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

REPLY BRIEF FOR APPELLANT

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PRELIMINARY STATEMENT

The opening brief for defendant-appellant the State of New York demonstrated that plaintiff-appellee Michael Picard lacks standing to maintain this preenforcement First Amendment challenge to Penal Law § 215.50(7)—because that provision plainly does not apply to Picard's intended activity of standing outside a New York courthouse and generally advocating for jury nullification without mentioning any specific trial.

Picard's insistence that § 215.50(7) does in fact criminalize his intended activity disregards the text, structure, context, and history of this provision. And it is immaterial that a court officer mistakenly arrested Picard under this provision when no judge or prosecutor ever determined that the arrest was legally supported.

As the State's opening brief also demonstrated, even if § 215.50(7) arguably proscribed Picard's expression, principles of judicial restraint would call for a more limited remedy than the district court's facial injunction. Picard does not allege a future intention to engage in any other expressive activity besides general jury-nullification advocacy; thus, an injunction on the statute's enforcement as against this advocacy would afford Picard complete and appropriate relief. Picard's insistence

that § 215.50(7) must be fully enjoined because it has *no* legitimate application ignores that the Supreme Court already has determined that States may permissibly bar picketing near courthouses of specific trials pending inside. These types of restrictions serve the compelling governmental interest of promoting confidence in the judicial system, by ensuring the appearance and actuality of fair trials.

Alternatively, this Court should certify the question of § 215.50(7)'s proper interpretation to the New York Court of Appeals. Picard opposes certification on the ground that § 215.50(7) facially violates the First Amendment no matter how a New York court might construe it. But there are many plausible interpretations of § 215.50(7)—including the one presented in the State's opening brief—that would obviate or at least narrow any constitutional dispute. Certification is appropriate under these circumstances.

ARGUMENT

POINT I

PENAL LAW § 215.50(7) PLAINLY DOES NOT COVER PICARD'S INTENDED ADVOCACY, PRECLUDING ARTICLE III STANDING

To have standing to raise a First Amendment challenge to a statute or regulation, a party's activity must come "within the ambit of the specific rule of law that she challenges." *United States v. Smith*, 945 F.3d 729, 737 (2d Cir. 2019); *see Hedges v. Obama*, 724 F.3d 170, 195-99 (2d Cir. 2013). For standing in a preenforcement First Amendment lawsuit, the challenged provision must "arguably proscribe" the plaintiff's expressive activity. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 162 (2014); *see Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 382-83 (2d Cir. 2000) (requiring an objectively reasonable threat of prosecution under the "definition proffered").

Picard fails to establish this essential predicate to Article III standing. Picard's intended advocacy simply is not prohibited by Penal Law § 215.50(7), as the district court properly construed that subsection. It bars calling aloud, shouting, or displaying placards or signs within 200 feet of a New York State courthouse, "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." Penal Law § 215.50(7). As Picard acknowledges, the district court construed § 215.50(7) "exactly as the State propose[d]" (Br. for Pl.-Appellee (Opp. Br.) at 37)—i.e., to reach only expressive activity near a courthouse relating to one or more specific, identifiable "trials being held in that very courthouse at that very moment" (Joint Appendix (J.A.) 73-74). But as Picard confirms, when publicly advocating for jury nullification, "he does not address any specific trials." Opp. Br. at 16. He does "not research which trials are occurring before visiting a courthouse," is "not aware of any particular cases in which jurors [a]re being impaneled or serving," and does "not discuss any particular criminal proceeding with anyone." (J.A. 30.) Picard's intended advocacy thus falls outside the scope of § 215.50(7), and he has no standing to challenge that provision.

Although Picard asserts that § 215.50(7) arguably covers advocacy for jury nullification "even if it is not addressed to a specific trial" (Opp. Br. at 24), his arguments are unpersuasive. Picard offers no meaningful rejoinder to the State's explanation of how § 215.50(7)'s text, structure, context, and history confirm that this provision embodies a narrowly

drawn limitation on expression regarding particular trials pending in nearby courthouses—rather than a broad proscription on speech in any way regarding the trial process or justice system. Br. for Appellant (State Br.) at 20-28. For example, the statute pertains to speech concerning a "trial *being held* in [the] courthouse," Penal Law § 215.50(7) (emphasis added), a word choice that connotes current activity (State Br. at 21-23). Likewise, nearly all of the surrounding subsections regard conduct that denigrates the integrity of identifiable, ongoing court proceedings. *Id.* at 23-24 (discussing Penal Law § 215.50(1)-(5)). And as the legislative history reveals, § 215.50(7) was enacted in response to protests "immediately in front" of the federal courthouse in Manhattan's Foley Square, aimed at influencing "the determination of the litigation taking place in the Court." Letter from Assemblyman Thomas A. Duffy to Governor Thomas E. Dewey (Feb. 28, 1952), *in* Bill Jacket for ch. 669 (1952) (Bill Jacket), at 9-10.

