No. 20-1632

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PHILADELPHIA BAIL FUND

Appellee

v.

ARRAIGNMENT COURT MAGISTRATE JUDGES

Appellants

Appeal from United States District Court for the Eastern District of Pennsylvania. Case no. 2:15-cr-138, Honorable Harvey Bartle, III

BRIEF OF AMICI CURIAE CATO INSTITUTE, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, AND PENNSYLVANIANS FOR MODERN COURTS IN SUPPORT OF APPELLEE AND URGING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

None of the amici signing this brief are corporations with a parent corporation or corporations owned by a publicly held corporation. *See* Fed. R. App. P. 29(a)(4)(A).

June 5, 2020

/s/ *Matthew Stiegler*
MATTHEW STIEGLER

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INTERESTS OF AMICI CURIAE

Amici curiae are three organizations with widely diverse substantive focuses and perspectives that share a deep common concern about the administration of justice and civic discourse.

The **Cato Institute** is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. The Cato Institute's Project on Criminal Justice was founded in 1999 and focuses on the proper role of the criminal sanction in a free society, the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers.

Cato regularly advocates for both robust free speech rights and the importance of community participation in the criminal justice system through independent juries. Cato submitted an amicus curiae brief in *Fields v. City of Phila.*, 862 F.3d 353 (3d Cir. 2017), the Third Circuit's most recent major case involving the public's First Amendment right to access information about officials' public activities, and the Court quoted Cato's brief in its opinion and identified Cato among the amici who had submitted "excellent briefing on appeal," 862 F.3d at 358.

The **American Civil Liberties Union of Pennsylvania** is a nonprofit, nonpartisan organization with over 30,000 members dedicated to defending and expanding individual rights and personal freedoms throughout Pennsylvania. Through advocacy, public education, and litigation, the ACLU of Pennsylvania works to preserve and enhance liberties grounded in the United States and Pennsylvania constitutions and civil rights laws. Among those liberties is freedom of speech, which is at issue in this appeal. The ACLU of Pennsylvania frequently represents plaintiffs in civil rights litigation and often files amicus briefs on civil rights issues.

In particular, the ACLU of Pennsylvania has a strong interest in protecting the public's access to court proceedings, which is the focus of this appeal and this brief. As described in the body of the brief, ACLU of Pennsylvania has particular expertise about how Philadelphia's preliminary arraignment court functions because, in 2018 and 2019, it took handwritten notes of over 2,000 hearings in the course of representing groups and individuals challenging the court's failure to follow Pennsylvania law. *Phila. Cmty. Bail Fund v. Arraignment Ct. Magis. of First Jud. Dist.*, No. 21 EM 2019 (Pa.).

Pennsylvanians for Modern Courts, founded in 1988, envisions a Pennsylvania judicial system in which everyone who participates is assured impartiality, fairness, accessibility and respect. A key tenet of Pennsylvanians for Modern Courts' work is to engage and educate Pennsylvanians to foster a better understanding of local courts, and their place in the judicial system.

Pennsylvanians for Modern Courts partnered with Philadelphia Bail Fund in 2018 to conduct a volunteer court-watch initiative observing preliminary arraignment hearings. Seventy-six volunteers observed 611 hearings in 2018, and the organizers issued a report with findings and recommendations. *See* Phila. Bail Fund & Pennsylvanians for Modern Cts., *Philadelphia Bail Watch Report* (2018), https://www.pmconline.org/resources/philadelphia-bail-watch-report.

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Amici file this brief pursuant to Rule 29 of the Federal Rules of Appellate Procedure. No party or party's counsel authored the brief in whole or in part or contributed money to fund preparing or submitting this brief. Nor did any other person contribute money to fund preparing or submitting it. Amici file this brief with the consent of the parties.

ARGUMENT

The public discourse protected by the First Amendment is enhanced by allowing the public to make audio recordings of pretrial detention hearings that are neither transcribed nor recorded.

