

No. 20-1632

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

PHILADELPHIA BAIL FUND,

Plaintiff-Appellee

v.

Arraignment Court Magistrate Judges FRANCIS BERNARD, SHEILA
BEDFORD, KEVIN DEVLIN, JAMES O'BRIEN, CATERIA MCCABE,
ROBERT STACK, in their Official Capacities; President Judge PATRICK
DUGAN, in his Official Capacity,

Defendants-Appellants,

SHERIFF OF PHILADELPHIA ROCHELLE BILAL,

Defendant.

On Appeal from the United States District Court for the Eastern District of
Pennsylvania
Case No. 19-3110 (Hon. Harvey Bartle, III)

**BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS AND 19 MEDIA ORGANIZATIONS IN
SUPPORT OF PLAINTIFF-APPELLEE'S PETITION FOR REHEARING
EN BANC**

[Caption continued on next page]

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The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock.

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The Tully Center for Free Speech is a subsidiary of Syracuse University.

WHYY, Inc. is a privately supported, nonprofit membership organization that has no parent company and issues no stock.

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STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae are the Reporters Committee for Freedom of the Press, The Atlantic Monthly Group LLC, The Center for Investigative Reporting (d/b/a Reveal), Cox Media Group, International Documentary Association, The Media Institute, Metro Corp. d/b/a Philadelphia Magazine, MPA - The Association of Magazine Media, National Journal Group LLC, National Press Photographers Association, National Public Radio, Inc., The News Leaders Association, Pennsylvania NewsMedia Association, POLITICO LLC, Radio Television Digital News Association, Society of Environmental Journalists, Society of Professional Journalists, Tribune Publishing Company, Tully Center for Free Speech, and WHYY, Inc. (collectively, “amici”). The amici are members of the news media and organizations committed to defending the First Amendment and newsgathering rights of the press. A full description of each of the amici is included in the accompanying motion for leave to file this amicus brief. Many of the amici regularly report on court proceedings, and all of the amici have a direct interest in ensuring that state and local laws, rules, and practices of courts are consistent with the First Amendment right of access to judicial proceedings.

SOURCE OF AUTHORITY TO FILE

Pursuant to Federal Rule of Appellate Procedure 29(b)(2), amici have filed a motion for leave to file this amicus brief.

FED. R. APP. P. 29(a)(4)(E) STATEMENT

Amici state that:

1. no party's counsel authored the brief in whole or in part;
2. no party or party's counsel contributed money intended to fund preparing or submitting the brief; and
3. no person, other than amici, their members or their counsel, contributed money intended to fund preparing or submitting the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff-Appellee Philadelphia Bail Fund (“Plaintiff-Appellee” or the “Bail Fund”) challenges the constitutionality of portions of two Pennsylvania court rules and one Philadelphia Municipal Court Arraignment Court Magistrate rule that prohibit the public from making audio recordings of proceedings in courts of no record, such as bail hearings, in Philadelphia Municipal Court. The district court granted summary judgment for Plaintiff-Appellee, holding that, in the absence of an official transcript or audio recording of bail hearings, the rules are unconstitutional insofar as they prohibit members of the public from creating audio recordings of bail hearings. Defendants-Appellants Philadelphia Municipal Court Arraignment Court Magistrate Judges Francis Bernard, Sheila Bedford, Kevin Devlin, James O’Brien, Cateria McCabe, Robert Stack, and Philadelphia Municipal Court President Judge Patrick Dugan appealed, and a panel of this Court reversed and remanded the case to the district court to grant summary judgment in favor of Defendants-Appellants. Opinion of the Court, ECF No. 47 (hereinafter the “Panel Opinion” or “Op.”). Plaintiff-Appellee now petitions for rehearing en banc.

The question at the heart of this case is whether the First Amendment right to attend bail hearings encompasses the right to create a comprehensive account of what transpired there. Amici write to emphasize the exceptional importance of this

issue, both for the press and for the public as a whole. Amici also explain how the Panel Opinion is inconsistent with prior precedent in this Circuit addressing the public's First Amendment right of access to government proceedings. For the reasons set forth herein, amici urge the Court to grant Plaintiff-Appellee's petition for rehearing en banc and affirm the district court's decision below.

