COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Norfolk, ss. No. SJ-2024-

FREEDOM TO PROTEST COALITION,
NICHOLAS ROCCO, and JON SILVERIA,
Petitioners,

v.

COMMONWEALTH OF MASSACHUSETTS, KAREN READ,
and SUPERIOR COURT OF NORFOLK COUNTY,
Respondents.

EMERGENCY PETITION FOR RELIEF PURSUANT TO G.L. c. 211 § 3

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SUPREME JUDICIAL COURT
FOR THE COUNTY OF SUFFOLK

INTRODUCTION

Petitioners Freedom to Protest Coalition,[1] Nicholas Rocco, and Jon Silverio[2] petition the Single Justice under G.L. c. 211 § 3 for relief from an interlocutory order of the Superior Court.

PETITIONERS

Petitioners are members of the public who wish to engage in demonstrative activity, protected by the First Amendment, that will violate the Order the Superior Court issued creating a Prior Restraint Zone. They have organized themselves into an unincorporated

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[1] The Freedom to Protest Coalition is an association of individuals who wish to demonstrate in putative violation of the Superior Court's Order of April 4, 2024, but are chilled from doing so on account of such order.

[2] "[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Modified Motorcycle Ass'n of Massachusetts, Inc. v. Commonwealth, 60 Mass.App.Ct. 83, 85 n.6, 799 N.E.2d 597 (2003), quoting Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977). Thus, the Freedom to Protest Coalition has standing to bring this petition. Mr. Rocco and Mr. Silverio are members of the Freedom to Protest Coalition who, as with the other members, wish to demonstrate in putative violation of the Superior Court's Order of April 4, 2024, but are chilled from doing so on account of such order. However, they are joining as petitioners in their own names to ensure that there is no question of standing.

organization, the Freedom to Protest Coalition, for the sole purpose of challenging the Order.

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). Norfolk County Superior Court created a "Prior Restraint Zone" prohibiting all demonstrations (without defining the term) in a vaguely-defined area, but clearly encompassing a broad swath of public forums. It did so without considering any arguments that could have helped tailor the relief when it declined to hear from other parties who are 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 of the zone. The Superior Court made no findings to support its actions.[3] 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. All of these actions together

[3] In Richmond Newspapers v. Virginia, 448 U.S. 555, 558 (1980) closure of a courtroom required findings. Closure of a traditional public forum must require the same, but there were none here.

combined to effect a zone where the First Amendment no longer applies, and the Petitioners' rights are directly impacted.

When, as here, a prior restraint impinges upon the right of the public 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.

"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 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 not done for the stated reasons, but rather 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, seeking to ban a broad range of constitutionally protected speech. RA 023. 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 protest.

On April 2, 2024, four putative intervenors filed a Motion to Intervene for the Limited Purpose of opposing the request to close the outside to assembly and protest (the "Motion to Intervene"). RA 027. 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 Court orally stated that Intervention is never permitted in criminal cases, which is false. Globe Newspaper Co. v. Superior Court, 379 Mass. 846, 865, 401 N.E.2d 360, 372 (1980)

(noting that one need not formally move to intervene, but not precluding such).

The Superior Court 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—she took no position on the Commonwealth's motion. Rather, it is clear the Superior Court acted to protect the Commonwealth from protest, or to protect the Court itself from embarrassment. It strains credulity that the Superior Court entered an order banning demonstrations supporting Karen Read to protect Karen Read.

REASONS RELIEF IS APPROPRIATE PURSUANT TO G. L. c. 211, § 3

G. L. c. 211, § 3 provides that this Court has "general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided." In this matter, no other remedy is expressly provided

because the Petitioners are not parties to the underlying action. But they are materially affected by the Court's decision in that matter.[4]

Without any due process— without any opportunity to be heard—the Norfolk trial court entered an order which restricted Petitioners' rights to protest in the city of Dedham, Massachusetts. Petitioners, who wish for their voices to be heard, have no other recourse to object to the order other than appeal to this Court for relief.

