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**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

MATT STROUD; POSTINDUSTRIAL;)
)
Plaintiffs,)
)
vs.)
)
MAGISTERIAL DISTRICT JUDGES)
DANIEL E. BUTLER, ANTHONY M.)
CEOFFE, KEVIN E. COOPER, JAMES J.)
HANLEY, JR., RICHARD G. KING,)
RANDY C. MARTINI, JAMES A.)
MOTZNIK, MIKHAIL N. PAPPAS, OSCAR)
J. PETITE, JR., ROBERT P. RAVENSTAHL,)
EUGENE N. RICCIARDI, DERWIN D.)
RUSHING, in their official capacities;)
PRESIDENT JUDGE KIM BERKELEY)
CLARK, in her official capacity; and)
SHERIFF WILLIAM P. MULLEN, in his)
official capacity;)
Defendants.)
)
)
)

Case No. 2:19-cv-01289-MRH

**BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF
THE PRESS AND PENNSYLVANIA NEWSMEDIA ASSOCIATION IN SUPPORT OF
PLAINTIFFS**

INTEREST OF AMICI CURIAE

Amici curiae are the Reporters Committee for Freedom of the Press (the “Reporters Committee”), an unincorporated nonprofit association of reporters and editors dedicated to defending the First Amendment and newsgathering rights of journalists, and Pennsylvania NewsMedia Association (“PNA”), an association that represents the interests of over three hundred (300) daily and weekly newspapers and other media-related organizations across the Commonwealth of Pennsylvania in ensuring that the press can gather information and report to the public. As organizations that advocate on behalf of the news media, amici have a strong interest in ensuring that court rules are consistent with the First Amendment-protected newsgathering rights of journalists and the public’s rights of access to judicial proceedings.

The court rules at issue in this case unconstitutionally curtail journalists’ ability to report on proceedings in Pennsylvania courts of no record and, thus, limit their ability to effectively report on matters of substantial public importance to citizens of the Commonwealth. Accordingly, amici respectfully submit this amici curiae brief in support of Plaintiffs’ response to Defendants’ motions to dismiss.

INTRODUCTION

Plaintiffs Matt Stroud and *Postindustrial* (“Plaintiffs”) challenge the constitutionality of portions of three court rules that prohibit the general public, including members of the news media, from making audio recordings of proceedings that take place in courts of no record, such as bail hearings. At issue before the Court are two motions to dismiss, the first filed by Defendant Sheriff William P. Mullen (“Defendant Sheriff Mullen”) and the second filed by Defendant Magisterial District Judges Daniel E. Butler, Anthony M. Ceoffe, Kevin E. Cooper, James J. Hanley, Jr., Richard G. King, Randy C. Martini, James A. Motznik, Mikhail N. Pappas, Oscar J. Petite, Robert P. Ravenstahl, Eugene N. Ricciardi, and Derwin D. Rushing, and President Judge Kim Berkeley Clark (the “Defendant Judges”).

Plaintiffs challenge portions of three court rules as applied to the press’ ability to create audio recordings of bail hearings. First, Plaintiffs challenge Pennsylvania Rule of Criminal Procedure 112, which prohibits “the stenographic, mechanical, electronic recording, or the recording using any advanced communication technology, of any judicial proceedings by anyone other than the official court stenographer in a court case, for any purpose.” Pa. R. Crim. P. 112(C). The only exception to this prohibition is that attorneys for the Commonwealth, defendants, or affiants may record during proceedings before an issuing authority to be used “as an aid to the preparation of the written record for subsequent use in a case.” Pa. R. Crim. P. 112(D). Such recordings may not be publicly played or disseminated other than during a trial or hearing. *Id.* The second rule Plaintiffs challenge is Pennsylvania Rule of Judicial Administration 1910, which directs judges to prohibit recording in the courtroom during court sessions. Pa. R. Judicial Admin. 1910. Finally, Plaintiffs challenge Allegheny County Rule of Criminal Procedure 112.1, which prohibits the recording of proceedings in all courtrooms in

Pittsburgh Municipal Court. Allegheny County R. Crim. P. 112.1(a). The only stated exception to that prohibition is that a defendant may make a recording during a preliminary hearing. *Id.*; Pa. R. Crim. P. 542(C)(5). The rule authorizes the Sheriff to confiscate any electronic device that “is enabled or in any way disrupts court proceedings.” Allegheny County R. Crim. P. 112.1(c).

