in Pa.R.Crim.P. 523 and determines the type or combination of types of release on bail that is reasonably necessary, in the magistrate's discretion, "to ensure that the defendant will appear at all subsequent proceedings and comply with the conditions of the bail bond." Pa.R.Crim.P. 524.

During bail hearings, the defendant's counsel (often an assistant public defender) appears in open court before the magistrate to address bail. (Complaint ¶ 21.) A second hearing is then held – again in open court – where the defendant and counsel appear by an audio-visual connection from the county jail. (Complaint ¶ 23.) The magistrate announces their bail decision – what bail is imposed and any other conditions – and informs the defendant when the preliminary hearing will be held. (Complaint ¶ 24.)

The bail bond and criminal complaint are filed with the court and are available for public inspection. *See* Pa.R.Crim.P. 508(B)(complaint), 525(G)(bail bond).

Consistent with Pennsylvania rules, there are no publically available transcripts of the arraignments. The state Rules of Criminal Procedure require that open court proceedings be recorded only after a defendant has been held for court. Pa.R.Crim.P. 115(a).

Pennsylvania's rules on recording court proceedings.

Pennsylvania's Rules of Criminal Procedure prohibit audio or video recordings of any judicial proceeding by anyone other than an official court stenographer. Pa.R.Crim.P. 112(C). Pennsylvania's Rules of Judicial Administration

provide that judges should prohibit recording and photography (among other things) in a courtroom and areas immediately surrounding a courtroom. Pa.R.J.A. 1910.[4]

Consistent with these rules, the Court of Common Pleas of Allegheny County has implemented Local Rule of Criminal Procedure 112.1. Local Rule 112.1 prohibits the recording of proceedings in Municipal Court (in addition to other judicial areas).[5] The Court of Common Pleas has also issued an administrative order pertaining to electronic devices and prohibiting the recording of court proceedings. (The April 26, 2017, Order is attached as Exhibit C.)

Thus, due to binding Pennsylvania law, Judicial Defendants cannot allow the public or press to make audio recordings of arraignments.

In addition, it is a criminal offense for anyone to record a proceeding within a judicial facility or areas surrounding a judicial facility without court approval, the presiding judicial officer's approval, or as provided by court rule. 18 Pa.C.S.A. § 5301.1.

Plaintiffs' ability to report on arraignments and bail.

Plaintiffs are able to attend bail hearings, take notes, and report on what they observe. (Complaint ¶¶ 7-8, 46-47.) Plaintiffs wish to make audio recordings to

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[4] Amendments to Rule 1910 go into effect on January 1, 2020. The amended rule is attached as Exhibit B.

[5] The Court of Common Pleas' Local Criminal Rules are available at https://www.alleghenycourts.us/local_rules/Default.aspx?show=8+hlK2zVEKV4Q9CI6WSA5Q== (retrieved on December 14, 2019).

supplement their reporting by embedding the audio in their online reports. (Complaint ¶¶ 51, 54-55.)

Claims and requested relief.

Plaintiffs claim that Pa.R.Crim.P. 112(C), Pa.R.J.A. 1910, and Local Rule 112.1 are unconstitutional as applied to Plaintiffs because they prohibit them from audio recording preliminary arraignments in the Municipal Court, in violation of the First Amendment. (Complaint, Prayer for Relief.)[6] Plaintiffs assert that the Rules prevent them from "engaging in protected expression and reporting activities," like embedding audio clips into online features. (Complaint ¶ 54.)

Thus, Plaintiffs want a declaration that the cited rules are unconstitutional as applied to them. (Complaint, Prayer for Relief.) All Defendants are sued in their respective official capacities only.[7]

II. Statement of Question

Does the Complaint fail to state a First Amendment claim because the public and press are able to attend preliminary arraignments and report on what they observe, and there is no First Amendment right to record court proceedings?

Answer: Yes.

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[6] Presumably, Plaintiffs are bringing their claim through 42 U.S.C. § 1983.

