IN THE COURT OF COMMON PLEAS OF BEAVER COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	CRIMINAL DIVISION
	:	
	:	Docket #: 1126 of 2019
v.	:	
	:	
MICHAEL WITTMAN	:	

OMNIBUS PRE-TRIAL MOTION

AND NOW COME, Gerald V. Benyo, Jr., Esq., Max A. Schmierer, Esq., Nicolas Y. Riley, Esq., and Robert D. Friedman, Esq., and bring the following omnibus pre-trial motion as counsel of record for Defendant Michael Wittman in the above-captioned case.

FACTUAL AND PROCEDURAL HISTORY

1. Mr. Wittman is charged with the "unlawful use of an audio or video device in court" under Title 18, § 5103.1 of Pennsylvania's Consolidated Statutes. That provision, enacted last year, makes it a misdemeanor for a person:

> in any manner and for any purpose [to] use[] or operate[] a device to capture, record, transmit or broadcast a photograph, video, motion picture or audio of a proceeding or person within a judicial facility or in an area adjacent to or immediately surrounding a judicial facility without the approval of the court or presiding judicial officer or except as provided by rules of court.

18 Pa. Cons. Stat. § 5103.1(a).

2. As used in the statute, "the term 'judicial facility' means a courtroom, hearing room or judicial chambers used by the court to conduct trials or hearings or any other court-related business or any other room made available to interview witnesses." 18 Pa. Cons. Stat. § 5103.1(c).

3. The Commonwealth alleges that Mr. Wittman violated § 5103.1 by using his cell phone to take pictures during a break in court proceedings before a Beaver County magisterial district judge on March 22, 2019. The police report from that day indicates that Mr. Wittman was compliant and cooperative with law enforcement and "was not causing a problem" when he was discovered using his phone in the courtroom. Ex. A (Police Criminal Complaint), at 4.

4. A criminal complaint was filed on March 22. A criminal information was filed on July 23.

MOTION TO QUASH INFORMATION

5. Mr. Wittman moves to quash the information under Pennsylvania Rule of Criminal Procedure 578(5).

6. Mr. Wittman cannot be convicted under § 5103.1 because the statute violates the U.S. and Pennsylvania Constitutions. As explained below, the statute is unconstitutional for three reasons:

I. the statute imposes an unlawful "**prior restraint**" on expressive activity;

II. the statute is impermissibly **overbroad**; and

III. the statute criminalizes constitutionally protected activity with **no showing that the activity causes actual harm**.

7. Each of these reasons would suffice, on its own, to invalidate § 5103.1. But even if this Court finds that § 5103.1 is constitutional as a general matter, the statute still could not constitutionally be applied in this case because Mr. Wittman's alleged conduct was protected by the First Amendment. *See infra* Part IV.

8. Mr. Wittman has standing to challenge the constitutionality of § 5103.1—both on its face and as the statute has been applied to him in this case. "It is well established that in the area of freedom of expression an overbroad regulation may be subject to facial review and invalidation, even though its application in the case under consideration may be constitutionally unobjectionable." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 129 (1992). Criminal defendants may therefore challenge the constitutional validity of any law that "creates an impermissible risk of suppression of ideas" by "delegate[ing] overly broad discretion to the decisionmaker" or "sweeps too broadly" by "penalizing a substantial amount of speech that is constitutionally protected." *Id.* at 129-30 (citations omitted). Mr. Wittman's arguments fall squarely into these categories.

ARGUMENTS IN SUPPORT OF MOTION TO QUASH

I. SECTION 5103.1 IMPOSES A PRIOR RESTRAINT ON EXPRESSIVE ACTIVITY IN VIOLATION OF THE FIRST AMENDMENT AND ARTICLE I, § 7.

A "prior restraint is an official restriction imposed upon speech or other forms of expression in advance of actual publication." *Alderman v. Philadelphia Hous. Auth.*,

496 F.2d 164, 168 (3d Cir. 1974). The U.S. Supreme Court has long recognized that "placing unbridled discretion in the hands of a government official or agency" to decide whether someone may engage in expressive activity "constitutes a prior restraint." *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988). Such restraints threaten free expression by creating a "formidable" risk of "freewheeling censorship" by government officials. *Southeast Promotions v. Conrad*, 420 U.S. 546, 559 (1975); *see also City of Lakewood*, 486 U.S. at 763 (noting that the danger of "viewpoint censorship" is "at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official"). For that reason, "the presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression" through any other means. *Southeast Promotions*, 420 U.S. at 558-59.

