United States Court of Appeals

for the

Third Circuit

Case No. 20-1632

MERRY REED; PHILADELPHIA BAIL FUND,

– v. –

FRANCIS BERNARD ARRAIGNMENT COURT MAGISTRATE JUDGES; SHEILA BEDFORD; KEVIN DEVLIN; JAMES O'BRIEN; CATERIA MCCABE; ROBERT STACK in their official capacities; PRESIDENT JUDGE PATRICK DUGAN in his official capacity; SHERIFF OF PHILADELPHIA,

FRANCIS BERNARD, SHEILA BEDFORD, KEVIN DEVLIN, JAMES O'BRIEN, CATERIA MCCABE and ROBERT STACK,

Appellants.

ON APPEAL FROM AN ORDER IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA IN CASE NO. 2-19-CV-03110, HONORABLE HARVEY BARTLE, III, U.S. DISTRICT JUDGE

BRIEF FOR *AMICI CURIAE* PROFESSOR EUGENE VOLOKH, ARTHUR RIZER, THE CATO INSTITUTE, AND R STREET INSTITUTE IN SUPPORT OF PETITION FOR REHEARING *EN BANC*

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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).

Dated: November 19, 2020

/s/ *Gregory Dubinsky*
Gregory Dubinsky

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STATEMENT OF IDENTIFICATION

Amici curiae share a deep commitment to the protection of individual rights and personal freedoms.

Eugene Volokh, Gary T. Schwartz Distinguished Professor of Law at UCLA School of Law, has written extensively on First Amendment law and on constitutional law more broadly.

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government.

The R Street Institute is a non-profit, non-partisan public policy research organization. R Street's mission is to engage in policy research and educational outreach that promotes free markets, as well as limited yet effective government, including properly calibrated legal and regulatory frameworks that support economic growth.

Arthur Rizer is the Director of Criminal Justice and Civil Liberties Policy at R Street and is responsible for the Institute's criminal justice portfolio.

* * *

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.

ARGUMENT

"Eternal vigilance," it is said, "is the price we pay for liberty."[1] That is especially true in the criminal justice system, as to which "contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." *In re Oliver*, 333 U.S. 257, 270 (1948); *see* Stephanos Bibas, *Observers as Participants*, 127 HARV. L. REV. F. 342, 342 (2014) ("Sunlight is the best disinfectant . . . .") [hereinafter Bibas, *Observers as Participants*].

To maintain that vigilance, the First Amendment safeguards the public's right to free and open access to the halls of justice. Thus, the Supreme Court has repeatedly upheld the First Amendment right of access to information about judicial proceedings—in rejecting summary, closed-door trials, *see In re Oliver*, 333 U.S. at 268–69, requiring public access to criminal proceedings, *see Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980), and rejecting "total suppression of the transcript" of *voir dire*, *see Press-Enter. Co. v. Superior Ct. (Press-Enterprise I)*, 464 U.S. 501, 513 (1984).

Importantly, the First Amendment protects "access to the content of the *proceeding*—whether in person, or via some form of documentation," because it is the "content . . . that matters." *United States v. Antar*, 38 F.3d 1348, 1359-60 (3d

[1] *4th July, 1817, 42d year*, Vermont Gazette, (July 8, 1817). Attributed to John Philpot Curran.

Cir. 1994). Thus, "[t]he right of access encompasses both" "documentary access" and "concurrent access." *Id.* at 1360 n.13. The key guiding principle is "the conviction that the public should have access to *information*; the [Supreme] Court has never suggested that an open proceeding is only open to those who are able to be bodily present in the courtroom itself." *Id.* at 1360. Rather, "the public forum values emphasized [in *Richmond Newspapers*] can be fully vindicated ***only if*** the opportunity for personal observation is extended to persons other than those few who can manage to attend the trial" or other judicial proceeding "in person." *United States v. Criden*, 648 F.2d 814, 822 (3d Cir. 1981) (emphasis added).

