COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Single Justice Docket No. _____
Superior Court Docket No. 2282CR0117

TRACEY ANNE SPICUZZA, LORENA JENKINSON, DANA STEWART LEONARD, and PAUL CRISTOFORO
INTERVENORS/PETITIONERS,

v.

COMMONWEALTH OF MASSACHUSETTS, KAREN READ, and SUPERIOR COURT OF NORFOLK COUNTY
RESPONDENTS,

IN REVIEW OF AN ORDER OF
THE NORFOLK SUPERIOR COURT, NORFOLK COUNTY

Memorandum of Law in Support of Petition for Relief Under G.L. c. 211, § 3

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MEMORANDUM OF LAW

Tracey Anne Spicuzza, Lorena Jenkinson, Dana Stewart Leonard, and Paul Cristoforo petition the Single Justice under G.L. c. 211 § 3 to review unconstitutional and otherwise incorrect orders of the Superior Court.

THE ISSUE

"The principal purpose of the First Amendment's guaranty is to prevent prior restraints." In re Providence Journal Co., 820 F.2d 1342, 1348 (1st Cir. 1986). The Norfolk County Superior Court created a "Prior Restraint Zone" prohibiting all demonstrations (without defining that term) in a vaguely-defined area, but clearly encompassing a broad swath of traditional public forums. It did so without considering arguments that could have helped tailor the relief when it declined to hear to those who would be directly impacted by the creation of the Prior Restraint Zone.

The Superior Court had no power to legislate such a zone. The Superior Court refused to even consider narrow tailoring. The Superior

Court made no findings to support its actions.[1] The Superior Court refused to consider less restrictive means to address the Commonwealth's ill-defined concerns. The Superior Court declined to so much as *hear* dissenting voices.

When a prior restraint impinges upon the right of the public to speak, and forbids pure speech, not speech connected to any conduct, "the presumption of unconstitutionality is virtually insurmountable." In re Providence Journal Co., 820 F.2d 1342, 1348 (1st Cir. 1986). If a court wishes to take away the right to protest, it may not do so without at least entertaining protesters' arguments to the contrary. This is the situation we confront, here.

"The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." In re Oliver, 333 U.S. 257, 271 (1948). "Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account." Id. In this case, the media (aside from one outlet) has been largely absent

[1] In Richmond Newspapers v. Virginia, 448 U.S. 555, 558 (1980) closure of a courtroom required findings to justify its actions. Closure of a traditional public forum must require the same.

from performing its Fourth Estate function, but demonstrators have taken up that slack. The lower court's actions, especially the way its Order was crafted, create at least the impression to the public that it was imposed to insulate itself from publicity and meaningful criticism. This Court should revise the lower court's Order to one that is constitutionally firm.

PROCEDURAL HISTORY AND RELEVANT FACTS

Commonwealth v. Read has been a subject of intense public attention, and there have been regular peaceful demonstrations around the courthouse throughout pretrial proceedings. Demonstrators appear to have exclusively been in support of the Defendant, Karen Read.

On March 26 the Commonwealth asked for a 500-foot buffer zone around the Norfolk County Superior Courthouse during the *Read* trial, banning a broad range of constitutionally protected speech. RA 023-026. The Commonwealth asked for this Prior Restraint Zone because it claimed that the *Commonwealth* had a right to a fair trial, and that the Commonwealth felt that it could not get a fair trial without banning demonstrations.

On April 2 Petitioners sought to intervene for the limited purpose of opposing the request to close the outside to assembly and protest (the

"Motion to Intervene"). RA 027-047.

The Superior Court denied the Motion to Intervene without a hearing, stating only that the motion was denied "for reasons stated on the record." RA 051. The Superior Court orally stated that Intervention is never permitted in criminal cases, which is false.

The Superior Court then established a 200-foot zone where, *inter alia*, "no individual may demonstrate in any manner, including carrying signs or placards, within 200 feet of the courthouse complex during trial of this case, unless otherwise ordered by this Court." RA 049. The Court, however, claimed that this was to protect the *Defendant's* rights. This is clearly not the case. Defendant Read did not seek this relief. Rather, the Superior Court acted to protect the Commonwealth from protest, or to protect the Court itself from criticism. It strains belief that the Superior Court entered an order banning demonstrations in favor of Karen Read to protect Karen Read.

