UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

ABOLITIONIST LAW CENTER,

Plaintiff,

v.

Civil Action No. 2:21-cv-00285-CB

JUDGE ANTHONY M. MARIANI,

Defendant.

MEMORANDUM OF LAW
IN SUPPORT OF PLAINTIFF'S MOTION FOR
A PRELIMINARY INJUNCTION

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INTRODUCTION

The First Amendment provides the public with the right to attend and observe criminal proceedings. That right plays an essential role in our judicial system by ensuring that "the public [may] participate in and serve as a check upon the judicial process—an essential component in our structure of self-government." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982). For that reason, restrictions on the public's ability to observe criminal proceedings rarely survive First Amendment scrutiny.

This lawsuit challenges a restriction on the public's ability to observe criminal proceedings in Allegheny County, where the vast majority of proceedings are currently being conducted via videoconference in light of the COVID-19 pandemic. As in countless other jurisdictions, local court officials have implemented a system to provide the public with virtual access to all proceedings. One judge, however, has actively blocked the public from using that system to observe his proceedings, even though the litigants in those proceedings typically appear virtually. Instead, the judge requires any interested observers to *physically* visit his courtroom—which has been the site of multiple COVID-19 infections in recent months—to watch an audio-visual feed of his *virtual* proceedings.

This practice infringes the public's right of access to criminal proceedings. By needlessly denying virtual access to court observers—and thereby exposing them to grave health risks—the judge's policy imposes an impermissible burden on First

Amendment rights. Moreover, his policy undermines the ability of community groups, like Plaintiff Abolitionist Law Center, to engage in public discourse about their local court system. And it shields prosecutors, police officials, and the judge himself from public scrutiny. As explained further below, these are precisely the kinds of harms that the First Amendment right of access is intended to prevent. Accordingly, this Court should preliminarily enjoin the judge's policy.

BACKGROUND

A. The Response to COVID-19 in Pennsylvania's Fifth Judicial District

The COVID-19 pandemic has upended court operations throughout the country. The airborne nature of the virus has turned most urban courthouses—and other public indoor spaces—into high-risk sites of transmission. Gonsalves Decl. ¶¶ 15–18. As a result, court officials around the country have had to find ways to continue conducting their proceedings without exposing litigants, lawyers, or the public to the dangers of potential infection.

Pennsylvania's Fifth Judicial District, which encompasses Allegheny County, is no exception to this trend. The District's President Judge has suspended all in-person court proceedings and, just last week, issued the latest in a string of emergency orders addressing the ongoing public-health crisis. *In re: Temporary Amendment to Fifth Judicial*

District Emergency Operation Plan (Feb. 24, 2021).[1] The order stated: "due to the high number of positive COVID-19 tests in Allegheny County, ongoing efforts must be made to reduce the amount of people present in court facilities while keeping the courts open to the public." *Id.* at 1. The order further provided, with limited exceptions,[2] that "all matters shall be conducted remotely via Advanced Communication Technology (ACT) and no in-person hearings or proceedings shall occur in any division of the Court of Common Pleas." *Id.*

Consistent with that directive, judges in Allegheny County have been conducting their proceedings over a video conferencing platform called Microsoft Teams. To ensure that the press and the public have access to these proceedings, court officials have implemented a system to "temporarily provide remote access to public criminal proceedings that are being conducted through Microsoft Teams." Fifth Judicial District, *Public Access to Criminal Proceedings*, https://perma.cc/2CHD-U2Y9 (last visited Feb. 15, 2021). According to the Fifth Judicial District's website, this generally applicable policy is designed to provide the public with remote access to

[1] *Available at* https://perma.cc/GMC5-S953.

[2] The only proceedings that are permitted to occur in person are "non-jury trials, motions which require witness testimony, and sentencing hearings and pleas, where there is a likelihood that an immediate sentence of imprisonment." *In re: Temporary Amendment to Fifth Judicial District Emergency Operation Plan*, at 3 (Feb. 24, 2021). However, under the terms of the emergency-operations order, such hearings must be held "with as many participants appearing by ACT as possible, including witnesses and attorneys." *Id.* "No other Criminal Division hearings or proceedings shall be conducted in person." *Id.*

all proceedings other than those "that were closed to the public prior to the COVID-19 pandemic." *Id.* The website states that "[a]ccess to hearings will be provided to the public unless limited by statute or rule or the proceeding is closed by the presiding judge." *Id.*

Even though most in-person proceedings have been suspended, many court employees continue to work out of the Allegheny County Courthouse. Over the past several months, numerous court employees have contracted COVID-19 after visiting court facilities.[3] *See* Uber Decl. ¶ 8, Ex. B (screenshots of positive COVID-19 tests reported on the Fifth Judicial District's official Twitter page). Although court officials have announced certain screening protocols designed to reduce the risk of transmission inside the Courthouse,[4] the building's security staff does not enforce

[3] The Fifth Judicial District's website contains a list of recent incidents involving individuals who test positive for COVID-19 after visiting court facilities. *See* Fifth Judicial District, *Lastest [sic] Covid-19 – Reported Positive Test Results by Court Office*, https://perma.cc/275E-Z52W (last visited Mar. 1, 2021).

