No. 23-2062

United States Court of Appeals
For the First Circuit

MEREDITH O'NEIL; JESSICA SVEDINE; DEANNA CORBY; ROBERTO SILVA,
Plaintiffs - Appellants,

JENNA ROCCO; NICK ROCCO,
Plaintiffs,

v.

CANTON POLICE DEPARTMENT; TOWN OF CANTON MASSACHUSETTS; HELENA RAFFERTY, as Chief of the Canton Police Department and in her personal capacity; ROBERT ZEPF; MICHAEL CHIN; ANTHONY PASCARELLI; JOSEPH SILVASY,
Defendants - Appellees.

On Appeal from the United States District Court
for the District of Massachusetts
No. 1:23-cv-12685-DJC
The Honorable Denise J. Casper

DEFENDANTS-APPELLEES' PRINCIPAL BRIEF

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ISSUES PRESENTED[1]

1. Whether the District Court of Massachusetts committed reversible error when it denied Plaintiffs'-Appellants' Motion for Injunctive Relief under Fed. R. Civ. P. 65.

2. Whether Mass. Gen. L. c. 268, §§ 13A and 13B are constitutionally valid as written and applied to Appellants.

[1] Appellants did not provide Appellees a statement of the issues the Appellants' intended to present for review pursuant to Fed. R. App. P. 30(b). As such Appellees provide their own statement of issues.

STATEMENT OF THE CASE

1.0 PROCEDURAL HISTORY

Plaintiffs-Appellants brought this action on November 7, 2023 under 42 U.S.C. § 1983 seeking declaratory, injunctive relief, and damages for alleged violation of their First and Fourteenth Amendment rights. Specifically, Plaintiffs-Appellants sought "a preliminary and permanent injunction enjoining each Defendant from interfering with Plaintiff's right to lawfully engage in constitutionally protected expression and activity" and "a preliminary and permanent injunction enjoining the enforcement of Section 13A and Section 13B." AA015.

2.0 RULING PRESENTED FOR REVIEW

The District Court for Massachusetts denied Plaintiffs-Appellants' request for a preliminary injunction finding the witness intimidation statute serves a compelling governmental interest and is narrowly tailored as applied to Plaintiffs'-Appellants' protest. In reaching this conclusion it also found that Plaintiffs-Appellants were not reasonably likely to succeed on the merits of their as applied First Amendment challenge against §§ 13A and 13B or to demonstrate a likelihood of success on their retaliation claims. Finally, the District Court concluded that the Plaintiffs-Appellants did not show a risk of irreparable harm if the injunctive relief was not granted and that the public interest weighed against the Plaintiffs-

Appellants requested injunctive relief. Plaintiffs-Appellants now appeal the Memorandum and Order denying their motion seeking a temporary restraining order and preliminary injunction, which was entered by the District Court on November 10, 2023. ADD001-ADD013.

3.0 FACTUAL BACKGROUND

Due to a pending state criminal proceeding *Commonwealth v. Karen Read*, Docket No. 2282CR0117 in the Norfolk County Superior Court, the Town of Canton, Massachusetts has become subject to widespread public attention. AA042. The Criminal proceeding at time of this briefing has entered its eighth week of trial.[2] Supporters for Karen Read ("Read") believe she is being framed for murder by the State Police in collaboration with the Albert family. (AA001-AA002). There have been numerous contentious protests and rallies in Ms. Read's support. (AA023; AA029-AA030). The crowds of protestors has necessitated a buffer zone around the outside of the Norfolk Superior Court. The trial judge in that matter has

[2] *See* Todd Kazakiewich, "Karen Read murder trial enters week 8," WCVB NEWS (June 17, 2024). Available at: https://www.wcvb.com/article/karen-read-murder-trial-enters-week-8/61134805 (last accessed June 17, 2024).

noted that witness intimidation has been a prevalent issue affecting the trial.[3] Such harassment has additionally been testified to by a witness in the case.[4]

The magnitude of interest in the trial has placed a great strain on the Town of Canton and their police department, and on August 8, 2023 during a meeting of the Canton Select Board, Police Chief Helena Rafferty stated, in reference to demonstrations regarding the criminal trial, "residents of our community feel disrespected, targeted, and intimidated." (AA006 at ¶26). Chief Rafferty further stated that she "respect[s] everyone's right to voice [different] viewpoints under the First Amendment" but "cannot accept . . . witnesses—these are residents who have not been charged with any crimes—being bullied in their homes, at their children's games, or on vacation, all under the guise of the First Amendment" (AA006 at ¶26).

