87 pages

CLARK COUNTY DISTRICT COURT
IN AND FOR THE STATE OF WASHINGTON

CITY OF VANCOUVER, PLAINTIFF, vs. KELLY CARROLL, DEFENDANT.	No. 23649V VCA CN KELLY CARROLL'S MOTION TO DISMISS FOR SELECTIVE PROSECUTION

I. MOTION

COMES NOW Ms. Kelly Carroll, by and through the Angus Lee Law Firm, PLLC, and moves the Clark County District Court to dismiss the selective prosecution of Ms. Carroll in violation of her right to equal protection of the law. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-374, 6 S.Ct. 1064, 30 L.Ed. 220 (1886), RCW 9.94A.340, and CrRLJ 8.3.

Ms. Carroll also moves this court to compel production of all internal records related to the charging decision in this matter.

II. INTRODUCTION

Ms. Carroll has been singled out for prosecution on the basis of the exercise of her First Amendment right to protest the government. They City of Vancouver selectively prosecuted Ms. Carroll because of her political speech in opposition to the Governor's COVID Proclamation. The equal protection component of the Due Process Clause of the Fifth Amendment prohibits

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prosecution based on 'an unjustifiable standard such as race, religion, or other arbitrary classification, such as one's speech or political views. See *United States v. Armstrong*, 517 U.S. 456, 464, 116 S. Ct. 1480, 1486 (1996).

Here, despite the City of Vancouver having received numerous complaints of alleged violations of the Governor's Proclamation, that City of Vancouver has chosen to file charges on only Ms. Carroll, whom had spoken out publicly against the Proclamation and engaged in public protest of the same.

Internal City emails already obtained via the Public Records Act show that (1) the City has a policy of not enforcing the COVID Proclamation when they receive social distancing complaints, (2) a policy of referring complaints about business allegedly in violation of the Proclamation to a civil regulatory agency (not the police department), and (3) when the City discovered and confirmed an organized, open, and admitted, large scale intentional ongoing violation of the Governor's Proclamation, the City selected to take no action and instead pursued "a conversation" between the City and the violating organization.

This selective prosecution is unlawful. It violates the State and Federal Constitution. It mandates dismissal. The evidence outlined below establishes that (1) Ms. Carroll has received disparate treatment and that similarly situated parties have not been prosecuted, and (2) the prosecution was in response to Ms. Carroll's protected public speech in opposition to the Governor's Proclamation.

As the attached exhibits make a *prima facia* showing of selective prosecution, the burden is on the prosecution to come forward with a legitimate and non-selective basis for this prosecution. No such basis being presentable, the matter must be dismissed.

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III. FACTS

Violation of a Governor's Proclamation has rarely, if ever, been prosecuted. A Lexis search reveals that there is not a single appellate decision in the history of Washington that considers criminal charges for an alleged willful violation of a governor's order under RCW 43.06.220.

A. THE CITY'S POLICY AND PRACTICE IS CIVIL ENFORCEMENT OF THE COVID PROCLAMATIONS, NOT CRIMINAL PROSECUTION.

The City of Vancouver has received numerous complaints alleging violations of the various proclamations. A City of Vancouver spread sheet obtained via the Public Records Act shows numerous non-compliance complaints between April 7th and May 14.[1] According to the spread sheet, even City employees were alleged to have been in violation of the proclamation. Violations were also alleged against Fred Meyer, Lowe's, Chuck's Produce, Old Spaghetti Factory, and various other entities.

On April 8, 2020, the City received a complaint of hair care services being provided allegedly in violation of the proclamation.[2] The complaint was forward in an April 9, 2020, email from City Emergency Manager Gene Juve to City Attorney Jonathan Young. The City Emergency Manager wrote "The State directs reports of ***business*** non-compliance to the 'appropriate' state licensing or regulatory agency for 'action'."[3]

That City email also asserts that the police department should be involved only where the complaint relates to an "individual or personal non-compliance" as opposed to a business non-compliance.

[1] Decl. of D. Angus Lee, Ex. A.
[2] Id. Ex. B.
[3] Id. (emphasis added).

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According to that email, "There are approximately ***15,000 reports of business non-compliance***."[4] The email states that the business matters should be handled by "refer[ing] the complaint to [Community and Economic Development] to Determine if the activity in fact violates the Governor's order or any of the city's licensing or permitting requirements. If so, CED should advise the operator to stop performing these services." There is no indication that any other business owner has been prosecuted, let alone 15,000.

