UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

PHILADELPHIA BAIL FUND,

Plaintiff,

v.

ARRAIGNMENT COURT MAGISTRATE JUDGES FRANCIS BERNARD, SHEILA BEDFORD, KEVIN DEVLIN, JAMES O'BRIEN, CATERIA MCCABE, and ROBERT STACK, in their official capacities; PRESIDENT JUDGE PATRICK DUGAN, in his official capacity; SHERIFF ROCHELLE BILAL, in her official capacity,

Defendants.

Civil Action No. 2:19-3110

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

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INTRODUCTION

The most notable thing about Defendants' summary-judgment briefs is what they do not argue. For instance, Defendants do not argue that allowing people to audio-record bail hearings would actually disrupt the proceedings in any way. Nor do they argue that the information exchanged during the hearings is so sensitive that it must be shielded from public disclosure altogether. Instead, Defendants contend that the recording ban is necessary to *inhibit*—but not prevent—the public's ability to share and discuss the details of what happens during bail hearings.

That argument does not hold water. Defendants cannot claim a legitimate interest in suppressing the spread of truthful information about hearings that take place in open court. And they certainly cannot do so based on a speculative and unsupported fear that the spread of that information might prejudice arrestees in hypothetical cases. The Supreme Court has long recognized that "[w]hat transpires in the court room is public property" and that, in all but the rarest of cases, people can report what happens there "with impunity." *Craig v. Harney*, 331 U.S. 367, 374 (1947). Defendants therefore cannot justify the ban on audio-recording based on a purported need to limit the dissemination of accurate accounts of public bail hearings.

Nor can Defendants downplay the adverse impact of the ban by suggesting that people can simply obtain the same information from other publicly available sources. While the public can glean discrete facts about the bail process from court records (for a price), those records do not shed any light on what actually happens at the hearings, such as the parties' arguments, the magistrates' in-court demeanor, or—most importantly—the *reasons* underlying the magistrates' bail decisions. For that reason, none of the court records that Defendants have identified actually provides a substitute for audio recordings of the bail hearings. The Municipal Court itself

recognizes the limited utility of existing court records: that is why it creates audio recordings of the hearings to monitor the magistrates' performance.

In sum, Defendants' motions overstate the need for the recording ban while, at the same time, understating the ban's harmful impact on public debate. Thus, regardless of whether the ban is analyzed as a restriction on the First Amendment right of access (under *Whiteland Woods*) or the First Amendment right to record government officials' public conduct (under *Fields*), the outcome of this case remains the same: the ban cannot constitutionally be applied to Philadelphia's public bail hearings.

ARGUMENT

The Philadelphia Bail Fund's prior briefs explained why the court rules at issue in this case are unconstitutional as applied to the bail hearings held in Philadelphia's Criminal Justice Center.[1] Rather than reiterate those arguments here, the following sections focus exclusively on the latest round of arguments raised in Defendants' summary-judgment motions.

I. The bail magistrates' assertion that the recording ban protects criminal defendants against prejudice is not legally sufficient to justify the ban.

The bail magistrates maintain that the recording ban is necessary to "mitigate potential prejudice to [arrestees] and the court system." ECF No. 39 (Bail Magistrates' SJ Mot.), at 21. As previously noted, the magistrates have not produced any evidence to suggest that this purported risk of prejudice is real. *See* Plaintiff's MSJ 8-15 (noting the conjectural nature of the magistrates' prejudice theory). But, even if they had produced such evidence, the magistrates'

[1] *See* ECF No. 18 (Plaintiffs' Opp. to MTDs) (explaining why the recording ban fails under both the "time, place, and manner" standard of *Fields v. City of Philadelphia*, 862 F.3d 353 (3d Cir. 2017), and the "meaningful interference" standard of *Whiteland Woods, L.P. v. Township of West Whiteland*, 193 F.3d 177 (3d Cir. 1999)); ECF No. 40 (Plaintiff's MSJ) (explaining why the recording ban fails under the nonpublic-forum framework urged by the bail magistrates).

justification for the ban would still be unreasonable because all of the information they seek to shield from public dissemination is already in the public domain.

