UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 09-2144

MARYJO MILLER, individually and on behalf of her minor daughter, MARISSA MILLER; JAMI DAY, individually and on behalf of her minor daughter, GRACE KELLY; and JANE DOE, individually and on behalf of her minor daughter, NANCY DOE, Plaintiffs/Appellees.

v.

GEORGE SKUMANICK, JR., in his official capacity as District Attorney of Wyoming County, Pennsylvania, Defendant/Appellant.

On Appeal From the Judgement of the U.S. District Court for the Middle District of Pennsylvania Dated March 30, 2009, at Civil Action No. 3:09-cv-00540

BRIEF OF APPELLEES

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COUNTER STATEMENT OF ISSUES

1. Did the District Court properly issue a preliminary injunction enjoining Skumanick from filing baseless felony child pornography charges against the Plaintiff girls as a means to coerce their participation in a re-education program, to which both the girls and their parents objected, based on a likely violation of the Plaintiff girls' First Amendment right to be free from compelled speech and the Plaintiff parents' Fourteenth Amendment right to direct their children's upbringing?

2. Did the District Court properly refuse to abstain based on the fact that Skumanick's offer of an "informal adjustment" under Pennsylvania's Juvenile Act was not an ongoing state proceeding of a judicial nature and thus there was no reason to abstain under *Younger v. Harris*?

COUNTER STATEMENT OF FACTS

A. Sexting

The practice of sending or posting sexually suggestive text messages and images, including nude or semi-nude photographs, via cellular telephones or over the Internet, has become known as "sexting." A.II.11.[1] Sexting typically involves the subject taking a picture of him or herself, or asking someone else to take it for him or her, using a digital camera or the cell phone's camera feature. *Id*; A.I.3-4. The photograph, which is now stored as a digitized image, is then sent via the text-message or photo-send function on the cell phone, transmitted by computer through electronic mail, or posted to an Internet website, often one of the popular social-networking sites like Facebook or MySpace. A.II.11. Sexting has become widespread among American teenagers. A survey released in December 2008 found that approximately 20% of all teenagers (ages 13-19) have sent or posted on the Internet nude or semi-nude pictures of themselves. A.II.11-12.[2]

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[1] The Appendix submitted by Appellant is in three separately bound volumes and is not numbered sequentially, thereby precluding the usual "A-page" reference. Consequently, Appellees' record citations use the "A.Volume.Page" convention, e.g., A.II.5 represents Appendix Volume II at page 5.

[2] *Sex and Tech: Results from a Survey of Teens and Young Adults,* National Campaign to Prevent Teen and Unplanned Pregnancy, December 2008 (available at http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf).

B. Sexting Comes to Tunkhannock

In Fall 2008, sexting became an issue in the small northeastern Pennsylvania town of Tunkhannock. A.II.12, 107. In October 2008, Tunkhannock School District officials confiscated and searched several students' cell phones to discover that they contained photographs of scantily clad, semi-nude and nude teenage girls, many of whom were students. A.II.12, 137. School officials turned over five cell phones to George Skumanick, Jr., Wyoming County's District Attorney and chief prosecutor. He began a criminal investigation into the matter. A.II.12, 136-37.

In November 2008, Skumanick stated publicly, to local newspaper reporters and again at a Tunkhannock School District assembly at the high school, that students who possess inappropriate images of minors may be prosecuted for "sexual abuse of children" (18 Pa. Cons. Stat. § 6312, Pennsylvania's child pornography statute) or "criminal use of a communication facility" (18 Pa. Cons. Stat. § 7512). A.II.12, 141-42. Skumanick, in his comments, noted that both charges are felonies, which could result in a seven-year prison sentence, and that juveniles who are convicted would have a permanent record because the charges are felonies. A.II.12-13.[3] These were the only two charges that Skumanick ever mentioned publicly or to

[3] Pennsylvania's Registration of Sexual Offenders Act ("Megan's Law"), 42 Pa. Cons. Stat. §§ 9791, *et seq.*, currently does not apply to juveniles convicted of felony sex offenses, which includes possessing or distributing child pornography.

the parents of affected juveniles. A.II.142. Meanwhile, in the criminal investigation Skumanick viewed more than 100 cell-phone photos, A.II.139, to identify about twenty students for possible prosecution, A.II.137.

C. The Plaintiffs/Appellees

The Plaintiffs in this civil rights action are three teenage girls – Marissa Miller, Grace Kelly and Nancy Doe – and one parent of each – MaryJo Miller, Jami Day and Jane Doe, respectively.[4] A.II.3-4. All six live in Tunkhannock, which is located in Wyoming County, Pennsylvania. *Id.* The three girls were at all relevant times

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But the federal Sex Offender Registration and Notification Act ("SORNA"), 42 U.S.C. §§ 16911, *et seq.*, requires the state to amend its law by July 27, 2009, to conform to the SORNA requirements, or face a "mandatory 10% reduction in Byrne Justice Grant Act funding." *See* U.S. Dept. of Justice, FACT SHEET: The Proposed Guidelines for the Sex Offender Registration and Notification Act ("SORNA"), May 17, 2007 (FACT SHEET available at http://www.ojp.usdoj.gov/smart/pdfs/sorna_factsheet.pdf.). The change would operate retroactively and apply to all juveniles over age fourteen convicted of predicate offenses, including 18 Pa. Cons. Stat. § 6312, *id.*, which means that all three plaintiff minors would on a conviction or guilty plea be subject to Megan's Law registration for at least ten years and have their names and pictures displayed on the state's sex-offender Internet website. The Obama Administration recently granted a one-year extension of the July 2009 SORNA deadline. *See* http://www.ojp.usdoj.gov/smart/pdfs/sornaorder.pdf.

[4] "Nancy Doe" and "Jane Doe" are pseudonyms. The District Court, with Skumanick's consent (A.I.11, A.II.104), granted their motion to proceed pseudonymously, Docket No. 17 (A.II.5). Skumanick has not appealed that Order.

students in the Tunkhannock Area School District. *Id.* While aware generally that sexting had occurred at the High School, it was not until February 2009 that the girls or their parents learned that they were implicated in the situation. A.II.108.

D. District Attorney Skumanick Threatens Felony Prosecutions

Skumanick sent identical letters (except for the address), dated February 5, 2009, to the parents of approximately twenty Tunkhannock students, including Plaintiffs Miller, Day/Kelly and Doe. A.II.33 (copy of letter), 143. Skumanick sent the letter not to students responsible for disseminating the photographs, but to the students on whose cell phones the photos were stored and, more importantly for this case, the girls shown in the photos. A.II.138.

The letter conveyed the following important information to the parent(s):

1. their child "has been identified in a police investigation involving the possession and/or dissemination of child pornography";

2. if the child "successfully completes" a six to nine-month program "which focuses on education and counseling . . . no charges will be filed and no record of his/her involvement will be maintained";

3. parents and children are invited to a February 12 meeting to "discuss the program in more detail and to answer your questions...."; and

4. "Participation in the program is voluntary. . . . [but] charges will be filed against those that do not participate or those that do not successfully complete the program."

A.II.33, 143-44.

Accepting the letter's invitation to contact Skumanick beforehand, Ms. Miller and her ex-husband met with Skumanick on February 10, during which time he showed them the one photograph that formed the basis for his threatened prosecution of their daughter. A.II.108-17. A copy of the photograph is at A.III.2 (under seal). The photo was taken during a slumber party at the Millers' home approximately two years earlier. A.II.118-19. Marissa and a long-time friend, plaintiff Grace Kelly, were twelve or thirteen-years old at the time. The photo showed the two girls from the waist up, each wearing a white, opaque bra. *Id.* Marissa was on the phone while Grace held up her fingers, making a peace sign. *Id.* When Ms. Miller saw the photo around the time it was taken, her reaction was to laugh and call the girls "goof balls." A.II.119. Ms. Miller did not punish her daughter over the photograph. *Id.* The picture was taken by another girl, who has since moved away and whose whereabouts are unknown, using her own digital camera. *Id.* Marissa never had custody of the photo and does not know how it got on fellow students' cell phones. A.II.119-20.

The Millers were relieved upon seeing the picture because, in Ms. Miller's words, "there's nothing wrong with [the] photo." A.II.120. When the Millers protested that the photo could not be considered child pornography because the girls were not even naked and that magazines have similar photos of girls in bras, Skumanick insisted that they could be prosecuted because the girls were posed "provocatively." *Id.* Skumanick also told the Millers that unless their daughter accepted the deal he would prosecute both girls for child pornography and criminal use of a communications device. A.II.120-21.

The meeting Skumanick convened on the evening of February 12 was held inside the County courthouse, with about fifteen families (parents and children) in attendance. A.II.122. Skumanick discussed the dangers of sexting and told them that he was prepared to file felony charges against any minor who refused to submit to probation, pay the $100 program fee, and participate in (or who failed to successfully complete) the re-education program. A.II.16, 122-23, 146-48. Skumanick indicated that he might lessen the six-month probation period if the children completed the program to his "standards." A.II.16, 146-47. During the meeting one father asked how Skumanick could be prosecuting his daughter because, according to him, she was in the photograph wearing a bathing suit. A.II.123. Skumanick told the assembled crowd that she was posed "provocatively," which

made her subject to a child-pornography charge. *Id.* In response to Skumanick's comment, Marissa's father stood up and asked who was deciding what was provocative. *Id.* Skumanick replied that he was not going to argue and that he could charge all of the minors there that night but was instead offering them a deal. *Id.* Skumanick also told Mr. Miller that Skumanick was doing the right thing, that's the law and if Mr. Miller objected, "too bad." A.II.123-24.

At the conclusion of the February 12 meeting, Skumanick asked the people assembled in the courthouse to sign an agreement whereby the minors consented to be on probation and to participate in the re-education program. A.II.17, 122-24. He told them that they had forty-eight hours to agree to the offer or he would charge them. A.II.18. When parents objected to the short time frame Skumanick agreed to extend it. A.II.124.

