No. 23-2062

In the

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

APPELLANTS' REPLY BRIEF

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1.0 INTRODUCTION

According to the government, a citizen cannot peacefully demonstrate against police and prosecutorial misconduct in the busiest intersection in town or near a site relevant to a crime, if it happens, coincidentally, to be across the street from a business owned by or temporarily occupied by a witness in the related criminal case. That is Appellees' position as to what happened here. Appellants and other members of the public gathered on Sunday, November 5, 2023, at the busiest intersection in Canton, across the street from C.F. McCarthy's pub (where Read and O'Keefe were that fateful night), and which is adjacent to Chris Albert's business, D&E Pizza. AA007, ¶ 29. At that protest, Plaintiffs held signs that had inoffensive slogans like "Free Karen Reed" and "Justice." *Id.* at ¶ 30. For doing this, Appellants were threatened with, and ultimately charged with, violation of Mass. Gen. Laws, ch. 268, §§ 13A & 13B.

The government's brief misses the mark. Although Appellants discuss Mr. Albert in their complaint and motion for preliminary injunction, at no time is it pleaded that he was the target of the demonstration.[1] In fact, the government's brief highlights non-record evidence that the only sign mentioning someone other than

[1] While Appellants did wish for Mr. Albert to testify truthfully, they sought the same as to every witness, and none of the signs targeted him. To be clear, he was singled out in the pleadings because the government, not Appellants, used Mr. Albert as the excuse to silence Appellants.

Karen Read was not about Chris Albert. Opp. Br. at 13 n. 6. Appellants simply wish to call attention to an injustice in the best place in town to do so, a location that is a traditional public forum. They are thwarted by the offensive wielding of statutes meant to protect the justice system. The Constitution does not abide this, and the Court should reverse the order denying the injunctive relief.

2.0 ARGUMENT

Appellants are entitled to injunctive relief; as their opening brief shows, they met all of the factors and the District Court abused its discretion and made errors of law in denying it.

2.1 Appellants are Likely to Succeed on the Merits

The government argues that it did not retaliate against Appellants' protected speech when it threatened them with arrest under Section 13A, showing them a copy of the statute, on account of their peaceful demonstration. Opp. Br., 17-20. They deny that the speech was protected, and they deny a causal connection between the speech and the retaliatory response. They are wrong on all counts.

As to causal connection to the response, the government does not make any argument or otherwise show absence of cause or response. To the contrary, they explicitly state that they handed the copy of Section 13A on account of that very demonstration. Opp. Br., 20. Adverse action need only be more than "*de minimis*," which this Court has defined simply as sufficient to chill a "reasonably hardy"

person, or "a person of ordinary firmness," from continuing to exercise their constitutional rights. *Barton v. Clancy,* 632 F.3d 9, 29 (1st Cir. 2011); *Starr v. Dube*, 334 F. App'x 341, 342 (1st Cir. 2009). "[T]he mere threat of harm can be an adverse action, regardless of whether it is carried out because the threat itself can have a chilling effect[]" on First Amendment rights. *Huffman v. City of Bos*., Civil Action No. 21-cv-10986-ADB, 2022 U.S. Dist. LEXIS 112774, at *14 (D. Mass. June 27, 2022) (quoting *Brodheim v. Cry*, 584 F.3d 1262, 1270 (9th Cir. 2009)).

Instead of making any argument on causation, the government asserts the absence of a "retaliatory motive."[2] Opp. Br., 20. Motivation can be satisfied by circumstantial evidence that the constitutionally protected conduct was the "driving factor" that caused the retaliation (*see Rosaura Bldg. Corp. v. Mun. of Mayagüez*, 778 F.3d 55, 67 (1st Cir. 2015)), and an adverse action that "closely followed First Amendment activity may create a reasonable inference that the defendant acted with a retaliatory motive[,]" *Weiss v. Lavallee*, No. 01-cv-40177, 2005 U.S. Dist. LEXIS 55102 at *42 (D. Mass. Oct. 7, 2005) (citing *Ferranti v. Moran*, 618 F.2d 888, 892 (1st Cir. 1980)). Here, there is no question that the demonstration was the driving factor of the threat of charges under Section 13A—more than "closely following" the First Amendment activity, it occurred *while it was going on*.