As explained below, § 5103.1 constitutes a prior restraint because it expressly conditions expressive activity—specifically, documenting what happens in public spaces in and around courthouses—on obtaining advance permission from Commonwealth officials. By granting those officials unfettered discretion to decide who may engage in expressive activity, the statute infringes the First Amendment of the U.S. Constitution and Article I, § 7 of the Pennsylvania Constitution. And by using a prior restraint where less restrictive alternatives exist to achieve the Commonwealth's interests, it runs afoul of additional safeguards for free expression in Article I, § 7.

A. Section 5103.1 constitutes an unlawful prior restraint because it grants Commonwealth officials unfettered discretion to control expressive activity.

A regulation that "condition[s] the exercise of expressive activity on official permission . . . constitute[s] a prior restraint on speech." *MacDonald v. Safir*, 206 F.3d 183, 194 (2d Cir. 2000) (citation omitted). Section 5103.1 does exactly that: it conditions the rights of the public and the press to take photographs and make recordings on securing the "approval of the court or presiding judicial officer." 18 Pa. Cons. Stat. § 5103.1(a).

The activity that § 5103.1 inhibits—photographing, recording, and broadcasting public activity in and around the courtroom—constitutes protected expression under both the First Amendment and Article I, § 7.[1] "The First Amendment protects actual photos, videos, and recordings, and for this protection to have meaning the Amendment must also protect the act of creating that material." *Fields v. City of Philadelphia*, 862 F.3d 353, 358 (3d Cir. 2017). Indeed, ample case law recognizes that "[t]here is no practical difference between allowing [the government] to prevent people from taking recordings and actually banning the possession or distribution of them." *Id.*; *see also, e.g.*, *ACLU of Illinois v. Alvarez*, 679 F.3d 583, 595-96

[1] The Pennsylvania Supreme Court has recognized that "Article I, § 7 'provides protection for freedom of expression that is broader than the federal constitutional guarantee.'" *Pap's A.M. v. City of Erie*, 571 Pa. 375, 399 (2002). Thus, cases decided under the First Amendment also carry weight in construing the protections of Article I, § 7.

(7th Cir. 2012) ("Restricting the use of an audio or audiovisual recording device suppresses speech just as effectively as restricting the dissemination of the resulting recording.").

These same principles apply in the prior-restraint context, as well. After all, the rule against prior restraints would be "upended if it were a prior restraint to require a permit for a film to be shown, a book to be published, or a painting to be displayed but not a prior restraint to require a permit for a movie to be filmed, a book to be written, or a painting to be painted." *Vivid Entm't, LLC v. Fielding*, 965 F. Supp. 2d 1113, 1128 (C.D. Cal. 2013), *aff'd*, 774 F.3d 566 (9th Cir. 2014); *cf. Jay-Lee, Inc. v. Kingston Zoning Hearing Bd.*, 799 A.2d 923, 929 (Pa. Commw. Ct. 2002) (analyzing law governing "occupancy permits" for nude dancing establishments under prior-restraint framework).

For this reason, the First Amendment requires that the government's discretion to grant or deny someone the right to engage in expressive activity be limited by clear, objective criteria. As the U.S. Supreme Court has explained,

> Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. Without these guideposts, post hoc rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression.

City of Lakewood, 486 U.S. at 758. Accordingly, any prior restraint that lacks "narrowly drawn, reasonable and definite standards" to control the government's decision-

making violates the First Amendment. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 (1992) (quoting *Niemotko v. State of Maryland*, 340 U.S. 268, 271 (1951)). These standards must be expressly stated on the face of the law, articulated in a "binding judicial or administrative construction," or evidenced by "well-established practice." *City of Lakewood*, 486 U.S. at 770. Courts cannot simply assume that the government official tasked with granting permission will "act in good faith." *Id.*

Applying these principles, courts routinely strike down prior restraints that provide government officials with expansive discretion. *See, e.g.*, *City of Lakewood*, 486 U.S. at 769 (striking ordinance that placed "no explicit limits on the mayor's discretion" other than that the mayor "make the statement 'it is not in the public interest' when denying a permit application"); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150 (1969) (striking statute that allowed officials to withhold permit to parade or demonstrate based only on their "own ideas of 'public welfare, peace, safety, health, decency, good order, morals or convenience'"); *Lovell v. City of Griffin*, 303 U.S. 444, 451 (1938) (striking ordinance that contained no constraints on city manager's authority to deny permit to distribute literature); *Gannett Satellite Info. Network, Inc. v. Berger*, 894 F.2d 61, 69 (3d Cir. 1990) (striking rule that "empowers the Port Authority to grant or deny publishers the permission to distribute their newspapers at Newark Airport, but says nothing at all about how that power may be wielded"); *Slotterback v. Interboro Sch. Dist.*, 766 F. Supp. 280, 298 (E.D. Pa. 1991) (striking policy that conditioned ability to distribute materials on school property on

securing approval from the principal, but did not constrain principal's discretion); *cf. Commonwealth v. Speraw*, 25 Pa. D. & C.3d 690, 695-96 (Pa. Com. Pl. 1983) (striking loitering ordinance on the ground that it was no different than a law that "expressly provided that there can only be street and sidewalk assemblies in the unbridled discretion of the city police").

