No. 20-1632

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PHILADELPHIA BAIL FUND,

Plaintiff-Appellee,

v.

ARRAIGNMENT COURT MAGISTRATE JUDGES FRANCIS BERNARD, SHEILA BEDFORD, KEVIN DEVLIN, JAMES O'BRIEN, CATERIA MCCABE, and ROBERT STACK; and PRESIDENT JUDGE PATRICK DUGAN,

Defendant-Appellants,

SHERIFF ROCHELLE BILAL,

Defendant.

On Appeal from the U.S. District Court for the
Eastern District of Pennsylvania (No. 19-cv-3110-HB)

APPELLEE'S PETITION FOR REHEARING EN BANC

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RULE 35.1 STATEMENT

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the U.S. Court of Appeals for the Third Circuit, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court, *i.e.*, the panel's decision is contrary to this Court's decision in *Whiteland Woods v. Township of West Whiteland*, 193 F.3d 177 (3d Cir. 1999), and that this appeal involves a question of exceptional importance, *i.e.*, whether court officials may, consistent with the First Amendment, prevent the public from compiling a verbatim record of an open court proceeding that occurs entirely off the record.

/s/ Nicolas Riley
NICOLAS RILEY
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INTRODUCTION

Every week, hundreds of recently arrested Philadelphians appear at bail hearings in a basement courtroom of the City's criminal courthouse. The stakes of these hearings are extremely high: they determine whether or not the arrestee will be jailed for the ensuing days, weeks, or months as he awaits trial. Yet, despite the obvious import of these proceedings—both for the arrestee and for public safety—the hearings occur entirely off the record, without advance notice to the public. Worse still, members of the public are barred, by state and local court rules, from creating their own verbatim record of the proceedings. As a result, observers are unable to document key information from the hearings—including details that are never preserved in any public record—like the magistrate's stated rationale for a given bail decision.

The District Court properly held that these rules infringe the public's First Amendment right of access to the bail hearings. But a divided panel of this Court reversed. In upholding the rules, the panel majority upended decades of First Amendment precedent and dramatically expanded the government's power to shield courts and prosecutors from public oversight. The logic of the majority's decision is especially troubling. Not only does it permit court officials to hold major criminal hearings off the record without any advance notice to the public, but it also empowers them to *prevent* people who do attend the hearings from documenting what occurs there—including what prosecutors and judges actually say. Even more troublingly,

the majority would permit such restrictions without ever requiring the government to *justify* them—a stark departure from every other area of First Amendment law.

As the dissent rightly notes, the panel's decision conflicts with this Court's precedents, including *Whiteland Woods v. Township of West Whiteland*, 193 F.3d 177 (3d Cir. 1999), which hold that the government cannot prevent the public from obtaining a comprehensive record of an open proceeding. And the decision erodes the foundation underlying the First Amendment right of access while also undermining public discourse about Philadelphia's criminal-justice system. This Court should grant rehearing en banc.

BACKGROUND

A. Factual Background

People arrested in Philadelphia are brought before a magistrate within twenty-four hours. The magistrate typically hears argument from both a prosecutor and a public defender before deciding whether the arrestee should be released and, if so, what bail amount (or other conditions) to impose. Magistrates hear cases twenty-four hours a day, seven days a week. Although the public may attend the hearings, court rules prohibit observers from making any "stenographic, mechanical, or electronic recording[s]" of the proceedings. Pa. R. Crim. P. 112(C).

The Philadelphia Bail Fund brought this lawsuit to challenge those rules. The Bail Fund is a nonprofit organization that advocates for a more just bail system. As part of that work, the organization's volunteers observe bail hearings and attempt to

document what they see. The Bail Fund then uses that information to produce reports aimed at educating the public and government officials about Philadelphia's bail practices. Although Bail Fund volunteers take extensive handwritten notes on the proceedings, the rapid, back-to-back nature of the hearings makes it impossible to capture a verbatim record of what is actually said at each hearing.

Prior to this litigation, there was no way to obtain a complete record of what occurs at bail hearings because Philadelphia's Municipal Court (where the magistrates sit) does not transcribe the hearings. Although court officials audio-record each hearing to monitor the magistrates' conduct, they do not make those recordings available to the parties or the public. Nor does the court preserve any record of the magistrates' stated reasons for their decisions, or the parties' arguments, all of which are presented orally. Consequently, the only written record of this information is what observers are able to document by hand.

