

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

MUMIA ABU JAMAL, ROBERT L.	:	
HOLBROOK, KERRY	:	
SHAKABOONA MARSHALL,	:	Case No. 1:14-CV-2148
DONNELL PALMER, ANTHONY	:	
CHANCE, PRISON RADIO, HUMAN	:	
RIGHTS COALITION, EDUCATORS	:	Hon. Christopher C. Conner
FOR MUMIA ABU-JAMAL	:	
	:	ELECTRONICALLY FILED
Plaintiffs,	:	
	:	
v.	:	
	:	
KATHLEEN KANE, Attorney General	:	
of Pennsylvania, and R. SETH	:	
WILLIAMS, District Attorney of	:	
Philadelphia County	:	
	:	
Defendants.	:	

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION  
FOR PRELIMINARY INJUNCTION

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**PLAINTIFFS' BRIEF IN SUPPORT OF MOTION  
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**I. INTRODUCTION**

The statute challenged in this litigation authorizes state courts to ban *any* speech by a current or former prisoner that may cause a crime victim to feel distress. Drafted sloppily, enacted hastily, and signed immediately, 18 P.S. 11.1304 (the “Silencing Act”), lands on protected speech with all the precision of a sawed-off shotgun on a bad day. This the government cannot do. This Court should preliminarily enjoin enforcement of the law.

## II. STATEMENT OF FACTS

### A. Enactment of the Statute

On September 29, 2014, Goddard College, an institution located in Plainfield, Vermont, announced that Plaintiff Mumia Abu-Jamal would deliver a commencement address on October 5. Grote Dec., Ex. 1 (Commencement Speech Announcement).

In light of Abu-Jamal's incarceration, his remarks were pre-recorded by Plaintiff Prison Radio to be played at the college's Hayburn Theater. *Id.*

On October 5, Abu-Jamal's remarks were played to the graduating students. He spoke, rather noncontroversially, of his experiences as a student at Goddard, his *alma mater*, and of the importance of lifelong learning. Grote Dec. Ex. 2 (Commencement Speech).

In Pennsylvania, the days between the announcement and the speech witnessed a firestorm of anger. On October 2, Representative Mike Vereb circulated a memorandum to all House members seeking cosponsors for his proposed Silencing Act. Grote Dec. Ex. 3 (Vereb Memorandum). "A convicted murderer is still traumatizing the victim's family and it needs to stop," wrote Vereb. *Id.* The "traumatizing" act to which Vereb referred was Abu-Jamal's planned address:

I'm sure you all recently heard the news that convicted cop killer Mumia Abu-Jamal plans to give a commencement speech at a college in Vermont. I am utterly outraged that such a reprehensible person would be able to revictimize Officer Daniel Faulkner's family with this kind of self-promoting behavior. I am asking your support for a bill, the Revictimization Relief Act, that would put an end to this kind of shameful misconduct.

*Id.*

Clamor for the Silencing Act grew in the following days. Maureen Faulkner, the widow of the police officer Abu-Jamal was convicted of killing, told the media: “Thirty-two years later the Faulkner family, my family and I, have to endure to the pain of [Abu-Jamal] being able to speak in public and having rights.” Grote Dec., Ex. 4 (*Widow Outraged* article). She continued: “Just as he took my husband’s freedom and life, he lost his rights. Why does [Abu-Jamal] have constitutional rights?” Grote Dec., Ex. 5 (*Widow: Choice of Convicted Cop Killer*).

Comments during a debate in the House Judiciary Committee on October 6 left no doubt that the law was designed specifically to silence Abu-Jamal. One legislator declared:

[T]he recent event, the shocking news about the convicted murderer Mumia Abu-Jamal presenting a commencement address from prison. I join in the sentiments of the Department of Corrections Secretary John Wetzel who stated that he cannot express his disdain enough about his decision to allow this individual to be a commencement speaker. And I believe it is despicable and unworthy. . . . I commend and thank Representative Vereb for his quick work on this issue, on this bill.

Hanrahan Dec., Ex. 1 (Transcript of October 6 Judiciary Subcommittee Hearing).

Defendant Seth Williams spoke at a press conference on the same day, strongly supporting the bill, and leaving no doubt that it was directed specifically at Plaintiff Abu-Jamal:

[N]ow Goddard College invited an unapologetic cop killer to speak at its graduation. What an insult!

