COMMONWEALTH OF MASSACHUSETTS

NORFOLKS, SS. SUPERIOR COURT DEPARTMENT
DOCKET NO. 2282CR0117

COMMONWEALTH

v.

KAREN READ

AMICUS CURIAE MEMORANDUM OF THE AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS, INC. WITH REGARD TO NORFOLK DISTRICT ATTORNEY'S REQUEST FOR AN EXPANSIVE BUFFER ZONE DURING TRIAL AND OTHER MEASURES THAT IMPACT FREE EXPRESSION

Introduction

The American Civil Liberties Union of Massachusetts, Inc. ("ACLUM") respectfully submits this memorandum as *amicus curiae* with regard to the District Attorney's Motion, filed on or about March 25, 2024, seeking four orders from this Court:

1) requiring "prominent posting of G.L. c. 268, § 13A in and around the courthouse immediately before April 16, 204 and during the pendency of the trial,"

2) "prohibiting any individual from demonstrating in any manner, including carrying signs or poster, or making statements about the defendants, 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,"

3) "prohibiting anywhere where prospective jurors gather or walk to the courtroom, the wearing or carrying of papers, water bottles, tote bags, signs, buttons, pins, t-shirts, sweatshirts,

hats, or any other attire or item that contains any images or writing that suggests a favorable or unfavorable opinion of either party," and

4) "prohibit[ing] any individual in the courthouse from wearing any buttons, shirts, or insignia related to the defendant, the victim, or law enforcement . . ."

Each of the four orders requested in the pending Motion have an impact on free speech, expression and assembly and therefore require very close constitutional scrutiny by this Court before any order might enter. This Memorandum focuses primarily on the request for the whopping 500 foot buffer zone (request 2 above), although the analysis below is applicable to each element of the request.[1] As explained more below, the Court should proceed very carefully in ruling on the Motion – particularly the buffer zone request – given the impact on free expression protected by both the First Amendment to the U.S. Constitution and Article 16 of the Declaration of Right, which has been held to provide even greater protection for free expression than the First Amendment – including when criticism of the conduct of public officials is at issue. *See, e.g., Barron v. Kolenda*, 491 Mass. 408, 421-24 (2023).

Argument

For purposes of this *amicus*, it is assumed the request for the 500-foot buffer zone can be deemed content and viewpoint neutral.[2] And this Memorandum takes as a given that there is a

[1] We also have concerns about the request for posting of G.L. c. 268, § 13A at the courthouse, given it may be an overbroad and insufficiently tailored restriction speech in that it prohibits picketing "near a building housing a court of the commonwealth" which is arguably too vague. More appropriate than posting that statute might be the prominent posting of any buffer zone order the court might enter to ensure that no one inadvertently violates it due to lack of notice. Of course, the statute shows that the Legislature chose to restrict such activities undertaken with specific intent only when "near" a court – as opposed to anywhere within a 500-foot zone on every side of the entire courthouse complex.

[2] Given it is clearly motivated by a desire to suppress speech in favor of the defendant's perceived innocence, that assumption may be questionable.

strong government interest in preserving the administration of justice free from undue influence.[3] But even assuming those predicates, the Court still must conclude that that the requested restrictions are narrowly tailored, in that they do not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). In a case out of Massachusetts concerning 35-foot buffer zones near abortion clinics that were held to not meet the narrow tailoring requirement, the Supreme Court emphasized that "by demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily 'sacrific[ing] speech for efficiency.'" *McCullen v. Coakley*, 573 U.S. 464, 486 (2014) (quoting *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988)).

In *McCullen*, the Court also emphasized that the burden is on the *government* to show that it "seriously undertook to address the problem with less intrusive tools readily available to it" and "considered different methods that other jurisdictions found effective." *Id.* at 494.

Indeed, in this case where a judicial injunction – not a statute – is at issue, the standard is even higher. As the Supreme Court has explained, injunctions "carry greater risks of censorship and discriminatory application" and thus "when evaluating a content-neutral injunction, we think that our standard time, place, and manner analysis is not sufficiently rigorous. We must ask instead whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). Of course the Supreme Court has also recognized, and discussed in

[3] There is however a serious question whether the requested orders are necessary or effective to serve such an interest, given the huge amount of press attention that has already been provided to this case and the unlikelihood that many if any potential jurors or witnesses would not already have been exposed to it.

McCullen, 573 U.S. at 492, that injunctions, if carefully drawn to apply only to individuals or groups "because of [their] past actions in the context of a specific dispute between real parties," *Madsen*, 512 U.S. at 762, may be more consistent with free expression than more general laws, because "given the equitable nature of injunctive relief, courts can tailor a remedy to ensure that it restricts no more speech than necessary," *McCullen*, 573 U.S. at 770. "In short, injunctive relief focuses on the precise individuals and the precise conduct causing a particular problem," as opposed to a measure that "categorically excludes non-exempt individuals from the buffer zones, unnecessarily sweeping in innocent individuals and their speech." *McCullen*, 573 U.S. at 492.

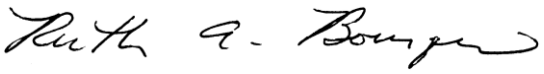
Here, the Commonwealth's Motion makes no attempt to explain why less intrusive measures are not sufficient to protect its legitimate interests. Such alternatives may include enjoining only specific individuals from engaging in certain conduct where the government shows that they have in the past engaged in unlawful witness intimidation or interference with the administration of justice. Any such violations would need to have been proven to have occurred with an intent to interfere with or obstruct the administration of justice, because intent is an important element in the protection of free expression, as recognized by the plain language of G.L. c. 268, § 13A. *O'Neil v. Canton Police Dep't*, No. 23-CV-12685-DJC, 2023 WL 7462523 *5 (D. Mass. Nov. 10, 2023). Moreover, any generally applicable restrictions could be much more tailored, for instance, by only prohibiting demonstrators (while expressing views about the case) from approaching within a certain number of feet of someone entering or in the courthouse; restricting noise levels within 200 feet from the courthouse complex below a reasonable decibel level so that proceedings inside are not disrupted; the Court conducting careful *voir dire* of each potential juror to ensure they can commit to judging the matter based only on the facts presented during trial and according to the Court's instructions, and not as a

result of media coverage or the influence of demonstrators; a much smaller buffer zone; and/or a combination of the same.

Conclusion

There are serious reasons to doubt that orders of the scope sought by the Norfolk District Attorney's Office can be justified consistent with free expression principles, protected both by the First Amendment to the United States Constitution and Article 16 of the Massachusetts Declaration of Rights. Certainly, the District Attorney seems not to have met the government's burden to show why narrower alternatives are not feasible, and unless and until that high burden is met, the Motion should be denied.

Respectfully submitted on behalf of ACLUM,



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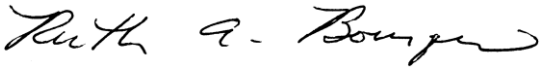
Certification of Service

I certify that on this 2d day of April 2024, a copy of this *Amicus Curiae* Memorandum, along with the Motion for Leave to File, was served by electronic mail on Adam C. Lally, Assistant District Attorney, Norfolk District Attorney's Office and on David Yanetti, counsel for the Defendant.



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