B. Procedural Background

The District Court granted summary judgment to the Bail Fund, ruling that the challenged rules could not be constitutionally applied to Philadelphia bail hearings. The District Court held that, when a court declines to make a verbatim record of proceedings available to the public, it cannot constitutionally prevent the public from making its own such record. Accordingly, it directed the magistrates to either make

transcripts of the bail hearings available to the public or permit the Bail Fund to audio-record the proceedings.[1]

A divided panel of this Court reversed. Although the majority agreed that bail hearings are subject to the First Amendment right of access, it held that the right is satisfied by permitting people to attend the hearings, take notes, and access certain court records. Maj. Op. 12-13. The dissent, in contrast, would have held that the challenged rules violate the right of access, which requires "ongoing access to comprehensive information about what takes place in judicial proceedings, especially those criminal proceedings that may lead to deprivation of liberty." Dissent 40-41.

ARGUMENT

I. The panel decision conflicts with Third Circuit precedent.

A. The majority's decision conflicts with *Whiteland Woods*.

The Supreme Court has long recognized that the First Amendment protects the public's "right of access to criminal proceedings." *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8-10 (1986). That right plays a vital role in our judicial system. Among its other virtues, "public access to criminal proceedings gives 'the assurance that the proceedings were conducted fairly to all concerned' and promotes the public 'perception of fairness.'" *United States v. Criden*, 675 F.2d 550, 556 (3d Cir. 1982) (citation omitted). Public access also "serves as a check on corrupt practices by

[1] While this appeal was pending, the Municipal Court began making bail-hearing transcripts available to the public.

exposing the judicial process to public scrutiny, thus discouraging decisions based on secret bias or partiality." *Id.* (citation omitted). And, just as importantly, public access "has a 'significant community therapeutic value' because it provides an 'outlet for community concern, hostility, and emotion.'" *Id.* (citation omitted).

These principles formed the foundation for this Court's decision in *Whiteland Woods v. Township of West Whiteland*, 193 F.3d 177 (3d Cir. 1999)—a decision squarely at odds with the panel's decision in this case. *Whiteland Woods* established a clear test for determining when a restriction on recording public proceedings violates the First Amendment. Under that test, the "critical question" 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." *Id.* at 183. The touchstone in applying that test is whether the restriction prevents the public from compiling a "comprehensive record" of the proceeding. *Id.* at 183.

Whiteland Woods involved a real-estate developer's challenge to a ban on videotaping local planning-commission meetings (which, like criminal proceedings, are subject to the First Amendment right of access). 193 F.3d at 178-79. To assess the validity of the videotaping ban, this Court focused on whether the public had "other effective means of recording the proceedings." *Id.* at 180. The Court ultimately upheld the ban because the public had "alternative means of compiling a comprehensive record"—specifically, "[s]pectators were free to take notes, use audio

recording devices, or even employ stenographic recording." *Id.* at 183. In short, the decision turned on the fact that the public was able "to compile an accurate record of the proceeding" without videotaping. *Id.*; *see also id.* at 184 (emphasizing the public's ability "to compile a full record of the proceedings, whether by written and stenographic notes or audiotaping"). As the Court put it, "[n]othing in the record suggest[ed] videotaping would have provided a uniquely valuable source of information about [the commission's] meetings." *Id.* at 183.

The panel's decision in this case renders the *Whiteland Woods* standard meaningless. Critically, the panel majority does not deny that the challenged rules preclude the public from obtaining a "comprehensive record" of bail hearings or deprive the public of "a uniquely valuable source of information" about the proceedings. 193 F.3d at 183-84. Nor could the majority deny that reality: the undisputed evidence establishes that it is impossible to compile a verbatim record of the proceedings through handwritten notes alone. Joint Appendix (JA) 123.[2] And the record likewise establishes that, by foreclosing the creation of any verbatim record, the challenged rules prevent key aspects of the hearings—including the prosecutor's initial bail request, the defender's response, and the magistrate's reasoning—from ever being memorialized. JA 124. As the dissent cogently explains, these undisputed facts yield only one conclusion under *Whiteland Woods*: that the challenged rules

[2] *See also* Cato Institute Amicus Br. 10 (describing the impossibility of transcribing Philadelphia bail hearings by hand, based on firsthand experience).

"meaningfully interfere with the right of access to bail hearings." Dissent 30; *see also id.* at 3, 9-10, 20-23. The majority's attempt to evade that conclusion not only injects confusion into this Court's right-of-access jurisprudence, but also renders hollow that important First Amendment right.