And more than that: What a hurtful thing to do to Maureen Faulkner. Do the students want to hear from Maureen? Do they care what she continues to go through? Do they consider the effect the invitation will have on her? So if this bi-partisan legislation by my friend Representative Vereb is enacted, it'll make very clear that we'll not forget about our victims.

Hanrahan Dec. Ex. 2 (Transcript of October 6 Press Conference). The House passed the bill unanimously.

The legislation met with greater dissent in the Senate. Senators complained that the bill “stifles free speech” and “raised constitutional issues.” Hanrahan Dec., Ex. 3 (Transcript of October 16 Senate Hearing). On October 16, however, the bill passed the Senate 37-11. *Id.*

During the signing ceremony, held on October 21 at the very intersection where the crime of which Plaintiff Abu-Jamal was convicted occurred, Governor Tom Corbett left no doubt the law was designed to silence what he called Abu-Jamal’s “obscene celebrity.” “With books, radio commentaries, and most recently a commencement speech,” Corbett declared, “this unrepentant cop killer has tested the limits of decency . . . .” Hanrahan Dec., Ex. 4 (Signing Ceremony Press Conference Audio).

Just two days after the bill was signed into law, plans to censor Plaintiff Abu-Jamal’s weekly radio commentaries were underway. Hanrahan Dec., Ex. 5 (Victims Advocate emails). In an email sent to the head of the National Crime Victim Law Institute at Lewis and Clark Law School, Pennsylvania’s Commonwealth Victim

Advocate, Jennifer Storm, stated that an unidentified person<sup>1</sup> “wants to test our new law by attempting to stop Mumia from giving a weekly radio commentary that he is currently doing from prison.” *Id.* In the same email Ms. Storm also noted:

“Additionally he has two more books coming out and [redacted] is hoping to cease their publication as well which I know is tricky but its been done right?” *Id.* The email ended by declaring, “We want a solid test case for this new law so we are toying with a couple of ideas and I need some good legal guidance here so we don’t step into a constitutional challenge that will end this law.” *Id.* A similar email was sent that same day by Jennifer Storm to Greg Rowe, Senior Policy Manager for Criminal Justice in the Governor’s Office of Policy and Planning, and Dauphin County District Attorney Ed Marsico.<sup>2</sup>

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<sup>1</sup> In all probability the individual contemplating the test case whose name is redacted is Maureen Faulkner. Ms. Faulkner was an outspoken proponent of the bill and has standing to bring such a case against Abu-Jamal. Additional emails make clear that she had been in contact with Jennifer Storm regularly in the days preceding this email.

<sup>2</sup> The threat of enforcement is heightened by the fact that the Silencing Act is only the latest in a series of attempts by Pennsylvania officials to silence Plaintiff Abu-Jamal. In May 1994, his commentaries were planned to be broadcast on National Public Radio’s (NPR) flagship program, All Things Considered. Abu-Jamal Dec. ¶ 11. The Fraternal Order of Police (FOP) contacted the Pennsylvania DOC to protest, and enlisted U.S. Senator Robert Dole in their efforts. *Id.* Senator Dole threatened NPR’s funding from the floor of the U.S. Senate. *Id.* Ultimately, NPR fired Abu-Jamal. *Id.* After publication of Abu-Jamal’s first book, the FOP launched a campaign intended to keep sales of the book down. *Id.* ¶ 12. The FOP even flew a plane with a banner denouncing the publisher Addison-Wesley over the publisher’s corporate

## **B. The Plaintiffs**

The Plaintiffs in this case, both individuals and organizations, engage in a wide range of expressive activities threatened by the Silencing Act:

**1. Plaintiff Mumia Abu-Jamal** has been a prolific writer and commentator both prior to and during his incarceration. He has written thousands of commentaries about a range of topics, including life on death row, U.S. politics, war and militarism, the criminal legal system, African American religious traditions, education, and history; published seven books and many essays; authored two more books that will be published in 2015; delivered thousands of radio commentaries; and given four commencement addresses. Abu-Jamal Dec. ¶¶ 4-9, and 15-16.