The presumption of innocence is a bedrock promise of our nation's legal system. For too many Americans, the promise is hollow. Accused of a crime, they are offered freedom before their trial but only if they pay a bail amount they cannot afford. Because they cannot pay, they are confined in jail for months or years before their guilt or innocence is decided. Too often, these unaffordable bail amounts are set in hearings that are shorter than a television commercial break, in courtrooms remote from public view: untranscribed and unrecorded.

The use and misuse of wealth-based pretrial detention is a matter of growing public concern. For accused persons, unaffordable bail spells separation from family who need them, loss of employment, and denial of freedom.[1] For the public at large, those individual costs add up to increase crime

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[1] *See, e.g.*, *Curry v. Yachera*, 835 F.3d 373, 377 (3d Cir. 2016) (while detained pretrial on bail he could not afford, "Curry missed the birth of his only child, lost his job" and "Curry feared losing his home and motor vehicle"); Clark Neily, *Jury Empowerment as an Antidote to Coercive Plea Bargaining*, 31 Fed. Sent'g Rep. 284, 286 (2019) ("Pretrial detention is a powerful lever of coercive plea bargaining for the simple reason that someone who is locked up pending trial is likely to be fairly miserable and will have substantial difficulty assisting in his defense."); Erika Kates, *Moving Beyond Incarceration for Women in Massachusetts: The Necessity of Bail/Pretrial Reform*, Wellesley Centers for Women, 2, 4–5 (2015) (survey of women in pretrial detention

and deepen societal divisions.[2] The policy debate over cash bail commands growing attention nationwide, from courts,[3] state legislatures,[4] legal com-

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demonstrated that almost half were at risk of losing their home); Will Dobbie et al., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 Am. Econ. Rev. 201, 204 (2018) ("Initial pretrial release increases the probability of employment in the formal labor market three to four years after the bail hearing by 9.4 percentage points, a 24.9 percent increase from the detained defendant mean."); Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, J. L., Econ. & Org. at 12, forthcoming (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2777615 (concluding that, from 2008 to 2013, almost 40 percent of Philadelphia defendants with bail set at $500 do not post bail within three days).

[2] *See, e.g.*, *Holland v. Rosen*, 895 F.3d 272, 279, 296 (3d Cir. 2018) (observing that New Jersey's shift away from cash bail was designed to serve its interests because "it found the reliance on monetary bail resulted in the release of defendants who had the means to pay regardless of their flight risk or danger, and the pretrial detention of poorer defendants even if they were accused of less serious crimes and posed little risk"), *cert. denied*, 139 S. Ct. 440 (2018); David Arnold et al., *Racial Bias in Bail Decisions*, 133 Q. J. Econ. 1885 (2018) (finding compelling evidence of racial bias in bail decisions in Miami and Philadelphia based on comparative post-release misconduct rates), *available at* https://www.nber.org/papers/w23421; Chris Lowenkamp *et al.*, The Laura and John Arnold Foundation, *The Hidden Costs of Pretrial Detention*, at 3 (2013), https://bit.ly/2u0Lj5d (finding that pretrial detention for as little as two or three days increases the likelihood of future criminal activity by 40 percent for low-risk defendants).

[3] *See, e.g.*, *Curry*, 835 F.3d at 377 (recognizing bail-reform efforts under way and "hop[ing] these efforts will ensure equal justice under the law, regardless of an individual's ability to pay"); *Anderson v. Perez*, 677 F. App'x 49, 50 n.1 (3d Cir. 2017) (not precedential) (noting "'what can be described as a

mentators,[5] the media,[6] and even presidential candidates.[7] The debate has added urgency with the arrival of the COVID-19 global pandemic, which has taken a grim toll on people confined together in jails.[8] The salience of the

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flaw in our system of justice—in particular, the inequity bail can create in criminal proceedings'"(quoting *Curry*, 835 F.3d at 375)).