Asserting that there is no First Amendment right to record courtroom proceedings, Defendant Sheriff Mullen and the Defendant Judges argue that Plaintiffs fail to state a claim upon which relief can be granted. Specifically, Defendant Sheriff Mullen argues that Plaintiffs have no claim against him, as he is not responsible for setting or implementing the relevant rules. *See Br. in Supp. of William P. Mullen’s Mot. to Dismiss Pl.’s Complaint at 7–8, ECF No. 16.* He states further that he joins in the arguments made by the Defendant Judges regarding the constitutionality of the challenged rules. *Id.* at 9. The Defendant Judges argue that there is no First Amendment right to record courtroom proceedings, and that Plaintiffs therefore fail to state a viable claim. *Br. in Supp. of Def. Judges’ Mot. to Dismiss the Complaint at 6–12, ECF No. 20.*

Amici write to emphasize the effect on members of the news media of the court rules at issue. Amici agree with Plaintiffs that the restrictions set forth in these rules violate the First Amendment, both by abridging the public’s right of access to judicial proceedings and by burdening journalists’ ability to engage in newsgathering activities for the benefit of the public at large. For the reasons set forth herein, amici urge the Court to deny Defendants’ motions to dismiss.

ARGUMENT

I. The challenged rules burden journalists' ability to report accurately and thoroughly on proceedings in courts of no record.

Over the past several years, public interest in the bail system has increased, particularly as reporting has brought to light the disparate effects that 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>; Fiona Ortiz, *Poor, Nonviolent Inmates Benefit from U.S. Bail Reform Push*, Reuters (July 16, 2015), <https://perma.cc/BDJ7-NSBH>; Casey Tolan, *Making Freedom Free*, Slate (Mar. 29, 2017), <https://perma.cc/4NEN-AN6K>; Jazmine Ulloa, *California Lawmakers Want to Reform a Bail System They Say 'Punishes the Poor for Being Poor'*, L.A. Times (Dec. 4, 2016), <https://perma.cc/2F92-DFSR>. Pennsylvania is among those states in which journalists have reported on the cash bail system. For example, the 2019 Amazon docuseries *Free Meek*, which chronicled the 12-year legal battle of Philadelphia rapper Meek Mill, highlighted systemic flaws in the Pennsylvania state court bail and probation systems. *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>.

Plaintiffs wish to report on bail hearings in the Pittsburgh area. *See* Complaint at 14–18, ECF No. 1. However, by prohibiting members of the public, including the news media, from audio recording during bail hearings, the challenged court rules curtail journalists' ability to report fully, accurately, and in detail about what transpires during bail hearings. No transcript or official audio recording is made of such hearings, leaving journalists to report based on what

they are able to quickly take down in the form of handwritten notes¹ or otherwise remember without assistance. As a result, the challenged court rules limit journalists' ability to, for example, verify verbatim quotations and report in thorough detail about bail hearing proceedings. See Adam L. Penenberg, *NYU Journalism Handbook for Students*, <https://journalism.nyu.edu/wp-content/uploads/document-nyu-journalism-handbook-for-students.pdf> ("There are obvious benefits to recording interviews, namely an assurance of accuracy and the creation of a verifiable record.").

Members of the news media also cannot incorporate audio recordings from bail hearings into their reporting as a result of the challenged rules. Members of the public benefit tremendously when they can hear for themselves what happened in a courtroom through audio recordings. Audio recordings of courtroom proceedings most fully and accurately convey the tone and demeanor of judges, parties, and counsel, as well as the pace of the proceedings. The use of audio recordings is paramount for audio-driven forms of media such as radio and podcasts. For example, the crime podcast *Serial* relied extensively on audio recordings of courtroom proceedings in its third season to reveal to the public the inner workings of a Cleveland, Ohio, county courthouse. Tana Ganeva, *How the 'Serial' Podcast Exposes Epic Dysfunction in Cleveland's Criminal Justice System*, *Rolling Stone* (Nov. 17, 2018), <https://perma.cc/6FQP-VQ9E>. The podcast included troubling audio recordings of courtroom proceedings, including recordings of a judge who "threaten[ed] black defendants with jail time if

¹ Pennsylvania Rule of Criminal Procedure 112(C) prohibits the "stenographic" recording of proceedings, meaning that even taking handwritten notes may be impermissible. Plaintiffs assert that this rule has been enforced to prohibit handwritten notetaking, Complaint at 15, though it is unclear whether the rule is consistently enforced in this manner. See Br. in Supp. of Def. Judges' Mot. to Dismiss the Complaint at 13 n.10 ("It is not the Court of Common Pleas' policy to prevent note taking in a judicial proceeding"). To the extent that this rule prohibits handwritten notetaking as well as audio recording, such prohibition violates the First Amendment.

they have more children and blithely thr[ew] around racist tropes about broken black families and drug use.” *Id.*; see also *You’ve Got Some Gauls*, Serial (Sept. 20, 2018) at 8:25–9:00, <https://perma.cc/SNQ9-HY75>. The inclusion of these audio recordings made *Serial*’s narrative “all the more unbelievable because you’re *listening* to people act.” *Ganeva, supra* (emphasis in original).

