UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

MATT STROUD, et al.,

Plaintiffs,

v.

2:19-cv-01289-MRH

MAGISTERIAL DISTRICT JUDGE DANIEL E. BUTLER, et al.,

Defendants.

PLAINTIFFS' CONSOLIDATED RESPONSE IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

CHARLES KELLY (PA 51942)
JOHN A. MARTY (PA 324405)
SAUL EWING ARNSTEIN & LEHR LLP
One PPG Place, Suite # 3010
Pittsburgh, PA 15222
Tel.: 412-209-2500
Fax: 412-209-2570
charles.kelly@saul.com
john.marty@saul.com

NICOLAS Y. RILEY *
ROBERT D. FRIEDMAN *
INSTITUTE FOR CONSTITUTIONAL ADVOCACY & PROTECTION
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Avenue NW
Washington, DC 20001
Tel.: 202-662-4048
Fax: 202-662-9248
rdf34@georgetown.edu
nr537@georgetown.edu

* Admitted to practice *pro hac vice*.

Counsel for Plaintiffs

January 15, 2020

TABLE OF CONTENTS

INTRODUCTION 1

BACKGROUND 2

ARGUMENT 3

I. Plaintiffs have a First Amendment right to audio-record prosecutors and magistrate judges performing their duties during bail hearings held in open court. 3

A. The First Amendment protects the right to record government officials performing their duties in public view. 3

B. The right to record government officials' public conduct does not vanish inside the courtroom. 6

C. Restrictions on the right to record the government's public activities must be narrowly tailored and leave open ample alternative channels for communication. 7

1. The challenged court rules are not narrowly tailored to prevent the types of "potential prejudice" the magistrates have identified. 9

2. The challenged court rules do not leave open ample alternative channels for communication. 11

II. The Third Circuit's decision in *Whiteland Woods* does not control here and, even if it did, Plaintiffs would still prevail. 14

A. *Whiteland Woods* is inapplicable here. 14

B. Plaintiffs would still prevail under the "meaningful interference" standard from *Whiteland Woods*. 17

III. The public-forum doctrine does not control here and, even if it did, Plaintiffs would still prevail. 19

IV. The case law cited by the magistrates is inapposite. 25

V. The Sheriff's remaining procedural arguments lack merit. 28

CONCLUSION 30

TABLE OF AUTHORITIES

Cases

ACLU v. Alvarez,
679 F.3d 583 (7th Cir. 2012) ..... passim

Animal Legal Defense Fund v. Wasden,
878 F.3d 1184 (9th Cir. 2018) 10, 20

Askins v. Dep't of Homeland Sec.,
899 F.3d 1035 (9th Cir. 2018) 4

Berner v. Delahanty,
129 F.3d 20 (1st Cir. 1997) 21

C.H. ex rel. Z.H. v. Oliva,
226 F.3d 198 (3d Cir. 2000) 29

Carter v. City of Philadelphia,
181 F.3d 339 (3d Cir. 1999) 29

Chandler v. Florida,
449 U.S. 560 (1981) 25

Child Evangelism Fellowship of N.J. Inc. v. Stafford Twp. Sch. Dist.,
386 F.3d 514 (3d Cir. 2004) 22

City of Ladue v. Gilleo,
512 U.S. 43 (1994) 14

Craig v. Harney,
331 U.S. 367 (1947) 22, 24

Enoch v. Hogan,
728 F. App'x 448 (6th Cir. 2018) 20

Fields v. City of Philadelphia,
862 F.3d 353 (3d Cir. 2017) ..... passim

Finberg v. Sullivan,
634 F.2d 50 (3d Cir. 1980) 30

First Amendment Coal. of Arizona, Inc. v. Ryan,
938 F.3d 1069 (9th Cir. 2019) 17

First Amendment Coal. v. Judicial Inquiry & Review Bd.,
784 F.2d 467 (3d Cir. 1986) 16

Garrison v. Louisiana,
379 U.S. 64 (1964) 4

Glik v. Cunniffe,
655 F.3d 78 (1st Cir. 2011) 4, 5, 8

Goldschmidt v. Coco,
413 F. Supp. 2d 949 (N.D. Ill. 2006) 7

Hill v. Borough of Kutztown,
455 F.3d 225 (3d Cir. 2006) 28

Huminski v. Corsones,
396 F.3d 53 (2d Cir. 2005) 21

Hutto v. Finney,
437 U.S. 678 (1978) 29

Iacobucci v. Boulter,
193 F.3d 14 (1st Cir. 1999) 20

In re Globe Newspaper Co.,
729 F.2d 47 (1st Cir. 1984) 23, 24

Int'l Soc. for Krishna Consciousness, Inc. v. New Jersey Sports & Exposition Auth.,
691 F.2d 155 (3d Cir. 1982) 20, 21