Plaintiffs-Appellants believe that Karen Read is being framed for murdering her partner Boston Police Officer, John O'Keefe ("O'Keefe"). (AA007 at ¶28). The

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[3] "The judge noted that, in connection with the underlying trial court proceedings, protestors have shouted at witnesses, have confronted family members of the victim, and have 'taken to displaying materials which may or may not be introduced into evidence during trial.' She also stated that witness intimidation has been a 'prevalent issue.'" *See Spicuzza v. Commonwealth*, 494 Mass. 1005 (2024).

[4] *See* Abby Patkin, "Witness in Karen Read trial breaks down describing harassment her family has faced," (May 15, 2024). Available at: https://www.boston.com/news/crime/2024/05/15/allie-mccabe-karen-read-murder-trial-harassment/ (last accessed June 17, 2024).

Plaintiffs-Appellants further believe various residents of the Town of Canton, including Chris Albert, his brother Brian Albert, and his son Colin Albert, are responsible for an alleged coverup for the murder of O'Keefe. (AA005-AA007 at ¶¶17-28). Plaintiffs-Appellants specifically believe that Colin Albert, Chris Albert's son, was involved in the murder of O'Keefe. (AA002, AA005). Chris Albert was known by Plaintiffs to have seen Read and O'Keefe the night of O'Keefe's death. (AA005 at ¶12). Plaintiffs-Appellants have described Chris Albert as "a focal point of this controversy." (AA002). Plaintiffs-Appellants anticipated Chris Albert's testimony to be against Karen Read. (AA012 at ¶60).[5] As such, Plaintiff-Appellants indicate that they gathered across the street from what they knew to be Chris Albert's business, D&E Pizza, "[t]o protest against what appears to be perjury to them." (AA007 at ¶29).

At the protest, Plaintiffs-Appellants held a number of signs and used several various slogans, including ones indicating their position on Read's arrest and

[5] Indeed, Chris Albert testified on behalf of the Commonwealth of Massachusetts on May 9, 2024 in the ongoing murder trial, *Commonwealth v. Karen Read*, Docket No. 2282CR0117 pending in the Norfolk County Superior Court of Massachusetts. *See* Matt Schooley, "Christopher Albert testifies in Karen Read murder trial about family's ties to case," WBZ NEWS (May 9, 2024). Available at: https://www.cbsnews.com/boston/news/karen-read-live-stream-today-murder-trial-day-8-chris-albert/ (last accessed June 17, 2024).

prosecution (i.e. "Free Karen Read").[6] (AA007 at ¶30). Canton Police Officers Robert Zepf, Michael Chin, Anthony Pascarelli, and Sergeant Joseph Silvasy approached the ongoing protest with a copy of Mass. Gen. L. c. 268, § 13A in hand and informed the crowd of protestors of the law which they could be charged with violating. (AA008 at ¶35).[7] None of the Plaintiffs-Appellees were arrested at the protest and an investigation was still pending at the time of the pleading, November 7, 2023. (AA008 at ¶36). Plaintiffs-Appellants have planned to return regularly to D&E Pizza to continue protesting across the street. (AA003). Plaintiffs-Appellants stated intent was to organize large and periodical protests across the street and near the witness's business for the purpose of expressing their concern for his expected perjury (AA003 pg. 3). Plaintiffs-Appellants filed the percipient action particularly to obtain emergency declaratory and injunctive relief under 42 U.S.C. 1983 enjoining the enforcement of Mass. Gen. L. c. 268, § 13A & 13B and declaring them unconstitutionally vague in their application ahead of their

[6] While not available when briefing the opposition to Plaintiff's Emergency Motion for a Temporary Restraining Order and for a Preliminary Injunction, subsequent investigation has uncovered that there is video recording of both the entire police interaction with the Plaintiffs-Appellants as well as video from the witness of the conduct of some protestors that day. Moreover, pictures and video taken shows that while Plaintiff-Appellants did carry signs such as "Justice" they also carried signs such as "Free Karen Read" and "Colin Albert was in the house" as well as QR codes to various webpages furthering their theory of what occurred.

[7] Defendants-Appellees dispute that the officers attempted to intimidate the protestors from leaving. Instead, the officers simply informed them that their protest should be outside the eyesight of the witness.

November 12, 2023 protest. (AA013 pg. 13). Now, in June 2024, there is no emergency before this Honorable Court.