ARGUMENT

The Court may order rehearing en banc if it is necessary to "secure or maintain uniformity of the court's decisions," or if a case presents "a question of exceptional importance." Fed. R. App. P. 35(a). Both of those criteria are satisfied here. Whether members of the press and the public have a right to make audio recordings in proceedings of no record is an important constitutional question that affects the public's ability to scrutinize the workings of the criminal justice system. Moreover, because the Panel Opinion deviates substantially from this Court's prior decisions regarding the public's First Amendment right of access to government proceedings, rehearing is needed to maintain uniformity of the Court's decisions.

I. Whether the public has a First Amendment right to record judicial proceedings of no record is a question of exceptional importance.

The Panel Opinion correctly recognized that the qualified First Amendment right of access to criminal proceedings extends to bail hearings. Op. at 11 n.7. Whether that right encompasses the right to record proceedings of no record is a

question with significant implications for the ability of journalists to report on bail hearings and other proceedings with no official transcript.

- A. Journalists serve as surrogates for the public when they attend and report on court proceedings.

Public access to judicial proceedings benefits society as a whole. Open courts promote public confidence in the judicial system by allowing the public to observe criminal proceedings, which, in turn, “enhances the quality and safeguards the integrity of the factfinding process” and “fosters an appearance of fairness, thereby heightening public respect for the judicial process.” *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982) (“*Globe Newspaper*”); see also *United States v. Thomas*, 905 F.3d 276, 282 (3d Cir. 2018).

The Supreme Court has long recognized that reporting by the news media allows members of the public to monitor the criminal justice system. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572–73 (1980). As this Court has stated, for the right of access to be meaningful, it cannot “extend[] only to those who can squeeze through the door.” *United States v. Antar*, 38 F.3d 1348, 1360 (3d Cir. 1994). And members of the press who attend and report on court proceedings play a vital “function[]” as “surrogates for the public” who cannot attend court proceedings themselves. *Richmond Newspapers*, 448 U.S. at 573.

There are many reasons why interested members of the public may be unable to attend bail hearings in Philadelphia. As stipulated by the parties, bail

hearings take place twenty-four hours a day, and the names and case numbers of arrestees are not made public until the time of their bail hearing. JA 009–10.

News coverage is thus particularly important to ensuring that the benefits of public access described above extend to bail hearings. Indeed, news reporting has recently allowed the public to scrutinize what occurs at bail hearings, including the disparate effects that the bail system can have on communities of color and the poor. *See, e.g.*, P.R. Lockhart, *Thousands of Americans Are Jailed Before Trial. A New Report Shows the Lasting Impact*, Vox (May 7, 2019), <https://perma.cc/62MP-CR77>.

B. The challenged rules impermissibly burden journalists’ ability to report comprehensively on bail hearings.

If the public is to rely on press reports to observe and understand bail hearings, journalists must be able to report about what transpires at these hearings fully and in detail. The challenged court rules curtail journalists’ ability to do so. While journalists can attend bail hearings in the Philadelphia Municipal Court, they do not have access to an official record of those proceedings. As this Court has recognized, “documentary access is not a substitute for concurrent access, *and vice versa.*” *Antar*, 38 F.3d at 1360 n.13 (emphasis added). In the absence of a transcript or audio recording, journalists must report on bail hearings based on what they are able to quickly jot down in the form of handwritten notes or otherwise remember without assistance. As a result, the challenged court rules

limit journalists' ability to verify verbatim quotations and report in thorough detail about bail hearings.

The district court ordered Defendants-Appellants to either release transcripts of bail hearings or allow audio recording. *Phila. Bail Fund v. Arraignment Court Magistrate Judges*, 440 F. Supp. 3d 415, 427 (E.D. Pa. 2020). Defendants-Appellants then made available certified transcripts of all bail hearings created from the audio recordings previously created solely for "internal review" of bail hearings. *Op.* at 5 n.3; *see also id.* at 38 n.7 (Krause, J., dissenting). Release of either transcripts or audio recordings is necessary for the press to report comprehensively and in detail about bail hearings.