When a trial court tries to take away First Amendment rights *in its very realm* (the courthouse), the Supreme Court requires that it make *specific* findings justifying closure. Richmond Newspapers v. Virginia, 448 U.S. 555, 558 (1980). Here, the Superior Court failed to do that. Where the government seeks to shut down traditional public forums, in the absence of statutory authority upon which it could be based, the case law is rich with cases on point. This may be because it has been obvious

[4] The Petitioner wishes to bring it to the SJC's attention that a nearly identical petition was filed with the Single Justice of the Court of Appeals, on behalf of the four unsuccessful intervenors. See Commonwealth v. Tracey Anne Spicuzza, et al., Docket No. 2024-J-0205 (App. Ct., filed Apr. 9, 2024). That single justice of the appeals court ruled that this matter was outside his authority under G.L. c. 231, § 118, and cited to Globe Newspaper. that makes it clear that the Petitioner in *this case* absolutely must bring this under ch. 211 § 3. Petitioner organization hereby joins in and adopts the arguments in that separate petition by Spicuzza, et al., and has largely filed the same arguments herein.

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.[5]

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. However, there are analogous cases to consider. When courts seek to close their own courtrooms,[6] third parties (usually media entities) are nearly always permitted to intervene, because it is an affront to due process that a court can deprive hundreds of people of their First Amendment rights without an opportunity to be heard. See Eisai, Inc. v. Hous. Appeals

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[5] 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, but the Court's imprecision leaves citizens to guess where the zone begins and ends). As it stands, the Order clearly includes inside and grounds of the Dedham public library, churches, houses, and businesses, as well as streets and sidewalks.
[6]Something courts have the authority to do under proper conditions.

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").

1. The Order Violates Separation of Powers

The town of Dedham *might* have the authority to pass an ordinance preventing demonstrations. The Commonwealth might also have the same legislative authority. However, the judiciary has no power to decree anything affecting non-parties outside of its courtroom, much less outside its court*house*, especially when it comes to banning *all* demonstrations of any kind. Accordingly, without even reaching the violence the Zone does to the First Amendment, this Court should use its power under G. L. c. 211, § 3 to rein in the Superior Court's abuse of her authority and power to try and create a Prior Restraint Zone with no power at all to do so.

Massachusetts has witness intimidation statutes. See G.L. c. 268, §§ 13A & 13B. If anyone violates those laws, then they can certainly be charged. The Massachusetts legislature could have, perhaps, tried to ban all demonstrations within 200 feet of a courthouse, but it chose not to. Instead, it chose Sections 13A & 13B as this Commonwealth's vehicle for protecting the integrity of the court process, without simply

snuffing out the First Amendment in an ill-defined zone.

2. The Order Violates the First Amendment

Courts 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. "For the 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). Again, the Superior Court lacks jurisdiction over the public sidewalks, and even if it had such jurisdiction, it could not exercise power there without running headfirst into the First Amendment when trying to do so in the way it has here. The Prior Restraint Zone, is not just unconstitutional, but constructed of legally poor quality materials. The Superior Court did not even *consider*, much less correctly analyze, its obligation to engage

in narrow tailoring,[7] nor did it consider, much less implement, any less restrictive means. The Superior Court simply napalmed the entire First Amendment in a vaguely-defined area, to protect an interest that it disingenuously defined.[8]

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

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

[8] The Court is reminded that the Commonwealth requested the First Amendment Free Zone, not the Defense. This is unsurprising because there have been throngs of supporters for the Defendant. Meanwhile, the Superior Court claims in its Order that the Constitution must be suspended to protect the *Defendant*.

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, and in an example of "First Amendment Meta," there are members of the petitioner organization who wish to do just that -- they wish to voice displeasure at the Judge's actions, independent of the merits of the Karen Read case.

If the Superior Court has the power to reach outside the courthouse, *and* the ban were limited to jury *selection* only, the Superior

Court's actions might be so reasonable that they would not have raised enough concern to petition the Single Justice. However, if the Superior Court were truly interested in protecting the jury or witnesses, there are ample alternative means to do so. During trial, they 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 Petitioners would not challenge them.[9]

3. 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

[9] This Court itself has a responsibility to show greater deference to the Constitution than even the Petitioners' arguments request.

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.

REQUESTS FOR RELIEF

1. The Order be vacated, in its entirety, and the Superior 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 Sections 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.

Compare 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.

Date: April 10, 2024.

Respectfully submitted,

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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 2,972 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
Marc J. Randazza

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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Counsel for Karen Read

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:

Clerk of Court
Norfolk Superior Court

650 High Street
Dedham, MA 02026
<norfolk.clerksoffice@jud.state.ma.us>

/s/ Marc J. Randazza___
Marc J. Randazza

ADDENDUM

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT
CRIMINAL ACTION
22-00117

COMMONWEALTH

vs.