[7] An official capacity suit against a public official is really against the government entity the person is a part of. *Hafer v. Melo*, 502 U.S. 21, 26 (1991). In this case, it is the magisterial district courts and the Court of Common Pleas of Allegheny County.

III. Argument

There is no First Amendment right to make audio recordings of court proceedings. This has been settled law for decades. Instead of a constitutional issue, courts have recognized that this is a policy issue that is a choice for each judicial system. The Pennsylvania Supreme Court has 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 preserving courtroom decorum.

Plaintiffs are able to exercise their qualified First Amendment right to attend criminal trials and related proceedings. *See Waller v. Georgia*, 467 U.S. 39, 44 (1984); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980). This right to access is "constitutionally satisfied when some members of both the public and the media are able to 'attend the trial and report what they have observed.'" *United States v. Moussaoui*, 205 F.R.D. 183, 185 (E.D. Va. 2002)(quoting *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 610 (1978)).

Although the media has a role in disseminating information to the public, the media's right to access is no greater than the public's right. *PG Pub. Co. v. Aichele*, 705 F.3d 91, 99 (3d Cir. 2013)(citing *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972)), *cert. denied*, 569 U.S. 1018 (2013).

Municipal Court allows the public and press to attend arraignments and report on them as they see fit. Hence, Plaintiffs have their protected right to access.

Plaintiffs, however, want this Court to extend the First Amendment beyond what other courts have uniformly held is not a right.[8] While the media has a right to attend and report, courts have consistently held that the press (and public) has no right to record or broadcast court proceedings. Neither the Supreme Court nor any circuit court has held that the right of access to observe and report on judicial proceedings encompasses a right to electronically record proceedings.

The Third Circuit long ago recognized that courts may craft rules that limit the press' access to information without violating the First Amendment. *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 and did not violate the right to access).

The Supreme Court has addressed the recording of criminal proceedings. And it has never held that the press or public have a constitutional right to record criminal proceedings. Indeed, it is the opposite. In *Nixon v. Warner Communications, Inc.*, the court stated, "In the first place . . . there is no constitutional right to have [live witness] testimony recorded and broadcast." 435 U.S. 589, 610-11 (1978) The court stated:

> Once beyond the confines of the courthouse, a news-gathering agency may publicize, within wide limits, what its representatives have heard and seen in the courtroom. But the

[8] Plaintiffs assert that they are bringing an as-applied challenge to the rules. Thus, they must show that the rules as applied to them in a particular circumstances violated their constitutional rights. *United States v. Marcavage*, 609 F.3d 264, 273 (3d Cir. 2010).

> line is drawn at the courthouse door; and within, a reporter's constitutional rights are no greater than those of any other member of the public.

Id. at 610 (quoting *Estes v. Texas.* 381 U.S. 532, 588 (1965)(Harlan, J., concurring)).

Three years later, the Supreme Court supported the Florida Supreme Court's view by quoting the state court's holding that while the due process clause "does not prohibit electronic media coverage of judicial proceedings *per se,* by the same token, we reject the argument . . . that the first and sixth amendments to the United States Constitution mandate entry of the electronic media into judicial proceedings." *Chandler v. Florida,* 449 U.S. 560, 569 (1981)(quoting *Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So.2d 764, 774 (Fla. 1979)). The court went on to hold that while there was no inherent due process denial in allowing criminal proceedings to be televised, it was up to the states to decide whether to allow broadcasting. *Id.* at 574.

In addition to the Third Circuit, other circuit courts have held that there is no First Amendment right to record or broadcast a proceeding. An often-cited case is the Eleventh Circuit's decision on whether news organizations have a First Amendment right to record and broadcast federal criminal trials. *See United States v. Hastings*, 695 F.2d 1278 (11th Cir. 1983), *cert. denied*, 461 U.S. 931 (1983). The challenge there was to Federal Rule of Criminal Procedure 53, which – like the Rules at issue here – prohibits broadcasting courtroom proceedings. The court relied on Supreme Court case law in holding that there is no First Amendment right to record court proceedings. *Id.* at 1280-81 (analyzing Supreme Court case law).

