabe, Robert Stack, in their Official Capacities, and President Judge Patrick Dugan, in his Official Capacity, and the Sheriff of Philadelphia

Francis Bernard, Sheila Bedford, Kevin Devlin, James O'Brien, Cateria McCabe, Robert Stack, and President Judge Patrick Dugan

Appellants

**Appeal from the February 25, 2020, Order
of the United States District Court for the
Eastern District of Pennsylvania in Civil Action No. 19-3110**

JOINT APPENDIX VOLUME I, PP. 1-32

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MERRY REED, et al.	:	
<i>Plaintiffs,</i>	:	CIVIL ACTION
	:	
v.	:	
	:	No. 19-3110
ARRAIGNMENT COURT MAGISTRATE	:	
JUDGE FRANCIS BERNARD, et al.,	:	
	:	Hon. Harvey Bartle, III
<i>Defendants</i>	:	

Notice of Appeal

Defendants Arraignment Court Magistrates Francis Bernard, Sheila Bedford, Kevin Devlin, James O'Brien, Cateria McCabe, and Robert Stack and Philadelphia Municipal Court President Judge Patrick Dugan appeal to the United States Court of Appeals for the Third Circuit from the District Court's February 25, 2020, Order (Doc. 52) and accompanying Memorandum (Doc. 51) that granted Plaintiffs' Motion for Summary Judgment (Doc. 40) and denied appealing Defendants' Motion for Summary Judgment (Doc. 39).

Copies of the District Court's February 25, 2020, Order and Memorandum
are attached.

Respectfully Submitted,

s/Michael Daley

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Robert Stack and President Judge
Patrick Dugan*

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MERRY REED, et al.	:	
<i>Plaintiffs,</i>	:	CIVIL ACTION
	:	
v.	:	
	:	No. 19-3110
ARRAIGNMENT COURT MAGISTRATE	:	
JUDGE FRANCIS BERNARD, et al.,	:	
	:	Hon. Harvey Bartle, III
<i>Defendants</i>	:	

Certificate of Service

The undersigned certifies that on *March 20, 2020*, he caused the foregoing
Notice of Appeal to be served via CM/ECF to all counsel of record

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PHILADELPHIA BAIL FUND : CIVIL ACTION
: :
v. : :
: :
ARRAIGNMENT COURT MAGISTRATE : :
JUDGES, et al. : NO. 19-3110

ORDER

AND NOW, this 25th day of February, 2020, for the reasons set forth in the foregoing Memorandum, it is hereby ORDERED that:

(1) the motion of plaintiff Philadelphia Bail Fund for summary judgment against defendants, Arraignment Court Magistrates Francis Bernard, Sheila Bedford, Kevin Devlin, James O'Brien, Cateria McCabe, and Robert Stack as well as against defendants the Philadelphia Municipal Court President Judge Patrick Dugan and the Sheriff of Philadelphia County, Rochelle Bilal is GRANTED;

(2) Rule 112(C) of the Pennsylvania Rules of Civil Procedure, Rule 1910 of the Pennsylvania Rules of Judicial Administration, and the Philadelphia Municipal Court Arraignment Court Magistrate rule 7.09 are declared to be unconstitutional under the First Amendment of the United States Constitution insofar as they apply to bail hearings in the Philadelphia Municipal Court as long as the Philadelphia Municipal Court does not make available to plaintiff either official audio recordings

or transcripts of bail hearings of the same type and quality and in the same manner that are made available for other judicial proceedings;

(3) plaintiff may make its own audio recordings of bail hearings in the Philadelphia Municipal Court with silent handheld recorders beginning 45 days from the date of this order but only if the Philadelphia Municipal Court does not make available by that time official audio recordings or transcripts of bail hearings of the same type and quality and in the same manner that are made available for other judicial proceedings;

(4) the motion of the defendants, the Arraignment Court Magistrates and the Philadelphia Municipal Court President Judge, for summary judgment against plaintiff is DENIED;

(5) the motion of defendant the Sheriff of Philadelphia County for summary judgment against plaintiff on plaintiff's claim for attorney's fees and costs is GRANTED;

(6) the motion of defendant the Sheriff of Philadelphia County for summary judgment against plaintiff is otherwise DENIED;

(7) the cross-claim of the Sheriff of Philadelphia County for indemnity against the Arraignment Court Magistrates and the Philadelphia Municipal Court President Judge for attorney's fees and costs is DENIED as moot; and

(8) this court retains jurisdiction and directs defendants to file a status report within 45 days and at such other times as the court directs.

