UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

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**MERRY REED; PHILADELPHIA BAIL FUND,**

*Plaintiffs*,

**v.**

**ARRAIGNMENT COURT MAGISTRATE JUDGES FRANCIS BERNARD, SHEILA BEDFORD, KEVIN DEVLIN, JAMES O'BRIEN, JANE RICE, and ROBERT STACK, in their official capacities; PRESIDENT JUDGE PATRICK DUGAN, in his official capacity; SHERIFF JEWELL WILLIAMS, in his official capacity,**

*Defendants*.

Civil Action No. 2:19-3110

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# PLAINTIFFS' CONSOLIDATED BRIEF IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

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## INTRODUCTION

Over the past several years, Philadelphia's citizens, media, and elected officials have engaged in an ongoing public discussion about the fairness of the City's criminal justice system. One of the focal points of that discussion is the City's process for determining whether someone accused of a crime will spend the ensuing days, weeks, or months awaiting trial at home or in jail. That process comes to a head dozens of times each day inside a courtroom in the basement of Philadelphia's Criminal Justice Center. There, a group of magistrate judges, prosecutors, and public defenders hold round-the-clock hearings to set bail for recent arrestees and, ultimately, decide who goes home and who gets held.

This case is about the public's ability to document what happens at those hearings, which occur entirely off the record. No court reporter is present during the hearings and no transcripts or recordings are ever made available to the public. What's more, observers are prohibited from making any "stenographic, mechanical, [or] electronic recording[s]" of the hearings on their own. As a result, public discourse surrounding the City's bail process often rests on an incomplete picture of how that process—and the officials who implement it—actually work.

Plaintiffs Merry Reed and the Philadelphia Bail Fund seek to fill that gap. Specifically, they seek to create and disseminate audio recordings of bail hearings in order to show people, in the most objective light possible, exactly what transpires during those proceedings. They hope to use the recordings to capture and report on, among other details, the arguments that prosecutors raise, how public defenders respond to those arguments, and what considerations bail magistrates find most salient—information that has, thus far, been absent from the public debate. Plaintiffs bring this action under the First Amendment to challenge the court rules that prohibit them from audio-recording bail hearings in the Criminal Justice Center.

Defendants attempt to defend the recording ban by overstating the scope of Plaintiffs' claims. Contrary to those characterizations, Plaintiffs are not asserting an unfettered right to record all judicial proceedings of any kind. Nor are they asserting a right to film or live-stream any proceedings. Rather, Plaintiffs are asserting a right to audio-record the public activities of government officials in a very specific context: Philadelphia's off-the-record bail hearings. Defendants have not identified any cogent rationale for banning audio-recording during those hearings, which involve no jurors, witnesses, or sensitive evidentiary presentations. As explained below, the sole justification that Defendants have offered for the ban—protecting the privacy interests and fair-trial rights of arrestees—cannot bear the weight they seek to place upon it. Nor can the various cases they cite in defense of the ban, all of which address claims significantly broader than those asserted here. This Court should therefore deny both motions to dismiss.

## BACKGROUND

Plaintiffs Merry Reed and the Philadelphia Bail Fund are a journalist and nonprofit organization who seek to contribute to the ongoing public discourse surrounding Philadelphia's bail system. Compl. ¶ 5. Ms. Reed is a reporter and the managing editor of *The Declaration*, an online news outlet that covers Philadelphia politics, culture, and activism. *Id.* ¶ 8. Her reporting focuses on criminal justice issues and she is actively investigating Philadelphia's bail system. *Id.* ¶¶ 8, 42. The Philadelphia Bail Fund is a nonprofit whose mission is to ensure that no one is jailed simply because they are too poor to pay cash bail. *Id.* ¶ 9. Among its other work, the Bail Fund dispatches volunteers to observe bail hearings and collect information about the bail system that the organization incorporates into its reports and public messaging. *Id.* ¶¶ 9, 46.

In June 2019, Plaintiffs sought permission from the Defendant Arraignment Court Magistrates (the "bail magistrates" who preside over bail hearings) to bring silent, handheld recording devices into the Criminal Justice Center, so that they could audio-record the hearings. Compl. ¶¶ 38-39. In their requests, Plaintiffs noted that they would allow courthouse-security officials to inspect the devices—which would not have cellular capabilities—before they began using them. *Id.* ¶¶ 38-39, 44, 52. Nevertheless, Defendant President Judge Patrick Dugan denied both requests. *Id.* ¶¶ 38-39. Plaintiffs filed this suit the following month.

As set forth in their complaint, Plaintiffs challenge the court rules that bar the public from creating and disseminating audio recordings of Philadelphia bail hearings. *See* Compl. ¶¶ 40-41. Each of the challenged rules—Pennsylvania Rule of Criminal Procedure 112(C), Pennsylvania Rule of Judicial Administration 1910, and Local Arraignment Court Magistrate Rule 7.09—independently prohibits electronic recording of criminal proceedings, including bail hearings. *Id.* ¶¶ 25-27, 40. People who violate the recording ban may be held in contempt. *Id.* Plaintiffs seek a declaratory judgment that the recording ban violates the First Amendment by preventing them from audio-recording bail hearings in Philadelphia. *Id.* ¶¶ 53-56.