[2] While Appellees omit this as an element of a claim of retaliation (Opp. Br., 17), it nevertheless is an element. *See, e.g., D.B. ex rel. Elizabeth B v. Esposito*, 675 F.3d 26, 43 (1st Cir. 2012).

The only remaining question, then, is whether Appellants' speech at the busiest corner of Canton, across from the spot where Karen Read and John O'Keefe met up that fateful night, was protected. It was, and the future planned, constitutionally protected speech along the same lines has been chilled.

Appellees do not dispute that G.L. c. 268, §§ 13A and 13B are content-based restrictions on speech, subject to strict scrutiny.[3] The government does not argue that Appellants' speech falls within one of the few "historic and traditional categories of expression long familiar to the bar" for which content-based restrictions on speech are clearly permitted. *United States v. Alvarez*, 567 U.S. 709, 717-18 (2012) (cleaned up). Content-based restrictions, therefore, 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*, 576 U.S. 155, 163 (2015), citing *R. A. V. v. St. Paul*, 505 U. S. 377, 395 (1992); *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U.S. 105, 115, 118 (1991). Further, a restriction in a public forum must "'leave open ample alternative channels for communication of the information.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). The government fails to demonstrate these requirements.

[3] In fact, in subsequent pleadings below, they agree. (ECF No. 41 at 5-6).

The government has no compelling interest in suppressing a demonstrator asserting that they want all witnesses to testify truthfully, much less in a demonstrator merely holding up a sign that says "JUSTICE." Appellants do not dispute that protecting the "administration of justice" is an interest, but it is not sufficiently compelling to overcome protected speech. Both the state and federal governments consist of three "co-equal" branches. *Clinton v. Jones*, 520 U.S. 681, 699 (1997). Citizens routinely protest outside the White House and Governors' residences, in full view of witnesses and officials. Citizens routinely protest outside the U.S. Capitol and the Massachusetts General Court, in full view of witnesses and officials.[4] The judiciary is not elevated above the other two co-equal branches, and Appellees offer no reason why it deserves unequal treatment. The administration of justice is no more important than the administration of the executive or legislative functions. Even if the judiciary were not co-equal, "protecting the orderly administration of justice" could be used for all manner of mischief, for example, to extrajudicially enjoin the media from reporting on court proceedings. "Protecting

[4] *Compare Occupy Columbia v. Haley*, 738 F.3d 107, 121 (4th Cir. 2013) (entire State House grounds are traditional public forum); *Wells v. City & County of Denver*, 257 F.3d 1132, 1146 (10th Cir. 2001) (steps leading to county building are public forum); *Pouillon v. City of Owosso*, 206 F.3d 711, 716–17 (6th Cir. 2000) (steps leading to city hall are traditional public forum as they are "in the highest degree linked, traditionally, with the expression of opinion"); *see also Mahoney v. United States Capitol Police Bd.,* Civil Action No. 21-2314 (JEB), 2024 U.S. Dist. LEXIS 89067, at *20 (D.D.C. May 17, 2024) (holding that steps of U.S. Capitol are a "traditional public forum").

the orderly administration of justice" could mean you cannot lobby a legislator to vote against a judicial nominee or to expand the number of seats on a court. It is not a well-defined or compelling interest in and of itself. That is, Sections 13A and 13B are overbroad and, especially as-applied here, do not serve the interests of the administration of justice.

Nor are the statutes narrowly tailored. It is one thing to restrain unprotected, true threats against a witness—that would be proper narrow tailoring.[5] But, the mere fact that a witness might encounter a sign or demonstrator who is speaking out in a manner that a) encourages truthful testimony and/or b) might conflict with the witness's anticipated testimony, does not serve the orderly administration of justice. As noted above, the government abused Section 13A to stop a demonstration by saying that Christ Albert, who was, coincidentally, at a pizzeria across the street, could see it. But, the demonstration, at the busiest intersection in town, was not targeting Mr. Albert. By the government's reasoning, practically no demonstration regarding any judicial proceeding could ever occur because police officers, who are frequently witnesses, may happen to drive by and see it. In fact, the government could shut down any demonstration against police corruption by sending a police officer who is a percipient witness in the court proceeding to the scene.

[5] Section 13B prohibits such threats and Appellants do not challenge that restriction (nor are they accused of making any such threats).

