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' RESPONSIVE SUPPLEMENTAL BRIEF

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Dated: August 30, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES AND RULES:

INTRODUCTION

Defendants-Appellees initially raised the issue of mootness in their Principal brief because at the time, Chris Albert, the Commonwealth witness who draws the ire of Plaintiffs-Appellants, had already testified in the *Commonwealth v. Karen Read* criminal trial and that case was pending with a jury. A mistrial was declared in that matter and it is pending re-trial on January 27, 2025. Chris Albert remains a Commonwealth witness under protection of M.G.L. c. 268 §13A & §13B. (SDAA 2). Plaintiffs-Appellants are appealing a request for an injunction to prevent police interference during a planned November 12, 2023 protest, which is now plainly moot. Plaintiffs-Appellants maintain that their appeal is ultimately saved based on their inclusion of "and thereafter" in their request. (AA035). Plaintiffs-Appellants' amorphous intent to protest in the future does not provide this Court sufficient basis to find justiciability to rule on the denied emergency motion for a preliminary injunction before it. Plaintiffs-Appellants appeal is moot because the appellate record for their emergency preliminary injunction does not provide sufficient factual basis for this Court to provide effectual relief in the form of non-hypothetical guidance.

ARGUMENT

1.0 PLAINTIFFS-APPELLANTS SUPPLEMENTAL BRIEF RE-LITIGATES MATTERS IRRELEVANT TO THE ISSUE OF MOOTNESS AND IMPERMISSIBLY PRESENTS MATERIAL OUTSIDE THE APPELLATE RECORD

Plaintiffs-Appellants dedicate the first several pages of their supplemental brief to restating their allegations from the verified complaint instead of addressing the issue of mootness. It should be noted that Defendants-Appellees dispute several of these repeated allegations and have filed an answer to the Plaintiffs' complaint following the denial of Plaintiffs' motion for a temporary restraining order and preliminary injunction now on appeal. (*See* Abbreviated Electronic Record, Doc. No. 00118083419, pg. 6).

Plaintiffs-Appellants attempt to appeal the District Court's denial of their emergency preliminary injunction on the limited record now before this Court without engaging in further discovery which would provide the factual basis of whether such an order would be justified. A factual record would make clear what conduct and speech led to the officers informing the Plaintiffs-Appellants that they believed they were protesting in a manner that violated the witness intimidation statutes. Plaintiffs-Appellants' appeal is indeed moot partly for this exact reason: there is insufficient factual clarity as to what the conduct of the protesters was on November 5, 2023 within the appellate record for this Court to determine that the officers' actions were violative of the Constitution and that this matter is repetitive yet escaping review.

While Plaintiffs-Appellants lay the burden of establishing mootness with Defendants-Appellees, this is not the case. Given that Plaintiffs-Appellants contend

that this appeal's justiciability falls under what is an exception to the mootness doctrine, that this case is "capable of repetition, yet evading review," the burden in fact rests with the party invoking the exception. *See Ford v. Bender,* 768 F.3d 15, 30 (1st Cir. 2014). As is argued below, Defendants-Appellees reject Plaintiffs-Appellants contention that the factual record provides sufficient clarity for this Court to determine that their allegations, even if taken as true, are repeatable.

2.0 THE COURT CANNOT GIVE EFFECTUAL RELIEF BASED ON THE APPELLATE RECORD BEFORE IT

This Court cannot provide Plaintiffs effectual relief on their mere request that they intend, without substantive details, to protest "thereafter." (AA035). For a case to avoid being moot, there must be a reasonable expectation that the same complaining party would be subjected to the same action again. *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (finding there must be a reasonable expectation that the same complaining party would be subjected to the same action); *Illsley v. United States Parole & Probation Dep't*, 636 F.2d 1, 2-3 (1st Cir. 1980) (finding that the likelihood of recurring conduct must be clear, the mere contention of re-arrest or that charges will be relogged on future conduct is not sufficient to survive a mootness challenge).

