COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Norfolk, ss. No. SJC-13589

TRACEY ANNE SPICUZZA, LORENA JENKINSON, DANA STEWART LEONARD, PAUL CRISTOFORO, FREEDOM TO PROTEST COALITION, NICHOLAS ROCCO, AND JON SILVERIA,

Intervenors/Petitioners,

v.

COMMONWEALTH OF MASSACHUSETTS, KAREN READ, AND SUPERIOR COURT OF NORFOLK COUNTY,

Respondents.

On Appeal from Massachusetts Supreme Judicial Court Single Justice
No. SJ-2024-0122 & No. SJ-2024-0123

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

ARGUMENT

1.0 The Government Fails to Refute the Fact that a Superior Court Judge Does Not Have Authority Outside the Courthouse Over Non-Participants

Appellants established that a trial judge has no power to enact a zone outside of a courthouse where speech is prohibited. The government fails to come up with any authority supporting their position, instead providing a number of cases that either explicitly or impliedly support the Appellants' position.

For example, the government cites a case to support the proposition that a judge can transfer venue, Crocker v. Justices of Superior Court, 208 Mass. 162 (1911). Of course they do—it is hardly controversial to suggest a court has authority to manage the cases on its own docket. If the judge in this case had done that, there would be no dispute. The government then provides cases that demonstrate that judges have power to control judicial system personnel, conduct of participants in a trial, actions of officers of the court, and the internal court environment. Carrasquillo v. Hampden County District Courts, 484 Mass. 367, 384 (2020). But, none of that means, by extension, that the Superior Court has the authority or jurisdiction to then tell ordinary citizens, who are neither trial participants, officers of the court, nor

judicial system personnel what they can or cannot do even one foot outside of the Courthouse curtilage, much less 200 feet from it—even inside private businesses or on or within private property. A perusal of a map of the area shows that this Prior Restraint Zone even overlaps the Dedham Public Library. See Commonwealth's Brief at 68. A public library is perhaps the most First Amendment protective environment we should have, yet this untailored Prior Restraint Zone was not even customized to exclude the library.

The government invokes G.L. c. 220, § 2, for what seems to be the proposition that a trial court has unlimited power to do anything it sees fit, without any limitation, as long as it deems it "necessary for the performance of their duties." But, the cases cited after that show that this is not so broad. In Commonwealth v. Hardy, the court limited the attendees inside a courtroom – not outside the courthouse. 464 Mass. 660 (2013).[1] The government then cites Commonwealth v. Gomes, which does not support their legal position, but clearly relays to us what

[1] There has *never been a case* where a court issued such an order, and it was upheld after a challenge, and not a single case citing G.L. c. 220, § 2, was used to declare a Superior Court judge to have the power to create any kind of territorial control. Further, even if this Court now finds, for the first time in the Commonwealth's history, that G.L. c. 220, § 2, confers such power, the trial court still must exercise that power consistent with the First Amendment – which it has not done.

the Superior Court should have done here:

> Here, the judge instructed the jury prior to the view that anything they may see or hear outside the court room is not evidence, and that they were to decide the case solely on the evidence presented in the court room.

Commonwealth v. Gomes, 459 Mass. 194, 200-201 (2011). Precisely. That is what Judge Cannone should have done, instead of usurping legislative power and throwing a blanket over a huge section of a town, running roughshod over the First Amendment, all to stifle criticism of the government.[2]

2.0 The "Findings" Were No Such Thing

A "finding of fact" is not simply a pronouncement by a judge that a fact is what she loosely says it is. To find a fact is not to find the judge's opinion on rumors or matters she has not seen herself in the record. See Courtemarche v. Commonwealth, 1982 Mass. App. Div. 299, 300 (1982) ("A request that the evidence warrants a certain finding of fact means that the evidence, if believed, permits such a finding.")

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[2] As noted in the opening brief, a significant amount of criticism has been aimed at Judge Cannone, herself. That criticism has become heightened since the imposition of the Prior Restraint Zone. Accordingly, while there is no accusation here that she acted improperly out of self-interest, the appearance of a lack of neutrality is damaging to the legitimacy of any decision by a judge that stifles criticism of that very judge. It would be not only proper, but preferable, if there is a remand that it be assigned to a special master of some type.