[4] The Fifth Judicial District's homepage currently states:

> The following persons shall not enter any court facility or court office:
>
> - Persons who, because of exposure to COVID-19 or travel to a country or region with an outbreak of COVID-19, have been advised to self-quarantine by any doctor, hospital, or health agency;
> - Persons who reside with or have had close contact with someone who has been advised to self-quarantine by any doctor, hospital, or health agency;
> - Persons who have been diagnosed with or have had known contact with anyone who has been diagnosed with COVID-19;
> - Persons experiencing symptoms of respiratory illness such as fever, severe cough, or shortness of breath.
> - Persons who have taken a COVID-19 test and are awaiting results.

those screening protocols consistently. *Id.* ¶ 7. As a result, the risk of transmission inside the Courthouse remains significant, particularly as new, more contagious variants of COVID-19 continue to emerge. *See* Gonsalves Decl. ¶¶ 13–14 (explaining the threat of emerging variants and the limitations of vaccination efforts thus far); *id.* ¶¶ 16–20 (explaining why the risks of transmission inside the Courthouse are so high).

B. Abolitionist Law Center's Court Watch Program

Plaintiff Abolitionist Law Center (ALC) is a public interest law firm based in Pittsburgh. In addition to litigating on behalf of incarcerated individuals and criminal defendants, the organization runs "ALC Court Watch," a program designed to gather information about Allegheny County's criminal justice system. Redcross Decl. ¶¶ 2–5. ALC uses the information gathered through the Court Watch program to engage with the public, policymakers, activists, and legal professionals across Allegheny County in support of its advocacy and community-education work. *See id.* ¶¶ 5–7; Prabhu Decl. ¶ 4; Uber Decl. ¶ 4.

The Court Watch program is coordinated and staffed by a group of trained volunteers, who, collectively, observe dozens of criminal hearings in the Fifth Judicial District each week. Redcross Decl. ¶ 4; Brusselars Decl. ¶ 3. During a typical court-watching shift, a volunteer will usually monitor as many hearings as possible during a

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Fifth Judicial District, *Homepage*, https://perma.cc/QR2Q-9SN3 (last visited Feb. 15, 2021).

single judge's criminal calendar. On average, court-watching shifts range between twenty minutes and three hours in length, though shifts may last even longer depending on the length of a judge's criminal docket on any given day. Redcross Decl. ¶ 4; Brusselars Decl. ¶ 9.

C. Judge Mariani's Policy Against Virtual Access

Since the Fifth Judicial District implemented its virtual-access policy, ALC's volunteers have observed hundreds of virtual court hearings. Redcross Decl. ¶ 4. Throughout that period, only one judge has refused all of their requests for virtual access: Judge Anthony Mariani. Judge Mariani sits on the Court of Common Pleas, where he presides over several probation-violation hearings, sentencing matters, and other hearings each week.

Like every other judge in the Fifth Judicial District, Judge Mariani receives all requests for virtual access submitted through the court-wide virtual-access system. But when ALC's volunteers submit requests for access to Judge Mariani's hearings, their requests are either ignored or denied via an email from Judge Mariani's chambers. Brusselars Decl. ¶¶ 4–8, Ex. B & C; Redcross Decl. ¶¶ 8–9; Prabhu Decl. ¶ 6, Ex. A. A typical denial reads: "These hearings may not be accessed remotely. If you wish to observe these hearings you may come in person to: Courtroom 316 [at the] Allegheny County Courthouse." *See* Brusselars Decl. ¶ 5, Ex. A (Emails from Judge Mariani's chambers on Jan. 21, 27, and 29, and Feb. 1, 2, 3, 8, 9, 10, and 12, 2021).

ALC's efforts to follow up on these denials are usually ignored. *See* Brusselars Decl. ¶ 6, Ex. B. On February 5, 2021, for instance, ALC's volunteer coordinator emailed Judge Mariani's chambers to explain that many of ALC's volunteers cannot visit the courthouse during the current pandemic for health-related reasons. *Id.* ¶ 8, Ex. C. The email stated:

> We understand that Judge Mariani does not permit members of the public to observe his hearings unless they visit the courthouse to do so in person. However, some of our volunteers have underlying conditions that make it impossible for them to safely attend court during the pandemic. Additionally, sometimes we have volunteers who need to quarantine after a potential exposure or are experiencing some symptoms and who, as a result, would not be eligible to enter the building under the court's current access policy.
>
> In light of these barriers to in-person attendance, may we please have access via Teams to Judge Mariani's court?

