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

MERRY REED, et al.	:	
Plaintiffs,	:	CIVIL ACTION
	:	
v.	:	
	:	No. 19-3110
ARRAIGNMENT COURT MAGISTRATE JUDGE FRANCIS BERNARD, et al.,	:	
	:	
Defendants	:	

JUDICIAL DEFENDANTS' REPLY IN FURTHER SUPPORT OF THEIR MOTION TO DISMISS

I) INTRODUCTION

On October 16, 2019, Plaintiffs filed their Consolidated Brief in Opposition to Defendants' Motions to Dismiss. In the interest of brevity, Arraignment Court Magistrate Judges Francis Bernard, Sheila Bedford, Kevin Devlin, James O'Brien, Jane Rice, and Robert Stack, along with President Judge Patrick Dugan (collectively "Judicial Defendants"), now re-incorporate the arguments and authorities set forth in their initial Brief in support of their Motion to Dismiss, but file this Reply to briefly address various arguments Plaintiffs raise in their Consolidated Brief.

II) ARGUMENT

A) *Fields v. City of Philadelphia* is inapplicable to the instant case.

Perhaps because Plaintiffs recognize that case law uniformly holds that there is no First Amendment right to make recordings of court proceedings, they attempt

to equate filming police activity in public spaces with being able to record courtroom proceedings. This equation does not add up.

As set forth more fully in Judicial Defendants' initial Brief, the Supreme Court, along with numerous circuit and district courts across the country, have held that there is no First Amendment right to record judicial proceedings. Judicial Defendants' Initial Brief at 6-10. In an attempt to maneuver around this established precedent, Plaintiffs cite a variety of cases that have held that the public has a First Amendment right to record law enforcement officers in the discharge of their duties in public spaces, including the Third Circuit case *Fields v. City of Philadelphia*, 862 F.3d 353 (3d Cir. 2017). Plaintiffs' Response, p. 4. They then argue that because bail hearings involve government officials performing their duties in a public place, *Fields* and similar cases should apply in the context of judicial proceedings. Plaintiffs' Response, p. 7.

The problem with Plaintiffs' approach is that it ignores the important distinctions between different forums. In determining whether the First Amendment protects particular speech on a government property, the court must first examine the nature of the forum in which the speech is restricted, i.e., whether the forum is public or nonpublic. *See Huminski v. Corsones*, 396 F.3d 53, 89 (2d Cir. 2004). The cases to which Plaintiffs cite all involved individuals who filmed police officers performing their duties in public forums. *See e.g. Fields, supra* (plaintiffs filmed police action outside Philadelphia Convention Center and on a public sidewalk); *Glik v. Cunniffe*, 665 F.3d 78, 84 (1st Cir. 2011) ("Glik filmed the

defendant police officers in the Boston Common, the oldest city park in the United States and the apotheosis of a public forum."); *Turner v. Driver*, 848 F.3d 678 (5th Cir. 2017) (plaintiff filmed police activity from a public sidewalk); *Robinson v. Fetterman*, 378 F. Supp. 2d 534 (E.D. Pa. 2005) (plaintiff filmed police officers on public highway). The cases Plaintiffs cite note that it is well-settled that the "government's ability to regulate speech in a traditional public forum, such as a street, sidewalk, or park, is 'sharply circumscribed.'" *Askins v. Dep't of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018) (citing *Perry v. Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)); *see also Glik*, 665 F.3d at 84 ("In such traditional public spaces, the rights of the state to limit the exercise of First Amendment activity are 'sharply circumscribed.'").

In contrast, every Circuit Court to have addressed the issue to date has agreed that a courtroom is a *nonpublic* forum. *See Huminski*, *supra*; *Mezibov v. Allen*, 411 F.3d 712 (6th Cir. 2005); *Berner v. Delahanty*, 129 F.3d 20 (1st Cir. 1997); *United States v. Gilbert*, 920 F.2d 878 (11th Cir. 1991). Because courtrooms are considered nonpublic forums, "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, supra*); *see also Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1071 (1991) ("[i]t is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed").