BY THE COURT:

/s/ Harvey Bartle III

J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PHILADELPHIA BAIL FUND : CIVIL ACTION
: :
v. : :
: :
ARRAIGNMENT COURT MAGISTRATE : :
JUDGES, et al. : NO. 19-3110

MEMORANDUM

Bartle, J.

February 25, 2020

This case involves the First Amendment right of public access to bail hearings in the Philadelphia Municipal Court.

Plaintiff Philadelphia Bail Fund, a non-profit organization advocating for reform of Philadelphia's bail system, brings this action under 42 U.S.C. § 1983 against Philadelphia Municipal Court Arraignment Court Magistrates Francis Bernard, Sheila Bedford, Kevin Devlin, James O'Brien, Cateria McCabe, and Robert Stack as well as against Philadelphia Municipal Court President Judge Patrick Dugan and the Sheriff of Philadelphia County, Rochelle Bilal.¹ All are being sued in their official capacities. Plaintiff seeks a declaratory judgment that two Pennsylvania court rules and a Philadelphia Municipal Court Arraignment Court Magistrate rule, insofar as

1. Originally Merry Reed, a writer and reporter, was named as a plaintiff. She has been dismissed from the action by agreement of the parties. By stipulation, the parties have also substituted a new Arraignment Court Magistrate and the newly-elected Sheriff of Philadelphia County as defendants.

they prohibit plaintiff from making audio recordings of bail hearings, violate its right of access to court proceedings under the First Amendment to the United States Constitution. The complaint also requests attorney's fees and costs against the Sheriff and "such further relief as may be just, lawful and equitable."² The plaintiff does not seek damages from any of the defendants.

Before the court are cross motions of the parties for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

I

Under Rule 56(a), summary judgment may be granted "if the movant shows that there is no genuine dispute of material fact and the movant is entitled to judgment as a matter of law." Here, the parties have stipulated to all the relevant facts. We must simply decide whether any of the parties is entitled to judgment as a matter of law.

II

The following are the relevant facts to which the parties have stipulated.

2. The Sheriff also filed a cross-claim against the judicial defendants for indemnity for any assessed attorney's fees and costs.

The six defendant Arraignment Court Magistrates³ are appointed by the Philadelphia Municipal Court for four-year terms to conduct bail hearings at preliminary arraignments, among other duties. 42 Pa.C.S. § 1123(a)(5). They do not have to be lawyers. See 42 Pa.C.S. § 3112. They sit on a rotating basis in a courtroom in the basement of the Criminal Justice Center in downtown Philadelphia and conduct each bail hearing over a video link to each of the seven Philadelphia Divisional Booking Centers where arrestees are processed. A magistrate is available twenty-four hours a day, seven days a week, and 365 days a year. On average there are 30,000 bail hearings a year or roughly 90 hearings per day in Philadelphia.

When an individual is arrested, he or she is taken to one of the seven Divisional Booking Centers to be processed. A police report is generated and is electronically transmitted to the Philadelphia District Attorney's Office for charging. The report is also transmitted to the Pretrial Services Division of the First Judicial District, which encompasses Philadelphia County, to aid it in conducting an interview of the arrestee. The Pretrial Services Division asks the arrestee about his or her residence, employment, health, education, financial situation, and other biographical details which it compiles into

3. The magistrates are sometimes referred to as Bail Commissioners. 42 Pa.C.S. § 3111.

a report. It then submits the report to the magistrate through the Preliminary Arraignment Reporting System ("PARS"). After receipt of this report and approval of the charges against the arrestee by the District Attorney's Office, the magistrate holds a preliminary arraignment where bail is determined. The Pretrial Services Division report is available to the court, the District Attorney's office, and the arrestee's representative but not to the public.