Instead, Picard's contrary and broader interpretation of § 215.50(7) hangs solely on a dictionary definition of "concerning," which means "'involving'" or "'affecting.'" Opp. Br. at 24. But that definition alone does not answer what the speech proscribed by § 215.50(7) must "involve" or

"affect"—and the statute makes clear that the object is "a trial being held in" a courthouse within a 200-foot distance. Indeed, "[u]nder settled precepts," statutory "language should not be read in isolation, but within the context of the entire statute, giving relative meaning and effect to each of the section's remaining terms." *Scott v. Massachusetts Mut. Life Ins. Co.*, 86 N.Y.2d 429, 435 (1995).

In any event, as the State has shown, § 215.50(7) plainly excludes Picard's sign-and-flyer advocacy for an independent reason. State Br. at 25-26, 30-31. This subsection does not prohibit every mode of expression concerning trials in nearby courthouses. Rather, it restricts only calling aloud, shouting, or "display[ing] placards or signs" on that subject. Penal Law § 215.50(7). And here, Picard desires to hold aloft a sign stating merely, "Jury Info," an entreaty that cannot fairly be construed to concern a pending trial, or to convey any particular message at all. Jurors or others whose curiosity is piqued may then receive from Picard a flyer, citing a "moral responsibility to disobey unjust laws" and urging internet research on jury nullification. (J.A. 30, 37-38.)

Picard does not contend that § 215.50(7) even arguably proscribes holding this "Jury Info" sign within 200 feet of a New York State courthouse.

Nor does he address, much less refute, any of the authorities cited in the State's opening brief confirming that flyers (such as he disseminates in one-on-one transactions) are not plausibly "placards" (such as § 215.50(7) restricts, together with calling out, shouting, and signage). *See, e.g.*, *Matter of Kese Indus. v. Roslyn Torah Found.*, 15 N.Y.3d 485, 491-92 (2010) (statutory phrases are to be construed in accordance with surrounding terms).

Rather, Picard seeks to meld his two modes of communication, asserting that his "Jury Info" sign must be considered "in connection with," and "in the wider context of," his flyers' content. Opp. Br. at 28. But Picard cites no principle that would support arriving at criminal liability by combining these two otherwise legal acts. To the contrary, in New York, criminal statutes "must be construed according to the fair import of their terms," Penal Law § 5.00, and criminal liability "cannot be extended beyond the fair scope of the statutory mandate," *People v. Jennings*, 69 N.Y.2d 103, 121 (1986) (quotation marks omitted). There is no reason to assume that a New York court would subvert these principles and adopt an atextual and expansive reading of § 215.50(7)

that criminalizes Picard's bifurcated mode of expression, which the statute facially permits.[1]

Contrary to Picard's contention (Opp. Br. at 23), it makes no difference that a court officer once arrested Picard on the mistaken assumption that he had violated § 215.50(7) (*see* J.A. 31). The subjective view of the arresting officer, without more, does not inform the statute's construction one way or another.[2] Indeed, determining whether probable cause supports an arrest is purely a judicial function, for which the arresting officer's belief is irrelevant. *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004); *United States v. Gagnon*, 373 F.3d 230, 239 (2d Cir. 2004).

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[1] Picard also misplaces reliance (Opp. Br. at 27-28) on *United States v. Grace*, which held it uncontested that leaflets fell within the federal ban on displaying certain "'flag[s], banner[s], or device[s]'" on Supreme Court grounds. 461 U.S. 171, 176 (1983) (quoting statute then codified at 40 U.S.C. § 13k). Whether a leaflet is a "device" under this distinct provision does not control whether it is a "placard" under § 215.50(7).