KAREN READ

MEMORANDUM OF DECISION AND ORDER ON COMMONWEALTH'S MOTION FOR BUFFER ZONE SURROUNDING NORFOLK SUPERIOR COURT AND REQUEST FOR ORDER PROHIBITING SIGNS OR CLOTHING IN FAVOR OF EITHER PARTY OR LAW ENFORCEMENT

The Commonwealth seeks an Order from this Court (1) establishing a buffer zone around the Norfolk Superior Courthouse in Dedham during the trial of the defendant, in which demonstrations related to the case would be prohibited, and (2) prohibiting any individual from wearing any clothing or insignia related to the case in the courthouse during trial. While the Court recognizes and appreciates the constitutional right of the people to peacefully protest under the First Amendment to the United States Constitution,[1] the defendant has the right to a fair trial by an impartial jury under the Sixth Amendment to the United States Constitution. See U.S. Const. amend. VI ("the accused shall enjoy the right to a speedy and public trial, by an impartial jury"); *Skilling* v. *United States*, 561 U.S. 358, 377 (2010). "This right, ensuring the defendant 'a fair trial,' has also been characterized as 'a basic requirement of due process.'" *In re Tsarnaev*, 780 F.3d 14, 18 (1st Cir. 2015), quoting *Skilling*, 561 U.S. at 378.

To ensure the defendant's right to a fair trial, the Court may restrict protected speech so long as the restrictions do not "burden substantially more speech than is necessary to further the

[1] This court acknowledges the helpful *amicus curiae* memorandum submitted by the American Civil Liberties Union of Massachusetts, Inc.

government's legitimate interests." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 799 (1989). In this case, it is well documented that protestors have shouted at witnesses and confronted family members of the victim. Individuals have also taken to displaying materials which may or may not be introduced into evidence during trial, and airing their opinions as to the guilt or innocence of the defendant on their clothing or on signage. Witness intimidation has also been a prevalent issue in this case. Given these past actions, the Court concludes there is a substantial risk that the defendant's right to a fair trial will be jeopardized if prospective jurors are exposed to the protests and messages displayed on signs or otherwise, particularly before this Court has had an opportunity to instruct the jurors about their obligations with regard to remaining fair and unbiased. The risk extends during trial where jurors and witnesses would have no choice but to be exposed daily to the messages and viewpoints of the protestors when entering and leaving the courthouse or sitting in the courtroom.

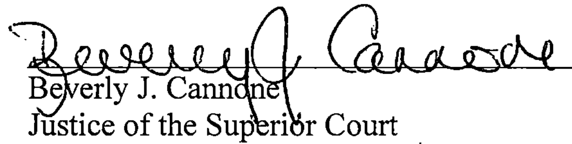
The defendant here is entitled to a fair trial with an impartial jury, free from outside influence, focused solely on the evidence presented in the courtroom during trial and the applicable law. To protect this right, this Court must reduce the risk of exposing witnesses or jurors in this case to such outside influences.

ORDER

It is, hereby, **ORDERED** that 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. This complex includes the Norfolk Superior courthouse building and the parking area behind the Norfolk County Registry of Deeds building. Individuals are also prohibited from using audio enhancing devices while protesting.

It is further **ORDERED** that no individuals will be permitted to wear or exhibit any buttons, photographs, clothing, or insignia, relating to the case pending against the defendant or relating to any trial participant, in the courthouse during the trial. Law enforcement officers who are testifying or are members of the audience are also prohibited from wearing their department issued uniforms or any police emblems in the courthouse.

Date: April 4, 2024



Beverly J. Cannone
Justice of the Superior Court

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NORFOLK, SS,

SUPERIOR COURT DEPARTMENT
NORFOLK SUPERIOR COURT
DOCKET NO. 2282CR0117

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CLERK OF THE COURT
NORFOLK COUNTY

COMMONWEALTH

V.

KAREN READ

CITIZENS' MOTION TO INTERVENE FOR THE LIMITED PURPOSE OF UPHOLDING AND DEFENDING THE FIRST AMENDMENT BY OPPOSING THE COMMONWEALTH'S MOTION FOR A BUFFER ZONE AND RESTRAINING SIGNS OR CLOTHING THAT EXPRESS A VIEWPOINT ABOUT THE TRIAL

1.0 Introduction

Movants Tracey Anne Spicuzza, Lorena Jenkinson, Dana Stewart Leonard, and Paul Cristoforo are a group of concerned free American citizens who will be negatively affected by the relief the Commonwealth seeks and wish to be heard before this Honorable Court renders its decision on that requested relief. The Commonwealth seeks to unconstitutionally infringe upon the right of the people to enjoy their full and robust rights under the First Amendment and Art. 16 of the Massachusetts Declaration of Rights, as amended by art. 77 of the Amendments to the Massachusetts Constitution. The Commonwealth's desire to clamp down on criticism and dissent must not be given this Court's imprimatur.