Journalists have relied on transcripts of bail hearings in other jurisdictions to report about those proceedings. For example, Nick Pinto relied on court transcripts in his reporting about how unaffordable bail leads to incarceration in New York City. Nick Pinto, *The Bail Trap*, N.Y. Times Magazine (Aug. 13, 2015), <https://perma.cc/9B82-BJ4F>. Pinto profiled arrestees who were jailed for their inability to make bail, such as Adriana, a single mother staying in a shelter for victims of domestic violence with her young daughter. *Id.* Adriana was arrested for endangering the welfare of her child after she left the shelter to purchase diapers, leaving her daughter in the care of a friend. *Id.* Quoting from the transcript of Adriana's bail hearing, Pinto reported:

[T]he assistant district attorney asked for bail to be set at \$5,000. Adriana had no criminal record and had never failed to make a court appearance, but the prosecutor cited an “A.C.S. history,” meaning that Adriana and her daughter had previous contact with the Administration for Children’s Services. This was true but misleading. [. . .]

But arraignments happen quickly. Just as there was no time to track down Adriana’s friend to confirm that her daughter hadn’t been left unsupervised, there was no time to find out what the A.C.S. order actually said. The judge set bail at \$1,500. Adriana’s public defender couldn’t believe it. “Judge, I’m going to ask you to state the reason for setting bail in this case,” she said, according to the court transcript. “Thank you, counsel,” was the judge’s only reply.

Id. As this example illustrates, transcripts of individual bail hearings allow journalists to include verbatim quotations that can more accurately reflect what occurred in order to highlight broader issues within the bail bond system.

In Philadelphia, reporting based on transcripts of proceedings other than bail hearings has similarly allowed the public to scrutinize aspects of the criminal justice system. For example, the 2019 Amazon docuseries *Free Meek*, which chronicled the twelve-year legal battle of rapper Meek Mill, highlighted systemic flaws in the Pennsylvania probation system. See Dan Adler, “*I’m Still in Shock Right Now*”: *Meek Mill on His Probation Win and Onerous Legal Odyssey*, *Vanity Fair* (Aug. 1, 2019), <https://perma.cc/Q89N-L8ZR>; see generally *Free Meek* (Prime Video Aug. 9, 2019), <https://perma.cc/TM3C-84BW>. Using actors reading transcripts of court proceedings, the docuseries gave life to Meek Mill’s allegations of bias on the part of the judge who presided over his criminal trial and supervised

his probation. *See, e.g., Free Meek*, Episode 3, at 18:53–19:10 (quoting the judge presiding over a probation violation hearing). Hearing the judge’s exact words spoken aloud, even by an actor, powerfully highlighted Meek Mill’s claim that the judge allowed her personal feelings to influence her decision-making regarding his probation. In July 2019, the Pennsylvania Superior Court overturned the conviction for which Meek Mill was on probation and ordered a retrial before a new judge. Elliott C. McLaughlin, *Meek Mill to get new trial and judge, Pennsylvania appeals court rules*, CNN (July 24, 2019), <https://perma.cc/7QT8-PTXE>.

Journalists also often incorporate audio recordings from court proceedings into their reporting. Members of the public benefit tremendously when they can hear for themselves what happened in a courtroom. Audio recordings most fully and effectively convey the tone and demeanor of judges, parties, witnesses, and counsel, as well as the pace of the proceedings. For example, the Michigan Radio podcast *Believed* incorporated audio clips from victim impact statements given at the sentencing hearing of Larry Nassar, the former USA Gymnastics national team doctor convicted of sexually assaulting minors. *Larry Nassar’s Survivors Speak, and Finally the World Listens—and Believes*, Nat’l Pub. Radio (Jan. 16, 2018), <https://perma.cc/9UAU-QWGV>. The use of audio recordings from the sentencing hearing allowed for powerful reporting, including an audio montage of some of the

hundreds of women and girls who spoke about the abuse they suffered at Nassar’s hands and the applause in the courtroom following the judge’s sentencing of Nassar. *See id.*; *see also Larry Nassar’s Survivors Speak, and Finally the World Listens—and Believes*, Nat’l Pub. Radio (Dec. 10, 2018), <https://perma.cc/V6UJ-LMMN>.

