IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

PRISON LEGAL NEWS, DANIEL DENVIR, PHILADELPHIA CITY PAPER, CHRISTOPHER MORAFF, PENNSYLVANIA PRISON SOCIETY, SOLITARY WATCH, PROFESSOR REGINA AUSTIN, STEVEN BLACKBURN, WAYNE JACOBS, EDWIN DESAMOUR, and WILLIAM COBB,	:	CIVIL ACTION
Plaintiffs,	:	No. 15-0045
v.	:	
KATHLEEN KANE, in her capacity as Attorney General of Pennsylvania, and R. SETH WILLIAMS, in his capacity as District Attorney of Philadelphia County,	:	
Defendants.	:	

PLN PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS AND IN FURTHER SUPPORT OF PLN PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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The Supreme Court and Third Circuit have made that clear when people reasonably fear that an unconstitutional law will be used against them, they should not be forced to just sit around and wait. They should not be told, give up your rights or proceed at your own risk. And it should not be left to the government, when it has not disavowed an intent to enforce the law, to determine if and when to give a court the opportunity to strike the law down.

The Silencing Act—enacted in response to a commencement speech by Mumia Abu-Jamal—is unconstitutional due to its vagueness, its content-based regulation of speech, its overbreadth, and its authorization of prior restraints. Plaintiffs in this case ("PLN Plaintiffs") reasonably fear that the Act will be used against them. Under Supreme Court and Third Circuit precedent, the time to enjoin its enforcement is now.[1]

I. PLN PLAINTIFFS' CLAIMS ARE JUSTICIABLE

A. PLN Plaintiffs Have Standing to Bring Their Claims.

Article III standing requires "(1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (internal quotation marks

[1] PLN Plaintiffs incorporate the arguments made in the brief filed today by the plaintiffs in *Abu-Jamal v. Kane*, No. 14-cv-2148, and the arguments made in the opening brief filed January 8, 2015 by the plaintiffs in the *Abu-Jamal* case.

and brackets omitted). Though Defendant Kane and Defendant Williams insist that there is no case or controversy here (AG Br. at 3-8; DA Br. at 6-9), PLN Plaintiffs satisfy all three of the requirements for standing.

1. The Threat of the Silencing Act's Enforcement Constitutes Injury in Fact.

Just the threat of enforcement can provide injury in fact: "an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law." *Susan B. Anthony*, 134 S. Ct. at 2342. In other words, "'[i]t is not necessary that [a plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights.'" *Id.* (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)).

Thus, the Supreme Court has repeatedly found standing in pre-enforcement challenges to allegedly unconstitutional statutes. *See, e.g.*, *Susan B. Anthony*, 134 S. Ct. at 2338, 2341-47 (pre-enforcement challenge to Ohio statute prohibiting false statements about political candidates); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 7, 15-16 (2010) (pre-enforcement challenge to federal statute prohibiting provision of material support or resources to terrorist organizations); *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 297-303 (1979) (pre-enforcement challenge to Arizona farm labor statute regulating union elections, limiting union publicity, and establishing criminal sanctions for violations of statute).

And courts in this Circuit have found similarly. *See, e.g.*, *Constitution Party v. Aichele*, 757 F.3d 347, 349-50, 360-67 (3d Cir. 2014) (pre-enforcement challenge to Pennsylvania statute permitting courts to impose administrative and litigation costs on political candidates whose nomination papers were successfully challenged); *Planned Parenthood v. Farmer*, 220 F.3d 127, 146-47 (3d Cir. 2000) (pre-enforcement challenge to New Jersey statute prohibiting abortion procedures); *Goudy-Bachman v. Health & Human Servs.*, 764 F. Supp. 2d 684, 692 (M.D. Pa. 2011) (pre-enforcement challenge to individual mandate in Patient Protection and Affordable Care Act).

Virginia v. American Booksellers Ass'n, 484 U.S. 383 (1988), illustrates these principles. There, a group of bookstore owners filed a pre-enforcement, facial First Amendment challenge to a Virginia statute prohibiting the knowing commercial display of sexually explicit materials to juveniles. *Id.* at 386-88. For several reasons, the Supreme Court was "not troubled by the pre-enforcement nature of [the] suit," even though the plaintiffs did not even wait until the statute took effect to sue. *Id.* at 392-93. First, "[t]he State ha[d] not suggested that the newly enacted law w[ould] not be enforced," and the Court "s[aw] no reason to assume otherwise." *Id.* at 393. Second, "the law [was] aimed directly at plaintiffs, who, if their interpretation of the statute [were] correct, w[ould] have to take significant and costly compliance measures or risk criminal prosecution." *Id.*

at 392. Third, "the alleged danger of this statute [was], in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution." *Id.* at 393.

