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.,	:	
	:	Hon. Harvey Bartle, III
Defendants	:	

Defendants Arraignment Court Magistrate Judges Francis Bernard, Sheila Bedford, Kevin Devlin, James O'Brien, Jane Rice, and Robert Stack and President Judge Patrick Dugan's Response to Plaintiff's Motion for Summary Judgment

Defendants Arraignment Court Magistrate Judges Francis Bernard, Sheila Bedford, Kevin Devlin, James O'Brien, Jane Rice, and Robert Stack and President Judge Patrick Dugan respond in opposition to Plaintiff's Motion for Summary Judgment on the grounds set forth in their accompanying Brief.

WHEREFORE, Judicial Defendants respectfully request that this Honorable Court deny Plaintiff's Motion for Summary Judgment.

Respectfully Submitted,

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Defendants Arraignment Court Magistrate Judges Francis Bernard, Sheila Bedford, Kevin Devlin, James O'Brien, Jane Rice, and Robert Stack and President Judge Patrick Dugan
Brief in Opposition to Plaintiff's Motion for Summary Judgment

I. Statement of the Case

In reading Plaintiff Philadelphia Bail Fund's Brief supporting its Motion for Summary Judgment, one would think that no court has ever addressed whether the public has a First Amendment right to make audio recordings of court proceedings. Yet as detailed in Judicial Defendants' Motion to Dismiss Briefs and Motion for Summary Judgment Brief, the United States Supreme Court, circuit courts, and district courts have addressed this issue. And they have all held that there is no such right.[1]

[1] In light of the Court's preference not to have legal arguments repeated, Judicial Defendants incorporate the arguments made in their Motion to Dismiss Briefs and Motion for Summary Judgment Brief. (Docs. 12, 19, and 39.) In addition, Judicial Defendants incorporate their Statement of the Case from their Summary Judgment Brief.

Plaintiff, however, does not address these cases. Instead, Plaintiff's Brief pursues a wandering legal path that misstates Judicial Defendant's argument and has no support in the law.

II. Statement of Question

1. Should the Court deny Plaintiff's summary judgment Motion because Plaintiff is able to exercise its full First Amendment rights to attend preliminary arraignments and report on what it observes, and there is no First Amendment right to make audio recordings of court proceedings?

Answer: Yes.

2. Should the Court deny Plaintiff's summary judgment Motion because the right to attend court proceedings is limited to a right of access, not expression, and even if there could be an expression claim, the state court rules are a reasonable policy designed to mitigate potential prejudice to defendants and to the court system?

Answer: Yes.

III. Argument

A. There is no First Amendment right to make audio recordings of court proceedings: only the right to attend and observe.

Settled law for decades holds that there is no First Amendment right to make audio recordings of court proceedings. The Supreme Court, Courts of Appeal, and district courts have all addressed the recording of criminal proceedings. And they uniformly hold that neither the press nor public have a constitutional right to make recordings.

Instead of a constitutional issue, courts – including the Supreme Court – have recognized that this is a policy issue for each judicial system. The Pennsylvania Supreme Court and Municipal Court have made a policy decision to not allow the public to make audio recordings of court proceedings based on their affirmative constitutional duty to ensure that defendants receive a fair trial by mitigating pretrial publicity, as well as preserving courtroom decorum.

Pursuant to this Court's direction, Judicial Defendants will not reiterate the case law holding that the First Amendment guarantees only a right to attend criminal proceedings, not the right to record that Plaintiff seeks.[2]

In its Brief, Plaintiff ignores this established case law. Plaintiff attempts to divert attention away from those cases by proffering a novel framework that has no basis in the law and by claiming that Judicial Defendants "urge this Court" to analyze this case under the forum analysis doctrine and try to "shunt this case into the public-forum framework."

Except that Judicial Defendants do not urge this Court to do so or believe that a forum analysis is necessary or even proper. To the contrary, Judicial Defendants' position has consistently been that the proper doctrine is a right of access – as the Third Circuit used in both *Fields* and *Whiteland Woods,* as explored below. And under the right of access doctrine, all that is required is the opportunity

[2] Judicial Defendants incorporate their legal analysis from their Motion to Dismiss and Summary Judgment Briefs. (Doc. 12, 19, and 39.)

for the public to attend court proceedings, take notes, and publicize what they observed – everything that Plaintiff is able to do and has done.[3]

As noted in Judicial Defendants' Motion to Dismiss and Summary Judgment Briefs, case law holds that the right to record judicial and related proceedings involves the right to access, not expression. But what about *Fields v. City of Philadelphia* that Plaintiff hangs its hat on? Well, that case holds the same: the right to record police officers performing their duties in public is a right of access to information, not expression. *Fields v. City of Philadelphia*, 862 F.3d 353 (3d Cir. 2017).

