No. 25-1380

In the

UNITED STATES COURT OF APPEALS

for the

FIRST CIRCUIT

JASON GRANT, ALLISON TAGGART,
LISA PETERSON, AND SAMANTHA LYONS,

Plaintiffs-Appellants,

v.

TRIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS, BEVERLY J. CANNONE, GEOFFREY NOBLE, MICHAEL D'ENTREMONT, AND MICHAEL W. MORRISSEY,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Massachusetts
No. 1:25-cv-10770-MJJ
The Honorable Myong J. Joun

APPELLANTS' REPLY BRIEF

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The government imposed a restriction that prohibits certain First Amendment protected activity within an ill-defined radius of a courthouse, regardless of its intent or its effect. This "no-liberty-zone" includes public sidewalks, private property, and even the Dedham Public Library. The government calls this a *modest* imposition on civil liberties. Every time this Court reads or hears the word *modest*, it should ask itself "what is the government trying to obscure with this word – *modest*?" The government wishes for us to accept that it can just *modestly* create new powers to quash criticism. Meanwhile, the only apt use of this word is perhaps metaphorically – when looking at narrow tailoring. The First Amendment requires tailoring as if the regulation were a flattering, perhaps *immodest* garment, not simply a feature-concealing dirty smock.

For the government to prevail, it must check every necessary box.

- ☐ The court must have the power to decree this zone.
- ☐ It must exercise that power consistent with the Fourteenth Amendment.
- ☐ It must exercise that power consistent with the First Amendment.
- ☐ The application of zone must be consistent with the First Amendment.

The government checks none of these here. The buffer zone injunction must be struck down as facially invalid. If it is not struck down facially, it must at least be struck down as applied.

The lower court's analysis was incomplete, because it improperly used the *Spicuzza* decision as a guide. In *Spicuzza*, the SJC held that a *previous* buffer zone *exempted the public sidewalks* and it never analyzed the due process nor ultra vires deficiencies in its creation. *Spicuzza* is less related to this case than the two companion cases that the District Court found to be unrelated.[1] Further, the *Grant* buffer zone is significantly larger and even less justified than the *Spicuzza* zone.

Rather than analyze this issue anew, as they should have, the Commonwealth and the District Court used *Spicuzza* and did no real independent analysis. Since the District Court simply cribbed the flawed *Spicuzza* decision, rather than giving the Constitution the full analysis it deserves, the District Court failed to evaluate the effect of the zone on public sidewalks, and the District Court failed to even ponder the lack of power in the first place. The District Court did consider the issue of whether the zone was imposed in violation of due process, but came up with a novel new interpretation of due process which must be rejected before it takes root and overcomes all notions of what due process really means.

[1] In *Derosier, et al. v. Noble, et al.,* Case No. 1:25-cv-10812-DJC (D. Mass), the State Police used the buffer zone to prohibit recording video and in Delgado, they used it to physically assault a man walking through the zone with a sticker that offended them. Both of these parties sought to file amicus briefs, so that the Court could fully analyze the extent to which this zone is being abused. They were denied. Nevertheless, the Record below does articulate the facts of their cases and how the zone is being unconstitutionally applied. AA159.

The government focuses on only one issue – that the protests outside the courthouse generate *noise*, which they claim *might* intimidate jurors and witnesses. It claims this noise will prevent Karen Read from receiving a fair trial, even though most of the untested evidence that the government provides merely indicates that *surrounding businesses* feel inconvenienced by protestors and would like them gone. And, most importantly, at no point does the government even suggest, let alone show, jury deliberations were actually affected by noise. *See, e.g.*, Opp. Br. at 14.

While the Court should ignore the extra-record argument claim that more noise can be heard inside the Dedham courthouse than in the Moakley courthouse (Opp. Br. at 34-35), neither Judge Cannone nor the District Court tested the implications of external noise. How much noise would penetrate? Would words be intelligible or merely a cacophony? The Commonwealth offers none of this information when it attempts to distinguish the *Tsarnaev* decision. As the Commonwealth notes, the Constitutionality of speech restrictions is a highly fact-intensive inquiry, yet Judge Cannone and the District Court failed to properly undertake that inquiry. Judge O'Toole was right in *Tsarnaev*—if he was wrong, then judges would have lined up in the decade since and issued buffer zone order after buffer zone order. If the *Tsarnaev* prosecution could handle demonstration, the *Read* one can as well.