Through decades of pre-enforcement standing cases, the Supreme Court has developed a three-part injury in fact test, explaining that "a plaintiff satisfies the injury-in-fact requirement where he alleges [1] an intention to engage in a course of conduct arguably affected with a constitutional interest, but [2] proscribed by a statute, and [3] there exists a credible threat of prosecution thereunder." *Susan B. Anthony*, 134 S. Ct. at 2342 (internal quotation marks omitted). PLN Plaintiffs have done all three. First, they have alleged an intention to engage in a wide range of constitutionally protected conduct—including speaking publicly about their own experiences with the criminal justice system and publishing accounts of others' experiences. (Ver. Compl. at ¶¶ 52, 64, 72, 84, 94, 103, 112, 121, 130, 138, 147.) Second, PLN Plaintiffs have alleged that this intended speech is proscribed by the Silencing Act. (*Id.* at ¶¶ 51, 63, 71, 83, 93, 102, 111, 120, 129, 137, 147.) Finally, they have alleged that they reasonably fear—or, in other words, face a credible threat—that the Silencing Act will be used against them. (*Id.* at ¶¶ 52, 64, 72, 84, 94, 103, 112, 121, 130, 138, 148.)

Both Defendants have challenged the credibility of the threat that PLN Plaintiffs allege the Silencing Act poses to them. (DA Br. at 8; AG Br. at 6.) Yet

the same factors that led the *American Booksellers* Court to find the threat of enforcement credible there—and many of the same factors that led the courts in the other pre-enforcement cases discussed above to find similarly—are present here.

Most important, as in *American Booksellers*, 484 U.S. at 393, neither Defendant Kane nor Defendant Williams has disavowed an intent to enforce the Silencing Act—even after learning of PLN Plaintiffs' suit. *See also Susan B. Anthony*, 134 S. Ct. at 2345 ("[R]espondents have not disavowed enforcement if petitioners make similar statements in the future."); *Holder*, 561 U.S. at 16 ("The Government has not argued to this Court that plaintiffs will not be prosecuted if they do what they say they wish to do."); *Babbitt*, 442 U.S. at 302 ("[T]he State has not disavowed any intention of invoking the criminal penalty provision against unions that commit unfair labor practices."); *Planned Parenthood*, 220 F.3d at 148 ("[P]laintiffs received no assurances that [the Act] would not be enforced against them if they performed such [abortion] procedures. They were entitled to know what they could not do.").

Defendant Williams does state in his brief that he will not enforce the Silencing Act "pending the outcome of this litigation." (DA Br. at 1; *accord* DA Br. at 8.) But this short-term commitment is cold comfort to PLN Plaintiffs, as it actually suggests that Defendant Williams *will* enforce the Silencing Act in the future, unless it is found unconstitutional. And PLN Plaintiffs, of course, care

most about Defendant Williams' enforcement plans over the coming months and years. Indeed, much of the speech in which PLN Plaintiffs intend to engage is fundamental to the missions of the organizations that they have founded and now run and much of it requires a long-term commitment of resources. (*See, e.g.*, Ver. Compl. at ¶¶ 75-76, 79-81, 87-88, 121, 130, 138, 144, 148-49.) *See Aichele*, 757 F.3d at 364-65 ("Because campaign planning decisions have to be made months, or even years, in advance of the election to be effective, the plaintiffs' alleged injuries are actual and threatened."); *Goudy-Bachman*, 764 F. Supp. 2d at 692 ("[Plaintiffs] must undertake financial planning and budgeting decisions now in preparation for the implementation of the individual mandate.").

Also substantiating the credibility of the threat of Silencing Act enforcement is the fact that at least those PLN Plaintiffs who are themselves "offenders," like the plaintiffs in *American Booksellers*, 484 U.S. at 393, are the express subjects of the statute. *See also Aichele*, 757 F.3d at 362 ("[W]hen an individual who is the very object of a law's requirement or prohibition seeks to challenge it, he always has standing. . . . Here, the portions of the election code challenged by [plaintiffs] directly regulate [them]." (internal quotation marks omitted)).

The Silencing Act's chilling effect on the exercise of constitutional rights, like the statute in *American Booksellers*, 484 U.S. at 393, further supports

finding injury in fact. *See also Aichele*, 757 F.3d at 363 ("[W]hen they submit nomination papers as they must under [the statute], they face the prospect of cost-shifting sanctions, the very fact of which inherently burdens their electioneering activities."). Tellingly, Plaintiff *Prison Legal News* held up publication of a submission by Abu-Jamal due to the threat of Silencing Act enforcement. (Ver. Compl. at ¶ 40.) And Plaintiff Pennsylvania Prison Society felt obliged to warn inmates that submissions for publication in the Prison Society's Graterfriends newsletter could be enjoined or penalized under the Act. (*Id.* at ¶ 96.)

