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' SUPPLEMENTAL BRIEF

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INTRODUCTION

The facts of this particular case are both not sufficiently clear nor foreseeably repeatable to maintain the justiciability of this matter before this Honorable Court. Plaintiffs-Appellants moved for an emergency temporary restraining order to enjoin police enforcement of Mass. Gen. Laws ch. 268, §§ 13A & 13B against them for a planned protest on November 12, 2023 and thereafter with the stated intent of expressing their concern for Chris Albert's alleged expected perjury. (AA003 pg. 3). The testimony of Chris Albert in the *Commonwealth v. Karen Read* trial occurred on May 9, 2024. Simply stated, the alleged facts of this incident, which are not sufficiently clear on the *emergency* record before the Court, will not repeat as stated by Plaintiffs-Appellants in their verified affidavit, and any potential repeat of the facts of this case apart from that statement of facts is simply speculative. Any hypothetical repetition of similar facts would only serve to provide a clearer justiciable question for the Court than the current case before the Court lacking justiciability.

SUMMARY OF THE ARGUMENT

Appellees contend that the Plaintiffs-Appellants Emergency Request for a Temporary Restraining Order is moot. The justification for the emergency, a planned protest set for November 12, 2023, has long passed. Additionally, the stated purpose for any planned continued protests, protesting what they perceived as perjury from

Chris Albert's *expected* testimony, has tolled. Any new or related intention in protesting in the same manner is hypothetical. Finally, the threat of repetition evading review is minimal despite a potential retrial and Chris Albert's status as a continued witness.

ARGUMENT

1.0 THERE IS NO LIVE CONTROVERSY OR EMERGENCY FOR THIS COURT TO RULE ON AND THE EMERGENCY RECORD DOES NOT PROVIDE SUFFICIENT SPECIFICITY FOR THIS COURT TO RULE.

As summarized briefly above, Plaintiffs-Appellants moved on an emergency basis for a temporary restraining order and preliminary injunction concerning a planned protest on Sunday, November 12, 2023.[1] The basis of Plaintiffs-Appellants' *emergency* motion was to enjoin police officers from allegedly chilling their speech by enforcing the Massachusetts Witness Intimidation statutes, M.G.L. c. 268, § 13A & 13B, against them. Plaintiffs-Appellants, however, provided no allegations regarding their planned conduct for their November 12, 2023 protest or for any potential future protests. Instead, Plaintiffs-Appellants merely vaguely assert that they wish to engage again in protest in the future. (Plaintiffs-Appellants' Brief p. 21,

[1] The Plaintiffs-Appellants' injunction specifically mentions November 12, 2023 but also vaguely mentions *potential* but ill-defined future protests. *Thomas R.W. by & Through Pamela R. v. Mass. Dep't of Educ.*, 130 F.3d 477, 479 (1st Cir. 1997) ("A case is moot, and hence not justiciable, if the passage of time has caused it completely to lose its character as a present, live controversy of the kind that must exist if the court is to avoid advisory opinions on abstract propositions of law").

Plaintiffs-Appellants' Reply Brief p. 4). The Town of Canton however does not and has not made it policy or practice to charge anyone with witness intimidation for merely protesting in support for Karen Read. (SDAA1).

To establish Article III standing, and for a case to be justiciable, a plaintiff must show (1) an "injury in fact," (2) a sufficient "causal connection between the injury and the conduct complained of," and (3) a "likel[ihood]" that the injury "will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (internal quotation marks omitted). An "injury in fact," must be "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Id.* at 560.

Standing is an ongoing requirement in a federal case. *See Davis v. Fed. Election Comm'n*, 554 U.S. 724, 733, 128 S. Ct. 2759, 171 L. Ed. 2d 737 (2008) ("[I]t is not enough that the requisite interest exist at the outset. To qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." (internal citation and quotations omitted)); *see Renne v. Geary*, 501 U.S. 312, 320, 111 S. Ct. 2331, 115 L. Ed. 2d 288 (1991) ("Justiciability concerns not only the standing of litigants to assert particular claims, but also the appropriate timing of judicial intervention."). A plaintiff must demonstrate standing "for each form of relief" that is sought. *Davis*, 554 U.S. at 734 (citations and quotation marks omitted).

Even if Plaintiff has standing to bring a claim at the time the suit is filed, that claim may become moot if there is no longer a "live case or controversy" for the court to resolve. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) ("The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).") (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68, n.22, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997)). "A case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Weaver's Cove Energy, LLC v. R.I. Coastal Res. Mgmt. Council*, 589 F.3d 458, 468 (1st Cir. 2009) (quoting *Powell v. McCormack*, 395 U.S. 486, 496, 89 S. Ct. 1944, 23 L. Ed. 2d 491 (1969)). If, after filing a case with standing, events occur that "undermine[] any of the three pillars on which constitutional standing rests: injury in fact, causation, and redressability" the court must dismiss the claim as moot. *See Ramirez v. Sanchez Ramos*, 438 F.3d 92, 100 (1st Cir. 2006).