## ARGUMENT

### I. Plaintiffs have a First Amendment right to audio-record prosecutors and bail magistrates performing their duties during bail hearings held in open court.

#### A. The First Amendment protects the right to record government officials performing their duties in public view.

The Supreme Court has long recognized that one of the First Amendment's core functions is to "protect[ ] the paramount public interest in a free flow of information to the people concerning public officials." *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964) (vacating the conviction of a defendant found guilty of criminal libel for publicly criticizing local judges).

Consistent with that principle, federal appellate courts have uniformly held that the "First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest." *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000); *see also Glik v. Cunniffe*, 655 F.3d 78, 85 (1st Cir. 2011) ("[A] citizen's right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment.").[1]

The Third Circuit recently joined "this growing consensus" with its decision in *Fields v. City of Philadelphia*, 862 F.3d 353, 356 (3d Cir. 2017). The plaintiffs in *Fields* alleged that the police had infringed their First Amendment rights by preventing them from filming police officers conducting law-enforcement work in public view. The district court granted summary judgment to the police, but the Third Circuit reversed, holding that "the First Amendment protects the act of photographing, filming, or otherwise recording police officers conducting their official duties in public." *Id.*

Like every other court to confront this issue, the Third Circuit determined that the right to record the government's public conduct fell at the intersection of several established First

[1] *See also Askins v. Dep't of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018) ("The First Amendment protects the right to photograph and record matters of public interest. This includes the right to record law enforcement officers engaged in the exercise of their official duties in public places." (citations omitted)); *Turner v. Driver*, 848 F.3d 678, 688 (5th Cir. 2017) ("We conclude that First Amendment principles, controlling authority, and persuasive precedent demonstrate that a First Amendment right to record the police does exist."); *ACLU v. Alvarez*, 679 F.3d 583, 608 (7th Cir. 2012) (preliminarily enjoining enforcement of a criminal eavesdropping statute against people "who openly audio record the audible communications of law-enforcement officers"). Numerous state courts and federal district courts—including this Court—have likewise held that citizens have a right to unobtrusively record government officials' public conduct. *See, e.g.*, *Robinson v. Fetterman*, 378 F. Supp. 2d 534, 541 (E.D. Pa. 2005) ("[T]here can be no doubt that the free speech clause of the Constitution protected Robinson as he videotaped [state troopers on a public highway].").

Amendment protections. In particular, the court held that protecting the public's ability to record their officials' public activities was necessary to ensure the public's right to speak and disseminate information about public affairs. As the court explained, "[t]here is no practical difference between allowing police to prevent people from taking recordings and actually banning the possession or distribution of them." *Fields*, 862 F.3d at 358; *see also, e.g.*, *Alvarez*, 679 F.3d at 595 ("The act of *making* an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording.").

At the same time, *Fields* recognized that the right to record government conduct was also rooted in the "the public's right of access to information about their officials' public activities." 862 F.3d at 359. The court reasoned that protecting the public's ability to record these activities is "particularly important because it leads to citizen discourse on public issues, 'the highest rung of the hierarchy of First Amendment values.'" *Id.* (citation omitted). The court also cited the unique role that citizen recordings, in particular, often play in "facilitat[ing] discussion" on public issues. *Id.* It highlighted "the ease in which [such recordings] can be widely distributed via different forms of media" and stressed how the recordings "lay[ ] aside subjective impressions for objective facts." *Id.* at 359; *see also id.* (noting that "information is the wellspring of our debates" and that "the more credible the information the more credible are the debates").

Finally, *Fields* recognized that the act of recording government officials' public conduct serves an independent interest in improving government behavior. 862 F.3d at 360 ("[J]ust the act of recording, regardless what is recorded, may improve policing."). That observation accords with the reasoning other courts have invoked in recognizing a right to record public officials.

*See, e.g.*, *Glik*, 655 F.3d at 82-83 (citations omitted) ("Ensuring the public's right to gather information about their officials not only aids in the uncovering of abuses, but also may have a salutary effect on the functioning of government more generally." (citations omitted)). As the Supreme Court has recognized, these benefits are not merely incidental to First Amendment concerns; rather, they underscore why the Amendment is so protective of the public's ability to oversee its government. *See, e.g.*, *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986) (noting that "many governmental processes operate best under public scrutiny").

As discussed further below, *Fields* acknowledged that the right to record public officials is "not absolute" and remains "subject to reasonable time, place, and manner restrictions." 862 F.3d at 360; *see infra* Part I.C. It made clear, however, that "in public places these restrictions are restrained." *Id.* (citation omitted).

**B. The right to record government officials' public conduct does not vanish inside the courtroom.**

*Fields*'s logic is instructive here. As noted above, Plaintiffs seek to audio-record prosecutors and magistrates performing their duties in open court so that they may disseminate those recordings publicly. These recordings, like the recordings at issue in *Fields*, would serve to document the public conduct of government officials in a format that "lays aside subjective impressions for objective facts" and "can be widely distributed via different forms of media." 862 F.3d at 359. Moreover, just like in *Fields*, the recordings would meaningfully contribute to "citizen discourse on public issues" by shedding new light on a key facet of Philadelphia's criminal justice system. *Id.* In fact, in many instances, Plaintiffs' recordings would represent the *only* public record of what prosecutors and magistrates actually said during an arrestee's first court appearance.