On April 8, 2020, the city received a written complaint of "large groups" congregating in violation of the proclamation.[5] The complaint was forwarded in an internal City email to several, including VPD Chief McElvain, and directed only that the non-compliant group be contacted to "remind them of the limitation" imposed by the proclamation and ask "officials to discourage gatherings in the parking lot and to enforce social distancing at all times."

On April 11, 2020, the City received a written complaint regarding non-compliance by Fred-Meyer with its obligations "as required by the Governor's Proclamation 20-25."[6] There the City opted to only "[c]ontact store officials and remind them of the requirement to promote and enforce physical distancing."

In an April 16, 2020, email from Vancouver Police Department Assistant Chief of Police Troy Price, to City Emergency Manager Juve, Price wrote "[i]f the complaint is about social distancing issues at a business, we are ***not taking any enforcement action***."[7] The email goes on to say that the official policy of the police department when they receive a complaint of a non-essential business operating in violation of the proclamation is for the police department to simply

[4] Id. (emphasis added).
[5] Id. Ex. C.
[6] Id. Ex. D.
[7] Id. Ex. F (emphasis added).

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document that they contacted the business and send a report of that contact to the City Emergency Manager, not the prosecutor.

> We will contact businesses that are considered non-essential if we receive information that they are operating and open to the public. In those instances, we will actually create a call with CRESA and document our response. Our plan is that **this information will be routed back to [the City Emergency Manager] via email** through the precinct that addressed the complaint.

The City Emergency Manager replied that this policy "sounds good to me."[8]

On April 16 and 17, 2020, the City received multiple written complaints regarding non-compliance. Again, the City chose not to involve the police department for those complaints.[9]

On April 26, 2020, the City received a scathing complaint regarding non-compliance by the Old Spaghetti Factory.[10] The City Emergency Manager forwarded the complaint in an email and concluded the violations were criminal.

> Sounds like a pretty blatant disregard by the Spaghetti Factory… I'm sure they will have numerous explanations, but that doesn't excuse the obvious fact they were woefully unprepared to operate within the rules. Not only is it ***illegal and unhealthy***, but it also jeopardizes the continued operation of their peers and destroys customer rapport.[11]

Nevertheless, even though the Old Spaghetti Factory complaint detailed an instance of business non-compliance, it was not sent to the police. Rather, the complaint was sent to City of Vancouver's director of Community Economic Development, who replied, "I'm feeling like some of these recent complaints would be better handled by the Health Department than the City."[12] "We're happy to give them a call, but since we will likely be getting more of these, can we find out if the Health District is set up to do any follow-up on food, hairdresser, and similar businesses?"

[8] Id. (emphasis added).
[9] Id. Ex. E, G, H, & I.
[10] Id. Ex. J.
[11] Id. (emphasis added).
[12] Id.

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On May 12, 2020, Vancouver City Emergency Manager wrote to Assistant Chief Price and Vancouver City Attorney Young about an open an ongoing violation of the COVID Proclamations by a local organization. According to the email from the City Emergency Manager, the City had contacted officials for the organization and had "advised them that by their actions they are breaking the law."[13] The City Emergency Manager wrote further that, upon being advised that their actions were illegal, the group advised the City that "[t]hey intend to continue." In the face of this open and willful violation of the Proclamation, The City Emergency Manager wrote to City Attorney Young:

> Troy Price and I discussed the situation and agreed that we'd best go into a standby mode on this one, pending further instructions from city officials. We both felt that issuing an official warning or making an arrest would be inappropriate and not contribute to resolution of the situation.[14]

Instead, Price and the City Emergency Manager "thought perhaps correspondence or a conversation" between the City Attorney's Office and the organization "would be a better option."[15] No criminal enforcement action was ever taken by the City regarding the willful, open, and ongoing violation by that organization.

Indeed, except for Ms. Carroll, no other criminal prosecutions for violation of the Proclamation have occurred at all.

Not only has the City overtly chosen to forego criminal prosecution for violations of the Proclamation by noncompliant organizations whose actions it has determined are "breaking the law," but the City itself has openly facilitated and participated in violations of the Proclamation.

[13] Id. Ex. K.
[14] Id.
[15] Id.

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Proclamation 20-25 states:

> All people in Washington State shall immediately **cease participating in all public and private gatherings and multi-person activities** for social, spiritual and recreational purposes, regardless of the number of people involved, except as specifically identified herein. Such activity **includes, but is not limited to**, community, **civic**, public, leisure, faith-based, or sporting events; **parades**; concerts; festivals; conventions; fundraisers; and similar activities.[16]

Yet, approximately three weeks after charges were filed against Ms. Carroll, the Vancouver Police Department facilitated a 250-person civic gathering in direct violation of the 20-25 Proclamation (the same Proclamation she alone is accused of violating).[17] Police even closed down I-5 so that the 250 people could walk shoulder to shoulder in the freeway.