Appellants do not contest that Ms. Read is guaranteed a fair trial. Appellants *want* Karen Read to have a fair trial. That's the main reason that they are protesting in the first place. The government's argument boils down to "The Constitution must be suspended in an unfettered fashion because Karen Read needs her own supporters to be quiet." And the government makes this argument without any support from Karen Read herself, who could end these protests by simply asking.

Appellants' peaceful protest has been going on since November and has not resulted in any adverse incidents. To the extent that trial participants are even aware that Appellants were outside the courthouse protesting, their actions apparently offended only Judge Cannone, who does not appreciate that they are criticizing her. So she created a new power out of thin air to enjoin non-parties over whom she lacked jurisdiction. In doing so, she trampled the rights that Appellants are guaranteed by the First and Fourteenth Amendments.

1.0 The Buffer Zone Was Imposed Without Any Power To Do So

It is rare that a government actor violates the First Amendment without even possessing the authority to do so. This authority is usually presumed, because similar cases are usually addressing ordinances or statutes. Here, we just have a judge appointing herself as the ruler of a fiefdom, which she has defined for herself, seeking input only from those who agree with her.

After refusing to even address the argument at the District Court, the Commonwealth now has concocted an argument that Judge Cannone had "inherent authority" to simply grant herself previously never-before-identified powers. (Opp. Br. at 37-40). Let that sink in. "She has unlimited power to do it because we said so?" That's their argument? Appellants concede that a judge has wide-sweeping authority inside the courtroom. But even there, the First Amendment and Due Process limit the judge's power. *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (First Amendment limits a judge's power to limit access to proceedings).

Outside the courtroom, as applied to non-parties, a judge's power is limited, and the government has not found a single case, despite plenty of time to look for one, that supports Judge Cannone's buffer zone. It cites a case that says that the Court has the power to change venue to get a fair and impartial jury. *Crocker v. Justs. of Superior Ct.*, 208 Mass. 162 (1911). And it cites a case that a judge can spend money to ensure that the court can function. *O'Coin's, Inc. v. Treas. of Worcester Cnty.*, 362 Mass. 507 (1972). It then expects this Court to extrapolate that to a blank check to allow Judge Cannone to do whatever she wants, to whomever she wants, wherever she wants, however she wants.

The injunction Cannone issued is not essential to the function of the judicial department, the maintenance of its authority, or its capacity to decide cases—in fact,

the ability of the first *Read* jury to deliberate belies any suggestion that demonstrations in the *expanded portion* of the buffer zone (which the government calls "modest") interfered with any of that. As the Commonwealth notes, among these inherent powers is the ability "to control [a court's] own proceedings ... and the environment of the court." *Chief Admin. Just. of the Trial Court v. Labor Relations Comm'n*, 404 Mass. 53, 57 (1989) (quoting *State v. LaFrance*, 124 N.H. 171, 179–80 (1983)). But the ability to control the environment of the court does not extend several football fields beyond the courthouse. *See, e.g., Sheppard v. Maxwell*, 384 U.S. 333, 358 (1966) ("The carnival atmosphere at trial could easily have been avoided since *the courtroom and courthouse premises are subject to the control of the court*") (emphasis added).

If *Crocker* means what the government says it did, then what is the limit? Can Judge Cannone ban all demonstrations in Massachusetts? Can she delegate herself the power to stop Max from streaming "A Body in the Snow: The Trial of Karen Read?" Of course she cannot—her powers end at the courthouse steps. Anything beyond that belongs to bodies subject to the democratic process. The government claims that what Judge Cannone did is not novel, yet it has failed to come up with a single case where a *judge* shut down the First Amendment as to non-parties, without any opportunity for even *similarly-situated* parties to be heard, much less the precise parties who were right outside her window to be consulted.

The government cooked up this unconstitutional scheme and now claims that *Crocker* says that the only thing that limits its power is the "conditions of society and human nature"? (Opp. Br. at 39 quoting *Crocker*, 208 Mass. at 179). Human nature certainly reared its head here – it is human nature to react poorly to people standing on the street with signs protesting against you. The "conditions of society?" What does that even mean? If *Crocker* means what the government claims it means, then Judge Cannone can order every resident of Norfolk County to vacate that county during the trial. Can she order a restriction that nobody can leave their homes until the trial is over? The government's reading of *Crocker* says yes.