[4] *See, e.g.*, *Holland*, 895 F.3d at 280 (describing 2017 state constitutional amendment and statute that sharply reduced New Jersey's use of cash bail); Jesse McKinley, *The Bail Reform Backlash That Has Democrats at War*, N.Y. Times, Feb. 14, 2020, https://www.nytimes.com/2020/02/14/nyregion/new-york-bail-reform.html; Vanessa Romo, *California Becomes First State to End Cash Bail After 40-Year Fight*, NPR, Aug. 28, 2018, https://www.npr.org/2018/08/28/642795284/california-becomes-first-state-to-end-cash-bail.

[5] *See, e.g.*, John D. Parron, Comment, *Pleading for Freedom: The Threat of Guilty Pleas Induced by the Revocation of Bail*, 20 U. Pa. J. Const. L. 137 (2017–18); Shima Baradaran Baughman, *Costs of Pretrial Detention*, 97 B.U. L. Rev. 1 (2017).

[6] *See, e.g.*, *US Money Bail System Blocking Real Justice Reform*, CNN, Aug. 29, 2019, *available at* https://www.youtube.com/watch?v=rMY5TUu8NYY; Margaret Talbot, *The Case Against Cash Bail*, New Yorker, Aug. 25, 2015, https://www.newyorker.com/news/news-desk/the-case-against-cash-bail.

[7] *See, e.g., Cash Bail Reform*, Politico, Jan. 31, 2020 (reporting that four candidates for the Democratic nomination for president favored reforming or reducing cash bail and eleven favored ending it outright), https://www.politico.com/2020-election/candidates-views-on-the-issues/criminal-justice-reform/cash-bail-reform/; *Trump, Cuomo spar over New York's bail reform law*, Associated Press, Nov. 15, 2019, https://apnews.com/1b96ebf7c6664336bba7946dd2ef1fc2.

[8] *See, e.g.*, Max Marin, *Over 75% of people tested in Philly jails are positive for COVID-19*, Billy Penn, May 4, 2020, https://billypenn.com/2020/05/

public discourse about the issue is reflected in this Court's remarkable observation that cash bail "has become a threat to equal justice under the law." *Curry v. Yachera*, 835 F.3d 373, 376 (3d Cir. 2016).

Just as holding bail proceedings outside of effective public view distorts bail decisions in individual cases, so too does it impair the discourse about the issue among the public at large. When the general public is effectively prevented from seeing how courts make bail decisions, the robust marketplace of ideas that the First Amendment was designed to ensure is diminished. *See Fields v. City of Phila.*, 862 F.3d 353, 359 (3d Cir. 2017) (identifying "citizen discourse on public issues" as "the highest rung of the hierarchy of First Amendment values" (internal quotation marks omitted)).

04/over-75-of-people-tested-in-philly-jails-are-positive-for-covid-19/; Jeremy Roebuck and Allison Steele, *Montgomery County's jail tested every inmate for COVID-19—and found 30 times more cases than previously known*, Phila. Inquirer, Apr. 28, 2020, https://www.inquirer.com/news/coronavirus-testing-montgomery-county-jail-asymptomatic-philadelphia-prisons-20200428.html; Seann Riley, *As coronavirus spreads, cash bail is a virtual death sentence*, USA Today, Apr. 14, 2020, https://www.usatoday.com/ story/opinion/policing/2020/04/14/coronavirus-cash-bail-virtual-death-sentence/5125312002/; *see generally* Udi Ofer & Lucia Tian, *New Model Shows Reducing Jail Population will Lower COVID-19 Death Toll for All of Us*, Apr. 22, 2020, https://www.aclu.org/news/smart-justice/new-model-shows-reducing-jail-population-will-lower-covid-19-death-toll-for-all-of-us/ (describing research model showing that reducing arrests and doubling the rate of release from jails will reduce American deaths from COVID-19 by as many as 23,000 people in jail and 76,000 in the broader community).