The statute's overbreadth and vagueness add to the pre-enforcement injury, too. *See Babbitt*, 442 U.S. at 303 ("If the provision were truly vague, appellees should not be expected to pursue their collective activities at their peril."); *Peachlum v. City of York*, 333 F.3d 429, 438 (3d Cir. 2003) ("In the case of overbreadth challenges, standing arises not because the plaintiff's own rights of free expression are violated, but because of a judicial prediction or assumption that the challenged statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." (brackets and internal quotation marks omitted)).

That the universe of potential enforcers under the Silencing Act is broad—including not only the Attorney General and sixty-seven district attorneys, but also victims and, in many instances, victims' family members to the "third

degree of consanguinity or infinity"—is yet another reason to find the alleged enforcement threat credible. *See Susan B. Anthony*, 134 S. Ct. at 2345 (holding that "[t]he credibility of that [enforcement] threat is bolstered by the fact that authority to file a complaint with the Commission is not limited to a prosecutor or an agency," even though plaintiff did not name all possible filers as defendants); *Aichele*, 757 F.3d at 364 (relying on *Susan B. Anthony* for same point).[2]

Finally, the seven non-offender PLN Plaintiffs who rely on and publish offender speech meet the injury in fact requirements not only based on the threat that the Silencing Act will be used against them, but also based on the threat that it will be used against their sources. As the Supreme Court said a half-century ago, "[i]t is now well established that the Constitution protects the right to receive

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[2]As the Third Circuit in *Aichele* explained, *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013), a pre-*Susan B. Anthony* case relied upon by the District Attorney (DA Br. at 8), is distinguishable for at least three reasons:

> First, *Clapper* addresses the unique realm of national security in which peculiar balance-of-power concerns, which are not present here, abound. Second, the Court's holding that respondents did not have standing was based on a detailed review of the particular statutory scheme at issue in that case, which, by the Court's count, included five levels of safeguards and contingencies. Third, and most importantly, the law at issue in *Clapper* did not directly regulate the respondents. This third point alone makes *Clapper* inapposite and renders any language from it regarding subjective speculation or chains of contingencies inapplicable here.

Aichele, 757 F.3d at 365 n. 21 (citations omitted).

information and ideas." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). In fact, while "[f]reedom of speech presupposes a willing speaker," "where a speaker exists . . . , the protection afforded is to the communication, to its source and to its recipients both." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Counsel*, 425 U.S. 748, 756 (1976). Thus, a third party enjoys standing to challenge a government limitation on speech "as long as the third party can demonstrate that an individual subject to the [limitation] would speak more freely if the [limitation] is lifted or modified." *United States v. Wecht*, 484 F.3d 194, 203 (2007); *see also FOCUS v. Colville*, 75 F.3d 834, 838-39 (3d Cir. 1996) (holding that third parties have standing to challenge a gag order "when there is reason to believe that the individual subject to the gag order is willing to speak and is being restrained from doing so").

Here, the seven non-offender PLN Plaintiffs—a combination of journalists and advocates—have alleged that they reasonably fear that the threat of Silencing Act enforcement will chill offenders from speaking with them and submitting materials for publication. (Ver. Compl. at ¶¶ 53, 65, 73, 85, 95, 104, 113.) All seven have relied on offender speech in the past, and it is critical to their journalistic and advocacy efforts that they be able to continue to do so in the future. The Silencing Act jeopardizes that flow of information. For example, Plaintiff Christopher Moraff is working on a long-term article that would put a

human face on mandatory juvenile life without parole in Pennsylvania by sharing the stories of several Pennsylvania inmates serving such sentences. (*Id.* at ¶ 22.) One of the inmates he has identified is Robert Holbrook, an inmate convicted of a Philadelphia murder over twenty years ago who has spoken publicly and with the press in the past about his experience as a juvenile lifer. (*Id.*) But Holbrook, a plaintiff in the other pending suit challenging the Silencing Act, has stated that the Act is now chilling his exercise of his right to speak about his experience. (*Id.*; *see also Abu-Jamal v. Kane*, No. 14-cv-2148, Am. Comp. at ¶¶ 73-74.)