*Fields* makes clear that Plaintiffs have a strong First Amendment interest in creating, disseminating, and commenting on these recordings. *See* 862 F.3d at 358 ("The First Amendment protects actual photos, videos, and recordings and for this protection to have meaning the Amendment must also protect the act of creating that material." (citation omitted)). And it likewise makes clear that the public has a strong First Amendment interest in hearing those recordings and discussing their contents. *See id.* at 359 (noting that the First Amendment "goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw" (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978))).

*Fields* focused on how these interests applied to recordings of police activity in "public places," 862 F.3d at 358, but the court's reasoning applies with equal force to recordings of prosecutors and magistrates performing their duties in open court. The courtroom, after all, "is a public place where the people generally—and representatives of the media—have a right to be present." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 578 (1980). The courtroom is also the only place where the public can observe prosecutors and magistrates interacting directly with criminal defendants, law-enforcement officials, and one another. Longstanding precedent recognizes the public's interest in observing and sharing information about those interactions. *See, e.g.*, *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) (noting the importance of "subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism").

Courts have relied on these same interests in striking down restrictions on the public's ability to document what happens inside their courtrooms. In *United States v. Columbia Broadcasting System*, for instance, the Fifth Circuit vacated a district court's order prohibiting in-court sketching during a high-profile criminal trial. 497 F.2d 102, 107 (5th Cir. 1974).

Similarly, in *Goldschmidt v. Coco*, a district court held that a plaintiff had stated a valid First Amendment claim by alleging that an Illinois state-court judge had prevented him from taking handwritten notes during a hearing. 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."). And some state courts have likewise invalidated sweeping bans on the public's ability to record court proceedings. *See, e.g.*, *People v. Boss*, 701 N.Y.S.2d 891, 895 (Sup. Ct. 2000) (holding that a New York criminal statute that imposed "an absolute ban on audio-visual coverage in the courtroom . . . is unconstitutional"). These cases make clear that the important First Amendment protections that the Third Circuit identified in *Fields* are present wherever government officials perform their duties in public—including inside the courtroom.

### C. Restrictions on the right to record government officials' public activities must be narrowly tailored and leave open ample alternative channels for communication.

Defendants do not address (or even mention) *Fields* in their motions to dismiss. Nor do they discuss the First Amendment principles underlying *Fields*'s recognition of a right to record government officials' public activities. Instead, Defendants focus on a line of cases addressing a separate First Amendment right—namely, the right to attend and observe government proceedings.[2] By focusing narrowly on that right, however, Defendants overlook the growing body of First Amendment law (including *Fields*) governing the right to record the government's public activities. And, as a result, Defendants apply the wrong framework and wrong case law to

[2] *See* ECF No. 16 (Sheriff's MTD), at 12 (asserting that "the critical question is not whether the manner of access is regulated, but whether access to a government proceeding itself (i.e. the ability to attend and observe) is limited"); ECF No. 12 (Bail Magistrates' MTD), at 13 (asserting that the recording ban "does not meaningfully restrict [Plaintiffs'] access to court").

Plaintiffs' claims. *See infra* Part II.A (explaining why Defendants' proposed framework is inapplicable).

The correct legal framework for determining whether a plaintiff has a First Amendment right to record a government official's public conduct is set forth in *Fields*. Under *Fields*, a plaintiff's ability to record such conduct may be curtailed only by "reasonable time, place, and manner restrictions." *Fields*, 862 F.3d at 360 (noting that the government's authority to prevent citizens from recording public police activity is "restrained").[3] "Such restrictions are valid provided '[1] [that] the restrictions are justified without reference to the content of the regulated speech, [2] that they are narrowly tailored to serve a significant governmental interest, and [3] that they leave open ample alternative channels for communication.'" *National Ass'n for the Advancement of Multijurisdiction Practice v. Castille*, 799 F.3d 216, 220 (3d Cir. 2015) (alterations in original; citations omitted).

Defendants cannot satisfy that test here. The only justification that Defendants have offered for the blanket ban on audio-recording bail magistrates and prosecutors is their need to prevent "[p]otential prejudice to the system and [criminal] defendants." *See* Bail Magistrates' MTD 13.[4] As explained below, however, the recording ban is not "narrowly tailored" to serve that interest and does not "leave open ample alternative channels for communication."

[3] *Accord Turner*, 848 F.3d at 688 (holding that "a First Amendment right to record the police does exist, subject only to reasonable time, place, and manner restrictions"); *Glik*, 655 F.3d at 84 (holding that the right "may be subject to reasonable time, place, and manner restrictions"); *Smith*, 212 F.3d at 1333 (holding that the right is "subject to reasonable time, manner and place restrictions").

