IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY
PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH of PENNSYLVANIA

VS.

JENNIFER VANASDALE

CR 1688 – 2020

THE HONORABLE:
Harry E. Knafelc

TYPE OF PLEADING:
Omnibus Pretrial Motion

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COMMONWEALTH of PENNSYLVANIA	:	
	:	Case No. 1688-2020
v.	:	
JENNIFER VANASDALE	:	

OMNIBUS PRETRIAL MOTION

AND NOW COME, Steven C. Townsend, Esq., Nicolas Y. Riley, Esq., and Robert D. Friedman, Esq., and bring the following omnibus pretrial motion as counsel of record for Defendant Jennifer Gilliland Vanasdale in the above-captioned case.

FACTUAL AND PROCEDURAL HISTORY

1. Ms. Vanasdale is a licensed attorney with no disciplinary history or prior criminal record. In this case, she is charged with conspiracy to violate Title 18 § 5103.1 of Pennsylvania's Consolidated Statutes, which prohibits the "unlawful use of an audio or video device in court."

2. The provision, which was enacted in October 2018 and not effective until December 24, 2018, 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).

3. 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).

4. This case arises from an incident that occurred on March 20, 2019 while Ms. Vanasdale was running for a local judgeship in Butler County. The Commonwealth alleges that Ms. Vanasdale conspired with Co-Defendant Jason Renton, to take a cell-phone photo of two individuals pending a court proceeding in Courtroom 7 of the Butler County Courthouse.

5. The Commonwealth presented evidence at the Preliminary Hearing that there was no proceeding taking place at the time of the alleged conduct.

6. More important, the "pending proceeding" was rescheduled to April 3, 2019.

7. The two individuals depicted in the photo were Nicole Thurner, a local attorney and one of Ms. Vanasdale's opponents in the election, and Ms. Thurner's client, Justin Castilyn. According to the Affidavit attached to Complaint, it is alleged that Mr. Renton took the photo from the hallway outside of Courtroom 7. At the time, there were no signs or notices displayed anywhere in the building to indicate that it was a crime to take any photo inside the courthouse without judicial approval. In fact, it wasn't until after March 20, 2019 that notices and/or signs were sporadically posted outside some of the courtrooms within the courthouse.

8. The Attorney General filed a criminal complaint against Ms. Vanasdale in August 2020—nearly a year and a half after the alleged incident.[1] A preliminary hearing was held in October 2020, and a criminal information was filed in November 2020.

[1] The Butler County District Attorney, Richard Goldinger, Esquire, referred this matter to the Attorney General after recusing himself due to a conflict of interest.

MOTION TO QUASH INFORMATION

9. Ms. Vanasdale moves to quash the information under Pennsylvania Rule of Criminal Procedure 578(5). She asserts five independent grounds for dismissal.[2]

10. ***First***, the charge of conspiracy to violate § 5103.1 should be dismissed under Pennsylvania's *de minimis* infractions statute because Ms. Vanasdale's alleged conduct did not harm any person and mirrored conduct that others, including local news outlets, routinely undertake without consequence. *See* 18 Pa. Cons. Stat. § 312 (requiring dismissal where the defendant's conduct "did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction"); *infra* Part I.

11. ***Second***, Ms. Vanasdale cannot be convicted of conspiracy to violate § 5103.1 because the statute violates the U.S. and Pennsylvania Constitutions. As explained below, § 5103.1 is unconstitutional because the statute imposes an unlawful "prior restraint" on expressive activity. *See infra* Part II.

[2] This pre-trial motion focuses on purely legal arguments. Nothing in this motion should be construed as a waiver of any additional defenses or arguments Ms. Vanasdale may raise at trial.

12. ***Third***, Ms. Vanasdale cannot be convicted because § 5103.1 is unconstitutionally overbroad and criminalizes a broad wide of protected First Amendment activity. And, to the extent that the Court declines to dismiss this case under the *de minimis* infractions statute, that would only highlight—and exacerbate—§ 5103.1's overbreadth problem. *See infra* Part III.

13. ***Fourth***, even if this Court finds that § 5103.1 is constitutional on its face, the statute still cannot constitutionally be applied to Ms. Vanasdale's alleged conduct in this case because her conduct is protected by the First Amendment and punishing her here would not advance any valid government purpose. *See infra* Part IV.

14. ***Fifth***, the conspiracy count against Ms. Vanasdale should be dismissed because the has been selectively targeted for prosecution in violation of Pennsylvania law. The Commonwealth has failed to prosecute numerous other people who have engaged in the same conduct as Ms. Vanasdale, and it cannot prosecute Ms. Vanasdale for that conduct merely because she sought to exercise her First Amendment rights. *See infra* Part V.

