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

BRIEF OF *AMICI CURIAE* FIRST AMENDMENT LAWYERS ASSOCIATION, FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION, AND NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION IN SUPPORT OF APPELLANTS APPEAL TO REVERSE DENIAL OF REQUEST FOR INJUNCTIVE RELIEF

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RULE 26.1 DISCLOSURE STATEMENT

Undersigned counsel certifies, pursuant to Federal Rule of Appellate Procedure 26.1(a), that amicus curiae First Amendment Lawyers Association (FALA) is not a publicly held corporation and does not have any parent corporation, and that no publicly held corporation owns 10 percent or more of any corporation's stock.

Undersigned counsel certifies, pursuant to Federal Rule of Appellate Procedure 26.1(a), that amicus curiae Foundation for Individual Rights and Expression (FIRE) is not a publicly held corporation and does not have any parent corporation, and that no publicly held corporation owns 10 percent or more of any corporation's stock.

Undersigned counsel certifies, pursuant to Federal Rule of Appellate Procedure 26.1(a), that amicus curiae National Press Photographers Association (NPPA) is not a publicly held corporation and does not have any parent corporation, and that no publicly held corporation owns 10 percent or more of any corporation's stock.

INTEREST OF *AMICI CURIAE*[1]

The First Amendment Lawyers Association (FALA) is a nonprofit organization comprised of attorneys across the United States with a shared commitment to preserving and advancing the rights guaranteed by the First Amendment. Since its founding in the 1960s, FALA has actively participated in cases concerning free expression, freedom of the press, and restrictions on speech in public spaces. FALA members are often on the front lines of First Amendment litigation, and the organization frequently appears as amicus to protect against government encroachment on constitutional expression.

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit that defends the rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended First Amendment rights on college campuses nationwide through public advocacy, targeted litigation, and *amicus curiae* filings in cases that implicate expressive rights. In June 2022, FIRE expanded its advocacy beyond the university setting and now defends First Amendment rights both on campus and in society at large. In lawsuits across the United States, FIRE works to vindicate First

1 No counsel for a party authored this brief in whole or in part. Further, no person, other than *amici*, their members, or their counsel contributed money intended to fund this brief's preparation or submission. As reflected in the accompanying unopposed motion for leave to file this brief, Plaintiffs-Appellants consented to its filing, and Defendants-Appellees do not oppose.

Amendment rights without regard to the speakers' views. *See, e.g.*, *Trump v. Selzer*, No. 4:24-cv-449 (S.D. Iowa filed Dec. 17, 2024); *Volokh v. James*, No. 23-356 (2d Cir. argued Feb. 16, 2024); *Novoa v. Diaz*, No. 4:22-cv-324, (N.D. Fla., Nov. 17, 2022), *appeal docketed*, No. 22-13994 (11th Cir. argued June 14, 2024); *Netchoice, LLC v. Bonta*, 2025 WL 807961 (N.D. Cal. Mar. 13, 2025)). FIRE has a longstanding interest in, among other safeguards for free speech, ensuring that public fora, both on campus and off, remain open for free expression of all kinds. *See, e.g.*, *Dubash v. City of Houston*, 2024 WL 4355196 (S.D. Tex. Sept. 30, 2024), *appeal docketed*, No. 24-20485 (5th Cir.); *Sanders v. Guzman*, No. 1:15-cv-426 (W.D. Tex. filed May 20, 2015); *Sinapi-Riddle v. Citrus Comm. Coll.*, No. CV-14-05104 (C.D. Cal. filed July 1, 2014).

The National Press Photographers Association (NPPA) is a 501(c)(6) nonprofit founded in 1946 to advocate for the rights of visual journalists, including photojournalists, videographers, and multimedia reporters. NPPA promotes the highest standards in visual journalism and works to protect its members' right to gather and disseminate news—particularly in public places where government efforts to limit press access can chill constitutionally protected activity. NPPA has a long history of litigation and public advocacy on behalf of photographers and press freedom, especially where law enforcement or judicial actions restrict newsgathering in public forums.