4/4/24
Denied for reasons stated on the record.
B. Cannone

Intervenors have no intent to interfere with anyone, to obstruct anyone, nor to impede anyone. But, they do intend to engage in core First Amendment activity – speech on a matter of public concern in a traditional public forum. The Commonwealth is not satisfied that it has the unlimited power and resources that come from one-party rule, unlimited ability to tax, and a monopoly on violence. Power has become so intoxicating that the Commonwealth has, in the course of prosecuting this case, gone on an unchecked bender – pursuing the additional prosecution of journalists and demonstrators alike. But, like any addiction, eventually even those who love the addict must stop enabling them. The Commonwealth wants this Honorable Court to feed its addiction by giving it the most Constitutionally repugnant relief that can ever be fashioned – a prior restraint. Intervenors resist on their own behalf and on behalf of many others who fear further Commonwealth retaliation if they step forward.

If the Court does not permit intervention, no one will advocate for the rights of the people. These four brave Patriots[1] have come forward to do so, not only on their own behalf, but as proxies for anyone who wishes to keep freedom intact in Norfolk County.

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[1] This word is not used lightly. Given the way that the Commonwealth has retaliated against other citizens for challenging its authoritarianism, it truly did take bravery for them to step forward. The Commonwealth's actions in arresting journalists and demonstrators who vocally disagreed with this prosecution have had a strong chilling effect on the speech surrounding this trial.

2.0 The Court Should Allow Movants to Intervene

The Court should grant this Motion to Intervene and consider Movants' opposition to the relief the Commonwealth has asked for.

2.1 Movants Have Standing

Courts permit intervention in criminal matters by third parties when First Amendment rights are at stake, and neither party is particularly suited to, nor motivated to, preserve those rights. *See, e.g.*, *Commonwealth v. Clark*, 730 N.E.2d 872, 880 (Mass. 2000) (trial court granted media entities' motion to intervene to seek reconsideration of trial judge's order barring electronic media from trial). Petitioners seek to intervene for the limited purpose of being heard when the Court considers the Commonwealth's motion, as neither the Commonwealth nor the Defense are in the position to adequately stand up for the rights of the affected citizens. The Commonwealth seeks to bind and gag Lady Liberty and must not be permitted to do so without opposition. Defendant Read should not be asked to defend herself and the rights of 7 million Massachusetts citizens at the same time.

Movants have standing to intervene, relative to the Commonwealth's motion, because they intend to demonstrate outside the courthouse during the trial. It is the citizenry, not Ms. Read, who would suffer the injuries inflicted by the requested relief. Non-parties may intervene in proceedings where they would otherwise suffer "a substantial injury to a direct and certain violation of" their rights. *Eisai, Inc. v.*

Hous. Appeals Comm., 89 Mass. Ct. App. 604, 607 (2016). Movants intend to demonstrate by holding signs and wearing shirts with slogans on them.

Movant Tracey Anne Spicuzza is aware of the history of this courthouse and the fact that Nicola Sacco and Bartolomeo Vanzetti were wrongfully convicted here. It is her intent to hold a sign outside commemorating the injustice perpetrated upon them, with a statement that the Commonwealth of Massachusetts is not to be trusted. She wishes to do so outside the courthouse, because she is aware that the press will be there and the public will pass by, and this is therefore where her demonstration will be most meaningful. She has not settled on the exact content of her signs that she will hold each day, but she intends to commemorate the injustice done to Sacco and Vanzetti and to draw parallels that she sees in this prosecution. She wishes to communicate that everyone deserves a fair trial, and Sacco and Vanzetti did not get one, but Karen Read should.

Movants Lorena Jenkinson and Dana Stewart Leonard wish for the public to focus on how this trial is conducted, ensuring that the public is focused on it and they pay attention to it, even if the public cannot attend the trial themselves. They are aware that the press will be outside the courthouse, and they want the press to see what they have to say on their signs. Lorena Jenkinson particularly intends to criticize the police and the prosecutors in this case by holding up signs in support of

the "Canton 9" – who were previously charged with witness intimidation for demonstrating about this case.

Movant Paul Cristoforo wishes to demonstrate to call attention to his belief that the Commonwealth, the Norfolk District Attorney's Office and the Canton Police are not to be trusted. He intends to hold up a sign that says "FREE TURTLEBOY" – in support of the journalist, Aidan Kearney, who has been prosecuted for engaging in journalism pertaining to this case. He also intends to hold up signs that say "FREE KAREN READ."