Given Plaintiffs-Appellants have not provided a clear indication of what conduct will be in question during these future protests, this Court must find the appeal moot because the expectation of repetition is rendered hypothetical. *See*

Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 241, 81 L. Ed. 617, 57 S. Ct. 461 (1937) (controversy must admit of specific relief through conclusive decree, as opposed to opinion advising what the law would be upon hypothetical state of facts). The likelihood of recurring conduct, to be justiciable, must be clear. *See, e.g.*, *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 774-75, 98 S. Ct. 1407, 1414-1415, 55 L. Ed. 2d 707 (1978); *United States v. New York Telephone Co*., 434 U.S. 159, 165 n.6, 98 S. Ct. 364, 368, 54 L. Ed. 2d 376 (1977); *Marchand v. Director, U.S. Probation Office*, 421 F.2d 331, 334 (1st Cir. 1970).

Though Plaintiffs-Appellants statements allege they remain in fear to protest,[1] it has been made clear that Karen Read supporter protests continue to occur within the Town of Canton without largescale enforcement of M.G.L. c. 268 §13A & §13B. (SDAA 3). Moreover, "Appellant's 'subjective fear' and 'speculative contingencies' provide 'no basis for [this Court's] passing on the substantive issues [Plaintiffs-Appellants] would have [this Court] decide'" *Illsley v. United States Parole & Probation Dep't*, 636 F.2d 1, 3 (1st Cir. 1980) (citations omitted). Again, Plaintiffs-Appellants do not state with specificity what speech and conduct their future protests will exhibit for this Court to determine if such is violative of M.G.L. c. 268 §13A & §13B. Instead, they expect this Honorable Court will grant an injunction on how

[1] Each of the Plaintiffs-Appellants noted in their statements that they "intend to continue protesting" despite this alleged fear. (Plaintiffs-Appellants' Supplemental Brief, Doc. No. 00118181041 at pgs. 19, 25, 32, 91).

they might hypothetically protest in the future without providing sufficient factual evidence that such would even be found by Defendants-Appellees as violative of M.G.L. c. 268 §13A & §13B.[2]

As previously argued in Defendants-Appellees Supplemental brief, if Plaintiffs-Appellants continue to protest, the intent of their conduct is pivotal to determining whether such violates the witness intimidation statute. Yet, the present insufficient factual record makes it unclear what intent and conduct will be at play if Plaintiffs-Appellants protest again. While Plaintiffs-Appellants' prior protests on November 5, 2023 outside D&E Pizza & Subs were to specifically protest Chris Albert's expected testimony, he has since testified. Plaintiffs-Appellants now only vaguely clarify that their intent will be "protesting what they believe to be the framing of Karen Read."[3] (Plaintiffs-Appellants' Supplemental Brief, Doc. No.

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[2] To the extent Plaintiffs-Appellants allege future protests will occur as described in Paragraph 2 of Chief Rafferty's affidavit, Defendants-Appellees have addressed such conduct. *See SDAA02*.

[3] Of course, if Plaintiffs-Appellants admit that they again intend to protest Chris Albert outside his place of business in an attempt to influence his testimony, this appeal may well not be moot. However, such admission would clearly indicate that Plaintiffs-Appellants intend to interfere with the administration of justice and their First Amendment rights would not be unconstitutionally infringed by the Town's continued enforcement of M.G.L. c. 268 §13A & §13B. *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); *Cox v. State of La*., 379 U.S. 559, 562 (1965) (the government "may adopt safeguards necessary and appropriate to assure that the administration of justice at all stages is free from outside control and influence").

00118181041 at pgs. 19, 25, 32, 91). Without more, the changing circumstances underlying the intention for their protest render this appeal moot.