The bail magistrates' prejudice argument rests on the premise that the information exchanged during bail hearings is so sensitive in nature that, if it were recorded and disseminated, it could jeopardize the fair-trial rights of arrestees. The magistrates point, in particular, to the possibility that audio recordings of the hearings might be used to publicize an arrestee's "criminal history, drug abuse issues, mental condition, [or] a history of flight or escape." Bail Magistrates' SJ Mot. 22. That possibility, however—even if it were real—does not provide a sound justification for suppressing public discourse about what occurs during public bail hearings.

Indeed, the Supreme Court has made clear that fair-trial concerns will rarely, if ever, justify restrictions on the dissemination of truthful information about criminal defendants that has been disclosed in open court. For instance, in *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976), the Court explicitly rejected the argument that a criminal defendant's due-process rights justified a pretrial order barring the press from "broadcasting accounts of confessions or admission made by the accused" disclosed during pretrial hearings. *See id.* at 541, 570. Although the Court acknowledged the importance of safeguarding the defendant's right to a fair trial, it held that "prohibiting reporting or commentary on judicial proceedings held in public" was "clearly invalid." *Id.* at 570; *see also id.* at 568 ("To the extent that this order prohibited the reporting of evidence adduced at the open preliminary hearing, it plainly violated settled principles.").

Similarly, in *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977) (per curiam), the Court held that a state trial judge could not prohibit the press from publishing the

name and photograph of a juvenile defendant whose trial had occurred in open court. The Court did not dispute that the state had a valid interest in protecting the juvenile's identity, and it even acknowledged that state law favored closed trials for juvenile cases. *See id.* at 309-10. Nevertheless, because the judge had declined to close the courtroom during the trial, the Court concluded that the First Amendment did "not permit a state court to prohibit the publication of widely disseminated information obtained at court proceedings which were in fact open to the public." *Id.* at 310.

The outcomes of these cases are not surprising. After all, the notion that public scrutiny of the judicial process would *undermine*—rather than enhance—the fairness of criminal trials inverts the very interests underlying the Constitution's requirement that trials be open to the public. *See* U.S. Const. amend. VI (guaranteeing the "right to a . . . *public* trial" (emphasis added)); *see also, e.g.*, *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) ("Underlying the First Amendment right of access to criminal trials is the common understanding that 'a major purpose of that Amendment was to protect the free discussion of governmental affairs.' " (citation omitted)); *United States v. Criden*, 675 F.2d 550, 557 (3d Cir. 1982) ("The public's vital interest in evaluating the public officials who work in the criminal justice system cannot be fully vindicated unless the public and press can attend pretrial hearings. Otherwise, much of the work of prosecutors and trial judges may go unscrutinized.").

The doctrinal rules derived from these cases further illustrate why the bail magistrates' reliance on generalized concerns about the risk of prejudice to arrestees is misplaced. For instance, the Supreme Court has held that states cannot restrict the public's access to criminal proceedings absent "a compelling governmental interest"—even when the proceedings revolve around highly sensitive matters. *See, e.g.*, *Globe Newspaper Co.*, 457 U.S. at 607, 610-11

(striking down a Massachusetts statute requiring trial judges to exclude the public from any proceeding featuring the testimony of a minor sexual-assault victim). And the Court has likewise held that states cannot punish people for disseminating information disclosed during open court proceedings. *See, e.g.*, *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496-97 (1975) (reversing judgment against a television station found liable in tort for broadcasting the name of a sexual-assault victim whose identity was disclosed during a criminal trial). Here, the bail magistrates have not even attempted to argue that their generalized fair-trial concerns would be sufficiently "compelling" to justify cutting off public access to bail hearings altogether. *See Criden*, 675 F.2d at 557 (recognizing a First Amendment right to attend and observe pretrial hearings in criminal cases). Nor have they argued that their fair-trial concerns would justify punishing people who disseminate information disclosed during bail hearings. *See Cox Broad.*, 420 U.S. at 495-97. They therefore cannot rely on those concerns to justify the recording ban, which does not even fully protect against the types of prejudice they have identified.