15. Finally, Ms. Vanasdale has standing to challenge the constitutionality of § 5103.1—both on its face and as applied to her alleged conduct 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 "delegat[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). Ms. Vanasdale's arguments fall squarely into these categories.

ARGUMENTS IN SUPPORT OF MOTION TO QUASH

I. THE COUNT AGAINST MS. VANASDALE SHOULD BE DISMISSED UNDER PENNSYLVANIA'S *DE MINIMIS* INFRACTIONS STATUTE.

Pennsylvania's *de minimis* infractions statute codifies the maxim "de minimis non curat lex"—the principle that "the law does not concern itself with small or trifling things." *Commonwealth v. Houck*, 233 Pa. Super. 512, 517 (1975). The statute's purpose is "to remove petty infractions from the reach of the criminal law." *Commonwealth v. Moll*, 375 Pa. Super. 147, 156 (1988). The statute provides:

> The court shall dismiss a prosecution if, having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds that the conduct of the defendant:
>
> (1) was within a customary license or tolerance, neither expressly negatived by the person whose interest was infringed nor inconsistent with the purpose of the law defining the offense;
>
> (2) did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or
>
> (3) presents such other extenuations that it cannot reasonably be regarded as envisaged by the General Assembly or other authority in forbidding the offense.

18 Pa. Cons. Stat. § 312(a). Pennsylvania courts construe this language to cover "situations in which there was no harm done to either the victim or society." *Commonwealth v. Moses*, 350 Pa. Super. 231, 235 (1986).

Ms. Vanasdale's alleged conduct here falls squarely within this category. According to the Commonwealth, she sought to take a cell-phone photo of two people sitting in a public courtroom where no proceedings were taking place. The photo did not cause any harm to either of the individuals depicted (or anyone else), nor did it invade their personal privacy. Indeed, the courtroom door was wide open when the photo was taken, and the court's public docket—which was posted both online and in the courthouse lobby—openly announced that these two specific individuals were scheduled to appear together in court that day. The photo therefore did not reveal any information that was not already in the public domain. Moreover, as the Commonwealth itself has acknowledged in other cases, taking

photos of people when they are "in public and subject to public view" does not infringe their privacy interests. *See, e.g.*, Br. of Appellant, *Commonwealth v. Manjarrez-Torres*, 2014 WL 9868989, at *24 (Pa. Super. Ct.) (arguing that a defendant "did not have a reasonable expectation of privacy concerning his photograph taken while he was in public and subject to public view").

Nor can the Commonwealth show that Ms. Vanasdale's alleged conduct threatened to disrupt any court proceeding. Court was not in session when the photo was taken; and, by all accounts, the individuals in the photograph did not even learn of the photo's existence until after they had left the courtroom. *See* 10/30/2020 Preliminary Hearing Transcript (Ex. A), at 8 (testimony of Nicole Thurner that she did not learn of the picture until she returned to her office after the hearing). Thus, the photo could not have had any impact—let alone an adverse impact—on any proceeding.

The Commonwealth likewise cannot show that Ms. Vanasdale's alleged conduct was inherently harmful or dangerous in any way. *See Commonwealth v. Hoffman*, 714 A.2d 443, 447 (Pa. Super. Ct. 1998) (affirming dismissal under § 312 where the defendant's conduct, which involved driving an oversized truck without a proper permit, was not "*per se* unsafe"). Local news outlets routinely take photos inside local courthouses—including the Butler County Courthouse—and often share those pictures on social media.

See, e.g., *Butler Co. Man Headed to Prison for Death of Girlfriend's 4-Year Old Son*, CBS Pittsburgh (Jan. 6, 2020), https://pittsburgh.cbslocal.com/2020/01/06/keith-lambing-formal-sentencing-bentley-miller-death/ (featuring video footage of criminal defendant during sentencing hearing) (Ex. B); *Butler man convicted of killing 4-year-old boy sentenced to 30-60 years in prison*, ABC Pittsburgh (January 6, 2020), https://www.wtae.com/article/butler-man-convicted-of-killing-4-year-old-boy-sentenced-to-30-60-years-in-prison/30417470#; (Ex. C), *Marty Griffin (@MartyGriffinKD), Twitter (March 16, 2020, 10:48 a.m.)*, https://twitter.com/MartyGriffinKD/status/1239564163200028674.(Ex. D) [3], *see also infra* Part III.A-.C (identifying other common examples of photography occurring inside Pennsylvania courthouses)

Court officials' longstanding acceptance of these activities only further underscores the harmless nature of Ms. Vanasdale's alleged conduct in this case.