Kentucky v. Graham,
473 U.S. 159 (1985) 29

Lefemine v. Wideman,
758 F.3d 551 (4th Cir. 2014) 29

Linmark Associates, Inc. v. Willingboro Twp.,
431 U.S. 85 (1977) 11, 12

Los Angeles Cty. v. Humphries,
562 U.S. 29 (2010) 29

McCullen v. Coakley,
573 U.S. 464 (2014) 10

Mezibov v. Allen,
411 F.3d 712 (6th Cir. 2005) 21

Nat'l Ass'n for the Advancement of Multijurisdiction Practice v. Castille,
799 F.3d 216 (3d Cir. 2015) 8

Nat'l Inst. of Family & Life Advocates v. Becerra,
138 S. Ct. 2361 (2018) 9

Northeast Pa. Freethought Soc'y v. County of Lackawanna Transit Sys.,
938 F.3d 424 (3d Cir. 2019) 22

Nebraska Press Ass'n v. Stuart,
427 U.S. 539 (1976) 22, 23

Nixon v. Warner Commc'ns, Inc.,
435 U.S. 589 (1978) 27

Oklahoma Publishing Co. v. District Court,
430 U.S. 308 (1977) 23

People v. Boss,
701 N.Y.S.2d 891 (Sup. Ct. 2000) 7

Pomicter v. Luzerne Cty. Convention Ctr. Auth.,
939 F.3d 534 (3d Cir. 2019) 20, 22

Press-Enterprise Co. v. Superior Court,
478 U.S. 1 (1986) 6, 10, 14, 15

Richmond Newspapers, Inc. v. Virginia,
448 U.S. 555 (1980) 7

Sheppard v. Maxwell,
384 U.S. 333 (1966) 7

Skilling v. United States,
561 U.S. 358 (2010) 11, 13

Smith v. City of Cumming,
212 F.3d 1332 (11th Cir. 2000) 4, 8

Sorrell v. IMS Health Inc.,
564 U.S. 552 (2011) 16

Tribune Review Pub. Co. v. Thomas,
254 F.2d 883 (3d Cir. 1958) 27

Turner v. Driver,
848 F.3d 678 (5th Cir. 2017) 4, 8

United States v. Antar,
38 F.3d 1348 (3d Cir. 1994) 17, 18

United States v. Columbia Broad. Sys.,
497 F.2d 102 (5th Cir. 1974) 7, 26

United States v. Criden,
675 F.2d 550 (3d Cir. 1982) 23

United States v. Gilbert,
920 F.2d 878 (11th Cir. 1991) 21

United States v. Kerley,
753 F.2d 617 (7th Cir. 1985) 26

United States v. Yonkers Bd. of Educ.,
747 F.2d 111 (2d Cir. 1984) 27

Whiteland Woods, L.P. v. Twp. of W. Whiteland,
193 F.3d 177 (3d Cir. 1999) ..... passim

Rules

Pa. R. Crim. P. 112 ..... 16, 17

Constitutional Provisions

U.S. Const. amend. VI 23

Other Authorities

Paula Reed Ward, *ACLU of Pa. Report Slams Use of Cash Bail in Allegheny County*, PITT. POST-GAZETTE (Oct. 24, 2019) 19

PUBLIC ACCESS TO COURT ELECTRONIC RECORDS, DIGITAL AUDIO RECORDING PROJECT 11

Stephanos Bibas, *Observers as Participants: Letting the Public Monitor the Criminal Justice Bureaucracy*, 127 HARV. L. REV. F. 342 (2014) 19

INTRODUCTION

Over the past several years, Pittsburgh'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 the Pittsburgh Municipal Court. There, a group of magisterial district 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. Observers are also 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 Matt Stroud and *Postindustrial* 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 and comprehensive 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 the 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 Pittsburgh Municipal Court.