Thank goodness the government is wrong. *Crocker* involved a criminal defendant seeking to move a trial. Of course a court has *that* power. If Judge Cannone wants to move the trial, she may. But *Crocker* seems limited to a recognition of the ability to do this to guarantee the empanelment of an unbiased jury. Then why did the buffer zone even exist beyond jury selection? *Crocker* does not mean that trial court judges have the power to do literally anything they can cook up to shut up protesters. While *Crocker* has not specifically been overruled, the Court should not ignore that it was decided before most First Amendment jurisprudence even existed – before even Holmes' dissent in *Abrams v. United State*s, 250 U.S. 616, 624 (1919). Yet the government wants it to stand for the proposition that the First Amendment does not apply if a judge says it needs to be.

If anything, the "conditions of society" have changed in that we have active First Amendment protections, which barely existed in 1911.

Even if the Court accepts the government's argument that Judge Cannone possesses the authority to regulate speech away from the courthouse grounds, its argument still fails. Her injunction in this case is akin to a "permit scheme" that regulates time, place, and manner. Permit schemes are allowed if they: (1) do not delegate overly broad discretion to a government official; (2) are content neutral; (3) are narrowly tailored to serve a significant government interest; and (4) leave open ample alternatives for communication. *See New Eng. Reg'l Council of Carpenters v. Kinton*, 284 F.3d 9, 20 (1st Cir. 2002). Here, (1) Judge Cannone has given herself overly broad discretion to limit speech; (2) her injunction is not content neutral by any definition of the term; (3) it is not narrowly tailored; and (4) it prohibits Appellants from communicating their message in traditional public forums, including sidewalks and on the lawn of the public library.

2.0 Appellants Were Denied Due Process

Nonparties to a lawsuit, who received "neither notice of, nor sufficient representation in" the proceedings, cannot be bound by a decision "as a matter of federal due process." *Richards v. Jefferson Cty.,* 517 U.S. 793, 805 (1996). "Due process requires notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to

present their objections." *United Student Aid Funds v. Espinosa*, 559 U.S. 260, 272 (2010) (cleaned up).

The Commonwealth says that Appellants had due process because *some people* heard third hand about the motion and Judge Cannone held the hearing on television. That is not due process. Appellants were not given notice. Appellants did not have an opportunity to be heard. Only *the parties* could be heard. Karen Read was not appointed as a class representative. The Court provided no opportunity to present opposition because it was uninterested in hearing dissent. In one breath, the Commonwealth now suggests that Appellants forfeited their due process rights because they did not file a futile motion to intervene in the state court. In the next, it cites to *Republican Co. v. Appeals Ct.*, 442 Mass. 218 (2004) for the proposition that intervention is not allowed. So which is it?

If the Superior Court had even *considered* oppositional testimony or argument, it would have heard that the jurors "could not make out any words [from the protestors], only cheers similar to what you would hear at a sporting event." Jane Roe Denied Amicus at 6. It does not take a logical leap to realize opposition testimony was not considered because it would have obviated the "need" to expand the buffer zone or to impose a buffer zone at all.

Appellees then argue that Appellants are not entitled to any degree of due process because the buffer zone amounts to a rule of general applicability, citing

O'Neil v. Town of Nantucket, 711 F.2d (1st Cir. 1983). But that case dealt with a town revoking a license to operate arcade games on the plaintiff's property; it did not deal with a judge reaching out of her sphere of authority to ban speech in public forums. Appellees additionally cite *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915), but that case is equally inapplicable, discussing a state tax commission order increasing the valuation of all property in the City of Denver. (Opp. Br. at 42). In this case, there was an injunction levied at protesters outside the courthouse who had no way to challenge it. "Laws of general applicability" are at least enacted through the legislative process, where those affected can petition the government during the process, or express displeasure at the ballot box. And while Judge Cannone apparently did hear and consider statements from local business owners (AA152-3), this does not help the Commonwealth. Further it is unknown how the business owners became aware of the proposed buffer zone, but it certainly was not through a general notice to the public comparable to the legislative process or administrative rulemaking. The fact that local businesses who claim to be anti-speech sent the judge a letter (presuming it even was them) complaining about protests doesn't mean that protesters had their interests represented.

Neither did Appellants waive their due process rights. In fact, the Commonwealth is judicially estopped from suggesting that Appellants could have intervened when **it fought against intervention in the *Spicuzza* case**.