Instead, the court concluded that Rule 53 was a valid "time, place, and manner" restriction. *Id.* at 1283-84.

The Second Circuit holds that a local rule and associated court order prohibiting a newspaper reporter from using a tape recorder in the courtroom were constitutionally permissible, stating that the First Amendment right of access is "limited to physical presence at trials." *United States v. Yonkers Bd. of Educ.*, 747 F.2d 111, 113 (2d Cir. 1984). The court rejected the reporter's argument that since he "relies heavily on his tape recorder, he is effectively excluded" from court if he could not use it. *Id.*

Other circuits are consistent in holding that there is no First Amendment right to record court proceedings. *See Conway v. United States,* 852 F.2d 187, 188 (6th Cir. 1988)(holding that Rule 53 does not violate the First Amendment), *cert. denied,* 488 U.S. 943 (1988); *Radio & Television News Ass'n of S. California v. U.S. Dist. Ct. for Cent. Dist. of California,* 781 F.2d 1443, 1447 (9th Cir. 1986)(holding that the media's right to gather information is no more than a right to attend a criminal trial and report on their observations); *United States v. Edwards,* 785 F.2d 1293, 1296 (5th Cir. 1986)(upholding Rule 53 and stating that there is no "abridgement of the freedom of press" as long as the press can send representatives to trials and report on them); *United States v. Kerley,* 753 F.2d 617, 622 (7th Cir. 1985)(upholding Rule 53); *Combined Communications Corp. v. Finesilver,* 672 F.2d 818, 821 (10th Cir. 1982)(upholding local rule banning recording devices); *see also Rice v. Kempker,* 374 F.3d 675, 679 (8th Cir. 2004)(stating that "courts have

universally found that restrictions on videotaping and cameras do not implicate the First Amendment guarantee of public access.").

District courts have been as equally harmonious in holding that there is no First Amendment right to record court proceedings, including *Shavlik v. Snohomish Co. Superior Court*, 2019 WL 2616631, at *7 (W.D. Wash. 2019)(collecting cases and holding that the media's First Amendment right is limited to attending proceedings and reporting their observations); *United States v. Nabaya*, 2017 WL 1424802, at *2 (E.D. Va. 2017)(upholding challenge to a local court rule that prohibited recording devices at arraignment and pretrial hearings); *McKay v. Federspiel*, 22 F.Supp.3d 731, 736 (E.D. Mich. 2014)(upholding a state court electronics ban for a government center that the plaintiff claimed violated his constitutional rights to record proceedings and matters of public concern); *Moussaoui*, 205 F.R.D. at 185 (noting that the Fifth, Sixth, Seventh and Eleventh Circuits have held that the First Amendment "does not include a right to televise, record or otherwise broadcast federal criminal trial proceeding"); and *United States v. Hernandez*, 2000 WL 36741162, at *2 (S.D. Fla. 2000)(holding that the First Amendment right is a "right to attend, rather than a license allowing cameras or tape-recorders into the courthouse[.]"); *see generally Whiteland Woods v. Township of West Whiteland*, 1997 WL 653906, at *5 (E.D. Pa.1997)(collecting cases)(stating that the First Amendment "does not guarantee the right to record or broadcast live testimony or other trial proceedings" and is "not violated by absolute bans on video cameras or still-picture cameras in courtrooms."), *aff'd*, 193 F.3d 177 (3d Cir. 1999).

As the *McKay* court noted: any case that would hold that there was a First Amendment right to record within the courtroom would violate Supreme Court precedent. *McKay*, 22 F.Supp.3d at 735 n.2. At bottom, courts are lockstep in holding that there is no First Amendment right to record court proceedings.

The Rules at issue do not limit Plaintiffs' right of access to preliminary arraignments.