Id., Ex. C (Email to Judge Mariani's chambers on Feb. 5, 2021). Judge Mariani did not respond to the email.

One week later, ALC sent another email to Judge Mariani's chambers to follow up on the February 5 inquiry. *See* Brusselars Decl. ¶ 8, Ex. C (Email to Judge Mariani's chambers on Feb. 12, 2021). Again, Judge Mariani did not respond. *Id.* ¶ 8. ALC's volunteers thus remain unable to observe any of Judge Mariani's proceedings.

LEGAL STANDARD

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of

preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

ARGUMENT

I. ALC is likely to succeed on the merits of its First Amendment claim.

A. Courts may not restrict the public's right of access to criminal proceedings absent a compelling, narrowly tailored justification.

One of the "major purpose[s]" of the First Amendment is "to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). That includes discourse about the justice system, which serves an important democratic function by "subjecting the police, prosecutors, and judicial processes to extensive public scrutiny" and thereby "guard[ing] against the miscarriage of justice." *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966). Indeed, "it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980).

For that reason, the Supreme Court has held that the First Amendment guarantees the public a "right of access to criminal proceedings." *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986). That right protects several important "societal interests," including:

> promotion of the public perception of fairness which can be achieved only by permitting full public view of the proceedings; providing a significant community therapeutic value as an outlet for community concern, hostility and emotion; serving as a check on corrupt practices

> by exposing the judicial process to public scrutiny; enhancement of the performance of all involved; and discouragement of perjury.

United States v. Simone, 14 F.3d 833, 839 (3d Cir. 1994) (citation omitted).

These interests create a "presumption of openness [that] may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984). In other words, "[a]ny restriction on the right of public access 'is . . . evaluated under strict scrutiny.'" *See In re Avandia Marketing*, 924 F.3d 662, 673 (3d Cir. 2019) (citation omitted)).

The Supreme Court's decision in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982), illustrates how stringent this standard is in practice. In that case, the Court struck down a Massachusetts statute that prevented the general public from attending any proceeding involving the testimony of a minor sexual-assault victim. *Id.* at 610–11. Although the Court acknowledged the importance of protecting minor sexual-assault victims, it held that such an interest could "not justify a *mandatory* closure rule" in all cases. *Id.* at 607–08 (emphasis in original). As the Court explained, the government's stated interests "could be served just as well by requiring the trial court to determine on a *case-by-case basis* whether . . . concern for the well-being of the minor victim necessitates closure." *Id.* at 609 (emphasis added). Thus, the Court concluded, the state's "mandatory rule, requiring no particularized determinations in individual cases, [was] unconstitutional." *Id.* at 611 n.27.

That principle applies with even greater force here. Indeed, unlike the statute at issue in *Globe Newspaper*, Judge Mariani has not even attempted to limit his administrative policy to a subset of proceedings involving specific participants or subject matter. Rather, his policy prohibits the public from observing virtually any hearing before him. As a result, the policy effectively excludes the public from all of his proceedings.

Judge Mariani's requirement that interested observers visit his courtroom in the middle of a pandemic to view an audio-visual feed of his proceedings is not a viable option. *Cf. Rouviere v. DePuy Orthopaedics, Inc.*, 471 F. Supp. 3d 571, 574 (S.D.N.Y. 2020) ("The hardship that would be caused to Howmedica's witness(es) and its counsel by an in-person deposition [during the COVID-19 pandemic] is obvious."). To state the obvious, "the ability of the public and press to attend . . . criminal cases" must be more than "merely theoretical" to satisfy the right of access. *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93 (2d Cir. 2004). Thus, the right of access cannot be conditioned on people's willingness to jeopardize their health—and the health of their communities—by sitting inside Judge Mariani's courtroom for hours at a time. *See* Gonsalves Decl. ¶¶ 16–20 (noting dangers of spending extended periods inside courthouses). Again, the entire reason that Fifth Judicial District is conducting its proceedings virtually right now is because court officials themselves have determined that it is not safe to conduct those proceedings at the Allegheny County Courthouse.

See In re: Temporary Amendment to Fifth Judicial District Emergency Operation Plan (Feb. 24, 2021).

The risks of airborne transmission at the Courthouse remain acute. *See* Gonsalves Decl. ¶¶ 11, 16–20 ("It is my professional opinion that requiring people to spend extended periods of time inside the Allegheny County Courthouse will increase the health risks to those individuals, attorneys, court staff, and the surrounding community."). Numerous court employees have contracted COVID-19 this winter and, over the past two months alone, more than a dozen have tested positive shortly after visiting court facilities.[5] *See* Uber Decl., Ex. B (screenshots of positive COVID-19 tests reported on the Fifth Judicial District's official Twitter page). The Courthouse's antiquated ventilation system poses additional dangers: as a representative of the District Attorney's Office testified at a County Council hearing last fall, air circulation in the building is poor, thereby increasing the risks of transmission for those inside.[6] *See* Gonsalves Decl. ¶ 16 (explaining that poor ventilation increases the risk of transmission). And the failure of the building's security staff to consistently enforce COVID-19 screening protocols only exacerbates

[5] *See* Fifth Judicial District, *Lastest [sic] Covid-19 – Reported Positive Test Results by Court Office*, https://perma.cc/MKU6-CE4J.