Movants do not ask for permission for these statements and these statements exclusively, but offer them as nonexclusive examples of the lawful speech they intend to engage in. They do not intend to, nor should they be permitted to, engage in legally obscene demonstration, nor true threats, nor incitement to violence, nor true "fighting words," to the extent that such doctrine still exists.[2] They should not

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[2] The "fighting words" doctrine, from *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) is a derelict adrift on the sea of jurisprudence. *See* 1 Smolla & Nimmer on Freedom of Speech § 2:70 (2008). David Hudson, observed courts "have reached maddeningly inconsistent results" with respect to what are "fighting words." "FIGHTING WORDS," Freedom Forum's First Amendment Center. (archived at https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/personal-public-expression-overview/fighting-words/) The doctrine is borne from a sexist notion, that there are certain things a man's pride cannot endure hearing without resorting to fisticuffs. "Chaplinsky… is steeped in an outdated idea of toxic masculinity." Eric Kasper, *No Essential Reason*, 53 TEX. TECH L. REV. 613, 614 (2021). Authoritarians frequently retreat to this toxically-sourced doctrine as a last resort when what they really want to say is "your honor, gag our critics." Nevertheless, if there is to be a determination that certain statements are "fighting words," these must be addressed *after* the words are used, not in a prior restraint.

be enjoined from other forms of demonstration, as long as such demonstration is protected by the First Amendment and/or Article 16.

The Commonwealth's requested relief would directly preclude the exercise of Movants' freedom of speech under the First Amendment and Article 16 and therefore must be denied, or at least narrowly tailored. The Commonwealth asks this Court to use a sledgehammer when a fine scalpel is the only tool it should wield.

3.0 The Court Should Deny the Commonwealth's Motion

The Commonwealth's seeks a 500-foot free speech buffer. The Court should not grant what would amount to a prior restraint on free and fair discourse concerning this trial. Intervenors implore this Court to not sacrifice freedom at the altar of the Commonwealth's zeal.

3.1 Trials are Public Events

Trials are public events, and this Court should not allow the Commonwealth to keep the public from participating. The Supreme Court has recognized that public opinion in a fair and open trial is particularly important. "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, Intervenors take no position on whether *judicial* power has been used in an unrestrained or unchecked manner. The default position is that it has been used wisely, with restraint and reverence for the Constitution, and the default presumption is that this Court will continue to use it when evaluating the Motion. The Court should *embrace* demonstrators outside the courthouse. Courts wield an immense amount of authority because they are seen as legitimate checks on the power of the other branches of government. Where a court *may* find itself checked by public opinion, it is more likely to be *legitimized* by wide open and robust debate. What better way for a Court to show its confidence in the process than to pronounce that it has no fear of speech outside its walls. It should invite it.

3.2 The Forums the Commonwealth Seeks to Regulate

The Commonwealth seeks to regulate two classes of turf: The Courthouse and its curtilage (inside the Court's territory), and outside the Court's territory—traditional public forums such as public sidewalks. The Commonwealth's Motion exceeds the reasonable restriction as to both classes. Intervenors recognize that there is a lower level of tolerance for speech in the courthouse itself. Nevertheless, the Court should still exercise restraint and wisdom when fashioning its remedies even in the space where it has virtually unlimited authority.

3.2.1 Inside the Courthouse

With respect to regulations *inside* the Courthouse, Intervenors have little quarrel. The Court has near plenary authority to use its best judgment inside its own realm. Intervenors do take issue with the blanket nature of the request, prior to speech occurring. The Court is in a position to observe the conduct of the proceedings, and it is able to judge *at the time of the speech* if it is disruptive or distracting. Should a member of the public sit inside the courtroom with a shirt that says "Free Karen Read," or a button that says "Justice" or any other message, and the Court sees no disruption, then such should be permitted.[3] The Commonwealth seeks a prior restraint, when this Court can observe the courtroom, day to day, and see for itself if either Read's rights or the Commonwealth's interests could be impacted. The Court should not bind itself and the public prior to seeing what will happen, and how it might affect things, unless there is a restriction that is so obviously necessary that it should be pre-announced. Courtroom observers should be admonished to be silent. Holding up signs seems to be disruptive, no matter what the message, or even if the sign is a blank piece of paper. But limiting the messages that people can have on water bottles? The Commonwealth is going too far.