While the Supreme Court upheld a similar statute relating to picketing or parading near courthouses, it has not approved of such a statute *vis a vis* **any building at all** in which a witness **may** be found. *Contrast Cox v. Louisiana*, 379 U.S. 559 (1965). This is especially where Appellants have and will restrict themselves from engaging in the "blocking, impeding, inhibiting, or in any other manner obstructing or interfering with access to, ingress into and egress from any building or parking lot of the" business they plan to protest. *Compare Madsen v. Women's Health Ctr.*, 512 U.S. 753 (1994) (upholding such restrictions on protest activities near abortion clinics). When a restriction on speech in a traditional public forum targets the content of speech, that restriction raises the special concern 'that the government is using its power to tilt public debate in a direction of its choosing.'" *March v. Mills*, 867 F.3d 46, 54 (1st Cir. 2017), quoting *Cutting v. City of Portland*, 802 F.3d 79, 84 (1st Cir. 2015). A content-based restriction on speech within a traditional public forum "may be upheld only if that law uses ***the least speech restrictive means*** to serve what must be a compelling governmental interest." *Id.* (emphasis added), citing *Globe Newspaper Co. v. Beacon Hill Architectural Comm'n*, 100 F.3d 175, 182 (1st Cir. 1996). The government says the statutes are narrowed by an intent element, yet there was no "intent" here, where Appellants were threatened and charged merely because Chris Albert could see them, not because Appellants were targeting him. Nor is the government utilizing the least

restrictive means. As-applied, the government imposed strict liability as the standard, not "intent." The preliminary injunction motion only brought an as-applied challenge and Appellants continue to require that the government be enjoined from enforcing and threatening enforcement in the manner in which they apply the law, not simply as it is written.[6]

Further, as there is no other intersection like the one at issue—the busiest in town and across from where O'Keefe and Read met up—there are no sufficient alternative channels of communication. Demonstrations outside the roving zone of wherever a witness may be or on the internet are no substitution for in-person, on-site demonstrations. *See, e.g., City of Ladue v. Gilleo*, 512 U.S. 43, 56-57 (1994) (location of speech carries its own message and alternative channels may not carry that message). No one would say that such alternatives were sufficient for anti-abortion protestors or for protests outside the Israeli Embassy/Palestinian Mission, and the *Read* prosecution should not be singled out for special treatment under the

[6] Related, Appellees argue that the statutes are not unconstitutionally vague, but that is not an issue before the District Court. Nevertheless, Appellants cannot ascertain what is and is not lawful under the statutes. A sign that says "JUSTICE" is deemed by the government to be disallowed, even though such is not likely to intimidate a witness. The statutes are so unclear that it is impossible for a person of ordinary intelligence to know whether signs saying "XYZ Pizza Shop Doesn't Sell Pineapple Pizza" or "Vote Against Selectman Chris Albert" are prohibited. These laws permit the Police to decide which ideas they favor in the marketplace of ideas, and to shut down those they disfavor, with no reasonable discretion nor any restraint.

constitution. In light of the foregoing, Appellants are substantially likely to succeed on the merits.

2.2 The Remaining Factors Warrant Injunctive Relief

Absent injunctive relief, Appellants suffer irreparable harm; the balance of equities favors Appellants; and an injunction is in the public interest. The government does not seriously argue that, in the absence of a determination that Appellants' First Amendment rights are being infringed, these factors favor them. In fact, they concede an infringement constitutes irreparable harm. Thus, should the Court determine Appellants are likely to succeed on the merits, injunctive relief is warranted.

As to irreparable harm, the government primarily argues, again, that Appellants are not likely to succeed, but for the reasons set forth above, this fails. The government purports to further argue that Appellants have not shown irreparable harm because they have not asserted what speech is being chilled. However, it could not be clearer—Appellants wish to demonstrate, as they did on November 5, at the busiest corner in town, across from where Read and O'Keefe met up that fateful night. While the government argues that Appellants are not prohibited from engaging in peaceful demonstrations, that is precisely what the threatened and actual prosecution for the peaceful November 5 demonstration prohibits. Moreover, Appellants cannot simply demonstrate anywhere else for fear that some other

random witness might accidentally or purposefully place themselves in view of the demonstration. There is nowhere in Canton they can safely go. Thus, Appellants suffer irreparable harm.