Defendants seek to defend the recording ban by overstating both the scope of Plaintiffs' claims and the breadth of the applicable case law. Contrary to those characterizations, however, Plaintiffs are not asserting an unfettered right to record all types of judicial proceedings in any manner they choose. Rather, Plaintiffs are asserting a right to audio-record their local officials performing public duties during a very specific type of public proceeding: Pittsburgh's *off-the-record*, *non-testimonial* bail hearings. Defendants have not cited any cases addressing (let alone rejecting) such a narrow First Amendment claim. Nor have they cited any cases addressing the full range of First Amendment protections at issue in this case—protections that include not only the right to *access* court proceedings but also the right to *document* and *disseminate* truthful accounts of those proceedings. Moreover, the sole justification Defendants have offered for the recording ban—namely, preventing potential prejudice to arrestees—rests on speculative fears not borne out by reality. This Court should therefore deny the motions to dismiss and allow Plaintiffs to test—with evidence—Defendants' purported justification for barring people from audio-recording bail hearings.

BACKGROUND

Matt Stroud is a longtime writer and journalist who previously worked as a national reporter at Bloomberg News and as a correspondent for the Associated Press. ECF No. 1 (Complaint), at ¶ 7. He currently serves as CEO and Executive Editor of Postindustrial Media, a media company that operates the magazine *Postindustrial*, among other projects. *Id.* ¶¶ 7-8. *Postindustrial* provides in-depth reporting about communities in the Rust Belt and Greater Appalachia, including Pittsburgh. *Id.* at ¶ 8. The magazine publishes stories—both online and in print—on a variety of topics, including bail and other criminal justice issues. *Id.* Part of its mission is to report on how the criminal justice system interacts with the poor and other at-risk

communities. *Id.* *Postindustrial* also distributes the podcast "Criminal Injustice," a series that "dissects problems with police, prosecutors and courts." *Id.*

In May 2019, Mr. Stroud emailed President Judge Kim Berkeley Clark to ask if he could use a silent, handheld recording device to audio-record bail hearings before magisterial district judges (sometimes called "magistrates") in Pittsburgh Municipal Court. Complaint ¶ 43. In his email, Mr. Stroud noted that he would allow courthouse-security officials to inspect the device—which would not have cellular capabilities—before he began using it. Nevertheless, the Deputy Court Administrator denied his request (on behalf of President Judge Clark), stating that "recording proceedings is strictly prohibited by Pa.R.Crim.P. 112 and Allegheny County Local Rules." *Id.*

In October 2019, Mr. Stroud and *Postindustrial* filed this suit challenging the court rules that bar the public from creating and disseminating audio recordings of Pittsburgh bail hearings. Each of the challenged rules—Pennsylvania Rule of Criminal Procedure 112(C), Pennsylvania Rule of Judicial Administration 1910, and Allegheny County Rule of Criminal Procedure 112.1—independently prohibits electronic recording of criminal proceedings, including bail hearings. Complaint ¶¶ 29-32. Plaintiffs seek a declaratory judgment that this ban violates the First Amendment insofar as it precludes them from audio-recording bail hearings. *Id.* ¶¶ 56-60.

ARGUMENT

I. Plaintiffs have a First Amendment right to audio-record prosecutors and magistrate judges 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). 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).[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 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

[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"); *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.").

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, 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 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 of other courts. *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 Pittsburgh's criminal justice system. *Id.* In fact, in many instances, Plaintiffs' recordings would represent the *only* public record of what was actually said during a bail hearing.

The same First Amendment interests that necessitate protections for recording police activity in "public places," 862 F.3d at 358, likewise necessitate protections for audio-recording prosecutors and magistrates performing their duties during off-the-record hearings 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 people can observe prosecutors and magistrates interacting directly with arrestees, 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 the government's public activities must be narrowly tailored and leave open ample alternative channels for communication.

The magistrates seek to evade the import of *Fields* by urging this Court to rely on a separate line of cases involving a more limited First Amendment right—namely, the "right to

attend, observe, and report" on court proceedings. *See* ECF No. 20 (Magistrates' MTD), at 17.[2] Those cases, however, are inapposite because (unlike *Fields*) they do not address the full set of First Amendment interests implicated by Plaintiffs' claim here. *See infra* Part II.A (explaining why the magistrates' attempt to cast Plaintiffs' claim as a "right of access" claim is untenable). By focusing narrowly on those cases, the magistrates overlook the growing body of law (including *Fields*) governing the right to record the government's public activities. And, as a result, the magistrates apply the wrong framework and wrong case law to Plaintiffs' claims.

