

20-1632

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

Merry Reed and the Philadelphia Bail Fund

Appellees

v.

Francis Bernard, Arraignment Court Magistrate Judges, Sheila Bedford, Kevin Devlin, James O'Brien, Cateria McCabe, Robert Stack, in their Official Capacities, and President Judge Patrick Dugan, in his Official Capacity, and the Sheriff of Philadelphia

Francis Bernard, Sheila Bedford, Kevin Devlin, James O'Brien, Cateria McCabe, Robert Stack, and President Judge Patrick Dugan

Appellants

**Appeal from the February 25, 2020, Order
of the United States District Court for the Eastern
District of Pennsylvania, in Civil Action No. 19-3110**

Appellants Arraignment Court Magistrate Judges Francis Bernard, Sheila Bedford, Kevin Devlin, James O'Brien, Cateria McCabe, and Robert Stack, and Philadelphia Municipal Court President Judge Patrick Dugan Opposition to Appellee's Petition for Panel Rehearing and Rehearing *En Banc*

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Introduction

This case presents a straightforward issue: does the First Amendment mandate that a state court must allow court attendees to make their own audio recordings of court proceedings? In answering no, the Majority applied this Court's precedential law to reach its conclusion.

At issue are the Supreme Court of Pennsylvania's statewide rules and the Philadelphia Municipal Court's local rule that prohibit attendees of criminal court proceedings from making their own electronic recordings.¹ Appellee the Philadelphia Bail Fund contends that the Rules violate its First Amendment right of access to court proceedings.

The Majority used the correct precedent from this Court to the facts in this as-applied case. Consistent with precedent, the Majority held that the Rules do not meaningfully interfere with the Bail Fund's

¹ See Pa.R.Crim.P. 112(C); Pa.R.J.A. No. 1910; Phlia.M.C.R.Crim.P.A.C.M. 7.09. In addition, it is a criminal offense to make unauthorized recordings of court proceedings. See 18 Pa.C.S.A. § 5103.1.

ability to inform itself about preliminary arraignments, in which bail determinations are made.

The Majority’s analysis is in accord not only with this Court’s decisions, but its outcome is consistent with every other Court of Appeals that has addressed the issue, as well as the Supreme Court’s holdings: the First Amendment right of access to court proceedings is limited to the right to attend, observe, take notes, and report.

For that reason, the Majority’s decision does not “upend decades of First Amendment precedent” as the Bail Fund claims. Just the opposite: it is harmonious with every court that has addressed the First Amendment right of access to court proceedings.

Thus, there is no need for this Court to exercise the disfavored procedure of a rehearing. The Majority did not make new law or disregard this Court’s prior law. Instead, the Majority applied this Court’s decisions and concluded that the Rules at issue were constitutional under those decisions.²

² In its petition, the Bail Fund requested only rehearing *en banc*, but by Order entered November 20, 2020, the Court directed Appellants to file a response to the petition for panel rehearing. Thus, this response addresses both forms of rehearing.

I. Argument

This Court's Internal Operating Procedures provide that rehearing is "not favored" and will not be granted unless consideration is "necessary to secure or maintain uniformity of its decisions or the proceeding involves a question of exceptional importance." Third Cir. I.O.P. 9.3.1. *See* Fed.R.A.P. 35(a); Third Cir. L.R. 35.1.

Further, this Court "does not ordinarily grant rehearing en banc when the Majority's statement of the law is correct and the controverted issue is solely the application of the law to the circumstances of the case." Third Cir. I.O.P. 9.3.2. *See* Fed.R.A.P. 35(a). These requirements are "rigorous." Third Cir. L.R. 35.4.

A. The Majority's decision is consistent with this Court's precedent.

The Bail Fund's belief that the Majority's decision is inconsistent with this Court's case law is incorrect. Instead, the Majority examined pertinent cases related to a First Amendment right of access and applied the correct law to the facts of this case. The Bail Fund cannot meet the rigorous rehearing standard merely because it disagrees with the application of that law to this case's facts.