After the meeting, Skumanick showed the parents the photograph(s) of their respective child(ren). A.II.18. This was the first time that Plaintiff Jane Doe viewed the allegedly illegal photo of her daughter, Nancy Doe. It showed Nancy with a white, opaque towel wrapped around her body, just below the breasts. *Id.* It appeared that she had just gotten out of the shower. *Id.* The photo was more than a year old. *Id.* A copy of the photograph is at A.III.1 (under seal).

Neither the photo of Nancy Doe nor the one of Marissa and Grace depicted sexual activity. Neither of the photos showed the girls' genitalia or pubic area. According to Skumanick, these photos were among those found on boys' cell phones in the school. A.II.18. Skumanick's sole basis for threatening to prosecute the three girls is that they allowed themselves to be photographed. A.II.19. A February 23 letter from the Wyoming County Court of Common Pleas' Juvenile Court Services division instructed the parents to attend a February 28 meeting at the County Courthouse to "finalize the paperwork for the informal adjustment." A.II.19, 41 (letter). Court personnel advised the assembled parents and minors that in addition to the re-education course, for which they would have to pay $100, the juveniles would be on probation for at least six months and would be subject to suspicionless drug testing during that period. A.II.19-20, 146-48.

E. Skumanick's Re-education Program

Skumanick's responses to parents' questions about the nature and cost of the re-education program changed over time. A.II.17. While the February 5 letter stated that the course would run six to nine months, at the meeting Skumanick told the parents it would take place for two hours per week over a five-week period. *Id.* Skumanick initially said the course would cost $150 but then reduced it to $100. *Id.*

In terms of course content, Skumanick indicated during the February 12 meeting that they were still working on the details. A.II.123.

Details of the re-education program emerged subsequent to the February 12 meeting. A.II.124-27. An outline of the course, which is divided into a "Female Group" and a "Male Group," is at A.II.34-40. Among other things, the course directed the girls to "[g]ain an understanding of how [their] actions were wrong," "[t]o gain an understanding of what it means to be a girl in today's society, both advantages and disadvantages," and "[i]dentify non-traditional societal and job roles." A.II.35-37.

Every parent and minor, except the three families represented in this action, acceded to Skumanick's demands, under threat of felony prosecution, and accepted the informal adjustment. A.II.151-52. Skumanick has steadfastly maintained, even after Plaintiffs filed this action, that he legally could and would charge any girls who refused his demands. A.I.8, 22 n.5; A.II.141-42, 154-55. On March 25, 2009, the three holdout girls and their parents filed this civil rights action in U.S. District Court for the Middle District of Pennsylvania seeking to enjoin Skumanick from bringing charges against the girls if they and their parents refused Skumanick's demands. After holding an evidentiary hearing and allowing Skumanick to file a responsive

brief, on March 30 the District Court granted the requested injunction. This appeal followed.

SCOPE AND STANDARD OF REVIEW

In First Amendment cases, such as this, the Court's review of appeals from grants of preliminary injunctions is plenary,[5] but the government has the burden of proof and persuasion to demonstrate the constitutionality of its action.[6]

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[5] *Child Evangelism Fellowship, Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 524 (3d Cir. 2004).

[6] *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816-17 (2000).

SUMMARY OF ARGUMENT

Skumanick had no probable cause to charge the Plaintiff girls with felony child pornography for appearing in innocuous digital photos topless or clad in underwear. Under Pennsylvania law, the photos could not be considered child pornography in terms of their content or context. Furthermore, Pennsylvania law regards minors portrayed in pictures as victims rather than perpetrators. Finally, the pictures could not be criminalized without running afoul of the First Amendment. For all of these reasons Skumanick's threat to charge the girls criminally was baseless and was made only to coerce the girls to participate in a re-education program of his design.

The Plaintiffs, however, have a constitutional right to refuse to participate in the re-education program: The girls have a First Amendment right not to be forced to mouth the views that Skumanick believes appropriate for "girls in today's society" and their parents have a Fourteenth Amendment right to direct their daughters' education, which includes the right not to subject them to a program that reflects Skumanick's views of what it means to be female in today's society. The District Court correctly concluded that under the circumstances Skumanick's threat to file baseless criminal charges against the girls, unless they and their parents acceded to his demands, represented unconstitutional retaliation.

The District Court's refusal to abstain from issuing a preliminary injunction enjoining Skumanick from carrying out his threatened prosecution was correct because there was (and still is) no ongoing state proceeding that would warrant abstention under *Younger v. Harris*. Skumanick's argument that "informal adjustments" commence proceedings under Pennsylvania's Juvenile Act, which was raised for the first time in this Court, must be rejected. The argument mis-states Pennsylvania law regarding commencement of juvenile proceedings. And informal adjustments carry none of the "indicia of judicial proceedings" that would permit abstention under *Younger*.

Finally, Skumanick's attempt to shield from this Court's review his efforts to coerce Marissa and Grace into the re-education program over a photo similar to many advertisements found in Sunday newspapers must be rejected. Although Skumanick represented in his brief to this Court that he did not intend to prosecute Marissa and Grace, he adopted that position for this first time in this appeal only after his efforts were enjoined by the District Court, and he retains the option of renewing the attempt at any time. He thus has not met the heavy burden to show that voluntary cessation moots the controversy.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DETERMINED THAT SKUMANICK'S THREATENED PROSECUTION WOULD VIOLATE APPELLEES' CONSTITUTIONAL RIGHTS.

The U.S. Constitution prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for exercising her constitutional rights.[7] Such retaliation "offends the Constitution [because] it threatens to inhibit exercise of the protected right."[8] In this case, Skumanick has threatened the Appellees with criminal prosecution in retaliation for asserting their constitutional right to refuse to participate in the re-education program. If not enjoined, his threat to prosecute the girls will cause irreparable harm: given the choice between participating in an unconstitutional re-education program or having

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[7] *Hartman v. Moore*, 547 U.S. 250, 256 (2006) ("the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out"); *Izen v. Catalina*, 398 F.3d 363, 367 n.5 (5th Cir. 2005) ("Any form of official retaliation for exercising one's freedom of speech, including prosecution, threatened prosecution, bad faith investigation, and legal harassment, constitutes an infringement of that freedom.") (quoting *Smith v. Plati*, 258 F.3d 1167, 1176 (10th Cir. 2001)); *Losch v. Parkesburg*, 736 F.2d 903, 907-08 (3d Cir. 1984) ("institution of criminal action to penalize the exercise of one's First Amendment rights is a deprivation cognizable under § 1983"); *see also Anderson v. Davila*, 125 F.3d 148, 162 (3d Cir. 1997) ("official retaliation for the exercise of *any* constitutional rights creates an actionable claim under Section 1983") (emphasis in original).

[8] *Hartman*, 547 U.S. at 256 (citation and internal quotation omitted).

to defend themselves against baseless felony child-pornography charges in state court, the Appellees will surrender their rights rather than subject themselves and their daughters to a criminal prosecution, regardless of the merit of the underlying charges.

In putting the parents and their daughters to such a choice, Skumanick has abused his prosecutorial authority by using the threat of baseless criminal charges to coerce Appellees to relinquish their constitutional right to opt out of his re-education program. Skumanick's threats thus satisfy this Court's three-part test for unconstitutional retaliation. First, the parents and their daughters have asserted a First and Fourteenth Amendment right to refuse to participate in the re-education program. Second, Skumanick responded to the assertion of those rights with threats to prosecute the girls for child pornography. And third, the threatened charges are not supported by probable cause, so Skumanick's only purpose for making the threat is to coerce the parents and their daughters to relinquish their constitutional rights.[9]

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[9] *See Eichenlaub v. Twp. of Indiana*, 385 F.3d 274, 282 (3d Cir. 2004) (To succeed on claim of unconstitutional retaliation, "Plaintiff must prove that (1) that he engaged in constitutionally-protected activity; (2) that the government responded with retaliation; and (3) that the protected activity caused the retaliation".).

A. THE FIRST AND FOURTEENTH AMENDMENTS PROTECT APPELLEES' DECISION NOT TO PARTICIPATE IN THE RE-EDUCATION PROGRAM.

Skumanick has no authority to compel the girls to participate in the re-education program. The girls' parents, on the other hand, have the authority, as part of their Fourteenth Amendment right to direct the education of their children, to refuse permission for their daughters to participate in the program because they find the content objectionable. And the girls have the right, under the First Amendment, to refuse to participate in the program because it would compel them to profess beliefs they do not hold. Because both the parents and their daughters have asserted a constitutional right to refuse to participate in the re-education program, they satisfy the first prong of this Court's retaliation test.

1. The District Court Correctly Held that the Parents Have Asserted a Constitutional Right to Direct the Education of their Children in Refusing to Permit their Daughters to Participate in the Re-Education Program.

This Court recently explained that "the right of parents to care for and guide their children is a protected fundamental liberty interest [that] is deeply rooted in this Nation's history and tradition."[10] That fundamental liberty interest is "sheltered by

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[10] *Anspach v. City of Philadelphia*, 503 F.3d 256, 261 (3d Cir. 2007) (citations and interior quotations omitted); *see also, e.g.*, *Troxel v. Granville*, 530 U.S. 57, 66 (2000); *Gruenke v. Seip*, 225 F.3d 290, 303-04 (3d Cir. 2000).

the Fourteenth Amendment against the State's unwarranted usurpation, disregard or disrespect"[11] and "includes the right of parents to 'establish a home and bring up children' and 'to control the education of their own.'"[12] The parents' refusal to send their daughters to a re-education program with which they disagree is an assertion of their Fourteenth Amendment right to control the education of their children.

The District Court found that all of the parent plaintiffs had alleged that being compelled to send their daughters to the re-education program would violate their right to direct their children's education. A.I.19. The District Court noted that Mary Jo Miller did not want her daughter, Marissa, to attend the program because she objected to a requirement that participants write an essay describing "what she did wrong and how it affected the victim in the case." *Id.* Ms. Miller testified that she believed her daughter had done "nothing wrong" and that she considered her daughter to be the victim of whoever sent out the photograph.[13] Requiring Marissa

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[11] *Gruenke*, 225 F.3d at 303-04 (quoting *M.L.B v. S.L.J.*, 519 U.S. 102, 116 (1996)).