The Commonwealth previously argued "*The petitioners did not have standing to challenge the buffer zone order below, and should not be deemed to have standing to challenge the trial judge's order in this Court*" and "*This Court should decline to exercise its extraordinary power here. The petitioners in SJ2024-0122 filed a motion to intervene in Norfolk Superior Court, which was denied. Where the petitioners had no standing to intervene below, they should not now be allowed to invoke this Court's extraordinary power of general superintendence for a resolution of those claims*."[2] But now they argue that this is precisely what Appellants should have done? They should be estopped from making this argument, even if it were serious. *See, e.g., Alternative Sys. v. Synopsys, Inc*., 374 F.3d 23, 33 (1st Cir. 2004).

An *amicus* is not *entitled* to be heard (as this Court itself demonstrated in this very case). It was not incumbent upon Appellants to seek to be heard when there is no right to be heard. It was incumbent upon the Commonwealth or the Court to initiate a proceeding in which Appellants would have had a *right* to be heard. That is how due process works. Otherwise, we live in a system where the government can throw people in a van and deport them, leaving them no recourse in American

[2] Consolidated Opp. to Petitioners' Emergency Motions to Stay Order of Norfolk Superior Court and Petitions for Relief Under G.L. c. 211, §3 in *Spicuzza v. Commonwealth*, Nos. SJ-2024-0122 & SJ-2024-0123 (Mass. Apr. 12, 2024).

courts. That is what happened here—the Commonwealth served up an order against Appellants without allowing them to be heard and with no right to recourse.

3.0 The Buffer Zone Violates the First Amendment

"Regulation of speech activity on governmental property that has been traditionally open to the public for expressive activity, such as public streets and parks, is examined under strict scrutiny." *U.S. v. Kokinda*, 497 U.S. 720, 726 (1990), citing *Perry Education Assn. v. Perry Local Educators' Assn*., 460 U.S. 37, 45 (1983). *See also* FALA FIRE NPPA Amicus Brief at 10. It must be narrowly tailored to serve a compelling state interest. *See Wash. State Grange v. Wash. State Rep. Party*, 552 U.S. 442, 451-52 (2008). The Commonwealth must prove both elements. *See Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015). It failed on both.

The government's reliance on *Kokinda* is wrong – since it is not the same kind of forum. *Kokinda* dealt with postal premises, which are not traditional public forums. However, like a postmaster, Judge Cannone's authority to regulate speech in her building is cabined to the facility. Judge Cannone acted like an individual postmaster in the post office in Dedham deciding that you couldn't have people soliciting 200 yards from the post office. Like a postmaster, Judge Cannone has no power over public streets and public sidewalks, despite how much dominion she may have over her own building.

3.1 The Buffer Zone Is Not Content Neutral (In Fact, it is not even Viewpoint Neutral)

Regulations on speech are not content neutral if they regulate it based upon its subject matter or based upon its function or purpose. *See Reed v. City of Gilbert*, 576 U.S. 155, 163-64 (2015). A regulation lacks content neutrality, and requires strict scrutiny, if it is aimed at a certain subject matter, even if it is viewpoint neutral. *McCullen v. Coakley*, 573 U.S. 464 (2014); *Reed* at 169.

The District Court erred when it determined that the zone was content neutral because it bars all forms of *demonstration*. It bans speech based upon its function or purpose. The District Court misunderstood the definition of "content neutral."

Here, only specific speech is prohibited. Specifically, any speech or expression within the buffer zone is fine unless the government deems it to be a "demonstration." Businesses have signs advertising their wares, but people can not hold signs saying "Free Karen Read" or "Convict Karen Read." That is viewpoint neutrality, not content neutrality. Citizens can wear t-shirts that support or reject any candidate for office—unless it is the Norfolk County DA. Trucks are allowed to honk their horns if another driver fails to go a 2/10 of a second after the light turns green, but are not permitted to honk in support of, or opposition to, Ms. Read.[3] The

[3] In this way, Appellees' reliance on *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), is misplaced. That case dealt with a truly content-neutral restriction: a limit on the volume of bandshell events so as not to disturb nearby residences. It was also

restriction is directed at specific speech and expression based on its *content*. Enforcement depends upon examining the content or intent of the communication before determining whether the restriction applies. *Coakley* specifically warned us that this renders a restriction content-based. 573 U. S. at 479.