[4] The ensuing sections of this brief focus on the bail magistrates' proffered justifications for the recording ban, as the Sheriff does not appear to offer any such justifications in his motion. *See* Sheriff's MTD 12 ("Plaintiffs allege that the ban has no valid justification because it does not preserve confidentiality, minimize disruption, protect against witness intimidation and that

**1. The challenged court rules are not narrowly tailored to prevent the types of "[p]otential prejudice" Defendants have identified.**

Defendants contend that the ban on audio-recording bail hearings serves to protect the "privacy and fair trial interests" of arrestees. Bail Magistrates' MTD 13. Specifically, Defendants assert, "[b]ail hearings often contain prejudicial evidence that would be inadmissible during a trial" and the recording ban reduces "the threat that the public dissemination of such inadmissible evidence would have on the accused['s] right to a fair trial." *See id.* (citation and quotation marks omitted). The ban on electronic recording, however, is not narrowly tailored to achieve that purpose.

As the Supreme Court has explained, speech restrictions that are too under-inclusive in serving their stated purpose cannot satisfy the narrow-tailoring requirement. *See*, *e.g.*, *National Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2375 (2018). Here, Defendants themselves concede that the ban on courtroom recording is under-inclusive. They explicitly acknowledge that as long as the courtroom remains open to the public during bail hearings (as it must), any information disclosed during those hearings—including evidence that would be inadmissible at trial—may be freely disseminated. *See* Bail Magistrates' MTD 14 (acknowledging that "the media can report all this information now by observing the proceedings").

The Ninth Circuit recently struck down an Idaho statute, which banned certain forms of electronic recording inside agricultural production plants, because it was similarly under-inclusive. In *Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018), the court held that the statute—which Idaho purportedly enacted to safeguard farmers' privacy interests—

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other jurisdictions have made recordings of bail hearings available to the public. However, the lack of justification for such a ban does not trigger the First Amendment.").

failed the narrow-tailoring requirement because it banned only audio and video recordings (but not photography) of agricultural operations. *See id.* at 1204-05. The court specifically remarked that the statute's under-inclusiveness cast doubt on the validity of the state's privacy-based justifications for the statute. *Id.* ("Why the making of audio and video recordings of operations would implicate property or privacy harms, but photographs of the same content would not, is a mystery."). Similar logic applies here: by banning only certain methods of documenting what occurs at bail hearings, Pennsylvania's recording ban does little to protect the fair-trial rights of criminal defendants.

At the same time, the ban also prohibits far more expressive activity than necessary to ensure trial fairness. *See McCullen v. Coakley*, 573 U.S. 464, 486 (2014) ("For a content-neutral time, place, or manner regulation to be narrowly tailored, it must not 'burden substantially more speech than is necessary to further the government's legitimate interests.' " (citation omitted)). The risk that an arrestee will actually disclose any private or inculpatory information during a bail hearing is extremely small, given both the brevity and scope of the proceedings. *See* Compl. ¶ 16 ("These hearings often last less than four minutes."). Plus, that risk is further minimized by the fact that all arrestees in Philadelphia are provided counsel, who typically do most of the speaking at bail hearings. *See id.* Moreover, Defendants' concerns about potential juror prejudice can be addressed more effectively through voir dire. *See, e.g.*, *Press-Enterprise Co.*, 478 U.S. at 15 (recognizing that "[t]hrough voir dire, . . . a court can identify those jurors whose prior knowledge of the case would disable them from rendering an impartial verdict"). And, in any event, even a substantial amount of pretrial publicity—which is unlikely to result *solely* because an audio recording exists—rarely results in juror prejudice in major cities that, like

Philadelphia, have a "large, diverse pool of potential jurors." *Skilling v. United States*, 561 U.S. 358, 382 (2010).

In other words, in the mine run of cases, the risk that prejudicial information will actually be disclosed at a bail hearing is extremely low. *Cf. Alvarez*, 679 F.3d at 606 ("Rather than attempting to tailor the statutory prohibition to the important goal of protecting personal privacy, Illinois has banned nearly all audio recording without consent of the parties—including audio recording that implicates *no* privacy interests at all."). That numerous other jurisdictions around the country—including the Eastern District of Pennsylvania—voluntarily make recordings of all pretrial proceedings available to the public only further illustrates that the recording ban sweeps more broadly than necessary to ensure trial fairness. Compl. ¶ 37; *see also* PUBLIC ACCESS TO COURT ELECTRONIC RECORDS (PACER), DIGITAL AUDIO RECORDING PROJECT (last accessed Oct. 14, 2019), https://perma.cc/7L2J-K2YW (listing dozens of federal district courts that make audio recordings of all court proceedings available through PACER).

In short, the ban on audio recording bail hearings is both under-inclusive and over-inclusive. It therefore lacks the requisite "fit" between its means and its ends. *Alvarez*, 679 F.3d at 605.

**2. The challenged court rules do not leave open ample alternative channels for communication.**

The ban on recording bail hearings fails for a second, independent reason: it does not leave open ample alternative channels for the public to communicate about how prosecutors and bail magistrates are performing their official duties. As noted above, the only justification Defendants offer for the ban is that, because audio recordings are more effective than written accounts in conveying information about bail hearings to the public, preventing the dissemination of such recordings protects the "privacy and fair trial interests" of arrestees. *See*

Bail Magistrates' MTD 13. But, by definition, openly targeting a uniquely effective method of communicating information *because of its effectiveness* fails to leave open ample alternative channels.