That longstanding acceptance also demonstrates that Ms. Vanasdale's conduct fell "within a customary . . . tolerance" under § 312. Prior to Ms. Vanasdale's alleged efforts to take the photo at issue in this case, court officials had never posted any signs at the courthouse notifying the public that it was a

[3] *See also, e.g.*, Andy Sheehan, *Michael Rosfeld's Attorney Upset Prosecution Seems To Be Holding Back Evidence Ahead Of Trial*, CBS Pittsburgh (Mar. 5, 2019), https://pittsburgh.cbslocal.com/2019/03/05/pre-trial-motions-hearing-east-pittsburgh-michael-rosfeld-case/ (featuring video footage of criminal defense attorneys inside courthouse).

criminal offense to take a photo inside the building without judicial approval. That lack of notice is yet another factor counseling in favor of dismissal under § 312. *See State v. Nevens*, 197 N.J. Super. 531, 535 (Law. Div. 1984) (invoking New Jersey's nearly-identical *de minimis* infractions statute to dismiss theft charges against a defendant accused of stealing from a restaurant where, *inter alia,* "no signs were posted indicating that no food could be taken out of the restaurant").

Most importantly, Ms. Vanasdale's alleged conduct did not cause the specific "harm or evil sought to be prevented" by § 5103.1. As § 5103.1's legislative sponsor explained, the statute's core purpose is to prevent witness intimidation.[4] Yet, even under the Commonwealth's theory of this case, Ms. Vanasdale's conduct did not have the purpose or the effect of intimidating any witness. To the contrary, the Commonwealth claims that Ms. Vanasdale's conduct arose out of a personal dispute with a professional and political acquaintence—precisely the kind of trivial matter that § 312 is designed to keep out of court. *See, e.g., Houck*, 233 Pa. Super. at 516-17 (affirming dismissal under § 312 of criminal-harassment charges against a defendant accused of repeatedly calling the victim offensive names after "a difficulty had arisen in their acquaintanceship"). In other

[4] *See* Rep. Jerry Knowles, *Press Release: Knowles Bill to Punish Intimidating Camera Use in Courtrooms Goes to Governor* (Oct. 18, 2018), https://perma.cc/D676-QJ3B.

words, the Commonwealth has made no attempt to establish a nexus between Ms. Vanasdale's conduct and the harms that § 5103.1 aims to prevent, thus further counseling in favor of dismissal.

The Commonwealth's failure to identify any concrete harm "to either the victim or society" is especially conspicuous here given the length of the Commonwealth's investigation. As noted above, the Commonwealth did not file its complaint in this case until *seventeen months* after the purportedly unlawful photo was taken. Yet, despite that lengthy inquiry, the Commonwealth cannot identify a single injury of any kind resulting from Ms. Vanasdale's conduct. That failure—along with the Commonwealth's longstanding tolerance of nearly identical conduct by others—mandates dismissal of this case under § 312.

II. 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.[5] "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 (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.").

[5] 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.

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 rein 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 inflict the type harm against which the First Amendment protects: 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. As noted above, the principal evil § 5103.1 aims to combat is witness intimidation. Yet the Commonwealth has ample alternative means to pursue that aim more directly. For instance, other criminal statutes already make it illegal to 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.[6]

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

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

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.

III. 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. And, to the extent that § 5103.1 sweeps in harmless conduct—like Ms. Vanasdale's alleged conduct in this case, *see supra* Part I—that only underscores its impermissible breadth. 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 Ms. Vanasdale'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 host newsworthy events such as local-government meetings, public legislative hearings, and other non-judicial proceedings.[7] 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

[7] *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).

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.[8] The statute would also prohibit parents and educators from filming the many mock-trial and moot-court competitions that take place in state courthouses throughout the school year (including in Butler County).[9] 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.[10] Capturing these defining personal and professional moments on film—and sharing the images with others—represent

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[8] *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.

[9] *See, e.g., Butler County Bar Ass'n, High School Mock Trial Competitions*, https://perma.cc/N4S4-4PPM (last visited Dec. 15, 2020).

[10] *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).

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 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").[11] Section 5103.1's wholesale ban on electronic recording

[11] *See also United States v. CBS*, 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

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).

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. The Sixth

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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.").

Circuit, for instance, recently 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*.; *see also infra* Part IV (explaining why the application of § 5103.1 to Ms. Vanasdale's harmless conduct is unconstitutional).