The ability to embed audio clips in an online news article has also made audio recordings increasingly important for online news sources, allowing them to add another dimension to their reporting. For example, National Public Radio embedded audio clips from the oral argument in *Loving v. Virginia*—the landmark 1967 civil rights case in which the U.S. Supreme Court ruled prohibitions on interracial marriage unconstitutional—in a 2017 article on NPR’s website reflecting on the fifty years since the case was decided. Marisa Peñaloza, *‘Illicit Cohabitation’: Listen to 6 Stunning Moments from Loving v. Virginia*, Nat’l Pub. Radio (June 12, 2017), <https://perma.cc/WU8D-FV4K>.

The ability to include audio recordings in published work allows journalists to produce uniquely impactful reporting. The challenged rules, however, prohibit journalists such as Plaintiffs from recording bail hearings in Pennsylvania courts, inhibiting the accuracy and thoroughness of their reporting.

II. The challenged rules limit the ability of the press to fulfill its constitutional role of serving as a surrogate for the public.

The First Amendment to the U.S. Constitution guarantees the public and the press a qualified right to attend criminal trials. *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 603 (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 558–81 (1980) (plurality opinion)). The First Amendment also guarantees the public and the press a qualified right to attend other criminal proceedings. *E.g., Press-Enterprise Co. v. Superior Ct.*, 478 U.S. 1, 9 (1986); *United*

States v. Thomas, 905 F.3d 276, 282 (3d Cir. 2018) (plea hearings); *United States v. Simone*, 14 F.3d 833, 840 (3d Cir. 1994) (post-trial hearings to investigate jury misconduct); *United States v. Criden*, 675 F.2d 550, 557 (3d Cir. 1982) (pretrial suppression, due process, and entrapment proceedings).

Although the news media's right of access to court proceedings is no greater than that of the public, the U.S. Supreme Court has recognized that reporting by the news media allows members of the public to monitor the criminal justice system without attending proceedings in person. *Richmond Newspapers, Inc.*, 448 U.S. at 572–73. By attending and reporting on court proceedings, members of the press “function[] as surrogates for the public.” *Id.* at 573. Furthermore, the U.S. Court of Appeals for the Third Circuit has found that the right to access court proceedings encompasses a right to access records created of those proceedings, such as transcripts: “It would be an odd result indeed were we to declare that our courtrooms must be open, but that transcripts of the proceedings occurring there may be closed, for what exists of the right of access if it extends only to those who can squeeze through the door?” *United States v. Antar*, 38 F.3d 1348, 1360 (3d Cir. 1994). While *Antar* says that the public has a right of access to transcripts of court proceedings, there are no transcripts of bail hearings made by the court itself. Allowing reporters to record bail hearings is the only way for those members of the public not in attendance to exercise their right of access to the hearings

There are many reasons why interested members of the public may be unable to attend bail hearings in Pittsburgh: they may be unable to attend a proceeding because it occurs in the middle of the night² or due to an immovable commitment, they may be unaware of a pending

² As set forth in the Complaint, bail hearings take place 24 hours a day. Complaint at 8.

bail hearing,³ or the courtroom could be full. When no transcripts are available, members of the press who attend bail hearings should be able to give meaningful effect to the public's right of access by creating audio recordings of the proceedings they attend and using them to report on those proceedings. By prohibiting audio recording in courtrooms, the challenged rules restrict the news media's ability to fulfill its constitutionally recognized role as a surrogate for the public.

CONCLUSION

The challenged portions of the court rules at issue here burden journalists' ability to report thoroughly and accurately on bail hearings and restrict their ability to keep the public informed about what transpires in courtrooms. Because Plaintiffs have stated a claim upon which relief can be granted, amici respectfully urge the Court to deny Defendants' motions to dismiss.

Respectfully submitted on this 15th day of January, 2020.

/s/ Frederick N. Frank

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³ As averred in the Complaint, no schedule of bail hearings is made available to the public. Complaint at 10.