The magistrates' fair-trial concerns also ring hollow in light of the court system's own willingness to make public much of the information that the magistrates have characterized as prejudicial. For example, the magistrates claim that the recording ban protects arrestees who might disclose their "criminal history[ies]" during their bail hearings. *See* Bail Magistrates' SJ Mot. 22. But the Administrative Office of Pennsylvania Courts (AOPC) itself makes arrestees' criminal-history information available online, via its own web portal. *See* ECF No. 31 (Stipulation of Facts), at ¶ 35.[2] Nowhere do the magistrates explain why arrestees would be

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[2] The arrestee's criminal history—including both past and pending charges—can be found in a document entitled "Court Summary," which is posted online alongside every criminal docket sheet. A sample court summary—taken from the same case as the sample docket sheet attached to the parties Stipulation of Facts—is attached here as <u>Exhibit 1</u>. (The arrestee's criminal history appears under the "Closed" heading.)

prejudiced if the public obtained this information via bail-hearing recordings but not if the public obtained it from an AOPC website.

The First Circuit's decision in *In re Globe Newspaper Company*, 729 F.2d 47 (1st Cir. 1984)—which the magistrates cite for support—further highlights the inconsistency in the magistrates' position. *In re Globe* arose from a district court's decision to close the courtroom during bail proceedings in a major organized-crime prosecution. A newspaper filed a mandamus petition with the First Circuit, arguing that the courtroom closure violated the First Amendment. Although the First Circuit denied the newspaper's petition, it did so based on the need to prevent the *disclosure* of sensitive evidentiary information in that case—not on the need to prevent the *dissemination* of already-public information. If the evidence at issue in the case had already been made public prior to the bail hearing, the court would have almost certainly found the courtroom closure unconstitutional. *See Craig v. Harney*, 331 U.S. 367, 374 (1947) ("If a transcript of the court proceedings had been published, we suppose none would claim that the judge could punish the publisher for contempt.").[3]

Although Pennsylvania's 2018 "Clean Slate" Law allows certain portions of people's criminal histories to be expunged, the public can still access other criminal-history information through AOPC's web portal, as the attached court summary demonstrates. Furthermore, even if AOPC no longer posts arrestees' *full* criminal histories online, its prior practice of doing so still undercuts its claims about the need to shield such information from public dissemination. And, in any event, Pennsylvania's legislative decision on how to handle certain criminal records cannot override the public's First Amendment rights, especially as to information disclosed in open court.

[3] The bail magistrates' discussion of *In re Globe* also fails to acknowledge that the court's decision was based on the unique circumstances of *that case*—specifically, the high-profile nature of the prosecution and the district court's need to consider wiretap evidence that might have been obtained illegally. *See* 729 F.2d at 59. The First Circuit expressly rejected the argument that bail hearings involve such sensitive subject matter as to justify blanket restrictions on public access (as the magistrates urge here). *See id.* at 53, 59 (holding that "the First Amendment right of access does extend to bail hearings" and that the "possibility of unfavorable publicity does not . . . automatically justify the court in closing pretrial proceedings").

The bail magistrates' attempt to analogize the recording ban to federal rules banning photography and broadcasting in district courts is similarly unavailing. *See* Bail Magistrates' SJ Mot. 7 n.4 & Ex. A. As an initial matter, none of the federal rules they cite is as sweeping as the rules at issue here (no federal rule, for instance, prohibits the public from stenographically recording court proceedings). And, more to the point, none of the federal rules is designed specifically to hinder public discourse about court proceedings. Once again, every federal court allows members of the public to obtain a verbatim transcript of every proceeding. *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."). Moreover, many federal courts—including this one—grant public access to the court's own audio recordings of their proceedings. PUBLIC ACCESS TO COURT ELECTRONIC RECORDS (PACER), DIGITAL AUDIO RECORDING PROJECT (last accessed Jan. 2, 2020), https://perma.cc/7L2J-K2YW (listing dozens of federal district courts, including the Eastern District of Pennsylvania, that make audio recordings of all court proceedings available through PACER). These policies and practices make clear that federal district courts—unlike the magistrates—do not actively seek to inhibit the dissemination of already-public information.