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Amici understand this firsthand. In 2018 and 2019, the ACLU of Pennsylvania undertook a court-watching project in the basement courtroom where preliminary arraignments are held in Philadelphia around the clock.[9] Staff and volunteers attended bail proceedings, taking notes by hand as best they could for each lightning hearing, over 2,000 in total.[10] Their efforts revealed some significant patterns. For example, over 90 percent of the time, the magistrate imposed cash bail without even inquiring, as required by state law, about the accused person's financial ability to pay. And over 85 percent of the people assigned monetary bail were also appointed counsel because of their indigency. The handwritten notes that court watchers took—while no substitute for on-the-record transcription or audio recording—also brought to light substantial evidence about the conduct of Philadelphia bail hearings:

- After one magistrate imposed $15,000 cash bail, the defendant stated, "Can I say something? I don't have nothing. I can't pay. I

[9] The data and hearing observations which follow were documented in a petition filed in the Supreme Court of Pennsylvania. *See* Class Action Complaint and Petition for Writ of Mandamus at 24–31, *Phila. Cmty. Bail Fund v. Arraignment Ct. Magis. of First Jud. Dist.*, No. 21 EM 2019 (Pa. March 12, 2019), *available at* https://www.aclupa.org/sites/default/files/field_documents/complaint_ 3.12.2019.pdf.

[10] Pennsylvanians for Modern Courts participated in a similar project in 2018, with similar results. *See* Phila. Bail Fund & Pennsylvanians for Modern Cts., Philadelphia Bail Watch Report (2018), https://www.pmconline.org/resources/philadelphia-bail-watch-report.

am homeless." The magistrate asked no questions, made no reply, and made no modification.

- After a magistrate imposed $7,500 bail, the defendant stated, "I can't afford that." The magistrate asked no questions, made no reply, and made no modification.
- A magistrate imposed $500 cash bail after learning that the defendant was homeless and staying at a shelter.
- A magistrate imposed $25,000 cash bail after learning that the defendant was unemployed and receiving food stamps.
- A magistrate imposed $450,000 cash bail after learning that the defendant was unemployed.
- After appointing the public defender, a magistrate assigned $400,000 cash bail to a sixteen-year-old defendant.
- A magistrate told the police officer at the divisional booking center to call her if the defendant called his mother or father to post his bail and that she would raise his bail.
- A defendant stated, "I can't hear you" as the magistrate and the district attorney representative discussed the factual allegations in the arrest report and the proper bail determination. The magistrate ignored the defendant and did not respond.
- After a magistrate imposed $7,500 cash bail, the defendant protested and began to cry. The magistrate responded by threatening to raise the amount to $25,000.

While this court-watching project contributed to the public discourse about cash bail, what the public could learn was limited in critical ways by what the monitors were able to write down. Monitors could summarize proceedings, record data, and in some instances write down short quotations. But their notes could not record the speakers' volume or tone of voice, nor capture the rushed, chaotic, indifferent tone of the proceedings. An observer's notes can be disputed as inaccurate, incomplete, out-of-context, or outright false; an official transcript or an audio recording is more difficult to dismiss and thus more valuable for informing public discourse on the issue. A more reliable record benefits magistrates and other courtroom actors too by disproving unfounded accusations of wrongdoing. This Court recognized the same realities in *Fields*. *See* 862 F.3d at 359–60. For the same reasons here, without a transcript or audio recordings the public is denied a full picture of how bail hearings in Philadelphia really work.

Although the basement courtroom where bail hearings are held in Philadelphia is open to the public, seats in a courtroom are no substitute for transcripts or audio recordings. After all, sidewalks are open to the public too, but that did not defeat the public's right to record police in *Fields*. Limiting public access to court proceedings to those few able to observe them in person shuts out the majority for whom in-person attendance is not a practical option. And the impracticality of in-person attendance is even greater here because Philadelphia's hearings are held around the clock, with dozens of hearings held each day between midnight and 7 a.m. Telling people they may

monitor legal proceedings but only by going to the courtroom is no more sound than telling people they may practice religion but only by going to a church, and not by singing from a hymnal, reading a sermon, or studying the Bible outside of it. Whether the underlying right is free speech or free exercise of religion, protecting the right means protecting people's ability to communicate information and ideas about it.