[6] Allegheny County, Public Hearing (Oct. 29, 2020), http://allegheny.granicus.com/MediaPlayer.php?view_id=4&clip_id=785 (2:06:38–2:08:28 minute marks). *See generally* Ctrs. for Disease Control & Prevention, *Ventilation in Buildings* (Feb. 9. 2021), https://perma.cc/25NB-YQQ6 (explaining that "SARS-CoV-2 viral particles spread between people more readily indoors than outdoors").

those risks by increasing the likelihood that infected people will enter the Courthouse. *See id.* ¶¶ 11–12, 15 (noting the risks and prevalence of asymptomatic transmission).

Judge Mariani's courtroom, in particular, has been the site of multiple infections in recent months. In October, Judge Mariani was forced to close his courtroom for two full weeks when an unidentified member of his staff contracted the virus. *See* Paula Reed Ward, *Safety Concerns Loom as Allegheny County Trials Resume During Covid-19 Pandemic*, PITT. TRIBUNE-REVIEW (Oct. 17, 2020 6:00 p.m.), https://perma.cc/PUQ9-7UQA ("[O]n Sept. 28, the courtroom of Common Pleas Judge Anthony M. Mariani, one of those who urged attorneys to appear in person before him, was shut down for two weeks. A person there tested positive."). And, earlier this month, the Fifth Judicial District announced that another member of Judge Mariani's staff had tested positive after visiting his courtroom four days in a row.[7]

Members of the public cannot be forced to undertake these grave health risks in order to exercise their First Amendment rights—especially in light of the available virtual-access alternative. Over the past year, courts around the country have enjoined

[7] Fifth Judicial District, *Lastest [sic] Covid-19 – Reported Positive Test Results by Court Office*, https://perma.cc/275E-Z52W ("The Court has received notice that a court employee has tested positive for COVID-19. The person works in the Allegheny County Courthouse, primarily on the 3rd floor, Courtroom of the Honorable Anthony A. Mariani. The person was last in the Allegheny County Courthouse on February 1, 2021, February 2, 2021, February 3, 2021 and February 4, 2021 between the hours of 8:00 AM – 4:30 PM.").

various policies that would have forced people to expose themselves to serious health risks in order to exercise their First Amendment rights. In *Acosta v. Restrepo*, 470 F. Supp. 3d 161 (D.R.I. 2020), for example, a district court enjoined the enforcement of Rhode Island's ballot-qualification process, which required electoral candidates to meet with voters face-to-face to collect nominating signatures, and then to submit those signatures to the election board in person. *Id.* at 163–64. The court held that those requirements could not be constitutionally enforced in light of the "highly transmissible and potentially fatal illness [that] still threatens the public health." *Id.* at 167; *see also id.* (noting that the normal "signature collection process would jeopardize [candidates'] health and that of the public"). The court therefore directed election officials to accept signatures collected "electronically" and submitted "via facsimile." *Id.* at 168.

Several other courts have relied on similar reasoning to enjoin state laws that effectively forced people to choose between safeguarding their health and exercising their constitutional rights. *See, e.g.*, *League of Women Voters of Va. v. Va. State Bd. of Elections*, 458 F. Supp. 3d 442, 452 (W.D. Va. 2020) ("In ordinary times, Virginia's witness signature requirement [for absentee voters] may not be a significant burden on the right to vote. But these are not ordinary times."); *Cooper v. Raffensperger*, 472 F. Supp. 3d 1282, 1292 (N.D. Ga. 2020) (granting preliminary injunction to modify Georgia's signature-collection requirement for electoral candidates because candidates "cannot, gather signatures in the same safe and reasonable manner as they could

during more typical times"); *Esshaki v. Whitmer*, 455 F. Supp. 3d 367, 382 (E.D. Mich. 2020) (recognizing the need to "reduc[e] a state statutory signature requirement [for electoral candidates] because of the burdens put on candidates by the COVID-19 pandemic"); *People First of Ala. v. Merrill*, 467 F. Supp. 3d 1179, 1211 (N.D. Ala. 2020) ("[O]n the record before the court, the plaintiffs have shown a likelihood of success on the merits of their claim that the witness requirement is unconstitutional as to vulnerable voters who cannot safely satisfy the requirement in light of the COVID-19 pandemic.").[8]