The preliminary arraignment takes place on average fifteen hours after the arrest. The name of the arrestee and the case and its number is first made public at that time. The prosecution, the defense counsel, and the arrestee all have an opportunity to address and argue before the magistrate concerning bail and answer any questions the magistrate may pose. Typically, neither the assistant district attorney nor the attorney for the arrestee submits any written argument. At the conclusion of the hearing, the magistrate decides whether pretrial release is appropriate and if so the amount and conditions of bail. Rules 523 and 524 of the Pennsylvania Rules of Criminal Procedure respectively set forth the criteria for release on bail and the types of release. Each bail hearing typically lasts less than four minutes on average. If either party objects to the magistrate's decision, a Municipal Court judge is immediately available by telephone for a de novo

appeal. The audio-visual connection with the arrestee, however, is terminated before any appeal.⁴

All preliminary arraignments are open to the public and press. The courtroom has capacity for an audience of 65 and contains a glass wall which separates the spectators from the front of the courtroom. The proceedings are amplified by a speaker system, and the audience can observe the visual link showing the arrestee. While the public and press may observe and take notes, the court rules in issue prohibit them from making video or audio recordings. The Sheriff's Office maintains order in the courtroom and enforces the court rules at the direction of the presiding magistrate.

There is no transcript of the preliminary arraignment or of any immediate telephonic appeal to a Municipal Court judge, and no court reporter is present for either. Although the court makes audio recordings of these preliminary arraignments, it does so to address technical issues such as the quality of the sound and to enable the President Judge of the Municipal Court to monitor the performance of the magistrates. The recordings are not filed of record and are not used in

4. An arrestee may also obtain a further hearing in the Municipal Court by filing a motion to challenge a bail determination or to have the bail amount reduced or to ask to participate in what is known as "Early Bail Review." This further hearing will take place within five days of the initial bail hearing at the earliest.

making a bail determination in any case or in any subsequent hearing or for any appeal. The recordings are not available to the parties or the public and are of inferior quality and often hard to hear.⁵ Such recordings are not made under the First Judicial District Digital Recording Program from which official court transcripts of other proceedings are prepared.

Counsel for the judicial defendants advised the court at oral argument and plaintiff's counsel does not dispute that the public may obtain for a fee written transcripts of all judicial proceedings that are the subject of the First Judicial District Digital Recording Program. Copies of the underlying recordings themselves, however, are not publicly available.

Following the preliminary arraignment, various court documents related to it are filed of record. These documents include the criminal complaint and a form which contains the magistrate's decision concerning bail. Copies are available at twenty-five cents per page, but there is no charge simply to view the documents. Docket sheets are also publicly accessible. In addition, the Administrative Office of Pennsylvania Courts makes available a bulk data report of case information for every preliminary arraignment in the Municipal Court. The public may

5. Counsel for the judicial defendants, in response to a question from the court, stated the facts in the second half of this sentence. All counsel agreed to have the court accept these facts as part of the record.

obtain electronic case data for a fee from the First Judicial District.

On June 14, 2019, the Bail Fund emailed Philadelphia Municipal Court President Judge Dugan requesting permission to audio-record bail hearings. Judge Dugan replied that state rules prohibited the granting of the request. Shortly after, the Philadelphia Bail Fund instituted this action.

III

The court rules at issue in this case generally operate to prohibit audio and video recordings of criminal proceedings by members of the public.

Rule 112 of the Pennsylvania Rules of Criminal Procedure provides⁶:

(C) Except as provided in paragraph (D), the stenographic, mechanical, electronic recording, or the recording using any advanced communication technology, of any judicial proceedings by anyone other than the official court stenographer in a court case, for any purpose, is prohibited.