The widespread nature of these policies and practices also casts doubt on the magistrates' speculative concerns about the motives of those who might audio-record bail hearings. *See* Bail Magistrates' SJ Mot. 24 n.21. Numerous court systems—both state and federal—have provided public access to recordings of criminal proceedings for years (including bail hearings) without suffering any adverse consequences. Plus, as noted, the Constitution already enables members of the public to publish whatever information they glean from bail hearings without restriction.

There is no reason to believe (and certainly no evidence to suggest) that the recording ban plays any role in policing the motives of people who attend bail hearings.[4]

None of this is to say, of course, that members of the public must be permitted to audio-record any proceeding that takes place in open court. As noted in prior briefs, judges possess inherent authority to adopt reasonable safeguards to prevent disruptions, distractions, and other conduct (including First Amendment activities) that detract from the proceedings. Those safeguards, however, must be adequately justified if they impinge on First Amendment activities. And, in this case, the justifications that the bail magistrates have provided for the recording ban fail—regardless of whether the ban is analyzed as an impingement on the right of access to court proceedings, the right to record government officials' public activities, or even the more limited right to engage in First Amendment activity inside a nonpublic forum. *See* Plaintiffs' Opp. to MTDs 3-18 (explaining why the recording ban fails under the "time, place, and manner" standard of *Fields*); *id.* at 21-22 (explaining why the recording ban fails under the "meaningful interference" standard of *Whiteland Woods*); Plaintiff's MSJ 7-15 (explaining why the recording ban fails under the nonpublic-forum framework urged by the bail magistrates).

[4] Nor is there any reason to believe that "allowing audio recording will place a burden on the magistrate[s] and court officials to monitor court attendees to ensure that the devices are silent, that the devices capture only audio as opposed to video, and so on." Bail Magistrates' SJ Mot. 21. The magistrates and court officials currently allow members of the public to bring electronic devices into the bail-hearing courtroom—including devices with video-recording capacity, like cellphones. Stipulation of Facts ¶ 30. Thus, whatever time or resources these officials currently devote (if any) to monitoring the use of electronic devices is entirely independent of the recording ban. To the extent that any additional time or resources would be required to ensure that people are using audio-only recording devices, that minimal burden would not overcome the public's First Amendment right to make that recording.

II. None of the publicly available sources that the bail magistrates have identified provides a viable substitute for an actual record of the proceedings.

The bail magistrates contend that the recording ban does not "meaningfully interfere" with the public's ability to understand bail proceedings because "there are alternative means to obtain information about the bail set at arraignments." Bail Magistrates' SJ Mot. 12. None of the alternatives that they identify, however, provides any insight into the most important aspects of the bail process, including the *reasons* underlying the magistrate's bail decision.

Unlike other judges, bail magistrates do not issue written opinions or otherwise set forth the reasons for their decisions in writing. As a result, no court records exist to document the magistrate's rationale for deciding "whether to release a defendant, and what conditions, if any, to impose." Pa. R. Crim. P. 523(a). Furthermore, because all bail hearings in Philadelphia occur entirely off the record, no court records exist to document whatever reasons the magistrate might have provided (orally) at the hearing itself. The public's lack of access to any hearing transcripts or recordings makes it difficult even to speculate about the magistrate's thinking in a given case: after all, the magistrate's questions for the parties—and the parties' responses to those questions—are never memorialized in any form.

Court records also fail to document everything else that occurs during bail hearings prior to the magistrate's final decision. No effort is made to document the arguments raised by the prosecutor, the arguments raised by the defense, or the specific topics discussed; indeed, the court does not even document whether or not an arrestee spoke at a hearing, let alone what he or she might have said. The dearth of information concerning what happens during bail hearings is more than an academic concern. Rather, it has a real impact on civic discourse. As the Bail Fund's director recounts in his declaration, local officials have sometimes disputed the Bail Fund's characterizations of how prosecutors and public defenders conduct themselves during

bail hearings. ECF No. 34 (Declaration of Malik Neal), at ¶ 6. Court records alone cannot resolve those disputes because they say nothing about what is discussed during the hearings.