As to the balance of hardships, the hardships fall squarely on Appellants. They suffer the ongoing irreparable deprivation of rights. There is no evidence or realistic possibility an injunction would "upend law enforcement's ability to prevent harassment" or "hinder law enforcement's ability to maintain order[.]" Opp. Br., 23. The very purpose of the Bill of Rights being enshrined is to restrain the government. *See e.g., Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 535 (2012). Responsible law enforcement officers can maintain order and protect citizens while abiding the Constitution; if these appellees do not know how to do that, they should be taught. Appellants should not lose their freedoms because of the government's ignorance or purposeful disregard for those freedoms. Thus, the balance of hardship favors the issuance of injunctive relief.

Finally, public interest favors an injunction. Although the government points to a recent decision where the Massachusetts Supreme Judicial Court suborned an *ultra vires* trial court order (issued in the absence of due process) prohibiting speech not merely on courthouse grounds, but in a 200' radius that extended into private businesses and homes, that decision is non-binding that should be given no heed. *Spicuzza v. Commonwealth*, 494 Mass. 1005, 232 N.E.3d 145 (2024). Nor does the

government establish what the public interest is in prohibiting demonstrations at the busiest intersection in Canton, miles from the Dedham courthouse. While the government asserts that there is a public interest in preventing interference with witnesses, Chris Albert is a Selectman and he is used to public criticism—it is an insult to his integrity as a public servant to suggest he cannot suffer to be within earshot of those demonstrating for "Justice." No witness would be interfered with, and the administration of justice would remain orderly were the injunction to issue. Thus, the public interest favors an injunction.

2.3 This Appeal is Not Moot

Briefly, although it is not in the record, Appellants wish to address the fact that the initial underlying prosecution of Karen Read is concluded. While this might ordinarily suggest the relief requested is moot, as the government tersely does at p. 22, n. 11 of its brief, it is not. A mistrial was declared and the Commonwealth has declared its intent to retry the matter.[7] The purpose of the demonstrations remains a live issue. "Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *D.H.L. Assocs., Inc. v. O'Gorman*, 199 F.3d 50, 54 (1st Cir. 1999) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)) (internal quotation marks omitted).

[7] *See, e.g.*, Flint McColgan, "*MISTRIAL: Karen Read jurors could not reach a verdict*," BOSTON HERALD (Jul. 1, 2024) available at <https://www.bostonherald.com/2024/07/01/karen-read-murder-trial-jury-starts-5th-day-of-deliberations/>.

"Another way of putting this is that a case is moot when the court cannot give any 'effectual relief' to the potentially prevailing party." *Horizon Bank & Trust Co. v. Massachusetts*, 391 F.3d 48, 53 (1st Cir. 2004) (citing *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992)).

The Court can still give effectual relief. Appellants' motion sought injunctive relief to permit "peaceful protest" on November 12, 2023, "and thereafter" to "avoid the threat of arrest[.]" AA035. The precise terms of the proposed order (AA052) sought to enjoin Appellees "from enforcing Mass. Gen. Laws, ch. 268, §§ 13A & 13B, to the extent it would interfere with Plaintiffs' demonstrations regarding the Karen Read prosecution based solely on Plaintiffs' otherwise lawful speech so long as Plaintiffs do not engage in the blocking, impeding, inhibiting, or in any other manner obstructing or interfering with access to, ingress into and egress from any building or parking lot of the business they plan to protest." Although the initial trial has ended, the prosecution has not. Further, related charges against journalist Aiden Kearney and certain protesters (including one or more Appellants) remain pending, and the intersection remains a proper location for the demonstrations. Similarly, neither Section 13A nor Section 13B are restricted to a pre-verdict timeframe—Appellants risk arrest for lifetime of Mr. Albert and every other witness who may pass by. Thus, injunctive relief remains necessary and effectual relief can still be granted.

3.0 CONCLUSION

In light of the foregoing, and as set forth in Appellants' Opening Brief, the Order denying the motion for temporary restraining order and preliminary injunction should be reversed, and the District Court should be direct to enjoin Appellees' actions interfering with Appellants' right to lawfully engage in constitutionally protected expression, including, but not limited to, enjoining actual or threatened enforcement of Sections 13A and 13B.

Date: July 9, 2024.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because this brief contains 3,122 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: July 9, 2024.

RANDAZZA LEGAL GROUP, PLLC

/s/ Jay M. Wolman
Jay M. Wolman

CERTIFICATE OF SERVICE

I hereby certify that on July 9, 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.

Dated: July 9, 2024.

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