

NORFOLK, SS,

SUPERIOR COURT DEPARTMENT
NORFOLK SUPERIOR COURT
DOCKET NO. 2282CR0117

COMMONWEALTH

V.

KAREN READ

**CITIZENS' MOTION TO INTERVENE FOR THE LIMITED PURPOSE
OF UPHOLDING AND DEFENDING THE FIRST AMENDMENT BY
OPPOSING THE COMMONWEALTH'S MOTION FOR A BUFFER ZONE
AND RESTRAINING SIGNS OR CLOTHING THAT EXPRESS A
VIEWPOINT ABOUT THE TRIAL**

1.0 Introduction

Movants Tracey Anne Spicuzza, Lorena Jenkinson, Dana Stewart Leonard, and Paul Cristoforo are a group of concerned free American citizens who will be negatively affected by the relief the Commonwealth seeks and wish to be heard before this Honorable Court renders its decision on that requested relief. The Commonwealth seeks to unconstitutionally infringe upon the right of the people to enjoy their full and robust rights under the First Amendment and Art. 16 of the Massachusetts Declaration of Rights, as amended by art. 77 of the Amendments to the Massachusetts Constitution. The Commonwealth's desire to clamp down on criticism and dissent must not be given this Court's imprimatur.

Intervenors have no intent to interfere with anyone, to obstruct anyone, nor to impede anyone. But, they do intend to engage in core First Amendment activity – speech on a matter of public concern in a traditional public forum. The Commonwealth is not satisfied that it has the unlimited power and resources that come from one-party rule, unlimited ability to tax, and a monopoly on violence. Power has become so intoxicating that the Commonwealth has, in the course of prosecuting this case, gone on an unchecked bender – pursuing the additional prosecution of journalists and demonstrators alike. But, like any addiction, eventually even those who love the addict must stop enabling them. The Commonwealth wants this Honorable Court to feed its addiction by giving it the most Constitutionally repugnant relief that can ever be fashioned – a prior restraint. Intervenors resist on their own behalf and on behalf of many others who fear further Commonwealth retaliation if they step forward.

If the Court does not permit intervention, no one will advocate for the rights of the people. These four brave Patriots¹ have come forward to do so, not only on their own behalf, but as proxies for anyone who wishes to keep freedom intact in Norfolk County.

¹ This word is not used lightly. Given the way that the Commonwealth has retaliated against other citizens for challenging its authoritarianism, it truly did take bravery for them to step forward. The Commonwealth's actions in arresting journalists and demonstrators who vocally disagreed with this prosecution have had a strong chilling effect on the speech surrounding this trial.

2.0 The Court Should Allow Movants to Intervene

The Court should grant this Motion to Intervene and consider Movants' opposition to the relief the Commonwealth has asked for.

2.1 Movants Have Standing

Courts permit intervention in criminal matters by third parties when First Amendment rights are at stake, and neither party is particularly suited to, nor motivated to, preserve those rights. *See, e.g., Commonwealth v. Clark*, 730 N.E.2d 872, 880 (Mass. 2000) (trial court granted media entities' motion to intervene to seek reconsideration of trial judge's order barring electronic media from trial). Petitioners seek to intervene for the limited purpose of being heard when the Court considers the Commonwealth's motion, as neither the Commonwealth nor the Defense are in the position to adequately stand up for the rights of the affected citizens. The Commonwealth seeks to bind and gag Lady Liberty and must not be permitted to do so without opposition. Defendant Read should not be asked to defend herself and the rights of 7 million Massachusetts citizens at the same time.

Movants have standing to intervene, relative to the Commonwealth's motion, because they intend to demonstrate outside the courthouse during the trial. It is the citizenry, not Ms. Read, who would suffer the injuries inflicted by the requested relief. Non-parties may intervene in proceedings where they would otherwise suffer "a substantial injury to a direct and certain violation of" their rights. *Eisai, Inc. v.*

Hous. Appeals Comm., 89 Mass. Ct. App. 604, 607 (2016). Movants intend to demonstrate by holding signs and wearing shirts with slogans on them.