Even for those few able to attend in person, the nature of the proceedings substantially limits observers' ability to understand and record them. Each hearing lasts just minutes (more than a tenth of those the ACLU of Pennsylvania project timed ran less than 60 seconds), with quick bursts of information, dense legal jargon, and rapid-fire abbreviations. Observers are not able to capture details of fast-moving proceedings, write down longer quotations, or record in full the arguments of the advocates or the reasoning of the magistrate. Worse, ACLU of Pennsylvania and Pennsylvanians for Modern Courts both learned through their monitoring projects that even trained volunteers using specially designed note-taking forms often found it impossible to even follow the proceedings. Many likened the experience to trying to follow a rapid conversation in a new language. Without a transcript or recording to review afterwards, merely understanding what happened to whom and why is difficult for most people, and taking live notes sufficient to convey that information to the public at large is harder still.

These practical hurdles impede the public's discourse about cash bail without transcripts or recordings. As amici understand from firsthand expe-

rience, citizen arraignment-hearing court-watching projects require a massive effort: recruiting note-takers, training them, preparing forms, answering questions, inputting the notes, and disseminating the fruits of the notetaking to the public. The scale of the effort required reinforces the inadequacy of court-watching projects to protect the public's First Amendment right of access.

This right of access takes on added importance for bail hearings because, in most criminal cases, the conviction itself is secured outside of public view. The robust system of trials envisioned by the Founders has become a system of pleas. *See Lafler v. Cooper*, 566 U.S. 156, 170 (2012). Because plea bargains now comprise all but a tiny fraction of convictions, *id.*, the most significant stage of prosecution available to the public is the bail hearing. So denying the public access to information about bail hearings denies it an outsized portion of its access to the entire court proceeding.

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Preserving the scope of this ruling will not be difficult, because the context where it applies is narrow and identifiable. In America, the vast majority of significant legal proceedings held in open court are on the record already, with public access protected adequately by the availability of official transcripts or audio recordings or both. While there are other important public-access-to-courts debates, such as whether to broadcast video of Supreme Court oral arguments that already are on the record and for which audio re-

cordings are available to the public,[11] such debates fall plainly outside of the scope of the First Amendment right at issue here. Only the shrinking pool of outliers like Philadelphia's bail courtroom fall within the rationale of the district court's decision.

CONCLUSION

Informed public debate is the engine of healthy democracy. People who have access to the facts make better voters and better citizens. Freedom of speech does not protect the speaker alone—it protects us all. "[I]nformation is the wellspring of our debates," *Fields* recognized, and "the more credible the information the more credible are the debates." 862 F.3d at 359. When an entire category of important legal proceedings are held outside meaningful public view, the harm is not limited to the parties in the courtroom. The district court's ruling recognized that important reality, and it should be affirmed.

Respectfully submitted,

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[11] *See, e.g.*, Sylvan Lane, *Alito, Kagan oppose cameras in Supreme Court*, The Hill, March 7, 2019, https://thehill.com/regulation/433109-alito-kagan-oppose-cameras-in-supreme-court.

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COMBINED CERTIFICATIONS

1. I am a member of the bar of the United States Court of Appeals for the Third Circuit. 3d Cir. L.A.R. 28.3(d).

2. This brief complies with the type-volume limitation of Rules 29(a)(5) and 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 2,503 words, excluding the parts of the brief exempted by Rule 32(f) and Third Circuit Local Appellate Rule 29.1(b).

3. I certify that today I served a copy of this opening brief and appendix on all counsel for the parties electronically through this Court's docketing system.

4. The text of the electronic brief is identical to the text in the paper copies. 3d Cir. L.A.R. 31.1(c)

5. The Avast Antivirus virus detection program, version 20.4.2410, has been run on this file and no virus was detected. 3d Cir. L.A.R. 31.1(c).

6. This brief complies with the typeface and type-style requirements of Rule 32(a)(5) and (a)(6) of the Federal Rules of Appellate Procedure because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in fourteen-point Equity font.

June 5, 2020

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