In determining whether bans on electronic devices in the courtroom violate the right to access, the Third Circuit's holding in *Whiteland Woods* is instructive. The 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 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)(holding that township could preclude videotaping of a planning commission meeting).[9]

Here, Plaintiffs' right of access is not meaningfully interfered with. First, they are able to attend proceedings, take notes, and report on them. Indeed, Plaintiff Stroud states that in December 2018 he reported on bail in 114 homicide cases in Allegheny County, and is working on a follow up on how bail amounts differ by judge. (Complaint ¶ 7.)[10]

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[9] The Rules at issue here are content-neutral.

[10] The Complaint contains a general, unspecific passing reference that "court representatives have previously" prevented Plaintiff Stroud from taking

Second, there are alternative means to obtain information about bail arraignments in addition to attending hearings. One is to access bail documents that are filed with the court after a preliminary arraignment, which include the bail bond, criminal complaint, and other relevant documents. In addition, dockets for every case – which include bail information – are available on line within hours after a preliminary hearing.[11] Thus, the public does not have to contemporaneously take down a defendant's name, charges, and other details – including what bail was set – about a case. (Complaint ¶ 50.) Instead, they can get that information and more in documents immediately after the arraignment.

Moreover, Plaintiffs and the public have access to a data compilation of over 50 fields of information related to every arraignment in Municipal Court for any selected time period.[12]

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handwritten notes. (Complaint ¶ 46.) It is not the Court of Common Pleas' policy to prevent note taking in a judicial proceeding.

[11] Docket sheets for Pennsylvania criminal cases are accessible through the Commonwealth's Unified Judicial System Web Portal through the Common Pleas Case Management System, which is located at https://ujsportal.pacourts.us/DocketSheets/MDJ.aspx (retrieved on December 15, 2019).

[12] The Unified Judicial System's Electronic Public Access Policy is located at http://www.pacourts.us/assets/files/page-1090/file-837.pdf (retrieved on December 16, 2019). As an example of data available, the undersigned was involved this year with a data request that contains over 45 data fields preliminary arraignments for an eight month period in Philadelphia. Thus, there are even more ways that the public and press can obtain a "comprehensive record" about what occurs in preliminary arraignments. (Complaint ¶ 50.)

Thus, the public's ability to monitor and obtain objective facts on what bail is set for what charges and by whom is not "severely constrained" as Plaintiffs allege. Moreover, there are a multitude of "objective facts" available. Contrary to Plaintiffs' belief, having selective audio clips from selected preliminary arraignments does not necessarily lend to creating an objective, comprehensive account of the preliminary arraignment process.

The Complaint contends that access to audio records would allow Plaintiffs to "create a more complete" record for their reporting, and they could insert audio clips into their web-based reporting, thereby highlighting the "human aspects" of the arraignments. (Complaint ¶ 51.) Of course, the same argument could be made about photography: inserting pictures of the courtroom, the defendant, and the other participants would also highlight the "human aspects."[13]

Next, the Complaint's claim that recording must be allowed because not everyone can attend proceedings does not make recording constitutionally mandated. Indeed, the *Moussaoui* court noted that "the inability of every interested person to attend the trial in person or observe it through the surrogate of the media does not raise a question of constitutional proportion," but rather raises a "question

[13] The Second Circuit put it succinctly: "[if] '[o]ne picture is worth more than ten thousand words,' the argument that appellant makes for a right to record could be made with equal force for a right to photograph. Yet, it is well settled that, insofar as courtroom proceedings are concerned, the latter right is not guaranteed by the Constitution." *Yonkers Bd. of Educ.*, 747 F.2d at 113.

of social and political policy best left to the United States Congress and the Judicial Conference of the United States." *Moussaoui*, 205 F.R.D. at 186.

To the extent that Plaintiffs contend that audio records are mandated to provide a further check on the judicial process, Justice Harlan noted that "it is impossible to believe that the reliability of a trial as a method of finding facts and determining guilt or innocence increases in relation to the size of the crowd watching it." *Estes*, 381 U.S. at 595 (Harlan, J., concurring). Instead, the "presence of interested spectators, attorneys, jurors and a judge" satisfies the safeguards of a public trial and the integrity of those proceedings. *Moussaoui*, 205 F.R.D. at 186. *See also Yonkers Bd. of Educ.*, 747 F.2d at 113 (dismissing the plaintiff's claim that his asserted right to record was strengthened by the "public's right to know.")