The Supreme Court's decision in *Linmark Associates, Inc. v. Willingboro Township*, 431 U.S. 85 (1977), illustrates this point well. In *Linmark*, the Court struck down an ordinance that prohibited the residents of a town from posting "For Sale" signs in front of their homes. The town adopted the ordinance in an effort to preserve residential stability by masking the visible rate of turnover among its residents, particularly its white homeowners. *Id.* at 86. Although the Court acknowledged that the town's goal was valid, *id.* at 94, it nevertheless held that the ordinance violated the First Amendment because it "restrict[ed] the free flow of truthful information," *id.* at 95. The Court held, in particular, that the ban on "For Sale" signs failed to leave open ample alternative channels for people to communicate that they were selling their homes. *See id.* at 93. As the Court reasoned, all of the "options to which sellers realistically are relegated" would have "involve[d] more cost and less autonomy," been "less likely to reach persons not deliberately seeking [the] information," and relied on "less effective media for communicating the message." *Id.*

The recording ban has the same adverse impact on the "free flow of truthful information," but in an even more important arena: public discourse concerning the actions of prosecutors and bail magistrates. Furthermore, just like the ordinance in *Linmark*, the ban leaves people with few viable options for communicating the same information as effectively or widely. As several courts have recognized, "audio and audiovisual recording are uniquely reliable and powerful methods of preserving and disseminating news and information about events that occur in public." *Alvarez*, 679 F.3d at 607; *see also, e.g.*, *Fields*, 862 F.3d at 359 ("To record what

there is the right for the eye to see or the ear to hear corroborates or lays aside subjective impressions for objective facts. . . . Recordings also facilitate discussion because of the ease in which they can be widely distributed via different forms of media."). These features, along with the "self-authenticating character" of the recordings, make "it highly unlikely that other methods could be considered reasonably adequate substitutes." *Alvarez*, 679 F.3d at 607.

That is especially true in the context of Philadelphia bail hearings, where note-taking is the only permissible medium for memorializing the proceedings. Transcribing an entire bail hearing is extremely difficult, even for skilled note-takers, because the hearings typically involve rapid exchanges of large amounts of technical information. *See* Compl. ¶¶ 16-19. To obtain even a basic record of what happens at a typical hearing, an observer would have to take down the arrestee's name and charges, the prosecutor's bail recommendation, defense counsel's response to that recommendation, the magistrate's questions for the parties, and the court's final bail decision. The obvious difficulty of transcribing this information—all by hand and in real time—only reaffirms that audio-recording provides a uniquely effective medium for documenting the conduct of prosecutors and bail magistrates objectively and comprehensively. *See Fields*, 862 F.3d at 359 ("[T]o record is to see and hear more accurately.").

Audio recording also captures aspects of the hearings that handwritten notes cannot. Among other differences, recordings capture the "critical human elements" of a proceeding—a magistrate's tone, a lawyer's inflection, a crack in the defendant's voice—that cannot be documented as effectively in print. Compl. ¶ 47. Recordings are also more accessible to many people, particularly those with limited literacy skills or visual ability, and are free from

transcription errors.[5] Indeed, the shortcomings of written transcripts are so well known that they form the basis for entire doctrines of trial-court deference. *See, e.g.*, *Skilling*, 561 U.S. at 386-87 ("In contrast to the cold transcript received by the appellate court, the in-the-moment *voir dire* affords the trial court a more intimate and immediate basis for assessing a venire member's fitness for jury service."). Thus, by barring all audio recording during bail hearings, the ban deprives Plaintiffs—and the public—of a qualitatively unique channel for communicating information about the hearings. *See City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994) ("Our prior decisions have voiced particular concern with laws that foreclose an entire medium of expression.").

**D. The case law Defendants cite is inapposite**.

Defendants contend that "courts have consistently held that the press (and public) has no right to record or broadcast court proceedings." Bail Magistrates' MTD 6; *see also* Sheriff's MTD 4 (same). Most of the cases they cite, however, addressed the right to *televise* (and sometimes even live-broadcast) trial proceedings—claims considerably broader than the one at issue in the present case. More to the point, none of the cases addressed the right that Plaintiffs actually assert here: the First Amendment right to record government officials performing their duties in public.

Defendants' reliance on *Estes v. Texas*, 381 U.S. 532 (1965), highlights both of these shortcomings. As an initial matter, *Estes* is not even a First Amendment case. The question in

[5] Even when (unlike here) transcripts are prepared by professional court reporters, perfect transcripts are often elusive. *See, e.g.*, Taylor Jones, et al., *Testifying While Black: An Experimental Study of Court Reporter Accuracy in Transcription of African American English*, 95 LANGUAGE e216 (2019), https://perma.cc/9D4E-DJC4 (summarizing results of peer-reviewed study "demonstrat[ing] that Philadelphia court reporters consistently fail to meet [the standard 95-98%] level of transcription accuracy when confronted with mundane examples of spoken African American English").