Instead, it is a judge's declaration of facts, reached after "*deliberation and deduction on an essential, material, or relevant fact that has been put in issue*," and which reflect a weighing of the evidence rather than a mere recitation of the evidence. Commonwealth v. Isaiah I., 448 Mass. 334, 339 (2007), citing J.J. George, JUDICIAL OPINION WRITING 134 (4th ed. 2000).

The government argues that, since it charged Aidan Kearney with witness intimidation (which charges are contested and of which he is presumed innocent), such establishes a "fact" that there has been witness intimidation. As the Commonwealth (and the Superior Court) well know, "an arrest or an indictment is not evidence to be considered in determining whether a person is guilty or not guilty." Commonwealth v. Di Roma, 5 Mass. App. Ct. 853, 853 (1977). The Appellants accuse the Commonwealth of abuse of power.[3] Under the Commonwealth's logic, Appellants' *ipse dixit* establishes this "fact" as much as the Commonwealth has established that "fact" with respect to Mr. Kearney.

However, let us accept that since the government accused a

[3] The Commonwealth's opinion is due no more weight than the undersigned's. (In the interest of full disclosure, Randazza Legal Group represents Kearney on an unrelated defamation matter).

journalist of "intimidation" because they did not like his reporting, that is now a "fact." Why should this Order apply to anyone other than Mr. Kearney?[4] If this is the sum of their "findings," the government has done nothing to support the creation of the Prior Restraint Zone. It sets a dangerous precedent—all the government need do to prevent criticism is to charge one person and use those charges to enjoin everyone else.

Moreover, the Superior Court made no findings that someone holding up a "Black Lives Matter" banner would impact the trial. The Superior Court made no "finding" that a sign that says "2 Corinthians 3:17" would threaten the Commonwealth's ability to prosecute this case The Superior Court made no "finding" that other alternative means of addressing the interests raised would not be just as effective. The Superior Court made no "finding" that jury instructions, like in Gomes would be ineffective.

The "findings" are not "findings" at all. There is not even a scrap of admissible documentary or testimonial evidence in the record supporting them. This is unsurprising, because the hearing was held in

[4] The Appellants do not urge this relief, but at least it would have been precise narrow tailoring. If Mr. Kearney were accused of murder, Tracey Spicuzza would not be the one subject to pre-trial confinement.

a perfunctory manner, excluding the real parties in interest,[5] and expressly precluding them from having an opportunity to be heard. This is the precise opposite of making findings and how things are supposed to be done.

3.0 The Government Plays Loose with Definitions of "Content" and "Prior Restraint"

The Government plays the part of the Cheshire Cat with terms like "Content Based" and "Prior Restraint." It expects this Court to accept "it means what [the government says] it means, my dear." But that does not make it so.

The government argues that this is not a content-based restriction, but it is, without a doubt. The Commonwealth could be forgiven for claiming that it is not viewpoint-based, even though it is viewpoint motivated. But, content? Even at this very moment, commercial speech is taking place inside the Prior Restraint Zone:

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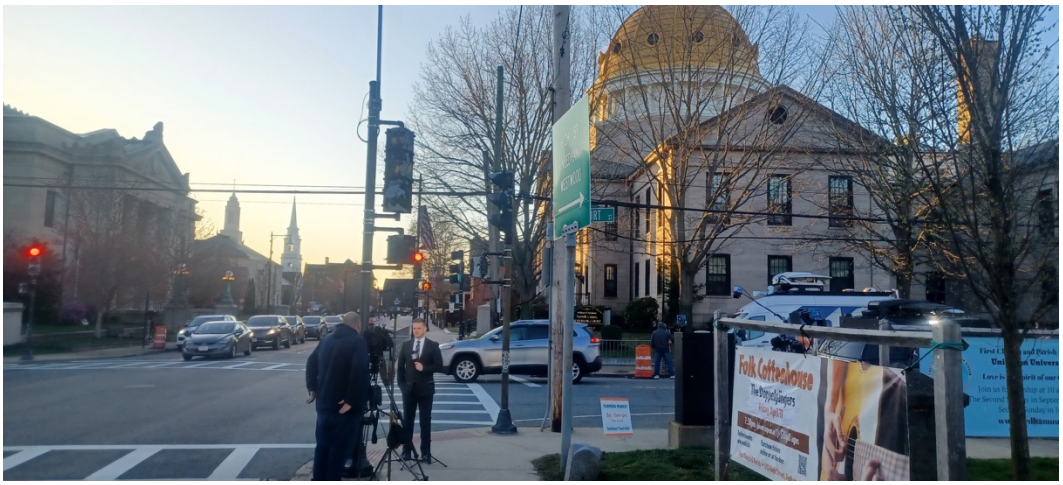
[5] That the Superior Court entertained an amicus brief is no substitute from hearing from those who would actually be restrained. Moreover, "amici have no right to initiate, extend, or enlarge issues, nor to appeal or dismiss issues." In re Vitamins Antitrust Litig., No. 99-197 (TFH), 2002 U.S. Dist. LEXIS 25815, at *32 (D.D.C. Dec. 18, 2002), citing Wyatt by and through Rawlins v. Hanan, 868 F. Supp. 1356, 1358-59 (M.D. Ala. 1994).