STANDARD OF REVIEW

A decision to deny a preliminary injunction and temporary restraining orders ("TROs") may only be reversed if there is abuse of discretion. *Waldron v. George Weston Bakeries Inc*., 570 F.3d 5, 8 (1st Cir. 2009); *Hiller Cranberry Prods. v. Koplovsky*, 165 F.3d 1, 4 (1st Cir. 1999); *Paris v. Dep't of Housing & Urban Dev*., 843 F.2d 561, 574 (1st Cir. 1988). Such abuse of discretion may be found where there is a mistake of law, a clear error in fact-finding, or a misapplication of the law to the facts. *Together Employees v. Mass. Gen. Brigham Inc.*, 32 F.4th 82, 85 (1st Cir. 2022); *OfficeMax, Inc. v. Levesque*, 658 F.3d 94, 97 (1st Cir. 2011). The scope of review on appeal is therefore narrow and deferential because the trial court is best able to handle the nuances of a case and be mindful of the quality and consistency of the evidence. *Massachusetts Coalition of Citizens with Disabilities v. Civil Defense Agency & Office of Emergency Preparedness*, 649 F.2d 71, 74 (1st Cir. 1981).

SUMMARY OF THE ARGUMENT

Appellees contend that there is no evidence to suggest an abuse of discretion in the lower court's denial of Appellants' Emergency Motion for Temporary Restraining Order and for Preliminary Injunction. In support of their arguments,

Appellees state that a preliminary injunction is an extraordinary remedy for which Appellants have not shown that they should be granted, particularly upon the scant factual record. Appellants underlying First Amendment retaliation claim and constitutional challenge of the witness intimidation statute are not likely to succeed, and the trial court was correct in holding as such.

Regarding Appellants' First Amendment retaliation claim, Appellees contend that (1) Appellants conduct was not constitutionally protected; and (2) there is no evidence of a retaliatory motive or response.

Regarding Appellants' constitutional challenge to M.G.L. c. 268, §§ 13A and 13B, such statutes survive the strict scrutiny required for all content-based restrictions of speech. The witness intimidation statutes are narrowly tailored to achieve the compelling government interest in the administration of justice and a fair trial, including the protection of witnesses from intimidation.

Finally, Appellees contend that the witness intimidation statutes were constitutionally applied in the instant matter. As such, the trial court's denial of Appellants' Emergency Motion for Temporary Restraining Order and for Preliminary Injunctive Relief should be affirmed.

ARGUMENT

1.0 THERE IS NO EVIDENCE TO SUGGEST AN ABUSE OF DISCRETION IN DECIDING THAT THE PRELIMINARY INJUNCTION WAS INAPROPRIATE

Preliminary injunctive relief is an extraordinary remedy not to be granted absent showing of probable success on merits and the possibility of irreparable injury should such relief be denied. Injunctive relief is "an act of equitable discretion by the district court." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). This is "an extraordinary remedy never awarded as of right." *Sindi v. El-Moslimany*, 896 F.3d 1, 29 (1st Cir. 2018) (internal quotation marks omitted). There is no suggestion that the trial court abused their discretion by making a mistake of law, an error in fact-finding, or misapplying the law to the facts. Indeed, given the emergency nature of the requested relief, no such factual record has been presented beyond the Plaintiffs-Appellants verified complaint.[8]

In deciding Plaintiffs' motion for injunctive relief (whether framed as a motion for a temporary restraining order or preliminary injunction), the Court must consider four factors: "[1] the movant[s'] likelihood of success on the merits of

[8] Of the limited discovery conducted, video evidence has come to light of the incident which is not apart of the appellate record. Given enforcement of the witness intimidation statutes §§ 13A &13B are based largely on the intent of the witness and the context of Plaintiffs-Appellants conduct, the absence of this record should weigh heavily in any determination that Plaintiffs-Appellants rights were violated.

[their] claims; [2] whether and to what extent the movant[s] will suffer irreparable harm if the injunction is withheld; [3] the balance of hardships as between the parties; and [4] the effect, if any, that an injunction (or the withholding of one) may have on the public interest." *Arborjet, Inc. v. Rainbow Treecare Sci. Advancements, Inc.*, 794 F.3d 168, 171 (1st Cir. 2015); *Corp. Techs., Inc. v. Harnett*, 731 F.3d 6, 9 (1st Cir. 2013) (citing *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 15 (1st Cir. 1996)); *see Latin Am. Music Co. v. Cardenas Fernandez & Assoc., Inc*., 2 F. App'x 40, 42 n.2 (1st Cir. 2001) (recognizing that four-factor test for preliminary injunctions applies to temporary restraining orders). Of these factors, the likelihood of success remains the most serious factor. *Acevedo-Garcia v. Vera-Monroig*, 296 F.3d 13, 17 (1st Cir. 2002) (per curium).