B. The majority's effort to distinguish *Whiteland Woods* is unpersuasive.

The panel majority attempts to reconcile its decision with *Whiteland Woods* in two ways. First, it asserts that the public's lack of access to a verbatim record does not "meaningfully interfere with the public's ability to inform itself" about bail hearings because observers can take notes and access public court records. Maj. Op. 12-13. Second, it asserts that *Whiteland Woods*'s "comprehensive record" mandate does not require access to a "verbatim" record. *Id.* at 13. Neither rationale withstands scrutiny.

1. The majority's application of the "meaningful interference" test ignores two undisputed facts: (1) it is impossible to document all of the magistrates' statements or parties' arguments by hand; and (2) those statements and arguments, all of which are made orally, are never preserved in any public records. The majority's attempt to downplay the importance of this information is contradicted by the record. Indeed, the Municipal Court itself recognizes the importance of that information: that's why it audio-records all of the hearings to monitor the magistrates' performance. JA 116. And the challenged rules likewise recognize the importance of

that information: that's why they expressly permit the parties to record the hearings for litigation purposes. *See* Pa. R. Crim. P. 112(D). The majority never explains how verbatim accounts of bail hearings can be so important to both the court and the litigants but not to the citizens who seek to oversee their work.

Nor does the majority acknowledge the concrete impact that preserving this information would have on public discourse. To take one example: some local officials have "disputed the Bail Fund's characterization of the amounts and stated rationales for prosecutors' requests for cash bail" and "questioned the frequency with which [public defenders] advocated for their clients" during bail hearings. *See* JA 123. These types of disputes cannot be resolved without verbatim accounts of the hearings.[3] Although the majority suggests that the public can glean "a mass of information" from court records, Maj. Op. 10, none of those records captures *why* a magistrate issued a particular decision or what was argued in court. Moreover, the Municipal Court retains unfettered discretion to decide what information (if any) to include in the records: indeed, under the majority's own logic, the Municipal Court could stop creating records altogether without offending the First Amendment.

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[3] Similar disputes have arisen elsewhere between Pennsylvania officials and bail-reform advocates. *See* Paula Reed Ward, *ACLU of Pa. Report Slams Use of Cash Bail in Allegheny County*, Pitt. Post-Gazette (Oct. 24, 2019), https://perma.cc/F8BJ-YW32 (quoting District-Attorney press release accusing advocates of "misrepresent[ing] the bail processes in Allegheny County").

2. The majority's attempt to differentiate between a "comprehensive record" and a "verbatim record" is similarly untenable, particularly in the bail-hearing context. Again, the lack of verbatim bail-hearing records undermines the public's ability to comprehend Philadelphia's bail process and serve as a check on the officials involved. And, even outside the bail-hearing context, numerous courts—including this one—have recognized the vast gulf between a verbatim record and a non-verbatim record. *See, e.g.*, *Gardner v. California*, 393 U.S. 367, 369 (1969) ("Certainly a lawyer, accustomed to precise points of law and nuances in testimony, would be lost without such a transcript[.]"); *United States v. Martin*, 746 F.2d 964, 968 (3d Cir. 1984) ("Although representatives of the media were present at the trial and were able to take notes on the recorded conversations as they were played to the jury, this procedure has obvious limitations. The public interest can best be vindicated by the release of complete and accurate transcriptions.").[4] Indeed, the panel's actions here underscore the value of a verbatim record: two days after oral argument, the panel directed the parties to prepare an argument transcript to assist it in resolving this very appeal. *See* Docket No. 41.

The majority relies on two out-of-circuit decisions to explain why it reads *Whiteland Woods*'s repeated references to a "comprehensive," "accurate," and "full" record to mean something other than a verbatim record. But neither of those cases

[4] Appellate courts uniformly require litigants to submit transcripts of lower-court proceedings. *See, e.g.*, Fed. R. App. P. 10(b).

involved adjudicative proceedings, let alone proceedings to which the right of access attaches. The Fifth Circuit's decision in *Garrett v. Estelle*, 556 F.2d 1274 (5th Cir. 1977), upheld a prohibition on filming executions, which were never open to the public in the first place. And the Tenth Circuit's decision in *Combined Communications Corp. v. Finesilver*, 672 F.2d 818 (10th Cir. 1982), upheld a ban on televising settlement negotiations in a civil case. Neither executions nor settlement negotiations involve judges weighing arguments or issuing decisions, so the lack of a verbatim record is less consequential than it is in the bail-hearing context. More to the point, neither decision actually upheld any restrictions on access to verbatim records—they simply rejected the media's efforts to *televise* certain events.[5]