Concerns of justiciability go to the power of the federal courts to entertain disputes, and to the wisdom of their doing so. Federal Appellate courts lack jurisdiction "unless 'the contrary appears affirmatively from the record.'" *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 546, 89 L. Ed. 2d 501, 106 S. Ct.

1326 (1986), quoting *King Bridge Co. v. Otoe County*, 120 U.S. 225, 226, 30 L. Ed. 623, 7 S. Ct. 552 (1887).

Here, Plaintiffs-Appellants notably make no specific allegations regarding realistic or probable expectations or plans for an impending protest. Meanwhile, the planned protest for November 12, 2023 has since lapsed without occurring. *See Renne v. Geary*, 501 U.S. 312, 320, 111 S. Ct. 2331, 2338 (1991) ("Respondents have failed to demonstrate a live dispute involving the actual or threatened application of § 6(b) to bar particular speech. Respondents' generalized claim that petitioners have deleted party endorsements from candidate statements in past elections does not demonstrate a live controversy").

In *Renne*, the Court found it significant that the speech being stricken was not specified in each instance and that plaintiffs had made a generalized claim as to the speech in question. Here too, there has been scant factual development of the record as to what was said beyond the mere verified complaint and what specific speech will allegedly be chilled if future protests are not presently accounted for. Defendant-Appellees have not been allowed, due to the nature of the *emergency* record, to produce video of the incident or to provide contrary evidence regarding the harassment of Chris Albert. For this Court to rule on this matter without any discovery having been conducted and without any certainty as to the intent and speech of future protests would be to rule on a hypothetical.

Furthermore, there is no "substantial risk" that the alleged harm will occur. An allegation of future injury will only suffice if the threatened injury is "certainly impending," or there is a "'substantial risk' that the harm will occur." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 414, n.5, 133 S. Ct. 1138, 1150, 185 L. Ed. 2d 264, 279 (2013) (emphasis deleted, internal quotation marks omitted). To find such, a court must be assured of specified instances that will reoccur unless they act. Here, the threat is not credible because the facts are not sufficiently clear to be predictably changing such that they are repeating yet evading review. *Horizon Bank & Tr. Co. v. Massachusetts*, 391 F.3d 48, 54-55 (1st Cir. 2004).

Looking at the vacant factual record before this Court, this matter is precisely the type of abstract question of law contemplated by *Horizon Bank & Tr. Co.* that is divorced from any real factual controversy and strays into conjecture. *Horizon Bank & Tr. Co. v. Massachusetts*, 391 F.3d 48, 55 (1st Cir. 2004) ("The mootness doctrine is rooted largely in the idea that courts, because of their distinct institutional competence and role, should not decide abstract questions of law divorced from real factual controversies"). Courts cannot, consistent with Article III, wander into the "realm of the advisory and the hypothetical." *Horizon Bank & Tr. Co. v. Massachusetts*, 391 F.3d 48, 53 (1st Cir. 2004) quoting *Oakville Dev. Corp. v. FDIC*, 986 F.2d 611, 615 (1st Cir. 1993).

That the Plaintiffs-Appellants merely state "and thereafter" in their request for injunctive relief does not in fact provide this Court the substantial grounds to provide guidance on future protests. To reiterate, and to distinguish from *Susan B. Anthony List v. Driehaus*, here the Court has insufficient factual record before it to know whether the Plaintiffs-Appellants will disseminate the same statements they disseminated when police informed them they could be found to be violating M.G.L. c. 268, § 13A or § 13B. 573 U.S. 149, 134 S. Ct. 2334 (2014).

Any possible police action that may be taken in the future will necessarily be predicated upon and in response to as yet unknown conduct taken by the Plaintiffs-Appellants at some indeterminate potential protest in the future. Indeed, a factual hearing will be necessary to resolve the proposed questions raised regarding the strength of the state's legitimate interest in protecting the judicial process, the degree of burden created by the challenged laws, and the narrow tailoring of these laws to achieve the state's interests. No such hearing can be done or should be done on the present *emergency* record. *See D.H.L. Assocs. v. O'Gorman*, 199 F.3d 50, 55 (1st Cir. 1999) ("It is not for this court to speculate").

Ultimately, Plaintiffs-Appellants are unable to show an impending certainty or even a substantial risk of a future injury and, as such, fail to establish an injury-in-fact and continued standing required for their claims to survive the changed circumstances.

2.0 PLAINTIFFS-APPELLANTS' INTENTIONS WHILE PROTESTING AT A FUTURE DATE ARE PURELY HYPOTHETICAL, WHICH RENDERS PLAINTIFFS-APPELLANTS' APPEAL MOOT.