2. PLN Plaintiffs Satisfy Article III Standing's Causation and Redressability Requirements, Too.

Where, as here, the injury in fact is the threat of enforcement of an allegedly unconstitutional statute, and the relief sought is an injunction against that statute's enforcement and a declaration of its unconstitutionality, there is, by definition, "a sufficient causal connection between the injury and the conduct complained of" and "a likelihood that the injury will be redressed by a favorable decision," *Susan B. Anthony*, 134 S. Ct. at 2341 (internal quotation marks and brackets omitted). Simply put, if the Silencing Act's enforcement is enjoined and the Act declared unconstitutional, PLN Plaintiffs' injury in fact—which is caused entirely by the Act's existence and potential enforcement—would necessarily be eliminated. Indeed, this Court has previously articulated that same logical point:

> The final two aspects of Article III standing—causation and redressability—need be addressed only briefly. [Plaintiff] alleges that the injury they suffer is caused directly by the passage of H.R. 535, and they seek, inter alia, a declaratory judgment that the resolution is unconstitutional. If [Plaintiff] prevails on the merits of their claims, a decision declaring the resolution void would redress their injury by communicating that the House has transgressed the boundaries of our Constitution and the First Amendment.

Freedom from Religion Found., Inc. v. Saccone, 894 F. Supp. 2d 573, 582 (M.D. Pa. 2012).

B. PLN Plaintiffs' Claims Are Ripe.

In pre-enforcement challenge cases, ripeness requires (1) that the parties have sufficiently adverse interests, (2) that the Court be able to issue a conclusive judgment, and (3) that such a judgment would actually be useful. *Presbytery of N.J. v. Florio*, 40 F. 3d 1454, 1463 (3d Cir. 1994). In *Presbytery*, a pre-enforcement First Amendment challenge to a New Jersey anti-discrimination statute, the Third Circuit found sufficient adversity when the defendants did not forswear enforcement of the statute. *Id.* at 1466-68. The court found a conclusive judgment could be rendered because the issues were "largely legal," stressing that "[f]actual development would not add much to the plaintiffs' facial challenges to the constitutionality of the statute." *Id.* at 1468-69. And the court held that a judgment "would be useful to the parties and others who could be affected," as "[a] declaration of [the plaintiffs'] rights and those of all others who would seek to

engage in similar activity would permit a person to speak without fear of governmental sanction or regulation of their activities protected by the statute." *Id.* at 1470.

Almost ten years later, in *Peachlum v. City of York*, 333 F.3d 429, 434-35 (3d Cir. 2003), the Third Circuit emphasized that "[a] First Amendment claim, particularly a facial challenge, is subject to a relaxed ripeness standard" because, "even in the absence of a fully concrete dispute, unconstitutional statutes or ordinances tend to chill protected expression among those who forbear speaking because of the law's very existence." The court went on to explain:

> Our stance toward pre-enforcement challenges stems from a concern that a person will merely comply with an illegitimate statute rather than be subjected to prosecution. Or, the government may choose never to put the law to the test by initiating a prosecution, while the presence of the statute on the books nonetheless chills constitutionally protected conduct.

Id. at 435 (citations omitted). That is why "in cases involving fundamental rights, even the remotest threat of prosecution, such as the absence of a promise not to prosecute, has supported a holding of ripeness where the issues in the case were 'predominantly legal' and did not require additional factual development." *Id.*

Here, given Defendants' failure to foreswear enforcement of the Silencing Act against PLN Plaintiffs, there is the requisite adversity of interests.

See id.; *Presbytery*, 40 F. 3d at 1466-68.[3] Further, the central issues in the case—whether the Silencing Act is unconstitutional in any of four different ways—are legal and require no further factual development, thus allowing for a judgment that resolves the dispute. *See Peachlum*, 333 F.3d at 435; *Presbytery*, 40 F. 3d at 1468-69. Finally, such a judgment would be useful—not only to the parties in this case, but to all those who want to engage in conduct that could be subject to the Act. *See Presbytery*, 40 F. 3d at 1470. *Peachlum*'s exhortation to relax this three-part standard even further in the First Amendment context only adds to the basis for finding ripeness here. *See Peachlum*, 333 F.3d at 434-35.[4]

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[3] *Zubik v. Sebelius*, 911 F. Supp. 2d 314 (W.D. Pa. 2012), relied on by Defendant Kane (AG Br. at 9, 11), is very different from this case. There, the court found a pre-enforcement challenge to regulations promulgated under the Patient Protection and Affordable Care Act to be unripe given that (1) the government agreed not to enforce it for over a year *and* (2) in the interim, the government had introduced amendments to the regulations to address plaintiffs' concerns. *Id.* at 325-26.

