

COURT OF APPEALS OF VIRGINIA

Record No. 0463-26-4

COMMONWEALTH OF VIRGINIA

v.

RICHARD COX

Present: Judges Malveaux, Ortiz and Callins

Argued by videoconference

Opinion Issued August 18, 2026*

FROM THE CIRCUIT COURT OF ARLINGTON COUNTY

Daniel T. Lopez, Judge

Mikaela A. Phillips, Assistant Solicitor General (Jay Jones, Attorney General; Travis G. Hill, Chief Deputy Attorney General; Tillman J. Breckenridge, Solicitor General; R. Trent Taylor, Deputy Solicitor General, on briefs), for appellant.

Michael C. Cash, Senior Trial Attorney (Cameron E. Williams, Assistant Public Defender; Office of the Public Defender for Arlington County and the City of Falls Church, on brief), for appellee.

Richard Cox, *pro se*.

MEMORANDUM OPINION BY JUDGE DOMINIQUE A. CALLINS

The circuit court dismissed indictments against Richard Cox for violations of Code § 18.2-370.2, holding the statute facially unconstitutional because it was void for vagueness.

The Commonwealth appeals, asserting the court failed to first determine whether the statute was constitutional as applied to Cox. We agree and reverse the circuit court's order, remanding for the court to determine whether Code § 18.2-370.2 is constitutional as applied to Cox before conducting a facial constitutional analysis.

* This opinion is not designated for publication. *See* Code § 17.1-413(A).

BACKGROUND¹

On October 21, 2024, police were called to Arlington’s Washington-Liberty High School over reports of an individual with male genitalia standing naked, with an erection, in a shower inside the women’s locker room. Weeks later, the Arlington County Public Schools’ Security Director informed the police she believed that the individual inside the locker room was Richard Cox,² a registered sex offender. She told them Cox had signed in at several other Arlington Public School facilities on nine separate dates in the past month. During an investigation, the police identified additional women and children who had seen Cox at public school facilities throughout the fall. On December 6, 2024, staff at Barcroft Sport and Fitness Center informed police they believed Cox was at the facility and using the women’s locker room. Police arrived at the fitness center and arrested Cox.

A grand jury indicted Cox on 12 violations of Code § 18.2-370.2. Each indictment alleged a different date and school at which Cox was observed loitering within 100 feet after having been convicted of an offense prohibiting proximity to children.

Despite having been appointed counsel, Cox moved for leave to represent herself *pro se*. The court granted her motion for nine of the indictments. Although Cox filed a motion to proceed *pro se* on the remaining indictments, the court denied this request.³

¹ We unseal facts found in the sealed record only to the extent we must discuss them. *Brown v. Va. State Bar ex rel. Sixth Dist. Comm.*, 302 Va. 234, 240 n.2 (2023).

² Cox identifies as a transgender woman and refers to herself with “she/her” pronouns. This opinion uses the pronouns Cox identifies with when referring to Cox. *See In re Brown*, 289 Va. 343, 346 n.1 (2015) (using the “feminine pronoun” for a transgender woman seeking a name change); *Leonard v. Commonwealth*, 296 Va. 479, 483 n.* (2018) (adopting the transgender petitioner’s preferred pronouns).

³ The circuit court found the reasons for Cox’s motion unclear. In denying her motion, the circuit court ordered that appointed counsel remain counsel of record on the remaining indictments.

Cox *pro se* filed a pretrial motion to dismiss arguing, among other things, that Code § 18.2-370.2(B) was void for vagueness and overbreadth, in violation of the First and Fourteenth Amendments. Regarding her vagueness challenge, Cox argued that the statute violated the Due Process Clause of the Fourteenth Amendment because “its prohibitions [were] not clearly defined.” Cox explained that, as an unhoused person, she often used public facilities to maintain her hygiene. In the absence of a definition for the term “loitering,” Cox argued, she had no way of knowing her presence on public property was unlawful or what conduct violated the statute. Cox further argued that the statute was similarly vague on its face, as it failed to inform individuals of what conduct violated the statute. Additionally, Cox argued that because the statute failed to clearly define its restricted zones, its overbreadth infringed on her First Amendment religious freedom and freedom of expression. Cox’s appointed counsel filed both a plea in bar and motion to dismiss, each challenging the indictments on vagueness grounds. The Commonwealth countered that loitering had a common meaning sufficient to provide notice of prohibited conduct and that Cox’s counsel failed to make an argument that the statute was vague as applied to Cox.

The circuit court held a hearing on the parties’ motions. There, Cox’s counsel further argued the statute was vague as applied to Cox, contending she would not be able to distinguish what actions were prohibited by the statute when she was otherwise permitted to be present in these public spaces.