Intervenors petitioned the Single Justice of the Appeals Court under G.L. c. 231, s. 118 on April 9, 2024. See Comm. v. Read, No. 2024-J-0204 (App. Ct., filed Apr. 9, 2024). On April 10, 2024, the petition was denied, as the Single Justice determined there was no authority to grant any relief as "the challenged orders were entered in a

criminal case and do not involve impoundment[.]" See Comm. v. Read, No. 2024-J-0204 (App. Ct., Apr. 10, 2024), citing Commonwealth v. Silva, 448 Mass. 701, 704, 864 N.E.2d 1, 4 (2007).

ARGUMENT

1.0 Standard of Law

Under G.L. c. 211 § 3, "[t]he supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided; and it may issue all writs and processes to such courts and to corporations and individuals which may be necessary to the furtherance of justice and to the regular execution of the laws. In addition to the foregoing, the justices of the supreme judicial court shall also have general superintendence of the administration of all courts of inferior jurisdiction, including, without limitation, the prompt hearing and disposition of matters pending therein[.]" The denial of a Motion to Intervene is reviewed de novo. Beacon Residential Mgmt., LP v. R.P., 477 Mass. 749, 753 (2017); accord CP 200 State, LLC v. CIEE, Inc., 488 Mass. 847, 848 (2022)(questions of law are considered de novo).

2.0 Review of Motions to Intervene

The Superior Court entered an order which harms the public, but

nobody in the case itself was in a position to advocate for those affected.

In civil cases, denial of intervention is immediately appealable. Reznik v. Garaffo, 466 Mas. 1034, 1035 (2013). There is no identical rule in criminal cases, but the SJC recognizes that the media may intervene in criminal cases to challenge orders that close courtrooms. See Globe Newspaper Co. v. Superior Court, 379 Mass. 846 (1980) (deciding newspaper's attempt to intervene to challenge order closing criminal trial to the public).[2] Protesters, including Intervenors, have no lesser First Amendment rights than the *Boston Globe*. Moreover, the Superior Court did observe that there is no express rule regarding intervention in a criminal case, unlike in a civil case and there is, therefore, no express appellate remedy from the denial of a motion to intervene in a criminal case. Petitioners are not parties to the underlying action, but are, nonetheless, materially affected by the Superior Court's order in that action. Thus, as in Globe Newspaper, the Single Justice should hear "this matter in view of the doubts concerning the

[2] Vacated and remanded in No. 79-1862, 1980 U.S. LEXIS (Oct. 14, 1980) in light of Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); see also Commonwealth v. Clark, 730 N.E.2d 872, 880 (2000) (trial court granted media entities' motion to intervene regarding order barring electronic media from trial).

practicality of an alternative remedy in the circumstances, and in view of the significant public issues raised by the petition." Id. at 850 n.3, citing Ottaway Newspapers, Inc. v. Appeals Court, 372 Mass. 539, 550-551 (1977).

"From the outset, the right of assembly was regarded not only as an independent right but also as a catalyst to augment the free exercise of the other First Amendment rights with which it was deliberately linked by the draftsmen." Richmond Newspapers v. Virginia, 448 U.S. 555, 577-578 (1980). "The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental." Id. (quoting De Jonge v. Oregon, 299 U.S. 353, 364 (1937)). This Commonwealth should be at the forefront of protecting civil liberties, not the first place to try to de-link the importance of all five of the First Amendment's freedoms.

3.0 Denial of Intervention Was Improper

When a trial court tries to suspend First Amendment rights *in its very realm*, (the courthouse) it must make specific findings justifying closure. Richmond Newspapers v. Virginia, 448 U.S. 555, 558 (1980). Judge Canone failed to do that and also failed to make findings denying intervention, except an erroneous determination that there is never

permissible intervention in criminal cases. Meanwhile, when Courts seek to close *courtrooms* (where they have greater powers than they have over traditional public forums) intervention is preferred. See, e.g., United Nuclear v. Cranford Ins., 905 F.2d 1424, 1427 (10th Cir. 1990) ("the correct procedure for a non-party to challenge a protective order is through intervention") See also, Pub. Citizen v. Liggett, 858 F.2d 775, 783 (1st Cir. 1988); In re Assoc. Press, 162 F.3d 503, 507 (7th Cir. 1998) (intervention is the "most appropriate procedural mechanism" to challenge closure).