Because the protected activity in *Fields* and other police recording cases occurred in forums markedly different from a courtroom, those cases are not applicable to this matter. In an effort to avoid this fact, Plaintiffs cite to the U.S. Supreme Court case *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 578 (1980), in which the Court stated that the courtroom is a "*public place* where the people generally - and representatives of the media - have a right to be present." Plaintiff's Response, p. 7 (emphasis added). Because the Supreme Court has stated that the courtroom is a "public place," Plaintiffs assert that there is no distinction between the courtroom and the public spaces at issue in *Fields*.

The District Court for the Eastern District of Michigan, when faced with a challenge to Federal Rule of Civil Procedure 53, succinctly explained why this reasoning is flawed. *See McKay v. Federspeil*, 22 F. Supp. 3d 731 (E.D. Mich. 2014). In *McKay*, the plaintiff raised the same argument that Plaintiffs attempt to raise here - that because there is a First Amendment right to record government officials in public places, he had a First Amendment right to record courtroom proceedings. The Court in *McKay* rejected this argument. First, it noted that *Richmond Newspapers*, upon which Plaintiffs rely, was decided one year before *Chandler v. Florida*, 449 U.S. 560 (1981), in which the Supreme Court specifically rejected the argument that the First Amendment mandated entry of electronic media into judicial proceedings. *McKay*, 22 F. Supp. 3d at 735. Second, it noted that the *Richmond Newspapers* dealt with a judge's decision to physically close off the courtroom to members of the public and the press. *Id*. Because an electronics ban

does not prevent attendance at judicial proceedings, the Court found that *Richmond Newspapers* had no bearing on the issue of Rule 53's constitutionality. Instead, it flatly rejected the plaintiff's reliance on the line of cases dealing with recording of law enforcement officials in public, stating:

> "[Plaintiff] also relies on several cases from neighboring circuits, which he alleges have held that a person has "the right to record as a First Amendment protected activity . . . ." Reconsideration 3 (citing *Smith v. Cumming*, 212 F.3d 1332 (11th Cir. 2000), *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995), *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011), and *American Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 586-87 (7th Cir. 2012)). However, to the extent that these cited cases held that there is a First Amendment right to record, these cases dealt only with recording public officials *outside* the courtroom. ***Not a single cited case has held that there is a First Amendment right to record within the courtroom—nor could it, without violating Supreme Court precedent."***

Id. at 735 n. 2 (emphasis added).

The analysis in *McKay* is directly applicable here. Plaintiffs' only authority for their position are cases that involved law enforcement officials acting outside the courtroom. These cases cannot be applied in the present matter without violating Supreme Court precedent and the case law consistently holding that there is no right to record within the courtroom. *See Chandler, supra; Nixon, supra*. What is more, Plaintiff's argument ignores the difference between a public street and a courtroom.

B) Technological advances are insufficient to create a nonexistent right.

Plaintiffs also attack Judicial Defendants' justifications for implementing the recording ban, namely, protecting defendants' privacy rights and safeguarding the integrity of the system. *See* Judicial Defendants' Brief, pp. 13-15. They argue that Judicial Defendants' concerns are overblown, since it is unlikely that a significant amount of prejudicial information will come out during bail hearings, and since voir dire is sufficient to address whatever prejudice remains. *See* Plaintiffs' Response, pp. 10-12. They further argue that by banning recording devices in the courtroom, Judicial Defendants have left spectators "with few viable options for communicating the same information as effectively or widely." Plaintiffs' Response, p. 13.

Setting aside that other courts have rejected these arguments, while these public policy issues may be properly presented to the Pennsylvania Supreme Court Rules Committee, they are insufficient to create a substantive constitutional right that does not exist. *See McKay*, 22 F. Supp. 3d at 734 ("McKay contends that, with recent technological advancements, this Court should ignore the Supreme Court's pronouncement in *Chandler* and find that an individual does have a First Amendment right to electronic media in the courtroom. But this Court is bound by the Supreme Court's holding in *Chandler* pursuant to the doctrine of stare decisis…This Court may not disregard the Supreme Court's express conclusion that there is no First Amendment right to record courtroom events.") (internal citations omitted).