Similar logic applies here. ALC's volunteers, many of whom have underlying conditions that make them especially vulnerable to the virus, cannot be forced to jeopardize their safety in order to observe court proceedings. *See* Gonsalves Decl. ¶¶ 11, 16–20 (explaining the dangers of visiting the Courthouse in light of the current public-health situation in Allegheny County); Redcross Decl. ¶ 11; Brusselars Decl. ¶ 9. By excluding them from the court's virtual-access system—and forcing them to sit inside his courtroom for hours at a time—Judge Mariani's policy imposes an unreasonable burden on their First Amendment rights. *See Circle Schools v. Pappert*, 381 F.3d 172, 181 (3d Cir. 2004) ("The Supreme Court has repeatedly stated that

[8] *Cf. Drenth v. Boockvar*, No. 1:20-CV-00829, 2020 WL 2745729, at *5 (M.D. Pa. May 27, 2020) ("Plaintiffs [in Americans with Disabilities Act case] would suffer irreparable injury because they are effectively forced to choose between forfeiting their right to vote privately and independently or risking their health and safety by traveling to a polling place to vote in person.").

'constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights.'" (citations omitted)).

Furthermore, even if it were reasonable to force people to sit in Judge Mariani's courtroom for hours at a time—which it is not—court observers would still face other barriers in attempting to do so. The Courthouse's posted COVID-19 screening protocols prohibit people from entering the building if, *inter alia*, they have "had known contact with anyone who has been diagnosed with COVID-19" or "have had close contact with someone who has been advised to self-quarantine." Fifth Judicial District, *Homepage*, https://perma.cc/QR2Q-9SN3.[9] Any ALC volunteers who seek to comply with these restrictions in good faith will likely find themselves, often through no fault of their own, unable to enter the Courthouse for certain periods of time. *See, e.g.*, Redcross Decl. ¶ 11 (noting that some Court Watch volunteers are students who live in campus communities). Under Judge Mariani's policy, these individuals would not have even a theoretical means of observing his proceedings.

[9] As a practical matter, these restrictions affect a large number of people, particularly in light of the Pennsylvania Department of Health's directive that anyone who travels outside Pennsylvania should self-quarantine upon returning to the Commonwealth. *See* Pa. Dep't of Health, *Second Amendment to Order of the Secretary of the Pennsylvania Department of Health for Mitigation Relating to Travel* (Dec. 9, 2020), *available at* https://perma.cc/VG6L-K26W.

B. Judge Mariani's administrative policy is not narrowly tailored to serve any compelling government interest.

Judge Mariani has not disclosed his reasons (if any) for refusing to provide the public with virtual access to his proceedings. But any justifications he might offer are unlikely to survive strict scrutiny. After all, every other judge in the Fifth Judicial District currently provides the public with virtual access to his or her criminal proceedings, and none has suffered any adverse consequences as a result. Thus, whatever (unstated) interests Judge Mariani's policy might be intended to serve, the success of the court's current virtual-access system—and similar systems around the country—shows that he could achieve the same ends without burdening the First Amendment right of access.

In any event, even if Judge Mariani were not such an outlier, his decision to withdraw from the court's virtual-access system would still inevitably fail the narrow-tailoring prong. Again, his policy precludes virtual access to *all* of his proceedings in *all* of his cases, regardless of the subject matter or litigants involved. *See* Brusselars Decl. ¶¶ 4–8, Ex. B & C; Redcross Decl. ¶¶ 8–9; Prabhu Decl. ¶ 6, Ex. A; Uber Decl. ¶¶ 5–6. That approach directly contravenes the Supreme Court's repeated admonition that courts must evaluate the need for access restrictions on a case-by-case basis. *See, e.g.*, *Globe Newspaper*, 457 U.S. at 608–09 ("A trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim."); *El Vocero de P.R. v. Puerto Rico*, 508 U.S. 147, 151 (1993) (explaining that

access restrictions designed to limit pretrial publicity "must be addressed on a case-by-case basis"). As the Court has explained, the case-by-case approach "ensures that the constitutional right of the press and public to gain access to criminal trials will not be restricted except where necessary." *Globe Newspaper*, 457 U.S. at 609. Judge Mariani's blanket policy flouts that basic principle.

Finally, Judge Mariani's policy is not tailored to mitigate any legitimate administrative or logistical concerns. The Fifth Judicial District has already provided every judge on the Court of Common Pleas with the tools, training, and infrastructure necessary to make their proceedings virtually accessible. Those tools allow chambers staff to monitor who is present at every virtual hearing and to mute the microphones of any virtual observers. Accordingly, the presence of virtual observers is unlikely to have any impact on the underlying proceedings themselves—other than the salutary effects that the right of access is intended to vindicate in the first place.

C. This Court has authority to enjoin the policy.

Section 1983 generally authorizes courts to enjoin ongoing violations of constitutional rights. Although the statute contains a narrow exception precluding injunctions "against a judicial officer for an act or omission taken in such officer's judicial capacity," 42 U.S.C. § 1983, judges remain subject to injunctive-relief claims for actions taken outside of their judicial capacity. Thus, because Judge Mariani's policy restricting public access to his proceedings is quintessentially *administrative* in nature—rather than judicial—§ 1983 does not stand as a bar to injunctive relief here.