One portion of the request is particularly calling out for caution: the Commonwealth has asked that law enforcement officers not be permitted to wear

[3] Intervenors intend to also rotate to seats inside the trial wearing such expressive apparel.

their uniforms inside the courtroom. The Court should, prior to granting such a request, consider *why* the Commonwealth is asking for this restriction, and should consider the fact that the Commonwealth may be asking for this relief *in order to send a message of its own.*

In most cases involving a fallen law enforcement officer, courtrooms are packed with fellow officers, in uniform, supporting their fallen comrade. Here, despite this being a high-profile case about a fallen officer, the courtroom has been devoid of law enforcement officers in uniform. The Court should be mindful that the Commonwealth seems aware that this is a unique trial in which a fallen officer's alleged killer's trial is not being attended *en masse* by men and women in uniform. This Court should be mindful that the lack of officers in uniform may communicate one thing if the room is void of them because they chose to remain home. The Court itself will create a second narrative if they weren't coming anyway – letting the Commonwealth blame the Order for a lack of law enforcement attendance -- rather an inability to attract supporters in Blue. This is also a clear and present danger in restrictions on the Intervenors. If members can wear shirts that read "Sacco and Vanzetti's Lives Mattered" in this Courthouse, but not "Free Karen Read," the Court may be placing its imprimatur on some displays, but not others. To the extent that any restriction is placed on displays inside the courtroom, the Court should pronounce that this is because the Commonwealth asked for the restriction (or Ms.

Read asked for it, if she asks for one). Otherwise, it may appear that observers in the courtroom are not communicating a message to anyone because they have chosen to remain silent. Choosing to remain silent is, itself, a viewpoint.

The Court should temper any "inside the courthouse" relief with mindfulness toward how the Commonwealth may be manipulating this process (on purpose or simply unwittingly) to enlist the Court into using trial observers to present a narrative of its own.

3.2.2 Outside the Courthouse

The Commonwealth seeks an order "prohibiting any individual from demonstrating in any manner, including carrying signs or posters, or making statements about the defendant, law enforcement, the Norfolk District Attorney's Office, potential witnesses, or the evidence, within 500 feet of the Norfolk Superior Court complex, which includes the parking area behind the Registry of Deeds building, during the trial of this case." Such a request is not narrowly tailored and constitutionally infirm.

From "time out of mind public streets and sidewalks have been used for public assembly and debate, the hallmarks of a traditional public forum." *Frisby v. Schultz*, 487 U.S. 474, 480 (1988). The government's ability to "limit expressive activity" in a traditional public forum is "sharply circumscribed." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). In *United States v. Grace*, 461 U.S.

171 (1983), the Supreme Court held that the "sidewalks forming the perimeter of the Supreme Court grounds" are traditional public forums, places where expressive activity is lightly regulated, because they are "indistinguishable from any other sidewalks in Washington, D.C." *Id.* at 179-80. In other words, Congress tried to protect the Supreme Court from protests, and the Supreme Court itself struck down Congress' attempts to do so. If the Supreme Court can tolerate protests, this Court can do so as well.

The Commonwealth seeks not only to regulate the sidewalks adjacent to Court grounds, but also to the streets, sidewalks, buildings, and parks within a 500-foot distance from court grounds. This request is overbroad and not narrowly tailored to a compelling state interest. The Court cannot justify banning all demonstrations within 500 feet of the courthouse, unless it articulates a compelling governmental interest in doing so, and it does so in a narrowly tailored fashion. *Perry,* 460 U.S. at 45. To do that, we must ask ourselves what *is* the government interest? The Commonwealth's interest is to quash public displays of criticism. This is not a legitimate, let alone compelling governmental interest.

On the other hand, Intervenors accept that shielding the jury from contact that could *unduly* influence them is a compelling governmental interest. In order to meet the narrowly tailored prong of the analysis, the Commonwealth must target the exact wrong that it wants the Court to cure. *See, e.g., Frisby v. Schultz,* 487 U.S. 474, 485

(1988); *Ward v. Rock Against Racism*, 491 U.S. 781, 800 n.7 (1989); *Casey v. City of Newport*, 308 F.3d 106, 115 (1st Cir. 2002). Meanwhile, the Commonwealth just seeks to create a 500-foot wide sledgehammer and crush all disfavored speech that it lands on. This even includes private property, where the Intervenors have gathered in the past and intend to in the future. The Commonwealth seeks to create the illusion that there is no public outcry against how they have handled this case, and how they have quashed dissent by prosecuting journalists and demonstrators alike.