The DA can give a news conference on the steps of the courthouse, and he has. But the Appellants can not stand there quietly with signs. And this is not content-based, nor viewpoint based? There is a reason that the government seeks to quash only protest, and it reveals underlying viewpoint discrimination. A photograph of the courthouse with just a bunch of mainstream news cameras in front of it sends one message. But a photograph of that courthouse ringed with protesters holding up signs calling the openly questioning the government sends a different message. The purpose of the regulation is to quash one viewpoint, even if it is dressed up in viewpoint neutrality. The obscured viewpoint discrimination in the guise of the slightly more *modest* garb of content discrimination is there because the government wants to insulate itself from public criticism, and the public sees through it. Allowing this is not only unconstitutional, but has a corrosive effect on respect for our institutions at a time when Courts should be showing leadership. The censorship here screams impropriety.

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directed at the specific source of noise, rather than to all members of the general public who could conceivably make noise that a jury *might* hear. There is no factual comparison between *Ward* and the case here.

3.2 The Buffer Zone is Not Narrowly Tailored

Appellees correctly state "whether a provision restricting speech is narrowly tailored is a highly fact-based analysis." (Opp. Br. at 35, citing *Bl(a)ck Tea Soc'y v. City of Boston*, 378 F.3d 8 (1st Cir. 2004)). This serves to demonstrate that the court committed error when opting to only hear argument from people that supported the buffer zone – especially when the first time around, Judge Cannone smacked down would-be-intervenors, but *this time* she listened to anonymous business owners? What Sixth Amendment right did *they* raise? Narrow tailoring requires "that a challenged speech restriction not burden 'substantially' more speech than is necessary to further the government's interest." *Cutting v. City of Portland*, 802 F.3d 79, 87 (1st Cir. 2015), quoting *McGuire v. Reilly*, 260 F.3d 36, 48 (1st Cir. 2001). As part of the narrow tailoring analysis, the Court must ensure that any rule that "affect[s] First Amendment rights" is pursued by means that are "neither seriously underinclusive nor seriously overinclusive." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 805 (2011), citing *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993). Here, the buffer zone imposed by the government is both overinclusive and underinclusive.

3.2.1 The Buffer Zone is Underinclusive

The supposed governmental interest is to curtail noise that it contends will deprive Karen Read of her Sixth Amendment right to a fair trial. The buffer zone is

underinclusive in that the only noise that the government seeks to alleviate is noise made by protestors. Anyone may make cacophonies for any reason other than "demonstration." Loud motorcycles, loud cars, loud music, and loud advertisements are permitted. But if the government views it as a "protest," then it is prohibited, regardless of whether the protestor is making any noise at all. There is no limitation on the government giving statements to the international media on the courthouse steps, so the government gets to "demonstrate" and preen for the cameras, getting its speech distributed globally. But protesters holding signs that challenge the government's position are prohibited. They must down the street where nobody sees them? Why didn't the Court tell the Commonwealth that it can't "demonstrate" out there either? Is it really about noise? Or is it about silencing dissent?

3.2.2 The Buffer Zone is Overinclusive

The buffer zone order is *overinclusive* as it prohibits quiet protest. For instance, Judge Cannone would not allow a protestor to stand in silence with a sign that says "Impeach Judge Cannone." If "noise" disrupting Ms. Read's trial is really the evil the government seeks to regulate, then it would have regulated *noise*, not *demonstrations*. It certainly would not have prohibited people from *filming* within the buffer zone or from *wearing buttons supporting or opposing Ms. Read*. As applied by the government, both of those activities are also prohibited. AA061-3.

Compare to *March v. Mills*, 867 F.3d 46, 69 (1st Cir. 2017), where a noise prevention law "was the product of a careful legislative process[, which]... sought to forge a consensus among many competing interests"[4] The regulation there was content-neutral, restricting noise that could be heard within a healthcare facility if it was done intentionally, *after* an order from law enforcement to quiet down, with an *additional intent* to interfere with the healthcare. Here, the government just seeks to stop people from protesting its actions. *March* provided the government with a guide on how to constitutionally deal with noise – a legislative solution (not judicial fiat in the form of an injunction against speech) where competing interests were taken into account and all "disruptive" noise was regulated, a *mens rea* was required (as in *Cox v. Louisiana*),[5] and a warning prior to ejecting the noise maker from the area. That might be a reasonable and tailored regulation.

Appellees argue that the buffer zone is narrowly tailored because it leaves open ample alternative channels of communication; after all, citizens are not categorically barred from demonstrating *anywhere*, just hundreds of feet from the courthouse. But the argument of "you can demonstrate somewhere else" never works, as shown by the line of buffer zone cases regarding abortion clinics. *See, e.g.,*

[4] Appellees cite *March v. Mills* to support their position, completely disregarding the vast differences between the deliberate legislative process that occurred there and the shotgun approach that Judge Cannone took that was aimed only at silencing her critics. *See* Opp. Br. at 25.