Plaintiffs' policy arguments are just that: policy arguments. Yet they do not create a First Amendment right to record proceedings. Pennsylvania has made a policy decision to not allow courtroom proceedings to be recorded. Plaintiffs' arguments are better directed to the state rules committee, which has the authority to make recommended changes to the procedural rules to the Supreme Court of Pennsylvania.

Finally, that there are no official transcripts of the preliminary arraignments is of no moment. As noted above, there is no constitutional right to record to begin with; the right to attend and report is all that is required. *See United States v. Beckham*, 789 F.2d 401 (6th Cir. 1986) ("No fundamental right is implicated as long

as there is full access to the information and full freedom to publish."). Moreover, whether transcripts were available in these cases was not a basis for their holdings.[14]

All in all, that Plaintiffs cannot use audio clips to insert into their reports or an online article does not meaningfully restrict their access to court. Plaintiffs have been able to report on arraignments, may continue to do so, and there are a wealth of additional resources available to buttress their reporting.

Plaintiffs' right of expression claim.

Perhaps recognizing that case law bars a right of access claim, Plaintiffs attempt to avoid that unified case law by asserting that the Rules prevent them from "engaging in protected expression and reporting activities."

But case law holds that the right to record judicial and related proceedings involves the right to access, not expression. *See 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 right of expression analysis).[15]

The Third Circuit held the same in a case involving the right to record police officers performing their duties in public. *See Fields v. City of Philadelphia*, 862 F.3d 353, 359-60 (3d Cir. 2017). At issue in *Fields* was whether the public has a

[14] Besides, just a transcript would not solve Plaintiffs' claimed need for audio to provide the "human aspects."

[15] There are two *McKay* cases: this one involved the plaintiff's motion for reconsideration.

"First Amendment right of access to information" about how "public servants operate in public." *Id.* 355. Despite the plaintiff's contention that the case involved the right of expression, the court held that the right at issue was instead the "right of access." *Id.* at 360.[16] And as laid out above, the right of access to a criminal court is the right to attend, observe, and report. That is all.

Thus, this case does not involve a right of expression. Yet even if it did, Plaintiffs' claims would still come up short. In determining whether the First Amendment protects a right of expression on government property, the court must first examine the nature of the forum in which the speech is restricted – whether the forum is public or nonpublic. *Pomicter v. Luzerne Co. Convention Ctr. Auth.*, 939 F.3d 534, 539-40 (3d Cir. 2019).

When it comes to courtrooms, every Circuit Court to have addressed the issue has agreed that a courtroom is a nonpublic forum. *See Huminski v. Corsones*, 396 F.3d 53, 91 (2d Cir. 2005)(collecting cases); *Mezibov v. Allen*, 411 F.3d 712 (6th Cir. 2005); *Berner v. Delahanty*, 129 F.3d 20 (1st Cir. 1997); *United States v. Gilbert*, 920 F.2d 878 (11th Cir. 1991); *see also Rouzan v. Dorta*, 2014 WL 1716094, at *12 (C.D. Cal. 2014).

Because courtrooms are considered nonpublic forums, "the First Amendment rights of everyone . . . are at their constitutional nadir." *Kraska v. Clark*, 2015 U.S. Dist. LEXIS 109843 (M.D. Pa. 2015)(quoting *Mezibov*, 411 F.3d at 718); *see also*

[16] The *Whiteland Woods* court also used a right to access analysis, noting that the plaintiff did not allege a speech or expression claim. *Whiteland Woods*, 193 F.3d at 183. Nonetheless, the court analyzed the case as a time, place, and manner restriction. *Id.*

Gentile v. State Bar of Nev., 501 U.S. 1030, 1071 (1991)("It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed").