SUMMARY OF ARGUMENT

The Massachusetts Superior Court's order at issue in this case, which categorically bans constitutionally protected expression on public sidewalks within 200 feet of the Norfolk Superior Courthouse in Dedham (the 200 Ft. Order), represents a prior restraint on speech in a traditional public forum that cannot withstand constitutional scrutiny. Among other things, the 200 Ft. Order issued without the narrow tailoring, individualized findings, or procedural safeguards the First Amendment demands.

The 200 Ft. Order suffers from multiple fundamental and therefore fatal constitutional defects that support reversal. The 200 Ft. Order is a classic prior restraint that restricts speech in quintessential traditional public fora—sidewalks surrounding a courthouse—and thus triggers strict scrutiny, a standard it fails because it sweeps far more broadly than necessary to serve any legitimate governmental interest. The 200 Ft. Order also bound the parties to this case without Due Process. Even if analyzed under intermediate scrutiny, the 200 Ft. Order lacks adequate tailoring and fails to preserve meaningful alternative channels for expression. Furthermore, the 200 Ft. Order's vague terminology invites arbitrary enforcement and chills protected expression. Finally, the 200 Ft. Order sets a dangerous precedent by allowing judges to unilaterally redefine public forum boundaries to shield themselves from criticism.

We accordingly urge this Court to reverse the denial of preliminary injunctive relief and reaffirm that public sidewalks remain constitutionally protected spaces for peaceful expression, even when that expression criticizes government officials.

ARGUMENT

A preliminary injunction should have issued because the appellants are likely to succeed on the merits given the 200 Ft. Order is a content-based prior restraint in a traditional public forum that cannot withstand strict scrutiny, and it issued without Due Process. Furthermore, its enforcement represents irreparable harm *per se* as "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). And, the balance of interests always favors upholding First Amendment rights, whether that be for the press or for protest: "it is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge v. Michigan Liquor Control*, 23 F.3d 1071, 1079 (6th Cir. 1994) (citing *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 383 (1979)); see also *Riley' s Am. Heritage Farms v. Elsasser,* 32 F.4th 707, 731 (9th Cir. 2022) (stating the same). This Court should therefore reverse the denial of a preliminary injunction below.

I. The 200 Ft. Order must be analyzed under Strict Scrutiny, as it Restricts Speech in a Traditional, Quintessential Public Forum, and it Fails such Strict Scrutiny Analysis.

The 200 Ft. Order restricts speech on public ways and sidewalks, locations that are the heart of free expression in America. The Supreme Court has stated that public sidewalks hold a "special position in terms of First Amendment protection because of their historic role as sites for discussion and debate." *McCullen v. Coakley*, 573 U.S. 464, 476 (2014) (citing *United States v. Grace*, 461 U.S. 171, 177 (1983)). Thus, sidewalks and public ways are "[q]uintessential examples of a public forum...to which the public generally has unconditional access and which have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *United States v. Kokinda*, 497 U.S. 720, 743 (1990) (Brennan, J., dissenting) (quoting *Hague v. Committee for Industrial Organization*s, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.)). When government restricts speech in these traditional, quintessential public forums, it must satisfy the most demanding constitutional standard of strict scrutiny: "[r]egulation 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." *Kokinda*, 497 U.S. at 726 (citing *Perry Education Ass. v. Perry Local Educators' Ass.*, 460 U.S. 37, 45 (1983)). The

regulation of speech on the "quintessential public sidewalk" is included in this group subject to strict scrutiny. *Kokinda*, 497 U.S. at 727.[2]

Under strict scrutiny, a speech restriction is presumed unconstitutional and can survive only if "narrowly tailored to serve a compelling state interest." *Kokinda*, supra, 497 U.S. at 738 (Kennedy, J., concurring); *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015). The burden rests with the government to prove both elements. *Reed*, supra, 576 U.S. at 171. The 200 Ft. Order fails this exacting test in multiple respects. While ensuring a fair trial and maintaining courthouse security are undoubtedly compelling interests, the 200 Ft. Order's vast overreach cannot be justified as it extends beyond state court property, across the street, and touches upon public ways and sidewalks. Yet strict scrutiny applicable to traditional public fora demands that speech restrictions employ "the least restrictive means" available. *McCullen v. Coakley*, 573 U.S. 464 at 478 (2014) (citing *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000)).