Movant Tracey Anne Spicuzza is aware of the history of this courthouse and the fact that Nicola Sacco and Bartolomeo Vanzetti were wrongfully convicted here. It is her intent to hold a sign outside commemorating the injustice perpetrated upon them, with a statement that the Commonwealth of Massachusetts is not to be trusted. She wishes to do so outside the courthouse, because she is aware that the press will be there and the public will pass by, and this is therefore where her demonstration will be most meaningful. She has not settled on the exact content of her signs that she will hold each day, but she intends to commemorate the injustice done to Sacco and Vanzetti and to draw parallels that she sees in this prosecution. She wishes to communicate that everyone deserves a fair trial, and Sacco and Vanzetti did not get one, but Karen Read should.

Movants Lorena Jenkinson and Dana Stewart Leonard wish for the public to focus on how this trial is conducted, ensuring that the public is focused on it and they pay attention to it, even if the public cannot attend the trial themselves. They are aware that the press will be outside the courthouse, and they want the press to see what they have to say on their signs. Lorena Jenkinson particularly intends to criticize the police and the prosecutors in this case by holding up signs in support of

the “Canton 9” – who were previously charged with witness intimidation for demonstrating about this case.

Movant Paul Cristoforo wishes to demonstrate to call attention to his belief that the Commonwealth, the Norfolk District Attorney’s Office and the Canton Police are not to be trusted. He intends to hold up a sign that says “FREE TURTLEBOY” – in support of the journalist, Aidan Kearney, who has been prosecuted for engaging in journalism pertaining to this case. He also intends to hold up signs that say “FREE KAREN READ.”

Movants do not ask for permission for these statements and these statements exclusively, but offer them as nonexclusive examples of the lawful speech they intend to engage in. They do not intend to, nor should they be permitted to, engage in legally obscene demonstration, nor true threats, nor incitement to violence, nor true “fighting words,” to the extent that such doctrine still exists.² They should not

² The “fighting words” doctrine, from *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) is a derelict adrift on the sea of jurisprudence. See 1 Smolla & Nimmer on Freedom of Speech § 2:70 (2008). David Hudson, observed courts “have reached maddeningly inconsistent results” with respect to what are “fighting words.” “FIGHTING WORDS,” Freedom Forum’s First Amendment Center. (archived at <https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/personal-public-expression-overview/fighting-words/>) The doctrine is borne from a sexist notion, that there are certain things a man’s pride cannot endure hearing without resorting to fisticuffs. “Chaplinsky... is steeped in an outdated idea of toxic masculinity.” Eric Kasper, *No Essential Reason*, 53 TEX. TECH L. REV. 613, 614 (2021). Authoritarians frequently retreat to this toxically-sourced doctrine as a last resort when what they really want to say is “your honor, gag our critics.” Nevertheless, if there is to be a determination that certain statements are “fighting words,” these must be addressed *after* the words are used, not in a prior restraint.

be enjoined from other forms of demonstration, as long as such demonstration is protected by the First Amendment and/or Article 16.

The Commonwealth's requested relief would directly preclude the exercise of Movants' freedom of speech under the First Amendment and Article 16 and therefore must be denied, or at least narrowly tailored. The Commonwealth asks this Court to use a sledgehammer when a fine scalpel is the only tool it should wield.

3.0 The Court Should Deny the Commonwealth's Motion

The Commonwealth's seeks a 500-foot free speech buffer. The Court should not grant what would amount to a prior restraint on free and fair discourse concerning this trial. Intervenors implore this Court to not sacrifice freedom at the altar of the Commonwealth's zeal.