[12] *Troxel*, 530 U.S. at 65 (citation and internal quotation omitted). *See also, Gruenke*, 225 F.3d at 307 ("it is the parents' responsibility to inculcate moral standards, religious beliefs, and elements of good citizenship") (citations and internal quotation omitted).

[13] *Id.* When Ms. Miller first saw the picture, near the time it was taken, she joked that the girls were "goof balls." A.II.119.

to write the required essay would squarely contradict the beliefs that Ms. Miller wishes to instill in her daughter.

The parents also objected to the course's lessons in "understanding of what it means to be a girl in today's society" and "[i]dentify[ing] non-traditional societal and job roles." A.II.22-23, 127-28. The parents believe that these "lessons" will contradict the values they have endeavored to impart to their daughters given that they were developed, at least in part, by a man who stated publicly that a teen-age girl who voluntarily posed for a photo while wearing a swimsuit violated Pennsylvania's child pornography statute. The parents have a constitutionally protected right to choose not to expose their daughters to that sort of instruction. Indeed, even in a compulsory-education setting, parents' rights to inculcate fundamental values in their children must be respected.[14] And where there is no legal authority for compelling parents to enroll their children in an educational program, as

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[14] *See C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 183 (3d Cir. 2005) ("It is not educators, but parents who have primary rights in the upbringing of children. School officials have only a secondary responsibility and must respect these rights."); *see also, e.g.*, *Rhoades v. Penn-Harris-Madison School Corp.*, 574 F. Supp. 2d 888, 899 (N.D. Ind. 2008) ("School-sponsored counseling and psychological testing that pry into private family activities can overstep the boundaries of school authority and impermissibly usurp the fundamental rights of parents to bring up their children, as they are guaranteed by the Constitution."); *Merriken v. Cressman*, 364 F. Supp. 913, 922 (E.D. Pa. 1973) (questionnaire probing family relationships by school authorities held unconstitutional).

is the case here, the parents have an unencumbered right to prevent their daughters from participating in a program that purports to impart messages with which they strongly disagree.

2. The District Court Correctly Held that the Girls Have Asserted a First Amendment Right to be Free from Compelled Speech in Refusing to Participate in the Re-Education Program.

"[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all."[15] Thus, "[i]t is settled law that '[g]overnment action that ... requires the utterance of a particular message favored by the Government, contravenes th[e] essential right' to refrain from speaking protected by the First Amendment."[16] Skumanick has stated, before and during these proceedings, that he will prosecute the girls unless they enroll in his re-education program and each write an essay "admit[ting] that her actions that could lead to the charges were wrong." App. Br. at 19; *see also*, A.I.8, 22 n.5; A.II.141-42, 154-55. The girls have refused to comply with that demand because they do not agree that their actions in posing for the photographs were wrong. Like students who refuse to recite the pledge in public

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[15] *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

[16] *C.N.*, 430 F.3d at 187 (citation and internal quotation omitted).

schools[17] or drivers who refuse to display state-mandated license plate messages with which they disagree,[18] the girls cannot be coerced by a government official to profess that being photographed in a bathing suit, in underwear, or topless is wrong.

Skumanick's attempt to paint the essay requirement as no different than the admission of guilt that is mandated for pre-trial diversionary programs such as Accelerated Rehabilitative Disposition totally ignores the gravamen of the Appellees' argument in the District Court and before this Court, which is that the lack of probable cause to support child pornography charges against the girls demonstrates that Skumanick is using the threat of prosecution to accomplish through coercion what he cannot accomplish through other, legal means. Without probable cause to support his threat of criminal charges, Skumanick has no authority to prosecute the girls, much less offer them a deal in exchange for writing an essay about what they did wrong. That he may personally believe that the girls' participation in the re-education program would be beneficial to them is of no import to the constitutional analysis, for the First Amendment right against compelled speech "does not depend upon whether as a voluntary exercise we would think it to

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[17] *See West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *Circle Sch. v. Pappert*, 381 F.3d 172, 182-83 (3d Cir. 2004).

[18] *Wooley*, 430 U.S. at 713.

be good, bad or merely innocuous."[19] Forcing the girls to participate in a re-education program, a "central part" of which[20] is the requirement that they write an essay expressing a viewpoint with which they disagree, "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[21] The girls' refusal to comply thus constitutes protected speech.

B. THE THREATENED CRIMINAL PROSECUTION FOR APPELLEES' REFUSAL TO PARTICIPATE IN THE RE-EDUCATION PROGRAM CONSTITUTES AN ADVERSE ACTION.

Adverse actions are those that would deter a person of ordinary firmness from exercising her constitutional rights.[22] "Where a prosecution is a likely possibility ... speakers may self-censor rather than risk the perils of a trial. There is a potential for extraordinary harm and a serious chill upon protected speech."[23] The threat of

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[19] *Barnette*, 319 U.S. at 634.

[20] App. Br. at 19.

[21] *Barnette*, 319 U.S. at 642.

[22] *See, e.g., Mitchell v. Horn*, 318 F.3d 523, 530 (3d Cir. 2003).

[23] *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 670-71 (2004); *see also Blankenship v. Manchin*, 471 F.3d 523, 531 (4th Cir. 2006) (deterrence likely where state actor has "'engaged the punitive machinery of the government in order to punish'" a person for speaking out) (quoting *Garcia v. City of Trenton*, 348

criminal prosecution would deter a person of ordinary firmness from exercising his constitutional rights,[24] particularly when, as in this case, the threat of prosecution has been made repeatedly – including in his testimony before the trial court – by a person with the authority to file criminal charges.[25] Skumanick's threat to prosecute the girls if they refuse to participate in the re-education program is plainly an adverse action. That threat is also an adverse action with respect to the girls' parents, as a

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F.3d 726, 729 (8th Cir. 2003)); *McCormick v. City of Lawrence*, 253 F. Supp. 2d 1172, 1196 (D. Kan. 2003) ("the threat of arrest by a police officer is exactly the sort of act that would deter a person of ordinary firmness from exercising his or her First Amendment right to orally challenge that officer"); *O'Malley v. Lukowich*, No. 3:08-CV-0680, 2008 WL 4861477, *8 (M.D. Pa. Nov. 7, 2008) ("The initiation of criminal charges and subsequent arrest constitute conduct that would deter a person of ordinary firmness from exercising his constitutional rights.") (citing *Blankenship*, 471 F.3d at 531).

[24] *See Izen*, 398 F.3d at 367 n.5 ("Any form of official retaliation for exercising one's freedom of speech, including prosecution, threatened prosecution, bad faith investigation, and legal harassment, constitutes an infringement of that freedom.") (quoting *Smith v. Plati*, 258 F.3d at 1176); *see also, e.g.*, *Hartman*, 547 U.S. at 256 ("[T]he First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out."); *Losch*, 736 F.2d at 907-08 ("institution of criminal action to penalize the exercise of one's First Amendment rights is a deprivation cognizable under § 1983").

[25] *See, e.g.,* A.I.22 n.5 (District Court explains that during hearing on temporary restraining order, Skumanick "affirmed that he planned to bring charges under 18 Penn. Stat. § 6312 for child pornography and 18 Penn. Stat. § 7501 for criminal use of a communication device if the girls refused to participate in the program.").

prosecutor's threat to file charges against one's minor children in retaliation for the parent's exercise of constitutional rights would deter a parent of ordinary firmness from exercising those rights.

C. SKUMANICK'S THREAT TO PROSECUTE THE GIRLS IS RETALIATION FOR THEIR AND THEIR PARENTS' ASSERTION OF THEIR CONSTITUTIONAL RIGHT NOT TO PARTICIPATE IN THE RE-EDUCATION PROGRAM.

Skumanick has threatened to charge the girls under 18 Pa. Cons. Stat. § 6312, Pennsylvania's child-pornography statute, unless they participate in his re-education program. Because he lacks probable cause to support that charge, the threatened prosecution is not a genuine attempt to enforce the law, but is instead designed to force the girls to "attend a rehabilitative class where they could be educated to understand" Skumanick's disapproval of their actions. App. Br. at 8. Without probable cause, then, Skumanick's threat of criminal charges can only be viewed as retaliatory, as its only purpose is to coerce the Appellees to surrender their constitutional rights.[26]

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[26] *See Hartman*, 547 U.S. at 256 ("Some official actions ... might well be unexceptionable if taken on other grounds, but when nonretaliatory grounds are in fact insufficient to provoke the adverse consequences, we have held that retaliation is subject to recovery as the but-for cause of official action offending the Constitution.").

"[P]robable cause is defined in terms and circumstances sufficient to warrant a prudent man in believing that the suspect had committed or was committing a crime."[27] The Court must determine whether the objective facts available to Skumanick are sufficient to justify a reasonable belief that the girls had violated Pennsylvania's child pornography statute, 18 Pa. Cons. Stat. § 6312.[28] The facts demonstrate that the conduct for which Skumanick has threatened criminal charges does not violate the Pennsylvania's child pornography statute, nor could it consistent with the First Amendment. First, the conduct of appearing in the photos in question fails to state an offense, either under the child-pornography statutes that Skumanick invokes or under other potentially relevant Pennsylvania laws. And second, the conduct could not, consistent with the guarantees of the First Amendment to the U.S. Constitution and Article I, Section 7 of the Pennsylvania Constitution, be made a crime, as the photos are constitutionally protected images. Because the conduct for which Skumanick has threatened prosecution is not illegal under Pennsylvania law, any criminal charges filed would not be supported by probable cause.

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[27] *Merkle v. Upper Dublin Sch. Dist.*, 211 F.3d 782, 789 (3d Cir. 2000).