This case calls for a straightforward application of these principles. Here, bail hearings in Philadelphia—which are conducted at all hours and each of which may take only a few minutes to be decided—are open to public viewing, but ***no record*** is created for review by the public. Specifically, despite creating audio recordings for internal purposes, the Magistrate Judges ("Magistrates") "refused to produce transcripts, refused to grant public access to the audio recordings they now acknowledge are of sufficient quality to create accurate transcripts, and simultaneously prohibited members of the public from using stenographic or recording devices to create their own record." *Reed v. Bernard*, 976 F.3d 302, 319 (3d Cir. 2020) (Krause, J., dissenting). This untenable—and unjustified—

restriction on the public's ability to scrutinize judicial decisions depriving individuals of liberty cannot be squared with the First Amendment.

Despite recognizing that the First Amendment protects a right of access to bail hearings, the panel asserted that "the challenged Rules" did not "meaningfully interfere with the public's ability to inform itself about bail hearings." *Id.* at 307. The panel's decision gives short shrift to bedrock First Amendment principles in a vitally important context. A bail hearing—where a "criminal defendant[] . . . learns the charge against him and his liberty is subject to restriction"—"marks the start of adversary judicial proceedings" in the criminal justice system. *Rothgery v. Gillespie Cty., Tex.*, 554 U.S. 191, 213 (2008). It is undisputed that only recordation would fully capture "the parties' arguments and the bail magistrate's reasoning for his or her decision." *Bernard*, 976 F.3d at 304.

By breezily approving a total prohibition on the public's ability to assemble a complete record of this critical information, the panel's decision undermines the transparency necessary for public debate over—and, ultimately, confidence in—the workings of the criminal justice system. In so doing, it also diminishes the accountability that incentivizes reasoned judicial decision-making. And it disserves those individuals with high personal stakes in the process, including victims and defendants' families. Stephanos Bibas, *Transparency and*

Participation in Criminal Procedure, 81 N.Y.U. L. REV. 911, 924 (2006) [hereinafter Bibas, *Transparency and Participation*].

Worse yet, the panel turned aside the First Amendment right of access without even querying whether the rules at issue had any justificatory rationale, let alone a weighty one. It should go without saying that a complete prohibition on a right at the core of the First Amendment—here, the right to meaningful access to critical information about judicial proceedings at which individuals are deprived of liberty—should draw exacting scrutiny. The panel's failure to probe at all the justifications for the rules at issue barring meaningful access to judicial proceedings sets down a worrisome precedent.

The Court should grant the petition for rehearing *en banc*.

I. THE PANEL'S DECISION UNDERMINES FUNDAMENTAL FIRST AMENDMENT PRINCIPLES

A. "Transparency is pivotal to public perception of the judiciary's legitimacy and independence." *United States v. Aref*, 533 F.3d 72, 83 (2d Cir. 2008). This principle of transparency manifests itself, most notably, in "[t]he traditional Anglo-American distrust for secret trials" which has a lineage winding back to "the notorious use of this practice by the Spanish Inquisition," to the "excesses of the English Court of Star Chamber," and to the "French monarchy's abuse of the *lettre de cachet*." *In re Oliver*, 333 U.S. at 268–69.

Thus, the First Amendment's commitment to the openness of judicial proceedings provides "an effective restraint on possible abuse of judicial power." *Id.* at 270. In the context of trials, "[t]he value of openness lies in the fact that people not actually attending trial can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known." *Press-Enterprise I*, 464 U.S. at 508. "Similarly," this Court has explained, "public confidence is furthered by the knowledge that access to the proceedings is available at a later date via the transcript which is a public judicial record." *Antar*, 38 F.3d at 1360 n.14.

Judicial transparency is also closely linked to the Anglo-American tradition of reasoned judicial decision-making. The judiciary, of course, "claim[s] legitimacy . . . by reason." *Hicklin Eng'g, L.C. v. Bartell*, 439 F.3d 346, 348 (7th Cir. 2006). And transparency—not secrecy—furthers this goal, because "[a]ny step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat . . . ." *Id.* Judicial proceedings must be public—and a thorough record of such proceedings compiled—so that the "input and output of the decision-making process," and the decisions of a court, "are subject to correction on appeal." Stephen B. Burbank, *The Past and Present of Judicial Independence*, 80 Judicature 117, 121 (1996). For this reason, "judicial

independence and judicial accountability are joined at the hip," *id.*; indeed, "[a]n independent judiciary without any accountability is dangerous," Stephen B. Burbank, *What Do We Mean by "Judicial Independence"?*, 64 OHIO ST. L.J. 323, 325 (2003). Thus, public access to what occurs in the courtroom—especially, as relevant here, the parties' arguments and the basis for the judge's decision—promotes reasoned decision-making.