Plaintiffs-Appellants prior stated intent for their protest, to influence Chris Albert's expected testimony, has rendered this appeal moot. Chris Albert's testimony has crystallized with his May 9, 2024 trial testimony in *Commonwealth v. Karen Read*.[2] While Plaintiffs-Appellants may express themselves across the street from D&E Pizza and Subs, as they would any other public space, any case or controversy arising from a future protest will not be regarding the prospect of his unknown expected testimony. Given that an analysis of intent is essential to the applicability of M.G.L. c. 268, §§ 13A & 13B, the lack of clarity as to that issue within the present, lacking, factual record renders the standing of Plaintiffs-Appellants sought emergency injunctive relief on this appeal moot. Any future demonstration will be predicated on a different unknown and hypothetical intent and facts. Given that the constitutional application of the Witness Intimidation Statutes (M.G.L. c. 268, §§ 13A & 13B) depends on specific facts and circumstances informing the protestors intent to assemble, presence of witnesses known to be testifying in a criminal trial, expressions of speech being made, and actions of

[2] Though the result of the criminal trial was a mistrial and Chris Albert remains a witness as this case proceeds to a re-trial, any concern for influencing Albert's testimony being perjurious has been erased by it having been made more definite. No charges of perjury have been brought against Chris Albert for his testimony and such testimony is now publicly known.

intervening officers, this Court should not find justiciability where such factors are not sufficiently clear on the available present record.

These same, necessary variables are yet unknown and not clear on the present record because the emergency filing consists *only* of the Plaintiffs-Appellants verified affidavit. Given Chris Albert has testified under oath and Plaintiffs-Appellants' intent was in anticipation of his *expected* testimony which was then unknown, the Plaintiffs-Appellants' intent in protesting necessarily has changed which impacts any future application of Mass. Gen. Laws ch. 268, §§ 13A & 13B. While Plaintiffs-Appellants may hypothesize that there will be another application of Mass. Gen. Laws ch. 268, § 13A or Gen. Laws ch. 268, § 13B if they protest outside of Chris Albert's pizza shop, such is necessarily dependent on their intent and conduct, which at this time is too conjectural to allow this Court to rule on the specific emergency temporary restraining order before them.

Neither Plaintiffs-Appellants or Defendants-Appellees can now be said to have a legally cognizable interest in the final determination of whether protests can occur outside of D&E Pizza & Subs that intend to influence Chris Albert's expected testimony on November 12, 2023. Nor can they have the same previously expressed intent for any future protests as there is now no question as to what Chris Albert's testimony is.

3.0 THE CONCERN FOR REPETITION EVADING REVIEW IS *DE MINIMUS.*

The prospect of the similar protests outside D&E pizza occurring due to the anticipated retrial of Karen Read should not defeat Defendants-Appellees mootness argument. Defendants-Appellees initially argued that this matter may be moot because, when briefed, Chris Albert had concluded his testimony in the *Commonwealth v. Karen Read* trial and a jury was then pending. Chris Albert remains a witness in the anticipated retrial of Karen Read January 27, 2025. (SDAA1). While Plaintiffs-Appellants and others may be expected to continue to protest in areas around Canton, MA, it is simply not the case that the particular allegations here are precisely repeatable necessitating a review of the immediate injunction request. Contrary to what Plaintiffs-Appellants have alleged in their verified affidavit, the Canton Police Department does *not* have a policy whereby they will enforce the witness intimidation statute against protestors who merely carry signs such as "JUSTICE". (SDAA1). Numerous protests in support of Karen Read have continued in Canton, MA while Mass. Gen. Laws ch. 268, §§ 13A & 13B has continued to be enforced without notable repeated issue. (SDAA1). There is simply no active threat against Plaintiffs-Appellants to merely peacefully protest in support of Karen Read as hundreds of others have done across the Town of Canton and outside the Norfolk Superior Court in nearby Dedham, MA.

Unlike in *D.H.L. Assocs. v. O'Gorman*, 199 F.3d 50, 53 (1st Cir. 1999) where the supposed proscribed conduct of the Plaintiff, distributing adult entertainment, was continuing but enforcement was delayed pending appeal, here Defendants-Appellants have continued to enforce Mass. Gen. Laws ch. 268, §§ 13A & 13B to its full extent and similar protests have been conducted without issue. (SDAA1).

Defendants-Appellees enforcement of the law remains to defend against intentional and harassing conduct against witnesses. Unless Plaintiffs-Appellants are willing to re-affirm and clarify their intent is to influence or harass Chris Albert as a witness or as father or husband to another witness, Plaintiffs-Appellants' alleged, supposed mere expression in support of "JUSTICE" from a place across the street from a witness's establishment is not sufficient to create a controversy for this Court's review.