The circuit court granted the motion to dismiss in a memorandum opinion. It found the statute did not provide “constitutionally sufficient notice of the conduct it prohibits and lacks adequate standards to guide enforcement” and was thus unconstitutionally vague on its face. The circuit court did not consider the statute’s vagueness as applied to Cox. Although the court noted Cox’s First Amendment overbreadth claim, it expressly declined to address the argument,

explaining that “because the [c]ourt concludes that the statute is void for vagueness . . . it is unnecessary to resolve the Defendant’s First Amendment challenge.”

The Commonwealth moved the court to reconsider, arguing that the court needed to first conduct an as-applied analysis to Cox before it could strike the statute as unconstitutionally vague on its face. After hearing arguments, the circuit court denied the Commonwealth’s motion. In so ruling, the court emphasized the “difficult facts involving extremely troubling situations,” making it “hard” for “fact finder[s] or judges to make these [as-applied] determinations.” Instead, the circuit court opined, “it should be made on the facial context because of the rights that are involved and not get into the facts of the as[-]applied analysis.” Further, the court held an as-applied analysis would “ignore[] the fundamental rights” raised by Cox. The Commonwealth appeals.

ANALYSIS

The Commonwealth argues the court erred in holding the statute unconstitutionally vague on its face, in failing to first analyze constitutional vagueness as applied to Cox, and in failing to interpret the statute to avoid constitutional infirmity. We agree.

“This Court reviews the constitutionality of statutes *de novo*.” *Chianelli v. Commonwealth*, 64 Va. App. 632, 642 (2015). We presume duly enacted laws are constitutional. *Tanner v. City of Virginia Beach*, 277 Va. 432, 438 (2009). As such “the Constitution is to be given a liberal construction so as to sustain the enactment in question, if practicable.” *Working Waterman’s Ass’n. v. Seafood Harvesters, Inc.*, 227 Va. 101, 110 (1984). Thus, “a court should not declare a statute to be wholly unconstitutional ‘unless such a determination is absolutely necessary to decide the merits of the case.’” *Volkswagen of Am., Inc. v. Smit*, 279 Va. 327, 337 (2010) (quoting *Volkswagen of Am., Inc. v. Smit*, 266 Va. 444, 454 (2003)).

In her motion to dismiss, Cox argued that Code § 18.2-370.2 (1) violated the Due Process Clause of the Fourteenth Amendment because it was *vague* as applied to her because the term “loitering” was undefined under the statute, and (2) did not clearly define its “restricted zones,” infringing on her First Amendment rights in its *overbreadth*. We find the extent of Cox’s arguments before the circuit court, and the court’s failure to address these arguments, significant because this framing sets the bounds of applicable principles of constitutional validity.

The United States Supreme Court has laid out a clear path for courts to follow when addressing a facial challenge to a statute based on either overbreadth or vagueness. *Hoffman Ests. v. Flipside, Hoffman Ests.*, 455 U.S. 489, 494-95 (1982). “In a facial challenge to the overbreadth and vagueness of a law, a court’s first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail.” *Id.* at 494. Only then should a court examine “the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct,” it “should uphold the challenge only if the enactment is impermissibly vague in all of its applications.” *Id.* at 494-95. A movant found to have “engage[d] in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.” *Id.* at 495. This is why “[a] court should therefore examine the complainant’s conduct *before* analyzing other hypothetical applications of the law.” *Id.* (emphasis added). The recognized exception to this analytical framework only applies where the vagueness challenge implicates First Amendment rights. *Cf. Maynard v. Cartwright*, 486 U.S. 356, 361 (1988) (noting that “[v]agueness challenges to statutes not threatening First Amendment interests are . . . judged on an as-applied basis”); *see also Roberts v. Va. State Bar*, 296 Va. 105, 124 (2018) (noting a “recognized exception” to the general as-applied analysis when a vagueness

challenge involves an alleged violation of First Amendment rights); *Motley v. Va. State Bar*, 260 Va. 243, 247 (2000) (following the as-applied framework set forth in *Maynard*).

Here, the circuit court declined to address Cox’s First Amendment overbreadth challenge and did not rule on whether the statute was unconstitutional as applied to Cox. Instead, the court decided the statute was unconstitutional in all applications and thus violated the Due Process Clause of the Fourteenth Amendment. The court acknowledged its choice to skip the as-applied analysis, noting that the case’s “difficult facts” made it “hard for the fact finder or judges to make these determinations.”