**2. Plaintiff Robert Holbrook** is an activist and writer incarcerated at SCI Greene. He has written articles on an array of subjects of public concern, including juvenile life without parole, mandatory minimum sentencing, the killing of Trayvon Martin, prison censorship, drone warfare, the Egyptian Revolution, use of confidential informants by police, solitary confinement, and many more. Articles written by or quoting Plaintiff Holbrook have been published in the *Philadelphia Sunday Sun*, *Impacto*

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headquarters. *Id.* In November 1996, the DOC responded to FOP pressure by eliminating in-person broadcast media visits with all prisoners. *Id.* ¶ 13. Later, in response to the lobbying of the FOP, the DOC punished Plaintiff Abu-Jamal for violating a prison rule that forbid prisoners from conducting a business or profession, until Abu-Jamal obtained an injunction. *See Abu-Jamal v. Price*, 154 F.3d 128, 131 (3d Cir. 1998).

Latin Newspaper, the *Philadelphia City Paper*, the *Philadelphia Metro*, the *Philly Independent Media Center*, the *Philadelphia Tribune*, the *Guardian*, the *Las Vegas Weekly*, the *San Francisco Bay View*, *The Defenestrator* online newspaper, and *The Movement*. Holbrook Dec. ¶¶ 3-5.

**3. Plaintiff Kerry Shakaboona Marshall** is an activist and writer currently imprisoned at SCI Rockview. He is the founder and editor of Plaintiff Human Rights Coalition's publication, *The Movement*, a magazine containing content that is critical of the criminal legal and prison systems. Plaintiff Marshall contributes a column to each issue of *The Movement*. He is also a commentator for Plaintiff Prison Radio, and has recorded more than 10 commentaries this year. Marshall Dec. ¶¶ 4-6.

**4. Plaintiff Donnell Palmer** is an activist and writer currently imprisoned at SCI Graterford. He has been a participant in the Temple Inside Out program since 2007, which organizes workshops and trainings with the public, and he is a member of multiple prisoner-led organizations that invite members of the public to workshops, classes, discussions, and meetings. Plaintiff Palmer has published in the book project *Letters to My Younger Self: An Anthology of Writings by Incarcerated men at S.C.I. Graterford and a Writing Workbook*. He has also written fiction and nonfiction works that he is in the process of getting published, in addition to several political poems about the criminal justice system, criminality, ethics, and violence. Palmer Dec. ¶¶ 3-6, and 12-14.

5. **Plaintiff Anthony Chance** is an activist and writer currently imprisoned at SCI Graterford. Between 2007 and 2011 he participated in an education program through the Montgomery County Community College in which prisoners and non-prisoner students took the same course, wrote on identical topics, and in which prisoners' papers were shared with students outside of the prison. Plaintiff Chance is also a member of multiple prisoner-led organizations that have invited members of the public to workshops, classes, discussions, and meetings. He has also written two fictional books that are being edited and will be self-published and sold via Amazon.com under a pseudonym due to the passage 18 P.S. § 11.1304. Chance Dec. ¶¶ 2-6.

6. **Plaintiff Prison Radio** produces and distributes commentaries by prisoners, including Plaintiffs Marshall and Abu-Jamal. Prison Radio has also produced a documentary about Abu-Jamal, and was the producer of the commencement address that led to enactment of 18 P.S. § 11.1304. Hanrahan Dec. ¶¶ 2-6.

7. **Plaintiff Human Rights Coalition** has members including current and former prisoners and their families. Human Rights Coalition also publishes *The Movement*, and correspondence and articles by prisoners are a core feature of the publication and the work of Human Rights Coalition. Plaintiffs Holbrook and Marshall contribute regularly to *The Movement*; Plaintiff Abu-Jamal has done so as well. Vickers Declaration ¶¶ 2-14.

8. **Plaintiff Educators for Mumia Abu-Jamal** is a network of national and international scholars who present material about Abu-Jamal and other prisoners to their students, using prisoners' writings and recorded commentary. Fernandez Dec. ¶¶ 2-3.

### III. LEGAL ARGUMENT

The elements a plaintiff must establish to obtain a preliminary injunction are well-established: "A district court must consider four factors: (1) the likelihood that plaintiff will prevail on the merits at final hearing; (2) the extent to which plaintiff is being irreparably harmed by the conduct complained of; (3) the extent to which defendant will suffer irreparable harm if the preliminary injunction is issued; and (4) the public interest." *Pappan Enterprises, Inc. v. Hardee's Food Sys., Inc.*, 143 F.3d 800, 803 (3d Cir. 1998). As demonstrated below, Plaintiffs satisfy each of these elements; a preliminary injunction therefore should issue.