While the Plaintiffs-Appellants argue that there are no assurances that the next time they protest in the same place and manner they will not be subject to the threat of prosecution, such argument obscures the fact that the present factual record does not make clear what "manner" Plaintiffs-Appellants conduct was to cause Appellees to invoke M.G.L. c. 268 §13A & §13B other than to say what they will *not* do. (AA035). Plaintiffs-Appellants' conduct is simply not specifically stated or clear enough for this court to determine based on the limited emergency record before it, nor does this narrow record provide sufficient evidence that there is a reasonable expectation that this situation will recur as alleged. *See Thomas R.W. by & Through Pamela R. v. Massachusetts Dep't of Educ.,* 130 F.3d 477, 480 (1st Cir. 1997). While Plaintiffs-Appellants similarly raise the specter of the witness intimidation statute possibly extending to a post-verdict timeframe, they can point to no case where such has ever been done or indicating such an interpretation would persist.

Finally, this Court cannot give effectual relief to Plaintiffs-Appellants appeal of their *emergency* motion because the issue has ceased to be urgent. *See Rubacky v. Morgan Stanley Dean Witter Credit Corp.,* 104 F. App'x 757, 758 (1st Cir. 2004)*; Matos v. Clinton Sch. Dist*., 367 F.3d 68, 72 (1st Cir. 2004) (where "the posture of the case has changed in significant ways since the plaintiff initially made her motion

for a preliminary injunction,' the justiciability of an interlocutory appeal from the denial of that motion 'is called into question'."). The change in postures of this instant case, the criminal complaints brought against some of the Plaintiffs-Appellants, and the criminal case the Plaintiffs-Appellants intend to protest make this matter more properly dealt with upon a full factual record with the District Court.

3.0 PLAINTIFFS-APPELLANTS INTERPRETATIONS OF CASES CITED BY THIS COURT ARE FLAWED

Appellants address the several cases this Court requested the parties discuss, the Appellees reply here below in turn.

Plaintiffs-Appellants attempt to distinguish themselves from *Renne v. Geary* by arguing that the Court based its reasoning there on the notion that a declaration of unconstitutionality would not redress the injury alleged, whereas they claim that an injunction of M.G.L. c. 268 §13A & §13B would enable Appellants to resume their protest activities. 501 U.S. 312 (1991). In *Renne*, however the Court also had based its reasoning on the notion that the matter before them was not sufficiently concrete on the factual record before them. 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. *Renne*, at 322. This failure to specify provided the Court no evidence of a credible threat that the statute would be enforced. Here too, there has been scant factual development of the record as to what

was said beyond the mere verified complaint[4] and Plaintiffs' failure to provide specific plans for future protests and the conduct expected provides this Court no evidence that any future protest will be any different than the other Free Karen Read protests occurring in Canton where the witness intimidation statute has not been enforced. (SDAA pg. 2).

Appellants assert that *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014) "fully supports" them. However, unlike in *Driehaus*, the Plaintiffs-Appellants have not sufficiently outlined their conduct like the *Driehaus* Appellants, who made explicit the specific statements they would make about the candidates such that there existed a credible threat of prosecution. *Driehaus*, at 160. Chief Hafferty has clarified in her Affidavit that Defendants-Appellees do not consider, as Plaintiffs-Appellants allege they did, non-offensive signs like "Justice" in mere eyesight of a witness to constitute intimidation under M.G.L. c. 268 §13A & §13B. (SDAA pg. 2). As has been briefed, intent is a crucial element to applying the statutes and it is not clear here what the intent of Plaintiffs-Appellants hypothetical future protests will be since Chris Albert's testimony under oath has already been given. The Court does not have a sufficient factual record to know whether the protestors at supposed future protests will disseminate the same statements and conduct themselves in the same

[4] Defendants-Appellees have not been allowed to produce video of the incident or to provide contrary documentary evidence regarding the harassment of Chris Albert.

manner as they did on November 5, 2023 and therefore cannot conclude that their intended speech at future protests would be proscribed by law unless they admit their intent is the same, to influence Chris Albert's testimony. *See Driehaus*, at 162.