1.1 Appellants Are Unlikely to Succeed On The Merits of Their Retaliation Claim

The trial court decided correctly that the Appellants were not likely to prevail on their First Amendment retaliation claim. To prevail on such a claim, Appellants must show (1) "that [their] conduct was constitutionally protected" and (2) "proof of a causal connection between the allegedly protected conduct and the supposedly retaliatory response." *Najas Realty, LLC v. Seekonk Water Dist.*, 821 F.3d 134, 141 (1st Cir. 2016). Appellants are unable to prove either of the two requisite elements of their retaliation claim.

Firstly, Appellants' conduct and speech was not constitutionally protected conduct by the First Amendment. "[T]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). Nor does the First Amendment supersede the proper administration of justice and the court's obligation to ensure a fair trial, including protecting witnesses from intimidation. *See Commonwealth v. McCreary*, 45 Mass. App. Ct. 797, 799 (1998) (purpose of witness intimidation statute "is to protect witnesses from being bullied or harried so that they do not become reluctant to testify or, to give truthful evidence in investigatory or judicial proceedings . . . [and] to prevent interference with the administration of justice"); *see also Commonwealth v. Kearney*, 2023 Mass. Super. LEXIS 448[9] (the constitutional guarantees of free speech do not protect "advocacy" that is "directed to inciting or producing imminent lawless action and is likely to produce such action) (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969).

The United States Supreme Court has recognized the government's interest in "protecting its judicial system from the pressures which picketing near a courthouse might create." *Cox v. State of La.*, 379 U.S. 559, 562 (1965). *Cox* acknowledged that the government "may adopt safeguards necessary and

[9] ASA001

appropriate to assure that the administration of justice at all stages is free from outside control and influence" and referred to a statute banning "pickets or parades in or near a building housing a court" as "[a] narrowly drawn statute . . . necessary and appropriate to vindicate the State's interest in assuring justice under law." *Id*. at 560, 562. Similar restrictions under law have been long recognized. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 n.18 (1984) (finding first amendment rights may be subordinated to other interests to ensure a fair trial and the administration of justice). Courts have "consistently emphasized the compelling State interest in protecting witnesses from intimidation, harassment, and threats of physical violence." *Commonwealth v. Frazier*, 99 Mass. App. Ct. 1120, 2021 WL 1561358, at *3 (unpublished opinion).

Appellants' verified complaint admits they had the requisite intent of influencing the expected (what they perceive untruthful) testimony. (Doc. No. 1 at ¶¶ 25, 29, 45 47, 60, and pg. 2). Appellants' protest was intentionally at this location across the street from Chris Albert's place of business, where they were aware he was located at the time the police informed them of the statute. The fact that the protest took place outside of an individual witness's place of work and involved multiple participants increases the risk that the witness's testimony may be influenced. *See Cox v. State of La.*, 379 U.S. 559, 562 (1965) (emphasizing need to shield fair trial from "influence or domination by either a hostile or friendly

mob"); *Lafferty v. Jones*, 336 Conn. 332, 246 A.3d 429, 452 (Conn. 2020) (concluding that speech "was calculated to interfere with the fairness of the proceedings as it directly targeted opposing counsel"). As such, the Appellants' speech and conduct, as admitted in Appellants' own pleadings, is not constitutionally protected.

Appellants have further failed to allege any facts that show a retaliatory motive rather than a lawful enforcement of the statute. By Appellants' own allegations, Canton Police Officers stopped at the ongoing protest after driving by and informed the crowd of protestors that "they were not permitted to protest there, because if the protest could be seen by Chris Albert, they would deem it to be 'witness intimidation' and Plaintiffs would be arrested." AA010 at ¶34. The Police Officer Appellees handed the Appellants a copy of Mass. Gen. L. c. 268, § 13A, a provision of the Massachusetts witness intimidation statute that outlines unlawful picketing of influence a witness, and informed them they were in violation of the law if they continued with their protest. A010 at ¶35. Nowhere in these alleged facts is there any suggestion of a retaliatory motive in response to the Appellants' exercise of constitutionally protected free speech, only a concern that Commonwealth witnesses in an ongoing criminal proceeding were being harassed to deviate from their testimony.