#### A. Plaintiffs Have A Likelihood of Success on the Merits.

##### 1. The Silencing Act Violates the First Amendment Because It Discriminates Against Particular Speakers.

Under the First Amendment, the government cannot permit speech "by all but a narrow class of disfavored speakers." *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2668 (2011), and "[t]he Supreme Court, on numerous occasions, has condemned government actions that have discriminated based upon the identity of the speaker,"

*Juzwick v. Borough of Dormont, Pennsylvania*, No. 01-310, 2001 WL 34369467, at \*3 (W.D. Pa. Dec. 12, 2001).

On its face and by its plain language, 18 P.S. § 11.1304 discriminates against particular speakers—“offender[s],” whether or not they have completed their sentence. Those with no criminal record remain free under the statute to “perpetuate[ ] the continuing effect of [a] crime on the victim” and to inflict “mental anguish” however they wish, including by taunting victims and glorifying bloody crimes, without any fear of being enjoined and forced to pay attorneys’ fees under the statute. In contrast, those with criminal records face the threat of injunctions and attorneys’ fees for any speech that causes a crime victim emotional pain.

To the extent the Defendants contend that they have a legitimate basis for discriminating against those with criminal records, the argument is foreclosed by *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 502 U.S. 105 (1991). In *Simon & Schuster*, the Court struck down a law that required anyone who committed a crime and received money from publicity to give the proceeds to a state board, holding that “the statute plainly imposes a financial disincentive only on speech of a particular content.” *Id.* at 116.

Even worse, the statute’s *raison d’être* is to silence and retaliate against a particular speaker: the law was written to shut Mumia up. As demonstrated in the Facts section, Legislators enacted the Silencing Act immediately after Plaintiff Abu-Jamal delivered a graduation speech with the explicit purpose of targeting him, the law

was signed on the street corner where his crime of conviction occurred, and plans to use the law against him were being formed before the ink on the statute was dry.

**2. The Silencing Act Violates the First Amendment Because It Prohibits Speech Solely on the Basis of Listener Reactions.**

The government cannot restrict expression based solely upon the effect of speech on the listener, including “[t]he emotive impact of speech on its audience.” *Boos v. Barry*, 485 U.S. 312, 321 (1988). Indeed, it is axiomatic that the mere fact that speech causes offense, outrage, or emotional anguish is no justification for prohibiting it. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988) (speech may not be prohibited merely because it has “an adverse emotional impact on the audience”); *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 414 (1992) (“The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected.”); *Snyder v. Phelps*, 131 S. Ct. 1207, 1218 (2011) (speech cannot be prohibited merely because it adds further “anguish” to the “already incalculable grief” of a mourning father).

There can be no question that the Silencing Act authorizes the prohibition of speech based solely on the emotional reaction listeners may experience. Under the plain language of the statute, an individual with a criminal record may engage in any speech that others find innocuous, pleasant, or boring. Only speech that provokes a particular emotional response from a listener—“a temporary or permanent state of mental anguish”—runs afoul of the law. If emotional outrage failed to justify speech

restrictions in the cases cited above—which involved picketing a soldier’s funeral (*Snyder*), publishing a cartoon of a preacher having sex with his mother in an outhouse (*Hustler*), and burning a cross on a black family’s lawn (*R.A.V.*)—then surely a law that purports to ban expression based on a listener’s “mental anguish” violates the First Amendment.

In *Simon & Schuster*, New York State, defending a similar law that allowed confiscation of funds derived from publicity surrounding an author’s crime, disclaimed the argument that “revictimization” or ongoing anguish could justify a restriction on speech. The high court noted that this was a terrible argument, which New York wisely declined to assert: “The [state] disclaims, as it must, any state interest in suppressing descriptions of crime out of solicitude for the sensibilities of readers. As we have often had occasion to repeat: ‘[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it.’ . . . The [state] thus does not assert any interest in limiting whatever anguish Henry Hill’s victims may suffer from reliving their victimization.” *Simon & Schuster*, 502 U.S. at 118 (1991) (citations omitted).

