20-3161

United States Court of Appeals for the Second Circuit

MICHAEL PICARD,

Plaintiff-Appellee,

v.

MICHAEL MAGLIANO, in his official capacity as Chief of Public Safety for the New York Unified Court System,

Defendant-Appellant,

DARCEL D. CLARK, in her official capacity as District Attorney for Bronx County,

Defendant.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR PLAINTIFF-APPELLEE

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PRELIMINARY STATEMENT

On December 4, 2017, a New York Unified Court System officer arrested Plaintiff-Appellee Michael Picard under New York Penal Law § 215.50(7) ("the Act") for advocating jury nullification outside the Bronx Hall of Justice. The Act makes it a crime, within 200 feet of a courthouse, to shout, call aloud, or hold or display placards or signs concerning the conduct of a trial taking place inside the courthouse. Picard fears that he will be arrested and prosecuted for violating the Act if he resumes his jury-nullification advocacy.

Picard brought this lawsuit for declaratory and injunctive relief against Defendant-Appellant Michael Magliano, the Chief of Public Safety for the New York Unified Court System (the "State"), and Defendant Darcel D. Clark, District Attorney for Bronx County. After a bench trial based on the parties' written submissions, the United States District Court for the Southern District of New York held that § 215.50(7) facially violates the First Amendment because it imposes a content-based restriction on speech in a traditional public forum without justification, and permanently enjoined Defendants from enforcing it. The State makes three arguments on appeal, none of which avail.

First, the State argues that the district court erred in concluding that Picard has standing to challenge the Act. According to the State, the Act's restriction on "placards or signs" that display speech "concerning" a trial taking place in a nearby

courthouse plainly excludes Picard's speech, because Picard's advocacy is not addressed to any particular trial, and because Picard's flyers are not "placards" or "signs." To the contrary, prosecutors have argued that nonspecific jury-nullification advocacy outside a courthouse concerns any number of existing trials taking place in the courthouse, because it could encourage the jurors participating in those trials to vote their consciences. And Picard's "sign-and-flyer" mode of advocacy arguably falls within the Act's prohibition on the display of placards or signs. Picard's feared interpretation of the Act is at least "reasonable enough" to establish standing under the relaxed standard applied to pre-enforcement constitutional challenges.

Second, the State argues that the district court abused its discretion by facially invaliding the Act, instead of granting as-applied relief. The State does not dispute that the Act is subject to strict scrutiny because it imposes a content-based restriction on speech in a traditional public forum. Nor does it seriously dispute the district court's conclusion that, even narrowly construed, the Act criminalizes more speech than necessary to protect the judicial system. Instead, the State contends that facial relief is inappropriate because the Act may be valid in some of its applications. This argument is mistaken. A content-based restriction on speech in a traditional public forum is facially invalid if it cannot satisfy strict scrutiny, even if it proscribes some speech that could be regulated by a law that is content neutral or more precisely tailored to a compelling governmental interest.

Finally, the State argues that this Court should certify this case to the New York Court of Appeals to resolve any ambiguity regarding the Act's application to Picard's advocacy. In this case, however, certification would not serve any proper purpose, because the Act's validity does not turn on any ambiguity regarding its scope. Indeed, the State has not identified any narrowing construction of the Act that would cure its facial unconstitutionality. Even if the New York Court of Appeals were to moot this particular challenge by holding that the Act does not prohibit Picard's advocacy, that would merely delay the Act's invalidation until another facial challenge can be brought. In the meantime, First Amendment rights would suffer. The better and more efficient result is for this Court to exercise its properly invoked jurisdiction and strike down the Act.

JURISDICTIONAL STATEMENT

The district court had original subject matter jurisdiction over this federal civil-rights action under 28 U.S.C. §§ 1331 and 1343. The district court entered judgment for Picard on August 14, 2020. (Joint Appendix ("J.A.") 79–80.) Defendant-Appellant Magliano filed a notice of appeal on September 14, 2020, then refiled the notice the next day to remedy a technical defect in compliance with the district court's electronic filing procedures. (J.A. 81.) This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

New York Penal Law § 215.50(7) makes it a crime, within 200 feet of a courthouse, to shout, call aloud, or hold or display placards or signs concerning the conduct of a trial taking place inside the courthouse. The questions presented are:

1. Did the district court err in holding, for purposes of the standing analysis, that § 215.50(7) could plausibly be interpreted to prohibit Picard's jury-nullification advocacy?

2. In light of the district court's holding that § 215.50(7) facially violates the First Amendment because it imposes a content-based restriction on speech in a traditional public forum without adequate justification, did the court abuse its discretion by facially invalidating the Act?

3. Should this Court certify to the New York Court of Appeals the question whether § 215.50(7) prohibits Picard's advocacy, where the State has not identified any narrowing construction of the Act that would cure its facial First Amendment violation?

STATEMENT OF THE CASE

I. N.Y. Penal Law § 215.50(7)

New York Penal Law § 215.50 provides as follows:

> A person is guilty of criminal contempt in the second degree when he engages in any of the following conduct:
>
> . . .
>
> 7. On or along a public street or sidewalk within a radius of two hundred feet of any building established as a courthouse, he calls aloud, shouts, holds or displays placards or signs containing written or printed matter, concerning the conduct of a trial being held in such courthouse or the character of the court or jury engaged in such trial or calling for or demanding any specified action or determination by such court or jury in connection with such trial.
>
> Criminal contempt in the second degree is a class A misdemeanor.

A class A misdemeanor is punishable by up to 364 days in jail. *Id.* § 70.15.

As described in the district court's July 29, 2020 Order, the legislative history of § 215.50(7) demonstrates that "[t]he Act was intended to restrict the expression of opposition to ongoing court proceedings, whether those expressions were peaceful or not." (J.A. 71.) It was passed in response to picketing around the Federal Courthouse in Foley Square, Manhattan, in protest against the prosecution of Communist Party USA ("CPUSA") leaders. (J.A. 71.)[1]

[1] On October 21, 1949, Eugene Dennis and ten other leaders of the CPUSA were convicted of violating 18 U.S.C. § 2385, which prohibits activity or advocacy directed towards "overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof." (J.A. 71 n.3.) "Of particular importance in the trial of Dennis and his co-defendants was § 2385's prohibition on conspiring to 'organize any society . . . who teach, advocate,

The Act's proponent, New York Assembly Member Thomas Duffy, wrote that the picketers "carried signs demanding the dismissal of the indictment, the freeing of the defendants and other remedies, addressing Judge [Harold] Medina by name." (J.A. 71 (alteration in original).) He pointed out that "[u]nder existing law, it appears that if the pickets are quiet and orderly, regardless of the legend appearing on the placards, there is no remedy." (J.A. 72–73.) The Act is necessary, he maintained, "to combat the 'inherent evil' of 'the attempt to influence the Court and jury[] in the determination of the issue involved,' whether 'the attempt is made quietly or noisily.'" (J.A. 73 (alteration in original).)

Defendant Magliano testified that "four individuals were arrested for alleged violations of the Act from 2005 to 2019," including the arrest at issue in this case. (J.A. 45.) One of those alleged violations involved a man who was arrested for "displaying and distributing printed matter" in front of the courthouse concerning the character of the judge presiding over his court case. (J.A. 48.) Another arrest involved a woman who displayed "a picture pertaining to an ongoing court case." (J.A. 50.) The final arrest involved a person who allegedly "interrupt[ed]

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or encourage the overthrow or destruction of any such government by force or violence.'" (J.A. 71 n.3.) *See also United States v. Dennis*, 183 F.2d 201, 205 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951). *Dennis* is now widely disparaged. *See, e.g.*, Jamal Greene, *The Anticanon*, 125 Harv. L. Rev. 379, 388–89 (2011).

proceedings by refusing several lawful orders to be seated and remain quiet or leave the courtroom." (J.A. 49.)

II. The Act's Application to Picard

Michael Picard is a committed civil libertarian who believes that jury nullification is an effective means to protest unjust laws. (J.A. 29.) Since 2016, Picard has advocated jury nullification by handing out flyers on public sidewalks outside courthouses throughout the northeastern United States. (J.A. 29.) He advocates for jury nullification outside courthouses because he believes that is the most relevant location to inform the public about jury nullification as a way to protest bad laws. (J.A. 29.) He has never attempted to influence a juror's vote in a particular case. (J.A. 30.)