[28] *Id.*

1. The Facts Do Not Support a Reasonable Belief that the Girls Committed a Crime by Appearing in the Photos.

Defendant Skumanick has threatened to charge the plaintiffs under 18 Pa. Cons. Stat. § 6312, Pennsylvania's anti-child-pornography statute. But § 6312 is inapplicable, on its face, for two reasons: (1) the images at issue do not meet the statutory definition of child pornography; and (2) the conduct for which Skumanick threatens to charge the girls, *i.e.*, allowing themselves to be photographed, is not a crime under Pennsylvania law.

a. The Two Photos Do Not Fall within the Statutory Definition of Child Pornography.

Pennsylvania's anti-child-pornography statute does not, by its plain terms, apply to the photographs of the girls identified by Skumanick. The statute, 18 Pa. Cons. Stat. § 6312, entitled "Sexual abuse of children," applies to three possible scenarios: images depicting (1) sexual activity; (2) lewd exhibition of genitals; or (3) "nudity if such nudity is depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction." None of these definitions applies to the two photographs of the three girls.

Skumanick contends that the photo of Nancy Doe depicts a prohibited sexual act under the third scenario identified in the sexual abuse statute, 18 Pa. Cons. Stat.

§ 6312.[29] He bases that contention solely on the content of the photo itself with no evidence – apart from his self-serving statement that "[t]he photographs were not disseminated to their Tunkhannock school mates for any reason other than sexual gratification," App. Br. at 15 – concerning the purpose for which the photo was taken, who took the photo, or who disseminated it.[30] And while the Pennsylvania Supreme Court has said that "an individual of ordinary intelligence, not a mind reader or a genius, can identify whether a photograph of a nude child depicts 'nudity' for the purpose of sexual stimulation or gratification,"[31] nothing in the content of the photo – which depicts Nancy Doe emerging from the shower with a

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[29] Skumanick appears to concede in his brief to this Court that his threats to prosecute Marissa and Grace for child pornography are not supported by probable cause. He also appears to concede that the photo of Nancy Doe does not fit within the first two definitions of prohibited sexual act under 18 Pa. Cons. Stat. § 6312. The first definition does not apply because the photo does not depict a sexual act. The second definition, "lewd exhibition of the genitals," also does not apply because, under Pennsylvania law, the term "genitals" does not include women's breasts. *See Commonwealth v. Dewalt*, 752 A.2d 915, 918 (Pa. Super. 2000) ("genitals" defined as vagina, labia or vulva).

[30] Although Skumanick argues that "Ms. Doe did not appear at the hearing before the Lower Court to deny that she was involved in posing for the photographs and assisting in their dissemination," that has no bearing on whether Skumanick has probable cause to prosecute her for child pornography. Skumanick testified that his threatened prosecution was not based on evidence of distribution. A.II.138.

[31] *Commonwealth v. Davidson*, 938 A.2d 198, 214 (Pa. 2007).

towel wrapped around her body just below her breasts, which are not covered – suggests that it was taken for an illicit purpose.[32]

A construction of the statute's prohibition against "nudity if such nudity is depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction" that would be broad enough to include the photo of Nancy Doe would violate the Pennsylvania Supreme Court's admonition in *Commonwealth v. Davidson* that 18 Pa. Cons. Stat. § 6312 must be applied strictly and narrowly to avoid fatal overbreadth.[33] Relying on the U.S. Supreme Court's

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[32] *Compare Lesoine v. County of Lackawanna*, 77 Fed. Appx. 74, 78 (3d Cir. 2003) (non-precedential) (images taken by professional photographer of teen-age stepdaughter and stepdaughter's two teen-age female friends standing nude under outdoor shower did not violate child-pornography statute) *with Commonwealth v. Savich,* 716 A.2d 1251, 1256-57 (Pa. Super. 1998), *alloc. denied*, 558 A.2d 457 (Pa. 1999) (discussed in *Davidson* at 938 A.2d at 211-212) (images taken by man who surreptitiously videotaped girls changing in a beach-house bathroom depicted nudity for purpose of sexual stimulation or gratification); *Commonwealth v. Tiffany,* 926 A.2d 503, 512 (Pa. Super. 2007) (discussed in *Davidson* at 938 A.2d at 214) (photograph in which naked man posed with smiling naked boys displaying their genitals depicted nudity for purpose of sexual stimulation or gratification).

[33] *Davidson,* 938 A.2d at 214-15.

decisions in *New York v. Ferber*,[34] *Osborne v. Ohio*,[35] and *Ashcroft v. Free Speech Coalition*,[36] the *Davidson* court acknowledged that the phrase is "not so broad as to proscribe all depictions of minors in a state of nudity" and in fact "does not reach innocent family or artistic images of minors in a state of simple nudity".[37] An individual of ordinary intelligence – and unpolluted mind – would view the photo of Nancy Doe as an innocent artistic image of a minor in a state of simple partial nudity, not a sexually provocative image intended to titillate. A reasonable prosecutor would recognize that the photo does not provide probable cause to charge the minor depicted in it with child pornography.

Indeed, this Court has previously ruled that a woman's possession of pictures of three teen-age minors standing nude under an outdoor shower "does not provide probable cause that she was engaging in illegal conduct under federal or state law."[38] If a photo of three completely naked teen-age girls standing under a shower is not child pornography under Pennsylvania law, then a photo of a single teen-age

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[34] 458 U.S. 747 (1982).

[35] 495 U.S. 103 (1990).

[36] 535 U.S. 234 (2002).

[37] *Davidson,* 938 A.2d at 214-15 (citing *Osborne*, 495 U.S. at 113).

[38] *Lesoine*, 77 Fed. Appx. at 78.

girl emerging from the shower with a towel wrapped around her waist certainly cannot support criminal charges against the minor depicted in the photo.[39]

b. A Minor's Act of Appearing in Revealing Photographs Has not Been Criminalized by § 6312.

Anti-child-pornography laws, generally, are designed to protect minors against exploitation and abuse,[40] and § 6312 is no exception.[41] The victims of child pornography are the minors shown in the images. Accordingly, § 6312 directs the criminal prohibitions at those who victimize the minor subjects of the photos. The statute makes it illegal to depict a minor, or cause a minor to be depicted when engaged in a prohibited sexual act, to disseminate such depictions, or to possess such depictions. §§ 6312(b)-(d). The statute does not punish the subject depicted in the prohibited images; they are considered the victims and the statute seeks to

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[39]Appellees have filed a motion asking this Court to take judicial notice of the photographs at issue in *Lesoine*. The pictures are held under seal, but Appellees have not sought to unseal them. Appellees merely seek to allow the judges in this case to compare Appellees' two photos with the ones already adjudged not to violate § 6312 in *Lesoine*.

[40] *See, e.g., Free Speech Coalition*, 535 U.S. at 249-251; *id.* at 250 (*Osborne* "anchored its holding in the concern for the participants, those whom it called the 'victims of child pornography'").

[41] *See Davidson*, 938 A.2d at 219 ("each image of child pornography victimized each child and subjected the child to 'precisely the type of harm the statute seeks to prevent'") (citation omitted).

protect them. Even a sixteen-year-old minor who was knowingly videotaped having consensual sex with an adult is regarded as a victim of child pornography by the Pennsylvania courts: "that child too should be afforded the same protection" as a non-consenting victim.[42]

In this case Skumanick is threatening to prosecute Marissa, Grace, and Nancy Doe for being the subjects of the pictures, not for taking, disseminating or even possessing them. In threatening to prosecute the *subjects* of the photographs, Skumanick has moved well beyond the terms of the statute, or of any recorded application of it. He seeks to prosecute the alleged victims of the photos.

In his testimony before the District Court, Skumanick advanced the remarkable argument that by acquiescing in becoming the subject of the photographs, Marissa, Grace, and Nancy Doe have become "accomplices" in the violation of § 6312 by the individuals who took and disseminated the photos, pursuant to 18 Pa. Con. Stat. § 306 (2008).[43] In other words, Skumanick claims that the subject of child pornography should be prosecuted as an "accomplice" in her own abuse, an argument that is, to the best of counsel's knowledge, entirely without precedent or support in Pennsylvania law. Appellees' counsel have been unable to

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[42] *Commonwealth v. Kitchen*, 814 A.2d 209, 214 (Pa. Super. 2002).

[43] *See* A.II.146.

discover *any* reported case in which the depicted minor, who is to be protected by § 6312, has been charged as an "accomplice" in the alleged crime, any more than victims of statutory rape are held to be "accomplices" because of their lack of resistance.

Skumanick's argument flies in the teeth of Pennsylvania's accomplice-liability statute, 18 Pa. Cons. Stat. § 306(f)(2008), which provides that "a person is not an accomplice in an offense committed by another person if: (1) he is a victim of that offense; [or] (2) the offense is so defined that his conduct is inevitably incident to its commission." As we have noted, the law of Pennsylvania regards minors depicted in child pornography as victims of the offense; to charge them as accomplices is simply at odds with the statutory exception of § 306(f)(1).

So, too, the offenses of producing, distributing or possessing child pornography cannot occur in the absence of abuse of a real child in the making of the images.[44] The appearance of minors in the depiction is an "inevitable incident" of the offense. Yet while the legislature has made it illegal to depict minors, it has

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[44] *See Free Speech Coalition,*515 U.S. at 250-51; *Davidson*, 938 A.2d at 201 n.1.

not made it illegal for minors to allow themselves be subjected to depiction. Under these circumstances, accomplice liability is precluded by § 306(f)(2).[45]

In sum, while the Pennsylvania General Assembly has made it illegal to depict minors in child pornography, it has not made it illegal for minors to allow themselves to be subjected to such depiction. The Commonwealth has a strong interest in the enforcement of laws that its legislature has passed, but it has no interest (and can constitutionally have no interest) in prosecuting non-existent crimes.[46]

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[45] *Commonwealth v. Fisher*, 627 A.2d 732, 733 (Pa. Super. 1993).