Plaintiffs-Appellants cite to *D.H.L. Assocs., Inc. v. O'Gorman*, 199 F.3d 50 (1st Cir. 1999) for the assertion that the same speech likely will lead to charges again. While in that case enforcement was being delayed until litigation concluded, here there is no live case or controversy because the Town does not intend to enforce M.G.L. c. 268 §13A & §13B merely if Plaintiffs hold a peaceful protest within eyesight of a witness. The Town only intends to enforce M.G.L. c. 268 §13A & §13B if Plaintiffs-Appellants' conduct meets the intent requirement and seeks to intimidate or otherwise harasses a known witness. In *D.H.L. Assocs., Inc*. the Court explains the exception to the mootness doctrine that Plaintiffs-Appellants allege they fit into, that a matter is capable of repetition, yet evading review. There, however, the Court clarifies that such only applies when the underlying facts will predictably have changed. *Horizon Bank & Tr. Co. v. Massachusetts*, 391 F.3d 48, 54. Here, however, Plaintiffs-Appellants again fail to meet this exception because they do not meet their burden of articulating what their future speech and conduct will be for this Court to determine if the conduct has a substantial possibility of being repeated. *See Ford v. Bender,* 768 F.3d 15, 30 (1st Cir. 2014).

Finally, in *Horizon Bank & Trust Co. v. Massachusetts*, 391 F.3d 48 (1st Cir. 2004), Plaintiffs-Appellants argue that they similarly have a cognizable interest in preventing enforcement of the statutes against their speech because Chis Albert is expected to testify again and that they allege the statute could be enforced in a manner that limitlessly protects prior witnesses. Here, however, Plaintiffs-Appellants encourage the Court to do precisely what *Horizon Bank & Trust Co.* warns courts not to do, wander into the "realm of the advisory and the hypothetical." *Horizon Bank & Trust Co*. at 53. This Court cannot, despite Plaintiffs-Appellants urging, provide effectual relief where the future protests purportedly sought to be protected by the preliminary injunction are not specified sufficiently and the factual record is contested and too unclear as to determine what occurred during the underlying incident.

CONCLUSION

For the aforementioned reasons, the Court should determine that the appeal is now moot and send this matter back to the District Court so a proper factual record can be established. Plaintiffs-Appellants' underlying motion for an emergency preliminary injunction was predicated on an impending protest on November 12, 2023. Plaintiffs-Appellants no longer have any grounds to maintain the lacking emergency record, nor can they meet the incredibly high burden justifying such being granted even if this matter is determined not moot. Plaintiffs-Appellants appeal is therefore moot.

Respectfully submitted,

/s/ *Joseph Mongiardo*

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Dated: August 30, 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 2,454 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 30, 2024

/s/ *Joseph Mongiardo*

DOUGLAS I. LOUISON
JOSEPH A. MONGIARDO

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 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 30, 2024

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

ADDENDUM
TABLE OF CONTENTS

AFFIDAVIT OF OFFICER MICHAEL CHIN

I, Michael Chin, being duly sworn, depose and state the following under penalty of perjury:

1. I am a Defendant-Appellee in the above-captioned proceeding. I make this declaration in support of Defendants-Appellees' Supplemental Brief.

2. I am a police officer with of the Town of Canton.

3. On November 5, 2023 I, along with Sgt. Joseph Silvasy, Officer Robert Zepf and Officer Anthony Pascarelli, was dispatched to the area of Washington St. outside of D&E Pizza & Subs due to a report of possible witness intimidation occurring.

4. When driving by the protest there was no attempt to intimidate the protesters as they allege in ¶31 of their Verified Complaint, nor was there a directive to intimidate those protesting into leaving.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 29th DAY OF AUGUST, 2024

Canton Police Officer Michael Chin

Date: August 29, 2024