1. The decision is in harmony with *Whiteland Woods, L.P. v. Township of West Whiteland*.

Contrary to the Bail Fund's contention, the Majority's decision is in accord with *Whiteland Woods, L.P. v. Township of West Whiteland*, 193 F.3d 177 (3d Cir. 1999). There, this Court held that the "critical question regarding a content-neutral restriction on the time, place, or manner of access to a government proceeding" is whether the restriction "meaningfully interferes with the public's ability to inform itself of the proceeding: that is, whether it limits the underlying right of access rather than regulating the manner in which that access occurs." *Id.* at 183.

The Majority did not disregard *Whiteland Woods* or apply a different test. Instead, it used the same analysis in examining the Rules at issue and the Bail Fund's claims. (Slip Opinion at 12.) First, it looked to whether not having a verbatim recording "meaningfully interfer[ed]" with the Bail Fund's ability to inform itself about bail hearings. It held that it did not:

Here, the Bail Fund is able to attend bail hearings and take handwritten notes at those hearings. That the Bail Fund's volunteers may not be able to capture every word spoken does not meaningfully interfere with the public's ability to inform itself of the

proceedings. In fact, the Bail Fund successfully informs the public about matters occurring during bail hearings by publishing reports on its observations and findings. Moreover, the public may obtain documentation relating to the bail hearings, such as the criminal complaint and bulk data information, as well as access online dockets.

(Slip Opinion at 12-13.)

Next, the Majority aptly noted that the Bail Fund's argument that a verbatim record is required misreads *Whiteland Woods*. The Bail Fund's view is too narrow: it believes that unless the same, specific sources of information available in *Whiteland Woods* are available here (audio recordings), the right of access is violated.

Yet, as the Majority recognized, the core principle of *Whiteland Woods* is not whether attendees at a government proceeding are able to make audio instead of video recordings, but instead whether a regulation "meaningfully interferes" with the public's ability to "inform itself of the proceeding[.]" *Whiteland Woods, L.P.*, 193 F.3d at 183. And whether a regulation does so depends on each case's unique facts and the distinctive characteristics of the government proceeding at issue, including other available information.

In sum, the Majority applied that standard in examining the totality of the circumstances here to conclude that the Rules did not meaningfully interfere with the Bail Fund’s ability to inform itself. Both cases used the same legal analysis and applied it to the particular facts presented. The Majority’s decision is not “squarely at odds” with *Whiteland Woods*. It is squarely on all fours with it.

2. The Majority’s decision does not conflict with *United States v. Antar*, which involved a different issue.

The Bail Fund argues that the Majority’s decision conflicts with this Court’s decision in *United States v. Antar*, 38 F.3d 1348 (3d Cir. 1994). But it doesn’t: *Antar* involved a different legal question and different facts. While the Bail Fund cites to *Antar*’s dicta to claim that the Majority’s decision is in conflict, what matters here is what legal issue was in question – which is distinct from the instant case.

In *Antar*, the issue was whether an already-existing transcript was a “judicial record” subject to the right of access. *Id.* at 1351. The Majority here distinguishing *Antar* in succinctly noting that *Antar* concerned “restricted access to documentation already in existence,” which was “inapposite to the issue currently before us which concerns

the creation of documents or audio recordings.” (Slip. Op. at 11.) The *Antar* case did not involve a right for court observers to make their own recordings of court proceedings. And it did not require a court to create a judicial record for the public. Indeed, no precedent exists that requires a state court to do so.

Thus, the Majority’s decision is not at odds with *Antar*.³

B. The Majority’s non-discussion of the justification for the Rules is in accord with *Whiteland Woods*.

The Bail Fund complains that the Majority did not address Judicial Appellants’ justifications for the ban on making audio recordings.⁴ That the Majority did not delve into those ample justifications, however, does not warrant a rehearing. Indeed, the Court in *Whiteland Woods* did not examine the justifications for not allowing planning commission meetings to be videotaped. Instead, the Court examined the “critical question”: whether the regulation meaningfully

³ It is also not at odds with *Fields v. City of Philadelphia*, 862 F.3d 353 (3d Cir. 2017), as the Bail Fund claims. That case involved video recording police activity in public areas.