See, e.g., *Wolfe v. Strankman*, 392 F.3d 358, 366 (9th Cir. 2004) (concluding that a California judge could be subject to injunctive relief "in his administrative capacity" because "[s]ection 1983 only contemplates judicial immunity from suit for injunctive relief for acts taken in a judicial capacity").

Congress borrowed § 1983's "judicial capacity" language from a long line of Supreme Court cases outlining the scope of common-law judicial immunity. *See, e.g.*, *Mireles v. Waco*, 502 U.S. 9, 11 (1991) ("[A] judge is not immune from liability for nonjudicial actions, *i.e.*, actions not taken in the judge's judicial capacity."). Under that line of cases, the "touchstone" for determining whether or not an act is "judicial" in nature is whether it involves "the function of resolving disputes between parties, or of authoritatively adjudicating private rights." *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435–36 (1993) (citation omitted). Courts consider a variety of factors in assessing whether an act is judicial, such as whether the act arose during an adversarial process, is informed by precedent, and is correctible on appeal. *Cleavinger v. Saxner*, 474 U.S. 193, 202 (1985) (listing factors "characteristic of the judicial process"). In contrast, "[a]dministrative decisions, even though they may be essential to the very functioning of the courts, have not similarly been regarded as judicial acts." *Forrester v. White*, 484 U.S. 219, 228 (1988) (holding that a judge's decision to dismiss a subordinate is an administrative act).

In this case, Judge Mariani's policy bears all of the major hallmarks of administrative action, rather than judicial action. The policy did not arise out of a

specific case and is not subject to correction on appeal. *Cf. Morrison v. Lipscomb*, 877 F.2d 463, 466 (6th Cir. 1989) (holding that state-court judge's moratorium on restitution writs was not a judicial act because the "moratorium was a general order, not connected to any particular litigation," and "no direct appeal [was] available, making the absence of judicial liability far less reasonable").[10] The policy governs the rights of the general public, rather than parties or litigants, and is not informed by precedent. *Cf. Ex parte Virginia*, 100 U.S. 339, 348 (1879) (holding that state-court judge could be held criminally liable for excluding African-American citizens from juror rolls because the act of creating such rolls was "merely a ministerial act" and "not a judicial act"). And the policy does not leave any room for the exercise of discretion or judgment: again, it applies to *all* observers, in *all* cases, without exception.[11]

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[10] *Cf. Mitchell v. Fishbein*, 377 F.3d 157, 174 (2d Cir. 2004) (holding that the removal of an attorney from an indigent-defense panel is not a judicial act because it is not "related to any specific judicial proceeding"); *Caddell v. Campbell*, No. 1:19-cv-91, 2020 WL 703951, at *6 (S.D. Ohio Feb. 12, 2020) (holding that a judge's "general policy and custom of failing to conduct arraignments on Mondays and Fridays" was not subject to judicial immunity); *Campbell v. Supreme Court of N.J.*, No. 11-cv-555, 2012 WL 1033308, at *7 n.6, *8 (D.N.J. Mar. 27, 2012) (holding that assignment judge's decision to suspend another judge was "not taken in his judicial capacity" because, *inter alia*, it was "not taken in the context of a particular matter pending before the Court"); *Bryant v. Sylvester*, No. 94-cv-1990, 1994 WL 317848, at *1 (E.D. Pa. June 22, 1994) (characterizing judges' "decision to close a court operated nursery" as an "administrative function[] for which absolute judicial immunity is not appropriate").

[11] *Cf. Schultz v. Alabama*, No. 5:17-cv-00270, 2018 WL 9786086, at *5 (N.D. Ala. Nov. 8, 2018) ("Promulgation of a standing bail policy is not a judicial action within the meaning of § 1983."); *Wallace v. Powell*, No. 3:09-cv-0291, 2014 WL 70092, at *10

All of these factors make clear that insulating the policy from injunctive relief does not serve any of the underlying purposes of judicial immunity. The whole reason that "judicial" acts are treated differently from other acts is to "protect[] the finality of *judgments*" by "insulating judges from vexatious actions prosecuted by disgruntled litigants." *Forrester*, 484 U.S. at 225 (emphasis added). But a policy that has no impact on a judge's rulings cannot provide disgruntled litigants with a basis for attacking those rulings. Shielding such policies from corrective action, therefore, does little to protect the finality of judgments; instead, it simply entrenches lawless judicial action.

The fact that Judge Mariani has declined to provide any explanation or justification for the policy at issue here only further distinguishes it from more traditional judicial acts. Indeed, the absence of any obvious rationale for blocking virtual access to his proceedings, *see supra* Part I.B, makes it impossible to infer a legitimate judicial purpose for the policy. For that reason alone, the policy cannot be characterized as an action taken in Judge Mariani's "judicial capacity."