3.1 Trials are Public Events

Trials are public events, and this Court should not allow the Commonwealth to keep the public from participating. The Supreme Court has recognized that public opinion in a fair and open trial is particularly important. "The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." *In re Oliver*, 333 U.S. 257, 271 (1948). "Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account." *Id.*

In this case, Intervenors take no position on whether *judicial* power has been used in an unrestrained or unchecked manner. The default position is that it has been used wisely, with restraint and reverence for the Constitution, and the default presumption is that this Court will continue to use it when evaluating the Motion. The Court should *embrace* demonstrators outside the courthouse. Courts wield an immense amount of authority because they are seen as legitimate checks on the power of the other branches of government. Where a court *may* find itself checked by public opinion, it is more likely to be *legitimized* by wide open and robust debate. What better way for a Court to show its confidence in the process than to pronounce that it has no fear of speech outside its walls. It should invite it.

3.2 The Forums the Commonwealth Seeks to Regulate

The Commonwealth seeks to regulate two classes of turf: The Courthouse and its curtilage (inside the Court's territory), and outside the Court's territory—traditional public forums such as public sidewalks. The Commonwealth's Motion exceeds the reasonable restriction as to both classes. Intervenors recognize that there is a lower level of tolerance for speech in the courthouse itself. Nevertheless, the Court should still exercise restraint and wisdom when fashioning its remedies even in the space where it has virtually unlimited authority.

3.2.1 Inside the Courthouse

With respect to regulations *inside* the Courthouse, Intervenorors have little quarrel. The Court has near plenary authority to use its best judgment inside its own realm. Intervenorors do take issue with the blanket nature of the request, prior to speech occurring. The Court is in a position to observe the conduct of the proceedings, and it is able to judge *at the time of the speech* if it is disruptive or distracting. Should a member of the public sit inside the courtroom with a shirt that says “Free Karen Read,” or a button that says “Justice” or any other message, and the Court sees no disruption, then such should be permitted.³ The Commonwealth seeks a prior restraint, when this Court can observe the courtroom, day to day, and see for itself if either Read’s rights or the Commonwealth’s interests could be impacted. The Court should not bind itself and the public prior to seeing what will happen, and how it might affect things, unless there is a restriction that is so obviously necessary that it should be pre-announced. Courtroom observers should be admonished to be silent. Holding up signs seems to be disruptive, no matter what the message, or even if the sign is a blank piece of paper. But limiting the messages that people can have on water bottles? The Commonwealth is going too far.

One portion of the request is particularly calling out for caution: the Commonwealth has asked that law enforcement officers not be permitted to wear

³ Intervenorors intend to also rotate to seats inside the trial wearing such expressive apparel.

their uniforms inside the courtroom. The Court should, prior to granting such a request, consider *why* the Commonwealth is asking for this restriction, and should consider the fact that the Commonwealth may be asking for this relief *in order to send a message of its own*.

In most cases involving a fallen law enforcement officer, courtrooms are packed with fellow officers, in uniform, supporting their fallen comrade. Here, despite this being a high-profile case about a fallen officer, the courtroom has been devoid of law enforcement officers in uniform. The Court should be mindful that the Commonwealth seems aware that this is a unique trial in which a fallen officer's alleged killer's trial is not being attended *en masse* by men and women in uniform. This Court should be mindful that the lack of officers in uniform may communicate one thing if the room is void of them because they chose to remain home. The Court itself will create a second narrative if they weren't coming anyway – letting the Commonwealth blame the Order for a lack of law enforcement attendance -- rather an inability to attract supporters in Blue. This is also a clear and present danger in restrictions on the Intervenors. If members can wear shirts that read “Sacco and Vanzetti's Lives Mattered” in this Courthouse, but not “Free Karen Read,” the Court may be placing its imprimatur on some displays, but not others. To the extent that any restriction is placed on displays inside the courtroom, the Court should pronounce that this is because the Commonwealth asked for the restriction (or Ms.

Read asked for it, if she asks for one). Otherwise, it may appear that observers in the courtroom are not communicating a message to anyone because they have chosen to remain silent. Choosing to remain silent is, itself, a viewpoint.

The Court should temper any “inside the courthouse” relief with mindfulness toward how the Commonwealth may be manipulating this process (on purpose or simply unwittingly) to enlist the Court into using trial observers to present a narrative of its own.