[5] 379 U.S. 536 (1965).

Schenk v. Pro-Choice Network of W.N.Y., 519 U.S. 357, 377-79 (1997) (15-foot "floating buffer zone" against protesters on sidewalks was not narrowly tailored because it "would restrict the speech of those who simply line the sidewalk or curb in an effort to chant, shout, or hold signs peacefully," but fixed buffer zones in points of ingress were permissible); *McCullen v. Coakley*, 573 U.S. 464, 487-88 (2014) (35-foot buffer zone around abortion clinics unconstitutional because they imposed "serious burdens" on the speech of sidewalk counselors who were trying to "distribute literature to arriving patients" and to engage in the kind of conversations required for their message to be heard). Protest is effective when it is near the subject of the protest; that is exactly why traditional public forums like the sidewalks encompassed by the buffer have traditionally been where public protests are held. A separate location for protesters to express their opinions, remote enough for the protesters' intended audience to be oblivious to the protesters' presence, is not an adequate alternative channel of communication.

3.3 The Buffer Zone is Unconstitutionally Vague

Not only does the description of the boundaries lack sufficient particularity—a title examiner would cringe if it purported to be the metes and bounds of a property—but nowhere does it describe what *demonstration* is. Is it *talking*? Is it *recording*? The *Derosier* plaintiffs have been told it is. Is it wearing a sticker? The *Delgado* plaintiff was assaulted by police for it. Can they campaign against D.A.

Morrissey's reelection? Can they campaign against Canton Selectman Brian Albert? The Order seems (to the Appellants) to allow this conduct. The State Police interpret it otherwise. If the zone survives, at least the State Police need to be enjoined from interpreting it to prevent all First Amendment protected activity, including filming the buffer zone or walking peacefully in the buffer zone.

3.4 Appellees Are Attempting to Facilitate a Heckler's Veto

The government says that there should be no silently holding signs because the mere act of silent protest encourages vehicles to honk their horns in support of, or in opposition to, those signs. (Opp. Br. at 32).

"Heckler's vetoes," occur when speech is curtailed to prevent public disorder, are "impermissible justifications for the restriction of speech." *Hussey v. City of Cambridge*, 720 F. Supp. 3d 41, 58 n.15 (D. Mass. 2024), citing *Bachellar v. Maryland*, 397 U.S. 563, 567 (1970). Granting a heckler's veto is an impermissible and unconstitutional content-based and viewpoint-based restriction. *See Terminello v. Chicago*, 337 U.S. 1 (1949); *Seattle Mideast Awareness v. King Cty.*, 781 F.3d 489, 502-03 (9th Cir. 2015). Here, the government impermissibly and unconstitutionally restricted speech based upon its assumptions about the public's reaction to that speech.

Given that the jurors or trial participants inside the courthouse would have no idea whether the persons driving the honking vehicles supported the prosecution of

Karen Read, opposed it, or were merely irritated at another driver, the government is arguing that persons in the courthouse should be protected from the sounds of everyday traffic noise. This is facially absurd.

Even if it passed the lack-of-absurdity test, would this Court impose a rule that if protesters stand anywhere, they should be held liable for violating noise ordinances *by proxy* if supporters or detractors honked their horns at them or yelled at them? This kind of argument merely demonstrates that the government has imposed an unconstitutional heckler's veto on the protestors. An unconstitutional "heckler's veto" exists when the government allows or disallows protected speech based merely on the audience's reaction to its content. *See Bachellar v. Maryland*, 397 U.S. 563, 567 (1970).

If we would not stifle speech because passersby *might* react *violently*, we certainly do not stifle it because someone *might honk their car horn*.

4.0 Appellants Were Not Required to Exhaust State Remedies

Appellees make a bad faith argument that Appellants should have filed a petition for judicial review under Mass. Gen. Laws, ch. 211, § 3 prior to seeking remedies here for the state courts' deprivation of their Constitutional rights. Appellants were not required to do so; there is no exhaustion doctrine. And it is risible to suggest that they somehow lack standing on account of it—they are deprived of their free speech. That is the injury occasioned by the lack of process.