(M.D. Pa. Jan. 9, 2014) (holding that the "enactment and expansion of a zero tolerance policy dictating how probation officers were to handle violations of probation and other charging decisions fall outside the scope of judicial action").

II. Plaintiff has suffered—and will continue to suffer—irreparable harm as a result of Judge Mariani's policy.

"In general, to show irreparable harm a plaintiff must 'demonstrate potential harm which cannot be redressed by a legal or an equitable remedy following a trial.'" *Acierno v. New Castle Cty.*, 40 F.3d 645, 653 (3d Cir. 1994) (citation omitted). An encroachment on First Amendment rights almost always satisfies this standard. As numerous courts have recognized, "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Ctr. for Investigative Reporting v. Southeast Pa. Transp. Auth.*, 975 F.3d 300, 317 (3d Cir. 2020) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

In this case, ALC has suffered—and continues to suffer—irreparable harm as a result of Judge Mariani's policy. The policy not only prevents ALC's volunteers from observing high-stakes court proceedings, but also stymies their ability to report on the profound impact of those proceedings on their fellow citizens and community members. *See* Redcross Decl. ¶¶ 12–13; Brusselars Decl. ¶ 12; Prabhu Decl. ¶¶ 4, 8; Uber Decl. ¶ 10. What's more, the policy deprives ALC's volunteers of a critical opportunity to monitor their local prosecutors, judges, and police as they perform some of their most important public duties. *See United States v. Criden*, 675 F.2d 550, 557 (3d Cir. 1982) (noting that, without public access to pretrial proceedings, "much of the work of prosecutors and trial judges may go unscrutinized" because "most criminal prosecutions consist solely of pretrial procedures"). Those lost court-

watching opportunities cannot be remedied with a post-trial injunction: once ALC has been blocked from observing a hearing, it has lost the chance to observe that hearing forever.

The inability to observe a hearing in real time has a concrete impact on ALC's mission and work. ALC actively seeks to monitor probation-related matters and, in recent weeks, Judge Mariani has presided over roughly a third of all probation-violation hearings in the Court of Common Pleas. Prabhu Decl. ¶ 7. Moreover, Judge Mariani almost never issues written opinions to explain his rulings, and key aspects of the proceedings—such as the parties' arguments or the judge's questions—are never memorialized on the docket. *See id.* ¶ 4. If ALC wanted to know, for instance, whether Judge Mariani inquired into a defendant's financial situation before imposing a fee-payment schedule, it could not glean that information from the docket. Similarly, if ALC wanted to assess Judge Mariani's in-court demeanor or questions for the litigants, its volunteers would need access to the hearing itself in order to make those assessments. *See id.*

The ability to obtain a transcript of a hearing after the fact "is not a substitute for concurrent access" to the proceeding. *United States v. Antar*, 38 F.3d 1348, 1360 n.13 (3d Cir. 1994); *see also United States v. Simone*, 14 F.3d 833, 842 (3d Cir. 1994) ("Because we have found that the district court's findings in this case were insufficient to support closure, we cannot conclude that the release of the transcript afforded adequate access in this case."). For one thing, transcripts can "not fully implement

the right of access because some information, concerning demeanor, non-verbal responses, and the like, is necessarily lost in the translation of a live proceeding to a cold transcript." *Antar*, 38 F.3d at 1360 n.13. Transcripts are also notoriously expensive: obtaining a non-expedited transcript in Allegheny County costs $3.00/page—a rate that puts even a relatively brief transcript out of reach for most people. *Fifth Judicial District, Office of the Court Reporters, Transcript Request Information*, https://perma.cc/HE6V-2939 (last visited Feb. 17, 2021). And, of course, transcripts often require significant wait times, further undermining their public value. *See Courthouse News Serv. v. Planet*, 947 F.3d 581, 594 (9th Cir. 2020) ("[A] necessary corollary of the right to access is a right to timely access.").

In short, the only way to vindicate ALC's constitutional right of access is to ensure that its volunteers have virtual access to Judge Mariani's proceedings. Delaying that access until the conclusion of this litigation will functionally deprive ALC of access to literally hundreds of hearings in the interim.

III. The balance of the equities and the public interest both counsel in favor of issuing an injunction.

In deciding whether to grant a preliminary injunction, courts weigh "the potential injury to the plaintiffs without [an] injunction versus the potential injury to the defendant with it in place." *Issa v. Sch. Dist. of Lancaster*, 847 F.3d 121, 143 (3d Cir. 2017).

Here, that balance comes out squarely in ALC's favor. Enjoining Judge Mariani's policy would not only cure ALC's constitutional injury, but would also do so without causing any harm. Once again, every other judge in the Fifth Judicial District provides the public with virtual access to his or her criminal proceedings, and none has suffered any harm from doing so. Nor are those judges alone in permitting the public to observe their proceedings through virtual means: countless trial courts around the country have similarly made their criminal trial-court proceedings accessible online during the pandemic without any adverse consequences.[12] There is no reason to believe that Judge Mariani—and only Judge Mariani—would suffer some unique injury by permitting the public to observe his proceedings while this case is litigated.