The 200 Ft. Order falls dramatically short of this requirement. Rather than

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2 Courts have over time have recognized "jurisprudential inconsistencies that plague the public forum doctrine" and "confusion that has permeated courts' opinions across the land, percolating for decades," *e.g.*, *Mitchell v. Maryland Motor Vehicle Admin.*, 148 A.3d 319, 331 & n.13 (Md. 2016) (collecting cases), so to any extent that speech regulations in traditional public fora must be content-based to trigger strict scrutiny, *see, e.g.*, *Minnesota Voters Alliance v. Mansky*, 585 U.S. 1, 11 (2018); *March v. Mills*, 867 F.3d 46, 54 (1st Cir. 2017); *but see*, *e.g.*, *Brindley v. City of Memphis*, 934 F.3d 461, 467 (6th Cir. 2019), the 200 ft. Order qualifies, as Appellants illustrate. Op. Br. 14-18.

targeting specific disruptive conduct, the 200 Ft. Order imposes a categorical ban on constitutionally protected expression without regard to volume, conduct, or actual interference with court operations on quintessential, traditional public property, hundreds of feet away from the court and not even conceivably part of the court's purview. Peaceful protesters silently holding signs are treated identically to those creating genuine disruptions. Journalists documenting public events are subject to the same restrictions as those blocking courthouse access. This approach contravenes the Supreme Court's clear directive that the government "may not suppress lawful speech as the means to suppress unlawful speech." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002).

The order's 200-foot radius is particularly excessive given that it: (1) applies to quintessential, traditional fora; (2) encompasses and touches upon property that in no way could conceivably belong to the state court; and (3) extends a very long radius. In *Madsen v. Women's Health Center*, 512 U.S. 753, 774, 776 (1994), the Supreme Court struck down a 300-ft. buffer zone around an abortion clinic as "burdening more speech than necessary." Here, the 200-ft. zone lacks even the specific findings of the *Madsen* injunction. Moreover, in *McCullen v. Coakley*, 573 U.S. 464 (2014), the Supreme Court invalidated a 35-ft. buffer zone around abortion clinics that restricted sidewalk counselors, holding that it burdened more speech than necessary and failed to consider less-restrictive alternatives. The 200

Ft. Order's anti-free speech zone is nearly six times larger than the one struck down in *McCullen*, with far less justification and without exploration of readily available alternatives.

The alternatives to the overbroad prior restraint imposed in this case are numerous and well-established. The state court could have enforced existing noise ordinances, limited restrictions to the immediate vicinity of courthouse entrances, provided courthouse security to manage access points, and instructed jurors to disregard outside commentary—all without categorically banning protected speech on public sidewalks across the street from the courthouse. *See Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 380-84 (1997) (discussing the availability of narrower alternatives to broad buffer zones). The government's decision to ignore these targeted approaches in favor of a sweeping ban reflects precisely the sort of overreach strict scrutiny is designed to prevent.

II. The 200 Ft. Order Is a Classic Prior Restraint That Bears a Heavy Presumption of Unconstitutionality.

The state court's 200 Ft. Order is the kind of unconstitutional prior restraint on speech that represents "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *New York Times Co. v.*

United States, 403 U.S. 713, 714 (1971) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)). The 200 Ft. Order falls squarely within this most suspect category of speech restrictions.

The 200 Ft. Order preemptively bans "demonstrating in any manner, including carrying signs or placards" within 200 feet of the Norfolk County courthouse complex. This sweeping prohibition applies universally to "any individual"—protesters, journalists, observers, or passersby—without prior notice, due process, or individualized determinations. Unlike subsequent punishments that target specific conduct *after* it occurs, the 200 Ft. Order's prior restraint silences speech *before* it happens, based solely on its anticipated content and location.