(D) In a judicial proceeding before an issuing authority, the issuing authority, the attorney for the Commonwealth, the affiant, or the defendant may cause a recording to be made of the judicial proceeding as an aid to the preparation of the written record for subsequent use in a

6. The Pennsylvania Rules of Criminal Procedure are adopted by the Supreme Court of Pennsylvania under the authority of the Constitution of the Commonwealth of Pennsylvania. See Pa. Const. art. V, § 10(c); Pa.R.Crim.P. 102.

case, but such recordings shall not be publicly played or disseminated in any manner unless in a court during a trial or hearing.

Rule 1910 of the Pennsylvania Rules of Judicial Administration provides in relevant part: "judges shall prohibit broadcasting, televising, recording or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions," subject to limited exceptions not relevant here." Pa.R.J.A. No. 1910(B).⁷

The Philadelphia Municipal Court Arraignment Court Magistrate rule 7.09 reads in relevant part: "[a]n Arraignment Court Magistrate shall prohibit broadcasting, televising, recording, or taking photographs in the Courtroom or the areas immediately adjacent thereto during sessions or recesses between sessions. . . ." Phila. M.C.R. Crim., A.C.M., Sec. 7.09.

IV

The plaintiff has brought this action under 42 U.S.C. § 1983 which provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or

7. The Pennsylvania Supreme Court recently ordered Rule 1910(B) amended to read "judges shall prohibit" rather than "judges should prohibit" the recording of judicial proceedings. See In re Amendment of Rule 1910 of Judicial Admin., No. 522 (Pa. Oct. 8, 2019). The amendment took effect on January 1, 2020. Id.

causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. . . .

The question before the court is whether the plaintiff is entitled under the First Amendment to audio-record bail hearings in the Philadelphia Municipal Court where the court itself only makes inferior recordings for internal purposes and does not make official recordings or transcripts of those proceedings. Under Rule 115 of the Pennsylvania Rules of Criminal Procedure, recordings of proceedings in open court are not mandated until "after a defendant has been held for court," that is, until after a preliminary arraignment in the Municipal Court. Pa.R.Crim.P. 115(A); see also Pa.R.Crim.P. 1012(A).

The First Amendment reads in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." This guarantee has been incorporated into the due process clause of the Fourteenth Amendment and applies to the states. Nat'l Inst. of Family and Life Advocates v. Becerra, 138 S. Ct. 2361, 2371 (2018). It is now well-settled

that the First Amendment guarantees the right of public access to criminal trials, including the right to listen and take notes and to disseminate and publish what is observed. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575-80 (1980).

Underlying this right of access is "the common understanding that a major purpose of the [First] Amendment was to protect the free discussion of governmental affairs" and "to ensure that this constitutionally protected 'discussion of government affairs' is an informed one." Globe Newspapers Co. v. Superior Court for Norfolk Cnty., 457 U.S. 596, 604-05 (1982). Public scrutiny also "fosters an appearance of fairness" and "permits the public to participate in and serve as a check upon the judicial process." Id. at 606.

The right of public access, like many aspects of the First Amendment, is not absolute. Id. at 606. However, any denial of access must be narrowly tailored and be necessitated by a compelling governmental interest. Id. at 607. It must also be determined on a case-by-case basis. Id. at 608. As the Supreme Court later stated in Press-Enterprise Co. v. Superior Court of Cal., 478 U.S. 1, 9-10 (1986):

The presumption may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine

whether the closure order was properly entered.

In stressing the importance of public access, the Supreme Court had declared that the blanket closure of courtrooms even for the testimony of minor victims of sexual offenses violates the First Amendment. Globe Newspapers Co., 457 U.S. at 602-11.

In United States v. Simone, 14 F.3d 833, 839 (3d Cir. 1994), our Court of Appeals delineated six societal interests in support of open courtrooms:

[P]romotion of informed discussion of governmental affairs by providing the public with the more complete understanding of the judicial system; promotion of the public perception of fairness which can be achieved only by permitting full public view of the proceedings; providing a significant community therapeutic value as an outlet for community concern, hostility and emotion; serving as a check on corrupt practices by exposing the judicial process to public scrutiny; enhancement of the performance of all involved; and discouragement of perjury.