3.2.2 Outside the Courthouse

The Commonwealth seeks an order “prohibiting any individual from demonstrating in any manner, including carrying signs or posters, or making statements about the defendant, law enforcement, the Norfolk District Attorney’s Office, potential witnesses, or the evidence, within 500 feet of the Norfolk Superior Court complex, which includes the parking area behind the Registry of Deeds building, during the trial of this case.” Such a request is not narrowly tailored and constitutionally infirm.

From “time out of mind public streets and sidewalks have been used for public assembly and debate, the hallmarks of a traditional public forum.” *Frisby v. Schultz*, 487 U.S. 474, 480 (1988). The government’s ability to “limit expressive activity” in a traditional public forum is “sharply circumscribed.” *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983). In *United States v. Grace*, 461 U.S.

171 (1983), the Supreme Court held that the “sidewalks forming the perimeter of the Supreme Court grounds” are traditional public forums, places where expressive activity is lightly regulated, because they are “indistinguishable from any other sidewalks in Washington, D.C.” *Id.* at 179-80. In other words, Congress tried to protect the Supreme Court from protests, and the Supreme Court itself struck down Congress’ attempts to do so. If the Supreme Court can tolerate protests, this Court can do so as well.

The Commonwealth seeks not only to regulate the sidewalks adjacent to Court grounds, but also to the streets, sidewalks, buildings, and parks within a 500-foot distance from court grounds. This request is overbroad and not narrowly tailored to a compelling state interest. The Court cannot justify banning all demonstrations within 500 feet of the courthouse, unless it articulates a compelling governmental interest in doing so, and it does so in a narrowly tailored fashion. *Perry*, 460 U.S. at 45. To do that, we must ask ourselves what *is* the government interest? The Commonwealth’s interest is to quash public displays of criticism. This is not a legitimate, let alone compelling governmental interest.

On the other hand, Intervenors accept that shielding the jury from contact that could *unduly* influence them is a compelling governmental interest. In order to meet the narrowly tailored prong of the analysis, the Commonwealth must target the exact wrong that it wants the Court to cure. *See, e.g., Frisby v. Schultz*, 487 U.S. 474, 485

(1988); *Ward v. Rock Against Racism*, 491 U.S. 781, 800 n.7 (1989); *Casey v. City of Newport*, 308 F.3d 106, 115 (1st Cir. 2002). Meanwhile, the Commonwealth just seeks to create a 500-foot wide sledgehammer and crush all disfavored speech that it lands on. This even includes private property, where the Intervenor has gathered in the past and intend to in the future. The Commonwealth seeks to create the illusion that there is no public outcry against how they have handled this case, and how they have quashed dissent by prosecuting journalists and demonstrators alike.

The proposed restriction is not limited to this case. It means, as inside the courthouse, citizens cannot demonstrate with phrases like “Back the Blue” or “Defund the Police.” It means one cannot campaign against the incumbent district attorney. It means that one cannot protest excesses by the Commonwealth like charging other demonstrators or journalists with crimes. It means that one cannot engage in pamphleteering regarding jury nullification in general, without targeting any particular case. *See Picard v. Magliano*, 42 F.4th 89 (2d Cir. 2022) (finding such pamphleteering protected). It means that the homeowners and business owners and patrons, even inside the multitude of buildings within the proposed perimeter, cannot use their property, implicating not only the First Amendment, but also the Fifth Amendment. *See Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021) (a regulatory taking “imposes regulations that restrict a property owner’s ability to use his own property”). It means nearby employees cannot exercise their Section 7

rights and picket their employer in opposition to unfair labor practices. If anything, a restriction can only apply to the courthouse grounds and to the particulars of this specific case, and even then, the tailoring must be even more narrow than that.

3.3 Narrow Tailoring

The Commonwealth's proposal reflects no tailoring, let alone *narrow* tailoring. The Commonwealth wants to create a "free speech desert" 500 feet in all directions from the courthouse. However, this Court could readily craft narrower restrictions than this, which would target any imaginable legitimate concerns.