The Supreme Court has historically and consistently struck down similar restraints as unconstitutional. For example, in *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971), the Court invalidated an injunction prohibiting leafletting near a real estate broker's home, noting that "[n]o prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court." Similarly, in *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 n.13 (1980), the Court upheld the Fifth Circuit's striking down of a prior restraint statute involving an adult movie theater, noting that "a free society prefers to punish the few who abuse rights of speech after they break the law than

to throttle them and all others beforehand."

The 200 Ft. Order presents precisely these constitutional defects. It is not based on articulated judicial findings of sufficient examples of disruption that have already occurred, is not narrowly tailored to specific conduct, and there are no procedural safeguards to minimize censorship. Instead, the 200 Ft. Order operates as a blanket ban on expression before any individual's conduct can be evaluated for disruption or interference. As the Court has repeatedly stated, such restrictions on future speech are "the essence of censorship" that the First Amendment was designed to prevent. *Near v. Minnesota*, 283 U.S. 697, 713 (1931).

The state court's articulated justifications—protecting trial integrity and public order—do not alter this analysis. While courts inherently possess the authority to manage proceedings within the courtroom, that power does not extend to suppressing constitutionally protected speech on public sidewalks outside, or especially 200 feet away on distant sidewalks across the street. As the Supreme Court explained in *United States v. Grace*, 461 U.S. 171, 179 (1983), "[s]idewalks, of course, are among those areas of public property that traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property."

Put another way, public ways and sidewalks—often called "traditional

public fora"—"occupy a special position in terms of First Amendment protection because of their historic role as sites for discussion and debate." *McCullen v. Coakley*, 573 U.S. 464 at 476 (2014) (quoting *Grace, supra*) (internal quotation marks omitted). Among other things, they are vital places where "a speaker can be confident that he is not simply preaching to the choir." *Id*.

The government's burden in overcoming the presumption against prior restraints in such areas is "heavy," and requires some evidence that the speech "will surely result in direct, immediate, and irreparable damage." *New York Times*, 403 U.S. at 730 (Stewart, J., concurring). Little such showing has been made here. Instead, the 200 Ft. Order appears motivated by the very sort of criticisms of government officials (of which judges, prosecutors, and police are included) and government activities (such as criminal trials) that lie at the core of First Amendment protections. Thus, this unconstitutional 200 Ft. Order is precisely the type of censorship the Constitution forbids.

III. The State Court denied Due Process in imposing its 200 Ft. Order.

The state court issued the 200 Ft. Order that binds appellants without any semblance of Due Process. Among other things, the court restricted their free speech without a meaningful opportunity to appear on the matter or be heard in opposition. The 200 Ft. Order was not based on an existing statute, but was an order from the state court judge. The state held a hearing to which only the

government and the defendant Karen Read appeared. None of the appellants attended or were called to attend. Furthermore, the state court offered no meaningful discussion or inquiry or findings as to the (1) harm caused by protesters in connection with the Karen Read trial, or (2) any possible remedies more limited than imposing a 200 Ft. Order against any and all "demonstrating." The 200 Ft. Order thus violated their Due Process rights, and this Court should reverse the denial of the preliminary injunction against its enforcement on this ground alone.

The only rationale the state court offered for the order – on the asserted ground of protecting fair trial rights – was that at the prior Karen Read trial, some voices and car horns could be heard inside the courthouse, and one anonymous juror stated they had heard screaming and yelling outside. The only testimony from anyone not directly involved in the court proceedings was a complaint from local merchants regarding the demonstrations. These do not satisfy Due Process.

There was no finding the noise actually influenced or threatened those in the courthouse, and one juror stating s/he had heard the noise in no way proves that jurors or witnesses were influenced by it. Furthermore, the statements from the local merchants were self-serving; of course they, who are presumably not involved in the protests, would want the protesters pushed away, as such demonstrations are necessarily interfering with their regular course of business.

However, inconvenience to businesses located nearby the courthouse does not overcome the appellants' Due Process or First Amendment rights.