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).

The magistrates cannot satisfy that test here. The only justification they have offered for the blanket ban on audio-recording magistrates and prosecutors is the need to "mitigate potential

[2] The Sheriff adopted the magistrates' merits arguments in his motion but did not raise any independent merits arguments of his own.

[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").

prejudice to [criminal] defendants and to the court system." *See* Magistrates' MTD 19.[4] But they cannot rely on a speculative risk of "potential prejudice" to justify the ban—especially at the pleading stage. And, even if they could, the recording ban would still fail the "time, place, and manner" test because it is not "narrowly tailored" and does not "leave open ample alternative channels for communication."

1. The challenged court rules are not narrowly tailored to prevent the types of "potential prejudice" the magistrates have identified.

The magistrates contend that the ban on audio-recording bail hearings serves to protect the "privacy and fair trial interests" of arrestees. Magistrates' MTD 20. Specifically, they 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.* at 19-20 (citation and quotation marks omitted). The ban on electronic recording, however, is not 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 the courtroom must remain open to the public during bail hearings and that any information disclosed during those hearings—including evidence that would be inadmissible at trial—may be freely disseminated. *See* Magistrates' MTD 21 (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

[4] Because the Sheriff does not identify any independent justifications for the recording ban, the ensuing sections of this brief focus on the magistrates' proffered justifications.

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—failed the narrow-tailoring requirement because it banned only audio and video recordings (but not photography) of agricultural operations. *See id.* at 1204-05; *see also 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. Plus, that risk is further minimized by the fact that all arrestees in Pittsburgh are provided counsel, who typically do most of the speaking at bail hearings; in fact, arrestees are not even present for a certain portions of these hearings. Complaint ¶¶ 20-21. Moreover, any 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 Pittsburgh, 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 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. Complaint ¶ 42; *see also* PUBLIC ACCESS TO COURT ELECTRONIC RECORDS (PACER), DIGITAL AUDIO RECORDING PROJECT (last accessed Jan. 6, 2020), https://perma.cc/7L2J-K2YW (listing dozens of federal district courts that make audio recordings of all court proceedings available through PACER).

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 magistrates are performing their official duties. As noted above, the magistrates' only justification for the ban is the purported need to restrict the dissemination of information disclosed during bail hearings. *See* Magistrates' MTD 21 (arguing that "limiting [dissemination] to reporting as opposed to allowing rebroadcasting of audio recordings is a safeguard . . . against potential prejudice"). But, by definition, openly targeting a uniquely effective method of communication *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 magistrate judges. 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 Pittsburgh 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* Complaint ¶¶ 50-51. 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, defense counsel's arguments and evidence, the magistrate's questions, and the magistrate's reasons for his or her 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 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. Complaint ¶ 51. Recordings are also more accessible to many people, particularly those with limited literacy skills or visual ability, and are free from transcription errors. 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.").

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*, the magistrates 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). *See* Magistrates' MTD 12-13. 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.*

The magistrates contend that this case should be decided under *Whiteland Woods*'s "meaningful interference" standard. *See* Magistrates' MTD 12-13. 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 the magistrates), 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—which occur entirely off the record.

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." 193 F.3d at 183. As noted, 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. *See supra* Part I.C.2; *cf. First Amendment Coal. of Arizona, Inc. v. Ryan*, 938 F.3d 1069, 1075 (9th Cir. 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 observe 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.

The 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." Magistrates' MTD 13. None of the alternatives that they identify, however, provides any insight into the most important aspects of the bail process. 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.

Magisterial district judges do not outline the reasons for their bail 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 Pittsburgh occur entirely off the record, no 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—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 or evidence provided by the defense or the specific topics discussed at the hearing. This dearth of documentation effects civic discourse in concrete ways. Only a few months ago, for instance,

local officials publicly disputed the way that certain reform advocates characterized Pittsburgh's bail process in a public report. Paula Reed Ward, *ACLU of Pa. Report Slams Use of Cash Bail in Allegheny County*, PITT. POST-GAZETTE (Oct. 24, 2019), https://perma.cc/F8BJ-YW32 (quoting statement of District Attorney accusing local advocates of "misrepresent[ing] the bail processes in Allegheny County"). Those types of disputes cannot be resolved by court records that say nothing about what actually transpires during bail 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. Complaint ¶ 26. And the court records that are available to the public are often costly, difficult to access, and laden with legal jargon that renders them opaque to most lay readers. 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). In short, none of the court records identified by the magistrates actually provides a meaningful substitute for a verbatim record of bail hearings.