The Supreme Court has extended that First Amendment right of public access beyond the criminal trial itself. It has held that the First Amendment also applies to jury selection and to preliminary hearings. Press-Enterprise Co. v. Superior Court of Cal., 464 U.S. 501, 513 (1984); Press-Enterprise Co., 478 U.S. at 13. Our Court of Appeals has also concluded that post-trial hearings to investigate jury misconduct must also be

open to the public under the First Amendment. Simone, 14 F.3d at 840.

While the parties have not cited any case specifically dealing with bail hearings, we have no hesitancy in determining that the right of public access encompasses this significant aspect of the judicial process. The Eighth Amendment to the Constitution specifically guarantees that "Excessive bail shall not be required." See Timbs v. Indiana, 139 S. Ct. 682, 688 (2019). Regardless of what the historical practice of openness may have been, the societal interests outlined by the Supreme Court and later by our Court of Appeals in Simone all lead to the inexorable conclusion that the First Amendment protects the right to attend and report on bail proceedings.

In addition to the constitutional right to attend criminal judicial proceedings, the courts have dealt with public access to judicial records. There is a common law right of the public "to inspect and copy . . . judicial records and documents" in criminal as well as civil cases. In re Avandia Mktg., Sales Practices and Prods. Liab. Litig., 924 F.3d 662, 672 (3d Cir. 2019). This right long antedates the Constitution and, at least in the criminal context, has now taken on constitutional dimensions. In Press-Enterprise Co., for example, the Supreme Court elevated to First Amendment status

the right of the public to have access to a copy of the transcript of a preliminary hearing. 478 U.S. at 13.

In United States v. Antar, 38 F.3d 1348 (3d Cir. 1994), our Court of Appeals concluded that the district court erred in initially sealing the transcript of jury voir dire and putting restrictions on its use when later unsealed, including limiting use of juror information. The Court of Appeals made clear that access to the transcripts of a judicial proceeding is as critical under the First Amendment as is the right to be present to hear and observe what occurs in the courtroom. The Court emphasized:

True public access to a proceeding means access to knowledge of what occurred there. It is served not only by witnessing a proceeding firsthand, but also by learning about it through a secondary source. . . . Access to the documentation of an open proceeding, then, facilitates the openness of the proceeding itself by assuring the broadest dissemination. It 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?

Id. at 1360.

The Court grounded its analysis on the First Amendment: "This strong presumption of access to records, including transcripts, provides independent support for the

conclusion that the First Amendment right of access must extend equally to transcripts as to live proceedings.” Id. at 1361.

The right to attend and report on trials and to have access to judicial records, albeit not absolute, has now been firmly established as a First Amendment right. The Supreme Court has also held in Chandler v. Florida, 449 U.S. 560, 583 (1981), that the Constitution does not prohibit radio, television or photographic coverage of a criminal trial. While the press is not constitutionally prohibited from recording and broadcasting a criminal trial, it is also not constitutionally entitled to do so. The Court wrote in Nixon v. Warner Commc’ns, Inc., 435 U.S. 589, 610 (1978) that the press has “no constitutional right to have such testimony [of live witnesses] recorded and broadcast.” Likewise, a number of appellate decisions in other circuits have denied any First Amendment right to audio-record, videotape or televise court proceedings. See, e.g., Conway v. United States, 852 F.2d 187, 188 (6th Cir. 1988); United States v. Yonkers Bd. of Educ., 747 F.2d 111, 113-14 (2d Cir. 1984); United States v. Hastings, 695 F.2d 1278, 1284 (11th Cir. 1983).

The plaintiffs rely on a more recent decision, Whiteland Woods, LP v. Twp. of West Whiteland, 193 F.3d 177 (3d Cir. 1999), a case which did not involve public access to criminal proceedings. There the plaintiff claimed a

First Amendment right to videotape a meeting of a Township Planning Commission. The Court of Appeals framed the issue before it as follows:

The primary issue on appeal is whether there is a federal constitutional right to videotape public meetings of a township planning commission when other effective means of recording the proceedings are available.

Id. at 180.