1.2 There is No Irreparable Harm Where Appellants' Speech Is Not Constitutionally Protected

While Defendants admit that any interference with First Amendment free speech is irreparable harm, the risk of such harm does not exist where, as here, Plaintiffs-Appellants speech was not protected speech.

It is well established that the loss of First Amendment freedoms constitutes "irreparable injury." *Maceira v. Pagan*, 649 F.2d 8, 18 (1st Cir. 1981) (citing *Elrod v. Burns*, 427 U.S. 347, 374, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976)); see also *Vaqueria Tres Monjitas, Inc*., 587 F.3d at 484 (1st Cir. 2009) ("While certain constitutional violations are more likely to bring about irreparable harm, we have generally reserved this status for infringements of free speech, association, privacy or other rights as to which temporary deprivation is viewed of such qualitative importance as to be irremediable by any subsequent relief.")

However, as discussed above, Appellants' speech and conduct exceeded the bounds protected by the First Amendment and, as such, was not constitutionally protected. Restrictions of speech with the intent to influence witness testimony at trial has previously been deemed permissible when balanced against the significant governmental interest in ensuring a fair trial and the administration of justice. *See supra, Cox*, 379 U.S. 559 at 560, 562; *Seattle Times Co.*, 467 U.S. 20 at 32, n. 18. Due to the outweighing governmental interests in the administration of a fair trial, such intimidating and influential speech cannot fall within the First Amendment

freedoms of which restriction constitutes irreparable harm *per se*. Simply put, while Plaintiffs-Appellants are allowed to express their discontent with respect to Chris Albert's expected testimony, they have no constitutional protection to do such in a place, a manner, and with an intent as to impede that testimony.

Furthermore, Appellants have not alleged any specific facts that show a risk of irreparable harm if the injunctive relief is not granted in the instant matter. Although Appellants alleged that they "have determined to not move forward with a November 12, 2023, planned protest in support of Read and other similar such protests," they have provided no details regarding the planned protest[10] and why such protest would inevitably be viewed by law enforcement as violative of §§ 13A, 13B.[11] Appellees are not alleged to have issued any prohibition on protests related to the Read prosecution or to have halted any peaceful, non-threatening protests regarding the Read prosecution. Moreover, it is not clear that any exercise of free speech has been chilled where Appellants have other public forums to express their views, particularly given the widespread news coverage and public interest that has already been generated regarding same.

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[10] No details besides that they would intend that it be specifically across from Chris Albert's place of business expressing their concern for what they believed would be perjurious testimony.

[11] Appellees also note that at this time, Appellants' emergency injunction is now moot as the anticipated date of Appellants' planned protest has long past and Chris Albert has already testified.

As such, there was no abuse of discretion in the trial court's finding that Appellants failed to show a risk of irreparable harm if the requested injunctive relief was not granted.

1.3 Balance of Hardships Clearly Favors Appellees

When balancing the hardships between the Appellants and the Appellees, it is not hard to see that hardships imposed on the Appellees by the requested injunctive relief would greatly outweigh those for the Appellants. Such injunctive relief would upend law enforcement's ability to prevent harassment of critical witnesses during a pending criminal trial. The imposition of the requested injunctive relief would completely hinder law enforcement's ability to maintain order in the already fractured community and ensure the fair administration of justice in a criminal trial.[12]

Conversely, any potential hardships for the Appellants are minimal in nature. As discussed above, Appellants have a myriad of alternative public forums to express their views, should they choose to do so, including with the crowds of people 200ft away from the Norfolk Superior Court steps. *See Spicuzza v. Commonwealth*, 494 Mass. 1005 (2024).

[12] Appellees would note that such concern is equally for the sake of the Defendant receiving a fair trial.

Appellants have merely been told that they cannot protest in front of a testifying witness's place of work in an effort to intimidate that witness into testifying in a certain manner. Appellee officers reasonably instructed them they could continue their protest outside of the witness's eyesight. Appellants retain the ability to protest and express their views to the full extent protected by the First Amendment, just not using intimidating conduct deemed illegal by M.G.L. c. 268.

1.4 Public Policy Concerns Outweigh Appellants' Interest in Injunctive Relief

With respect to public policy concerns, it is for impartial jurors to decide what is true in the matter of Karen Read. Plaintiffs' constitutional rights to free speech are not unlimited, they may be limited particularly where they can be used to influence a criminal proceeding. Moreover, "it is in the interests of the police to protect witnesses, in order to secure convictions." *Rivera v. Rhode Island*, 402 F.3d 27, 38 (1st Cir. 2005).