*Estes* was whether a criminal defendant had been "deprived of his right under the *Fourteenth Amendment* to *due process* by the televising and broadcasting of his trial." *Id.* at 534-35 (plurality op.) (emphasis added). In holding that the defendant's due-process rights had been violated, the Court focused on the disruption to his trial resulting from the trial judge's decision to allow numerous television broadcasters (and their equipment) into the courtroom. *See id.* at 535-39. The Court's opinion discussed the First Amendment only briefly, and only in rejecting an argument—raised by amici—that prohibiting the press from televising a criminal trial would impermissibly discriminate against television broadcasters. *See id.* at 540 (explaining that the First Amendment does not confer any special rights on broadcasters beyond those enjoyed by the public). What's more, even in the course of that brief discussion (of an issue with no bearing on the present case), the Court made clear that it did not intend to permanently foreclose the existence of a First Amendment right to record trials. To the contrary, it noted, "[w]hen the advances in these arts permit reporting by printing press or by television without their present hazards to a fair trial we will have another case." *Id.* at 540.

Notably, Justice Harlan made the same point in his concurrence, which the bail magistrates quote at length. *See* Bail Magistrates' MTD 7.[6] He openly acknowledged that "the day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may

[6] To the extent that the bail magistrates contend that Justice Harlan's concurrence represents the controlling opinion in *Estes*, they are mistaken. *See* Bail Magistrates' MTD 7 (asserting that Justice Harlan "cast the deciding vote" in *Estes*). Under the rule set forth in *Marks v. United States*, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" 430 U.S. 188, 193 (1977) (citation omitted). Insofar as Justice Harlan's position in *Estes* rests on a First Amendment rationale, it extends much more broadly than the plurality's narrow Sixth Amendment rationale and therefore cannot be controlling under *Marks*.

disparage the judicial process." 381 U.S. at 595 (Harlan, J., concurring). "If and when that day arrives," he wrote, "the constitutional judgment called for now would of course be subject to re-examination." *Id.* at 595-96.

In any event, even if *Estes* had held that there is no First Amendment right to *televise criminal trials*—which it did not—that holding would not foreclose a First Amendment right to *audio-record bail hearings*. The act of audio-recording a judicial proceeding, especially one that does not involve any witnesses or jurors, raises far fewer institutional concerns than televising the same proceeding. Unlike a video recording, audio recordings may be made inconspicuously, without pointing a camera or device at the proceeding's participants. *Cf. Columbia Broad. Sys.*, 497 F.2d at 106 (rejecting *Estes*-based argument that a ban on courtroom sketching was needed to avoid the "psychological implications of the [participants'] 'awareness' of being sketched"). Moreover, audio recordings capture only the voices of people who actually participate in the proceedings, unlike video recordings, which can inadvertently capture images of non-participants, like court employees.

Given these differences, it is not surprising that so many of Defendants' cases focus on the unique risks associated with *filming* court proceedings, without considering whether audio-recording poses the same concerns. *See, e.g.*, *United States v. Kerley*, 753 F.2d 617, 621-22 (7th Cir. 1985) (affirming district court's denial of a defendant's request to videotape his court proceedings while noting that "the trial court will permit [the defendant] to record the proceedings on audiotape"). As the practice of this Court and many other courts reflects, these concerns are not implicated by the routine audio recording of judicial proceedings. *See, e.g.*, PACER, DIGITAL AUDIO RECORDING PROJECT (last accessed Oct. 14, 2019), https://perma.cc/7L2J-K2YW; Compl. ¶ 37.

Defendants' precedents also suffer from a more fundamental flaw: none of them considered a claim asserting a right to record proceedings that occur entirely off the record, like Philadelphia's bail hearings. Rather, most of Defendants' cases considered whether or not the First Amendment protected the right to record federal-court proceedings, all of which are statutorily required to occur on the record. *See* 28 U.S.C § 753(b) ("Each session of the court and every other proceeding designated by rule or order of the court or by one of the judges shall be recorded verbatim."). Prohibiting the public from recording those proceedings, therefore, does not raise the same First Amendment concerns about cutting off alternative channels of communication about the proceedings. The recording ban at issue here, in contrast, raises much more serious concerns in that regard because Philadelphia's bail hearings (unlike federal-court proceedings) are not recorded in any other form and the public has no way of knowing what was said at any given hearing.

## II. The Third Circuit's decision in *Whiteland Woods* does not control here and, even if it did, Plaintiffs would still prevail.

Rather than evaluating the constitutionality of the recording ban in this case under the framework set forth in *Fields*, Defendants urge this Court to evaluate the ban under an entirely different First Amendment standard: namely, the standard governing the right to attend and observe government proceedings, which is set forth in *Whiteland Woods, L.P. v. Township of West Whiteland*, 193 F.3d 177 (3d Cir. 1999). As explained below, *Whiteland Woods* is inapplicable in this case—which concerns the distinct right recognized in *Fields*—and, even if it did apply, it still would not provide a basis for dismissal.

### A. *Whiteland Woods* is inapplicable here.

In *Whiteland Woods*, a real-estate developer sought to challenge a town planning commission's refusal to let the company videotape the commission's meetings. 193 F.3d at

178-79. The developer asserted that the videotaping ban violated its First Amendment right of access to the commission meetings, but the Third Circuit ultimately rejected that claim. *Id.* at 184. The court held that the developer had a First Amendment right to attend the commission's meetings but did not—in the context of that case—enjoy an accompanying right to videotape them. *Id.* at 183-84.