Like the prior restraints struck down in these cases, § 5103.1 provides government officials with unconstitutionally broad discretion to control expressive activity. The statute vests the "the court or presiding judicial officer" with free reign to grant or deny permission to photograph, record, or broadcast court proceedings for any reason—or no reason at all. The statute contains no standards to guide a judicial officer's decision, let alone "narrowly drawn, reasonable and definite standards." *Forsyth County*, 505 U.S. at 133. Further, no binding judicial decision limits § 5103.1's reach (or reasonably could, given its plain terms), and there is no historical practice that constrains its application. Indeed, because § 5103.1 makes every judicial officer in the Commonwealth a licensor, it is difficult to see how a consistent, unwritten, and constitutional practice could ever exist. Pennsylvania has over 500 magisterial district judges alone, on top of all of the judges of the Courts of Common Pleas, Superior Courts, and Commonwealth Courts.

This extensive scope also demonstrates how § 5103.1 is ripe for abuse. Even if some judges might grant or deny permission to take photographs without regard to the requestor's viewpoint, the statute vests censorial power in the hands of hundreds

of different individuals across the Commonwealth. It requires no leap of imagination to envision an official granting photography permission to a journalist who wants to write a glowing profile, but not to a journalist who wants to document perceived injustices. That risk of censorship is, by itself, enough to do harm: the "mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused." *City of Lakewood*, 486 U.S. at 757.

B. Prior restraints on restrict expressive activity are presumptively invalid, even if they apply only to activity in and around courtrooms.

The presumption of invalidity applies with full force to prior restraints that condition expressive activity in the courtroom and its environs on first securing prior government approval. "There is broad agreement that, even in limited public and nonpublic forums"—where government authority to restrict speech is ordinarily at its height—"investing governmental officials with boundless discretion over access to the forum violates the First Amendment." *Child Evangelism Fellowship of Md. v. Montgomery Cty. Pub. Sch.*, 457 F.3d 376, 386 (4th Cir. 2006) (collecting cases scrutinizing prior restraints in non-public fora). This consensus recognizes that the core danger that prior restraints pose—unbridled discretion to engage in viewpoint discrimination—violates the First Amendment no matter the forum. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) (regulations of nonpublic forums must still be "viewpoint neutral"); *Higher Soc'y of Indiana v. Tippecanoe*

County, 858 F.3d 1113 (7th Cir. 2017) (even where "courthouse grounds are a nonpublic forum," viewpoint discrimination is still unconstitutional).

Courts have therefore struck down licensing schemes that give government officials unbridled discretion to decide who may engage in expressive activity in a nonpublic forum, just as in any other forum. *See, e.g.*, *Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1891 (2018) (striking down statute regulating speech in polling places, even though polling places are nonpublic fora, on the ground that no "objective, workable standards" constrained election officials' control over what speech was permissible); *Atlanta Journal & Constitution v. Atlanta Dep't of Aviation*, 322 F.3d 1298, 1311-12 (11th Cir. 2003) (en banc) (striking down the "boundless discretion" granted to city official with authority over newsracks in airport, even though airport was a nonpublic forum). There is no principled basis for treating the courtroom and its environs—where newsworthy events occur daily—differently than any other forum where prior restraints are forbidden.

Nor is it of any help to the Commonwealth to claim that, because it could prohibit all photography and recording in the courthouse and its environs, it has authority to grant exceptions at its discretion. As explained below, that premise is incorrect: Section 5103.1, even apart from acting as an unconstitutional licensing scheme, impermissibly proscribes constitutionally protected conduct. *See infra* Parts II.A-.C. Further, the U.S. Supreme Court has already rejected this "'greater-includes-the-lesser' syllogism," explaining that authority to prohibit speech in a "viewpoint

neutral" manner with a blanket ban does not translate to authority to grant discretionary permission through a licensing system that "raises the specter of content and viewpoint censorship." *City of Lakewood*, 486 U.S. at 762-63.

For all of these reasons, § 5103.1 cannot satisfy the rigorous scrutiny applicable to all prior restraints under the First Amendment and Article I, § 7.