III. The public-forum doctrine does not control here and, even if it did, Plaintiffs would still prevail.

As an alternative to their argument that *Whiteland Woods* should govern this case, the magistrates argue that Plaintiffs' claims should be analyzed under the public-forum doctrine. *See* Magistrates' MTD 17-19. They argue, in particular, that "[i]n 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." *Id.* at 17. But nothing in *Fields*—or any other Third Circuit case—

suggests that the public's right to record government activity in "public places" should turn on how a court would classify the recording location under public-forum principles.

Indeed, *Fields* itself implicitly recognized that the right to record government conduct extends to nonpublic forums. One of the plaintiffs in *Fields* sought to record police activity at the entrance of a public convention center[5]—a type of public space that the Third Circuit has repeatedly treated as a nonpublic forum. *See Pomicter v. Luzerne Cty. Convention Ctr. Auth.*, 939 F.3d 534, 539 (3d Cir. 2019); *Int'l Soc. for Krishna Consciousness, Inc. v. N.J. Sports & Exposition Auth.*, 691 F.2d 155, 161 (3d Cir. 1982). Yet, the *Fields* court held that the plaintiff's recording efforts were constitutionally protected. *Id.* at 360. And it did so without engaging in any public-forum analysis. In other words, neither the holding nor language of *Fields* supports the magistrates' claim that the decision rested on an implicit public-forum analysis.

Other courts have similarly recognized a right to record matters of public interest on various types of public and private property, without suggesting that the level of scrutiny turns on the type of "public place" where the recording is made. *See, e.g.*, *Animal Legal Def. Fund*, 878 F.3d at 1203 (recognizing right to record agricultural production activities inside private agricultural plants); *Enoch v. Hogan*, 728 F. App'x 448, 456 (6th Cir. 2018) (recognizing right to record press conference in a courthouse corridor); *Iacobucci v. Boulter*, 193 F.3d 14, 25 (1st Cir. 1999) (recognizing right to record local-government officials in a town-hall corridor). These cases undercut the magistrates' effort to inject a forum-based analysis into the *Fields* framework.

The magistrates' own cited cases only further highlight why the public-forum doctrine provides a poor framework for analyzing this case. The magistrates cite a handful of cases for

[5] *See Fields*, 863 F.3d at 356 (noting that one of the plaintiffs was filming police during a "protest at the Philadelphia Convention Center"); *Fields*, No. 16-1650 (3d Cir.), Joint Appendix, at JA-35 (noting that the plaintiff was "right at the main front doors to the convention center").

the proposition that the "courtroom is a *nonpublic* forum." Magistrates' MTD 17. But all of those cases deal with restrictions on conduct—specifically, protest activity and attorney speech—involving actual, contemporaneous expression inside the courtroom. *See Huminski v. Corsones*, 396 F.3d 53, 63 (2d Cir. 2005) (restriction on displaying protest signs on courthouse grounds); *Mezibov v. Allen*, 411 F.3d 712, 719 (6th Cir. 2005) (restriction on attorney speech during judicial proceedings); *Berner v. Delahanty*, 129 F.3d 20, 22 (1st Cir. 1997) (restriction on attorney's ability to wear political buttons in court); *United States v. Gilbert*, 920 F.2d 878, 880 (11th Cir. 1991) (restriction on protest activity on courthouse grounds).[6] None of those cases provides any guidance for evaluating restrictions on the type of First Amendment activity at issue here—namely, *gathering* and *documenting* information about court proceedings for later use *outside* the courtroom. The magistrates' reliance on those cases therefore ignores a basic doctrinal reality: the fact that a government property may be considered a nonpublic forum for *some* types of First Amendment activity does not convert it into a nonpublic forum for *all* types of First Amendment activity. *See, e.g., Int'l Soc. for Krishna Consciousness*, 691 F.2d at 161 ("[C]ivil rights protesters may keep a silent vigil in a segregated library, although they may not deliver a speech in the reading room.").