When presented with a vagueness challenge, our Supreme Court has consistently followed the path set out in *Hoffman* by first determining whether the statute is constitutional as applied to the moving party. In *Commonwealth v. Hicks*, 267 Va. 573, 580 (2004), the Court noted that *Hoffman* established “principles which are pertinent” for deciding facial challenges. Applying these principles, the Court held that a defendant could not raise a vagueness challenge where he engaged in conduct prohibited by the statute. *Id.* at 581. In *Muhammad v. Commonwealth*, 269 Va. 451, 501 (2005), our Supreme Court held that because the appellant had engaged “in conduct . . . clearly proscribed and not constitutionally protected,” he could “not successfully attack a statute as void for vagueness based upon hypothetical conduct of others.”

Even more recently our Supreme Court emphasized that “[a]n appellant can only mount a successful facial challenge to a statute by first showing that the statute in question is unconstitutional as applied” to her *and* “that the statute in question would not be constitutional in any context.” *Toghill v. Commonwealth*, 289 Va. 220, 228 (2015) (citing *Cnty. Ct. of Ulster Cnty. v. Allen*, 442 U.S. 140, 154-55 (1979)). “[I]f a statute is constitutional as applied,” then the movant lacks standing to challenge it, and it “is not facially unconstitutional because it has *at least one constitutional application*.” *Id.* (emphasis added). A party has standing to challenge a

law's constitutionality "only insofar as [the statute] has an adverse impact on [the party's] own rights." *Allen*, 442 U.S. at 155.

We agree with the Commonwealth that the circuit court erred in not first determining whether the statute was constitutional as applied to Cox. If Cox's conduct was "clearly proscribed," she could not "complain of the vagueness of the law as applied to the conduct of others," *Hoffman*, 455 U.S. at 495, and she would lack standing to challenge the statute, *Allen*, 442 U.S. at 155. Not only is the as-applied test necessary for standing, it is also integral to a determination that the statute is unconstitutional in *all* applications. If a court finds the statute constitutional as applied to the party before it, the statute is not "facially unconstitutional." *Toghill*, 289 Va. at 228.

Further, we cannot excuse the court's choice to skip the as-applied test under the First Amendment exception. True, the United States Supreme Court recognizes that "a litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court." *Sec'y of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 953 (1984) (quoting *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 634 (1980)). But, here, the circuit court explicitly declined to address the First Amendment issue raised, clarifying its reason for skipping the test was because the facts were "difficult." *See Goodyear Tire & Rubber Co. v. Pierce*, 5 Va. App. 374, 384 (1987) ("The *right* to find the facts carries with it a *duty* to find the facts." (quoting 3 A. Larson, *Workmen's Compensation Law* § 80.13 (1983))). The circuit court never considered whether the statute was constitutional as applied to Cox, and the matter is not yet ripe for our consideration because we "are [a] court[] of review, not first view." *Commonwealth v. Holland*, 304 Va. 34, 38 (2025).

We remand to the circuit court to determine, as a threshold inquiry, whether the statute is constitutional “as applied” to Cox. *See Chesapeake Bay Found., Inc. v. Commonwealth ex rel. State Water Control Bd.*, 46 Va. App. 104, 118 (2005) (remanding for the trial court to determine if the litigant alleged sufficient facts for standing because the trial court “never addressed” it). On remand, the circuit court must consider whether Cox’s conduct falls within the scope of the statute such that Cox had fair notice that she violated the statute. The absence of a statutory definition of the term “loitering” is of no moment; the circuit court must give effect to the General Assembly’s intent “as expressed by the language used.” *Perry v. Commonwealth*, 84 Va. App. 165, 170 (2025) (quoting *Browning v. Browning*, 68 Va. App. 19, 24 (2017)). The circuit court can and should look to precedent and dictionary definitions when ascertaining the ordinary and plain meaning of “loitering.” *Id.*

Thus, we decline Cox’s invitation to consider the facial constitutionality of the statute. *See Butcher v. Commonwealth*, 298 Va. 392, 397 (2020) (opining that, as a matter of judicial restraint, “a ruling on the factual sufficiency of a single case will affect far fewer subsequent cases than a broad pronouncement on an open legal question”). Indeed, whether the statute is facially constitutional is not “absolutely necessary to decide the merits of th[is] case.” *Smit*, 266 Va. at 454. That question may ripen for adjudication another day, but today we refuse to turn a “small case[] into [a] large one[.]” *Camreta v. Greene*, 563 U.S. 692, 707 (2011).

CONCLUSION

The circuit court erred in not conducting the proper analysis to determine whether Code § 18.2-370.2 was unconstitutional as applied to Cox. Thus, we reverse the circuit court’s judgment and remand for proceedings consistent with this opinion.

Reversed and remanded.