C. Section 5103.1 violates the Pennsylvania Constitution because it imposes an unnecessary prior restraint.

Besides conferring unconstitutionally broad discretion on judges, § 5103.1 also violates Article I, § 7 of the Pennsylvania Constitution, which provides even broader protections than the First Amendment. The Pennsylvania Constitution "differs" from the federal constitution "in that it has codified the proscription of prior restraints on speech." *Uniontown Newspapers, Inc. v. Roberts*, 576 Pa. 231, 244 (2003); *see also DePaul v. Commonwealth*, 600 Pa. 573, 589 (2009) (identifying prior restraints as one of a "number of different contexts" where the Pennsylvania Constitution "provides broader protections of expression than the related First Amendment guarantee"). Specifically, Article I, § 7 provides: "The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty." This mandate "is designed . . . to prohibit the imposition of prior restraints upon the communication of thoughts and opinions, leaving the utterer liable only for an abuse

of the privilege," *i.e.*, in a prosecution or other enforcement action after the speech has taken place. *William Goldman Theatres, Inc. v. Dana*, 405 Pa. 83, 88 (1961).

To give teeth to the added protection the Pennsylvania Constitution provides, the Pennsylvania Supreme Court has prohibited the use of prior restraints where the Commonwealth's aims can "be accomplished practicably in another, less intrusive manner." *Insurance Adjustment Bureau v. Insurance Com'r*, 518 Pa. 210, 225 (1988). In *Insurance Adjustment Bureau*, for example, the Court struck down a statute that barred public adjusters from soliciting business within 24 hours of a disaster. *Id.* at 212. Although the statute targeted legitimate government concerns—combatting fraud and misleading speech—the Court held that the Commonwealth had to address those concerns through "enforcement of civil, criminal and administrative remedies already in place," rather than a prior restraint, because doing so was "practicable" and "less intrusive." *Id.* at 225.

Here, too, the Commonwealth's aims can be accomplished through other means that do not involve targeting a wide range of expressive activity with a prior restraint backed by criminal penalties. The principal evil § 5103.1 aims to combat is witness intimidation.[2] Yet the Commonwealth has ample alternative means to pursue that aim more directly. For instance, other criminal statutes already make it illegal to

[2] In a press release about the bill, the sponsor of § 5103.1 cited only concerns about witness intimidation as motivation for the legislation. *See* Rep. Jerry Knowles, *Knowles Bill to Punish Intimidating Camera Use in Courtrooms Goes to Governor* (Oct. 18, 2018), https://perma.cc/D676-QJ3B.

intimidate witnesses and victims from participating in ongoing or future proceedings, 18 Pa. Cons. Stat. § 4952, or to retaliate against them for their past participation, 18 Pa. Cons. Stat. § 4953. These statutes are tailored to criminalize the actual, specific wrong—witness intimidation—without sweeping up constitutionally protected activity along the way. And these criminal statutes are not even the only safeguards at the Commonwealth's disposal. The Pennsylvania Court System recently released a handbook outlining the many other tools judges can use to prevent witness intimidation, such as issuing protective orders, closing the courtroom, and using their contempt powers, among others. Section 5103.1 is mentioned in only a single paragraph of the fifty-page handbook.[3]

To the extent that § 5103.1 is designed to limit disruptions of judicial proceedings or advance any other interests, less intrusive means exist to further those interests, as well. Through the use of statewide procedural rules and judges' inherent authority to control their courtrooms, Pennsylvania courts functioned for decades prior to the enactment of § 5103.1 without photography, broadcasting, and recording causing unduly imperiling these interests. Viewed against this network of different tools available to the Commonwealth, it is evident that the prior restraint that § 5103.1 establishes is not the least restrictive means of achieving the Commonwealth's aims. The statute therefore violates Article I, § 7.

---

[3] *Free To Tell the Truth: Preventing and Combating Intimidation in Court* 5 (2019), https://perma.cc/8S7R-2E5H.

II. SECTION 5103.1 IS UNCONSTITUTIONALLY OVERBROAD.

In addition to serving as an unconstitutional prior restraint, § 5103.1 is also unconstitutional because it is overly broad. "The Constitution provides 'significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere.'" *Commonwealth v. Davidson*, 595 Pa. 1, 18 (2007) (quoting *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002)). Thus, a statute that targets unprotected speech may nevertheless be struck down as overbroad if it also "punishes lawful 'constitutionally protected activity.'" *Id.* (citation omitted).

To determine whether a given law is overbroad, courts examine whether "the impermissible applications of the law are substantial when judged in relation to the statute's plainly legitimate sweep." *Commonwealth v. Ickes*, 582 Pa. 561, 567 (2005) (quoting *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999)). "The showing that a law punishes a '*substantial*' amount of protected free speech . . . suffices to invalidate all enforcement of that law." *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003) (emphasis added; citations omitted).