In any event, even if the bail-hearing courtroom could properly be classified as a nonpublic forum here, the recording ban would still be unconstitutional because the magistrates have not shown that the ban is reasonable. As the Third Circuit has recognized, the

[6] Most of these cases are inapposite for other reasons, as well. *Mezibov*, for instance, was not even decided on a public-forum rationale; rather, the court invoked the public-forum doctrine only to bolster its (unrelated) holding that an attorney is "not engaged in free expression" when "filing motions and advocating for his client in court." 411 F.3d at 720. And *Huminski* and *Gilbert* both dealt with expressive conduct on courthouse grounds generally—rather than in courtrooms specifically—and both acknowledged that citizens retain First Amendment rights inside courthouses. *Huminski*, 396 F.3d at 89 n.34; *Gilbert*, 920 F.2d at 886.

government's authority to restrict First Amendment activity in a nonpublic forum is not unfettered and must, instead, be "reasonable in light of the purpose of the for[um]." *Child Evangelism Fellowship of N.J. Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 526 (3d Cir. 2004). This reasonableness test is "more exacting than the deferential rational basis standard." *Northeast Pa. Freethought Soc'y v. County of Lackawanna Transit Sys.*, 938 F.3d 424, 438 (3d Cir. 2019). Under this test, the government bears the burden of establishing that a given regulation is a reasonable means of advancing a purpose of the forum. *See Pomicter*, 939 F.3d at 541, 542. The Third Circuit has described this reasonableness inquiry as "fact-intensive." *Id.* (quoting *New England Reg'l Council of Carpenters v. Kinton*, 284 F.3d 9, 20 (1st Cir. 2002)).

In this case, the magistrates have not met their burden of establishing that the recording ban is a reasonable means of advancing a legitimate purpose of the forum. As noted above, the magistrates' primary justification for the ban is their purported need to protect arrestees' fair-trial rights by limiting the means by which information about the hearings can be disseminated publicly. *See supra* Part I.C. But the magistrates cannot claim a legitimate interest in suppressing the spread of truthful information about hearings that take place in open court. 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). The magistrates therefore cannot rely on a purported need to limit the dissemination of accurate accounts of 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 that criminal defendants have 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 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 never closed the courtroom during trial, the Court held that the First Amendment did not permit the judge "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 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 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.").[7]

The magistrates suggest (without elaboration) that there is something uniquely prejudicial about the audio-recording format because it might capture arrestees speaking in their "own words" at their pretrial hearings. Magistrates' MTD 21. But the Supreme Court rejected that argument in *Nebraska Press Association*, which, as noted above, invalidated a trial-court order barring the press from "broadcasting accounts of confessions or admission made by the accused." 427 U.S. at 541. Furthermore, even if a public recording of an arrestee's "own words" posed some unique risk of prejudice—and it does not—that still would not justify the ban

[7] The 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. Indeed, the First Circuit expressly rejected the argument that bail hearings *generally* involve such sensitive subject matter as to justify *blanket* restrictions on public access. *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").

on audio-recording in the bail-hearing context: after all, the arrestee is typically not even present for the substantive bail discussion between the magistrate and defense counsel. *See* Complaint ¶¶ 21-23. Thus, any risk of capturing an arrestee's "own words" is virtually nonexistent.

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. Judges possess inherent authority to adopt reasonable safeguards to prevent disruptions, distractions, and other conduct (including expressive activity) that detracts from the proceedings. Those safeguards, however, must be adequately justified if they impinge on First Amendment activities. And, in this case, the sole justification that the magistrates have provided is inadequate—even under the nonpublic forum framework—because it rests entirely on an illegitimate purpose: hindering public access to information disclosed during open-court proceedings that do not involve jurors or witnesses.[8]

IV. The case law cited by the magistrates is inapposite.

The magistrates contend that "courts have consistently held that the press (and public) has no right to record or broadcast court proceedings." Magistrates' MTD 8. Most of the cases they cite, however, addressed the right to *televise* (and sometimes even live-broadcast) proceedings involving *jurors* and *witnesses*—claims considerably broader than the one at issue in the present case. More to the point, none of these cases addressed the right that Plaintiffs actually assert here: the First Amendment right to record the government's public activities and to disseminate those recordings publicly.

The magistrates' reliance on *Chandler v. Florida*, 449 U.S. 560 (1981), highlights both of these shortcomings. Indeed, the Court in *Chandler* did not purport to opine on the First

[8] The magistrates' unsupported assertion that "witnesses do appear at preliminary arraignments on occasion" conflicts with most accounts of the hearings and, in any event, cannot be accepted as true at the Rule 12(b)(6) stage. *See* Complaint ¶ 41.