It is anticipated that Plaintiffs will contend that *Fields* should apply here. But the cases upholding the right to record police officers involve them performing their duties in public forums. *See e.g. Fields*, 862 F.3d at 358-60 (plaintiffs filmed police action outside Philadelphia Convention Center and on a public sidewalk); *Glik v. Cunniffe*, 665 F.3d 78, 84 (1st Cir. 2011)(right to record in the Boston Common, "the oldest city park in the United States and the apotheosis of a public forum."); *Turner v. Driver*, 848 F.3d 678 (5th Cir. 2017)(right to record police activity on public sidewalk).[17]

Because the protected activity in *Fields* and other police recording cases occurred in forums markedly different from a courtroom, those cases are not applicable to this matter. *See McKay*, 22 F.Supp.3d at 735 (rejecting a claim that the existence of a First Amendment right to record government officials in public places confers a right to record courtroom proceedings).

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[17] In *Richmond Newspapers, Inc. v. Virginia*, the Supreme Court noted that a courtroom is a "public place where the people generally – and representatives of the media – have a right to be present." 448 U.S. 555, 578 (1980). Yet the court did not hold that a courtroom is a public forum – it was not conducting a forum analysis. Moreover, the court simply stated that the public and media have a "right to be present," which is also not at issue here. Three years later, the court held that merely because the public is allowed to "come and go at will" in a place does not make it a public forum. *United States v. Grace*, 461 U.S. 171, 177 (1983).

Because a courtroom is a nonpublic forum, the government has more "flexibility to craft rules limiting speech." *Pomicter*, 939 F.3d at 540. The government may reserve a nonpublic forum for its "intended purposes, communicative or otherwise," provided that the regulation on speech is "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.*

The reasonableness question turns on whether the government's policy is "reasonable in light of the purpose served by the forum." *Id.* at 541. The government's burden is "light" and a "low bar": it need only provide a legitimate explanation based on the forum's purposes and surrounding circumstances. *Id.* at 541, 543. When it comes to reasonableness, the regulation need not be the "most reasonable or the only reasonable regulation possible" – it just needs to be reasonable. *Id.* Thus, whether there are "other strategies" is irrelevant, and there is no need for restrictions to be narrowly tailored. *Id.* at 545.

Further, the government does not have to wait until "havoc is wreaked" to restrict access. *Id.* Instead, it may act ahead of time to prevent possible issues.

Potential prejudice to the system and defendants.

In making a policy decision to not allow audio records, Pennsylvania and the Court of Common Pleas have made a reasonable decision to mitigate potential prejudice to defendants and to the court system.

First, bail hearings often contain prejudicial evidence that would be inadmissible during a trial and, therefore, courts "should show heightened concern

about the threat that the public dissemination of such inadmissible evidence would have on the accused right to a fair trial." *In re Globe Newspaper Co.*, 729 F.2d 47, 59 (1st Cir. 1984). Indeed, the First Circuit notes that a defendant's "privacy and fair trial interests" are at their "zenith during the bail hearings, since they have not yet had an opportunity to test the material admitted at the hearings." *Id.*

The Supreme Court has recognized that "adverse publicity can endanger" a defendant's ability to receive a fair trial. *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 378 (1979). For that reason, courts have an "affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity." *Id.*[18]

In the instant case, there are many factors that go into a bail decision that could have prejudicial effects on a defendant's right to obtain a fair trial. As outlined above, these include the defendant's criminal history, drug abuse issues, mental condition, and a history of flight or escape. *See* Pa.R.Crim.P. 523(A).

Indeed, this Court in its Local Rules recognizes that information such as "prior criminal record," a defendant's "confessions, admissions, or statements," and a defendant's refusal to submit to a test or examination (and the outcome of such tests) are "substantially likely to be considered materially prejudicial to ongoing criminal proceedings." W.D. Pa. LCrR. 83.C. While this Rule applies to attorneys in

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[18] The *Gannett* case involved a criminal case where the trial court prohibited the public and press from attending a suppression hearing, which the Supreme Court held was permissible due to the particular circumstances in that case. *Gannett Co., Inc.*, 443 U.S. at 394. Indeed, 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*, 467 U.S. at 46 (addressing the Sixth Amendment right to a public trial).

a case, it is instructive because it recognizes that the similar information that is discussed at a preliminary arraignment is potentially prejudicial.