See, e.g., Photograph posted by X user @GrantSmithEllis outside Dedham Courthouse on first day of Read trial (Apr. 16, 2024) (showing commercial signage within Prior Restraint Zone).[6] If that content is allowed, but "JUSTICE" on a sign is not, then where is the support for the argument that the Order is not "content based?" Dashed on the rocks like the Hesperus, that is where it is.

The Commonwealth simply wishes to change the definition of "prior restraint" so that it can claim that this is not one. However, the interest that the government purports to seemingly advance here is protecting jurors and witnesses from intimidation. That is an important interest. It is so important that the legislature passed G.L. c. 268, §§ 13A & 13B. Any violation of those statutes is to be dealt with after

[6] Available at: https://twitter.com/GrantSmithEllis/status/1780186296301789291/photo/1 (last accessed Apr. 24, 2024).

it occurs. And, this Court has already indicated that statutes that restrain speech that intend to and do cause intimidation are constitutionally circumscribed to only restraining unprotected fighting words and true threats. Van Liew v. Stansfield, 474 Mass. 31, 36-37 (2016); O'Brien v. Borowski, 461 Mass. 415, 425 (2012). Here, the government seeks to simply declare that all speech, not merely fighting words or true threats, inside the Prior Restraint Zone is effectively violating §§ 13A or 13B, unless it is commercial speech, in which case it is allowed. The Order restrains constitutionally-protected speech before it is uttered; it is an unconstitutional prior restraint.

4.0 The Government's Cases do not Support Its Position

The government points to security measures for the 2004 Democratic Convention to justify the Prior Restraint Zone, citing Bl(a)ck Tea Soc'y v. City of Boston, 378 F.3d 8, 12 (1st Cir. 2004). First, those restrictions were imposed by a municipality, with authority over the affected areas, not a judge acting *ultra vires*. Further, even a perfunctory review of that case shows a highly developed record full of concerns about terrorism, and Judge Selya invoking the smoldering ruins of the World Trade Center to justify the establishment of access perimeters around the Convention. But, most importantly, those

restrictions were about *who* could enter the perimeter, not **what they could say once inside** the perimeter. Id.

> The City established a highly secure hard zone in the area immediately surrounding the Fleet Center (a zone for which the United States Secret Service assumed principal responsibility) and a less secure soft zone extending several blocks south in the area commonly known as Bullfinch Triangle. Only candidates, delegates, staff, press, and other specially authorized classes of persons were permitted into the hard zone – and even they had to pass through magnetometers before entering. By contrast, pedestrian access to and through the soft zone was generally unrestricted (although vehicles were not allowed to enter). This dual arrangement left little opportunity for groups wishing to demonstrate to do so within sight and sound of the delegates (especially since chartered buses, which loaded and unloaded within the hard zone, ferried the delegates to and from the Fleet Center).

Bl(a)ck Tea, 378 F.3d at 10-11.

Accordingly, comparing the Dedham Prior Restraint Zone to the Democratic National Convention zone is nonsensical. The Democratic Party got a permit, months in advance, and cordoned off an area with municipal authority and through the permitting process for a private event. The "Bl(a)ck Tea Society" essentially wanted access to areas that had been leased to a private entity so they could protest. They had no more right to enter the cordoned off areas than protesters would have to enter the Topsfield Fair without a ticket.

Neither does Frisby v. Schultz give the government's position any comfort. Frisby was a case about a statute, not a judicial decree – and it banned picketing a private residence. 487 U.S. 474 (1988).