[4] Defendant Kane maintains that PLN Plaintiffs' challenge to the Silencing Act is unripe because no one can be enjoined or penalized under the Act without a judicial determination that an injunction or other penalty is in fact warranted. (AG Br. at 10.) In other words, according to Defendant Kane, only after "[t]he intervening determination" by a court that "the conduct has caused temporary or permanent mental anguish" "will offenders sued under the Act be injured." (*Id.*) But having to defend against a lawsuit, even if ultimately successful, is injury in and of itself. More important, statutes that authorize civil or criminal penalties almost always require some sort of judicial determination before a penalty can be imposed. That is how our system of separation of powers and due process generally works. And it has not made—and should not make—pre-enforcement challenges to such statutes unripe. *See, e.g.*, *Aichele*, 757 F.3d at 349-50, 368

The Supreme Court has recognized that, in the pre-enforcement challenge context, "the Article III standing and ripeness issues . . . boil down to the same question." *Susan B. Anthony*, 134 S. Ct. at 2341 n.5; *see also* Aichele, 757 F.3d at 368 n.25 (summarily holding that pre-enforcement challenge was ripe "for the reasons discussed above" as to standing). Therefore, given that PLN Plaintiffs have standing to bring their pre-enforcement challenge, it is only natural that their challenge is ripe, too.

II. THE *MONELL* DOCTRINE DOES NOT WARRANT DISMISSAL AS TO DEFENDANT WILLIAMS.

Defendant Williams maintains that PLN Plaintiffs' official-capacity suit against him should be dismissed under the *Monell* doctrine because, he contends, he is a *county* official for Silencing Act purposes and "has no policy or custom of using the [Silencing Act] in violation of Plaintiffs' constitutional right." (DA Br. at 9-12.) Defendant Williams is incorrect for two reasons.

First, he is a *state* official—not a county official—for purposes of the Act, making *Monell*'s "policy or custom" requirement irrelevant. *See L.A. County v. Humphries*, 562 U.S. 29, 34-39 (2010) (describing the contours of the *Monell* doctrine and its application to municipal government). The Third Circuit has explained that Pennsylvania district attorneys have a hybrid state/county status, as

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(finding to be ripe pre-enforcement challenge to statute permitting *courts* to impose costs on candidates whose nomination papers were successfully challenged).

they "may be State officials when they prosecute crimes or otherwise carry out policies established by the State, but serve as local policy makers when they manage or administer their own offices." *Carter v. City of Phila.*, 181 F.3d 339, 354 (3d Cir. 1999). Thus, for example, "[d]istrict attorneys act as agents of the state when they 'execut[e] their sworn duties to enforce the law by making use of all the tools lawfully available to them to combat crime.'" *N.N. v. Tunkhannock Area Sch. Dist.*, 801 F. Supp. 2d 312, 318 (M.D. Pa. 2011) (quoting *Coleman v. Kaye*, 87 F.3d 1491, 1499 (3d Cir. 1996) (brackets in *N.N.*)). But when a district attorney "engages in purely administrative tasks unrelated to prosecutorial functions, he or she 'in effect acts on behalf of the county that is the situs of his or her office.'" *Id.* (quoting *Coleman*, 87 F.3d at 1499).

The Silencing Act is a *state* law that authorizes the Attorney General and all Pennsylvania district attorneys to enforce it. Thus, by enforcing the Act, Defendant Williams would be "carrying out policies established by the State." *Carter*, 181 F.3d at 354. Further, given that the Silencing Act, located in the state's Crimes Code, is aimed at halting the "continuing effect of . . . crime[s] on . . . victim[s]," 18 Pa. C.S. § 11.1304, it is a "tool" available to Defendant Williams "to combat crime," *Coleman*, 87 F.3d at 149. Indeed, at the beginning of the Crime Victims Act, which the Silencing Act amends, the General Assembly "finds and declares" that protecting crime victims' rights helps fight crime:

> In recognition of the civic and moral duty of victims of crime to fully and voluntarily cooperate with law enforcement and prosecutorial agencies and *in further recognition of the continuing importance of victim cooperation to State and local law enforcement efforts* and the general effectiveness and well-being of the criminal justice system of this Commonwealth, all victims of crime are to be treated with dignity, respect, courtesy and sensitivity.

18 Pa. C.S. § 11.102 (emphasis added). Further, bringing a court action under the Act is in no way "purely administrative," *N.N.*, 801 F. Supp. 2d at 318.

Second, even if Defendant Williams were considered a county official with purely administrative functions as to the Silencing Act, his policy as to the Act's enforcement is at the heart of the case. As described in PLN Plaintiffs' Verified Complaint, Defendant Williams was an enthusiastic proponent of the Act before its passage, leaving no doubt that he would use it if enacted. (Ver. Compl. at ¶¶ 34, 36.) Moreover, in his brief, he has effectively revealed that his current policy is to enforce the Act unless it is deemed unconstitutional in this litigation. (DA Br. at 1, 8.) It is this policy of intended enforcement that is causing PLN Plaintiffs' constitutional injury.