The *Fields* Court flat out rejected the plaintiff's contention that the case involved the right of expression – specifically the plaintiff's contention that recording is "inherently expressive conduct." *Id.* at 359. Hence, the court held that the right at issue was the "right of access." *Id.* at 360. *See also S.H.A.R.K. v. Metro Parks Serving Summit Co.*, 499 F.3d 553, 559 (6th Cir.2007)(clarifying that the public's right to record involves the right to access information, not freedom of expression); *McKay v. Federspiel*, 2014 WL 1400091, at *10 (E.D. Mich. 2014)(rejecting a right of expression analysis in a courtroom recording case).[4]

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[3] The Judicial Defendants did not make a forum argument in their Motion to Dismiss, but instead addressed the doctrine only because Plaintiff argued in its response to the Motion to Dismiss that courtrooms are a public place, and that Plaintiff was "explicitly asserting an abridgement of their speech and expressive rights." (Doc. 18 at 20.)

[4] Plaintiff claims that the *McKay* case should be treated with doubt because of a subsequent Sixth Circuit case, *Enoch v. Hogan*, 728 Fed. Appx. 448 (6th Cir. 2018). Yet *Enoch* does not cast doubt on *McKay*. To the contrary, it supports Judicial

Thus, the instant case does not involve a right of expression, despite what Plaintiff may wish to call it (like the plaintiff in *Fields* tried to do). It is a right of access case.

Nonetheless, Plaintiff seeks to hijack *Fields´* holding by arguing that because the Third Circuit did not conduct a forum analysis, whether the police activity in that case took place in a public forum is irrelevant. Of course, the Third Circuit had no reason to conduct a forum analysis: the issue in *Fields* was whether the public has a "First Amendment right of access to information" about how "public servants operate in public." *Id.* 355.

So, the proper framework is a right of access. And what do the courts hold the right of access encompasses for court proceedings? To attend and observe.

The Third Circuit's holding in *Whiteland Woods* is instructive. And Plaintiff agrees: it claims that under *Whiteland Woods* that the Rules at issue are unconstitutional. (Doc. 40 at 1.) The *Whiteland Woods* court held that the "critical question regarding a content-neutral restriction on the time, place, or manner of access to a government proceeding is whether the restriction meaningfully interferes with the public's ability to inform itself of the proceeding: that is, whether

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Defendants' argument. The Sixth Circuit noted that "trial-related newsgathering may be subject to reasonable restrictions and limitations," yet – unlike in the case at bar – there were no rules or laws that the plaintiffs in that case violated. *Id.* at 455-56. That was because the "impromptu press conference" at issue was held in a courthouse hallway, and hallways were not included in a court rule that prevented the use of electronic recordings in courtrooms and related areas. *Id.* at 454. Here, conversely, there is a rule (and a criminal statute) that precludes what Plaintiff wants to do.

it limits the underlying right of access rather than regulating the manner in which that access occurs." *Whiteland Woods, L.P. v. Township of W. Whiteland*, 193 F.3d 177, 183 (3d Cir. 1999).

As explained in detail in Judicial Defendants' Summary Judgment Brief, the Rules do not "meaningfully interfere with the public's ability to inform itself" about preliminary arraignments. (Doc. 39 at 11-13.) Plaintiff is able to attend arraignments, take notes, and report on them. It is able to access publically available bail documents that are filed with the court after a preliminary arraignment as well as online dockets with bail information. Additionally, Plaintiff and the public have access to a data compilation of almost 50 fields of information pertinent to bail for every arraignment in Municipal Court.

In sum, Plaintiff's contention that its inability to make audio recordings meaningfully interferes with its ability to inform itself is meritless. The content-neutral Rules do not limit access, they simply regulate the manner of access, consistent with a court's authority to do so. *See Tribune Review Pub. Co. v. Thomas*, 254 F.2d 883, 885 (3d Cir. 1958)(holding that a Pennsylvania court rule prohibiting the taking of photographs in and about the courthouse to be a valid exercise of judicial authority).

B. Even under a forum analysis, Plaintiff's claim fails because a courtroom is a nonpublic forum, and the Rules are reasonable and not an effort to suppress expression.

As noted above, a forum analysis is not needed: courts have uniformly ruled that there is no First Amendment right to record a proceeding without using such a framework. Yet, even if the forum doctrine is used, Plaintiff's claims still fail, as laid out in Judicial Defendants Summary Judgment Brief.

In addressing the forum analysis, Plaintiff claims that the purpose of the Rules is to "restrict the public's ability to gather and disseminate information about the hearings." (Doc. 40 at 10.) That is not correct. As explained in Judicial Defendants' Summary Judgment Brief, the Pennsylvania Supreme Court and Municipal Court have made a policy decision to not allow the public to make audio recordings of court proceedings based on its affirmative constitutional duty to ensure that defendants receive a fair trial by mitigating pretrial publicity, as well as to preserve courtroom decorum.[5]

Plaintiff's contention is also belied by the wealth of information available about every single preliminary hearing in Philadelphia. Information that Judicial Defendants make available to anyone who seeks it.