Audio recordings and transcripts allow journalists to produce uniquely impactful reporting and to convey the fullest information about court proceedings. The challenged rules, however, leave journalists with no documentary record of what occurs in bail hearings beyond their own recollection and notes, thus limiting their reporting and depriving the public of valuable information.

II. Rehearing en banc is necessary to maintain uniformity of Third Circuit precedent.

The Panel Opinion’s holding diverges from the holding in *Whiteland Woods, L.P. v. Township of West Whiteland*, 193 F.3d 177 (3d Cir. 1999) (“*Whiteland Woods*”). That case involved a claim by a real estate developer, Whiteland Woods, that a rule prohibiting the videotaping of township planning commission meetings violated the First Amendment. *Id.* at 180. A three-judge panel of this Court found that it did not, but only because of the availability of alternative recording methods. *Id.* at 183. The Court in *Whiteland Woods* held that the videotaping ban did not meaningfully interfere with the right of access only because the plaintiff was able to compile an “accurate” and “comprehensive” record of the town planning

commission meetings by means of audio recording, notetaking, and stenography. *Id.* Here, notetaking alone cannot similarly create an accurate and comprehensive record of bail hearings. *See* Appellee’s Pet. for Reh’g En Banc at 7, ECF No. 51 (citing Joint Appendix at 123).

The Panel Opinion disregarded the importance of the availability of alternative recording methods to the analysis in *Whiteland Woods*. In *Whiteland Woods*, the Court framed the issue as “whether there is a federal constitutional right to videotape public meetings of a township planning commission *when other effective means of recording the proceedings are available.*” 193 F.3d at 180 (emphasis added). The Panel Opinion, however, incorrectly framed the issue in that case as simply whether the videotaping ban “meaningfully interfere[d]” with the right of access. Op. at 12 (quoting *Whiteland Woods*, 193 F.3d at 183). It then held that the court rules at issue did not do so because “the Bail Fund is able to attend bail hearings and take handwritten notes at those hearings.” *Id.*

The Panel Opinion relied upon two of the three cases cited with approval in *Whiteland Woods* to reject the argument that creation of a “comprehensive record” requires a “verbatim record.” Op. at 13–14. Both of those cases—*Combined Communications Corp. v. Finesilver*, 672 F.2d 818 (10th Cir. 1982), and *Garrett v. Estelle*, 556 F.2d 1274 (5th Cir. 1977)—predate the Supreme Court’s decision in *Globe Newspaper* and its progeny recognizing the public’s First Amendment right

of access to court proceedings, calling into question the value of their analysis. The third case cited with approval in *Whiteland Woods, Johnson v. Adams*, 629 F. Supp. 1563, 1564–65 (E.D. Tex. 1986), which the Panel Opinion did not address, also expressly relied on the fact that audiotaping was permitted to find a videotaping ban constitutional. Because the Panel Opinion’s holding that an audio recording ban is permissible in the absence of alternative means of creating a comprehensive record is inconsistent with *Whiteland Woods*, rehearing en banc is necessary to maintain the uniformity of Third Circuit precedent.

CONCLUSION

For the reasons stated herein, amici respectfully urge the Court to grant rehearing en banc.

Respectfully submitted on this 19th day of November, 2020.

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COMBINED CERTIFICATIONS

I hereby certify that the foregoing brief complies with the following:

1. The type-volume limitation of Fed. R. App. P. 29(b)(4) because it contains 2,544 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as calculated by the word-processing system used to prepare the brief.
2. The typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface in 14-point Times New Roman.
3. At least one of the attorneys whose names appear on the brief of amici curiae the Reporters Committee for Freedom of the Press and 19 Media Organizations in support of Plaintiff-Appellee (the “Amici Brief”), including the undersigned, is a member of this Court, as required by Local Rule 28.3(d).
4. The text of the electronic version of the Amici Brief filed on ECF is identical to the text of the paper copies filed with the Court.
5. The electronic versions of the Amici Brief and this Certification filed on ECF were virus-checked using Avast Security, and no virus was detected.

Dated: November 19, 2020

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system with a resulting electronic notice to all counsel of record on November 19, 2020.

Dated: November 19, 2020

By: /s/ Katie Townsend
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