B. These principles apply with full force to bail hearings. "Pretrial detention implicates a liberty interest," and therefore warrants the utmost transparency and openness. *United States v. Delker*, 757 F.2d 1390, 1397 (3d Cir. 1985). As the panel recognized, the First Amendment right of access attaches to bail hearings, and with good reason. Indeed, as Judge Krause noted, "[t]he soundness of Philadelphia's bail system is an issue of great and immediate public importance." *Bernard*, 976 F.3d at 317. The panel also acknowledged, correctly, that "the First Amendment right of access is, at heart, a right to information." *Bernard*, 976 F.3d at 306 n.6.

Despite recognizing the public's right of access to bail hearings, the panel went badly astray in securing the meaningful exercise of the right. The panel asserted that the First Amendment is satisfied because "the Bail Fund maintains access to a mass of information, not merely access to the courtroom itself and the

notes its volunteers take at the bail hearings, but also the criminal complaint, court docket, and bulk data information." *Id.*

But at the heart of this case are the undisputed facts that (1) the documents that the public "may access" on adjudications of individuals' liberty "do not include information such as the parties' arguments and the bail magistrate's reasoning for his or her decision," and for those critical points the public must rely only on what mad-dash notes it can take; and (2) the Magistrates have, but previously refused to publicly release, audio recordings of the proceedings. *Id.* at 304.

The refusal to permit a comprehensive and open record of the bail hearings has grave consequences for liberty and the robust public debate needed to safeguard it.

First, with no full record of the proceedings, it is impossible to "assur[e] the public that procedural rights are respected and that justice is afforded equally." *Richmond Newspapers,* 448 U.S. at 557; *see also Antar*, 38 F.3d at 1360 ("Access to the documentation of an open proceeding, . . . facilitates the openness of the proceeding itself by assuring the broadest dissemination."). The public debate ongoing over the bail system in Philadelphia, *see Curry v. Yachera*, 835 F.3d 373, 377 (3d Cir. 2016) (recognizing multiple ongoing bail reform efforts), can only suffer in the absence of full and comprehensive records of bail hearings. It is, of

course, the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open" that the First Amendment safeguards. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *see Fields v. City of Phila.*, 862 F.3d 353, 359 (3d Cir. 2017) ("[C]itizen discourse on public issues" is "the highest rung of the hierarchy of First Amendment values." (internal quotation marks omitted)).

Second, the restriction approved by the panel limits judicial accountability. The general right to pretrial liberty is long embedded in the Anglo-American tradition.[2] Though individuals in Philadelphia have a right to appeal their bail determination, there is also no record made of the appeal—instead, it is "off-the-record." *Bernard*, 976 F.3d at 321. As Judge Krause observed, this arrangement "may exacerbate the First Amendment injury here." *Id*. This setup—two unrecorded adjudications of an individual's liberty—heightens the danger of the arbitrary exercise of judicial power. Of course, the Constitution "bar[s] arbitrary exercises of power over people that rest upon mere will." Randy E. Barnett & Evan Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process of*

[2] *See, e.g.*, 4 William Blackstone, Commentaries *295 ("By the ancient common law, before and since the [Norman] conquest, all felonies were bailable, till murder was excepted by statute; so that persons might be admitted to bail before conviction almost in every case." (footnotes omitted)).

Law, 50 WILLIAM & MARY L. REV. 1599, 1600 (2019). Recordation safeguards this liberty interest because it incentivizes reasoned decision-making over exercise of sheer will.

Third, the ban on the compilation of a comprehensive record harms not only arrestees, but all others with personal stakes in the criminal justice system. For example, crime victims have powerful interests in a "transparent" criminal justice system that safeguards "the public's right to see justice done." Bibas, *Observers as Participants*, at 342.