Nonetheless, in an attempt to argue that the recording ban is not tied to the purpose of the forum, Plaintiff asserts that the forum's purpose is to hold bail

[5] What is more, Pennsylvania has enacted a statute that criminalizes unapproved court recordings. *See* 18 Pa.C.S.A. § 5103.1. To accept Plaintiff's argument would require believing that Pennsylvania's other branches of government also want to restrict the public's ability to gather information about court hearings.

hearings that the public can observe. Then, they create a strawman to knock down by stating that Judicial Defendants have not highlighted any evidence that the purpose of bail hearings is to limit public access to information.

Plaintiff misunderstands the purpose of the preliminary arraignment courtroom, however. The purpose is to have a defendant appear before a neutral magistrate as soon as possible to be informed of the charges and the next steps in the case, advised of the right of counsel, and to have bail set. While Judicial Defendants recognize that the public has a right to attend and observe, the preliminary arraignment's purpose is not theater. *See United States v. Yonkers Bd. of Educ.*, 747 F.2d 111, 113 (2d Cir. 1984)("Unlike Broadway plays, trials are not conducted for the purpose of entertaining or enlightening an audience.")[6]

Thus, the public accommodations that the court provides comports with the public's First Amendment right of access to attend and observe. Merely because a court provides seating for the public does not change a courtroom's purpose. To accept Plaintiff's argument would mean that a criminal proceeding's purpose could be only for public spectacle, unless a courtroom had no public seating, which, of course, would invite a right of access to attend claim.

Plaintiff next argues that Judicial Defendants cannot support their reasons for the recording ban because they have not pointed to an arrestee who was

[6] The "central aim of a criminal proceeding must by to try the accused fairly," and the "public-trial guarantee" is for a defendant's benefit, not the public's. *Waller v. Georgia*, 467 U.S. 39, 46 (1984)(addressing the Sixth Amendment right to a public trial).

deprived of a fair trial due to the release of an audio recording. There are a few problems with Plaintiff's position.

First, as the Third Circuit holds, Judicial Defendants do not have to wait for a defendant to be prejudiced during their preliminary arraignment because the defendant withheld relevant information or was deprived of a fair trial because they revealed information. *See Pomicter v. Luzerne Co. Convention Ctr. Auth.*, 939 F.3d 534, 539-40 (3d Cir. 2019). A court system may act ahead of time to mitigate the potential prejudice to a defendant, which the Pennsylvania Supreme Court and Municipal Court have done, while still allowing the public and media access to court. That is a policy decision for each court to make. *Chandler v. Florida*, 449 U.S. 560, 574 (1981).

Next, it is odd to argue that Judicial Defendants are required to show that the release of a specific audio recording prejudiced a defendant's rights when audio recordings are not allowed. That is what the Rules here prevent. Hence, Judicial Defendants do not need to point to prejudice caused by something that has not been allowed.[7]

Further, given that many courts prevent making audio recordings and have for decades, this Court may make a "commonsense inference" based upon record evidence of the courtroom's purpose – to conduct preliminary arraignments – that

[7] In addition, Plaintiff's own Bail Watch Report confirms that that defendants occasionally discuss the underlying facts of their case during an arraignment. (Stipulation ¶ 59, https://perma.cc/9Y29-W4SA, at page 25.) Thus, there is evidence that defendants reveal prejudicial and inculpatory information at arraignments.

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

Finally, whether subsequent proceedings after the preliminary arraignment are transcribed is of no moment.[8] Notably, those proceedings do not produce public audio recordings of a defendant's own voice. And this is what Plaintiff seeks: it notes that audio recordings "fundamentally change" the reporting's substance and convey the "human aspects" more powerfully. (Complaint ¶ 43.)[9]

Moreover, Plaintiff's extensive policy arguments about whether the Rules at issue are reasonable highlights the downfall of its argument. The United States Supreme Court has already concluded a court's decision whether to allow recordings is a policy choice. A policy choice that has arguments to be made on each side, some of which Plaintiff makes here. What the United States Supreme Court – indeed any court – has not held is that the First Amendment requires a court to allow the public to make audio recordings.

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[8] Plaintiff's allegations that preliminary arraignments are conducted without any public record is incorrect as explained in Judicial Defendants' Summary Judgment Brief.

[9] What is more, as set forth in Judicial Defendants' Summary Judgment Brief, Judicial Defendants cannot assume that other persons or entities will make audio recordings to simply report on proceedings. Municipal Court and the magistrates tasked with conducting arraignments cannot ascribe the intent, purpose, or motive to every courtroom observer before a violation takes place.

IV. Conclusion

In sum, case law from the Supreme Court, Third Circuit, and other circuit courts and district courts have already addressed this issue: Plaintiff has a right to attend, observe, take notes, and report. That is it. The Rules at issue have not and are not violating Plaintiff's First Amendment.

Judicial Defendants respectfully request that this Honorable Court deny Plaintiff's Motion for Summary Judgment and enter judgment in their favor.

Respectfully Submitted,

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Certificate of Service

The undersigned certifies that on *January 6, 2020*, he caused the foregoing *Brief* to be served via CM/ECF to all counsel of record

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