On December 4, 2017, Picard traveled to the Bronx County Hall of Justice, located at 265 East 161 Street, Bronx, New York, to advocate jury nullification. (J.A. 30, 56, 62.) Standing on the public sidewalk outside the main entrance to the courthouse, Picard held a sign with the words "Jury Info." (J.A. 35, 56–57, 62.) The flyers read "No Victim? No Crime. Google Jury Nullification" on one side and "'One has a moral responsibility to disobey unjust laws'—Martin Luther King Jr." on the other. (J.A. 37–38, 57, 63.) Picard handed out flyers to about four pedestrians; he did not ask any of these individuals whether they were serving on a jury. (J.A. 30, 57, 63.)

Roughly five minutes after Picard began handing out flyers, a New York State Court Officer approached him and informed him that it was against the law to distribute flyers about jury nullification within 200 feet of a courthouse. (J.A. 31, 57, 63.) The officer warned him that he would be arrested if he did not move. (J.A. 31, 57, 63.) Picard refused to move, stating that he was standing on a public sidewalk and was permitted to distribute his flyers advocating jury nullification. (J.A. 31, 57, 63.) Picard was then taken into custody for violating the Act and placed in a holding cell inside the Bronx Hall of Justice. (J.A. 31, 57, 63.)

Several hours later, the Bronx County Assistant District Attorney's Office issued an Affidavit in Support of Declining/Deferring Prosecution.[2] (J.A. 40–41, 57, 63.) The Affidavit identifies the charge against Picard as N.Y. Penal Law § 215.50(7). (J.A. 40.) It states in relevant part:

> The People decline to prosecute the instant matter due to insufficient evidence. On December 4, 2017, at 8:05am, arresting officer observed defendant on the sidewalk in front of the courthouse, holding and displaying a sign with the words printed JURY INFORMATION, and displaying pamphlets stating NO VICTIM NO CRIME. When the arresting officer approached Defendant and informed him that he needed to be 200 feet away from the courthouse to protest, the defendant refused to move. Since the officer did not measure the distance between the defendant and the courthouse, the People have insufficient evidence to meet their burden of proof at trial and as such, the charges must be dismissed.

[2] As the State points out, Opening Br. at 10 n.2, the decision not to prosecute Picard was made by the Bronx County District Attorney's Office, not the New York County District Attorney's Office. (J.A. 9, 20, 31.) The contrary statement in the district court's decision was based on a misstatement in the parties' joint factual stipulations. (J.A. 57.)

(J.A. 20, 57–58, 63–64.) Picard was then transferred to New York Police Department's Bronx Central Booking facility, where he was detained for another five hours. (J.A. 31.) He was eventually released from police custody at around 6:00 PM, roughly ten hours after his arrest. (J.A. 31.)

Since his arrest, Picard has not advocated jury nullification within 200 feet of a courthouse in New York State. (J.A. 32, 65.) He fears that, if he were to do so, he would be arrested and prosecuted for violating the Act. (J.A. 32, 65.) Were it not for the Act, Picard would continue his jury-nullification advocacy outside New York courthouses, including the Bronx Hall of Justice. (J.A. 32, 65.)

III. District Court Proceedings

On April 5, 2019, Picard filed this 42 U.S.C. § 1983 lawsuit against Defendants Michael Magliano, the Chief of Public Safety for the New York Unified Court System, and Darcel D. Clark, the District Attorney for Bronx County, in their official capacities. (J.A. 8–15, 65.) Picard sought declaratory and injunctive relief under the First and Fourteenth Amendments. (J.A. 15, 65.) He claims that N.Y. Penal Law § 215.50(7) is facially unconstitutional because it imposes a content-based restriction on speech in a traditional public forum, and because it is substantially overbroad. (J.A. 14–15, 65–66.) He further claims that the Act is unconstitutional as applied to him. (J.A. 15, 66.)

A. December 2019 Opinion and Order

On December 2, 2019, the district court issued an Opinion and Order denying Defendants' motions to dismiss Picard's claims for lack of standing.[3] (J.A. 18–28.) Applying the tripartite test for pre-enforcement constitutional challenges, the district court held that Picard had standing to challenge § 215.50(7), because: (1) he "has pleaded that he intends to engage in a course of conduct that is protected by the First Amendment" (J.A. 24); (2) "his interpretation of the Act as prohibiting his intended conduct appears reasonable" (J.A. 24); and (3) "[a]s Picard's prior arrest shows, it is reasonable for him to fear that he will be arrested if he again distributes his fliers within two hundred feet of a New York courthouse." (J.A. 25.) The court had "little difficulty concluding that [Picard's] injury is both traceable to the defendants' conduct and likely to be redressed by a favorable judicial decision," reasoning that it is "[t]he threat of prosecution under the Act that has chilled Picard's speech, and a declaration concerning the Act's constitutionality—whether on its face or as applied—would redress this alleged injury." (J.A. 25.)

Defendants argued principally that Picard's injuries were not traceable to § 215.50(7), and would not be redressed by the requested relief, because Picard's jury-nullification advocacy "is 'plainly' beyond the scope of the Act." (J.A. 25–26.)

[3] The District Court also denied Defendant Clark's motion to dismiss for failure to state a claim. (J.A. 27–28.) Clark has not appealed the judgment against her.

"According to the defendants, [Picard's] advocacy for jury nullification would have to relate to a particular trial being held at that moment in the courthouse in order to violate the Act." (J.A. 26.) Rejecting this argument, the district court explained that "[w]hile the defendants' proposed construction of the Act—i.e., that it prohibits jury-nullification advocacy only if directed at a specific trial—may be correct, Picard has met his burden to show that his conduct is 'arguably proscribed' by the Act." (J.A. 26.) "Similarly," the court held, "Picard's fear of prosecution under the Act is not defeated by a benign interpretation of the Act offered through the defendants' motions to dismiss." (J.A. 26–27.)

B. July 2020 Opinion and Order

The parties agreed to a bench trial on the written record, which included both stipulated facts and individual submissions by the parties. (J.A. 29–50, 56–58, 62.) On July 29, 2020, the district court issued an Opinion and Order holding that § 215.50(7) facially violates the First Amendment and that Picard is entitled to both declaratory and injunctive relief. (J.A. 61–78.) Although the court noted "that Picard's conduct did not violate the Act as construed" in the Opinion and Order, it rejected Defendants' renewed argument that the case should be dismissed for lack of standing "for the reasons explained in [its] December 2019 Opinion." (J.A. 66 n.2.) On the merits, the court held that the Act is subject to strict scrutiny because it imposes a content-based restriction on speech in a traditional public forum. (J.A.

70.) The court then proceeded to hold that defendants had failed to carry their evidentiary burden of demonstrating that the Act is justified under strict scrutiny.

First, the district court acknowledged that "[i]t is undisputed between the parties that the Act is directed toward a compelling state interest." (J.A. 70.) Reading the Act to apply "only to speech within the immediate vicinity of the courthouse and only that speech that concerns trials being held in that very courthouse at that very moment," the court concluded that "[i]t helps preserve the integrity of those proceedings by allowing the trial participants to enter and leave the courthouse, whether they be witnesses or jurors, without being subjected at the courthouse entrances to shouting or signage concerning the trial," and that it "promotes the duty of witnesses to tell the truth and of jurors to follow a judge's instructions on the law and return a verdict based on the evidence received in the courtroom, all without regard to public opinion or influence." (J.A. 73–74.)

The district court held, however, that the Act fails strict scrutiny because "defendants have not shown that the state must criminalize speech in this way to protect the integrity of ongoing trials." (J.A. 75.) The court noted that, unlike several other provisions of § 215.50, the Act is not limited to "expression that is likely to disrupt ongoing proceedings." (J.A. 75.) The court also identified several other less restrictive alternatives for protecting the integrity of judicial proceedings. First, "[t]o the extent that speakers are obstructing passage on the sidewalks or engaging with

others in demonstrations, there are content-neutral regulations to maintain public order and access to a public building." (J.A. 75.) Second, "there are laws that make it a crime to tamper intentionally with jurors and witnesses." (J.A. 75.) Third, "while it may pose a not inconsiderable burden on the court system, if jurors or witnesses must be escorted to and from the courthouse to encourage or protect their service on a particular trial, that can be done as well." (J.A. 75–76.)

Contrasting this case with *Burson v. Freeman*, 504 U.S. 191 (1992) (plurality opinion), "where the [Supreme] Court could point to a 'widespread and time-tested consensus' that demonstrated that restricted zones were necessary to serve the states' compelling interests in preventing voter intimidation and election fraud," the district court observed that "the defendants have not offered any such evidence of necessity to protect the trial process." (J.A. 76.) "To the contrary," the court pointed out, "only four individuals have been arrested for alleged violations of the Act in the last fourteen years." (J.A. 76.) On the basis of the record before it, the court concluded that Defendants had failed to carry their "burden to prove the Act is necessary to protect the fair administration of justice." (J.A. 76.)