Section 5103.1 punishes numerous activities that fall squarely within the ambit of First Amendment protection. As explained below, the statute bars photography and recording during countless public and private events (like local-government meetings and weddings) that take place inside courtrooms when court proceedings are not in session. At the same time, the statute also prohibits people from exercising their rights to document and report on court proceedings themselves—even when

they seek to exercise those rights *outside* of the courtroom. By criminalizing such a broad spectrum of First Amendment activity, § 5103.1 exceeds the bounds permitted by both the U.S. and Pennsylvania Constitutions.

A. Section 5103.1's ban on photographing, broadcasting, or recording any "person within a judicial facility" prohibits a wide swath of First Amendment activity.

"The first step in overbreadth analysis is to construe the challenged statute." *United States v. Williams*, 553 U.S. 285, 293 (2008). After all, "it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *Id.*

In this case, a plain reading of § 5103.1's text demonstrates the statute's expansive reach. As noted above, the statute makes it a crime to photograph, broadcast, or record any "person within a judicial facility," including anyone in a "courtroom, hearing room or judicial chambers." 18 Pa. Cons. Stat. §§ 5103.1(a), (c). The statute contains no exceptions to this broad prohibition: to the contrary, § 5103.1 expressly encompasses *all* efforts to photograph, broadcast, or record people inside a courtroom "in *any manner* and for *any purpose*"—even when court is not in session (as occurred in Mr. Wittman's case). *Id.* § 5103.1(a) (emphases added).

This proscription sweeps in a host of constitutionally protected activities, many of which directly implicate First Amendment freedoms. Indeed, Pennsylvania courtrooms routinely play host to newsworthy events such as local-government

meetings, public legislative hearings, and other non-judicial proceedings.[4] The press and the public enjoy a constitutional right to photograph, broadcast, and record these events. But § 5103.1 expressly precludes any audio or visual coverage of such events if they are held inside a courtroom. *Cf. In re 24th Statewide Investigating Grand Jury*, 589 Pa. 89, 102-05 (2006) (striking down a grand-jury subpoena as overbroad because of its "potential chilling effect" on the news media).

Nor is documenting the activity of public officials the only First Amendment activity that § 5103.1 prohibits. The statute also reaches a vast array of protected expression and association by everyday citizens. It would bar wedding photographers, for example, from taking pictures of couples who exchange their vows inside a courtroom or judge's chambers—an almost weekly occurrence in some Pennsylvania courthouses.[5] The statute would also prohibit parents and educators from filming the many mock-trial and moot-court competitions that take place in state courthouses

[4] *See, e.g.*, *Warren County, Pa.*, *Commissioner Meetings*, https://perma.cc/6ZV2-Y2C4 (last visited Aug. 25, 2019) (listing various courtroom locations for upcoming county commissioner meetings); *Center for Rural Pa., Public Hearing: State of Addiction, Confronting the Heroin/Opioid Epidemic in Pennsylvania*, https://perma.cc/Y6MF-EDT7 (last visited Aug. 25, 2019) (listing agenda for 2018 public hearing to be held in courtroom of Cambria County courthouse).

[5] *See, e.g.*, *Tara Nelson Photography, Jon + Ashley: A Center County Courthouse and Penn State Wedding*, https://perma.cc/5X97-WAEX (last visited Aug. 24, 2019); Michael Goldberg, *Montgomery County District Judge Vows To Wed as Many Couples as He Can*, MainLine Media News (Jan. 20, 2018), https://perma.cc/K8BX-9CL7; *Philly Court Weds Scores on Valentine's Day*, Phila. Public Record (Feb. 23, 2018), https://perma.cc/EW8J-AN4G.

throughout the school year (including in Beaver County).[6] And it would preclude families from sharing photos of courtroom ceremonies where loved ones take the oath of citizenship, graduate from drug-court programs, or are honored by local bar associations.[7] Capturing these defining personal moments on film—and sharing the images with others—represent core examples of First Amendment expression and association. *See Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh*, 229 F.3d 435, 438 (3d Cir. 2000) ("Two types of association are protected by the federal Constitution: intimate association (i.e., certain close and intimate human relationships like family relationships) and expressive association (i.e., association for the purpose of engaging in activities protected by the First Amendment)."). Yet, § 5103.1—by its plain terms—would render all of those activities criminal.

Section 5103.1's overbreadth is exacerbated by its capacious definition of "judicial facility." The definition is not limited to "courtroom[s], hearing room[s] and judicial chambers," but also includes "any other room made available to interview witnesses." 18 Pa. Cons. Stat. § 5103.1(c). Thus, any lawyer who records a

---

[6] *See, e.g.*, Kristen Doerschner, *Lawyers Become Jurors in Mock Trial Competition*, Beaver County Times (Feb. 22, 2015), https://perma.cc/M2LZ-ZWF4.