What New York was smart enough not to say to the high court in *Simon & Schuster*—that laws of this nature can be justified to prevent anguish or revictimization—the Pennsylvania Legislature has said, repeatedly, in 18 P.S. § 11.1304 itself. The statute is *called* “Revictimization relief” and amends the “Crime Victims Act.” The law allows victims themselves, as well as district attorneys and the

Attorney General, to bring suit “for conduct which perpetuates the continuing effect of the crime on the victim”—precisely what the Supreme Court called “reliving ... victimization” in *Simon & Schuster*. 502 U.S. at 118. “Conduct which perpetuates the continuing effects of the crime,” in turn, is defined by the 18 P.S. § 11.1304, to include “conduct which causes a temporary or permanent state of mental anguish.” This, again, is the “anguish ... [that] victims may suffer” rationale, a rationale spurned by the Supreme Court in *Simon & Schuster*. 502 U.S. at 118; *see also Abu-Jamal v. Price*, 154 F.3d 128, 135 (3d Cir. 1998) (“Although, Jamal's articles, book, and radio commentaries may have generated controversy beyond prison walls, unless they amount to fraud, extortion, or threats to those outside the prison, the valid objectives dwindle.”).

### **3. The Silencing Act Violates the First Amendment Because It Is Wildly Vague and Overbroad**

“In the First Amendment context, . . . this Court recognizes a . . . type of facial challenge, whereby 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) (citations omitted); *see also Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975) (“This Court has long recognized that a demonstrably overbroad statute or ordinance may deter the legitimate exercise of First Amendment rights.”). Furthermore, the Supreme Court has repeatedly struck down statutes that vest standard-less discretionary authority in

government officials. *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 769 (1988) (striking down ordinance that on its face “contains no explicit limits on the mayor’s discretion” to grant or deny permits for placing newsracks on public property); *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 151 (1969) (a law that “makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official . . . is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms”) (quoting *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958)); *Cox v. Louisiana*, 379 U.S. 536, 557 (1965) (broad discretionary authority “sanctions a device for the suppression of the communication of ideas and permits the official to act as a censor”).

The Silencing Act—drafted poorly, passed quickly, signed hastily on the eve of an election—covers virtually any expressive activity by a person who has been convicted of a crime. Any statement “which perpetuates the continuing effect of the crime on the victim” provides a basis for an injunction and attorneys’ fees. The legislature’s attempt to define “conduct which perpetuates the continuing effect of the crime on the victim” only serves to broaden the law’s sweep, for such conduct means any action that “causes a temporary or permanent state of mental anguish.” In short, the law prohibits speech whenever two elements are met: (1) a person with a criminal record says or writes *anything*, and (2) the victim of a crime experiences, even for an instant, “emotional anguish” as a result.

The universe of protected activity made actionable under the Silencing Act is vast. Examples include:

- A prisoner who believes she was wrongfully convicted gives an interview, in which she lays out the case for her innocence. The victim of the crime finds the interview offensive.
- A current or former prisoner publishes an op-ed about an issue she considers important, such as the death penalty, the war on drugs, police killings in Ferguson and New York, or juvenile life without parole sentences. The victim finds it traumatic that the prisoner receives a public forum in which to express her views.
- A prisoner is invited to give a speech by phone (whether a graduation speech, as in Plaintiff Abu-Jamal's case, or any other type of public address). A victim is anguished that the prisoner is receiving public attention.
- A prisoner writes an essay on how the writings of another prisoner, such as Plaintiff Abu-Jamal, have positively influenced him. Under the law the person who wrote the essay could be sued by the victim of that prisoner's case or Abu-Jamal's case, as the plain language of the statute allows *any* victim to sue *any* person convicted of a personal-injury crime.
- A prisoner writes a book about the criminal justice system, and the victim takes offense.

- A victim learns that a former prisoner paints pictures and enjoys doing so. The victim is saddened that the former prisoner finds enjoyment in this pursuit.

It would be difficult, in short, to imagine a broader, more amorphous ban on speech. The law is both impermissibly vague and substantially overbroad.