The district court also rejected Defendants' argument that the Act should be narrowly construed to avoid a constitutional question, because Defendants "offered no construction of the Act to achieve that goal." (J.A. 76.) For its part, the court "perceive[d] no readily available alternative construction of the Act that would

accomplish the perceived goal of the legislation and avoid a constitutional question." (J.A. 77.)

Finally, the district court held that Picard had satisfied the requirements for a permanent injunction. First, the court held that "[he] has succeeded on the merits and the risk of constitutional injury satisfies the irreparable harm requirement." (J.A. 78.) Second, the court determined that "the balance of hardships tilts decidedly in favor of enjoining enforcement of the Act," especially since "the defendants represent that prosecutions under the Act are rare." (J.A. 78.) "Lastly," the court concluded that "continued enforcement, however uncommon, of a constitutionally impermissible law would not serve the public interest." (J.A. 78.)

On August 14, 2020, the district court entered Final Judgment declaring § 215.50(7) facially invalid and permanently enjoining its enforcement by Defendants. (J.A. 79–80.)

SUMMARY OF THE ARGUMENT

I. The district court correctly held that Picard has standing under the relaxed standard applied to pre-enforcement constitutional challenges. First, it is undisputed that Picard's jury-nullification advocacy is constitutionally protected. Second, Picard's feared interpretation of § 215.50(7) is at least reasonable enough to support standing: (a) his advocacy may be said to "concern" the conduct of trials taking place in a nearby courthouse by encouraging jurors participating in those trial to vote their consciences, even though he does not address any specific trials; and (b) his "sign-and-flyer" mode of expression plausibly constitutes the display of a "sign" or "placard" under the Act. Finally, Picard's prior arrest under the Act is more than sufficient to establish a credible threat of future prosecution.

II. The district court did not abuse its discretion by facially invalidating § 215.50(7). The State does not dispute that the Act is facially subject to strict scrutiny because it imposes a content-based restriction on speech in a traditional public forum. Despite construing the Act exactly as the State proposes, the court held that the content-based criminalization of courthouse protests fails strict scrutiny because it is not necessary to protect the fair administration of justice or to promote public confidence in the judicial system. The Act is therefore facially unconstitutional, not just unconstitutional as applied to Picard. As-applied relief would fail to redress the full extent of the Act's First Amendment violation.

III. Certification to the New York Court of Appeals is not warranted. While the State disputes § 215.50(7)'s application to Picard's speech, any statutory ambiguity on that point has no bearing on the facial First Amendment issues presented in this appeal. Even if the New York Court of Appeals were to moot this challenge by holding that the Act does not proscribe Picard's speech, that would not address the First Amendment violation identified by the district court; it would merely allow a presumedly unconstitutional statute to continue criminalizing expression until another facial challenge could be mounted. Both the public interest in vindicating First Amendment rights and judicial economy support this Court's exercise of its jurisdiction to decide whether the Act is facially unconstitutional.

STANDARD OF REVIEW

On appeal from a bench trial, both conclusions of law and mixed questions of law and fact are reviewed de novo, while findings of fact are reviewed for clear error. *Atl. Specialty Ins. Co. v. Coastal Env't Grp. Inc.*, 945 F.3d 53, 63 (2d Cir. 2019). A district court's finding of standing is a conclusion of law that this Court reviews de novo. *Shain v. Ellison*, 356 F.3d 211, 214 (2d Cir. 2004). "Where a district court's jurisdictional finding is premised on an application of state law, [this Court] similarly review[s] the district court's interpretation of state law de novo." *Chufen Chen v. Dunkin' Brands, Inc.*, 954 F.3d 492, 497 (2d Cir. 2020).

A district court's exercise of its equitable discretion to grant or deny permanent injunctive relief is reviewed for abuse of discretion. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

ARGUMENT

I. The district court correctly determined that Picard has standing to challenge N.Y. Penal Law § 215.50(7).

The plaintiff bears the burden of establishing Article III standing "for each claim he seeks to press and for each form of relief that is sought." *Davis v. FEC*, 554 U.S. 724, 734 (2008) (internal quotation marks and citation omitted). To establish Article III standing, a plaintiff must show that he has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85, 92 (2d Cir. 2019) (citation omitted).

One "recurring issue . . . is determining when the threatened enforcement of a law creates an Article III injury." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). This issue poses special problems when a law threatens to punish constitutionally protected activity, particularly speech. "[W]ithout the possibility of pre-enforcement challenges, plaintiffs contesting statutes or regulations on First Amendment grounds face an unattractive set of options if they are barred from bringing a facial challenge: refraining from activity they believe the First Amendment protects, or risk civil or criminal penalties for violating the challenged law." *Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 689 (2d Cir. 2013) (citation and internal quotation marks omitted). Faced with such a Hobson's choice, many people will predictably self-censor, and the values protected by the First

Amendment will be infringed, even in the absence of an actual prosecution. *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988).

To address this problem, the Supreme Court has applied a "relaxed" Article III standard for pre-enforcement constitutional challenges. *Nat'l Org. for Marriage*, 714 F.3d at 689. Under the test established in *Babbitt v. United Farm Workers National Union*, 442 U.S. 289 (1979), a plaintiff has standing to bring a pre-enforcement challenge if he alleges (1) an intention to engage in a course of conduct arguably affected with a constitutional interest, that is (2) arguably proscribed by a statute, and (3) there exists a credible threat of prosecution thereunder. *See id.* at 298; *see also Susan B. Anthony List*, 573 U.S. at 159, 162. This standard governs the standing inquiry for all pre-enforcement challenges, regardless whether the plaintiff challenges the statute on its face or as applied. *See Steffel v. Thompson*, 415 U.S. 432, 473–75 (1974); *Knife Rights, Inc. v. Vance*, 802 F.3d 377, 383–84 (2d Cir. 2015); *Farrell v. Burke*, 449 F.3d 470, 499 (2d Cir. 2006).

A. Picard's jury-nullification advocacy is arguably affected with a constitutional interest.

To satisfy *Babbitt*'s first prong, a plaintiff must show that their intended conduct is arguably affected with a constitutional interest. *Babbitt*, 442 U.S. at 298. Picard satisfies this requirement because speech concerning the operation of the judicial system is political speech at the heart of the First Amendment.

"A trial is a public event. What transpires in the court room is public property." *Craig v. Harney*, 331 U.S. 367, 374 (1947). The criminal justice system, in particular, "exists in a larger context of a government ultimately of the people, who wish to be informed about happenings in the criminal justice system, and, if sufficiently informed about those happenings, might wish to make changes in the system." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1070 (1991) (plurality opinion). Indeed, "it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980).

To provide adequate breathing room for public discussion about public affairs, the First Amendment squarely protects speech concerning the operation of the judicial system, except where that speech presents a "clear and present danger to the administration of justice." *Wood v. Georgia*, 370 U.S. 375, 389 (1962). This robust constitutional protection for speech about judicial proceedings extends to jury-nullification advocacy, so long as it does not involve an attempt to influence a juror's vote in a particular case. *See United States v. Heicklen*, 858 F. Supp. 2d 256, 274–75 (S.D.N.Y. 2012) (citing *Turney v. Pugh*, 400 F.3d 1197, 1203 (9th Cir. 2005)).

In this case, Picard's undisputed testimony establishes that he has "never attempted to influence a juror's vote in a particular case." (J.A. 30.) The district court accordingly found, and the State does not dispute, that Picard has established that he

"intends to engage in a course of conduct that is protected by the First Amendment." (J.A. 24; *see also* J.A. 66 n.2.)

B. The Act arguably proscribes Picard's jury-nullification advocacy.

To satisfy *Babbitt*'s second prong, a plaintiff must establish that their intended conduct is "'arguably . . . proscribed by [the] statute' they wish to challenge." *Susan B. Anthony List*, 573 U.S. at 162 (omission and alteration in original) (quoting *Babbitt*, 442 U.S. at 298). This analysis does not require the Court to identify the best interpretation of the statute; rather, it merely requires the Court to determine whether the plaintiff's proffered interpretation is "reasonable enough" to establish a legitimate fear of future enforcement. *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 383 (2d Cir. 2000).