The Massachusetts Supreme Judicial Court ("SJC") has explicitly acknowledged the significant dangers and potential consequences of attempted influences on the underlying judicial proceedings in the criminal trial of Karen Read. *See Spicuzza v. Commonwealth*, 494 Mass. 1005 (2024). In *Spicuzza*, the SJC established a 200-foot buffer zone around the Norfolk Superior Court in order to create a clear path for jurors, witnesses, and other individuals to come and go without obstruction or interference by protestors or demonstrators, and any

concomitant intimidation or harassment. Such restriction on speech was deemed permissible when balancing the interests of the public in exercising free speech with the significant governmental interest of ensuring a fair trial.

To issue a preliminary injunction preventing Canton Police Officers from enforcing a constitutional statute designed to protect and aid in the administration of justice raises significant public policy concerns. Although Appellants allege that they merely want Chris Albert to testify to the truth of what happened, it is also clear that Appellants have a preconceived notion of what the truth is and have protested in an effort to influence his testimony to align with their beliefs. Such questions as to the truthfulness of testimony and questions of fact should be reserved for a jury. The consequences of such influence in these determinations bear significant impact on the outcome of the underlying trial and our system of justice. Appellants' interest in obtaining injunctive relief cannot outweigh the Appellees' interest in ensuring the fair administration of justice, including the prevention of interference with witnesses.

Once again, there is no suggestion here of a mistake of law, a clear error in fact-finding, or a misapplication of the law to the facts that would indicate abuse of trial court's discretion.

2.0 THE WITNESS INTIMIDATION STATUTES ARE CONSTUTIONALLY VALID AS WRITTEN AND APPLIED

Appellants arguments that the statues are constitutionally vague and unconstitutional as applied miss the mark. Mass. Gen. L. c. 268, §§ 13A and 13B satisfies strict scrutiny as it is narrowly tailored to serve vital state interests and is clearly written specifying necessary terms. The statute was applied correctly as Plaintiffs-Appellants demonstrated in their protest and aver in their Verified Complaint (AA001-AA020) a clear intent to influence a Commonwealth's witness to an ongoing criminal trial.

2.1 The Statutes Survive Strict Scrutiny

Content-based regulations "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). That is, content-based restrictions are subject to strict scrutiny. A restriction is content-based if it "draws distinctions based on the message a speaker conveys," "cannot be justified without reference to the content of the regulated speech," or was "adopted by the government because of disagreement with the message [the speech] conveys." *March v. Mills*, 867 F.3d 46, 54 (1st Cir. 2017) (quoting *Reed*, 576 U.S. at 164 (internal quotation marks omitted) (alteration in original)).

Following *Reed*, most courts have concluded that witness intimidation statutes are content-based and subject to strict scrutiny when applied to expressive

conduct because they limit speech related to a pending court proceeding but not speech on other subjects. *See Picard v. Magliano*, 42 F.4th 89, 95 (2d Cir. 2022) (applying strict scrutiny to a state statute that barred speech within 200 feet of a courthouse concerning, among other things, "the conduct of a trial being held in such courthouse"); *Commonwealth v. Frazier*, 99 Mass. App. Ct. 1120, at *2-3 (2021) (unpublished opinion) (suggesting that strict scrutiny would apply to an as-applied challenge to § 13B and citing to similar challenges to statutes in other states).

Here, enforcement of the statute is narrowly tailored to serve the compelling interest of protecting the administration of justice. The Massachusetts statutes are narrowly tailored to protect against particular conduct targeting judges, jurors, court officers, or witnesses (M.G.L. c. 268 § 13A) and to protect against picketing and parading (with the requisite intent) in or near a building or residence that a witness occupies (M.G.L. c. 268, § 13B). Both statutes are narrowed by an intent requirement that aligns with the Defendants' compelling interest in protecting the administration of justice. M.G.L. c. 268, § 13A (prohibiting conduct "with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer); M.G.L. c. 268, § 13B (prohibiting conduct "with the intent to or with reckless disregard for the fact that it may; (1) impede, obstruct, delay, prevent or otherwise interfere with:

. . . a trial or other criminal proceeding of any type"); *see March*, 867 F.3d at 56 (finding that disruptive-intent requirement of noise provision "narrow[s] the measure's reach").