The state court's 200 Ft. Order notably goes well beyond the courthouse property—onto the public sidewalk, over a public way, and onto opposite-side of the street sidewalks—yet despite this great breadth and how it impacted public property in no way connected to the courthouse, the state court did not hear witnesses from among the demonstrators or the journalists covering the trial. In short, the state court issued a sweeping, broad order on First Amendment issues without so much as hearing a single witness who might disagree. Such an action defies Due Process and denied it to all the appellants and any other journalists and people present.

Contrast that with various statutes challenged in the past regarding such zones, all of which were passed by legislatures after public comment and public debate. See, e.g. *Cox v. Louisiana*, 379 U.S. 559 (1965). Even unconstitutional statutes of the past had legislative Due Process, being debated, voted on, and published. Here, the state court's 200 Ft. Order provided none of the trappings of such fundamental fairness; instead, the state court held a closed hearing and issued an incredibly broad order without any input from anyone else that immediately abridged the First Amendment rights of all those having an interest in the issue but who were not at the hearing.

IV. The Order Also Fails Under Intermediate Scrutiny.

Even if this Court were to accept the government's position that intermediate scrutiny applies—a proposition with which *amici* strongly disagree (see *supra* and *Kokinda*, 497 U.S. at 727),—the 200 Ft. Order would still fail constitutional review. Under intermediate scrutiny, a restriction on speech in a traditional public forum must still be "narrowly tailored to serve a significant governmental interest" and "leave open ample alternative channels for communication." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). The 200 Ft. Order satisfies neither requirement.

A restriction such as the 200 Ft. Order challenged at bar is not narrowly tailored if it "burden[s] substantially more speech than is necessary to further the government's legitimate interests." *McCullen*, 573 U.S. at 486 (quoting *Ward*, 491 U.S. at 799). First, the 200 Ft. Order's geographic scope is vastly disproportionate to any legitimate security or operational concern. By extending 200 feet from the courthouse complex perimeter, it encompasses numerous public sidewalks and spaces far removed from courthouse entrances. Merely because some noise from demonstrators may have been heard from these distances is constitutionally insufficient basis for the 200 Ft. Order, particularly in the absence of findings and

an explanation of why lesser measures, such as jury instructions to ignore the distraction, would not address the issue.

Simply put, the 200 Ft. Order lacks any nexus between its restrictions and actual disruption of court proceedings. Unlike the injunction partially upheld in *Madsen*, 512 U.S. at 768-71, which included extensive factual findings about specific protest activities that had impeded access to medical services, the 200 Ft. Order operates without any demonstration that peaceful expression on nearby sidewalks actually interferes with court operations.

Moreover, the 200 Ft. Order sweeps in speech activities that pose no conceivable threat to courthouse operations. This Circuit has recognized, for example, that "filming of government officials engaged in their duties in a public place" is constitutionally protected and "clearly established." *Glik v. Cunniffe*, 655 F.3d 78, 82, 84 (1st Cir. 2011). Yet 200 Ft. Order prohibits this protected activity without differentiation from genuinely disruptive conduct. The same goes for silent sign-holding, or simply passing through the buffer zone with a sticker (or button, or t-shirt) that those enforcing the 200 Ft. Order may view as "demonstration." *See also infra* § V.A. The Constitution does not permit such indiscriminate restrictions. As the Supreme Court emphasized in *Ward*, while narrow tailoring under intermediate scrutiny does not require the "least restrictive alternative," it does demand that "the means chosen are not substantially broader than necessary to

achieve the government's interest." *Ward*, 491 U.S. at 800. Here, the 200 Ft. Order's vast overreach cannot satisfy even this more forgiving standard, as it is substantially broader than necessary to achieve any governmental interest asserted as necessitating the order.

A speech restriction must also "leave open ample alternative channels for communication of the information." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). The 200 Ft. Order fails this requirement by forcing speakers away from the single most important place for their expression.

The Supreme Court has consistently recognized that location matters in protected expression. When a speaker seeks to reach the minds of willing listeners, "[w]ithout the ability to interact in person, however momentarily," the speaker loses access to "the time, place, and manner most vital to the protected expression." *Hill v. Colorado*, 530 U.S. 703, 780 (2000). By forcing speech 200 feet away from the courthouse complex, the order effectively removes speakers from the sight and hearing of their intended audience—those entering and exiting the courthouse, including court personnel, the parties court observers and other members of the public, and the press.