[16] (emphasis added).
[17] Id. Ex. M.

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Despite the Stay Home Stay Safe Proclamation's prohibition on gatherings for social or spiritual purposes including civic or faith-based events such as parades, Vancouver Police Department assisted with the gathering, even posing for photos with members of the group while both the officers and other participants were in violation of the social distancing requirements of the 20-25 proclamation that Ms. Carroll is charged with violating.

B. MS. CARROLL'S POLITICAL ACTIVITY IS THE FOCUS OF AND EXTENSIVELY DETAILED IN THE OFFICER'S REPORT.

When Sergeant Moore of the Vancouver Police Department learned that Ms. Carroll and Patriot prayer were protesting Governor Inslee's proclamations and intended to hold a protest rally, a Department Operational Plan was put in place.[18] The operational plan noted that her planned

[18] Id. Ex. N.

rally had "caught the attention of others," and that "media is expected to be present." The 9-page operational plan detailed that Lt. Williams would be the incident commander during the protest and that Lt. Hatley will be the Deputy Incident Commander. "Surveillance TLs are Sergeants Moore and Chylack."

The narrative of the officer's report in this case leads by detailing Ms. Carroll's political activity in opposition to the proclamation.[19]

> On May 14th, 2020, Investigations told me of an upcoming event in the geographical area I oversee as the District 3 Lieutenant… The owner of the business, Kelly Carroll, made several Facebook posts outlining her plan to open her business on May 16th… Additionally, she urged people to "Rally with me." She also said that she contacted the media and was doing this not for her but for the whole State of Washington.
>
> Carroll said that if she was arrested or fined that she encouraged people to financially support her by making donations on her website.
>
> On Saturday, May 16th, 2020, Carroll carried out her plan and had a re-opening rally / celebration at The PetBiz. Vancouver Police Department members witnessed the crowd and estimated that there were over 100 people present for the rally. Some of the people in attendance marched around the area carrying flags and signs...

C. CITY ATTORNEY YOUNG SOUGHT PROSECUTION OF THOSE WHO PROTESTED THE CHARGES BROUGHT BY HIS OFFICE IN THIS CASE AND WRONGLY ACCUSED MS. CARROLL OF BEING ONE OF THOSE PROTESTERS.

Once the prosecution of Ms. Carroll became public knowledge, political protests occurred at various locations.[20] Officer Pat Moore was present at those protests and viewed extensive video footage of the protests. He described the events as non-threatening, law-abiding, and politically themed. He stated:

> During all these events, organizers Kelli Stewart and Joey Gibson both reminded individuals attending to not commit any crimes, do not trespass, do not threaten or

[19] Ex. E to Knapstad Motion filed on July 24, 2020.
[20] Id. Ex. L.

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> intimidate, do not violate the VMC noise ordinance and to make sure they clean up after themselves when they leave an area.
> …
> Det. Romiti and I have both been physically present during the events described above, as well as monitoring the live feeds. At no time have I heard anyone in the group, to include the organizers, threaten Attorneys…
> A Majority of the group's chants during these protests are:
> "Drop the charges Kelly is not a criminal." "Grandmas Lives Matter."
> "Dismiss the charges, do the right thing."
> "Uphold the Constitution."

In stark contrast to Officer Moore's observations and characterization of the demonstrations as law-abiding, respectfully led, and non-threatening, City Attorney Young claimed he felt threatened and intimidated by those same demonstrations. City Attorney Young sought a criminal investigation for felony harassment. He also asserted that Ms. Carroll had been present at a protest outside his home.

According to the redacted police report of Officer Long, City Attorney Young asserted that the comments of one woman at the protest made him "feel 'threatened' and 'intimidated.'"[21] Young further claimed the chants were "intimidating … said he felt he was a victim of RCW 9A.76.180 Intimidating a public servant."[22] City Attorney Young also indicated to Officer Long there were "some of the leaders in the protest groups that he felt were especially threatening and intimidating him." [23]

However, the investigation report by the Vancouver Police Department makes very clear that any assertion that Ms. Carroll was at Mr. Young's home is totally unfounded. Further, the Vancouver Police Department concluded that there was no probable cause for Intimidating a public servant. Officer Long viewed video of the protest and described the activity as people walking on

[21] Id.
[22] Id.
[23] Id.