The proposed restriction is not limited to this case. It means, as inside the courthouse, citizens cannot demonstrate with phrases like "Back the Blue" or "Defund the Police." It means one cannot campaign against the incumbent district attorney. It means that one cannot protest excesses by the Commonwealth like charging other demonstrators or journalists with crimes. It means that one cannot engage in pamphleteering regarding jury nullification in general, without targeting any particular case. *See Picard v. Magliano*, 42 F.4th 89 (2d Cir. 2022) (finding such pamphleteering protected). It means that the homeowners and business owners and patrons, even inside the multitude of buildings within the proposed perimeter, cannot use their property, implicating not only the First Amendment, but also the Fifth Amendment. *See Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021) (a regulatory taking "imposes regulations that restrict a property owner's ability to use his own property"). It means nearby employees cannot exercise their Section 7

rights and picket their employer in opposition to unfair labor practices. If anything, a restriction can only apply to the courthouse grounds and to the particulars of this specific case, and even then, the tailoring must be even more narrow than that.

3.3 Narrow Tailoring

The Commonwealth's proposal reflects no tailoring, let alone *narrow* tailoring. The Commonwealth wants to create a "free speech desert" 500 feet in all directions from the courthouse. However, this Court could readily craft narrower restrictions than this, which would target any imaginable legitimate concerns.

For example, if the Court were to require a ban during *jury selection only*, this would still likely chafe the Constitution, but Intervenors would compromise and waive any challenge to such a limitation. During trial, the jury could be brought in through the back entrance to the courthouse, and demonstrators could be banned from that entrance. After all, the public does not generally pass by the back entrance to the courthouse, and the press will be out front. 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. These suggestions alone would tailor the relief so that the Constitution was not so obviously treated with such violence.

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Intervenors suggest the following narrow tailoring devices:

1. Any restrictions on demonstrations should only be during jury *selection*, when the prospective jurors will be entering through the main entrance, and they cannot be instructed to enter through the alternate entrances.

2. Any other concerns about tainting the jury or witnesses should be limited to actual contact with jurors or witnesses. Any concerns about demonstrators influencing them should be addressed by bringing jurors and witnesses in through alternate access points, 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.

3. If there is a specific finding that it is impossible for a juror or witness to enter the courthouse through the back entrance, perhaps then, law enforcement may be called to require that demonstrators face away from the courthouse for the few seconds it takes for that person to enter the courthouse, and then the demonstrators may continue un-restricted once that affected person has entered or exited the building. However, to prevent abuse of this narrowly tailored restriction, there should be a specific factual finding as to why it would be impossible to use the back door, rather than the public facing door to the courthouse.

3.4 The Commonwealth Should Be Restrained

Demonstrators outside the Courthouse are outside the jurisdiction of this Court. However, the Commonwealth is not. And the Commonwealth, having opened this subject for discussion should have that discussion aimed at its conduct to date, and its conduct going forward.

The Commonwealth claims that it, too, has a "right" to a fair trial. It claims so citing dicta[4] and seems to miss the entire point of the Bill of Rights. The Government does not have *rights* – the government has *powers* and those powers are tempered by the rights that are God-given *to the people* and Constitution-preserved *for the people.* In contrast, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373 (1976). Intervenors would suffer irreparable harm were the proposed restrictions endorsed by the Court.

The Commonwealth is prosecuting journalists and demonstrators alike—in its quest to act without criticism. Its authoritarianism has led to people currently facing criminal charges for standing on a street corner holding innocuous signs. *See O'Neil v. Canton Police Dep't,* No. 23-cv-12685-DJC, 2023 U.S. Dist. LEXIS 202183 (D.

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[4] The Commonwealth cites a throwaway line in a case involving a trial judge abusing his discretion by dismissing a criminal case right after opening statements. And while the SJC may have used this troubling phrase more than once, it is hardly a "right" that would be coextensive with the Fifth, Sixth, or Fourteenth Amendment, nor is it a "right" that should render the First Amendment a mere afterthought.

Mass. Nov. 10, 2023). The government reads G.L. c. 268, §§ 13A & 13B, as giving it the power to arrest demonstrators if a potential witness can even *see* a sign that pertains to the trial. *Id.* By the Commonwealth's reading of the statute, there is literally nowhere that the demonstrators can safely operate, as there are huge roving free speech voids. The Commonwealth should be ordered to limit its application of 13A and 13B only to acts that have the intent and the effect of intimidation – not the expansive reading that it seeks in its motion.