But let's assume that there is ordinarily an exhaustion requirement at play here. Such a requirement would not apply because Plaintiffs brought suit under 42 U.S.C. § 1983. *See Patsy v. Bd. Of Regents*, 457 U.S. 496, 500-01 (1982) (superseded by statute on unrelated grounds) (noting the Supreme Court "has stated categorically that exhaustion is not a prerequisite to an action under § 1983").

State court review was discretionary and there is no exhaustion requirement. *See Commonwealth v. Fontanez*, 482 Mass. 22, 24-25 (2019). Mass. Gen. Laws, ch. 211, § 118 provides that a "party aggrieved by an interlocutory order of a trial court justice … may file" a petition for single justice appellate review. The process is discretionary, not mandatory. Additionally, there was no likelihood that the SJC would be capable of answering at least one question at the heart of the current dispute – the trial court's lack of authority to suspend the First Amendment. It lacked the competence to decide that issue as quickly and as accurately as the federal courts. Appellants intentionally chose a route that could end the deprivation of their Constitutional rights as promptly as possible. Moreover, it is absurd to suggest that Appellants must jump through state court hoops to vindicate their Constitutional rights post-deprivation when the Commonwealth gave no process to protect or even consider their rights pre-deprivation.

The entire purpose of Section 1983 is to protect federal rights from state actors. Judge Cannone failed to recuse herself in adjudicating a motion to preclude

protests against her. State and local officials were the central offenders in the 1950s-60s civil rights era, and no one would have expected individuals like Ruby Bridges to seek vindication of federal rights in state courts. What is the point of federal courts if not to protect American citizens from state government actions that demonstrate that the state actors are out of control?

5.0 "Comity" Is a Canard

There is no abstention doctrine that would preclude the relief Appellants seek. Thus, the Commonwealth retreats to a general invocation of "comity." However, none of the cases are on point. At no time has a state court ever enjoined non-parties to a proceeding who had no right to participate and be heard in the state court. The closest the Commonwealth comes to any case in its favor is *Gottfried v. Med. Planning Servs*., 142 F.3d 326 (6th Cir. 1998). But reliance on *Gottfried* is a desperate attempt to take out-of-context quotes and to try and make them fit here.

Factually, *Gottfried* dealt with a state court injunction that had already been in place *for twelve years*, while here *Read* trial is underway, and once it is over, Appellants will have completely lost the necessity to protest. *Id.* at 329. Appellants will have lost all this time for nothing, and the speed of a federal claim where there is a right of access to the court is necessary.

Further, *Gottfried* was a *Pullman* abstention doctrine case and is not even a loose fit to scenario before this Court. "To warrant Pullman abstention: (1) there

must be substantial uncertainty over the meaning of the state law at issue; and (2) there must be a reasonable possibility that the state court's clarification of the law will obviate the need for a federal constitutional ruling." *Rivera-Puig v. Garcia-Rosario*, 983 F.2d 311, 321-22 (1st Cir. 1992) (citing *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 236-37(1983)).

This case presents no "state law" – just an ultra vires decree we examine under the rubric of the First and Fourteenth Amendments. Pullman abstention "is generally inappropriate when First Amendment rights are at stake." *Wolfson v. Brammer*, 616 F.3d 1045, 1066 (9th Cir. 2010) (internal alterations and quotation marks omitted). In fact, it is "almost never" satisfied in First Amendment cases "because the guarantee of free expression is always an area of particular federal concern." *Ripplinger v. Collins*, 868 F.2d 1043, 1048 (9th Cir. 1989); *Porter v. Jones*, 319 F.3d 483, 492-93 (9th Cir. 2003) (rejecting Pullman abstention in challenge to threatened prosecution over "vote swapping" website).

Further, in *Gottfried*, the plaintiff had a state law **right** to an action in prohibition. Appellants have no such right here. Even if they were to file an extraordinary request of a single justice, that review is discretionary both as to whether the single justice would hear it, and as to the timing of such a hearing. Moreover, *Gottfried* involved specific questions of Ohio tort and property – a reasonable area to leave to a state court to determine, especially when there was a

right to state review. 142 F.3d at 332. No such state law issues are necessary to be considered here, Massachusetts law prohibits intervention in criminal actions, and there is no basis to insist that Appellants go to an uncertain state court process that could very well simply stall with no decision. The whole purpose of §1983 was to have federal law put a leash on state actors who failed to abide the Constitution.

Further, simply shepardizing *Gottfried* shows us that even the 6th Circuit would not rely on it, were this case before it. *Jones v. Coleman* does not fully overrule *Gottfried*, but it roundly rejects *Gottfried* analysis in First Amendment cases. 848 F.3d 744, 750 (6th Cir. 2017).