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public sidewalks and streets chanting slogans. Likewise, Officer Moore concluded in his report "***there is no probable cause for intimidating a public servant***."[24]

IV. ARGUMENT

"The Fourteenth Amendment prohibits any state from taking action which would 'deny to any person within its jurisdiction the equal protection of the laws.'" *United States v. Falk*, 479 F.2d 616, 618 (7th Cir. 1973). "The promise of equal protection of the laws is not limited to the enactment of fair and impartial legislation, but necessarily extends to the application of these laws." *United States v. Falk*, 479 F.2d 616, 618 (7th Cir. 1973). The United States Supreme Court announced in *Yick Wo v. Hopkins*, 118 U.S. 356, 373-374, 6 S.Ct. 1064, 30 L.Ed. 220 (1886), that the application of laws "with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances" constitutes a denial of equal protection and is "within the prohibition of the Constitution." *Yick Wo*, 118 U.S. at 373-374.

When a statute or regulation is extremely broad and permits near unfettered discretion in the decision to prosecute, it "sanctions a device for the suppression of the communication of ideas and permits the official to act as a censor." *Cox v. Louisiana*, 379 U.S. 536, 557 (1965).

> It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute.

Id. at 557-58.

Thus, the actions of prosecutors and police officials are duly subject to these constitutional constraints; and prosecutorial discretion is not unfettered. *United States v. Batchelder*, 442 U.S.

[24] Id. (emphasis added).

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114, 125, 60 L. Ed. 2d 755, 99 S. Ct. 2198 (1979); *United States v. Falk*, 479 F.2d 616, 618 (7th Cir. 1973). "Selective prosecution" is thus prohibited by the Constitution and occurs where "the government looks beyond the law itself to arbitrary considerations, such as race, religion, or ***control over the defendant's exercise of his constitutional rights***, as the basis for determining its applicability." *United States v. Berrios*, 501 F.2d 1207, 1209 (2d Cir. 1974) (emphasis added); *United States v. Armstrong*, 517 U.S. 456, 464, 116 S. Ct. 1480, 1486 (1996). In those instances, selective prosecution becomes a weapon to punish those harboring beliefs with which the administration in power may disagree. *Berrios*, at 1209.

Discrimination on the basis of the exercise of protected First Amendment activities is forbidden by the Constitution. *Falk*, 479 F.2d, at 620. Accordingly, the decision whether to prosecute may not be based on a desire to punish people who express certain ideas, while excusing those who do not express those ideas. *United States v. Steele*, 461 F.2d 1148, 1152 (9th Cir. 1972). Specifically, "[t]he Government may not prosecute for the purpose of deterring people from exercising their right to protest official misconduct and petition for redress of grievances." *Dixon v. District of Columbia*, 394 F.2d 966, 968 (D.C. Cir. 1968). Prosecution related to a desire to chill speech violates the prohibition on selective prosecution. See *Steele*; *United States v. Crowthers*, 456 F.2d 1074 (4th Cir. 1972); *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973).

In order to prove a selective prosecution claim, the claimant must demonstrate only that (1) the prosecutorial policy or action had a discriminatory effect and (2) was motivated by a discriminatory purpose. *United States v. Armstrong*, 517 U.S. 456, 457 (1996).

Part one, discriminatory effect, is established where the accused demonstrates that similarly situated individuals were not prosecuted. *Id.* at 457. In the First Amendment context,

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discriminatory effect is demonstrated where evidence shows that other violations of regulation occurred; yet violators who did not openly criticize the regulation were not prosecuted. *Steele*, 461 F.2d at 1152.

Part two, discriminatory purpose or intent based on First Amendment free speech, is established where the enforcement procedure focuses on a "vocal offender" and any of the following circumstances are present: (1) violators who did not openly criticize the regulation are not prosecuted, (*Steele* at 1152), (2) the government maintained a stated policy of not prosecuting violations but of handling them administratively (or of not prosecuting them at all when the violator later acquiesced) (*Falk* at 621 and 623), (3) higher level officials than would normally be involved in the prosecution of the offense participated in the prosecution, (*Falk* at 622), (4) background reports were compiled only on persons who publicly attacked the governmental action (*Steele* at 1152), or (5) the decision to prosecute the particular individual instead of other violators was not correlated to a higher degree of the violation (*Crowthers* at 1079). See *Steele*; *Falk; United States v. Crowthers*, 456 F.2d 1074 (4th Cir. 1972).