[7] *See, e.g.*, *Lancaster County, Pa.*, *Naturalization*, https://perma.cc/QMW6-NFL6 (last visited Aug. 26, 2019) (noting that naturalization ceremonies "are held in courtroom 'A' of the Historic Courthouse"); Renatta Signorini, *Westmoreland Drug Court Graduate: 'It Feels Like I'm Starting Over,'* Pitt. Tribune-Review (Dec. 28, 2017), https://perma.cc/X396-C8JM; *Pa. Bar Assoc., Pro Bono Month*, https://perma.cc/Q242-HTH3 (last visited Aug. 26, 2019) (featuring photos of recipients of 2018 pro bono awards inside courtrooms).

conversation with a client in a courthouse office—even a privileged conversation—would be guilty of violating § 5103.1. So, too, would a court-appointed psychiatrist who records a mental-health evaluation of a juvenile defendant. Even police detectives would be barred from recording interviews with suspects housed at the courthouse jail. Section 5103.1's lack of exemptions for any of these activities—all of which involve recording a "person within a judicial facility" under the statute's literal text—underscores the provision's staggering breadth.

B. Section 5103.1's prohibition on photographing, broadcasting, or recording "proceeding[s] . . . within a judicial facility" also proscribes protected First Amendment activity.

In addition to its ban on recording "person[s]" in "judicial facilit[ies]," § 5103.1 also prohibits recording any court "proceeding." 18 Pa. Cons. Stat. § 5103.1(a). While judges may lawfully restrict such recording under certain circumstances, § 5103.1's blanket prohibition on all such recording—"in *any manner* and for *any purpose*," *id.* (emphasis added)—raises serious overbreadth concerns.

The Supreme Court has long recognized that "the press and general public have a constitutional right of access to criminal trials." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982). A growing body of cases have held that this right is infringed when a rule or statute restricts the public's ability to document what happens during judicial proceedings. *See, e.g.*, *People v. Boss*, 705, 701 N.Y.S.2d 891, 895 (Sup. Ct. 2000) (holding that a New York criminal statute that imposed "an absolute

ban on audio-visual coverage in the courtroom . . . is unconstitutional").[8] Section 5103.1's wholesale ban on electronic recording during court proceedings raises the same constitutional concerns. Those concerns grow even more stark when a judicial hearing occurs off the record (as frequently occurs in many magisterial district courts) and no court reporter is present to document what is said. By making it a crime to record such a proceeding "in any manner," § 5103.1 "meaningfully interferes with the public's ability to inform itself of the proceeding," in violation of the First Amendment. *Whiteland Woods v. Township of West Whiteland*, 193 F.3d 177, 183 (3d Cir. 1999).

[8] *See also United States v. Columbia Broad. Sys.*, 497 F.2d 102, 107 (5th Cir. 1974) ("We are unwilling, however, to condone a sweeping prohibition of in-court sketching when there has been no showing whatsoever that sketching is in any way obtrusive or disruptive."); *Goldschmidt v. Coco*, 413 F. Supp. 2d 949, 952 (N.D. Ill. 2006) ("A sweeping prohibition of all note-taking by any outside party seems unlikely to withstand a challenge under the First Amendment."); *Katzman v. Victoria's Secret Catalogue*, 923 F. Supp. 580, 589 (S.D.N.Y. 1996) ("[A]dvances in technology and the above-described experiments [with televising judicial proceedings] have demonstrated that the stated objections can readily be addressed and should no longer stand as a bar to a presumptive First Amendment right of the press to televise as well as publish court proceedings."); *State ex rel. Cosmos Broad. Corp. v. Brown*, 14 Ohio App. 3d 376, 382-83 (1984) ("[U]nder the First Amendment, the concept of equal access to courtroom proceedings and the effective reporting of courtroom events means at least this: unless there is an overriding consideration to the contrary, clearly articulated in the trial court's findings, representatives of the electronic news media must be allowed to bring their technology with them into the courtroom, even if only to a small degree.").

C. Section 5103.1's ban on photography, broadcasting, and recording in areas "adjacent to or immediately surrounding a judicial facility" prohibits even more protected activity.

Section 5103.1's sweeping prohibition on photography, broadcasting, and recording inside a "judicial facility" raises a serious overbreadth problem on its own. But the statute compounds that problem by prohibiting the same activities in any "area *adjacent to* or *immediately surrounding* a judicial facility." 18 Pa. Cons. Stat. § 5103.1(a) (emphases added).

Federal courts have struck down similar bans on photographing, broadcasting, or recording people in areas surrounding the courtroom. Just last year, for instance, the Sixth Circuit upheld a First Amendment claim brought by a pair of Ohio journalists who alleged that they had been arrested for photographing a criminal defendant and her lawyer in a courthouse hallway. *See Enoch v. Hogan*, 728 F. App'x 448, 456 (6th Cir. 2018). The court reasoned that "the First Amendment protects the rights of both the media and the general public to attend and share information about the conduct of trials." *Id.* (citing *Richmond Newspapers v. Virginia*, 448 U.S. 555, 578 (1980)). Punishing people for engaging in newsgathering activities in public places outside of the courtroom—as § 5103.1 does—plainly implicates those rights.