The majority also attempts to write off *Whiteland Woods*'s "comprehensive record" requirement as dicta.[6] But that language was hardly dicta; rather, it supplied the Court's entire ratio decidendi. Indeed, if the right of access did not actually encompass the ability to compile a comprehensive record, then the question in *Whiteland Woods* could have been resolved on that basis alone, in a single sentence. Instead, this Court anchored its decision in the availability of "other effective means

[5] Notably, the majority's discussion of *Garrett* and *Finesilver* fails to mention the third case that *Whiteland Woods* included in the same string-cite: *Johnson v. Adams*, 629 F. Supp. 1563, 1564-65 (E.D. Tex. 1986), which rejected a ban on filming local-government meetings precisely *because* audio-recording was permitted.

[6] The majority never addresses *Whiteland Woods*'s use of similar terms like "accurate record" and "full record."

of recording the proceedings." 193 F.3d at 180. The Court's opinion would make little sense if it were divorced from its central premise: that the government cannot preclude the public from obtaining a comprehensive record of an open proceeding. In erasing that premise from the opinion, the majority razes *Whiteland Woods*'s guideposts for deciding when the government meaningfully interferes with the public's ability to inform itself of a proceeding.

C. The majority's reasoning conflicts with the reasoning of this Court's other right-of-access precedents.

The majority's decision breaks from circuit precedent in other ways, as well. Most notably, it conflicts with this Court's decision in *United States v. Antar*, 38 F.3d 1348 (3d Cir. 1994). There, the Court reversed an order sealing a transcript of voir dire proceedings, explaining that "[a]ccess to the documentation of an open proceeding . . . facilitates the openness of the proceeding itself by assuring the broadest dissemination." *Id.* at 1360. As the Court reasoned: "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.*

Antar plainly refutes the majority's view that the First Amendment requires only that bail hearings be open to the public. *See also* 38 F.3d at 1360 ("[T]he Court never has suggested that an open proceeding is only open to those who are able to be bodily present in the courtroom itself."). Although the majority reads *Antar* to stand

for the narrow proposition that the right of access to a verbatim record exists only where the court itself has created such a record, that reading contravenes *Antar*'s basic logic: specifically, that "*openness* is ongoing" and that "[t]rue public access to a proceeding means access to knowledge of what occurred there." *Id.*; *see also* Dissent 26.

Indeed, under the majority's reading of *Antar*, the district judge in that case could have avoided any First Amendment problem if, instead of sealing the voir dire transcript, he simply directed the court reporter to stop transcribing voir dire altogether. It is not clear why the First Amendment—which aims to promote "access to *information*"—would preclude judges from restricting access to a verbatim record by sealing it (after the fact), but allow judges to accomplish the same thing by actively blocking the creation of the record (preemptively). 38 F.3d at 1360. Yet, under the majority's logic, the latter is a constitutionally permissible "policy" choice.

Finally, the majority disregards existing precedent by suggesting that the Bail Fund's past success in disseminating information about bail hearings somehow undermines its right-of-access claim. *See* Maj. Op. 12. Simply put, the public's ability to access *some* information about government proceedings does not foreclose its right to any *other* information. If that were the case, then the public's ability to observe the voir dire proceedings in *Antar* would have foreclosed its right to obtain transcripts of those proceedings. Similarly, the public's ability to observe police activity that occurs in public would have foreclosed its right to record that activity, which this Court

recognized in *Fields v. City of Philadelphia*, 862 F.3d 353, 356 (3d Cir. 2017) ("[T]he First Amendment protects the act of photographing, filming, or otherwise recording police officers conducting their official duties in public."). These and other cases have all rejected the majority's reasoning.

II. The panel majority curtails First Amendment rights without any governmental justification.

The majority's decision disregards another core First Amendment principle: that the government cannot restrict First Amendment activity absent some reasonable justification. *Cf. Pomicter v. Luzerne Cty. Convention Ctr. Auth.*, 939 F.3d 534, 541-42 (3d Cir. 2019) (explaining that, even in non-public forums, the government must provide reasonable, evidence-backed justifications for restricting protected activity). The act of documenting government officials performing their duties in public is squarely protected by the First Amendment. *See, e.g.*, *Fields*, 862 F.3d at 356. As such, that activity cannot be restricted—even inside the courtroom—absent some governmental justification. *See, e.g.*, *United States v. CBS*, 497 F.2d 102, 107 (5th Cir. 1974) (invalidating "a sweeping prohibition of in-court sketching"); *Goldschmidt v. Coco*, 413 F. Supp. 2d 949, 952 (N.D. Ill. 2006) ("A sweeping prohibition of all note-taking by any outside party seems unlikely to withstand a challenge under the First Amendment."); *see also United States v. Cabra*, 622 F.2d 182, 184-85 (5th Cir. 1980) (holding that district court abused its discretion in barring note-taking without evidence of disruption).