**B. Plaintiffs Suffer Irreparable Harm and Will Continue To Face Such Harm in the Absence of an Injunction.**

There can be no question that the violation of Plaintiffs' First Amendment rights constitutes irreparable harm, for, as the Supreme Court has stated, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976); *see also Abu-Jamal*, 154 F.3d at 136 (affirming grant of preliminary injunction in favor of Mumia Abu-Jamal; holding that opening legal mail resulted in irreparable injury); *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 323 (3d Cir. 2013) (affirming preliminary injunction; holding that ban on breast cancer awareness bracelets in school "unquestionably constitutes irreparable injury," and "[a]n after-the-fact money judgment would hardly make up for their lost opportunity to wear the bracelets in school"), *cert. denied*, 134 S. Ct. 1515, 188 L. Ed. 2d 450 (2014); *K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 113 (3d Cir. 2013) (affirming grant of preliminary injunction; ban on distribution of Christmas party invitations in school constitutes irreparable injury); *Stilp v. Contino*, 613 F.3d 405, 409 (3d Cir. 2010)

(affirming grant of preliminary injunction; holding that “the alleged suppression of speech in violation of the First Amendment” satisfies the irreparable harm requirement); *Swartzwelder v. McNeilly*, 297 F.3d 228, 241 (3d Cir. 2002) (granting preliminary injunction; holding that municipal ban on police officers serving as expert witnesses resulted in irreparable harm to First Amendment rights).

The individual and organizational plaintiffs indisputably engage in core expression that could be enjoined under the Silencing Act, including political commentaries, the publication of fictional and nonfictional books, speeches, radio broadcasts, and teaching and addressing university students.

While Defendants may argue that the Silencing Act is somehow more innocuous than other statutes because no restriction exists until a state court issues an injunction, this curious feature of the law hardly dissipates the irreparable harm of chilling speech. The statute provides no standard for determining what conduct justifies a court in issuing an injunction, nor the appropriate scope of that injunction. It authorizes a state court to issue any sort of injunction against “conduct which perpetuates the continuing effect of the crime on the victim,” defined to include “conduct which causes a temporary or permanent state of mental anguish.” In a case where a victim feels anguish whenever a current or former prisoner’s speech is disseminated, a state court could, consonant with the statute, forbid all public speech by the individual. Fear of such an injunction creates an incentive to choose one’s words very carefully, lest they provoke a sweeping ban on all speech.

Further, the statute creates an entitlement to attorneys' fees, extracted from the defendant, whenever a crime victim seeks an injunction. In *Constitution Party v. Aichele*, the Third Circuit recently held that a political party had met the actual injury requirement for bringing a pre-enforcement challenge to an election law based on the very same type of cost-shifting regime: Plaintiffs "face the prospect of cost-shifting sanctions, the very fact of which inherently burdens their electioneering activity." 757 F.3d 347, 364 (3d Cir. 2014). Because many people with criminal records barely get by economically, the threat of attorneys' fees provides a strong deterrent to speech. Indeed, in most suits brought under the Silencing Act, defendants will be unable to retain their *own counsel*, making them "easy targets," *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2345 (2014), for the enforcement of an unconstitutional law.

To make matters worse, the vast number of people who can seek an injunction against a speaker under the statute increases the threat of enforcement. As the Supreme Court recently stated:

The credibility of that threat is bolstered by the fact that authority to file a complaint with [an election commission] is not limited to a prosecutor or an agency. Instead, the false statement statute allows "any person" with knowledge of the purported violation to file a complaint. Because the universe of potential complainants is not restricted to state officials who are constrained by explicit guidelines or ethical obligations, there is a real risk of complaints from, for example, political opponents.

*Susan B. Anthony List*, 134 S. Ct. at 2345. This statute, too, makes all the world a plaintiff. It empowers not only district attorneys, but any "victim of a personal injury crime" to bring a lawsuit seeking to silence people with criminal records.

The concrete harm that the Silencing Act inflicts upon the Plaintiffs in this case is clear and immediate. Free Speech Radio News (FSRN) has regularly featured Abu-Jamal as their leading op-ed contributor. Hanrahan Dec. ¶ 12. Between 2002 and 2014, Abu-Jamal recorded more than 250 commentaries with Prison Radio that were aired by FSRN, at times reaching more than 100 radio stations around the world. *Id.* Abu-Jamal and Prison Radio were paid between 90 and 180 dollars by FSRN per commentary. *Id.* The last time Abu-Jamal was aired by FSRN on their weekly program was the week before Governor Corbett signed the law at issue in this litigation. *Id.* at ¶ 13. Since the October 17, 2014 Weekly Edition, FSRN has not aired any commentaries by Mumia Abu-Jamal on its weekly program. *Id.* at ¶ 15. FSRN's managing editor has expressed concerns that the program may be held legally liable under the newly enacted statute. *Id.* While FSRN has posted one of Plaintiff Abu-Jamal's commentaries on its website, this was not part of the weekly program that is picked up by stations across the country. *Id.* This is not typical of FSRN's use of Plaintiff Abu-Jamal's commentaries—usually the commentaries are both posted online and broadcast via radio. *Id.* Excluding Plaintiff Abu-Jamal's commentaries from radio broadcast substantially diminishes the audience he is able to reach. *Id.*