Therefore, be he a state actor or a county actor, Defendant Williams should be preliminarily enjoined from enforcing the Silencing Act because, as explained below, the Act is unconstitutional in at least four ways. *See Miller v. Mitchell*, 598 F.3d 139, 147-55 (3d Cir. 2010) (affirming, on First Amendment

grounds, preliminary injunction of District Attorney's threatened prosecution of minors for refusing to attend sex education class).[5]

III. PLN PLAINTIFFS HAVE A REASONABLE PROBABILITY OF SUCCESS ON THE MERITS, THUS SATISFYING THE FIRST PRELIMINARY INJUNCTION REQUIREMENT.

A. The Silencing Act is Unconstitutionally Vague.

In their opening brief, PLN Plaintiffs identified three ways in which the Silencing Act is unconstitutionally vague. (PLN Br. at 13-19.) Defendant Kane has not overcome any of them.

First, PLN Plaintiffs explained that one cannot know in advance what conduct will be subject to the Silencing Act. (PLN Br. at 16-17.) Defendant Kane stresses, in response, that courts determine all the time whether people have suffered mental anguish. (AG Br. at 24-25.) But those are determinations about how people felt in the past, not predications about how they will feel in the future. The Silencing Act requires a person subject to it to somehow determine *beforehand* whether the speech or other conduct in which he or she wishes to engage will cause his or her "victim" (broadly construed under the Act) mental anguish. Crucially, this risk-assessment inquiry depends entirely on what the future, subjective response of the would-be actor's "victim" will be to the contemplated conduct—not on any objective or reasonable person standard. *That*

[5] Unlike Defendant Kane, Defendant Williams has declined to take a position on the propriety of a preliminary injunction. (DA Br. at 12.)

is why "men of common intelligence are left to guess" about what conduct will end up falling with the Act's scope. *See Cramp v. Bd. of Public Instruction*, 368 U.S. 278, 287 (1961). Making matters worse is the Act's failure to specify what "conduct which perpetuates the continuing effect of the crime on the victim" "includes" other than "conduct which cases a temporary or permanent state of mental anguish." *See* 18 Pa. C.S. § 11.1304(d).

Second, in response to PLN Plaintiffs' argument that the lack of a definition for "offender" also makes the statute vague (*see* PLN Br. at 17-18), Defendant Kane contends that the term's meaning is obvious (AG Br. at 25). Her reason is that FreeDictionary.com has a definition for it: "an accused defendant in a criminal case or one convicted of a crime." (*Id.* (quoting http://legal-dictionary.thefreedictionary.com).) Yet Defendant Kane fails to explain how anyone would know that this particular definition—which sweeps in the accused, not just the convicted—controls for Silencing Act purposes. Indeed, it differs from the range of "offender" definitions found in other Pennsylvania statutes (PLN Br. at 17-18) and from the definition in Black's Law Dictionary (http://thelawdictionary.org/offender: "the name that is used for a person who is guilty of an offense according to law"). Defendant Kane's reliance for statutory construction on FreeDictionary.com—rather than on anything in the Silencing Act itself—only confirms the Act's vagueness.

Third, as to PLN Plaintiffs' argument that it is unclear whether the Silencing Act permits the injunction of a third party's publication of offender speech (PLN Br. at 18), Defendant Kane suggests that it does not because the statute is silent on that point (AG Br. at 25). But the House Judiciary Committee counsel said just the opposite at the Committee hearing on the law. (Ver. Compl. at ¶ 33 ("[T]he court would have broad power to stop a third party who is the vessel of that conduct or speech from delivering it or publishing that information.").) Which makes good sense, given that Abu-Jamal's commencement speech—the Silencing Act's impetus—was pre-recorded and broadcast to the students by a third party (*id.* at ¶¶ 23, 27), and given that prisoners usually need third party conduits to be able to communicate broadly with the outside world. Moreover, Pennsylvania recognizes a "civil conspiracy" cause of action when "two or more persons combine[] or agree[] with intent to do an unlawful act," *Thompson Coal Co. v. Pike Coal Co.*, 412 A.2d 466, 472 (Pa. 1979), and whether the tort will be used to extend the Silencing Act's reach to third parties and fulfill the legislative intent is unclear.

B. The Silencing Act Is an Unconstitutional Content-Based Speech Regulation.

In an effort to invoke intermediate scrutiny—which is somewhat less rigorous than the strict scrutiny that applies to content-based speech regulations—

Defendant Kane insists that (1) the Silencing Act does not regulate speech, but regulates conduct, and (2) is not content-based. She is incorrect as to both.