This is not a high threshold, as *Vermont Right to Life Committee* demonstrates. There, Vermont Right to Life Committee (VRLC) mounted a pre-enforcement First Amendment challenge to a state campaign finance law that required political advertisements to "clearly designate the name of the candidate, party or political committee by or *on whose behalf* the same is published or broadcast." *Id.* at 382–83 (emphasis added). Although VRLC did not expressly advocate the election or defeat of particular candidates, it argued that the statutory phrase "on whose behalf" could be construed to encompass any communications that benefit, advantage, or interest candidates, parties, and committees, and that this broad interpretation of the statutory

disclaimer requirement could be applied to VRLC's communications. *Id.* at 383. Vermont, on the other hand, argued that the plain meaning of "on whose behalf" is "as the agent or representative of." *Id.* This Court held that "while there may be other, perhaps even better, definitions of 'on whose behalf,' VRLC's is reasonable enough that it may legitimately fear that it will face enforcement of the statute by the State brandishing the definition proffered by VRLC." *Id.*; *accord Hedges v. Obama*, 724 F.3d 170, 197–98 (2d Cir. 2013); *Pac. Cap. Bank v. Connecticut*, 542 F.3d 341, 350 (2d Cir. 2008).

Here, the district court found that "Picard's interpretation of [N.Y. Penal Law § 215.50(7)] as prohibiting his intended conduct appears reasonable," because "the advocacy of jury nullification arguably constitutes speech that concerns the conduct of a trial being held in the courthouse." (J.A. 24–25; *see also* J.A. 66 n.2.) The plausibility of Picard's interpretation is supported by the fact that he has already been arrested and detained under the Act for engaging in precisely this conduct. (J.A. 63.) Furthermore, the district attorney's decision not to prosecute was based entirely on the arresting officer's failure to measure Picard's distance from the courthouse, and did not indicate that Picard's advocacy was beyond the Act's reach. (J.A. 63–64.) The arresting officer's belief that Picard's jury-nullification advocacy violated the Act, combined with the district attorney's silence on this point, stands in some tension with the State's assertion that § 215.50(7) "plainly does not proscribe

Picard's sign-plus-flyer method of messaging about jury nullification near New York courthouses." Opening Br. at 50.

The State challenges the district court's plausibility ruling on two grounds. *First*, it argues that § 215.50(7) applies only to speech "relating to a specific, identifiable trial" taking place in a nearby courthouse. Opening Br. at 17. According to the State, the Act does not proscribe Picard's jury-nullification advocacy, because his advocacy "did not address any specific proceeding then happening in the nearby courthouse." *Id.* at 17; *see also id.* at 21–24. But nothing in the statutory text limits § 215.50(7)'s ambit to speech that expressly identifies or refers to a specific, identifiable trial. To the contrary, speech may "concern[] the conduct of a trial" taking place in a nearby courthouse, even if it is not addressed to a specific trial. *See Concern*, N. Webster, *Webster's New Collegiate Dictionary* (2d ed. 1951), *available at* https://bit.ly/3rwgqB3 (defining "concern" to mean *inter alia* "to implicate or involve" or "to affect the interest of"); *Concerning*, Black's Law Dictionary (4th ed. 1951), *available at* https://bit.ly/39oG0l0 (defining concerning to mean *inter alia* "involving" or "affecting"). Indeed, federal and state prosecutors have made similar arguments in some of the very cases on which the State relies.

In *United States v. Heicklen*, the federal government indicted Julian Heicklen under the federal jury tampering statute, which criminalizes "attempts to influence the action or decision of any grand or petit juror of any court of the United States

upon any issue or matter pending before such juror . . . by writing or sending to him any written communication, in relation to such issue or matter." 18 U.S.C. § 1504. The indictment charged that Heicklen violated the statute by "distribut[ing] pamphlets urging jury nullification, immediately in front of an entrance to the United States District Court for the Southern District of New York." *Heicklen*, 858 F. Supp. 2d at 261. There was "no allegation that Heicklen distributed the pamphlets in relation to a specific case," but the government argued that the pamphlets related to an "issue or matter" pending before a federal juror "because they could encourage a juror to follow her conscience instead of the law, thus affecting the outcome of a case"—regardless of whether that case had been specifically identified by Heicklen. *Id.* at 275. Although the court held that the statute required that the defendant must have attempted to influence the outcome of a *particular* case, it recognized that there was "potential ambiguity" regarding this requirement, requiring it to go beyond the plain terms of the statutory text in order to construe the provision. *Id.* at 266–67.

Similarly, in *People v. Iannicelli*, 449 P.3d 387 (Colo. 2019), Colorado prosecutors alleged that Mark Iannicelli and Eric Brandt violated the state's jury tampering statute—which provides that "[a] person commits jury-tampering if, with intent to influence a juror's vote, opinion, decision, or other action in a case, he attempts directly or indirectly to communicate with a juror other than as a part of the proceedings in the trial of the case," Colo. Rev. Stat. § 18-8-609—by handing out

jury nullification pamphlets to people reporting for jury duty. *Iannicelli*, 449 P.3d at 389. As in *Heicklen*, there was no allegation that Iannicelli and Brandt ever referred to a specific case or targeted jurors serving on a specific case. *Id.* at 396. And, as in *Heicklen*, the prosecutors argued that no such allegation was required, because the statute prohibits communicating with a juror with the intent to influence their actions in any existing case—not just a specific, identifiable case. *See id.* at 392. Although the Colorado Supreme Court did not agree with the prosecutors' interpretation of the statute, *see id.* at 394–96, two of the seven justices dissented from what they characterized as the majority's "untenable conclusion that 'a case' circumscribes the statute's prohibited conduct to communications or attempted communications about *a specifically identifiable case*," *id.* at 399 (Samour, J., dissenting).

Here, the State argues that § 215.50(7) plainly applies only to speech addressed to a specific, identifiable trial because it refers to a trial "being held in the courthouse." Opening Br. at 21. The federal jury tampering statute similarly prohibits speech to a juror about "any issue or matter pending before such juror," 18 U.S.C. § 1504, but that did not stop federal prosecutors from arguing that nonspecific jury-nullification advocacy violated the statute. *See Heicklen*, 858 F. Supp. 2d at 275. The State also contends that § 215.50's other subsections "target conduct that disrespects the integrity of specific, ongoing matters," and that § 215.50(7) should be similarly construed. Opening Br. at 23. However, the prosecutors in *Iannicelli*

argued that the defendants' nonspecific jury-nullification advocacy sought to influence the outcome numerous extant cases. *See* 449 P.3d at 392. As these prosecutions and his own arrest demonstrate, Picard's interpretation of the Act is at least "reasonable enough that [he] may legitimately fear that [he] will face enforcement of the statute by the State." *Vt. Right to Life Comm.*, 221 F.3d at 383.[4]

Second, the State argues that § 215.50(7) "is limited to certain forms of expressive activity, and does not extend to the act of handing out flyers to individual passersby." Opening Br. at 25. If this interpretation of the Act is obvious, it was lost on the arresting officer, who "informed [Picard] that it is against the law to distribute flyers about jury nullification within two hundred feet of a courthouse." (J.A. 63.) Nor was it sufficiently apparent to form the basis of the district attorney's decision not to prosecute. (J.A. 63–64.) In other contexts, as well, the government has taken the position that a ban on public displays—such as flags, banners, and devices—encompasses leaflets. *See United States v. Grace*, 461 U.S. 171, 176 (1983) (observing that it was "uncontested that [the plaintiff's] leaflets fall within [40

[4] The State also asserts that § 215.50(7)'s legislative history supports its interpretation of the Act as prohibiting only speech about specific, identifiable cases. Opening Br. at 24. However, nothing in the Act's legislative history contradicts Picard's feared interpretation of the statute as prohibiting nonspecific jury-nullification advocacy. Furthermore, if the statute is ambiguous enough to require resort to legislative history, *see Auerbach v. Bd. of Educ. of City Sch. Dist. of City of N.Y.*, 86 N.Y.2d 198, 204 (1995), then Picard's interpretation is reasonable enough to support standing. The State's rule of lenity argument fails for the same reason. *See People v. Roberts*, 31 N.Y.3d 406, 423–24 (2018).

U.S.C. 13k's] proscription" on "the display of a 'flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement'" in the Supreme Court building or on its grounds). The Act is susceptible of a similar interpretation.

In any event, it is immaterial whether § 215.50(7) plausibly prohibits Picard's distribution of flyers, because Picard also publicly displayed a sign that read "Jury Info." (J.A. 35, 62.) Members of the public who responded to this "two-word solicitation," Opening Br. at 30, received individual flyers instructing them on the moral responsibility to disobey unjust laws and urging them to research jury nullification. (J.A. 37–38, 63.) The public solicitation contained on Picard's sign plausibly "concern[ed] the conduct of" trials being held in the Bronx Hall of Justice, N.Y. Penal Law § 215.50(7), particularly when it is considered in the wider context of his "sign-and-flyer mode" of jury-nullification advocacy. Opening Br. at 28.