The Court held that under the circumstances no First Amendment right to videotape existed. Id. at 185. It noted that interested parties and the public were allowed to take notes, use audio recording devices, and even engage stenographers. The Court observed:

Nothing in the record suggests videotaping would have provided a uniquely valuable source of information about Planning Commission meetings. The First Amendment does not require states to accommodate every potential method of recording its proceedings, particularly where the public is granted alternative means of compiling a comprehensive record.

Id. at 183.

In affirming the district court's order granting summary judgment in favor of the Township, the Court concluded, ". . . plaintiff has failed to demonstrate an essential nexus between the right of access and a right to videotape the Planning Commission proceedings. Id. at 183-84.

The most recent pronouncement of our Court of Appeals on the First Amendment right to record a public event is in Fields v. City of Phila., 862 F.3d 353 (3d Cir. 2017). This case like Whiteland Woods did not involve access to a court proceeding. See id. at 355. There plaintiffs brought an action against the City of Philadelphia and certain police officers for retaliation for photographing and recording police activity in arresting protestors in public places. Id. The Court held that plaintiffs had a First Amendment right to do so. Id. at 360. It observed, "To record what there is the right for the eye to see or the ear to hear corroborates or lays aside subjective impression for objective facts." Id. at 359. The Court continued, "We do not say that all recording is protected or desirable. It is subject to reasonable time, place, and manner restrictions. . . . But in public places these restrictions are restrained." Id. at 360.

The cases that have considered the issue have all held that the First Amendment does not guarantee the public the right to record judicial proceedings. These holdings, in our view, do not end the analysis because the facts here are significantly different. In none of those cases does it appear that the court of first instance had a policy or custom not to make official recordings or transcripts of those proceedings. Indeed, in several of those cases, the decision specifically referenced the

fact that either a transcript was available or the court had an official recording system.

In Nixon, the press sought copies of the actual Nixon tapes featured in a criminal trial of the ex-President's former advisors with the intent of broadcasting them. 435 U.S. at 591-92. While denying the request because of the special provisions of the Presidential Recordings Act and stating that the press had no constitutional right to record and broadcast anything, the Court emphasized that the press already had copies of the trial transcripts which included the tapes that were being sought. Id. at 610.

In Yonkers Bd. of Educ., the Court of Appeals for the Second Circuit upheld a federal district court rule banning the public use of recording devices in the courtroom. 747 F.2d at 113-14. Yet, in doing so, it touched upon the existence of an official reporting system as one of the reasons not to allow the public to make recordings. Id. at 114. The Second Circuit opined that "indiscriminate recording of trial proceedings might undermine the official court reporter system." Id. Of course, in this pending case there are no transcripts and no official court reporter system to undermine.

The precedents in this circuit have emphasized how important the objective record of an event can be beyond what one may see or hear whether in a court proceeding or elsewhere.

As our Court of Appeals stated in Antar, "Access to the documentation of an open proceeding . . . facilitates the openness of the proceeding itself by assuring the broadest dissemination. It would be an odd result indeed were we to declare that our courtrooms must be opened, but that transcripts of the proceedings occurring there may be closed. . . ."

38 F.3d at 1360.

In Whiteland Woods, the Court of Appeals denied the right to videotape a Township Planning Commission meeting. 193 F.3d at 183-84. In doing so, it explained that "The First Amendment does not require states to accommodate every potential method of recording its proceedings, particularly where the public is granted alternative means of compiling a comprehensive record." Id. (emphasis added). And recently in Fields, involving the recording of public police activity, the Court asserted, "To record what there is the right for the eye to see or the ear to hear corroborates or lays aside subjective impression for objective facts." 862 F.3d at 359. These three cases all emphasized the significance of a recording of events as well as the significance of court records in any First Amendment analysis.