Thus, to allow audio recordings of a defendant's own words about these matters would endanger a defendant's right to a fair trial. A person could post audio of a defendant admitting to prior criminal acts, drug abuse, escape, and other matters that would not be admissible at trial, thereby prejudicing their right to a fair trial. Indeed, a defendant may inadvertently discuss the crimes that they are charged with. In addition, the court may order a defendant to stay away from a victim or witnesses, information that could potentially endanger those persons.

Moreover, a defendant and their counsel may be unwilling to discuss mental health, drug-related issues, and other relevant bail factors if they know that the media may rebroadcast their statements, which could impact the bail decision. *Cf. McKay*, 2014 WL 7013574, at *6 (recognizing that witness may be less forthcoming if their answers were being recorded). While the media can report all this information now by observing the proceedings, limiting it to reporting as opposed to allowing rebroadcasting of audio recordings is a safeguard that mitigates against potential prejudice.

Second, contrary to Plaintiffs' contention, witnesses do appear at preliminary arraignments on occasion. These could be family members, employers, and others who provide information for the magistrate in making their determination. For instance, counsel may present a family member who can verify that a defendant may stay with them, or an employer who confirms that the defendant is employed

and might lose their job if incarcerated. Courts have uniformly recognized the potential prejudice if witnesses could be recorded by the public and press. *See Yonkers Bd. of Educ.*, 747 F.2d 111 at 114; *McKay*, 2014 WL 7013574, at *6; *Moussaoui*, 205 F.R.D. at 186.

Plaintiffs may argue that these concerns are overblown and that their interest in going beyond the right of access to make recordings so that they can replay hearings and post audio clips outweighs any potential prejudice. Setting aside that balancing test, that is not the issue here. Under the forum analysis, it need only be reasonable for the state courts to conclude that prohibiting audio recording protects a defendant's fair trial rights, witness, and decorum.

Courts have not extended the First Amendment to require that the public or media be allowed to make audio recordings. The question, instead, is left to each court and judicial system as a policy matter – as the Supreme Court in *Chandler* recognized.

What is more, although Plaintiffs point out that recordings can be made with silent handheld devices, whether recordings are physically less intrusive does not curtail these potential prejudices. Simply put, whether the recordings can be made in "less disruptive" ways is irrelevant: there is no First Amendment right to record to begin with. *See McKay*, 22 F.Supp.3d at 736 (rebuffing a claim that "technological advances" require courtroom recording).

In addition, allowing audio recording will place a burden on the magistrate 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. By having a blanket rule, the state court has made a reasonable policy decision to avoid these issues, allow magistrates and court participants to focus on the proceedings, and ensure decorum.

In sum, there is no First Amendment right to record courtroom proceedings. Pennsylvania and the Court of Common Pleas of Allegheny County have made a reasonable policy decision consistent with longstanding case law to mitigate the potential prejudice to defendants and witness, and to ensure the decorum of court proceedings, while still allowing the public and media access to court, the ability to report, and access to court filings and information.

IV. Conclusion

Judicial Defendants respectfully request that this Honorable Court grant their Motion and dismiss the claims against them with prejudice. Given the legal defenses, it would be futile to allow Plaintiffs leave to amend the Complaint. *See Miklavic v. USAir, Inc.*, 21 F.3d 551, 557-58 (3d Cir. 1994); *Shane v. Fauver*, 213 F.3d 113, 115 (3d Cir. 2000).

Respectfully Submitted,

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

MATT STROUD *et al*	:	
	:	CIVIL ACTION
Plaintiffs	:	
	:	No. 19-1289
v.	:	
	:	
MAGISTERIAL DISTRICT JUDGE DANIEL E. BUTLER *et al.*	:	
	:	
Defendants	:	

Certificate of Service

The undersigned certifies that on *December 17, 2019*, he caused the foregoing *Motion to Dismiss* and *Brief in Support* via CM/ECF to all counsel of record

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