Such relocation of protest demonstrations fundamentally alter the nature and impact of the expression. As the Supreme Court has repeatedly recognized, "one-on-one communication" is an "the most effective, fundamental, and perhaps

economical" form of expression, and it cannot be meaningfully replicated from a distance." *McCullen*, 573 U.S. at 488 (quoting *Meyer v. Grant*, 486 U.S. 414, 424 (1988)). The same principle applies here, where protesters' ability to convey messages about ongoing proceedings and journalist reporting on the matter are inextricably tied to proximity to the courthouse.

Moreover, the sidewalks surrounding a courthouse hold special significance for expression concerning judicial proceedings. Unlike alternative locations at a far remove, these spaces have symbolic and practical importance for those seeking to comment on or critique judicial action. The 200 Ft. Order effectively denies speakers their constitutional right to be heard where it matters most—at the seat of judicial power, in the presence of government authority, while petitioning grievances pertaining to the exercise of that authority. *See* U.S. Const. Amend. I ("... or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

V. The Order Is Unconstitutionally Vague and Overbroad

The 200 Ft. Order neither provides clear notice of what is prohibited nor avoids sweeping in substantial amounts of protected expression, rendering it unconstitutionally vague and overbroad. These are independent grounds – of each

other, and of the order's failure to satisfy strict or intermediate scrutiny – that justify reversing denial of the preliminary injunction.

A. Vagueness

The 200 Ft. Order is unconstitutional because it both fails to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited" and "impermissibly delegates basic policy matters to policemen….with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). The Supreme Court has emphasized that this standard applies with particular force to laws that potentially interfere with First Amendment rights. *See Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

The 200 Ft. Order prohibits "demonstrating in any manner" without defining what constitutes "demonstrating." This vague terminology leaves ordinary citizens with no clear understanding of what conduct falls within the prohibition against "demonstrating", and, indeed, the adverbial clause "in any manner" deliberately broadens the term far out of proportion to its rational definition. Actions such as standing or sitting in a particular manner within the 200 ft. zone could be interpreted as "demonstration" by some law enforcement officers but not by others. The wearing of T-shirts or pins with statements such as "Freedom" and "Justice" could be construed by some as "demonstration" others as not. The passing out of leaflets promoting, say, controversial topics such as "jury nullification" or in favor

of Massachusetts bringing back the death penalty might be construed as a "demonstration" or not, depending on the official observing. And a journalist interviewing, taking notes, or recording the scene might well be construed as "demonstrating" by some, but not by others. Like "beauty," the term "demonstrating" is completely left to the subjective interpretation and imagination of "the beholder"—in this case, the "beholder" being the law enforcement officer(s) enforcing the judge's diktat. The 200 Ft. Order simply provides no guidelines, leaving enforcement to the unbounded discretion of court personnel and law enforcement.

Such ambiguity creates exactly the situation the Supreme Court warned against in *City of Chicago v. Morales*, where it affirmed invalidation of an anti-loitering ordinance because it vested "too much discretion to the police and too little notice to citizens who wish to use the public streets." 527 U.S. 41, 64 (1999). Here, the 200 Ft. Order similarly delegates unconstrained authority to the police and court officers to determine who may be present or speak near the courthouse and who must remain distant or silent.

This vagueness has already produced troubling results. The record shows enforcement against journalists and observers who posed no threat to courthouse operations. This selective application illustrates the constitutional danger identified

in *Kolender*: when officials have "virtually complete discretion" in enforcement, the risk of content and viewpoint discrimination becomes acute. 461 U.S. at 358.