For example, if the Court were to require a ban during *jury selection only*, this would still likely chafe the Constitution, but Intervenor would compromise and waive any challenge to such a limitation. During trial, the jury could be brought in through the back entrance to the courthouse, and demonstrators could be banned from that entrance. After all, the public does not generally pass by the back entrance to the courthouse, and the press will be out front. Any infringement on First Amendment rights from these narrowly tailored and limited remedies would be *de minimis* enough that more zealous parties might complain, but these Intervenor would not challenge them. These suggestions alone would tailor the relief so that the Constitution was not so obviously treated with such violence.

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Intervenors suggest the following narrow tailoring devices:

1. Any restrictions on demonstrations should only be during jury *selection*, when the prospective jurors will be entering through the main entrance, and they cannot be instructed to enter through the alternate entrances.

2. Any other concerns about tainting the jury or witnesses should be limited to actual contact with jurors or witnesses. Any concerns about demonstrators influencing them should be addressed by bringing jurors and witnesses in through alternate access points, where there may be reasonable buffer zones enacted, however such buffer zones should be limited to 25 feet on either side of the rear entrance to the courthouse.

3. If there is a specific finding that it is impossible for a juror or witness to enter the courthouse through the back entrance, perhaps then, law enforcement may be called to require that demonstrators face away from the courthouse for the few seconds it takes for that person to enter the courthouse, and then the demonstrators may continue un-restricted once that affected person has entered or exited the building. However, to prevent abuse of this narrowly tailored restriction, there should be a specific factual finding as to why it would be impossible to use the back door, rather than the public facing door to the courthouse.

3.4 The Commonwealth Should Be Restrained

Demonstrators outside the Courthouse are outside the jurisdiction of this Court. However, the Commonwealth is not. And the Commonwealth, having opened this subject for discussion should have that discussion aimed at its conduct to date, and its conduct going forward.

The Commonwealth claims that it, too, has a “right” to a fair trial. It claims so citing dicta⁴ and seems to miss the entire point of the Bill of Rights. The Government does not have *rights* – the government has *powers* and those powers are tempered by the rights that are God-given *to the people* and Constitution-preserved *for the people*. In contrast, “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Intervenors would suffer irreparable harm were the proposed restrictions endorsed by the Court.

The Commonwealth is prosecuting journalists and demonstrators alike—in its quest to act without criticism. Its authoritarianism has led to people currently facing criminal charges for standing on a street corner holding innocuous signs. *See O’Neil v. Canton Police Dep’t*, No. 23-cv-12685-DJC, 2023 U.S. Dist. LEXIS 202183 (D.

⁴ The Commonwealth cites a throwaway line in a case involving a trial judge abusing his discretion by dismissing a criminal case right after opening statements. And while the SJC may have used this troubling phrase more than once, it is hardly a “right” that would be coextensive with the Fifth, Sixth, or Fourteenth Amendment, nor is it a “right” that should render the First Amendment a mere afterthought.

Mass. Nov. 10, 2023). The government reads G.L. c. 268, §§ 13A & 13B, as giving it the power to arrest demonstrators if a potential witness can even *see* a sign that pertains to the trial. *Id.* By the Commonwealth's reading of the statute, there is literally nowhere that the demonstrators can safely operate, as there are huge roving free speech voids. The Commonwealth should be ordered to limit its application of 13A and 13B only to acts that have the intent and the effect of intimidation – not the expansive reading that it seeks in its motion.

3.5 A Complete Ban Would De-Legitimize the Proceedings

The public interest favors denial of the Commonwealth's motion, and restraining the Commonwealth from abusing Sections 13A and 13B. The Courts are independent. The people presume that the judge will be free of bias and influence from public opinion. Intervenors challenge the Commonwealth's view that this Court cannot function if it knows how the public feels about its decisions. Similarly, the Court is presumed to be capable of controlling the jury and its courtroom.

In *United States v. Grace*, the Supreme Court noted:

Court decisions are made on the record before them and in accordance with the applicable law. The views of the parties and of others are to be presented by briefs and oral argument. Courts are not subject to lobbying, judges do not entertain visitors in their chambers for the purpose of urging that cases be resolved one way or another, and they do not and should not respond to parades, picketing, or pressure groups.