Victims "desperately want information about their cases." Bibas, *Transparency and Participation*, at 924. Indeed, "one of the greatest sources of frustration to them is their lack of information." *Id*. Yet, under the panel's decision, victims are essentially given *no* meaningful information. There is "no notice to the public of the time, case number, of circumstances of any given arrestee's hearing before the instant it occurs." *Bernard*, 976 F.3d at 321 (Krause, J., dissenting). And, with the challenged rules in force, victims have no way to read the arguments offered in support of and against bail; nor are they able to read the judge's decision.

All of this is, of course, precisely the opposite of what the criminal justice system should strive for. *See* Bibas, *Transparency and Participation*, at 953 (proposing that district attorneys or clerks "e-mail victims automated updates every

time a[] . . . bail . . . hearing is scheduled" and that "[e]-mails after each hearing . . . summarize what happened," thus "increas[ing] victim information, satisfaction, and healing"). As a result of bail hearings like those implicated in this case, "victims and the public may lose confidence in and respect for the system." *Id*. at 924.

II. THE PANEL'S FAILURE TO SCRUTINIZE THE PROFERRED JUSTIFICATIONS FOR THE BAN ON RECORDATION OF BAIL HEARINGS SETS A TROUBLING PRECEDENT

"[T]he default rule should be one of openness." Bibas, *Observers as Participants*, at 343. As a result, to tolerate the species of hindrance on the First Amendment implicated by the challenged rules in this case, the Court should require at least *some* justification. *Pomicter v. Luzerne Cty. Convention Ctr. Auth.*, 939 F.3d 534, 541-42 (3d Cir. 2019) (requiring evidence-backed justifications for restricting First Amendment activity). In this case, however, the panel failed to even inquire whether the challenged rules were supported by any reasoning, let alone a weighty rationale. This incuriosity sets a troubling precedent.

In any event, neither fear of pretrial publicity nor impact on courtroom decorum—the only two justifications proffered by the Magistrates—have even a rational relationship to the prohibitions at issue.

The Magistrates' first suggestion—that allowing recordation of the hearings would add an untenable risk of pretrial publicity—is pure conjecture. Indeed, they

conceded at oral argument that they were not aware of a single case *anywhere* where a recorded bail hearing prejudiced the defendant. *Bernard*, 976 F.3d at 322 (Krause, J., dissenting). No court should credit this justification. *See F.C.C. v. Beach Commc'ns*, 508 U.S. 307 n.3 (1993) (Stevens, J., concurring) (criticizing overly deferential judicial review that is "tantamount to no review at all").

The second purported justification for the total prohibition on recordation and access to the Magistrates' recording is even weaker: "courtroom decorum." This makes no sense; as the dissent notes, the courts *already audio record the hearings* for their own internal use, and there is a plethora of other technology in the courtroom that is used, including audio-video feeds for arrestees. *Bernard*, 976 F.3d at 322–23 (Krause, J., dissenting). Moreover, even if true, the Magistrates could simply produce a transcript from their audio recordings, even while banning others from recordation. And as with the first justification, the Magistrates conceded at argument that they could not point to a single example of negative effects on decorum.

CONCLUSION

This Court should grant the petition for rehearing *en banc*. The bail process—the adjudication of when it is appropriate to deprive an individual of his or her liberty—is at the heart of our system of due process and rule by law. The public must be afforded a full and complete basis upon which to debate the

efficacy and justice of its bail system, and individuals with personal stakes in bail hearings should be empowered with a full record to "increase victim information, satisfaction, and healing." Bibas, *Transparency and Participation*, at 953; *see id.* at 966 ("While we cannot return to the colonial justice system, we can better incorporate its values of transparency, participation, and accountability.").

DATED: New York, New York
November 19, 2020

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COMBINED CERTIFICATIONS

I hereby certify the following:

1. At least one of the attorneys whose names appear on this brief is a member of the bar of this Court. 3d Cir. L.A.R. 28.3(d).
2. This brief complies with the type-volume limitation of Rules 29(b)(4) and 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 2,567 words, excluding the parts of the brief exempted by Rule 32(f) and Third Circuit Local Appellate Rule 29.1(b).
3. I served a copy of this brief 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 Sophos virus detection program, version 2.10.7, 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 Times New Roman font.

Dated: November 19, 2020

/s/ *Gregory Dubinsky*
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