In reaching that conclusion, the court applied the traditional "experience and logic" test to determine whether or not the public had a "right to attend" the commission's meetings. 193 F.3d at 181; *see generally Press-Enterprise*, 478 U.S. at 9 (explaining that, under the "experience and logic" test, courts examine whether there is a historical tradition of public access to the proceeding and whether public access makes logical sense). After concluding that the public had a right to attend the meetings, the court went on to consider whether the "right of access" encompassed a right to videotape the meetings. The court explained that the "critical question" in determining whether a restriction on recording infringes the "right of access" to a proceeding is "whether the restriction meaningfully interferes with the public's ability to inform itself of the proceeding." *Id.* at 183. The ban on videotaping survived that test, the court concluded, because the commission's meetings were open to the public and "[s]pectators were free to take notes, use audio recording devices, or even employ stenographic recording." *Id.* at 183. The court noted that "[n]othing in the record suggests videotaping would have provided a uniquely valuable source of information about Planning Commission meetings." *Id.* Thus, in light of the many "alternative means of compiling a comprehensive record," the court held that the company's right of access "was not meaningfully restricted by the ban on videotaping." *Id.*

Defendants contend that this case should be decided under *Whiteland Woods*'s "meaningful interference" standard. *See* Bail Magistrates' MTD 10-11; Sheriff's MTD 10. But

*Whiteland Woods* itself made clear that the "meaningful interference" standard applies only when the plaintiff is asserting a pure "right of access" claim that does not implicate any free-speech or expressive rights. In fact, the court in *Whiteland Woods* underscored that the plaintiff real-estate developer "d[id] not allege the Township interfered with its speech or other expressive activity." 193 F.3d at 183. The court never purported to decide how *all* First Amendment claims asserting a right to record government activity should be decided; rather, it decided the much narrower question of whether there is a right to videotape a local-government meeting "when other effective means of recording the proceedings are available" and when the plaintiff "does not allege . . . interfer[ence] with its speech or other expressive activity." *Id.* at 180, 183.

These distinctions have obvious significance for the present case. Unlike the rules in *Whiteland Woods*, the court rules at issue here expressly prohibit Plaintiffs and other members of the public from making stenographic or audio recordings. *Compare* 193 F.3d at 179 ("audio recording or stenographic recording equipment may be used"), *with* Pa. R. Crim. P. 112(C) ("[T]he 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.").

In addition, unlike the real-estate developer in *Whiteland Woods* (and the claimants in the other right-of-access cases cited by Defendants), Plaintiffs here are explicitly asserting an abridgement of their speech and expressive rights. As *Fields* and other recent cases have recognized, the right to record government officials' public conduct falls squarely under the First Amendment's protections for speech and expression. *E.g.*, *Fields*, 862 F.3d at 358 ("The First Amendment protects actual photos, videos, and recordings, and for this protection to have

meaning the Amendment must also protect the act of creating that material."); *Alvarez*, 679 F.3d at 595 ("The act of *making* an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording."); *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011) ("This Court has held that the creation and dissemination of information are speech within the meaning of the First Amendment." (citations omitted)). *Whiteland Woods* therefore provides little guidance in evaluating those distinct protections. *Cf. First Amendment Coal. v. Judicial Inquiry & Review Bd.*, 784 F.2d 467, 471-72 (3d Cir. 1986) (en banc) (explaining that the "right of access" and the "right of publication" are "doctrinally discrete, and precedents in one area may not be indiscriminately applied to the other").

### B. Plaintiffs would still prevail under the "meaningful interference" standard from *Whiteland Woods*.

Even if *Whiteland Woods* applied here, the ban on audio-recording bail hearings would still fail because it "meaningfully interferes with the public's ability to inform itself of the proceeding." 193 F.3d at 183. As noted above, the ban deprives the public of any viable "means of compiling a comprehensive record" of what occurs during bail hearings. *See supra* Part I.C.2 (discussing lack of alternative channels of communication). Indeed, in stark contrast to the meeting rules at issue in *Whiteland Woods*, the court rules challenged here expressly prohibit the use of "audio recording devices" and "stenographic recording." Pa. R. Crim. P. 112(C). Accordingly, the challenged court rules impose a much more direct restriction on the public's ability to create and disseminate a comprehensive record of the proceedings.

The prohibition on recording bail hearings also differs from the videotaping ban in *Whiteland Woods* in that it deprives Plaintiffs of a "uniquely valuable source of information" about the hearings. 193 F.3d at 183. As previously explained, audio recordings do not just allow

for a more "comprehensive record" of the hearings—they allow for the capture of qualitatively different information, including the "critical human elements" that cannot be documented as effectively in print. Compl. ¶ 47; *supra* Part I.C.2; *cf. First Amendment Coal. of Arizona, Inc. v. Ryan*, No. 17-16330, 2019 WL 4419676, at *4 (9th Cir. Sept. 17, 2019) (holding that "the First Amendment right of access to governmental proceedings encompasses a right to hear the *sounds* of executions in their entirety" (emphasis added)).

The fact that members of the public may attend bail hearings in person is not sufficient, on its own, to satisfy the First Amendment right of access. As the Third Circuit explained in *United States v. Antar*, the right of access encompasses not just access to a live proceeding but also "[a]ccess to the documentation of an open proceeding." 38 F.3d 1348, 1360 (3d Cir. 1994) (holding that a district court's order sealing a voir dire transcript violated the First Amendment right of access). In other words, "concurrent access" to a government proceeding is "not a substitute" for "documentary access"; rather, "both are vitally important." *Id.* at 1360 n.13.