We recognize that First Amendment decisions which involved other kinds of public spaces are not necessarily applicable to judicial proceedings. Courtrooms, whether they

are deemed public or non-public fora, are different than other places such as street corners, parks, subways, stadiums, theaters, and even the halls of non-judicial governmental bodies. Courts are fact-finding institutions which after due deliberation adjudicate constitutional and other significant substantive and procedural rights of litigants. Fairness and impartiality are paramount. There must be decorum, dignity, order and even solemnity in the judicial process. The hustle and bustle and cacophony of the street or marketplace have no place in the courtroom. The behavior and actions of participants and spectators attending a judicial proceeding are properly subject to unique constraints that do not apply elsewhere.

There also can be no denying that bail hearings are a significant part of the criminal process. Indeed, as already noted, there is a constitutional dimension to them. The Eighth Amendment provides that "[e]xcessive bail shall not be required. . . ." Likewise, the Constitution of the Commonwealth declares that "[e]xcessive bail shall not be required. . . ." Pa. Const. art. I, § 13.⁸ What and how the defendant magistrates

8. Article I § 14 of the Pennsylvania Constitution further provides:

All prisoners shall be bailable by sufficient sureties, unless for capital offenses or for offenses for which the

rule on bail is no small matter even though a bail hearing usually lasts less than four minutes on average. Bail of course may be denied to protect the public or the arrestee and to prevent pretrial flight. At other times, release will be granted and in those cases the magistrate will be required to decide appropriate monetary and non-monetary conditions of release pursuant to the detailed state procedural rules. See Pa.R.Crim.P. 523-28.

The decisions of the magistrates will affect, in many instances, whether the arrestees can continue to work and support their families pending trial. The time period between the bail hearing and the trial is often many months if not longer. Improperly setting bail beyond the financial reach of an impecunious individual or otherwise erring in a decision can result in wrongful pretrial detention, with particularly unfortunate consequences if the charges are later dropped or an arrestee is found not guilty. We, of course, do not intimate that the magistrates here are making improper rulings, either under Pennsylvania law or the United States Constitution. The salient point is that meaningful public access to bail hearings

maximum sentence is life imprisonment or unless no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community when the proof is evident or presumption great

is imperative. The rulings concerning bail and the process by which they are made, no matter how quickly accomplished, have federal and state constitutional ramifications. The rulings and the process have serious consequences for the arrestee and implicate vital societal interests. See Simone, 14 F.3d at 839.

The defendants justify the ban on audio recordings as needed to protect the privacy of the arrestee and his or her right to a fair trial. The ban, according to the defendants, allows arrestees to speak more frankly at the bail hearing concerning their mental health, drug issues and other personal matters. We find this argument unconvincing. The bail hearings are presently open to the press and public, and anyone can observe and take notes about what is occurring. Thus, anything said at the hearing is subject to wider dissemination and can appear in the newspapers, on television, or on social media even if no audio recordings by the public are allowed. Further, defendants have not articulated why the privacy of the arrestee at bail hearings is any more compelling than the privacy of an arrestee at later stages of the criminal process when judicial recordings are made and transcripts are produced.

We observe that Rule 112(D) of the Pennsylvania Rules of Criminal Procedure allows an attorney for the Commonwealth, for an affiant, or for the defendant to make recordings to prepare a record although it prohibits any dissemination to the

public of such recordings. This exception allowing recordings, to say nothing about the existence of the Philadelphia Municipal Court's own inferior recordings for internal purposes, undercuts the defendants' argument about the arrestee's fear of speaking frankly if a recording is being made.

Public access to bail hearings is clearly guaranteed under the First Amendment. Official audio recordings or transcripts of such hearings are not required under Rule 115 of the Pennsylvania Rules of Criminal Procedure and in fact such recordings are not being made. If the hearings were officially recorded, the public would have a constitutional right of access to the recordings or to the transcripts absent compelling circumstances not demonstrated here. In the cases which have denied the public the constitutional right to record judicial proceedings, there has been no hint that there would be no official record for public scrutiny.⁹

Under the narrow circumstances present here, we must balance the ability of the court to constrain the behavior and actions of those in the courtroom against the public right of meaningful access. In deciding the matter, we must take into

9. We note, for example, that all bail hearings before the Magistrate Judges in the United States District Court for the Eastern District of Pennsylvania are officially recorded and the recordings and transcripts are available for purchase by the public.

account the importance our Court of Appeals has placed on the official or objective record. There are over 90 bail hearings a day in Philadelphia and each usually lasts less than four minutes on average. Absent an official record other than a ruling set forth on a form, attendance and notes alone are insufficient to comprehend the full import of these numerous and rapid hearings. While an arrestee has a right of immediate appeal de novo to a Municipal Court judge, the appeal is conducted by telephone with no video link to the arrestee and no recording of that proceeding. The public has less access to the de novo appeal than to the hearing before the magistrate.