Moreover, M.G.L. c. 268, §§ 13A and 13B is certainly not unconstitutionally vague. A law is unconstitutionally vague when it fails to provide a person of ordinary intelligence fair notice of what is prohibited or is so standardless that it authorizes or encourages seriously discriminatory enforcement. *See Commonwealth v. Disler*, 451 Mass. 216, 223, 884 N.E.2d 500 (2008) ("A statute violates due process and is void for vagueness when individuals of normal intelligence must guess at the statute's meaning and may differ as to its application, thus denying them fair notice of the proscribed conduct."); *see also United States v. Harriss*, 347 U.S. 612, 617 (1954) ("The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."); *Commonwealth v. McGhee*, 472 Mass. 405, 414, 35 N.E.3d 329 (2015) ("Penal statutes must define the criminal offense with sufficient definitiveness that ordinary people can understand what conduct is prohibited.") (internal quotations and citations omitted).

However, perfect clarity and precise guidance have never been required, even of regulations that restrict expressive activity. *Ward v. Rock Against Racism*, 491 U.S. 781, 794, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989). M.G.L. c. 268,

§ 13B provides clear notice as to the proscribed conduct and does not prohibit a substantial amount of protected expression. The words of the requisite intent statute are commonly accepted and understood. M.G.L. c. 268, § 13B(a) defines harassment in the context of the statute:

> (a) "Harass", to engage in an act directed at a specific person or group of persons that seriously alarms or annoys such person or group of persons and would cause a reasonable person or group of persons to suffer substantial emotional distress including, but not limited to, an act conducted by mail or by use of a telephonic or telecommunication device or electronic communication device including, but not limited to, a device that transfers signs, signals, writing, images, sounds, data or intelligence of any nature, transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photo-optical system including, but not limited to, electronic mail, internet communications, instant messages and facsimile communications.

The term "harass" is sufficiently defined so as to put an individual on notice of the proscribed conduct. *Commonwealth v. Kearney*, 2023 Mass. Super. LEXIS 448.

Ultimately, M.G.L. c. 268, §§ 13A and 13B are narrowly tailored to serve a compelling government interest, have a clear intent requirement, and are not vague in their language and application. The First Amendment does not supersede the proper administration of justice and the court's obligation to ensure a fair trial, including protecting witnesses from intimidation. The right to a fair trial is just as important to the functioning of a democratic society as the First Amendment. There

was no abuse of the trial court's discretion in holding in accordance with such previously determined case law.

2.2 Application of the Statutes Reveals No Infringement of Appellants' Constitutional Rights

M.G.L. c. 268, §§ 13A and 13B as applied to the Appellants in the instant matter, survive strict scrutiny. Canton Police Officers' enforcement of the statute was narrowly tailored to serve the compelling government interest of the administration of a fair trial, with witnesses free of any intimidation or influence. By Appellants own verified admission, Canton Police Officers informed the crowd of protestors that their conduct was violating Mass. Gen. L. c. 268, § 13A and requested that they leave Chris Albert's immediate eyesight after informing them he was a witness for the Commonwealth and that their conduct was intimidating him. AA010 at ¶34. The Police Officer Appellees handed the Appellants a copy of Mass. Gen. L. c. 268, § 13A, a provision of the Massachusetts witness intimidation statute that outlines unlawful picketing to influence a witness, informing them of the law which they stated they could be charged. AA010 at ¶35. Police Officers Appellees then left the scene, leaving Appellants to their protest.[13]

[13] While Appellants state that some of the Appellants later being charged with this crime was in some way impermissibly kept from them and the Court, it has been clear that the Canton Police Department's investigation was ongoing and that Appellants were well aware their conduct was potentially violating the law.

Police Officer Appellees, in accordance with M.G.L. c. 268, §§ 13A and 13B did not prohibit Appellants from gathering in any other public locations. They merely informed the Appellants that because they were outside Chris Albert's location of business while Chris Albert was known to be inside, Appellants were in violation of the witness intimidation statute. Appellants retained the option to protest in any other public location, even slightly down the road, or on any of the various online forums available to make their opinions known. Appellants were simply not denied or restricted from making their opinions known in any manner that did not intimidate or attempt to influence a testifying witness. Appellees' actions were narrowly tailored in accordance with the witness intimidation statute in the instant matter and, as such, the District Court was correct in their ruling denying Appellants' request for injunctive relief.