The Act was expressly designed to criminalize all manner of courthouse protests, not just disorderly ones, on the ground that even peaceful courthouse protests threaten to exert improper influence over judges and jurors. (J.A. 73); *see also* Opening Br. at 7. Given that the Act's acknowledged purpose is to thwart courthouse protests that might influence the outcome of a trial, it is not unreasonable for Picard to fear that the Act prohibits his public display of a "Jury Info" sign in connection with his dissemination of flyers advocating jury nullification. *Cf.*

Commonwealth v. Schierscher, 668 A.2d 164, 171 (Pa. Super. Ct. 1995) (upholding conviction under a Pennsylvania statute that prohibits *inter alia* picketing or parading near a courthouse with intent to influence a judge, where the defendant "dispensed leaflets and set-up placards on the Courthouse property").

Finally, the State suggests that the district court contradicted itself by concluding that Picard's interpretation of the Act is plausible enough to establish standing, even though it ultimately construed the Act more narrowly when it ruled on the merits. Opening Br. at 20. There is no inconsistency here. "Federal precedents are not binding [on New York courts] in interpreting a [s]tate statute." *Hartnett v. New York City Transit Auth.*, 86 N.Y.2d 438, 447 (1995); *see also Gooding v. Wilson*, 405 U.S. 518, 520 (1972) ("Only the Georgia courts can supply the requisite [narrowing] construction, since of course we lack jurisdiction authoritatively to construe state legislation." (citation and internal quotation marks omitted)). Even though the district court construed the Act narrowly for the purpose of assessing its constitutionality under the First Amendment, it was still right to conclude that Picard's interpretation of the Act is "reasonable enough" that he may legitimately fear future enforcement actions based on that interpretation. *Vt. Right to Life Comm.*, 221 F.3d at 383.

C. Picard faces a credible threat of prosecution under the Act.

To satisfy *Babbitt*'s third prong, a plaintiff must demonstrate that the "threat of future enforcement of the [challenged] statute is substantial." *Susan B. Anthony List*, 573 U.S. at 164.

"The identification of a credible threat sufficient to satisfy the imminence requirement of injury in fact necessarily depends on the particular circumstances at issue." *Knife Rights*, 802 F.3d at 384. In general, the test "is quite forgiving to plaintiffs seeking such preenforcement review," and a credible threat will be found where the plaintiff's "fear of criminal prosecution under an allegedly unconstitutional statute is not imaginary or wholly speculative." *Cayuga Nation v. Tanner*, 824 F.3d 321, 331 (2d Cir. 2016) (citations and internal quotation marks omitted). When a plaintiff claims that their speech is proscribed by an "ordinary criminal or civil punitive statute[]," courts "have presumed that the government will enforce the law." *Hedges*, 724 F.3d at 200.

The same principle applies when a plaintiff's speech is arguably proscribed by the challenged statute. Thus, this Court has found standing even when the plaintiff's interpretation is not necessarily the "best" interpretation of the challenged statute, no enforcement actions have been initiated, and the government actively disputes that the statute prohibits the plaintiff's intended conduct—so long as the

plaintiff's interpretation of the statute was "reasonable enough" to establish a legitimate fear of future enforcement. *Vt. Right to Life Comm.*, 221 F.3d at 383.

Here, the district court held that Picard faces a credible threat of future enforcement. First, "[a]s Picard's prior arrest shows, it is reasonable for him to fear that he will be arrested if he again distributes his fliers within two hundred feet of a New York courthouse." (J.A. 25.) Furthermore, "[a]lthough the district attorney declined to prosecute, the basis for that declination—a failure to 'measure the distance between the defendant and the courthouse'—does little to ease Picard's concern that that Act prohibits his conduct." (J.A. 25.) Finally, "Picard's fear of prosecution under the Act is not defeated by a benign interpretation of the Act" offered by the State in support of its efforts to dismiss the lawsuit. (J.A. 26.)

The State argues that the district court erred in holding that Picard's prior arrest and detention under § 215.50(7) supported his reasonable fear of prosecution. The State principally asserts that a law enforcement officer's decision to arrest someone for violating a statute cannot by itself confer pre-enforcement standing to challenge that statute; the plaintiff must still establish that the statute at least arguably proscribes his intended conduct. Opening Br. at 33. However, Picard has already cleared that threshold. *See supra* Section I.B. Insofar as the district court may have considered whether Picard's arrest and detention supported the plausibility of his interpretation of the Act, that was not error. The fact that the arresting officer

believed Picard to be in violation of the statute, and that the district attorney did not suggest otherwise, suggests that Picard's interpretation of the Act is at least plausible enough to establish a legitimate fear of future enforcement—even if prior enforcement is not dispositive under *Babbitt*'s second prong.

To the extent the State argues that Picard's arrest is not largely dispositive under *Babbitt*'s third prong, it is mistaken. It is well established that "actual threats of arrest made against a specific plaintiff are generally enough to support standing as long as circumstances haven't dramatically changed." *Seegars v. Gonzalez*, 396 F.3d 1248, 1252 (D.C. Cir. 2005) (citing *Steffel*, 415 U.S. at 459); *see also Susan B. Anthony List*, 573 U.S. at 158. If threats of arrest are sufficient to establish a credible threat of enforcement, an actual arrest is more than sufficient, even if it is based on a disputed interpretation of the underlying statute, and even if the arrest does not lead to prosecution.

The Ninth Circuit's decision in *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995), is instructive. In that case, Jerry Fordyce was arrested for violating Washington's electronic eavesdropping statute, on the theory that the statute criminalized all recording of private conversations without the consent of all parties, even on public streets. *Id.* at 438. The charges were dropped the next day by the prosecuting attorney. *Id.* Fordyce then brought a lawsuit, seeking *inter alia* declaratory and injunctive relief. *Id.* Noting that Washington's electronic

eavesdropping statute had not yet been construed by the state's supreme court, and that Fordyce was "uncertain and insecure regarding his right *vel non* to videotape and audiotape private persons on public streets," the Ninth Circuit held that his arrest was sufficient to establish a credible threat of future enforcement. *Id.* at 440. Thus, it is immaterial to the credible threat analysis whether the arresting officer in fact had probable cause to believe that Picard violated the Act. *See* Opening Br. at 32–33. The arrest itself establishes a credible threat of future enforcement under Picard's plausible interpretation of the Act.

Finally, Picard faces a credible threat of enforcement even though the State "actively disputes" that § 215.50(7) prohibits his jury-nullification advocacy. *Hedges*, 724 F.3d at 197. For one thing, the State's interpretation of the law is not "authoritative," because it "does not bind the state courts or local law enforcement authorities." *Am. Booksellers*, 484 U.S. at 395; *see also Baez v. Hennessy*, 853 F.2d 73, 77 (2d Cir. 1988) ("It is well established in New York that the district attorney, and the district attorney alone, should decide when and in what manner to prosecute a suspected offender." (collecting cases)); *Am. Tel. & Tel. Co. v. State Tax Comm'n*, 61 N.Y.2d 393, 404 (1984) ("[A]n opinion of the Attorney-General is an element to be considered but is not binding on the courts."). Moreover, the State is "not forever bound, by estoppel or otherwise, to the view of the law that it asserts in this litigation." *Vt. Right to Life Comm*, 221 F.3d at 383. Since "nothing . . . prevents the

State from changing its mind," *id.*, its litigating position here is not sufficient to undermine the credible threat of prosecution presented by a statute that has recently been enforced against Picard.

II. The district court did not abuse its discretion by facially enjoining N.Y. Penal Law § 215.50(7).

"The decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). "A district court abuses its discretion if it (1) bases its decision on an error of law or uses the wrong legal standard; (2) bases its decision on a clearly erroneous factual finding; or (3) reaches a conclusion that, though not necessarily the product of a legal error or a clearly erroneous factual finding, cannot be located within the range of permissible decisions." *Klipsch Grp., Inc. v. ePRO E-Commerce Ltd.*, 880 F.3d 620, 627 (2d Cir. 2018) (citation omitted).

A. The State does not dispute that the Act is facially subject to strict scrutiny as a content-based restriction on speech in a traditional public forum.