3.5 A Complete Ban Would De-Legitimize the Proceedings

The public interest favors denial of the Commonwealth's motion, and restraining the Commonwealth from abusing Sections 13A and 13B. The Courts are independent. The people presume that the judge will be free of bias and influence from public opinion. Intervenors challenge the Commonwealth's view that this Court cannot function if it knows how the public feels about its decisions. Similarly, the Court is presumed to be capable of controlling the jury and its courtroom.

In *United States v. Grace*, the Supreme Court noted:

> Court decisions are made on the record before them and in accordance with the applicable law. The views of the parties and of others are to be presented by briefs and oral argument. Courts are not subject to lobbying, judges do not entertain visitors in their chambers for the purpose of urging that cases be resolved one way or another, and they do not and should not respond to parades, picketing, or pressure groups.

461 U.S. at 182-183. It is rare that judges and prospective jurors are ignorant of high-profile matters and, frankly, one would hardly think a jury of one's peers

includes those who are out of touch with society. Demonstrations show that our system is open and fair. Lockdowns and bans show that we have something to fear.

In *Grace*, the Government tried to justify a restriction on picketing outside the Supreme Court on the grounds that it might *appear to the public* that the Supreme Court is subject is subject to influence by picketers and marchers. The Supreme Court rejected the Government's desire to protect it from demonstrators, but in doing so endorsed the notion that a ban on demonstrators would likely send the *opposite* message. If a crowd stood outside the Massachusetts Institute of Technology with signs saying "the Earth is flat!," would it change the minds of the astrophysicists at M.I.T.? Of course not. There would be no harm, because there would be no *influence*. Accordingly, a Court with confidence in itself should permit demonstrators. Otherwise, if it banned them for this trial, why not *all* trials? Is it that there are too many people focused on this trial? Would a single demonstrator outside another trial holding a sign that said "Black Lives Matter" or "Judge Not, Lest Thee Be Judged" influence the Court? Why not? If that one hypothetical person would not change the outcome of this free and fair trial, why would 100 people wearing "FREE KAREN READ" shirts change the outcome of the trial? The hundreds of protestors against police brutality outside the trial of the police officers who killed Amadou Diallo did not effect a guilty verdict, are the demonstrators here more powerful? Is there talismanic power in this case that does not exist in others,

such power that this Court lacks the ability to combat it through Constitutionally reverent means?

3.6 Attempts to Stifle Dissent Will Have the Opposite Effect

The Commonwealth should be careful what it wishes for. Should an Order issue that unjustly stifles freedom of expression, Liberty finds a way.

Dissidents are a scrappy lot. In Apartheid South Africa, the government banned newspapers from publishing stories that could call Apartheid into disrepute. So, newspapers simply published blank newspapers. Their attempts to shut down criticism metastasized into greater criticism. Even those who were not previously drawn to the cause embraced the cause of freedom of expression. Free Americans make other people fighting for Liberty look like amateurs. Since April 19, 1775, we in Massachusetts have been the O.G.s of Liberty. As another rebellion's spokesperson said, "the more [the Commonwealth] tighten[s] [its] grip, the more [Liberty] will slip through [its] fingers."[5]

The kind of people who will travel from miles around to demonstrate outside a trial for months and months will find a way to protest. The Commonwealth asks for a blanket ban on protesting within 500 feet of the courthouse – this would even place the sidewalk in front of the public library off limits. It is forseeable that there would be protests simply about the lack of a right to protest.

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[5] STAR WARS (Lucasfilm, 1977).

If we narrow the request to just content or viewpoint based restrictions, and a demonstrator cannot hold up a sign that says "KAREN READ," then they may hold up one that says "READING IS FUNDAMENTAL." If the Commonwealth bans that, they will hold up books. If they cannot hold up books, they will find another way. This is not to say that these are reasonable alternate avenues of expression – they are not. But, the reaction to a clampdown is rarely silent compliance.

The Commonwealth seeks to blow out the candlelight of Liberty, and if it succeded, it would fan those flames, not extinguish them. It will be a challenge to find jurors who are ignorant enough about this trial to serve on its jury. If the Commonwealth gets its way, it may render that quest impossible – as they will pour metaphorical gasoline on the small fire of Liberty that will otherwise calmly smolder outside this courthouse.

4.0 CONCLUSION

Leave to intervene should be granted. If the Court is inclined to grant any prior restraint, it should do so with a scalpel rather than with a sledgehammer. The Court should tread lightly outside the courthouse, and it should make its decisions as circumstances require inside the courthouse.

Dated: April 2, 2024.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was served upon all pro se parties and all attorneys of record in via first-class mail, postage prepaid, on April 2, 2024, as follows:

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