Plaintiffs-Appellants will no doubt argue that they meet the exception to the mootness doctrine for disputes capable of repetition yet evading review because they believe they face the same potential threat of arrest if they position themselves across the street from D&E Pizza & Subs. *See Renne v. Geary*, 501 U.S. 312, 320, 111 S. Ct. 2331, 2338 (1991). However, the Defendants-Appellees state clearly (and maintain that such has always been the case) that protestors who exercise their First Amendment rights in public will not face prosecution under the witness intimidation statute in the Town of Canton so long as their intention and conduct is not obstructing

the administration of justice or influencing a witness in the discharge of her duty. (M.G.L. c. 268, §§ 13A & 13B). The Chief of Police, Helena Rafferty, has in fact worked with protestors to ensure protests are peaceful and safe for all involved. (SDAA1).[3]

CONCLUSION

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. Due to changed circumstances which occurred in the time since the Plaintiffs' claims were filed, there is no longer a clear, live controversy upon which this court may find justiciability. Plaintiffs-Appellants are unable to show an impending certainty or a sufficiently specified substantial risk of a future injury and, as such, fail to establish an injury-in-fact and the continued standing required for their claims to survive the changed circumstances. The present factual record is lacking such that any circumstances surrounding a future protest are purely hypothetical, rendering the issue outside this Court's jurisdiction. Furthermore, the threat of repetition evading review is minimal despite a potential retrial and Chris Albert's status as a continued witness. As such, Plaintiffs-Appellants' appeal must be dismissed as moot.

[3] While Defendants-Appellees are not stating Plaintiffs-Appellants are required to work with or register their protest with the Chief of Police, they are stating that such protestors have the same opportunity to ensure their hypothetical future protests do not interfere with the administration of justice.

Respectfully submitted,

/s/ Joseph A. Mongiardo

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Dated: August 21, 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 2,919 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: August 21, 2024

/s/ Joseph Mongiardo

DOUGLAS I. LOUISON
JOSEPH A. MONGIARDO

CERTIFICATE OF SERVICE

I hereby certify that on August 21, 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: August 21, 2024

/s/. Joseph Mongiardo

DOUGLAS I. LOUISON
JOSEPH A. MONGIARDO

ADDENDUM

ADDENDUM
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The Honorable Denise J. Casper

DEFENDANTS-APPELLEES' SUBMITTED STATEMENT PER ORDER OF THE COURT ON AUGUST 7, 2024

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AFFIDAVIT OF CHIEF OF POLICE HELENA RAFFERTY

1. I am the Chief of Police of the Town of Canton.

2. It is *not* the policy or prerogative of the Canton Police Department to charge an individual for witness intimidation under Mass. Gen. Laws, c. 268, § 13A or Mass. Gen. Laws, c. 268, §13B merely because she holds a sign that says "JUSTICE" within eyesight of a witness.

3. On November 5, 2023 Canton Police Department was made aware by a special prosecutor of the Norfolk District Attorney's Office that protestors were allegedly harassing Chris Albert outside his place of business.

4. There are video recordings indicating certain individuals from the protest did not remain across the street and had in fact made their way in front of D&E Pizza & Subs. Signage observed by officers also included "Colin Albert was in the house" and slogans recorded on audio included "Chris Albert killed a man".

5. Chris Albert previously testified in the case of *Commonwealth v. Karen Read* on May 9, 2024 and is still understood to remain a witness protected under Mass. Gen. Laws, c. 268, §§ 13A & 13B as the case proceeds to a retrial.

6. Canton Police Department has been made aware of numerous incidents of harassment against Chris Albert related to his involvement as a witness in the Commonwealth's case against Karen Read, including threats made against his business, himself, and his family (several of which are also witnesses). Canton Police Department continues to enforce Mass. Gen. Laws, c. 268, §§ 13A & 13B.

7. I personally have coordinated with organizers of protestors supporting Karen Read and the named Plaintiffs-Appellants in planning protests that both ensure the objectives of the protestors are met and that such is peaceful and safe for all involved.

8. Thanks to cooperation with protest organizers, numerous protests have been held outside the Norfolk County District Attorney's office at Shawmut Rd., Canton, MA and in front of the Canton Police Department at 1492 Washington St., Canton, MA without violation of the law.

9. The charges of witness intimidation brought against the Plaintiffs-Appellants in this matter for their protest taking place on November 5, 2023 outside D&E Pizza & Subs were recently dismissed by the Stoughton District Court for lack of probable cause. The Canton Police Department is currently reviewing its ability to appeal these findings.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 16TH DAY OF AUGUST, 2024

Helena Rafferty

Canton Police Chief Helena Rafferty

Date: August 16, 2024