Washington State case law follows the federal case law and likewise recognizes and prohibits selective prosecution. "CrR 8.3(b) authorizes a trial court to dismiss any criminal prosecution on its own motion in the furtherance of justice. The purpose of CrR 8.3(b) is to ensure that an accused person is fairly treated." Ferguson, Wash.Crim.Prac. and Proc., § 2113 (3d ed.). "Grounds which will ordinarily support such an order of dismissal are arbitrary action or misconduct by the prosecution, which may ***include selective prosecution.***" Id. (emphasis added). "Where the defendant has been charged for a crime under a statute which is rarely enforced, or enforced only

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against a class of persons, he should move for dismissal of the information on the ground of selective prosecution." Ferguson, at § 2114.

The Washington State Constitution, Article 1, Section 12, ensures that the law "equally belong to all citizens." This principle of equal application of the law is reinforced statutorily in that state's prosecutorial standards which demand that the laws "apply equally to offenders in all parts of the state, *without discrimination as to any element that does not relate to the crime* or the previous record of the defendant." RCW 9.94A.340 (emphasis added).

"[A]lthough prosecutorial discretion is broad, it is not 'unfettered. The decision to prosecute may not be based upon race, religion, ***or other arbitrary classification***." *State v. Alonzo*, 45 Wash. App. 256, 259, 723 P.2d 1211, 1212 (1986) (internal cites omitted).

> To succeed in an unconstitutional selective prosecution claim the defendant must show (1) disparate treatment, *i.e.*, failure to prosecute those similarly situated, and (2) improper motivation for the prosecution.

State v. Terrovonia, 64 Wash. App. 417, 422, 824 P.2d 537, 540 (1992); see also *Alanzo*, 45 Wash. App. at 259. Improper motivation for prosecution means a selection based on "an unjustifiable standard such as race, religion, or other arbitrary classification." *Terrovonia*, at 422.

"When the defendant moves to dismiss the indictment on the grounds of selective prosecution, he is entitled to a hearing." Ferguson, Wash.Crim.Prac. and Proc., § 2114 (3d ed.)

> At that hearing the defendant must establish prima facie (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, **or the desire to prevent his exercise of constitutional rights.**

Ferguson, at § 2114 (emphasis added).

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A. ON POINT FEDERAL CASES ESTABLISHING DISCRIMINATORY EFFECT AND INTENT IN RETALIATION FOR FIRST AMENDMENT ACTIVITY.

1) *United States v. Steele*

In *Steele*, 461 F.2d 1148 (9th Cir. 1972), the controlling 9th Circuit case, the court found that evidence of discriminatory intent based upon First Amendment speech was "compelling" where only four individuals in Hawaii were chosen for prosecution for refusing to answer census report questions in violation of 13 U.S.C. § 221(a). Each of the individuals, including Steele, had each participated in a census resistance movement urging the public to not comply with the census. Steele, a "vocal offender," had led protests, held press conferences, and distributed leaflets as part of the resistance. *Id.* at 1151.

In finding discriminatory intent, the court relied on facts showing that the governmental agent responsible for Steele's prosecution, the Regional Technician, had taken a special interest in the four vocal offenders. *Id.* The Regional Technician described the four as "hard core resisters" and had ordered his staff to compile background reports on them, a discretionary procedure not followed with other offenders. *Id.* He also testified that his organization was "concerned about the census resistance movement." *Id.* Indeed, census authorities had complained that the broadcast of resistance ideas were intended to motivate others to not comply with the census law. *Id.*

While the Regional Technician had taken a special interest in the four census resisters, he testified that he was unaware of any other offenders. The evidence, however, established the existence of at least six other offenders who had not been prosecuted, as well as a governmental information gathering system that should have apprised the Regional Technician of the names of all who refused to comply with the census. *Id.* at 1152. Accordingly, the court found that the government's lack of awareness of the other violators was strong evidence that "questionable

emphasis" had been placed the "census resisters." *Id.* It concluded that Steel had demonstrated purposeful discrimination against those who had publicly expressed their opinions about the census and reversed the conviction, stating: "An enforcement procedure that ***focuses upon the vocal offender*** is inherently suspect, since it is vulnerable to the charge that those chosen for prosecution are being punished for their expression of ideas, a constitutionally protected right." *Id.* (emphasis added).

2) United States v. Falk.