CONCLUSION

The Order denying the motion for temporary restraining order and preliminary injunction was correctly decided by the District Court and should be upheld. Plaintiffs-Appellants appeal of the decision denying them injunctive relief which would enable them to carry out their planned November 12, 2023 protest is moot. Moreover, declaratory judgment should be denied as M.G.L. c. 268, § 13A & 13B are constitutional and narrowly tailored to achieve a compelling government interest. Application of the witness intimidation statutes in the instant

matter was also constitutional and narrowly tailored. There is no evidence or suggestion of an abuse of discretion by the trial court and, as such, their decision must be upheld.

Respectfully submitted,

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Dated: June 18, 2024

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because this brief contains 5,414 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

Date: June 18, 2024

/s/ Joseph A. Mongiardo
DOUGLAS I. LOUISON
JOSEPH A. MONGIARDO

CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: June 18, 2024

/s/ Joseph A. Mongiardo
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Section 13A PICKETING COURT, JUDGE, JUROR, WITNESS OR COURT OFFICER

Section 13A. Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the commonwealth, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, shall be punished by a fine of not more than five thousand dollars or by imprisonment for not more than one year, or both.

Nothing in this section shall interfere with or prevent the exercise by any court of the commonwealth of its power to punish for contempt.

Part IV CRIMES, PUNISHMENTS AND PROCEEDINGS IN CRIMINAL CASES

Title I CRIMES AND PUNISHMENTS

Chapter 268 CRIMES AGAINST PUBLIC JUSTICE

Section 13B INTIMIDATION OF WITNESSES, JURORS AND PERSONS FURNISHING INFORMATION IN CONNECTION WITH CRIMINAL PROCEEDINGS

Section 13B. (a) As used in this section, the following words shall have the following meanings unless the context clearly requires otherwise:—

"Investigator", an individual or group of individuals lawfully authorized by a department or agency of the federal government or any political subdivision thereof or a department or agency of the commonwealth or any political subdivision thereof to conduct or engage in an investigation of, prosecution for, or defense of a violation of the laws of the United States or of the commonwealth in the course of such individual's or group's official duties.

"Harass", to engage in an act directed at a specific person or group of persons that seriously alarms or annoys such person or group of persons and would cause a reasonable person or group of persons to suffer substantial emotional distress including, but not limited to, an act conducted by mail or by use of a telephonic or telecommunication device or electronic communication device including, but not limited to, a device

that transfers signs, signals, writing, images, sounds, data or intelligence of any nature, transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photo-optical system including, but not limited to, electronic mail, internet communications, instant messages and facsimile communications.

(b) Whoever willfully, either directly or indirectly: (i) threatens, attempts or causes physical, emotional or economic injury or property damage to; (ii) conveys a gift, offer or promise of anything of value to; or (iii) misleads, intimidates or harasses another person who is a: (A) witness or potential witness; (B) person who is or was aware of information, records, documents or objects that relate to a violation of a criminal law or a violation of conditions of probation, parole, bail or other court order; (C) judge, juror, grand juror, attorney, victim witness advocate, police officer, correction officer, federal agent, investigator, clerk, court officer, court reporter, court interpreter, probation officer or parole officer; (D) person who is or was attending or a person who had made known an intention to attend a proceeding described in this section; or (E) family member of a person described in this section, with the intent to or with reckless disregard for the fact that it may; (1) impede, obstruct, delay, prevent or otherwise interfere with: a criminal investigation at any stage, a grand jury proceeding, a dangerousness hearing, a motion hearing, a trial or other criminal proceeding of any type or a parole hearing, parole violation proceeding or probation violation proceeding; or an administrative hearing or a probate or family court proceeding, juvenile proceeding, housing proceeding, land proceeding, clerk's hearing, court-ordered mediation or any other civil proceeding of any type; or (2) punish, harm or otherwise retaliate against any such person described in this section for such person or such person's family member's

participation in any of the proceedings described in this section, shall be punished by imprisonment in the state prison for not more than 10 years or by imprisonment in the house of correction for not more than 21/2 years or by a fine of not less than $1,000 or more than $5,000 or by both such fine and imprisonment. If the proceeding in which the misconduct is directed at is the investigation or prosecution of a crime punishable by life imprisonment or the parole of a person convicted of a crime punishable by life imprisonment, such person shall be punished by imprisonment in the state prison for not more than 20 years or by imprisonment in the house of corrections for not more than 21/2 years or by a fine of not more than $10,000 or by both such fine and imprisonment.

(c) A prosecution under this section may be brought in the county in which the criminal investigation, trial or other proceeding was being conducted or took place or in the county in which the alleged conduct constituting the offense occurred.