[46] Although Skumanick suggested in his testimony before the trial court and in his Brief to this Court that he may seek to bring "other appropriate charges" against the girls, including open lewdness, 18 Pa. Cons. Stat. § 5901, public indecency, or "criminal use of a communications facility," 18 Pa. Cons. Stat. § 7512, *see* App. Br. at 12; A.II.142, he does not have probable cause to support those charges, either. With respect to "open lewdness," the acts at issue involve neither public display to those likely to be affronted or alarmed, *see Commonwealth v. Allsup*, 392 A.2d 1309, 1311 (Pa. 1978), nor public nudity or sexuality, *see Commonwealth v. Williams*, 574 A.2d 1161, 1163 (Pa. Super. 1990), and thus do not satisfy the requisite elements of the offense. Skumanick has failed to identify any offense under Pennsylvania law labeled "public indecency." Skumanick clearly lacks probable cause to charge the girls with a nonexistent crime. Finally, § 7512, "criminal use of a communications facility," applies only to predicate felonies, so the misdemeanor of "open lewdness," even if it did apply, cannot provide the predicate. Since the images at issue do not come within the terms of the § 6312 felony prohibition, that provision also cannot support a prosecution for this crime. *See Commonwealth v. Moss,* 852 A.2d 374, 383-84 (Pa. Super 2004).

2. The Girls' Conduct Cannot Be Criminalized Without Violating the Constitutional Guarantees of Free Expression.

The process of taking a photograph, like painting a self portrait, writing in a diary, drafting personal correspondence, or mounting a theatrical production, is a mode of expression that is protected the First Amendment.[47] Any effort to take such expression outside of First Amendment protection, by for example labeling it child pornography, must be narrowly drawn to avoid punishing more speech than necessary to accomplish the government's goals.[48] Both the Pennsylvania and U.S. Supreme Courts have recognized the danger that broad prohibitions of child pornography will have the effect of impermissibly punishing constitutionally protected expression. The U.S. Supreme Court has recognized that pictures of nude

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[47] *See, e.g., Tunick v. Safir*, 228 F.3d 135, 137 (2d Cir. 2000) (upholding injunction against interference in photographer's photo shoot of nude models); *see also, e.g., Gilles v. Davis*, 427 F.3d 197, 212 n.14 (3d Cir. 2005); *Bery v. City of New York*, 97 F.3d 689, 695-96 (2d Cir. 1996); *Whiteland Woods, L.P. v. Twp. of West Whiteland*, 193 F.3d 177, 180-81 (3d Cir. 1999).

[48] *See Free Speech Coalition*, 535 U.S. at 251 ("where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment"); *Ferber*, 458 U.S. at 764-65 (to meet demands of Constitution, prohibitions on child pornography "must be adequately defined by the applicable state law ... the nature of the harm to be combated requires that the state offense be limited to works that visually depict sexual conduct by children below a specified age").

minors, without more, are expression protected under the First Amendment.[49] And the Supreme Courts of both the United States and Pennsylvania have approved child-pornography restrictions only when their terms do not reach innocuous images whose production does not involve the abuse and exploitation of children.[50]

Because the photos depicting the girls contain, at most, innocent nudity in the case of Nancy Doe and no nudity in the case of Marissa and Grace, and involved no abuse of children in their production, they cannot be proscribed under the First Amendment. Although Skumanick may view the images of Marissa, Grace, and Nancy Doe as immoral or inappropriate, the state may not suppress nude images

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[49] *Osborne*, 495 U.S. at 112 ("depictions of nudity, without more, constitute protected expression"); *Ferber*, 458 U.S. at 765 n.18 ("[N]udity, without more[,] is protected expression."); *accord Lesoine*, 77 Fed. Appx. at 78.

[50] *See Free Speech Coalition*, 535 U.S. at 251 (invalidating prohibition on "virtual" child pornography created by computer simulation on ground that, unlike pornography produced through use of actual children, images were not themselves the "product of sexual abuse"); *Osborne*, 495 U.S. at 113-14 (upholding statute that punished materials depicting minors "in a state of nudity" on basis of state-court construction that limited the prohibited exhibition to nudity that "constitutes a lewd exhibition or involves a graphic focus on the genitals" because limitation "avoided penalizing persons for viewing or possessing innocuous photographs of naked children"); *Ferber*, 458 U.S. at 764-65 (upholding state statute prohibiting child pornography that proscribed specifically defined sexual acts); *Davidson*, 938 A.2d at 214-15 (upholding Section 6312 because its "restrictions are not so broad as to proscribe all depictions of minors in a state of nudity").

simply on the basis of official opprobrium.[51] "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them."[52]

For all of these reasons, Skumanick lacks probable cause to charge the girls with child pornography or any other crime stemming from the photos.

3. Because There Is No Probable Cause for the Criminal Charges, Skumanick's Threat to Prosecute the Girls for Child Pornography Is Based Solely on a Retaliatory Motive.

A plaintiff alleging retaliation must demonstrate a causal connection between a government official's improper motive and the resulting harm.[53] In a retaliatory prosecution case, "[d]emonstrating that there was no probable cause for the underlying criminal charge will tend to reinforce the retaliation evidence and show that retaliation was the but-for basis for instigating the prosecution."[54] The lack of

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[51] *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 (1975) (striking down city ordinance that banned display of "any motion picture, slide, or other exhibit in which the human male or female bare buttocks [or], human female bare breasts... are shown" where the images were not "obscene even as to minors").

[52] *Id.* at 213-24.

[53] *See Hartman*, 547 U.S. at 259.

[54] *Id.* at 261. In *Hartman*, the Supreme Court held that plaintiffs alleging retaliatory prosecution generally have to demonstrate that there was no probable

probable cause to support any criminal charges against Marissa, Grace, and Nancy related to the photographs demonstrates that Skumanick's threats to prosecute the girls for child pornography are designed not to accomplish the lawful purpose of bringing those who violate the law to justice but to coerce the girls and their parents to do something that they have a constitutional right to refuse to do: participate in a program devised by Skumanick to impart his own views of appropriate female behavior.

To be sure, Skumanick can, consistent with the Constitution, present those views as part of a ***voluntary*** educational program. But he cannot do what he is attempting to do here, which is to use his prosecutorial authority to threaten criminal charges against those girls who decline to participate without probable cause to do so. Such threats are not only an abuse of power, but also unconstitutional retaliation as their purpose is to inhibit the girls and their parents from exercising their First and Fourteenth Amendment rights.

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cause for the prosecution and, since prosecutors are usually immune from liability for the decision to prosecute, that a "nonprosecuting official ... induced the prosecutor to bring charges that would not have been initiated without his urging." *Id.* at 262. In this case, however, the Appellees seek injunctive relief against the prosecutor himself, so the "government agent allegedly harboring the animus is also the individual allegedly taking the adverse action." *Id.* at 259.

II. THE DISTRICT COURT HAD THE AUTHORITY TO ENJOIN SKUMANICK'S *THREATENED* CRIMINAL PROSECUTIONS, AND PROPERLY DECLINED TO ABSTAIN UNDER *YOUNGER V. HARRIS.*

Federal courts have both the jurisdiction and the authority to enjoin state prosecutors from bringing criminal charges when those charges are baseless and used to threaten important constitutional rights, which is the situation in this case. Interests in equity, comity and federalism may guide a federal court to abstain from interfering in ongoing state proceedings that are judicial in nature, but where, as here, there are no such ongoing proceedings the Court cannot abstain under *Younger v. Harris*, 401 U.S. 37 (1971). Neither argument advanced by Skumanick – that no proceeding had yet commenced so the court's interference was premature or that "informal adjustments" commence proceedings under the Juvenile Act – supports his abstention claim. Finally, Skumanick's attempt to preclude this Court from reviewing his actions with respect to Marissa and Grace should be rejected because Skumanick has not met the heavy burden of showing that voluntary cessation moots the case.

A. FEDERAL COURTS CAN AND MUST EXERCISE THEIR JURISDICTION TO ISSUE DECLARATORY AND INJUNCTIVE RELIEF, EVEN AGAINST PROSECUTORS, WHEN THOSE PROSECUTORS THREATEN TO BRING BASELESS CRIMINAL CHARGES THAT WILL IRREPARABLY HARM IMPORTANT CONSTITUTIONAL RIGHTS.

Skumanick claims that the federal courts must defer to his "prosecutorial discretion" by leaving him free to bring prosecutions to suppress protected images that he views as "provocative" and to file retaliatory charges against those who refuse to acquiesce in his efforts to reeducate the young women of Wyoming County. This turns the constitutional scheme on its head. Prosecutors, like other participants in a criminal justice system governed by the rule of law and the Constitution, do not have discretion to bring baseless charges to suppress constitutionally protected conduct.[55] Nor does the Constitution permit prosecutors

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[55] *Hartman*, 547 U.S. at 256 ("the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, *including criminal prosecutions*, for speaking out") (emphasis added); *United States v. P.H.E., Inc.*, 965 F.2d 848, 853 (10th Cir. 1992) ("[A] prosecution motivated by a desire to discourage expression protected by the First Amendment is barred and must be enjoined or dismissed, irrespective of whether the challenged action could possibly be found to be lawful.").

to invent new versions of criminal statutes to govern conduct they find objectionable.[56]

Under the law of Section 1983, prosecutors are entitled to absolute immunity from damage actions for their exercise of discretion; they are not entitled to immunity from injunctive relief to prevent them from carrying out unconstitutional prosecutions.[57] Putative plaintiffs need not "await the institution of state-court proceedings against them in order to assert their federal constitutional claims."[58] Accordingly, prosecutors like Skumanick who abuse their prosecutorial discretion by threatening to file charges in violation of citizens' constitutional rights can be enjoined from carrying out those unconstitutional actions.

In fact, a generation of Supreme Court precedents instructs that federal courts, in their role as guarantors of people's constitutional rights, have the authority under proper circumstances to enjoin state prosecutors from proceeding with

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[56] *Cf. Marks v. United States*, 430 U.S. 188, 190 (1977) (precluding retroactive application of obscenity standards); *Rabe v. Washington*, 405 U.S. 313, 316 (1972) (per curiam); *Bouie v. City of Columbia*, 378 U.S. 347, 356 (1964).