> General marching through residential neighborhoods, or even walking a route in front of an entire block of houses, is not prohibited by this ordinance. Accordingly, we construe the ban to be a limited one; only focused picketing taking place solely in front of a particular residence is prohibited.

Id. at 483. The Prior Restraint Zone, on the other hand, is an area where all free speech is simply vaporized upon breaking the perimeter. The statute in Frisby tolerated demonstrations, it just did not tolerate congregating in front of a particular residence. In this circumstance, had the Superior Court simply entered an order that nobody could block the entrance to the Courthouse, that would have been consistent with Frisby. But, then again, G.L. c 268 §§ 13A and 13B already do that job for us. We do not need an Order that bans all demonstrations.

5.0 The Trial Judge Made No Findings

Claiming that the trial judge was somehow uniquely tuned in to what was the right thing to do misses the point. The trial judge made no findings, relied on no evidence, and refused to even hear from the affected public. In fact, the Order at least has the *appearance* of having been crafted to stifle criticism of the judge. Given this, if the matter is

remanded for actual factual findings, which are a prerequisite to establishment of any Prior Restraint Zone, no matter how small, then the judicial officer entrusted to create the zone should be specially appointed, rather than remanding the matter to the judge who erred in the first place.

Reliance on Lyons v. Secretary of the Commonwealth, 490 Mass. 560, 588-589 (2022) (discussing G.L. c. 54, § 65) is of no comfort either. Again, that was a statute, passed by the representatives of the citizens of the Commonwealth – not simply decreed by one person, who made no findings and who cannot be thrown out of office at the next election, if the citizens find that her actions were tyrannical. Additionally, there are no alternate means to provide for a peaceful voting experience – voters come to the polls (or did, before Covid). In the circumstance of a trial, jurors can come in through the back door to the courthouse, or can be delivered to the courthouse in vehicles where they do not need to even see anything else. Further, there is no impediment to the police enforcing G.L. c 268 §§ 13A and 13B, which occupy the legal turf that the Massachusetts legislature has chosen to occupy on this subject.

It boggles the mind to understand how the Commonwealth makes the following argument:

> [T]his is not a case such as United States v. Grace, 461 U.S. 171, 175-184 (1983), where a blanket, prohibition on parading, assembling, or displaying banners, devices, or signage on public sidewalks around the Supreme Court was found unconstitutional.

Commonwealth's Brief at 27. The only difference between this case and Grace is that in Grace, at least the zone was created by Congress. But, the Supreme Court of the United States, itself, was willing to uphold the First Amendment, and protect the right of the people to picket and demonstrate off court property.

Finally, the Commonwealth seeks to simply handwave the fact that the issuance of the Order was infected, from the start, with a lack of due process – as if Carroll v. President & Commm'rs of Princess Anne, 393 U.S. 175, 180-183 (1968) does not apply. As the Commonwealth admits, "there, a court issued an ex parte restraining order against certain persons." Here, the Superior Court issued an *ex parte* order that "certain persons," *i.e. everyone*, cannot act as full-fledged citizens, because the government does not like seeing signs that criticize them. That is the purpose and the function of the Order, and it must be struck down.

CONCLUSION

The Order created a Prior Restraint Zone without due process, without allowing affected parties to be heard, and without proper findings to justify it. Even if all of that were not true, the Prior Restraint Zone violates the First Amendment because it is not narrowly tailored nor is it a better way than much more less impactful ways of addressing the claimed concerns. The Order must be struck down, and if there is a remand for further consideration of the Commonwealth's motion, with due process and a proper consideration of the First Amendment, the remand as to the motion should be to a special master, and not the judge that originally imposed the Order.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(k) of the
Massachusetts Rules of Appellate Procedure

I, Marc J. Randazza, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16 (a)(13) (addendum);
Mass. R. A. P. 16 (e) (references to the record);
Mass. R. A. P. 18 (appendix to the briefs);
Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents); and
Mass. R. A. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the proportional font Times New Roman at size 14, and contains 2,780 words, total non-excluded words as counted using the word count feature of Microsoft Word.

/s/ Marc J. Randazza
Marc J. Randazza

CERTIFICATE OF SERVICE

Pursuant to Mass.R.A.P. 13(d), I hereby certify, under the penalties of perjury, that on April 25, 2024, I have made service of this Brief and Appendix upon the attorney of record for each party, or if the party has no attorney then I made service directly to the self-represented party, by the Electronic Filing System on:

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