⁴ As detailed in Judicial Appellants’ Principal Brief at pages 40 to 54, there is a host of legitimate reasons supporting the Supreme Court of Pennsylvania and Municipal Court’s reasonable policy decision to not allow court attendees to make audio recordings of court proceedings.

interfered with the public's ability to inform itself. *Whiteland Woods, L.P.*, 193 F.3d at 183.

Hence, the Majority's analysis and decision is consistent and uniform with this Court's precedent. Because no First Amendment right of access exists beyond attending, observing, and reporting, there was no need for the majority to examine the justifications.

C. No exceptional importance exists because the Bail Fund's access is not meaningfully interfered with, and the decision is in line with Third Circuit precedent and decisions from other circuit courts and the Supreme Court.

The Bail Fund claims that an exceptionally important interest exists because the issues surrounding bail are "critically important." The Majority, in highlighting that the Bail Fund has been able to comprehensively report on the hearings through both its observations and from the data available about every arraignment in Municipal Court, was cognizant of the Bail Fund's need to be informed about and report on bail hearings. (Slip Op. at 12-13.) Indeed, that is why it employed the "meaningfully interfere" precedent to determine if the Rules were constitutional.

What is more, the information and data available to the Bail Fund and other organizations pertain directly to the policy issues involving bail that it cites in its Petition on pages 15 to 17. Further, as the Majority notes, the Bail Fund has been able to use its right of access to the courtroom and the abundance of information available about every case to report, advocate, and “successfully inform[]” the public about bail hearings and the bail system. (Slip Op. at 12.)

Moreover, pursuant to the District Court’s order, transcripts have been available for every preliminary arraignment in Municipal Court since June 2020. Since then, over 12,000 arraignments have occurred. Despite the Bail Fund’s contention that it needs a verbatim record to “to document and disseminate information about what happens during bail hearings,” it has not ordered even one transcript.⁵

Finally, this is not an instance where a new rule went into effect that affected the Bail Fund’s right of access to court proceedings or information. Because the Rules have been in place for decades, nothing about them affects the Bail Fund’s current ability to inform itself and

⁵ The Bail Fund’s counsel ordered one transcript in June 2020.

others about arraignments. Thus, no novel regulation or change in circumstance that may rise to an exceptional importance exists here.

In sum, the Rules do not meaningfully interfere with the Bail Fund's ability to inform itself and document and disseminate information. The Majority's decision is in line with this Court's precedent, other circuit courts, and the Supreme Court. Hence, no exceptionally important interests exist to meet the rigorous standard necessary to grant a rehearing.

III. Conclusion

The Majority's decision is in line with this Court's prior decisions. This Court's law and the analysis on the First Amendment right of access to government proceedings remains uniform under both *Whiteland Woods* and this decision.

Judicial Appellants respectfully request that this Honorable Court deny the Petition for Panel Rehearing and Rehearing *En Banc*.

Respectfully submitted,

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Certifications

1. The undersigned counsel certifies that they are a member in good standing of the Bar of this Court.
2. The Brief contains 1896 words, not including the title pages, tables, and certifications. The word count is based on the word processor used to prepare the Brief.
3. A virus detection program has been run on the electronic brief filed in this Court and no virus has been detected. The virus protection program used is McAfee Virus Scan – Enterprise Version.

s/Michael Daley
MICHAEL DALEY, ESQUIRE

Certificate of Service

The undersigned certifies that on *December 9, 2020*, he caused the foregoing *Opposition to Appellee's Petition for Panel Rehearing and Rehearing En Banc* to be served upon Appellee by CM/ECF.

s/Michael Daley
MICHAEL DALEY, ESQUIRE