The few court records that might actually shed light on what is discussed during bail hearings—like the pretrial services reports—are not made available to the public. *See* Stipulation of Facts ¶ 12. And the court records that are available to the public are often costly and difficult to access.

For instance, to request data on preliminary arraignments from AOPC, a member of the public must navigate the bureaucratic gauntlet set forth in AOPC's Electronic Case Record Public Access Policy. *See* Stipulation of Facts, Ex. G. Under that Policy, a requester must first locate the contact information for "the proper record custodian in the court or office where the electronic case record information originated"—information that does not appear anywhere in the Policy itself. Stipulation of Facts, Ex. G, at 4. After locating the proper point of contact, the requester must then submit a written request that includes, among other things, "the purpose/reason for the request" and a "certification that the information will not be used except for the stated purposes." Stipulation of Facts, Ex. G, at 3. A single request can take eight weeks to process and will cost the requester $80 for each hour of staff time needed to process the request. *See* Stipulation of Facts ¶ 42 & Ex. H. Recurring requests cost $240 per month. Stipulation of Facts, Ex. I. Finally, once a requester has actually obtained the information she requested, she remains subject to constraints on her use of that information because, under AOPCS's Policy, all requesters must "ensure that the information provided will be *secure and protected*." Stipulation of Facts, Ex. G, at 3 (emphasis added). On its face, that requirement seems to ensure that any bulk data obtained from AOPC will be of limited value for anyone seeking to use it to further public discourse about the bail system.

Even setting aside the costs and other challenges of obtaining the court records the magistrates have identified, the records themselves are often difficult to decipher—particularly for lay people. The public docket sheets, for instance, are filled with legal jargon and formatted in a manner that obscures key information. To take just one example: the docket entry for an arrestee's preliminary arraignment (listed under the "Calendar Events" heading) typically contains a blank space in the field reserved for "Judge Name"—the field that is supposed to list the name of the magistrate who presided over the arraignment. *See, e.g.*, Stipulation of Facts, Ex. F (Sample Docket Sheet), at 1. Although the magistrate's name is listed elsewhere on the docket—under the "Entries" heading at the end of the docket sheet—nothing on the docket identifies the magistrate's title or role in the case. *See* Stipulation of Facts, Ex. F, at 2. Thus, the only readers who would be able to identify the presiding magistrate from the docket sheet are those who are already familiar with the magistrates' names. Without that background knowledge (which is difficult to acquire from public sources), a reader would have no way of ascertaining from the docket who actually presided over the preliminary arraignment.

The opacity of the docket sheets underscores why the existing court records do not provide a viable substitute for a verbatim record of what happens during bail hearings. Besides their failure to capture key information about the hearings, the records are often quite difficult for ordinary people to understand. Audio recordings of the bail hearings, in contrast, would not only capture more information, but also memorialize that information in a more intelligible format. *See generally* Stephanos Bibas, *Observers as Participants: Letting the Public Monitor the Criminal Justice Bureaucracy*, 127 HARV. L. REV. F. 342, 345 (2014) (encouraging greater public observation of criminal proceedings as a way of making the judicial process more intelligible).

Given the shortcomings of the available court records, it is not surprising the Municipal Court itself uses other tools to oversee the bail magistrates' performance. Since April 2019, the Municipal Court has relied on its own (non-public) audio recordings of bail hearings to "allow for general performance monitoring of the Arraignment Court Magistrates by the President Judge." ECF No. 42 (Supplemental Stipulation of Facts), at ¶ 3. The Municipal Court's reliance on those recordings represents an implicit acknowledgement that audio recordings capture something distinct from existing court records and reaffirms that such recordings provide an effective means of oversight.

III. The bail magistrates mischaracterize the relevant case law.

A. *Fields v. City of Philadelphia*

The Bail Fund's prior briefs explained why the recording ban infringes its right to record the public activities of government officials under the Third Circuit's decision in *Fields*. *See* Plaintiffs' Opp. to MTDs 3-18. In particular, those briefs outlined why the recording ban cannot satisfy the "time, place, and manner" test mandated by *Fields*. 862 F.3d at 360. The bail magistrates now seek to avoid the application of that test by attempting to recast the right at issue in *Fields* as "a right of access to information, not expression." Bail Magistrates' SJ Mot. 17. That argument is untenable.