First, that the Silencing Act uses the term "conduct" does not mean that it does not regulate speech or that it does so only incidentally. The term "conduct" includes speech, and what matters for First Amendment purposes is the actual effect of the law being challenged on the exercise of free expression. *See, e.g.*, *Holder*, 561 U.S. at 27-28 (evaluating statute prohibiting provision of material support and resources to terrorist organizations as content-based speech regulation because, even though statute "generally function[ed] as a regulation of conduct," "as applied to plaintiffs the conduct triggering coverage under the statute consist[ed] of communicating a message"); *Cohen v. California*, 403 U.S. 15, 16-26 (1971) (deeming "offensive conduct" prohibition a First Amendment violation when applied to individual wearing "F— the Draft" jacket); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214-18 (3d Cir. 2001) (invalidating on First Amendment overbreadth grounds school district policy prohibiting "verbal or physical" harassing "conduct").

Here, the Silencing Act was drafted, introduced, enacted, and signed into law in direct response to Abu-Jamal's graduation *speech*. The legislative history recapped in PLN Plaintiffs' Verified Complaint, and not disputed by Defendants, leaves no doubt about that. (Ver. Compl. at ¶¶ 21-44.) *See Sorrell v.*

IMS Health Inc., 131 S. Ct. 2653, 2663-64 (2011) (citing legislative history as suport for conclusion that statute was content-based speech restriction). Further, as the bases for their First Amendment claims, PLN Plaintiffs have identified countless ways in which the Act jeopardizes their freedom of *speech*. (Ver. Compl. at ¶¶ 47-150.) And while Defendant Kane has identified a few examples of non-speech conduct that could fall within the Act's scope (AG Br. at 16-17, 22, 31), that conduct, as explained at pages 20-24 of the Abu-Jamal Plaintiffs' brief, is already prohibited by other Pennsylvania laws and thus could not have been the reason for the Silencing Act.[6] To claim that the Silencing Act does not regulate speech simply does not comport with reality.

Second, while Defendant Kane says that the Silencing Act is "content-neutral" (AG Br. at 18, 23), the Supreme Court and Third Circuit, as detailed in PLN Plaintiffs' opening brief, have made clear that where a speech restriction is based on listeners' reaction to that speech, the restriction is necessarily content-based (*see* PLN Br. at 20-21). Defendant Kane ignores that authority, even though its application is a matter of common sense here. Whether any particular speech falls within the scope of the Silencing Act depends on the subjective reaction of the particular "victim" (broadly construed) to it. That subjective reaction in turn depends on the content of the particular speech. Defendant Kane appears to

[6] Defendant Kane offers no legislative history to suggest that it was.

concede as much, by positing a list of "innocuous" speech that, based on *her* sensibilities, would not be subject to the statute. (*See* AG Br. at 23.)[7]

Because the Silencing Act is a content-based speech restriction, it is subject to strict scrutiny, which the Defendants not only cannot satisfy (*see* PLN Br. at 21-25), but have not even attempted to satisfy.

C. The Silencing Act Is Unconstitutionally Overbroad.

Defendant Kane's response to PLN Plaintiffs' overbreadth argument is based on the wrong standard. According to her brief, a statute is overbroad only if it has no legitimate sweep. (AG Br. at 16.) But the Supreme Court has held that, in the First Amendment context, "a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010). As discussed in PLN Plaintiffs' opening brief, when judged under *that* standard, the Silencing Act is overbroad. (PLN Br. at 26-30.)[8]

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[7] Defendant Kane's subjective view of what is "innocuous" naturally differs from others'. For example, while she suggests that Abu-Jamal's graduation speech, given its content, would not have been subject to the Act (AG Br. at 23), Pennsylvania legislators, Defendant Williams, former Governor Corbett, and Mrs. Faulkner appear to feel differently (*see, e.g.*, Ver. Compl. at ¶¶ 29, 34-36, 44).

[8] The Silencing Act is much broader than the harassment and stalking statutes that Defendant Kane invokes. (*See* AG Br. at 17-18). Unlike the Silencing Act, those statutes require a continuing course of conduct and specific intent by the offender. In fact, just a few months ago, the Third Circuit invalidated a harassment statute on overbreadth grounds because, among other things, the statute

D. The Silencing Act Unconstitutionally Authorizes Prior Restraints.

Defendant Kane maintains that the Silencing Act does not authorize prior restraints because, according to her, the injunctions it permits are "subsequent punitive measures" for conduct that a judge has already determined falls within the statute's scope. (AG Br. at 26-28.) She is wrong.