The scales tip in favor of the public's right to audio-record in a non-disruptive and quiet manner the preliminary arraignment and the determination of bail where the court has a policy or custom not to make official audio recordings or transcripts of its own. There is here an "essential nexus between the right of access" and the right to audio-record the proceedings. See Whiteland Woods, 193 F.3d at 183-84. The right to attend and take notes and then to obtain statistical data about bail hearings after the fact is not adequate under the circumstances presented to vindicate the public's First Amendment right of access to the courts. To reiterate what our Court of Appeals wrote in Antar:

It 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.

38 F.3d at 1360.

V

The court will grant the motion of plaintiff for summary judgment on its constitutional claim and will deny the cross-motions of all defendants for summary judgment on that claim. The court declares that Rule 112(C) of the Pennsylvania Rules of Criminal Procedure, Rule 1910 of the Pennsylvania Rules of Judicial Administration, and the Philadelphia Municipal Court Arraignment Court Magistrate rule 7.09 are unconstitutional under the First Amendment insofar as they prohibit the public to audio-record bail hearings. Our holding is limited to the present circumstances in which the Philadelphia Municipal Court does not make available to the public either its own official audio recordings or transcripts of the bail hearings of the same type and quality and in the same manner that are made available for other judicial proceedings.

The law in our view is well established as recited above that plaintiff is not entitled under the First Amendment to make its own audio recordings if the public can obtain official audio recordings or transcripts from the Philadelphia

Municipal Court. Thus, the validity of the court rules in question may be saved by making such audio recordings or transcripts publicly available. No state law or rule called to our attention prevents the court from taking this step.

If after 45 days from the date of the order entered in this case the Philadelphia Municipal Court has not made official judicial recordings or transcripts of bail hearings available to the public as set forth above, the plaintiff may then make its own audio recordings of said hearings by use of silent hand-held recorders. The court will continue to maintain jurisdiction of this action and will require defendants to notify the court whether such recordings or transcripts are now obtainable no later than 45 days after the entry of the order herein.

VI

Finally, the Sheriff of Philadelphia County, who is being sued in her official capacity, makes an additional argument that she cannot be held liable for attorney's fees and costs even if the plaintiff prevails on its constitutional claim under § 1983. Title 42 U.S.C. § 1988(b) provides in relevant part:

In any action or proceedings to enforce a provision of . . . § 1983 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or

omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

Plaintiff does not seek attorney's fees and costs against the Arraignment Court Magistrates or the Philadelphia Municipal Court President Judge. It has not presented any evidence that these defendant judicial officers have acted "clearly in excess of . . . [their] jurisdiction."

The Sheriff, as noted above, has been sued in her official capacity and is acting as an agent of the judicial officials who have promulgated and have directed her to enforce the state and local court rules against audio recordings by the public in the courtroom. See Kentucky v. Graham, 473 U.S. 159, 163-66 (1985). If the judicial defendants cannot be liable for attorney's fees and costs, surely attorney's fees and costs cannot be awarded against the Sheriff, who is merely acting at their behest without discretion to do otherwise.

Accordingly, the Sheriff is entitled to summary judgment in her favor to the extent plaintiff seeks attorney's fees and costs against her in her official capacity. The Sheriff's cross-claim against the judicial defendants for indemnity for attorney's fees and costs will be denied as moot.

Certificate of Service

The undersigned certifies that on May 1, 2020, he caused the foregoing *Appendix* to be served upon Appellee by CM/ECF.

s/Michael Daley
MICHAEL DALEY, ESQUIRE