Other courts have relied on similar reasoning in striking down local rules prohibiting recording or photography inside courthouses. In *Dorfman v. Meiszner*, for example, the Seventh Circuit invalidated a court rule that prohibited "[t]he taking of photographs in the courtroom or its environs or radio or television broadcasting from

the courtroom or its environs . . . whether or not court is actually in session." 430 F.2d 558, 560 (7th Cir. 1970) (quoting challenged rule). The court acknowledged that circumstances may sometimes justify narrow restrictions on courthouse photography, but held that imposing such restrictions "by a *blanket rule* is inconsistent with both the letter and the spirit of the first amendment." *Id.* at 563 (emphasis added). As the court explained, any prohibition on photography "must be confined to those activities which offer immediate threat to the judicial proceedings and not to those which are merely potentially threatening." *Id.*

The same principle applies here—especially in light of the large volume of expressive and newsgathering activity that occurs in the areas surrounding courtrooms and judicial chambers. Prosecutors and defense attorneys regularly hold press conferences and make public statements in courthouse hallways, on courthouse steps, and in courthouse offices. Members of the press and the public have a constitutionally protected interest in photographing, broadcasting, or recording those events. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975) ("With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice."). The press and the public also share similar interests in capturing images or recordings of litigants—particularly in high-profile criminal

matters—as they enter or exit the courtroom.[9] Section 5103.1 impinges directly on those interests.

Section 5103.1's ban on photography and recording in "area[s] adjacent to or immediately surrounding" judicial facilitates poses an especially grave threat to First Amendment activity in Pennsylvania. Many of the Commonwealth's magisterial district courts—including here in Beaver County—are housed in small, one-story buildings with courtrooms and judicial chambers that open directly onto public thoroughfares. In those places, § 5103.1 would operate to restrict photography, broadcasting, and recording even on *public streets and sidewalks*. Restricting First Amendment activity in those places raises obvious constitutional problems. *Schenck v. Pro-Choice Network*, 519 U.S. 357, 377 (1997) (noting that "speech in public areas is at its most protected on public sidewalks").

Those problems are especially stark insofar as § 5103.1 prohibits people from photographing or recording law-enforcement officers performing their official duties in public places. The Third Circuit has explicitly held that "recording police activity in public falls squarely within the First Amendment right of access to information." *Fields v. City of Philadelphia*, 862 F.3d 353, 359 (3d Cir. 2017). By purporting to

[9] *See, e.g.*, Daveen Rae Kurutz, *Charges Dropped Against Aliquippa Assistant Chief Again*, Beaver County Times (May 28, 2019), https://perma.cc/R33N-99P3 (featuring photo of local police official leaving court hearing).

criminalize that same behavior in the public areas surrounding courtrooms, § 5103.1 reaches beyond permissible constitutional limits.

D. Section 5103.1's overbreadth cannot be cured by any narrowing construction.

Courts can sometimes salvage an overbroad statute by adopting a narrowing construction to limit the statute's reach. *See Osborne v. Ohio*, 495 U.S. 103, 114 (1990) (rejecting an overbreadth challenge to an Ohio statute based on a state court's narrowing construction). But § 5301.1's text precludes that option here: once again, the statute expressly prohibits all efforts to photograph, broadcast, or record courtroom activities "in *any manner* and *for any purpose*." 18 Pa. Cons. Stat. § 5103.1(a). That language preempts any possible construction that this Court might otherwise adopt to narrow § 5103.1's reach. *Cf. Commonwealth v. Omar*, 602 Pa. 595, 611 n.14 (2009) (refusing to adopt narrowing construction of overbroad statute on the reasoning that "[i]t is not the role of this Court to redraft clear language even with the salutary purpose of correcting an unconstitutional criminal provision").

Nor can this Court simply defer to the Commonwealth's representations that it will limit its enforcement of § 5103.1 to a narrow set of circumstances. As the Supreme Court has explained, a court must "not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *United States v. Stevens*, 559 U.S. 460, 480 (2010). Section 5103.1 criminalizes—on its face—a vast amount of constitutionally protected activity, as the examples above illustrate. *See*

supra Parts II.A-C. The Commonwealth's post-hoc efforts to narrow the statute's scope through promises of good behavior cannot cure the statute's impermissible breadth.

III. SECTION 5103.1 VIOLATES THE FIRST AMENDMENT AND ARTICLE I, § 7 BECAUSE IT CRIMINALIZES EXPRESSIVE ACTIVITY WITHOUT ANY SHOWING OF HARM.