As previously explained, the right recognized in *Fields* falls at the intersection of several established First Amendment protections. Plaintiffs' Opp. to MTDs 4-6. Those protections include not only the "right of access to information" but also the right to *disseminate* that information—core speech activity. As the *Fields* 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." 862 F.3d at 358 (emphasis added); *see also*

ACLU v. Alvarez, 679 F.3d 583, 596 (7th Cir. 2012) ("Restricting the use of an audio or audiovisual recording device suppresses speech just as effectively as restricting the dissemination of the resulting recording."). The court's focus on the unique role that recordings play in shaping public discourse demonstrates that *Fields* was not about the right of access to information for information's sake, as the magistrates suggest. Rather, *Fields* was about the right to gather information for use in speech and expressive activity. *See* 862 F.3d at 359 ("Access to information regarding public police activity is particularly important because it leads to citizen discourse on public issues, 'the highest rung of the hierarchy of First Amendment values.' " (citation omitted)); *id.* (explaining that recordings are an effective tool for "facilitat[ing] discussion because of the *ease in which they can be widely distributed*" (emphasis added)).

Although the *Fields* court found it unnecessary to classify recording as "inherently expressive conduct," 862 F.3d at 359, it made clear that the process of making recordings for *subsequent* distribution falls squarely within the ambit of protected speech and expression. *See id.* 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." (emphasis added; citation omitted)). Indeed, the *Fields* court explicitly faulted the district court for focusing too narrowly on the plaintiffs' expressive intent "*at the moment when* they recorded or attempted to record police activity." *Id.* (emphasis in original). Such reasoning, the court explained, "ignores that the value of the recordings may not be immediately obvious, and only after review of them does their worth become apparent." *Id.*; *see also id.* ("As illustrated here, because the officers stopped Ms. Geraci from recording the arrest of the protestor, she never had the opportunity to decide to put any recording to expressive use."). The bail magistrates' efforts

to characterize the Bail Fund's claim as a pure "right of access" claim suffers from the same flawed reasoning that the Third Circuit rejected in *Fields*.

The magistrates' argument also ignores another key aspect of the court's analysis in *Fields*: specifically, the fact that *Fields* never applied the "experience and logic" test that typically governs right-of-access cases.[5] *See generally Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 9 (1986) (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). The Third Circuit ordinarily applies that test to determine whether the public enjoys a "right of access to [a] source of information or a government process." *PG Pub. Co. v. Aichele*, 705 F.3d 91, 102 (3d Cir. 2013) (applying "experience and logic" test to determine whether the public enjoyed a right of access to polling places). The Third Circuit's decision not to apply that test in *Fields* therefore undermines the magistrates' attempt to cast *Fields* as a traditional right-of-access case.

B. *Chandler v. Florida*

The magistrates repeatedly suggest that *Chandler v. Florida*, 449 U.S. 560 (1981), precludes the Bail Fund's First Amendment claim in this suit. *See* ECF No. 12 (Bail Magistrates' MTD), at 8; ECF No. 19 (Bail Magistrates' MTD Reply), at 8; Bail Magistrates' SJ Mot. 24. *Chandler* does no such thing. In fact, *Chandler* was not even a First Amendment case and, to the extent it has any relevance here, it casts doubt on the magistrates' justifications for the recording ban.

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[5] The bail magistrates' reliance on *S.H.A.R.K. v. Metro Parks Serving Summit County*., 499 F.3d 553 (6th Cir. 2007), is misplaced for the same reason.

The question in *Chandler* was "whether, consistent with constitutional guarantees, a state may provide for radio, television, and still photographic coverage of a criminal trial for public broadcast, notwithstanding the objection of the accused." 449 U.S. at 562. A pair of criminal defendants sought to challenge a new Florida rule permitting television coverage of judicial proceedings, arguing that the rule violated their fair-trial rights under the Sixth Amendment. The Supreme Court rejected that argument. As the Court explained, an "absolute constitutional ban on broadcast coverage of trials cannot be justified simply because there is a danger that, in some cases, prejudicial broadcast accounts of pretrial and trial events impair the ability of jurors to decide the issue of guilt or innocence." *Id.* at 574-75.