[57] *Supreme Ct. of Va. v. Consumers Union of U. S., Inc.*, 446 U.S. 719, 736-737 (1980) (internal citations omitted); *accord Martin v. Keitel*, 205 Fed. Appx. 925, 928 (3d Cir. 2006) (non-precedential).

[58] *Supreme Ct. of Va.*, 446 U.S. at 737.

threatened, and even pending, criminal prosecutions.[59] It has long been the law that equitable doctrine "does not prevent federal courts from enjoining state officers 'who threaten and are about to commence proceedings, either of a civil or criminal nature,'" that violate federal constitutional rights.[60] More recent federal appeals courts decisions have affirmed the need and appropriateness of enjoining threatened prosecutions that would abridge First Amendment rights.[61]

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[59] *See, e.g., Dombroski v. Pfister*, 380 U.S. 479, 492 (1965) (reversing district court's refusal to enjoin threatened prosecutions under unconstitutional subversive-activities law); *Steffel v. Thompson*, 415 U.S. 452, 475 (1974) (enjoining threatened prosecution of anti-trespass laws against anti-war protesters); *Allee v. Medrano*, 416 U.S. 802, 815 (1974) (injunction against police threats to prosecute union organizers); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 934 (1975) (injunction against threatened obscenity prosecutions where charges not yet filed); *Wooley,* 430 U.S. at 715 (injunction against threatened prosecution for covering license-plate motto).

[60] *Morales v. T.W.A.*, 504 U.S. 374, 381 (1992) (quoting *Ex parte Young*, 209 U.S. 123, 156 (1908)); *see also MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007) ("where threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat – for example, the constitutionality of a law threatened to be enforced"); *cf. Pennsylvania Pride, Inc. v. Southampton Twp.*, 78 F. Supp. 2d 359, 367 (M.D. Pa. 1999) (enjoining enforcement of unconstitutional ordinance); *Diener v. Reed*, 232 F. Supp. 2d 362, 390 (M.D. Pa. 2002) (same).

[61] *See, e.g., Jean v. Mass. State Police*, 492 F.3d 24, 33 (1st Cir. Mass. 2007) (approving grant of injunction against threatened prosecution); *Mangual v. Rotger-Sabat*, 317 F.3d 45, 69 (1st Cir. 2003) (reversing district court and remanding for injunction against state criminal prosecution that violated First Amendment); *For Your Eyes Alone, Inc. v. City of Columbus*, 281 F.3d 1209, 1220 (11th Cir. 2002) (abstention improper where prosecution commenced after TRO hearing and

It is of course true that under doctrines of "equity, comity and federalism" the federal courts are constrained (but even then not prohibited[62]) from interfering with state prosecutions that have already commenced before state courts.[63] But it is equally well-settled that those important principles "have little

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proceedings on the merits); *Agriesti v. MGM Grand Hotels*, 53 F.3d 1000, 1002 (9th Cir. 1995) (abstention improper where prosecution has not begun).

Skumanick makes a desultory suggestion, *see* App. Br. at 9 and 18, that the prospect of baseless and retaliatory prosecution to punish the exercise of First Amendment rights does not constitute irreparable injury. In fact, Judge Munley was well warranted in his determination that because "plaintiffs here have demonstrated a reasonable likelihood of success on the merits of their First Amendment claims" they have "demonstrated that they face irreparable harm from defendant's threatened actions." A.I.23-25 (citing *Swartzwelder v. McNeilly*, 297 F.3d 228, 241 (3d Cir. 2002) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("'[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury'")); s*ee also* cases cited in notes 23-24, *supra*. Because Skumanick can invoke absolute prosecutorial immunity in any damage action to redress his decision to bring a baseless retaliatory prosecution, the only remedy available to plaintiffs is an injunction.

[62] Even if the necessary three predicates exist, however, "*Younger* abstention is not appropriate if the federal plaintiff can establish that (1) the state proceedings are being undertaken in bad faith or for purposes of harassment or (2) some other extraordinary circumstances exist, such as proceedings pursuant to a flagrantly unconstitutional statute, such that deference to the state proceeding will present a significant and immediate potential for irreparable harm to the federal interests asserted." *Schall v. Joyce*, 885 F.2d 101, 106 (3d Cir.1989) (citing *Middlesex Co. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 435 (1982)).

[63] *See Ankenbrandt v. Richards*, 504 U.S. 689, 705 (1992) ("absent unusual circumstances, a federal court could not interfere with a pending state criminal prosecution").

force in the absence of a pending state proceeding."[64] The reason is that, "[w]hen no state criminal proceeding is pending at the time the federal complaint is filed, federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system; nor can federal intervention, in that circumstance, be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles."[65]

Skumanick has adopted a baseless and patently unconstitutional application of Pennsylvania's child-pornography statute, one in which he has arrogated to himself the authority to prosecute, with second- and third-degree felony charges,

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[64] *Steffel,* 415 U.S. at 462 (citation omitted); *see also FOCUS v. Allegheny Co. Ct. Com. Pl.*, 75 F.3d 834, 843 (3d Cir. 1996) (in case seeking to interfere with state judge's handling of juvenile hearing, *Younger* abstention does not apply when "no ongoing state proceedings" exist).

[65] *Steffel,* 415 U.S. at 462. Even if prosecution had already commenced, there is room for federal intervention to bar retaliatory proceedings that are brought without realistic basis in state law. *See, e.g., Nobby Lobby, Inc. v. Dallas,* 970 F.2d 82, 87-88 (5th Cir. 1992); *Fitzgerald v. Peek*, 636 F.2d 943, 945 (5th Cir. 1981); *Ruscavage v. Zuratt*, 821 F. Supp. 1078, 1083 (E.D. Pa. 1993); *cf. Kugler v. Helfant*, 421 U.S. 117, 126 n.6 (1975) (prosecution brought "in bad faith" if "brought without a reasonable expectation of obtaining a valid conviction"); *Heimbach v. Village of Lyons*, 597 F.2d 344, 346-47 (2d Cir. 1979) (per curiam). As the court observed in *Wilson v. Thompson*, 593 F.2d 1375 (5th Cir. 1979), in the absence of such relief, "State officials disposed to suppress speech could easily do so by bringing oppressive criminal actions pursuant to valid statutes rather than by enacting invalid statutes or using other parts of the state legal machinery, and § 1983 would give no effective relief unless they happen to warn their victims in advance." *Id.* at 1383.

minors whom he believes are posed "provocatively" in photographs, even if they are clothed in underwear and bathing suits and the photos are not lascivious. As will be discussed below, he has not commenced any judicial proceedings; he has merely rattled the intimidating saber that all prosecutors possess. Skumanick's threats to prosecute the girls for images that do not meet the statutory definition of child pornography and that are constitutionally protected forces the girls and their parents to choose "between the Scylla of intentionally flouting [the DA's demands to be placed on probation and attend the education class] and the Charybdis of forgoing what [they] believe to be constitutionally protected activity in order to avoid becoming enmeshed in [a] criminal proceeding."[66]Although Pennsylvania's child-pornography statute is facially constitutional, Skumanick's application of it to the girls' conduct in appearing in the photos is not. Federal courts may enjoin unconstitutional applications of facially valid statutes,[67] and that is precisely what the District Court did in this case.

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[66] *Wooley*, 430 U.S. at 710 (quoting *Steffel,* 415 U.S. at 462).

[67] *See Allee*, 416 U.S. at 815 (Supreme Court has "not hesitated ... to strike down applications of constitutional statutes which we have found to be unconstitutionally applied" when there is no interference with ongoing prosecutions) (citations omitted).

B. THE DISTRICT COURT PROPERLY REFUSED TO ABSTAIN UNDER *YOUNGER* BECAUSE THERE WAS NO ONGOING STATE PROCEEDING OF A JUDICIAL NATURE.

The District Court properly rejected Skumanick's abstention argument. A.I.13-16. Neither *Younger* nor the other abstention doctrines pose a *jurisdictional* bar – they are judicially created doctrines counseling federal courts to refrain from interfering in certain state actions.[68] "'Abstention rarely should be invoked' ... and is only appropriate 'in a few carefully defined situations.'"[69] In this case, Skumanick urges abstention under *Younger v. Harris* and its progeny.[70]

Federal courts may exercise discretion to abstain under the *Younger* doctrine "only when" three requirements are met: (1) there are ongoing state proceedings that are judicial in nature; (2) the state proceedings implicate important state interests; and (3) the state proceedings afford an adequate opportunity to raise federal claims."[71] Even if the proceedings involve "obviously important state interests,"

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[68] *See Ohio Civil Rights Com'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 626 (1986).

[69] *Addiction Specialists, Inc. v. Township of Hampton*, 411 F.3d 399, 408 (3d Cir. 2005) (citations omitted).

[70] App. Br. at 13-14 (relying on *Steffel v. Thompson*, 415 U.S. 452 (1974) and *Mitchum v. Foster,* 407 U.S. 225 (1972)).

[71] *Kendall v. Russell*, 572 F.3d 126, 131 (3d Cir. 2009) (citation omitted).

which satisfies the second prong, that alone is insufficient to permit abstention under *Younger*.[72] The test is conjunctive, so "[a]ll three prongs must be satisfied in order for a federal court to properly abstain from exercising its jurisdiction over a particular complaint."[73] Moreover, *Younger* abstention is not triggered simply because the federal plaintiff could seek the same relief in a state forum: "in no case has the Supreme Court or this court ever turned the propriety of a *Younger* dismissal upon the mere availability of a state judicial proceeding."[74]

In this case, the District Court properly refused to abstain because Skumanick failed to satisfy *Younger's* first requirement, namely demonstrating that there were "ongoing state proceedings that are judicial in nature." A.I.15. "*Younger* abstention is required . . . *only* when state court proceedings are initiated 'before any proceedings of substance on the merits have taken place in federal court.' ... In other cases, federal courts *must* normally fulfill their duty to adjudicate federal

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[72] *Id.* ("[j]udicial accountability and the regulation of the judiciary are obviously important state interest," but not sufficient to justify abstention in absence of first and third requirements).