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.[12] Section 5103.1 impinges directly on those interests.

[12] *See, e.g.*, *Butler Co. Man Headed to Prison for Death of Girlfriend's 4-Year-Old Son*, CBS Pittsburgh (Jan. 6, 2020), https://pittsburgh.cbslocal.com/2020/01/06/keith-lambing-formal-sentencing-bentley-miller-death/ (featuring video footage of criminal defendant during sentencing hearing).

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

D. The Commonwealth cannot evade the overbreadth problem by promising to exercise its prosecutorial authority responsibly.

As just explained, § 5103.1 proscribes a vast array of constitutionally protected activities. To the extent that the Commonwealth disclaims any intent to

enforce § 5103.1 against people engaged in such activities, that representation would not cure the statute's impermissible breadth. The Supreme Court has expressly stated that courts 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). The various examples described above illustrate that § 5103.1—on its face—criminalizes an enormous amount of constitutionally protected activity. The Commonwealth cannot evade the implications of those examples through post-hoc promises of good behavior.

This case offers a perfect illustration of the risks of deferring to prosecutorial judgment: once again, the Commonwealth is seeking to prosecute Ms. Vanasdale for conduct that not only failed to cause any harm, but also is identical to conduct that journalists and others routinely undertake in courthouses across Pennsylvania. The notion that prosecutors will reserve their enforcement authority under § 5103.1 for situations that pose a real threat to witnesses or court proceedings is belied by this very case.

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

Even if this Court concludes that § 5103.1 is not unconstitutional on its face, Ms. Vanasdale still cannot be convicted because her alleged conduct here was constitutionally protected. Numerous courts have recognized that there is a First Amendment right to document matters of public concern that occur in public.

Fields, 862 F.3d at 358 ("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."). The government therefore cannot prevent people from documenting such matters absent a valid justification—even when those matters take place inside a courthouse. *See, e.g.*, *Craig v. Harney*, 331 U.S. 367, 374 (1947) ("What transpires in the court room is public property."); *Dorfman*, 430 F.2d at 560 (invalidating a blanket ban on the "taking of photographs in the courtroom or its environs . . . whether or not court was in session"); *CBS*, 497 F.2d at 107 (invalidating "a sweeping prohibition of in-court sketching when there has been no showing whatsoever that sketching is in any way obtrusive or disruptive").

The Commonwealth cannot identify such a justification here. Instead, it seeks to convict Ms. Vanasdale for engaging in core First Amendment activity—namely, photographing a candidate for elected office in a public place—without identifying any valid rationale for curtailing that activity. As previously explained, court was not in session when the photo was taken, and no one was harmed by the photo. *See supra* Part I. Enforcing § 5103.1 against Ms. Vanasdale under these circumstances violates the First Amendment.

V. MS. VANASDALE HAS BEEN SELECTIVELY TARGETED FOR PROSECUTION UNDER § 5103.1, IN VIOLATION OF PENNSYLVANIA LAW.

"Selectivity in the enforcement of criminal law is . . . subject to constitutional constraints." *Wayte v. United States*, 470 U.S. 598, 608 (1985). To establish a selective-prosecution defense, the defendant must show that "(1) others who are similarly situated to the defendant are not generally prosecuted for similar conduct; and (2) the defendant has been intentionally and purposefully singled out for prosecution for an invidious reason." *Commonwealth v. Butler*, 367 Pa. Super. 453, 461-62 (1987). Pennsylvania courts have recognized that targeting a defendant based on his or her "exercise of some constitutional right" is one such invidious reason. *Commonwealth v. Mulholland*, 549 Pa. 634, 649 (1997).

Here, the Commonwealth seeks to convict Ms. Vanasdale for conspiring to engage in the exact same type of conduct—taking a photo inside a courthouse—that other people routinely undertake without facing prosecution. *See supra* Parts I & II.A (citing numerous examples of several people who have taken and shared photos inside Pennsylvania courthouses and courtrooms). Moreover, that conduct is constitutionally protected: as set forth extensively above, citizens enjoy a First Amendment right to document matters of public concern, particularly when they occur inside a public courthouse and do not disrupt any ongoing proceeding. *See supra* Part IV.

CONCLUSION

And now for the above reasons counsel respectfully requests that this Honorable Court enter an Order dismissing the charge against Defendant and/or schedule oral argument on the instant motion to a date available to all parties. It is further requested that Defendant be granted leave to file supplemental motions as justice requires and to promote a complete adjudication of all issues in this matter.

Respectfully submitted,

Dated: _____, 2021

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