Where the government seeks to shut down traditional public forums, with no statutory authority upon which it could be based, the case law is not rich with cases on point. This may be because it has been obvious that a judge lacks authority to issue such an order. This appears to be a case of first impression, where a court seeks to extend its tentacles outside of its realm (the courthouse) and ensnare *all demonstrations* on property it does not control including traditional

public forums and even private property.[3]

There are cases discussing *legislative* authority over such areas, such as Cox v. Louisiana, 379 U.S. 536 (1965). But despite a good faith effort to find one, Intervenors' counsel is unable to find a single case where a Court purported to command contempt authority over demonstrators outside the courthouse grounds, who were not otherwise part of the case, nor even in possession of court information. However, when courts seek to close their own courtrooms,[4] third parties (usually media entities) are nearly always permitted to intervene. It is an affront to due process that a court could deprive hundreds of people of their First Amendment rights without an opportunity to be heard. See Eisai, Inc. v. Hous. Appeals Comm., 89 Mass. Ct. App. 6045, 607 (2016) (non-parties may intervene where they would otherwise suffer 'a substantial injury to a direct and certain violation of' their rights").

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[3] The Court failed to precisely define where this "First Amendment Exclusionary Zone" is, stating that it is "200 feet of the court complex[.]" The Court *seemed* to mean 200 feet from the outer edge of all court buildings and parking areas, but the Court's imprecision leaves citizens to guess where the zone begins and ends). As it stands, the Order includes the insides and grounds of the library, churches, houses, and businesses, as well as streets and sidewalks.

[4] This is something that courts certainly have the authority to do under proper conditions.

4.0 The Superior Court's Order Should be struck down in its entirety, or narrowed by this Court

Courtrooms were long open to the public at the time of the founding. Thus, the First Amendment prohibits the government from summarily closing *courtrooms*. Richmond Newspapers v. Virginia, 448 U.S. 555, 576 (1980). Sidewalks and streets and parks outside a courthouse are given even greater First Amendment deference than the inside of the courtroom. "[T]he First Amendment does not speak equivocally. . . . It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." Bridges v. California, 314 U.S. 252, 263 (1941). Sidewalks around courthouses are traditional public forums. United States v. Grace, 461 US 171, 177 (1983), quoting Perry Education Assn. v. Perry Local Educator's Assn., 460 US 37, 45 (1983).

The zone, substantially and directly violates the First Amendment. The Superior Court did not even *consider*, much less correctly analyze, its obligation to narrowly tailor the Zone,[5] nor did it consider, much less implement, any less restrictive means of achieving

[5] That the Commonwealth sought an even broader zone does not mean the Court did its narrow tailoring duty.

its stated goals. The Superior Court simply napalmed the entire First Amendment in a vaguely-defined area.

The Court did not define "demonstrate," yet this term could encompass a broad swath of constitutionally protected conduct that would have no possible effect on the purported purpose for the Zone. Given the ill-defined term, citizens are left to guess what they can and cannot do. Can they march silently in a single column? Not if "demonstrate" prevents that. Can they hold a candlelight vigil? Probably not. When they are left to define "demonstrate" on their own, and the penalty for guessing wrong is contempt, this does not even meet rational basis review.

Temporally, when does this restriction apply? The Superior Court said it was "during trial." Is that the entire six week period of trial, or is it the technical interpretation of "gavel to gavel?" If the former, that would mean even at midnight on a Saturday, there can be no demonstrations. If the latter, then what purpose does it serve, since the jury will not be outside, but will be in the courthouse? The Superior Court's Order lacks any rational interpretation that comports with its purported purpose.