Not surprisingly, given *Chandler*'s focus on the defendants' Sixth Amendment rights, the Court never had occasion to address the scope of the public's First Amendment right to document criminal proceedings. The *Chandler* opinion's sole reference to the First Amendment appeared in a quote from an earlier decision of the *Florida Supreme Court* rejecting a television station's claim that it had a First Amendment right to broadcast live-witness testimony. 449 U.S. at 569 (quoting *In re Petition of Post-Newsweek Stations*, 370 So.2d 764, 774 (Fla. 1979)). And, even in quoting that case, the Court never actually endorsed the Florida court's reasoning—it merely referred to the case in recounting Florida's recent experience with courtroom broadcasting. Thus, to the extent that *Chandler* has any bearing on the present case, it simply reaffirms that a blanket ban on audio-recording bail proceedings is not necessary to safeguard the fair-trial rights of criminal defendants. *See, e.g.*, *id.* at 578-79 ("[A]t present no one has been able to present empirical data sufficient to establish that the mere presence of the broadcast media inherently has an adverse effect on that process.").

C. *McKay v. Federspeil*

The magistrates rely heavily throughout their briefs on the Eastern District of Michigan's decision in *McKay v. Federspeil*.[6] *See* Bail Magistrates' MTD Reply 4-5; Bail Magistrates' SJ Mot. 19-20, 23, 24. In *McKay*, a district court rejected a First Amendment challenge to a local state-court rule barring the use of electronic recording devices inside the courthouse. That ruling, however, rested on a gross misreading of Supreme Court precedent—one that even the bail magistrates have declined to fully endorse here.

The district court's ruling in *McKay* stemmed from its conclusion that "[t]he Supreme Court has explicitly disavowed that observers have a First Amendment right to use electronic equipment in the courtroom." 2014 WL 1400091, at *6; *see also* 22 F. Supp. 3d at 734 ("The Supreme Court thus concluded that there is no First Amendment right to have electronic media in the courtroom."). The court based that conclusion, however, on its reading of *Chandler*, which, as noted, was not a First Amendment case. What's more, the *McKay* court relied explicitly on the portion of *Chandler* that quoted the earlier Florida Supreme Court opinion—and it erroneously attributed that language to the U.S. Supreme Court. *See* 2014 WL 1400091, at *5 (quoting the Florida court's language to support the assertion that *Chandler* "clarified that the media does not have a constitutional right to have electronic equipment in the courtroom"). Given that basic misreading of the case law, *McKay* carries little persuasive weight here.

Furthermore, even if the *McKay* decision rested on sounder reasoning, its application to this case would still be limited. The plaintiff in *McKay* was asserting a much broader First

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[6] The magistrates rely on two different opinions in *McKay*: an unpublished order denying the plaintiff's motion for a preliminary injunction, *see* 2014 WL 1400091 (E.D. Mich. Apr. 10, 2014), and a published order denying the plaintiff's motion for reconsideration, 22 F. Supp. 3d 731 (E.D. Mich. 2014).

Amendment claim than the one at issue here. As noted, he brought a facial challenge to a ban on the use of *any* recording device (not just audio-recording devices) during *any* court proceeding (not just off-the-record, witness-free bail hearings). Its rejection of such a sweeping claim provides little guidance in resolving the much narrower claim at issue here.

IV. The Sheriff's arguments remain meritless.

The Sheriff's summary-judgment motion largely parrots the arguments she previously raised in her motion to dismiss. Those arguments fail for all of the reasons set forth in the Bail Fund's response to that motion, *see* Plaintiffs' Opp. to MTDs 22-24, and all of the reasons this Court outlined at the November 2019 hearing in this case, *see* 11/8/2019 Hrg. Tr. 31-36.