In *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973), the defendant was charged with refusing to submit to induction into the Armed Forces and with failure to possess a draft registration card. *Id.* at 617. The court found that Falk, like the defendant in *Steele*, was a "vocal offender" who had been actively involved in advising others on methods of legally avoiding military service and protesting American actions in Vietnam. *Id.* at 621. Falk presented evidence that other Selective Service registrants had disposed themselves of their draft registration cards but had not been prosecuted. *Id.*

Just as in *Steele*, the governmental agents responsible for prosecuting Falk had taken a special interest in him. *Id.* Evidence was presented showing that the Assistant U.S. Attorney knew of Falk's protest activities and believed that "a good deal of their trouble in enforcing the draft laws came from people such as Falk …" *Id.* In response to the allegation that the Assistant U.S. Attorney had personally singled Falk out, the government replied that the indictment against Falk had also been approved "by the Chief of the Criminal Division of the United States Attorney's Office, the First Assistant United States Attorney, the United States Attorney and the Department of Justice in Washington." *Id.* at 622. The court found that this list of approvals was evidence that

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Falk had been singled out, stating, "It is difficult to believe that the usual course of proceedings in a draft case requires such careful consideration by such a distinguished succession of officials prior to a formal decision to prosecute." *Id.*

In holding that Falk had presented a prima facie case of improper discrimination in enforcing the law, the court found compelling the fact that the government had an admitted policy not to prosecute violators of the card possession regulations, but to handle them administratively. *Id.* at 621. Indeed, the policy statement of the Selective Service Director stated, "registrants who turned in cards (as contrasted to those who burned cards) *were not prosecuted under Section 12(a) of the Military Selective Service Law of 1967*, but were processed administratively by the local boards." *Id.* (emphasis added).

Likewise, the statement by the Director of the Selective Service System also showed that government policy was "to prosecute only a portion of those who committed minor infractions of rules; [and] whether a violator is one of those prosecuted depends upon whether he accepts or refuses induction." *Id.* Although Falk refused induction, the court found that he had done so because his local draft board had arbitrarily and incorrectly refused to give him his classification as a conscientious objector. *Id.* at 623. Falk was therefore compelled to refuse induction in order to assert his claim as a conscientious objector. Thus, the court found that Falk was prosecuted for the prior, minor infractions (namely, violation of the card carrying requirements) "only because he had exercised his First Amendment privilege to claim a statutory right as a conscientious objector." *Id.* at 622-623. The court held that a *prima facie* showing had been made that the government engaged in an "invidious discrimination between violators who acquiesced to the power of the

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Selective Service System and those who continued to assert their rights to be classified as conscientious objectors." *Id.* at 624.

3) United States v. Crowthers.

Where the prohibitory regulation being enforced is extremely broad and allows for wide discretion in its enforcement, discriminatory intent is demonstrated where selection for prosecution does not correlate to a higher degree of the actual conduct constituting the violation, but instead correlates to the government's disapproval of the message expressed by the violator in addition to, or outside of, the offending behavior. *United States v. Crowthers*, 456 F.2d 1074, 1079-1080 (4th Cir. 1972); see also *Cox v. Louisiana*, 379 U.S. at 557-58 (finding the Louisiana law "Obstructing Public Passages" was extremely broad and permitted uncontrolled discretion enabling public officials to determine which expression of views was permitted).

In *Crowthers*, the court found that the regulation under which the defendants had been prosecuted granted uncontrolled discretion to governmental officials and had been selectively and unequally applied. Defendants, who had participated in several "Masses for Peace" protesting the Vietnam War at the Pentagon, were charged with and convicted of disorderly conduct in violation of 41 C.F.R. § 101-19.304.

The court found that "there was substantial evidence to support the magistrate's findings that the defendants created loud and unusual noise and obstructed the usual use of entrances, corridors" at a pentagon concourse. *Crowthers*, 456 F.2d at 1078. The Mass had about 185 participants, lasted about 25 minutes, and was accompanied by singing and hand clapping. *Id.* at 1077. The court stated that, "[n]othing else appearing, the convictions [for disorderly conduct] would have to be affirmed." *Id.* at 1078. Yet, there was more.

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Although the Mass attendees were in technical violation of regulation being enforced, the court also found that the pentagon concourse had been used 16 other times in the latter half of 1969 for both political and religious ceremonies including band recitals. *Id.* at 1078. The court stated, "Suffice it to say that the record establishes that the level of noise and obstruction attributed to [the Mass for Peace participants] could not possibly have exceeded the level of noise and obstruction previously permitted by the government on numerous prior approved occasions." *Id. at* 1079.