"[P]ublic places historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be public forums." *Grace*, 461 U.S. at 177 (citations and internal quotation marks omitted). These traditional public forums do "not lose [their] historically recognized character" simply because they abut a courthouse. *Id.* at 180 (holding that the "public sidewalks forming the perimeter of the Supreme Court grounds . . . are public forums

and should be treated as such for First Amendment purposes"); *see also Huminski v. Corsones*, 396 F.3d 53, 90–91 (2d Cir. 2005) (holding that a courthouse and courthouse grounds were nonpublic forums, but exempting abutting public streets and sidewalks).

In a traditional public forum, "[t]he government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place, and manner regulations as long as the restrictions are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Grace*, 461 U.S. at 177 (citation and internal quotation marks omitted). Content-based restrictions on speech in a traditional public forum are subject to strict judicial scrutiny. *Hotel Emps. & Rest. Emps. Union, Local 100 v. City of N.Y. Dep't of Parks & Recreation*, 311 F.3d 534, 544–46 (2d Cir. 2002).

"Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. This commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (citations omitted). In other words, a law is facially content based "if it require[s] 'enforcement authorities' to 'examine the content of the message that is conveyed to

determine whether' a violation has occurred." *McCullen v. Coakley*, 573 U.S. 464, 479 (2014) (citation omitted) (holding that a Massachusetts law establishing 35-foot buffer zones around abortion clinics was content neutral, because the Act's enforcement did not depend on what people said within the buffer zone).

Here, the district court held, and the State does not dispute, that § 215.50(7) imposes a facially content-based restriction on speech in a traditional public forum. (J.A. 70.) As the district court explained: "Section 50(7) is triggered when the speaker engages in speech that concerns the conduct of a trial that is going on in an adjacent courthouse. Any enforcement of the Act must consider the content of the speech to determine whether it is directed towards an ongoing trial. Furthermore, § 50(7) restricts speech in a traditional public forum—public sidewalks." (J.A. 70.) Accordingly, "[t]he Act is subject to strict scrutiny." (J.A. 70.)

B. The district court did not err in holding that the Act fails strict scrutiny.

Under strict scrutiny, the "usual presumption of constitutionality afforded [legislative] enactments is reversed." *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 817 (2000). "Content-based regulations are presumptively invalid, and the Government bears the burden to rebut that presumption." *Id.* (citation and internal quotation marks). "It is rare that a regulation restricting speech because of its content will ever be permissible." *Id.* at 818.

To survive strict scrutiny, the State must demonstrate that the restriction is "the least restrictive means of achieving a compelling state interest." *McCullen*, 573 U.S. at 478. This "is the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). "[I]f a less restrictive means is available for the Government to achieve its goals, the Government must use it." *Playboy Ent. Grp.*, 529 U.S. at 815. It is the State's burden to demonstrate that any "plausible, less restrictive alternative would be ineffective" in achieving its goals. *Id.* at 824. Such a demonstration normally requires detailed evidence. At the very least, "the Government must present more than anecdote and supposition." *Id.* at 822.

As the district court acknowledged, "[i]t is undisputed by the parties that the Act is directed toward a compelling state interest. It seeks to protect the integrity of the judicial process by shielding trial participants, including jurors and witnesses, from undue influence during their engagement in trials. This promotes the rule of law and the legitimate functioning of the justice system." (J.A. 70.) However, the court held that the Act fails strict scrutiny because, unlike other provisions of N.Y. Penal Law § 215.50, it is not limited to "expression that is likely to disrupt ongoing [trial] proceedings." And the State failed to show that it "must criminalize speech in this way to protect the integrity of ongoing trials." (J.A. 75.)

Notably, the district court reached this conclusion despite construing the Act, in its merits analysis, exactly as the State proposes. *See* Opening Br. at 20; (J.A. 73–

77). As the court recognized, the Act is facially unconstitutional even if it is interpreted to prohibit only public-facing speech about particular trials taking place in a nearby courthouse, because much of this speech does not significantly threaten to disrupt trial proceedings. There is simply no reason to believe that peaceful courthouse protests, even protests of particular trials, categorically pose such a significant threat to the administration of justice that the Constitution must tolerate a content-based restriction on speech in a traditional public forum. *See, e.g.*, Homer Bigard, *Tight Curbs Placed on Kent State Trial*, N.Y. Times, Nov. 23, 1971, at 20 (describing "a handful of students" who "stood in foot deep snow" outside the courthouse where the Kent State trials were taking place, protesting the prosecutions with signs such as "Sieg Heil, Judge Jones" and "Stop the Trials"), *available at* https://nyti.ms/3r8fEtG.

In addition to noting that the Act is not limited to speech that directly tends to interfere with the administration of justice, the district court identified several less restrictive alternatives at the State's disposal, including "content-neutral regulations to maintain public order and access to a public building," "laws that make it a crime to tamper intentionally with jurors and witnesses," and the possibility of escorting jurors or witnesses "to and from the courthouse to encourage or protect their service on a particular trial." (J.A. 75–76). The State did not address the feasibility of these or any other alternatives below, even though Picard addressed them in his pretrial

memorandum. *See* Dist. Ct. ECF No. 44 at 11–14. As a result, there is no evidence in the record on the feasibility of any of the proposed less restrictive alternatives. The court accordingly concluded that, "on the record before it," the State had failed to carry its burden of proving that "the Act is necessary to the fair administration of justice." (J.A. 76.)

The State does not directly challenge the district court's conclusion that it has failed to satisfy strict scrutiny. Instead, it argues that "the district court's unnecessarily broad relief precludes the State from enforcing Penal Law § 215.50(7) in situations that even the court itself acknowledged would serve a compelling state interest in protecting the 'integrity of the judicial process.'" Opening Br. at 36. However, it is irrelevant whether some of the speech prohibited by the Act could be legitimately proscribed by a more carefully tailored statute. Even "a content-neutral restriction on speech in a traditional public forum is facially unconstitutional if it does not survive the narrow tailoring inquiry," regardless of whether the "ordinance might seem to have a number of legitimate applications." *Cutting v. City of Portland*, 802 F.3d 79, 86 (1st Cir. 2015); *see also Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 967–68 (1984) ("Where, as here, a statute imposes a direct restriction on protected First Amendment activity, and where the defect in the statute is that the means chosen to accomplish the State's objectives are too imprecise, so that in all its applications the statute creates an unnecessary risk of chilling free

speech, the statute is properly subject to facial attack." (footnote omitted)). The same principle applies to a content-based restriction speech, though the State's burden is significantly higher under strict scrutiny.

In any event, the State's scattershot arguments fail on their own terms. *First*, the State disputes that the less restrictive alternatives identified by the district court, *see* Dist. Ct. ECF No. 44 at 11–14, in fact suffice to address the State's asserted interest in protecting the fair administration of justice. However, the State has not demonstrated that these alternatives are actually ineffective.

"When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals." *Playboy Ent. Grp.*, 529 U.S. at 816. "The Government's burden is not merely to show that a proposed less restrictive alternative has some flaws; its burden is to show that it is less effective." *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 669 (2004); *cf. Brown v. Ent. Merch. Ass'n*, 564 U.S. 786, 803 n.9 (2011) ("[T]he government does not have a compelling interest in each marginal percentage point by which its goals are advanced.").

Here, the State relies on bald assertions, by the Act's sponsor and by Chief Magliano, that the Act's content-based restriction on speech is necessary to prevent peaceful and orderly courthouse protests from interfering with trials. Opening Br. at 40. These are precisely the sorts of "conclusory" statements that the Supreme Court

has rejected as "anecdote and supposition," incapable of sustaining the government's burden under strict scrutiny. *Playboy Ent. Grp.*, 529 U.S. at 822–23.

Second, the State asserts that the "district court unjustifiably suggested that a lack of documented arrests precluded a showing that § 215.50(7) remains 'necessary.'" Opening Br. at 41. It did not. The district court expressly acknowledged that the dearth of arrests may reflect "the Act's success in deterring violations" or the absence of any significant need for the Act's content-based restriction on speech. (J.A. 76.) The critical point is that it is the State's burden under strict scrutiny to demonstrate that the Act's content-based restriction on speech in a traditional public forum *is* necessary to protect the due administration of justice, such that less restrictive alternatives would not suffice—the four arrests the state identified over the past fourteen years do little to meet that burden.[5] The State's speculation that local police officers may have also arrested people under the Act at some point during the last fourteen years, Opening Br. at 41, is also irrelevant: the State cannot rely on hypothetical arrests to carry its burden under strict scrutiny.