Amendment at all. *Id.* at 562. Rather, *Chandler* involved a *Sixth* Amendment challenge to a Florida rule permitting television coverage of judicial proceedings. A pair of criminal defendants challenged the rule, arguing that it violated their fair-trial rights, but the Supreme Court rejected their challenge. 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 Sixth Amendment, the Court never had occasion to address the constitutionality of restrictions on the public's First Amendment right to document criminal proceedings.

Chandler also focused specifically on the impact of *televising* criminal proceedings. The Court never examined the impact of audio-recording, which raises far fewer institutional concerns than video-recording. 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 (invalidating a courtroom-sketching ban that had been adopted to minimize 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 film or photography, which can inadvertently capture images of non-participants. In light of these differences, it is unsurprising that so many of the magistrates' cited cases focus on the unique risks associated with *filming* or *photographing* court proceedings. *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").

Nor is it surprising that the magistrates' cases focus on the specific risks associated with

recording *live witness* testimony, which is not at issue here. The magistrates rely, for instance, on dicta from *Nixon v. Warner Communications, Inc*., 435 U.S. 589 (1978), which stated that "there is no constitutional right to have [live witness] *testimony* recorded and broadcast." Magistrates' MTD 8 (emphasis added; quoting *Nixon*, 435 U.S. at 610). But the magistrates never explain why that language—which comes from a passage about the *Sixth* Amendment—would apply to bail hearings, where "there are no witnesses." Complaint ¶ 41.

The magistrates' cited cases also suffer from an additional flaw: none of them involved proceedings that occur entirely off the record, like Pittsburgh's bail hearings. In fact, most of the cases they cite addressed 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 people from recording on-the-record proceedings does not raise the same First Amendment concerns—either under *Fields* or under *Whiteland Woods*—because they can always obtain a verbatim record of what transpired.

Finally, even setting aside the other shortcomings in the magistrates' cited cases, the cases remain inapposite because they implicate a much narrower range of First Amendment interests than the present case. Indeed, the courts in those cases (much like the court in *Whiteland Woods*) made clear that they "were not dealing with freedom of expression at all." *Tribune Review Pub. Co. v. Thomas*, 254 F.2d 883, 885 (3d Cir. 1958). Rather, they were concerned with the more limited "right to attend" court proceedings. *See, e.g.*, *United States v. Yonkers Bd. of Educ*., 747 F.2d 111, 113 (2d Cir. 1984) (rejecting the view that "the *right to attend* includes the right to record" (emphasis added)). In short, the courts focused exclusively on whether the prohibitions on recording (typically, bans on filming or photography) infringed

the First Amendment "right of access," without addressing whether the rules had any implications for other First Amendment rights. Here, in contrast, Plaintiffs' claims directly implicate the full constellation of First Amendment protections outlined in *Fields* and other recent cases. Those protections include not only the "right of access to information," *Fields*, 862 F.3d at 359, but also the right to *disseminate* that information. As *Fields* 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." *Id.* at 358 (emphasis added); *see also id.* at 359 (explaining that recordings are an effective tool for "facilitat[ing] discussion because of the *ease in which they can be widely distributed"* (emphasis added)). For that reason, the magistrates' cited cases—all of which predate *Fields*—provide little guidance here.

V. The Sheriff's remaining procedural arguments lack merit.

The Sheriff does not address the constitutionality of the challenged court rules. Instead, he raises two procedural defenses, both of which rest on a misunderstanding of the complaint.

First, the Sheriff's qualified-immunity defense rests on the mistaken assumption that this is a suit for damages. *See* ECF No. 16 (Sheriff's MTD), at 2 ("Plaintiffs are seeking an award of damages solely from the Sheriff's Office."). As the complaint makes clear, Plaintiffs are seeking only declaratory and injunctive relief. *See* Compl. 20 (Prayer for Relief). The Sheriff therefore cannot rely on qualified immunity as a defense to those claims. *See, e.g.*, *Hill v. Borough of Kutztown*, 455 F.3d 225, 244 (3d Cir. 2006) ("[T]he defense of qualified immunity is available only for damages claims—not for claims requesting prospective injunctive relief."). Nor can he invoke qualified immunity as a defense to Plaintiffs' request for attorneys' fees: in suits for prospective relief, courts "have repeatedly rejected good faith as a special circumstance justifying the denial of Section 1988 attorneys' fees." *Lefemine v. Wideman*, 758 F.3d 551, 557

(4th Cir. 2014) (holding that defendant was liable for attorneys' fees based on prospective relief despite qualified immunity applying to the plaintiff's damages claim); *see also, e.g.*, *Hutto v. Finney*, 437 U.S. 678, 693 (1978) (affirming award of attorneys' fees against state official sued for prospective relief even though the award was "not supported by any finding of bad faith").