[73] *Addiction Specialists*, 411 F.3d at 408.

[74] *FOCUS,* 75 F.3d at 843 (quoting *Marks v. Stinson*, 19 F.3d 873, 882 (3d Cir. 1994) (quoting *Monaghan v. Deakins*, 798 F.2d 632, 638 (3d Cir. 1986), *aff'd in part and vacated in part*, 484 U.S. 193 (1988))).

questions brought before them."[75] The two relevant considerations, thus, are the timing of the state court proceedings – whether initiated before federal proceedings of substance – and whether the proceedings are "judicial in nature."

1. The District Court Properly Rejected Skumanick's Argument that Federal Court Intervention Was Not Justified Because He Had Not Yet Filed Charges.

The District Court had little trouble rejecting Skumanick's abstention argument based on the fact that there were no "ongoing state proceedings." A.I.15. Indeed, Skumanick simplified the District Court's decision by arguing that there was no ongoing proceeding to enjoin. In his post-hearing brief to the District Court opposing the preliminary-injunction motion, Skumanick argued that federal court intervention was premature and "speculative" because "no prosecution has been initiated," A.II.79, "charges ... have yet to be brought," A.II.80-81, and "no charges have been filed...." A.II.81. His brief concluded with the argument that the "harm to [Skumanick]" of federal court intervention "is that a State District Attorney will be stripped of his discretion and authority to *investigate and possibly bring charges* against the Plaintiffs." A.II.84 (emphasis added).

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[75] *Hawaii Housing Auth. v. Midkiff,* 467 U.S. 229, 238 (1984) (quoting *Hicks v. Miranda*, 422 U.S. 332, 349 (1975) (emphasis added)).

Accepting Skumanick's claims at face value, Judge Munley made the straightforward and correct decision that, "under the principles articulated by our Court of Appeals, refusing to hear this case on abstention grounds would be inappropriate, since there are no ongoing state proceedings and – as discussed below – the danger of irreparable harm is clear and imminent." A.I.15. The decision reflects black-letter law, which holds that "*Younger* is not a bar to federal court action when state judicial proceedings have not themselves commenced."[76] Indeed, "*Younger* abstention cannot be invoked in the absence of any on-going state proceedings."[77] The district court's entry of the preliminary injunction, which marked the start of federal court "proceedings of substance on the merits,"[78] thus occurred before any state proceedings commenced.

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[76] *Midkiff*, 467 U.S. at 238-39 (citations omitted);

[77] *Matusow v. Trans-County Title Agency, LLC*, 545 F3d 241, 248 (3d Cir. 2008).

[78] *Midkiff*, 467 U.S. at 238-39.

2. Skumanick's New Argument that Informal Adjustments Commence Proceedings under Pennsylvania's Juvenile Act Must Be Rejected Because Informal Adjustments Are Neither Proceedings Nor "Judicial in Nature."

Apparently acknowledging the weakness of his position in the court below, Skumanick has developed for the purpose of this appeal a substitute for his argument that the court should not interfere within his threatened prosecution. Skumanick now maintains that his threat to prosecute and the ensuing discussions with Plaintiffs, in which he offered an "informal adjustment" under Pennsylvania's Juvenile Act, 42 Pa. Cons. Stat. § 6323, constitute an ongoing state proceeding sufficient to invoke *Younger* abstention. App. Br. at 14-19. This Court should reject the argument simply because it was never presented to the District Court and is, therefore, waived.[79] But even on its merits the claim must be rejected. *Younger* abstention is not justified just because "a state bureaucracy has initiated contact with a putative federal plaintiff."[80] *Younger* involved state court criminal proceedings, although the doctrine has been extended to certain noncriminal judicial

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[79] "It is the general rule that a federal appellate court does not consider an issue not passed upon below." *Selected Risks Ins. Co. v. Bruno*, 718 F.2d 67, 69 (3d Cir. 1983); *see also Webb v. City of Philadelphia*, 562 F.3d 256, 263 (3d Cir. 2009) ("Generally, failure to raise an issue in the District Court results in its waiver on appeal") (citing *Huber v. Taylor*, 469 F.3d 67, 74 (3d Cir. 2006)).

[80] *Telco Communications, Inc. v. Carbaugh*, 885 F2d 1225, 1229 (4th Cir. 1989).

proceedings and administrative proceedings.[81] But any proceeding must, to invoke *Younger*, still be "judicial in nature." For example, in *Hawaii Housing Auth. v. Midkiff*, the Supreme Court held that public hearings on land condemnation and an order to participate in mandatory arbitration prior to filing of a condemnation proceeding in court were not judicial proceedings mandating abstention under *Younger*.[82]

This Court recently reviewed, in *Kendall v. Russell*, the "traditional indicia of a judicial action" under the *Younger* doctrine.[83] Proceedings *may* be judicial in nature if they are initiated by a complaint, adjudicative in nature, governed by rules of procedure, employ legal burdens of proof, and are subject to judicial review.[84] The Court identified other factors "akin to judicial proceedings," namely, notice, a hearing, "the right to attend the hearing[], be represented by counsel, present evidence on his own behalf, and confront and cross-examine any witnesses against him."[85] None of these "indicia of judicial action" attend informal adjustments.

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[81] *Zahl v. Harper*, 282 F3d 204, 208-09 (3d Cir. 2002) (citations omitted).

[82] 467 U.S. at 238-39.

[83] 572 F.3d at 131-133.

[84] *Id.* at 131.

[85] *Id.* at 132. In *Kendall*, the Court held that even though the process before the Virgin Islands Commission on Judicial Disabilities contained most of the "indicia of judicial action," the failure to provide appellate review meant that the

Informal adjustments are neither proceedings nor are they judicial in nature. The Pennsylvania statute itself characterizes the process as a "refer[ral]," and even then the referral is not to a court but to a "public or private social service agency."[86] The prevailing view is that the process can be used only before a petition is filed.[87]

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scheme failed to satisfy the first and third *Younger* requirements and thus abstention was not warranted. *Id.* at 135.

[86] *See* 42 Pa. Cons. Stat. § 6323(a)(1) ("...if otherwise appropriate, *refer* the child and his parents to any public or private social service agency available for assisting in the matter"); *id.* ("Upon *referral*..."); § 6323(a)(2) ("...*refer* the child and his parent to an agency..."); § 6323(a)(3) ("The agency may return the *referral*...") (emphasis added in all foregoing parentheticals).

[87] 18 West's Pa. Practice, Juvenile Delinquency § 7:1, Informal adjustment (2008 ed.) ("Under the statute, informal adjustment is available only before a petition has been filed."). Pennsylvania law is currently in flux about whether informal adjustments can be offered after a delinquency petition has been filed to resolve the case. Prior to 2008, it was "clear ... [that an] informal adjustment is not permitted to proceed after a petition is filed." *Commonwealth v. J.H.B.*, 760 A.2d 27, 32 (Pa. Super. 2000), *appeal denied*, 771 A.2d 1280 (Pa. 2001). But a Superior Court decision last year cast doubt on that longstanding interpretation, ruling that an informal adjustment could be offered after the filing of a delinquency petition. *See Commonwealth v. C.L.*, 963 A.2d 489, 492 n.3 (Pa. Super. 2008). In response to *C.L.*, the Juvenile Court Procedural Rules Committee is recommending that the Pennsylvania Supreme Court amend Rule 312 of the Juvenile Court Rules of Procedure to "clarify that informal adjustments may only occur prior to the filing of a petition." A copy of the recommendation is available at http://www.pacourts.us/NR/rdonlyres/FDC5B5C9-AB11-45F9-851F-1DF6BC9EB413/0/312juvct.pdf. The outcome of the debate over when an informal adjustment can be employed is immaterial to this case, because the issue is not whether an informal adjustment can dispose of a petition, but whether it can commence proceedings under the Juvenile Act. As discussed at pp. 56-57, *infra*, the law is clear that it cannot.

It is a method of "*diverting children away from the court process* to therapeutically oriented individuals and agencies ... *[w]here official court action does not seem necessary*, but a child is in need of and desirous of some service."[88] The underlying purpose is to "provide assistance, counseling and supervision... [and they] are not meant to be punitive in nature, but, rather, are meant to 'invoke[] the court's social service and supervisory resources without implicating the court's formal and coercive powers, including the power to commit the child to custody or confinement.'"[89] The process is entirely voluntary – it "flows from the consent of the child and his parent."[90] Consequently, judges have no authority to impose conditions on, or coerce any action from, the juvenile and her parents in an informal adjustment.[91]

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[88] 18 West's Pa. Practice, Juvenile Delinquency § 7:1 (emphasis added).

[89] *Id.* (citations omitted); *accord C.L.*, 963 A.2d at 493.

[90] *C.L.*, 963 A.2d at 493 (citation omitted).

[91] *Id.* In *C.L.*, the Superior Court held that the trial court had no authority to impose a $50 court fee, as part of an informal adjustment, where the family objected. Significantly, the Juvenile Court Procedural Rules Committee's recommendation to amend Rule 312 states in the "Explanatory Report" that an, "informal adjustment is a diversionary process used to dispose of the cases that should not come before the court." *See* note 87, *supra*.

In sum, an informal adjustment does not entail any "proceeding," as that term is commonly used, and it contains not a single one of the "traditional indicia of judicial action."[92] There is no formal notice of charges, no written complaint, no hearing or proceeding, no examination of witnesses, no rules of procedure or evidence, no burdens of proof, no judge or hearing officer, no appeal and no opportunity to vindicate constitutional rights. Even Skumanick, while arguing that informal adjustments commence a proceeding, candidly admits that informal adjustments are a "Pre-Petition diversionary process designed to avoid criminal charges from ever being filed." App. Br. at 10. If the judicial misconduct proceedings at issue in *Kendall* were found to be lacking in the requisites to *Younger* abstention, certainly informal adjustments cannot be considered judicial proceedings sufficient to warrant abstention under *Younger*.