[5] One of the arrests identified by the State was apparently a misapplication of the Act to a person who allegedly "interrupt[ed] proceedings by refusing several lawful orders to be seated and remain quiet or leave the courtroom." (J.A. 49.) Excluding that arrest and Picard's arrest, which the State maintains was also a misapplication of the Act, the State has identified only two violations of the Act over the past fourteen years.

Third, the State contends that the district court incorrectly distinguished this case from *Burson v. Freeman*, 504 U.S. 191 (1992) (plurality opinion), which upheld a content-based ban on electioneering outside polling places. The State argues that its "compelling interest in protecting the integrity of the judicial process is similar to the . . . indisputable 'compelling interest in preserving the integrity of its election process.'" Opening Br. at 42 (quoting *Burson*, 504 U.S. at 199). The State's compelling interest in protecting the fair administration of justice is undisputed. However, as the district court observed, *Burson* upheld polling-place buffer zones because there was "a 'widespread and time-tested consensus' that demonstrated that restricted zones were necessary to serve the states' compelling interests in preventing voter intimidation and election fraud." (J.A. 76.) By contrast, the State did not offer "any such evidence" that content-based buffer zones around courthouses are necessary "to protect the trial process." (J.A. 76.)

The State now argues that, "at the relevant historical moment," such a consensus did exist among "legions of affected parties." Opening Br. at 45. It is true that there was a rash of concern about courthouse protests during the Second Red Scare, leading the federal government and several states, including New York, to pass laws restricting courthouse protests. "The federal statute resulted from the picketing of federal courthouses by partisans of the defendants during trials involving leaders of the Communist Party. This picketing prompted an adverse

reaction from both the bar and the general public." *Cox v. Louisiana*, 379 U.S. 559, 561 (1965) [*Cox II*].[6] The federal statute prohibits "picket[ing] or parad[ing]" near a courthouse "with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer." 18 U.S.C. § 1507.

Louisiana's courthouse protest statute, La. Stat. Ann. § 14:401, which was modeled on the federal law, was upheld by the Supreme Court in *Cox II*, 379 U.S. at 561–64. A handful of states now similarly prohibit picketing or parading near a courthouse with the intent to either interfere with the administration of justice or improperly influence a judge, juror, witness, or court officer. Cal. Penal Code § 169; Mass. Gen. Las. Ch. 268 § 13A; N.C. Gen. Stat. Ann. § 14-225.1; 18 Pa. Cons. Stat. § 5102; Utah Code Ann. § 76-8-302. Additionally, Mississippi and Washington prohibit picketing or parading near a courthouse in a manner that actually interferes with the administration of justice. Miss. Code Ann. § 97-7-63; Wash. Rev. Code § 9.27.015.

Section 215.50(7) differs from these other courthouse protest statutes in a crucial respect—none of the other statutes imposes a facially content-based

[6] Even against this backdrop, the New York Bar Association opposed the bill that became N.Y. Penal Law § 215.50(7), "on the ground that existing law covers the situation." *See* Letter from the N.Y. Bar Ass'n Comm. on Crim. Cts., L. & P. to Gov. Thomas E. Dewey (Feb. 25, 1952), *in* Bill Jacket for ch. 669 (1952), at 3–4.

restriction on speech. This stands in stark contrast to *Burson*, where every state in the country except Vermont imposed content-based restrictions on political speech in designated areas outside of polling places. *See* Robert Brett Dunham, *Defoliating the Grassroots: Election Day Restrictions on Political Speech*, 77 Geo. L.J. 2137, 2143 (1989). There is thus no relevant consensus among jurisdictions regarding the need for content-based restrictions on courthouse protests to protect the trial process.

Other jurisdictions' courthouse protest statutes are also more carefully tailored to the governmental interest in protecting the trial process, as they prohibit speech that is either intended to, or actually does, interfere with the administration of justice. *See Cox II*, 379 U.S. at 562 (holding that Louisiana's statute was "narrowly drawn" to the government's overriding interest in preventing the "influence or domination" of judicial proceedings "by either a hostile or friendly mob"). By contrast, § 215.50(7) prohibits courthouse protests concerning the conduct of a trial regardless of their intent or actual effect; it applies to both the hostile mob and the lone protestor with a posterboard sign. The content-neutral laws enacted by other jurisdictions belie the State's assertion that the Act's content-discriminatory prohibition is necessary to ensure the fair administration of justice.

Finally, although the district court acknowledged the State's compelling interest in promoting public confidence in the administration of justice, (J.A. 68), the State argues that the court failed to consider whether § 215.50(7) is necessary to

effectuate that interest. Opening Br. at 47. Once again, the fault lies with the State's failure to carry its burden under strict scrutiny. There is no evidence to support the State's assertion that the Act's content-based restriction is necessary to promote public confidence in the judicial system.

The State relies on the Supreme Court's decision in *Grace*, 461 U.S. 171, and the D.C. Circuit's decision in *Hodge v. Talkin*, 799 F.3d 1145 (D.C. Cir. 2015), to support its position, but that reliance is misplaced. In fact, *Grace* established that, even under intermediate scrutiny, the government's interest in promoting public confidence in the judicial system is not sufficient to justify a restriction on speech in a traditional public forum. The case concerned a First Amendment challenge to 40 U.S.C. § 13k, now 40 U.S.C. § 6135, which prohibits *inter alia* the "'display [of] ... any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement' in the United States Supreme Court building and on its grounds," including the public sidewalk abutting the Court. 461 U.S. at 172–73. The Supreme Court held that the statute's restriction on speech on the public sidewalk failed intermediate scrutiny because it was not narrowly tailored to any of the government's asserted interests, and invalidated the statute as applied to speech taking places on the public sidewalk. *Id.* at 180–84.

There, too, the government argued that the statute's restriction on public displays outside the Court was to prevent any "appear[ance] to the public that the

Supreme Court is subject to outside influence or that picketing or marching, singly or in groups, is an acceptable or proper way of appealing to or influencing the Supreme Court." *Id.* at 183. The Court squarely rejected this argument. While it did "not discount the importance of [the government's] proffered interest" in maintaining public confidence in the judiciary, it concluded that § 13k's restrictions did not "sufficiently serve" that interest "to sustain its validity insofar as the public sidewalks on the perimeter of the grounds are concerned." *Id.* Observing that "[t]here is nothing to indicate to the public that these sidewalks are part of the Supreme Court grounds or are in any way different from other public sidewalks in the city," the Court expressed "serious[] doubt that the public would draw a different inference from a lone picketer carrying a sign on the sidewalks around the building than it would from a similar picket on the sidewalks across the street." *Id.*

In *Hodge*, the D.C. Circuit upheld the same statute as applied to speech on the Supreme Court plaza, which the D.C. Circuit determined to be a nonpublic forum. 799 F.3d at 1162. After noting that *Grace* found the government's interest in promoting public confidence in the judicial system insufficient to justify the statute's application to speech on the public sidewalk abutting the Supreme Court building, *id.* at 1163–64, the court held that the restriction was constitutional under the more lenient standard applied to restrictions on speech in a nonpublic forum, *id.* at 1164–65. It explained that, whereas even content-neutral restrictions on speech in a

traditional public forum must be narrowly tailored to an important governmental interest in order to satisfy intermediate scrutiny, the "government's decision to restrict access to a nonpublic forum need only be reasonable, and even then, it need not be the most reasonable or the only reasonable limitation." *Id.* at 1165 (internal quotation marks omitted). "Judged by those standards," the court concluded, the statute, "as applied to the Supreme Court plaza, reasonably serves the government's interests in maintaining order and decorum at the Supreme Court and in avoiding the impression that popular opinion and public pressure affect the Court's deliberations." *Id.* There is a world of difference between the deferential standard applied in *Hodge* and the strict scrutiny at issue here; that difference reflects the strong constitutional presumption that content-based restrictions on speech in a traditional public forum are facially illegitimate.[7]

C. The district court did not abuse its discretion by granting facial declaratory and injunctive relief.

In its pretrial memorandum before the District Court, the State took the position that Plaintiff "does not state an independent as-applied claim" at all. Dist.

[7] The State's reliance on *Williams-Yulee v. Florida Bar*, 573 U.S. 433 (2015), fares no better. There, the Supreme Court held that restrictions on personal solicitation of campaign funds by judicial candidates is narrowly tailored to the compelling governmental interest in promoting public confidence in the administration of justice. *See id.* at 455–56. While the compelling nature of the State's interest is not in dispute, the restriction in *Williams-Yulee* is too far afield to shed any light on the tailoring analysis here.