Section 5103.1 is unconstitutional for a third reason: the Commonwealth cannot criminalize expressive activity without requiring proof that the activity actually causes, or is even intended to cause, any harm. *See, e.g.*, *Cantwell v. State of Connecticut*, 310 U.S. 296, 310 (1940) (striking down breach of peace conviction where defendant's speech "raised no . . . clear and present menace to public peace and order"). In *United States v. Alvarez*, for instance, the U.S. Supreme Court struck down under the First Amendment a statute that criminalized falsely claiming to have a military medal. 567 U.S. 709, 715 (2012) (plurality opinion); *id.* at 730 (Breyer, J., concurring in the judgment). The Court distinguished other statutes that *lawfully* punish false statements (such as fraud and defamation) on the ground that they target speech that causes "other legally cognizable harm." *Id.* at 719; *see also id.* at 737 (Breyer, J., concurring in the judgment); *cf. Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 690 (1992) (O'Connor, J., concurring in the judgment) (explaining, in controlling opinion, that ban on leafleting in non-public forum was unconstitutional because leafleting does not "intrinsic[ly]" cause disruption).

This case provides a perfect illustration of how § 5103.1 criminalizes harmless expressive activity. As noted above, Mr. Wittman is alleged to have violated the statute by taking pictures of public officials inside a courtroom while *no court proceedings* were taking place. Indeed, the arresting officer specifically noted in his affidavit that Mr. Wittman "was not causing a problem" when he took the pictures. Ex. A (Police Criminal Complaint), at 4. Moreover, because Mr. Wittman immediately consented to a search of his phone, the officer knew that Mr. Wittman's reason for taking the pictures was also harmless: he was sending the pictures to send to his girlfriend to show that he was in court, in response to a text from her asking him where he was. *See* Ex. B (Photos). In short, the Commonwealth chose to charge and prosecute Mr. Wittman for engaging in protected expression (i.e., communicating with a loved one by sending her images of courtroom activity) despite its knowledge that his actions were harmless.

Section 5103.1 therefore fails the test set forth in *Alvarez*. Unlike false impersonation, documenting activity in public places in or around a courtroom "for any purpose," 18 Pa. Cons. Stat. § 5103.1(a), does not inherently cause harm.[10] Indeed, in contrast to the false statements at issue in *Alvarez*, the activity Section 5103.1 criminalizes is not even morally wrong. Thus, because Section 5103.1 does not

[10] This is especially true where, as here, the public has a First Amendment right to access the public property where the expressive activity takes place.

require proof of, or intent to cause, harm or injury as an element of the crime, it unconstitutionally criminalizes expressive activity.

IV. SECTION 5103.1 CANNOT CONSTITUTIONALLY BE APPLIED TO MR. WITTMAN'S ALLEGED CONDUCT IN THIS CASE.

Even if this Court concludes that § 5103.1 is not unconstitutional as a whole, Mr. Wittman still cannot be convicted here because his alleged conduct was constitutionally protected. Even in a non-public forum, any restriction on expressive activity must be "reasonable in light of the purpose served by the forum." *Brody By & Through Sugzdinis v. Spang*, 957 F.2d 1108, 1122 (3d Cir. 1992) (quoting *Cornelius*, 473 U.S. at 806). As noted, Mr. Wittman took photographs of public officials (i.e., police officers) in a public place (i.e., the courtroom) without causing any harm to any person or government activity—indeed, court was not even in session at the time. His actions were therefore constitutionally protected and criminalizing them does nothing to advance the "purposes of the forum," i.e., holding judicial proceedings. Thus, Mr. Wittman's photography cannot provide a basis for criminal liability. *See Fields*, 862 F.3d at 358; *Pap's A.M.*, 571 Pa. at 396.

CONCLUSION

For the foregoing reasons, this Court should grant Mr. Wittman's motion to quash and dismiss the charge against him.

Respectfully submitted,

Dated: August 30, 2019

MAX A. SCHMIERER, ESQ. (# 321437)
P.O. Box 104
Beaver, PA 15009
Tel.: 724-680-0636
schmiererm@outlook.com

GERALD V. BENYO, ESQ. (# 74507)
330 Dravo Ave.
Beaver, PA 15009
Tel.: 724-774-1482
Fax: 724-774-3403
benyolawoffice@gmail.com

NICOLAS Y. RILEY*
ROBERT D. FRIEDMAN*
INSTITUTE FOR CONSTITUTIONAL
ADVOCACY & PROTECTION
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Avenue NW
Washington, DC 20001
Tel.: 202-662-4048
Fax: 202-662-9248
nr537@georgetown.edu
rdf34@georgetown.edu

* Admitted *pro hac vice*.