The Sheriff's second argument is based on a similarly flawed premise—namely, that Plaintiffs seek to hold him liable for his role as a "policy maker" for the City. *See* Sheriff's MTD 5-9 (arguing that the Sheriff is a municipal policymaker who cannot be subject to liability unless Plaintiffs identify a municipal policy that has harmed them). But Plaintiffs do not seek to hold the Sheriff liable for his policymaking role. Rather, they seek to hold him liable for his role in enforcing state-court rules—a role that he admits falls squarely within the scope of his duties.

As the Third Circuit has explained, some local officials have a "hybrid nature," sometimes acting on behalf of a local municipality and sometimes acting on behalf of the state. *Carter v. City of Philadelphia*, 181 F.3d 339, 352 (3d Cir. 1999). 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 *Ex parte Young*'s 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).

Here, Plaintiffs have sued the Sheriff for his role in implementing *Pennsylvania* law. *See* Complaint ¶ 11 ("The Sheriff is responsible for security at the Municipal Court and for enforcing court rules, including the prohibitions on audio recording[.]"). Their claim against him,

therefore, cannot be treated as a claim against Allegheny County. *See, e.g., Finberg v. Sullivan*, 634 F.2d 50, 54-55 (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 fact that the Sheriff's obligation to enforce court rules is "entirely ministerial" does not alter the result here. *Id.* at 54. As the Third Circuit has recognized, the proper inquiry under *Ex parte Young* "is not into the nature of an official's duties but into the effect of the official's performance of his duties on the plaintiff's rights." *Id.* For that reason, "courts often have allowed suits to enjoin the performance of ministerial duties in connection with allegedly unconstitutional laws." *Id.* Thus, even if the Sheriff has "no discretion" to decline to enforce the challenged court rules, *see* Sheriff's MTD 2, his actions remain a threat to Plaintiffs and he remains a proper defendant here.

Even setting aside 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 *state* law and evade liability for injunctive relief simply by tasking *local* officials with all enforcement responsibility. Neither law nor logic supports such a result.

CONCLUSION

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

Dated: January 15, 2020

Respectfully submitted,

/s/ Nicolas Y. Riley

NICOLAS Y. RILEY *
ROBERT D. FRIEDMAN *
INSTITUTE FOR CONSTITUTIONAL ADVOCACY & PROTECTION
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Avenue NW
Washington, DC 20001

CHARLES KELLY (PA 51942)
JOHN A. MARTY (PA 324405)
SAUL EWING ARNSTEIN & LEHR LLP
One PPG Place, Suite # 3010
Pittsburgh, PA 15222
Tel.: 412-209-2500
Fax: 412-209-2570

charles.kelly@saul.com
john.marty@saul.com

Tel.: 202-662-4048
Fax: 202-662-9248
rdf34@georgetown.edu
nr537@georgetown.edu

* Admitted to practice *pro hac vice*.

Counsel for Plaintiffs

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

MATT STROUD, et al.,

Plaintiffs,

v.

2:19-cv-01289-MRH

MAGISTERIAL DISTRICT JUDGE DANIEL E. BUTLER, et al.,

Defendants.

PROPOSED ORDER

Upon consideration of the Motions to Dismiss filed by Defendants William P. Mullen; Magisterial District Judges Daniel E. Butler, Anthony M. Ceoffe, Kevin E. Cooper, James J. Hanley, Jr., Richard G. King, Randy C. Martini, James A. Motznik, Mikhail N. Pappas, Oscar J. Pettite, Jr., Robert P. Ravenstahl, Jr., Eugene N. Ricciardi, and Derwin D. Rushing; and President Judge Kim Berkeley Clark, as well as the opposition thereto filed by Plaintiffs, it is this _____ day of _____ 2020, hereby

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

BY THE COURT:

_____
Hon. Mark R. Hornak, U.S.D.J.

CERTIFICATE OF SERVICE

I certify that on January 15, 2020, 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
NICOLAS Y. RILEY
Counsel for Plaintiffs