> The Supreme Court has indicated that a district court's certification of a novel issue of state law may be preferable to its abstaining under *Pullman*. Certification today covers territory once dominated by a deferral device called 'Pullman abstention' ... Certification procedure, in contrast, allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of an authoritative response. Perhaps because of the time, energy, and resources involved in resolving a case after a federal district court invokes Pullman abstention, the Supreme Court has been particularly reluctant to abstain in cases involving facial challenges based on the First Amendment. *Id.* (internal citations and quotes omitted).

To the extent comity is warranted, it is discretionary and the Federal courts should not prejudice plaintiffs who properly seek relief in them merely because they might have tried to, with no guarantee of even being heard, but were not required to, seek relief in state court. There is no novel issue of state law that needs to be considered by the SJC.

6.0 The Remaining Factors Warrant Injunctive Relief

Appellants will suffer irreparable harm and the equities and public interest favor Appellants. The Commonwealth does not deny that the loss of First Amendment freedoms for even a moment is irreparable harm. Instead, the Commonwealth argues that allowing a single week to pass after Judge Cannone entered her order meant they waited too long. In fact, they argue that Appellants should have sought relief *before* that order was entered, but then Appellants' claims would not have been ripe. All Appellees cite in support is an inapplicable Second Circuit case that speaks of a 10-week delay. (Opp. Br. at 44, citing *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985)).

Although this appeal has been handled on an expedited basis, it nevertheless takes time to identify and retain counsel and draft pleadings and motions. Moreover, the timeframe is of the Commonwealth's own making; they knew they were going to retry Ms. Read months ago, yet waited until the eve of trial to seek a second and expanded buffer zone order. Appellants did not sit on their rights; they acted as promptly as practicable. Perhaps if Judge Cannone or the Commonwealth had sought to invite third parties to share their views, more advance planning could have been in play.

As to the balance of equities, there is no harm to the Commonwealth if Appellants are permitted to exercise their Constitutional rights. Trials everywhere

have demonstrations, yet none have warranted a buffer zone like this. And if there is disruption that could affect the trial, the Commonwealth and the police have existing statutes to handle that. Mass. Gen. Laws, ch. 268, § 13B prohibits intimidation. Massachusetts is thick with laws against noise, disturbing the peace, disorderly conduct, and the right of the police to engage in actions to quell disturbances. The saddest part about this entire Constitutional quagmire is that it was never necessary, at all, if the stated reasons for it are credited.

The Appellees further ignore an easy alternative solution for them – The government argues that the courthouse itself is sound-porous. (Brief of Appellees at 34) But it cites the *Crocker* case that supports the proposition that courts can move their proceedings to other venues. Rather than stomp on the First and Fourteenth Amendments, why couldn't Judge Cannone have moved the trial to another court room, another building, or even another county? *Crocker* clearly supports that power. Why invent a new power and disrespect generations of First and Fourteenth Amendment jurisprudence?

The *Read* case is not Constitutionally special. All the Commonwealth gains if the zone remains is the ability to avoid the embarrassment of anti-government signs in the background while they give courthouse-steps speeches to the international media. Appellants lose the ability to communicate in the same context.

Finally, lifting the buffer zone serves the public interest. While the Commonwealth claims it has the "right" to a fair trial,[6] once more, there is nothing to suggest the demonstrations would interfere with a fair trial. The Commonwealth offered no evidence to Judge Cannone or the District Court of it. Witnesses can freely testify, and jurors can freely deliberate as they do in all high-profile cases. This order was not about "clearing the path." Physical blockages of courthouse property can be cleared. But the public cannot be silenced, especially without due process. And it is the people's right to peacefully assemble and speak that is at issue. The public interest favors Appellants' constitutional rights being vindicated. Thus, all of the factors warrant a preliminary injunction.

CONCLUSION

The government calls its attempt to suspend the Constitution an exercise in "modesty" as it tells Liberty herself, "you better cover your shoulders before you come to Dedham." We should not demand *modesty* of her, we should let her stand proud, especially when an annoyed government finds her presence "immodest." Modesty is for subjects of totalitarianism. We are free people, and this Court must recognize that by washing away this unconstitutional abomination.

[6] Governments have powers, not rights.

Date: May 4, 2025.

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)(i) because this brief contains 6,722 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: May 4, 2025.

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CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2025, 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.

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Dated: May 4, 2025.

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