Thus, because the ban on audio-recording bail hearings effectively precludes the public from documenting what happens during those hearings—without any valid justification and without any alternative means—the ban infringes Plaintiffs' First Amendment right of access to the proceedings.

## III. The Sheriff's remaining procedural arguments lack merit.

In addition to his arguments on the merits, the Sheriff argues that he is not subject to injunctive relief here because he is a City official. In particular, he argues that he cannot be enjoined from enforcing the *Commonwealth*'s recording ban because Plaintiffs have not challenged any *City* policy related to that ban. But that argument rests on a mistaken premise: that the claim against the Sheriff is, in effect, one against the City.

As the Sheriff acknowledges, some local officials "operate in a 'hybrid nature' " such that "a court must distinguish between their role in enforcing state law and their role as a county [or City] policymaker." Sheriff's MTD 7 (citation omitted). When those officials act on behalf of a locality, claims brought against them in their official capacity are construed as claims against the locality, *Kentucky v. Graham*, 473 U.S. 159, 165 (1985), and an injunction may issue only if the plaintiff's injury resulted from a *local* policy, *see Los Angeles County v. Humphries*, 562 U.S. 29, 39 (2010). In contrast, when local officials act on behalf of a *state*, they may be subject to an injunction under the well-settled rule that "a state official who is acting in violation of the United States Constitution can be sued for prospective equitable relief." *C.H. ex rel. Z.H. v. Oliva*, 226 F.3d 198, 202 (3d Cir. 2000); *see also Ex parte Young*, 209 U.S. 123, 159-60 (1908).

The claim against the Sheriff in this suit focuses on his role in "enforcing [Commonwealth] policy"—not on his role as a City policymaker. Sheriff's MTD 6. Accordingly, the claim should not be treated as a claim against the City. *See Finberg v. Sullivan*, 634 F.2d 50, 55 (3d Cir. 1980) (holding that the Philadelphia County Sheriff and Philadelphia County Prothonotary were proper defendants in a suit for prospective relief challenging the constitutionality of the *Commonwealth*'s post-judgment garnishment procedures).

The only case the Sheriff has identified in which liability was precluded because a "hybrid" official acted on behalf of a state confirms that he is subject to injunctive relief here. In *Scott v. O'Grady*, 975 F.2d 366 (7th Cir. 1992), two plaintiffs sued the Sheriff of Cook County (in his official capacity) for damages after the Sheriff evicted them pursuant to a state-court order issued under the Illinois Mortgage Foreclosure Law. *Id.* at 367. Although Illinois law classified sheriffs as "county officials," the Seventh Circuit held that the Sheriff had acted "as an arm of the Illinois state" by enforcing the state-court order. *Id.* at 371. The court therefore concluded

that, even though the plaintiffs' damages claims were barred by the Eleventh Amendment, the Eleventh Amendment contained an "exception" for "an official-capacity suit for prospective injunctive relief." *Id.* at 369. That is precisely the kind of claim Plaintiffs bring against the Sheriff here.

Even aside from the case law rejecting the Sheriff's position, his argument would also have perverse doctrinal consequences. Under his theory, the Commonwealth could enact a blatantly unconstitutional law and evade liability for injunctive relief simply by tasking local officials with all enforcement responsibility. Unsurprisingly, that is not how the law works. *See, e.g.*, *Finberg*, 634 F.2d at 55.

## CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendants' motions to dismiss.

Dated: October 16, 2019

Respectfully submitted,

*/s/ Nicolas Y. Riley*

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

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**MERRY REED; PHILADELPHIA BAIL FUND,**

*Plaintiffs*,

**v.**

**ARRAIGNMENT COURT MAGISTRATE JUDGES FRANCIS BERNARD, SHEILA BEDFORD, KEVIN DEVLIN, JAMES O'BRIEN, JANE RICE, and ROBERT STACK, in their official capacities; PRESIDENT JUDGE PATRICK DUGAN, in his official capacity; SHERIFF JEWELL WILLIAMS, in his official capacity,**

*Defendants*.

Civil Action No. 2:19-3110

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**PROPOSED ORDER**

Upon consideration of the Motions to Dismiss filed by Defendants Jewell Williams; Arraignment Court Magistrate Judges Francis Bernard, Sheila Bedford, Kevin Devlin, James O'Brien, Jane Rice, and Robert Stack; and President Judge Patrick Dugan, as well as the opposition thereto filed by Plaintiffs, it is this _____ day of _____ 2019, hereby

**ORDERED** that the Motions to Dismiss be **DENIED**.

BY THE COURT:

_____
Hon. Harvey Bartle, III, U.S.D.J.

**CERTIFICATE OF SERVICE**

I certify that on October 16, 2019, I caused the foregoing brief in opposition to Defendants' motions to dismiss, and all supporting documents, to be served electronically on counsel for all Defendants, who are registered ECF users. All of the foregoing documents will also be available for viewing and downloading via the ECF system.

*/s/ Nicolas Y. Riley*

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