The Order is made worse by the fact that it is not limited to anti-government demonstrations, when that is clearly the viewpoint it aims at. Presumably to evade strict scrutiny, the Court created a restriction that is so broad that it fails rational basis review. Nobody can demonstrate outside even the District Court down the street, nor the Registry of Deeds, nor at a major intersection in Dedham. A boisterous complaint to management about poor service in the coffee shop or pilates studio within the Zone violate the language of the Order. Even demonstrating to protest the fact that the Superior Court has declared a Constitution-free-zone would be contempt.

If the Superior Court has the power to reach outside the courthouse, and the ban were limited to jury selection only, this might be rational. During trial, the jury can be brought in through the back entrance to the courthouse, and demonstrators could be banned from that entrance. Any infringement on First Amendment rights from these narrowly tailored and limited remedies would be de minimis enough that more zealous parties might complain, but these Intervenors would

not challenge them.[6]

Intervenors re-urge this narrowing. However the Superior Court would not even *consider* (much less adopt) curtailments on the Order.

5.0 If the Court Does Not Strike Down the Order, it Should Pronounce That the Order Has No Effect

The Order *seems* so invalid that demonstrators of *extraordinary* firmness *might* simply ignore it, relying on In re Providence Journal Co., 820 F.2d 1342, 1347 (1st Cir. 1986):

> "An order entered by a court clearly without jurisdiction over the contemnors or the subject matter is not protected by the collateral bar rule. Were this not the case, a court could wield power over parties or matters obviously not within its authority -- a concept inconsistent with the notion that the judiciary may the judiciary may exercise only those powers entrusted to it by law."

However, in that landmark case, the Providence Journal did not face being thrown into a jail cell for ignoring a patently unconstitutional order. Petitioners, as mere human beings, certainly could. They should not be forced to violate the Order, get locked up, and *then* challenge the contempt. This Court should rein in the lower court.

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[6] Of course, this Court itself has a responsibility to show greater deference to the Constitution than even the Intervenors' arguments request. But, Intervenors have been willing to be reasonable, despite the Superior Court's unreasonable hostility.

REQUESTS FOR RELIEF

1. The Order be vacated, in its entirety, and the Court should be satisfied with reliance on G.L. c. 268, §§ 13A & 13B. In the alternative, the Order should be modified by this Court to limit its effect so that any restrictions on demonstrations should only be during jury selection, when prospective jurors will be entering through the main entrance and they cannot be instructed to enter through the alternate entrances, and should be tailored to only prohibit demonstrations on Court grounds.

2. Any concerns about tainting the jury or witnesses should be limited to actual contact with jurors or witnesses, consistent with G.L. c. 268, §§ 13A & 13B. Any concerns about demonstrators influencing them should be addressed by bringing jurors and witnesses in through jury instructions or using alternate entrances, where there may be reasonable buffer zones enacted, however such buffer zones should be limited to 25 feet on either side of the rear entrance to the courthouse. See McCullen v. Coakley, 573 U.S. 464, 134 S. Ct. 2518 (2014) (finding 35' buffer zone at abortion clinic too expansive).

CONCLUSION

In light of the foregoing, the Single Justice should either vacate the Order or narrow it to a Constitutionally permissible degree.

Respectfully submitted,

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By their attorneys,

/s/ Marc J. Randazza

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CERTIFICATE OF COMPLIANCE

I, Marc J. Randazza, hereby certify that the foregoing Memorandum complies with all of the rules of court that pertain to the filing. The Memorandum complies with the applicable length limit in Rule 20.0 because it contains 2,817 non-excluded words in 14-point Times New Roman font, as counted in Microsoft Word (version: Word for Mac 16.77.1).

/s/ Marc J. Randazza
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CERTIFICATE OF SERVICE

I, Marc J. Randazza, hereby certify that a true and correct copy of the foregoing document was served upon all *pro se* parties and all attorneys of record via first-class mail, postage prepaid, and electronic mail, this 10th day of April 2024, as follows:

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And that a true and correct copy has also been served and filed in the office of the clerk of the trial court from which the matter arose, via first-class mail, postage prepaid, and electronic mail, this 10th day of April 2024, as follows:

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