[12] *See, e.g.*, Texas Office of Court Administration, *Background and Legal Standards-Public Right to Access to Remote Hearings During COVID-19 Pandemic* (last visited Feb. 10, 2021) https://perma.cc/JW7G-FN2Y (articulating that "it is the court's burden to ensure public access to each hearing and take reasonable measures to remove barriers thereto"); Michigan Supreme Court, *Memorandum Re: Expanding Remote Proceedings* (Apr. 7, 2020), https://perma.cc/4XZ6-NCL9 ("[p]roviding access to the public during the proceeding or immediately after via a video recording, unless the proceeding is closed or limited by court rule or statute"); Wisconsin Court System, *Livestream Courts*, https://perma.cc/3BAD-74S6 (last visited Feb. 10, 2021); Indiana Supreme Court, *In the Matter of Administrative Rule 17 Emergency Relief for Indiana Trial Courts Relating to the 2019 Novel Coronavirus (COVID-19)* (May, 13, 2020), https://perma.cc/5T7J-R4JQ ("authorizing the courts to live stream court proceedings (except hearings that are confidential by law) on a public platform, including but not limited to YouTube or any other publicly accessible manner, to accommodate the public's access to court proceedings"); Rhode Island Judiciary, *Public Access to Court Hearings*, https://perma.cc/43NV-PGJG (last visited Feb. 10, 2021).

At the same time, enjoining the policy would benefit the public at large. *See N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013) ("[S]ecuring First Amendment rights is in the public interest."); *Cornette v. Graver*, 473 F. Supp. 3d 437, 478 (W.D. Pa. 2020) ("Protecting First Amendment rights unquestionably serves the public interest."). Permitting ALC to observe and report on public court proceedings serves the public interest by contributing to the "stock of information from which members of the public may draw." *Fields v. City of Philadelphia*, 862 F.3d 353, 359 (3d Cir. 2017) (quoting *First Nat'l. Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978)). More to the point, it would enable ALC to report on the activities of local prosecutors, judges, and police officers, thereby advancing 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). That "free flow of information" only inures to the public's benefit.

And, of course, permitting members of the press and the public to observe Judge Mariani's proceedings virtually would also minimize the number of people inside the Allegheny County Courthouse. That outcome—which is one of the Fifth Judicial District's own explicit objectives right now—would unquestionably benefit the public in the midst of the current pandemic. *See* Gonsalves Decl. ¶¶ 16–20.

CONCLUSION

For the foregoing reasons, ALC respectfully asks this Court to preliminarily enjoin Judge Mariani's policy prohibiting ALC's volunteers from accessing his proceedings virtually.

Respectfully submitted,

/s/ Witold J. Walczak

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Dated: March 2, 2021

INDEX OF SUPPORTING DECLARATIONS

1. Declaration of Dr. Autumn Redcross
   Director of the Abolitionist Law Center's Court Watch Program
   - Exhibit A: Emails exchanged between Autumn Redcross and Judge Anthony Mariani's chambers

2. Declaration of Erica Brusselars
   Volunteer Coordinator for the Abolitionist Law Center's Court Watch Program
   - Exhibit A: Email from Judge Anthony Mariani's chambers to Erica Brusselars
   - Exhibit B: Emails from Erica Brusselars to Judge Anthony Mariani's chambers
   - Exhibit C: Emails from Erica Brusselars to Judge Anthony Mariani's chambers

3. Declaration of Dolly Prabhu
   Staff Attorney and Equal Justice Works Fellow at the Abolitionist Law Center
   - Exhibit A: Email from Judge Anthony Mariani's chambers to Dolly Prabhu
   - Exhibit B: Emails from Dolly Prabhu to Judge Anthony Mariani's chambers

4. Declaration of Swain Uber
   Legal Consultant at the Abolitionist Law Center
   - Exhibit A: Email from Judge Anthony Mariani's chambers to Swain Uber
   - Exhibit B: Screenshots of the Fifth Judicial District's official Twitter page
   - Exhibit C: Screenshot of Fifth Judicial District's "Positive Test Results" page
   - Exhibit D: Fifth Judicial District Emergency-Operations Orders

5. Declaration of Dr. Gregg Gonsalves
   Assistant Professor in Epidemiology at the Yale School of Medicine

CERTIFICATE OF SERVICE

I certify that on March 2, 2021, I filed the foregoing brief, and all supporting documents, with the clerk via the ECF system. All counsel who are not registered ECF users will be served either by First Class Mail or by electronic mail (upon consent to electronic service). All of the foregoing documents will also be available for viewing and downloading via the ECF system.

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