In *Telco Communications, Inc. v. Carbaugh,* the Virginia Office of Consumer Affairs (OCA) investigated a professional fundraiser for violations of state solicitation laws, advised the fundraiser's attorneys of specific violations and conducted "an informal fact-finding conference" with the fundraiser that failed to produce an agreement.[93] Two weeks later, the fundraiser filed suit in federal court

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[92] *See* discussion at pp 50-52, *supra*.

[93] 885 F.2d 1225, 1227-28 (4th Cir. 1989).

to enjoin any OCA enforcement action, alleging that the solicitation laws violated the First Amendment.[94] The district court refused to abstain and subsequently declared the laws unconstitutional.[95] The U.S. Court of Appeals for the Fourth Circuit concluded that an "informal fact-finding conference" was not an ongoing state proceeding for *Younger* purposes because Virginia law did not mandate that the conference must be followed by any formal administrative or judicial proceedings and the informal fact-finding conference was not "remotely judicial in nature."[96] The participants were not sworn in, no record was maintained and there was no opportunity to examine or cross-examine witnesses.[97] In the court's words, "[t]he meeting was simply a settlement conference to see if the dispute could be consensually resolved."[98]

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[94] *Id.*

[95] *Id.* at 1229.

[96] *Id.* at 1228.

[97] *Id.*

[98] *Id.*; *see also Planned Parenthood of Greater Iowa, Inc. v. Atchison*, 126 F.3d 1042, 1047 (8th Cir. 1997) ("Although the Department contacted the plaintiff and requested information relative to the plaintiff's proposed project, such contact, standing alone, is not sufficient to commence CON [Certificate of Need] proceedings against the plaintiff".); *Louisiana Debating & Literary Ass'n v. City of New Orleans*, 42 F.3d 1483, 1491 (5th Cir. 1995) (no ongoing state proceedings when plaintiff is notified of administrative complaint of discrimination filed with Human Rights Commission).

Telco casts light on the informal adjustment process at issue here. The Fourth Circuit observed that "the period between the threat of enforcement and the onset of formal enforcement proceedings may be an appropriate time for a litigant to bring its First Amendment challenge in federal court," and that requiring abstention whenever a state merely threatens enforcement "would leave a party's constitutional rights in limbo while an agency contemplates enforcement but does not take it."[99]

In this case, Skumanick threatened enforcement of Pennsylvania's child pornography statute if the girls and their parents refused to accept informal adjustment agreements. In his brief, Skumanick admits that the girls' refusal to consent to the adjustment "may or may not have" triggered a Juvenile Petition. App. Br. at 10. As in *Telco*, during these informal discussions Plaintiffs exercised their right to protect their First and Fourteenth Amendment interests by filing suit in federal court while Skumanick contemplated whether to bring formal charges against the girls in Juvenile Court. Since there was no ongoing state judicial proceeding, the District Court properly refused to abstain.

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[99] 885 F.2d at 1228-29 (citing *Wulp v. Corcoran*, 454 F.2d 826, 831 (1st Cir. 1972)).

3. Skumanick's Claim that Informal Adjustments Commence Proceedings Under Pennsylvania's Juvenile Act is Meritless.

Skumanick's claim that proceedings can be commenced under the Juvenile Act not by filing a Petition for Delinquency, but by offering an informal adjustment under § 6323, App. Br. at 16-17, is plainly wrong. Significantly, his legal claim is made without citation. To the best of counsel's knowledge it is made without citation because none exists.

In Pennsylvania, the Juvenile Act[100] "encompasses the entire statutory scope of authority and discretion of the juvenile court to exercise jurisdiction over children."[101] That statutory authorization includes "a comprehensive scheme for the treatment of juveniles who commit offenses which would constitute crimes if committed by adults."[102] Besides transfers of juveniles from criminal courts in this or another state, the only method by which to commence a delinquency proceeding under the Juvenile Act is to file a petition.[103] It is only upon the filing of such a petition that the court will hold an "adjudicatory hearing" to hear the evidence and

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[100] 42 Pa. Cons. Stat. §§ 6301-6365.

[101] *C.L.*, 963 A.2d at 491-92 (citing *J.H.B.*, 760 A.2d at 32).

[102] *In re Bosket,* 590 A.2d 774, 776 (Pa. Super. 1991).

[103] 42 Pa. Cons. Stat. § 6321; *see also Bosket,* 590 A.2d at 776.

make necessary findings on the record.[104] Since this case does not involve a transfer from adult criminal court, and , as Skumanick admits, "no Petition has yet been filed," App. Br. at 17, no "proceeding" under the Juvenile Act has been commenced to trigger *Younger* abstention.

An informal adjustment is not a proceeding, is not "judicial in nature," and is not an essential first step in subsequent judicial proceedings. Accordingly, the District Court properly declined to regard it as a "pending judicial proceeding" that would require it to abstain under *Younger v. Harris.*

C. SKUMANICK HAS NOT MET THE STEEP BURDEN OF DEMONSTRATING THAT HIS ALLEGED VOLUNTARY CESSATION OF THE PROSECUTION AGAINST MARISSA AND GRACE MOOTS THEIR CASES.

Skumanick's argument that the claims by Plaintiffs Miller and Kelly are moot based on his voluntary cessation of the unconstitutional activity, *see* Appellant's Br. at 4, is entirely without merit. The burden to prove that voluntary cessation moots the case rests on Skumanick, and that burden is "heavy, 'even formidable.'"[105] This Court recently reviewed the standard:

> as a general rule, voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e.,

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[104] *Bosket,* 590 A.2d at 776.

[105] *DeJohn v. Temple Univ.*, 537 F.3d 301, 309 (3d Cir. 2008) (quoting *United States v. Gov't of Virgin Islands*, 363 F.3d 276, 285 (3d Cir. 2004)).

> does not make the case moot. But jurisdiction, properly acquired may abate if the case becomes moot because (1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. When both conditions are satisfied it may be said that the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law.[106]

In *DeJohn*, this Court was rightly skeptical of similar voluntary-cessation claims because the change in position occurred only after suit was filed and the government defendant continued to defend the legality of its policy. Considering the University's behavior, not just its promises of changed conduct, the Court concluded that there were "no subsequent events that make it absolutely clear that [the Defendant] will not reinstate the allegedly wrongful policy in the absence of the injunction."[107] The same is true here.

First, Skumanick has not explained why he has allegedly changed his position, stating merely that it was based on a "full review of the factual circumstances of the case" and unidentified "evidence which was put forward at the hearing" in the District Court. Appellant's Br. at 4. He does not identify those "factual circumstances" or the relevant evidence. It is just as likely that he wants to

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[106] *DeJohn*, 537 F.3d at 309 (quoting *Los Angeles County v. Davis*, 440 U.S. 625, 631 (1979)).

[107] *DeJohn*, 537 F.3d at 310.

remove from this Court's consideration the photograph of Marissa and Grace, A.III.2, because his claim that it is child pornography is ludicrous.

Second, Skumanick has steadfastly insisted, and continues to argue, that his actions were and are constitutional. At the preliminary injunction hearing, Skumanick insisted that he could bring charges against all sixteen students, including the three plaintiffs: "it would have been easier for us to simply charge them. We didn't need to give them any opportunity to do anything else other than be charged." A.II.142. The first crack in this resolve occurred in the brief to this Court, long after the District Court's adverse ruling and entry of the injunction. Even now, Skumanick argues that he must have "prosecutorial discretion" to address the situation he faced at the time, namely, "where provocative photographs of nude and semi-nude adolescent girls were being transmitted through the internet to members of the student body...." Appellant's Br. at 8. He insists on maintaining the discretion to force students into a classroom where they learn that their "actions were illegal." *Id.* Skumanick also maintains the viability of the charges against the girls, *id.* at 12, and insists that his pursuing informal adjustment "or juvenile prosecution" cannot be construed as "bad faith enforcement," *id.* at 15.

Skumanick has not met his burden to demonstrate that he will not continue or renew his unconstitutional retaliation against juveniles who transmit "provocative"

photographs that neither by content nor context rise to the level of unprotected child pornography. As in *DeJohn*, the "record ... does not support an assessment that [Skumanick's] policy change was the result of substantial deliberation, such that [he] would not be inclined to revert back to [his] old policy. To the contrary, [Skumanick] continues to defend his former policy."[108] Under these circumstances, Skumanick cannot meet his burden to show that it is "absolutely clear that the allegedly wrongful behavior [prosecuting or threatening to prosecute girls posed "provocatively"– but not criminally – in photos] could not reasonably be expected to recur."[109]

CONCLUSION

For all of the foregoing reasons, this Court should affirm the District Court's injunction against Skumanick.

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[108] 537 F.3d at 311.

[109] *DeJohn*, 537 F.3d at 310 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 189 (2000)).

Respectfully submitted,

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CERTIFICATES

Mary Catherine Roper, one of the attorneys for Appellees, hereby certifies that:

1. I caused two true and correct copies of the foregoing Brief of Appellees to be served upon the following counsel of record this 11th day of September, 2009, by U.S. Mail First Class:

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2. Ten copies of the Brief of Appellees was filed with the Court by hand delivery on September 11, 2009, in accordance with Rule 31.0 of the Local Appellate Rules.

3. I am admitted to the bar of the Third Circuit.

4. This Brief complies with the type/volume limitation contained in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. The brief contains 13900 words, excluding the Cover Page, Table of Contents, Table of Authorities, and the Certifications.

5. The printed Brief of Appellees filed with the Court is identical to the text in the electronic version of the Brief filed with the Court.

6. The electronic version of the Brief of Appellees filed with the Court was virus checked using AVG Antivirus version 8.5.412 on September 11, 2009, and was found to have no viruses.

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