First, the Silencing Act does not just permit the injunction of already-spoken or already-published speech; it permits the injunction of future speech just the same—a classic prior restraint. Second, by authorizing "special" and "preliminary" injunctions, the Act allows courts to enjoin speech based on a provisional judicial determination. *See* 18 Pa. C.S. § 11.1304(c). The Supreme Court made clear that this is unconstitutional in *Vance v. Universal Amusement Co.*, 445 U.S. 308, (1980), invalidating on prior restraint grounds a Texas statute permitting the provisional injunction of obscene materials without a final judicial determination that they were in fact obscene. Special and preliminary injunctions only require the plaintiff to be "likely to prevail on the merits," *SEIU Healthcare Pa. v. Commonwealth*, 104 A.3d 495, 501-02 (Pa. 2014); *Free Speech, LLC v. City*

"regulate[d] not only conduct 'solely intending to harass' but any conduct 'intending to harass,' broadly sweeping to regulate a wide variety of expressive speech." *Gov't of V.I. v. Vanterpool*, 767 F.3d 157, 166-68 (3d Cir. 2014). The court emphasized that "[a] harassment statute should be carefully tailored to avoid constitutional vulnerability on the grounds that it needlessly penalizes free speech." *Id.*; *see also DeJohn v. Temple Univ.*, 537 F.3d 301, 313-20 (3d Cir. 2008); *Saxe*, 240 F.3d at 214-16 (invalidating overbroad school district harassment policy).

of Phila., 884 A.2d 966, 970-71 (Pa. Commw. Ct. 2005)—a far cry from the beyond-a-reasonable-doubt standard in *Alexander v. United States*, 509 U.S. 544, 552 (1993), the key case on which Defendant Kane relies.

IV. PLN PLAINTIFFS SATISFY THE OTHER THREE PRELIMINARY INJUNCTION FACTORS, TOO.

First, as PLN Plaintiffs explained in their opening brief, the Supreme Court held in *Elrod v. Burns*, 427 U.S. 347, 373 (1976)—and the Third Circuit has since reiterated—that a First Amendment violation by definition qualifies as "irreparable harm." (*See* PLN Br. at 32-33; *see also Miller*, 598 F.3d at 147 n.8 (citing *Elrod* and holding that, given likelihood of success on claim that District Attorney's threatened prosecution would violate First Amendment, plaintiffs "have necessarily shown that irreparable harm would result absent an injunction"). Defendant Kane does not dispute that this is the law, but instead contends that there is no First Amendment violation here. (*See* AG Br. at 30-32.) As discussed throughout this brief, she is incorrect.

Second, the harm that Defendant Kane claims she would suffer if a preliminary injunction were issued is minimal if not non-existent. While she maintains that her "interest in protecting [Pennsylvania's] vulnerable citizens [would be] thwarted" (AG Br. at 32), an alternate avenue for protection already exists for the hypothetical vulnerable citizens she cites as examples. (*See* Abu-Jamal Plaintiffs' Br. at 20-24.) Also undercutting Defendant Kane's asserted

harm is the fact that she had no Silencing Act available to her until October 21, 2014, she has not used it since, and no other state appears to have such a law.[9]

Third, Defendant Kane's identical argument as to why the public interest would be harmed by a preliminary injunction (*see* AG Br. at 32) fails for the same reasons. Conversely, as discussed in PLN Plaintiffs' opening brief, a preliminary injunction would be in the public's interest, as it would help ensure that our Constitution is upheld. (*See* PLN Br. at 33.)

V. CONCLUSION

For all of these reasons and all those discussed in PLN Plaintiffs' opening brief and in the Abu-Jamal Plaintiffs' opening brief and brief filed today, PLN Plaintiffs respectfully request that this Court deny Defendants' motions to dismiss and preliminarily enjoin the enforcement of 18 Pa. C.S. § 11.1304.

[9] In response to the Court's request during the parties' January 13, 2015 teleconference, Plaintiffs researched whether other states have statutes similar to the Silencing Act. They found none.

Date: February 17, 2014

Respectfully submitted,

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CERTIFICATE OF PAGE COUNT

I hereby certify that, pursuant to the Court's February 13, 2015 Order (Docket No. 37) the foregoing PLN PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS AND IN FURTHER SUPPORT OF PLN PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION does not exceed twenty-five pages.

/s/ Eli Segal
Eli Segal

CERTIFICATE OF SERVICE

I hereby certify that the foregoing PLN PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS AND IN FURTHER SUPPORT OF PLN PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION was filed electronically with the Clerk of the Court using CM/ECF, which will send notification of the filing to all counsel of record.

/s/ Eli Segal
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