The Sheriff's immunity arguments have not grown any stronger since that hearing. Just last month, the Sixth Circuit rejected an argument nearly identical to the one the Sheriff raises here. In that case, a sheriff in Tennessee appealed a district court's order enjoining him from enforcing certain bail requirements under state law, arguing that he could not be enjoined for enforcing them. In rejecting that argument, the Sixth Circuit explained,

> the plaintiffs can sue the sheriff, and it makes no difference whether he acts for the State or the county. If he acts for the State, *Ex parte Young* permits this injunction action against him. If he acts for the county, neither sovereign immunity, qualified immunity, nor any other defense stands in the way at this stage of the case.

McNeil v. Community Probation Services, No. 19-5262, 2019 WL 7043172, at *2 (6th Cir. Dec. 23, 2019). The same reasoning precludes the Sheriff's argument here.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendants' motions for summary judgment.

Respectfully submitted,

Dated: January 6, 2020

_/s/ _Nicolas Y. Riley_

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Counsel for Plaintiff

EXHIBIT 1

(Sample “Court Summary”)

First Judicial District of Pennsylvania
Court Summary

[redacted], [redacted] DOB: [redacted] Sex: Female
Philadelphia, PA [redacted] Eyes: Brown
Aliases: Hair: Black
Race: White

Active

Philadelphia

MC-51-CR-00[redacted]-2019 Proc Status: Awaiting Preliminary Hearing DC No: [redacted] OTN [redacted]

Arrest Dt: 12/05/2019 Trial Dt: Legacy No:

Def Atty: Defender Association of Philadelphia - (PD)

Last Action: Preliminary Hearing Last Action Date: 12/19/2019 Last Action Room: 803

Next Action: Preliminary Hearing Next Action Date: 02/03/2020 Next Action Room: 703

Seq No	Statute	Grade	Description	Disposition
1	35 § 780-113		Manufacture, Delivery, or Possession With Intent to Manufacture or Deliver	
2	35 § 780-113		Int Poss Contr Subst By Per Not Reg	

Closed

Philadelphia

MC-51-CR-00[redacted]-2018 Proc Status: Awaiting Violation of Probation DC No: [redacted] OTN [redacted]

Arrest Dt: 12/08/2018 Disp Date: 07/19/2019 Disp Judge: Brady, Frank T.

Def Atty: Desiderio, David Ernest - (PR)

Seq No	Statute	Grade	Description	Disposition
1	75 § 3802 §§ A1*	M	DUI: Gen Imp/Inc of Driving Safely - 1st Off	ARD - County

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Please note that if the offense disposition information is blank, his only means that there is not a “final disposition” recorded in the Common Pleas Criminal Court Case Management System for this offense. In such an instance, you must view the public web docket sheet of the case wherein the offense is charged in order to determine what the most up-to-date disposition information is for the offense.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

PHILADELPHIA BAIL FUND,

Plaintiffs,

v.

ARRAIGNMENT COURT MAGISTRATE JUDGES FRANCIS BERNARD, SHEILA BEDFORD, KEVIN DEVLIN, JAMES O'BRIEN, CATERIA MCCABE, and ROBERT STACK, in their official capacities; PRESIDENT JUDGE PATRICK DUGAN, in his official capacity; SHERIFF ROCHELLE BILAL, in her official capacity,

Defendants.

Civil Action No. 2:19-3110

PROPOSED ORDER

Upon consideration of the Motions to Dismiss filed by Defendants Rochelle Bilal; Arraignment Court Magistrate Judges Francis Bernard, Sheila Bedford, Kevin Devlin, James O'Brien, Cateria McCabe, and Robert Stack; and President Judge Patrick Dugan, as well as the opposition thereto filed by Plaintiff, it is this _____ day of _________________ 2020, hereby

ORDERED that Defendants' Motions for Summary Judgment be **DENIED**.

BY THE COURT:

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

CERTIFICATE OF SERVICE

I certify that on January 6, 2020, I caused the foregoing brief in opposition to Defendants' motions for summary judgment, 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 from the ECF system.

/s/ *Nicolas Y. Riley*
NICOLAS Y. RILEY