The court found that discriminatory intent to suppress a viewpoint was evident because "[i]n choosing whom to prosecute, it is plain that the selection [was] made not by measuring the amount of obstruction or noise but because of governmental disagreement with ideas expressed by the accused." *Id.* The court held that the government may not apply an extremely broad statute to "permit public meetings in support of government policy and at the same time forbid public meetings that are opposed to that policy." *Id.*

B. MS. CARROLL WAS SELECTIVELY PROSECUTED BASED ON HER PROTECTED FIRST AMENDMENT ACTIVITY.

1) The prosecutorial action by the City of Vancouver had a discriminatory effect on Ms Carroll.

Evidence shows that there have been at least 15,000 reports of business non-compliance with the Stay Home Stay Safe Proclamation and numerous instances of individual noncompliance with the Proclamations. Ms. Carroll publicly criticized the Stay Home Stay Safe Proclamation and is the only individual to have been selected for criminal prosecution by the City of Vancouver (and apparently in the entire State of Washington). Though there were thousands of complaints against businesses for noncompliance with the Proclamation, none of those complaints were criminally investigated or prosecuted. What's more, the City did not even receive a complaint about Ms. Carroll's business. Rather, Ms. Carroll's noncompliance was targeted by the City *sua*

sponte specifically because it was accompanied by a political rally and public online speech in which she criticized the Proclamations.

2) The prosecutorial action by the City of Vancouver against Ms. Carroll was motivated by a discriminatory purpose.

Evidence of discriminatory intent against Ms. Carroll is more voluminous and compelling than in any comparable case. Ms. Carroll is unquestionably a "vocal dissenter." Like the defendants in *Steele* and *Falk*, Ms. Carroll spoke at protests, criticized the Governor's Proclamation on media platforms, and held a rally in defiance of classification of anyone as "non-essential" under the Proclamation.

As with the defendants in *Steele* and *Falk*, the governmental agents responsible for citing and prosecuting Ms. Carroll have taken a "special interest" in her because of her political speech. It is worth noting again that, although the City had received many complaints about noncompliance with the Stay Home Stay Safe Proclamation, it had not received a complaint about Ms. Carroll. Instead, officers went out of their way to find and document Ms. Carroll's political speech prior to the alleged violation. Similar to *Steele*, law enforcement engaged in a discretionary procedure to create a report specific to Ms. Carroll's protest activities. As in *Steele* and *Falk*, government officials were obviously concerned that Ms. Carroll's political activities would cause others to refuse to comply with the Stay Home Stay Safe Proclamation.

Questionable emphasis by Vancouver Police Department was certainly placed on Ms. Carroll where, like the officials in *Falk*, officers were 'unaware' of many of the other violators, despite the fact that other instances of noncompliance were known to the City generally. The special interest taken in Ms. Carroll was likewise evident from the fact that VPD sent a sergeant

to the protest and then two lieutenants to investigate, even though the offense is a mere misdemeanor.

More to that point, the case was first being prosecuted personally by the chief of the criminal division of the City Attorney's Office (as opposed to a front line assistant city attorney) and now is being fully handled personally by the actual City Attorney himself. This court can take judicial notice that City Attorney Young never appears before the District Court on a criminal matter.

Surpassing the "special interest" evident in analogous cases, the City Attorney in this case also responded to a protest outside his home by accusing Ms. Carroll of felony intimidation of a public servant. Ms. Carroll was not even present at the protest.

Discriminatory intent is evident from the fact that, as in *Falk*, the government had a stated policy of not pursuing business violators of the Stay Home Stay Healthy Proclamation criminally. This prosecution is in direct contradiction of their policy. In fact, in addition to the City Emergency Manager's stated policy, VPD officers claimed that they viewed their role as "education." Only when Ms. Carroll asserted her First Amendment right to disagree with the Stay Home Stay Safe Proclamation did officers decide to pursue her criminally.

Discriminatory intent is also evident from Vancouver Police Department in that its criminal enforcement of the Stay Home Stay Safe Proclamation in no way correlates to a higher degree of the violation by Ms. Carroll than by others. In fact, the exact opposite is true: while Ms. Carroll is being pursued for washing a single dog in violation of the Stay Home Stay Safe Proclamation, others are openly violating the Stay Home Stay Safe Proclamation by engaging in far riskier behavior with respect to COVID. Unrelated individuals have gathered shoulder to

shoulder, often without masks, by the hundreds in Vancouver. Rather than pursue these individuals criminally, the Vancouver Police Department has openly facilitated and participated in mass violations of the Stay Home Stay Safe Proclamation's prohibition on civic gatherings.