B. Overbreadth

The 200 Ft. Order epitomizes facial overbreadth because a "substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, n.6 (2008)). The Order prohibits constitutionally protected expression regardless of whether that expression causes any disruption to court operations. In *Boos v. Barry*, 485 U.S. 312 (1988), the Supreme Court struck down a prohibition on displaying signs critical of foreign governments within 500 feet of embassies, finding it a content-based restriction on political speech in a public forum which was not narrowly tailored that restricted considerably more speech than is necessary to serve the government's legitimate interest. The 200 Ft. Order here suffers from identical constitutional defects, restricting substantially more speech than necessary to protect legitimate interests in court security and operations.

As this Court recognized in *Glik v. Cunniffe*, 655 F.3d 78, 85 (1st Cir. 2011), "a citizen's right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-

established liberty safeguarded by the First Amendment." Yet 200 Ft. Order categorically prohibits such activity near the courthouse, without any specific, fact-based showing that it interferes with judicial proceedings.

This overbreadth creates precisely the chilling effect the First Amendment prohibits. Citizens uncertain about whether their expression falls within vague prohibitions will "steer far wider of the unlawful zone … than if the boundaries of the forbidden areas were clearly marked." *Grayned*, 408 U.S. at 109 (ellipses in original; internal quotations omitted). This chilling effect is particularly severe for journalists, who play a vital role in informing the public about judicial proceedings but now face arrest for routine reporting activities near the courthouse.

VI. The Order Establishes a Dangerous Precedent Without Constitutional Limits.

The 200 Ft. Order represents an unprecedented assertion of judicial authority over public spaces without any discernible constitutional limitation. By unilaterally redefining quintessential, traditional public forums as speech-restricted zones, the state court has established a precedent that undermines foundational First Amendment principles.

The Supreme Court has consistently held that judges, like all government officials, are subject to public criticism. In *Bridges v. California*, 314 U.S. 252, 270 (1941), the Court struck down contempt citations for out-of-court newspaper

commentary on pending cases, emphasizing that "[t]he assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions." Similarly, in *Craig v. Harney*, 331 U.S. 367, 376 (1947), the Court held that judges may not use their powers to silence criticism, noting that "[t]he law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate."

The 200 Ft. Order contravenes these principles by creating a mechanism for judges to shield themselves from precisely the kind of criticism the First Amendment most zealously protects—political speech about government officials. If permitted to stand, this principle would allow any judge facing public protest to unilaterally declare the surrounding sidewalks off-limits to protected expression about their job performance. There is no principled reason why such power, once recognized, would be limited to 200 ft rather than 500 ft or several city blocks.

The danger extends beyond protesters to journalists, legal observers, and the general public. The free press has historically served as a crucial check on judicial power, informing citizens about the operation of their courts and holding judges accountable for their decisions. The 200 Ft. Order significantly impairs this

oversight function by restricting press access and documentation of courthouse activities. As this Court recognized in *Glik, supra*, "gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting 'the free discussion of governmental affairs.'" *Glik*, 655 F.3d at 82 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). Given the vagaries of the definition of "demonstrating," and the arbitrariness of the police power to enforce the 200 Ft. Order, newsgathering is greatly harmed by the state court order.

CONCLUSION

When government officials—including judges—face criticism, the answer is not censorship but courage. The sidewalks surrounding our courthouses must remain open for peaceful expression, even when that expression is critical, uncomfortable, or inconvenient. That is not merely good policy. It is a constitutional command.

The First Amendment does not permit judges to silence criticism by unilaterally redefining the boundaries of the public forum. The state court's 200 Ft. Order represents a violation of Due Process and a classic prior restraint on speech in the most protected of constitutional spaces—public sidewalks—without the compelling justification, narrow tailoring, or procedural safeguards the Constitution demands. Thus, *amici* agree with appellants that the District Court

should have entered a preliminary injunction, and that this Court should accordingly reverse.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify the following:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because this brief contains 5,375 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. 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 was prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

Dated: April 28, 2025

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The undersigned certifies that an electronic copy of this document was filed with the Clerk of the Court for the United States Court of Appeals for the First Circuit using the CM/ECF system. The undersigned also certifies all parties in this case are represented by counsel who are registered CM/ECF users, and that service of the brief will be accomplished by the CM/ECF system.

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