461 U.S. at 182-183. It is rare that judges and prospective jurors are ignorant of high-profile matters and, frankly, one would hardly think a jury of one's peers

includes those who are out of touch with society. Demonstrations show that our system is open and fair. Lockdowns and bans show that we have something to fear.

In *Grace*, the Government tried to justify a restriction on picketing outside the Supreme Court on the grounds that it might *appear to the public* that the Supreme Court is subject to influence by picketers and marchers. The Supreme Court rejected the Government's desire to protect it from demonstrators, but in doing so endorsed the notion that a ban on demonstrators would likely send the *opposite* message. If a crowd stood outside the Massachusetts Institute of Technology with signs saying "the Earth is flat!," would it change the minds of the astrophysicists at M.I.T.? Of course not. There would be no harm, because there would be no *influence*. Accordingly, a Court with confidence in itself should permit demonstrators. Otherwise, if it banned them for this trial, why not *all* trials? Is it that there are too many people focused on this trial? Would a single demonstrator outside another trial holding a sign that said "Black Lives Matter" or "Judge Not, Lest Thee Be Judged" influence the Court? Why not? If that one hypothetical person would not change the outcome of this free and fair trial, why would 100 people wearing "FREE KAREN READ" shirts change the outcome of the trial? The hundreds of protestors against police brutality outside the trial of the police officers who killed Amadou Diallo did not effect a guilty verdict, are the demonstrators here more powerful? Is there talismanic power in this case that does not exist in others,

such power that this Court lacks the ability to combat it through Constitutionally reverent means?

3.6 Attempts to Stifle Dissent Will Have the Opposite Effect

The Commonwealth should be careful what it wishes for. Should an Order issue that unjustly stifles freedom of expression, Liberty finds a way.

Dissidents are a scrappy lot. In Apartheid South Africa, the government banned newspapers from publishing stories that could call Apartheid into disrepute. So, newspapers simply published blank newspapers. Their attempts to shut down criticism metastasized into greater criticism. Even those who were not previously drawn to the cause embraced the cause of freedom of expression. Free Americans make other people fighting for Liberty look like amateurs. Since April 19, 1775, we in Massachusetts have been the O.G.s of Liberty. As another rebellion's spokesperson said, "the more [the Commonwealth] tighten[s] [its] grip, the more [Liberty] will slip through [its] fingers."⁵

The kind of people who will travel from miles around to demonstrate outside a trial for months and months will find a way to protest. The Commonwealth asks for a blanket ban on protesting within 500 feet of the courthouse – this would even place the sidewalk in front of the public library off limits. It is foreseeable that there would be protests simply about the lack of a right to protest.

⁵ STAR WARS (Lucasfilm, 1977).

If we narrow the request to just content or viewpoint based restrictions, and a demonstrator cannot hold up a sign that says “KAREN READ,” then they may hold up one that says “READING IS FUNDAMENTAL.” If the Commonwealth bans that, they will hold up books. If they cannot hold up books, they will find another way. This is not to say that these are reasonable alternate avenues of expression – they are not. But, the reaction to a clampdown is rarely silent compliance.

The Commonwealth seeks to blow out the candlelight of Liberty, and if it succeeded, it would fan those flames, not extinguish them. It will be a challenge to find jurors who are ignorant enough about this trial to serve on its jury. If the Commonwealth gets its way, it may render that quest impossible – as they will pour metaphorical gasoline on the small fire of Liberty that will otherwise calmly smolder outside this courthouse.

4.0 CONCLUSION

Leave to intervene should be granted. If the Court is inclined to grant any prior restraint, it should do so with a scalpel rather than with a sledgehammer. The Court should tread lightly outside the courthouse, and it should make its decisions as circumstances require inside the courthouse.

Dated: April 2, 2024.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was served upon all pro se parties and all attorneys of record in via first-class mail, postage prepaid, on April 2, 2024, as follows:

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