Plaintiffs have also been injured because the threat of enforcement creates a risk of chilled speech and self-censorship. Indeed, chilled speech and self-censorship have already occurred as a consequence of 18 P.S. § 11.1304. *See* Hanrahan Dec. ¶¶ 11-15; Taylor Dec. ¶¶ 6-8; Chance Dec. ¶¶ 6-8; Marshall Dec. ¶ 7. What the Supreme

Court wrote in *Virginia v. American Booksellers Ass'n, Inc.* applies with equal force here:

“[T]he alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution.” 481 U.S. 383, 393.

The threat of self-censorship posed by this statute is not speculative, but is already occurring:

- Professor Mark Taylor, a Christian theologian and co-coordinator of Educators for Mumia Abu-Jamal, has repeatedly had Mumia Abu-Jamal call into his classes and speak with his students. Taylor Dec. ¶ 4 However, due to the new law, Professor Taylor was instructed by the institution at which he teaches, the Princeton Theological Seminary, not to have Mumia Abu-Jamal call into his classes. *Id.* ¶¶ 8-9. While the institution eventually reconsidered, the delay impeded Professor Taylor’s planning and forced him to scuttle plans for Abu-Jamal to call into his course and speak with his students. *Id.* ¶¶ 9-10.
- Plaintiff Anthony Chance is in the process of publishing two fictional books, which he has decided to publish under a pseudonym because for fear that 18 P.S. § 11.1304 will be used against him. Chance Dec. ¶¶ 6
- Plaintiff Kerry Shakaboona Marshall has shelved work on his autobiography out of concern that his discussion of his criminal case and trial may trigger an enforcement action under 18 P.S. § 11.1304. Marshall Dec. ¶ 7.

**C. An Injunction Will Not Harm the Defendants, and Will Benefit the Public Interest.**

The remaining factors—harm to the Defendants and impact on the public interest—are straightforward. There is no public interest in preserving a patently unconstitutional statute, nor do the Defendants have any legitimate interest in leaving the Silencing Act on the books and allowing it to continue to chill free expression.

#### **IV. CONCLUSION**

For the foregoing reasons, this Court should grant the motion for preliminary injunction and enjoin enforcement of 18 P.S. § 11.1304.

Respectfully submitted,

/s/ David M. Shapiro

Bret D. Grote  
PA I.D. No. 317273  
Dustin McDaniel (*pro hac vice*, to be admitted)  
PA I.D. No. 314618  
Jules Lobel, of counsel (*pro hac vice*)  
Abolitionist Law Center  
P.O. Box 8654  
Pittsburgh, PA 15221  
Telephone: (412) 654-9070  
[bretgrote@abolitionistlawcenter.org](mailto:bretgrote@abolitionistlawcenter.org)  
[dsm@abolitionistlawcenter.org](mailto:dsm@abolitionistlawcenter.org)

Deneekie Grant (*pro hac vice*)  
PA I.D. No. 314220  
Ashley Henderson (*pro hac vice*)  
PA I.D. No. 313492  
Amistad Law Project  
P.O. Box 9148  
Philadelphia, PA 19139  
Telephone: 267-225-5884  
[ashley@amistadlaw.org](mailto:ashley@amistadlaw.org)  
[nikki@amistadlaw.org](mailto:nikki@amistadlaw.org)

David M. Shapiro (*pro hac vice*)  
Roderick and Solange MacArthur Justice  
Center  
Northwestern University School of Law  
375 E. Chicago Avenue  
Chicago, Illinois 60611  
(312) 503-0711

*Attorneys for Plaintiffs*

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**WORD COUNT CERTIFICATION**

I hereby certify that the foregoing brief, according to the word count feature of the word-processing system used to prepare the brief, contains 4,978 words.

/s/ David M. Shapiro

David M. Shapiro

**CERTIFICATE OF SERVICE**

I hereby certify that I served a copy of the foregoing Brief in Opposition to Defendants' Motion to Dismiss was served via the Court's ECF system on all parties registered in the ECF system.

/s/ David M. Shapiro  
David M. Shapiro