The Pennsylvania Supreme Court has made a policy determination that recording devices should be banned in the courtroom, as is its sole right in administering the Pennsylvania court system. *See Combined Communications Corp. v. Finesilver*, 672 F.2d 818 (10th Cir. 1982) (upholding local rule banning recording devices, and holding "[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").[1]

Plaintiffs believe that there are policy reasons that favor recording court proceedings, and that the risks of prejudice is "extremely low." But policy reasons do not mandate the creation of a new First Amendment right here. *See United States v. Moussaoui*, 205 F.R.D. 183, 185 (E.D. Va. 2002)(holding that policy issues about whether to allow recording are up to the legislature and court committees, and are not properly addressed as constitutional issues). Plaintiffs' present arguments are better directed to the entity responsible for administering the court system – the Supreme Court of Pennsylvania – to weigh in its rule-making authority.

C) The fact that bail hearings are not "of record" is irrelevant.

Finally, Plaintiffs argue that the litany of cases cited by Defendants holding that there is no First Amendment right to record do not include any cases

[1] Plaintiffs argue that only televised recordings are not entitled to First Amendment protection. But – as Judicial Defendants cited in their Initial Brief – there are numerous cases upholding bans on audio recordings. (Judicial Defendants' Initial Brief at 8-10.)

addressing the right to record proceedings that are not of record, such as Philadelphia's bail hearings. Plaintiffs' Response, p. 18. As set forth in Judicial Defendants' initial Brief, there is no constitutional right to record to begin with; the right to attend and report is sufficient. *See Chandler*, 449 U.S. at 569 (quoting *Nixon*, 435 U.S. at 610) (the requirement of public proceedings is satisfied by the public's opportunity "to attend the trial and report what they have observed"); *see also United States v. Beckham*, 789 F.2d 401 (6th Cir. 1986) ("No fundamental right is implicated as long as there is full access to the information and full freedom to publish."). Thus, whether there are official transcripts of the bail hearings is of no moment.

Moreover, none of these cases Defendants cite rely on the availability of transcripts as a basis for the contention that there is no First Amendment right to record. The right to record does not exist, whether a transcript is produced or not.[2] Thus, the fact that bail hearings are not "of record" does not lend support to Plaintiffs' position.

---

[2] Plaintiffs cite *United States v. Antar*, 38 F.3d 1348 (3d Cir. 1994), for the proposition that the public's right of access "encompasses not just access to a live proceedings but also access to the documentation of an open proceeding." Plaintiffs' Response, p. 22 (internal quotations omitted). In *Antar*, the question was whether plaintiffs had a right to access the court's official transcripts of judicial proceedings. It did not address whether private plaintiffs have a right to *create* documentation of a judicial proceeding, and thus, is inapplicable here. In addition, there are documents filed of record arising from the arraignment, including bail information and complaints, which are publically available.

III) CONCLUSION

Based on the foregoing arguments and authorities, along with those set forth in Judicial Defendants' initial Motion to Dismiss and Brief in Support, Judicial Defendants respectfully request that this Court dismiss this matter, with prejudice.

Respectfully Submitted,

s/Megan L. Davis
MICHAEL DALEY, ESQUIRE
Attorney I.D. No. PA77212
MEGAN L. DAVIS, ESQUIRE
Attorney I.D. No. PA321341
Administrative Office of PA Courts
1515 Market Street, Suite 1414
Philadelphia, PA 19102
legaldepartment@pacourts.us
(215) 560-6300, Fax: (215) 560-5486

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

MERRY REED, et al.	:	
Plaintiffs,	:	CIVIL ACTION
	:	
v.	:	
	:	No. 19-3110
ARRAIGNMENT COURT MAGISTRATE JUDGE FRANCIS BERNARD, et al.,	:	
	:	
Defendants	:	

Certificate of Service

The undersigned certifies that on October 23, 2019, she caused the foregoing *Reply in Further Support of Motion to Dismiss* to be served via CM/ECF to all counsel of record.

Respectfully Submitted,

s/Megan L. Davis

MICHAEL DALEY, ESQUIRE
Attorney I.D. No. PA77212
MEGAN L. DAVIS, ESQUIRE
Attorney I.D. No. PA321341
Administrative Office of PA Courts
1515 Market Street, Suite 1414
Philadelphia, PA 19102
legaldepartment@pacourts.us
(215) 560-6300, Fax: (215) 560-5486