Discriminatory intent to suppress a viewpoint is plainly evident because, like the officials in *Crowthers*, in choosing whom to prosecute, the selection by the City has been made not by measuring the degree of COVID infection risk caused by the violations, but because of governmental disagreement with ideas expressed by the accused.

The City took no criminal action against any of the businesses they received non-compliance complaints about, including the complaint regarding Old Spaghetti Factory that the City characterized internally as "a pretty blatant disregard by the Spaghetti Factory" that is "illegal and unhealthy."[25] And later, when the City was notified by another organization that intended to continue its open and ongoing mass violations of the Proclamation, even though the City advised them it was illegal, the City (with written notice to Mr. Young and Assistant Chief Price) concluded that "issuing an official warning or making an arrest would be inappropriate and not contribute to resolution of the situation." [26] Instead, Assistant Chief Price "thought perhaps correspondence or a conversation" between the City Attorney's Office and the organization "would be a better option."[27]

The evidence is overwhelming that Ms. Carroll was selectively prosecuted based on her First Amendment activities. Thus, the matter should be dismissed.

[25] Id. Ex. J.
[26] Id. Ex. K.
[27] Id.

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C. AS A PRIMA FACIE SHOWING OF SELECTIVE ENFORCEMENT HAS BEEN MADE, THE BURDEN NOW SHIFTS TO THE PROSECUTION TO SHOW COMPELLING EVIDENCE OF NONDISCRIMINATORY PURPOSE.

When a defendant alleges intentional purposeful discrimination and presents facts sufficient to raise a reasonable doubt about the prosecutor's purpose, the government is compelled to accept the burden of proving nondiscriminatory enforcement. *Falk*, 479 F.2d. *at* 620-21. When a *prima facie* case of selective prosecution has been made, "the burden of going forward with proof of nondiscrimination ***will then rest on the government***." *Id.* at 624 (emphasis added). "[T]he government will be required to present ***compelling evidence to the contrary if its burden is to be met***." *Id.* (emphasis added).

Noting that it is neither novel nor unfair to require the party in possession of the facts to disclose them, the court in *Crowthers* stated:

> We think when the record strongly suggests invidious discrimination and selective application of a regulation to inhibit the expression of an unpopular viewpoint, and where it appears that the government is in ready possession of the facts, and the defendants are not, it is not unreasonable to reverse the burden of proof and to require the government to come forward with evidence as to what extent loud and unusual noise and obstruction of the concourse may have occurred on other approved occasions.

Crowthers, 456 F.2d at 1078.

A defendant cannot be convicted if he proves unconstitutional discrimination in the administration of a penal statute. *Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582, 588, 81 S.Ct. 1135, 6 L.Ed.2d 551 (1961)*. If the court finds that the accused would not have been prosecuted "except for his … lawful protest activities, the indictment must be dismissed." *Falk*, 479 F.2d at 624.

Here, there is no question that a *prima facie* showing of selective prosecution has been made. Frankly, the evidence is overwhelming. But for the public protesting, Ms. Carroll would

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have been treated like all others: she would have been ignored, or reported to a regulatory civil agency, but not prosecuted. The evidence of discriminatory intent is so compelling that matter must be dismissed. However, if the matter is not dismissed, the prosecution must present compelling evidence of nondiscriminatory intent and must disclose ALL internal records related to the decision to prosecute, or to continue the prosecution of, Ms. Carroll.

D. IF THE MATTER IS NOT DISMISSED IMMEDIATELY, THE CITY SHOULD BE COMPELLED TO DISCLOSE ALL INTERNAL RECORDS RELATED THE PROSECUTORIAL MOTIVATION IN THIS MATTER.

Because of the unique nature of the selective prosecution claim, "the judge may require the prosecutor to turn over for in camera inspection by the judge memoranda prepared by the prosecutor dealing with the decision to prosecute the defendant." Ferguson, Wash.Crim.Prac. and Proc., § 2114 (3d ed.) (citing *United States v. Berrios*, 501 F.2d 1207 (2d Cir.1974); *State v. Mitchell*, 164 N.J.Super. 198, 395 A.2d 1257 (App.Div.1978)).

V. CONCLUSION

Ms. Kelly Carroll moves the Clark County District Court to dismiss. The records obtained via the Public Records Act make very clear that she is being prosecuted only because of her political activity, and that she is being treated differently from all others. Had Ms. Carroll not engaged in political activity she would not be facing this prosecution. As this violates the prohibition against selective prosecution the matter must be dismissed.

Respectfully submitted Monday, August 3, 2020.

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