Ct. ECF No. 42 at 14. Reversing course, the State now argues on appeal that "the record at most warrants an injunction on enforcing the statute against Picard's intended advocacy, and not facial invalidation." Opening Br. at 48. Even if this argument were not forfeited, *see Sczepanski v. Saul*, 946 F.3d 152, 161 (2d Cir. 2020), it would be unavailing.

The State principally relies on this Court's decision in *American Booksellers Foundation v. Dean*, 342 F.3d 96 (2d Cir. 2003) [*Dean II*]. In that case, the Sexual Health Network, Inc. and the ACLU of Vermont challenged a Vermont statute restricting the dissemination of certain sexually explicit materials to minors. *See id.* at 98–99. Although the statute did not explicitly mention the Internet, the district court concluded that it applied to Internet speech, and held that the statute violated the First Amendment under the principles established in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), as well as the Dormant Commerce Clause. *Am. Booksellers Found. v. Dean*, 202 F. Supp. 2d 300, 316–321 (D. Vt. 2002) [*Dean I*]. While the district court's analysis focused entirely on the specific problems created by the statute's application to the plaintiffs' Internet speech, it permanently enjoined Vermont from enforcing the statute in all its applications. *Id.* at 322.

This Court deduced from "the broad terms of the injunction" that the district court believed the statute to be "substantially overbroad and thus invalid in all applications." *Dean II*, 342 F.3d at 104. This raised the potentially difficult question

of whether a statute that presents particular constitutional problems when applied to one type of speech should be invalidated for overbreadth, even when its constitutionality as applied to other types of speech has not been questioned or analyzed. One solution to this problem is to "cure" the alleged overbreadth by partially invalidating the statute as applied to the discrete context under review, rather than invalidating the statute *in toto*. Applying this remedy in *Dean II*, this Court modified the injunction to prohibit the state "from enforcing the statute against the internet speech upon which plaintiffs base their suit." *Id.*; *see also Bd. of Trustees v. Fox*, 492 U.S. 469, 485–86 (1989) (applying a similar approach to a university rule that regulated commercial and non-commercial speech); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985) (applying a similar approach to a state obscenity statute that extended to materials that incite "lust").

The Supreme Court has not routinely followed this approach to overbreadth analysis. *See, e.g.*, *United States v. Stevens*, 559 U.S. 460 (2010) (facially invalidating a federal statute prohibiting the dissemination of videos depicting animal cruelty on overbreadth grounds, rather than holding that the statute is unconstitutional as applied to protected speech). Whatever its wisdom may be, it has no application here. The district court's First Amendment analysis was not predicated on the Act's particular application to Picard' jury-nullification advocacy. To the contrary, the court adopted the State's narrowing construction for its merits

analysis and still concluded that the Act facially violates the First Amendment. The State therefore misses the mark when it argues that "the statute may be 'declared invalid to the extent that it reaches too far, but otherwise left intact.'" Opening Br. at 49 (quoting *Brockett*, 472 U.S. at 504). The problem is not just that the statute "reaches too far" with respect to Picard, but rather that it has no plainly legitimate sweep. The only way to remedy that violation is to facially invalidate the Act.

III. Certification to the New York Court of Appeals is not warranted.

Finally, the State argues that "if there were any doubt" about § 215.50(7)'s application to Picard's jury-nullification advocacy, "then the Court should certify this question of state law to the New York Court of Appeals." Opening Br. at 50. The rules of the New York Court of Appeals provide that "[w]henever it appears to . . . any United States Court of Appeals . . . that determinative questions of New York law are involved in a case pending before that court for which no controlling precedent of the [New York] Court of Appeals exists, the court may certify the dispositive questions of law to the [New York] Court of Appeals." 22 N.Y.C.R.R. § 500.27(a); *see also* 2d Cir. R. 27.2(a) ("If state law permits, the court may certify a question of state law to that state's highest court.").

This Court's discretion in deciding whether to certify is principally guided by three factors: (1) whether the New York Court of Appeals has addressed the issue and, if not, whether the decisions of other New York courts permit this Court to

predict how the Court of Appeals would resolve it; (2) whether the question is of importance to the state and may require value judgments and public policy choices; and (3) whether the certified question is determinative of a claim before this Court. *Joseph v. Athanasopoulos*, 648 F.3d 58, 67 (2d Cir. 2011).

First, although there do not appear to be any New York State judicial decisions construing § 215.50(7), that fact has limited relevance because the district court correctly found that the Act is not susceptible of any narrowing construction that would cure its constitutional defects. (J.A. 77.) "In cases involving a facial challenge to a statute, the pivotal question in determining whether abstention is appropriate is whether the statute is fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question." *City of Houston v. Hill*, 482 U.S. 451, 468 (1987) (citations and internal quotation marks omitted). "If the statute is not obviously susceptible of a limiting construction, then even if the statute has never been interpreted by a state tribunal it is the duty of the federal court to exercise its properly invoked jurisdiction." *Id.* at 468 (cleaned up). The same rule applies to certification. *See id.* at 470.

Second, this facial First Amendment challenge does not require value judgments or important public policy choices that are best addressed to the New York Court of Appeals. The State argues that "the scope and validity of § 215.50(7)'s bar on trial-related demonstrations near courthouses are of undeniable importance."

Opening Br. at 51. But the Act's facial validity under the First Amendment is a question of federal law. And, in this case, the Act's facial validity does not turn on any ambiguity regarding its scope. *Cf. Expressions Hair Design v. Schneiderman*, 877 F.3d 99, 104 (2d Cir. 2017) (certifying to the New York Court of Appeals where "the scope of [the challenged statute] prohibition [was] crucial to [the First Amendment] analysis" of the plaintiff's as-applied challenge).

Third, while certification might result in a statutory interpretation that moots this particular case, no interpretation of the Act by the New York Court of Appeals would address the First Amendment violation identified by the district court. *See Hill*, 482 U.S. at 471 n.22 (rejecting certification where, no matter how the certified question might be resolved, "the ordinance would remain unconstitutionally overbroad"); *cf. Baggett v. Bullitt*, 377 U.S. 360, 378 (1964) (denying *Pullman* abstention in a facial vagueness and overbreadth challenge, in part because construction of the challenged statute in state court would "hold little hope of eliminating the issue of vagueness" permeating the statute).

This Court must also consider the practical consequences of certification under these circumstances. If the New York Court of Appeals were to determine that § 215.50(7) applies to Picard's jury-nullification advocacy, then this Court would be in the same position it is now, with the added expense and delay occasioned by litigation in another forum. On the other hand, if the New York Court of Appeals

were to moot this case by concluding that the Act does not apply to Picard, then the Act would go back into effect until another challenge—raising the same facial issues, though perhaps with less opportunity for considered deliberation—can be brought. "Meanwhile where . . . the statute deters constitutionally protected conduct, the free dissemination of ideas may be the loser." *Baggett*, 377 U.S. at 379 (citation and internal quotation marks omitted). *See also* Opening Br. at 41 & n.8 (extolling the Act's deterrent effect).

This Court declined certification under strikingly similar circumstances in *Vermont Right to Life Committee*. There, it was ambiguous whether Vermont's disclaimer requirement for political communications applied to VRLC, *see* 221 F.3d at 382–84, but clear that the requirement itself facially violated the First Amendment, *see id.* at 386–87. The court did not suggest that certification to the Vermont Supreme Court was appropriate in order to determine whether the statute applied to VRLC. Instead, after concluding that VRLC's interpretation of the statute was reasonable enough to support standing, the court facially invalidated the offending provision. *See id.* at 388–89.

The State inaccurately suggests that *Vermont Right to Life* had no occasion to consider whether certification would have been appropriate in that case, because Vermont lacks a certification mechanism. Opening Br. at 54 n.13. To the contrary, in *Vermont Right to Life Committee*, this Court remanded to the district court with

instructions to consider certifying the following questions to the Vermont Supreme Court: (1) whether a narrowing construction could be applied to cure the First Amendment defects in Vermont's reporting requirement for mass media communications; and (2) whether the facially invalid provision in Vermont's disclaimer requirement could be severed from the rest of the statute. *Id.* at 391 n.7. Notably, the Court declined to suggest certification as a means to moot VRLC's challenge or otherwise save the facially unconstitutional portion of the disclaimer requirement. This Court should similarly decline to certify here.

CONCLUSION

This Court should affirm the district court's judgment.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with Local Rule 32.1(a)(4) because it contains 12,837 words, excluding the portions of the brief exempted by Federal Rule of Appellate Procedure 32(f), according to the count of Microsoft Word. I further certify that this brief complies with the typeface and type-style requirements of Rule 32(a)(5)-(6) because it is printed in a proportionally spaced 14-point font, Times New Roman.

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