Yet, the majority here never identifies—much less analyzes—a single justification for the challenged rules, despite ample briefing on the issue. And, as the dissent and the District Court both noted, the magistrates likewise failed to identify any valid grounds for banning audio-recording (which the magistrates acknowledged was non-disruptive) during bail hearings. Dissent 30-35. The absence of any such justification in the majority's opinion, thus, further highlights how far its ruling departs from established First Amendment doctrine.

III. This appeal presents a question of exceptional importance.

Beyond the majority's break from precedent, its decision also undermines public discourse about a critically important issue. As Judge Chagares has observed, "the problem of individuals posing little flight or public safety risk, who are detained in jail because they cannot afford the bail set for criminal charges that are often minor in nature" has "become a threat to equal justice under the law." *Curry v. Yachera*, 835 F.3d 373, 376 (3d Cir. 2016). Although "bail reform efforts [are] under way" in some jurisdictions, *id.* at 377, those efforts depend on citizens' ability to access accurate information about their local bail systems. *See Lee v. Minner*, 458 F.3d 194, 200 (3d Cir. 2006) ("Effective advocacy and participation in the political process . . . require access to information."), *abrogated on other grounds by McBurney v. Young*, 569 U.S. 221 (2013). After all, "information is the wellspring of our debates; if the latter are to be 'uninhibited, robust, and wide-open,' the more credible the information the more credible are the debates." *Fields*, 862 F.3d at 359 (citation omitted).

The national discourse concerning bail policy informs broader public debates about the criminal-justice system. Recent research on bail, for instance, has shown that the initial bail determination often affects a defendant's plea-bargaining choices. *See Curry*, 835 F.3d at 376 (citing studies and noting that "those unable to pay who remain in jail . . . are often forced to accept a plea deal to leave the jail environment and be freed"). Bail hearings also represent one of the few public-facing stages of the adjudicatory process, particularly given how many cases end in plea bargains. *See Criden,* 675 F.2d at 557 (explaining that public access to pretrial proceedings is "vital" because "most criminal prosecutions consist solely of pretrial procedures"). The ability to document and disseminate information about what happens during bail hearings is therefore critical in shaping public understanding of and confidence in the justice system. *See, e.g.*, *In re Globe Newspaper Co.*, 729 F.2d 47, 52 (1st Cir. 1984) ("[T]he bail decision is one of major importance to the administration of justice, and openness will help to assure the public that the decision is properly reached.").

Furthermore, preserving that information is important not just at a macro level, but also at the individual level. Most crime victims, for example, cannot attend bail hearings in their cases because arrestees are arraigned quickly and without advance notice to the public. Arrestees' families are similarly situated. All of these individuals must therefore rely on after-the-fact accounts to learn what happened at the hearings—an information channel that, under the majority's decision, the government may freely suppress. The majority's endorsement of such expansive state authority

cannot be squared with basic First Amendment principles. *See, e.g.*, *Fields*, 862 F.3d at 359 (explaining that the First Amendment "prohibit[s] government from limiting the stock of information from which members of the public may draw" (citation omitted)).

CONCLUSION

For the foregoing reasons, the Court should grant rehearing en banc.

Respectfully submitted,

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November 12, 2020

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COMBINED CERTIFICATIONS

I hereby certify the following:

1. At least one of the attorneys whose names appear on this brief is a member of the bar of this Court.

2. This brief complies with the type-volume requirements of Federal Rule of Appellate Procedure 35(b)(2) because the brief contains 3,898 words. The brief also complies with the typeface requirements of Rule 32(a) because it was prepared in 14-point Garamond font, a proportionally spaced typeface, using Microsoft Word.

3. On November 12, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

4. Pursuant to Local Rule 35.2(a), no paper copies of this brief will be provided unless directed by the Clerk.

5. This document was scanned for viruses using Windows Defender Antivirus, Version 1.327.797.0, and no virus was detected.

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