[2] *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995), on which Picard relies, held no differently. *See* Opp. Br. at 32. In *Fordyce*, the plaintiff challenged a Washington criminal law on First Amendment grounds after having been arrested for violating it, but two Washington Supreme Court decisions had "not clarified" whether the law applied to the type of activity in which the plaintiff wished to engage. 55 F.3d at 440 n.2. By contrast, no New York court ever has examined Penal Law § 215.50(7)—and the New York Court of Appeals should be given that chance if this Court deems the law ambiguous. See *infra* Point III.

Picard cites no authority holding otherwise. And here, there was never any finding that probable cause supported Picard's arrest under § 215.50(7) for leafletting; the Bronx District Attorney's Office declined to initiate a prosecution. *Cf. Susan B. Anthony List*, 573 U.S. at 162 (holding that prior administrative finding of probable cause supported regulated party's standing to challenge statute based on intent to perform same activity). Nor may anything be inferred from the Assistant District Attorney's "silence" on the question of § 215.50(7)'s scope. *See* Opp. Br. at 23-24. The prosecution was declined on the independently sufficient ground that the People could not prove that Picard had stood less than 200 feet from the courthouse. (J.A. 40.) This one identified deficiency does not foreclose the existence of others.

Finally, to support his proposed reading of § 215.50(7), Picard misplaces reliance on prosecutors' unsuccessful arguments in attempted jury-tampering prosecutions under other statutes. *See* Opp. Br. at 24-27 (discussing *United States v. Heicklen*, 858 F. Supp. 2d 256 (S.D.N.Y. 2012), and *People v. Iannicelli*, 449 P.3d 387 (Colo. 2019)). While the government in those cases maintained that general jury-nullification advocacy outside courthouses could be jury tampering, the statutes in question

facially could accommodate that view. *See* 18 U.S.C. § 1504 (prohibiting attempts to influence juror "upon any issue or matter pending before such juror . . . or pertaining to his duties"); Colo. Rev. Stat. § 18-8-609 (prohibiting extrajudicial communications with juror with intent to influence juror's vote "in a case"). Penal Law § 215.50(7) contains no such language about jurors' "duties" or votes "in a case," but rather targets discrete types of expression concerning specific trials being held in nearby courthouses. In any event, the courts in Picard's cited decisions ultimately construed these other statutes, consistent with the First Amendment, to apply solely to communications with jurors concerning specific pending cases. *See Heicklen*, 858 F. Supp. 2d at 270-75; *Iannicelli*, 449 P.3d at 395-96. Those rulings render the prosecutors' earlier and broader view of the laws irrelevant—and entirely immaterial to the interpretation of § 215.50(7) here.

POINT II

ASSUMING THAT PICARD HAS STANDING, THE PROPER REMEDY WOULD BE TO ENJOIN § 215.50(7)'S APPLICATION ONLY TO PICARD'S OWN ALLEGED ADVOCACY

Even if Penal Law § 215.50(7) arguably proscribed Picard's holding a "Jury Info" sign and handing out generic jury-nullification flyers within 200 feet of a New York courthouse, the proper remedy would be an injunction against the statute's application to that activity only. As the State's opening brief explained (at 35-50), this more modest remedy aligns with well-settled principles of judicial restraint. *See*, *e.g.*, *United States v. National Treasury Emps. Union*, 513 U.S. 454, 478 (1995); *American Booksellers Found. v. Dean*, 342 F.3d 96, 105 (2d Cir. 2003). By contrast, the district court's facial injunction inhibits § 215.50(7) from serving the State's compelling interest in protecting judicial integrity, even in scenarios in which the Supreme Court has held that States may permissibly limit advocacy outside courthouses.

Circumscribing the injunction to bar § 215.50(7)'s application to Picard's activities would fully eliminate Picard's asserted fear of being "prosecuted for violating the Act" if he again advocates for "jury nullification within 200 feet of a courthouse in New York State." (J.A. 32.) In

doing so, it would "limit the solution to the problem." *See Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328-29 (2006). And although Picard alleges that an as-applied injunction would not "redress the full extent" of § 215.50(7)'s infirmity (Opp. Br. at 16), such a remedy would "fully protect" his own interests—the only interests at stake here—while "avoiding unnecessary adjudication of constitutional issues," *see National Treasury Emps. Union*, 513 U.S. at 478; *accord American Booksellers*, 342 F.3d at 105 (narrowing facial injunction on state statute to apply solely to plaintiff's own speech, in keeping with usual First Amendment principles).[3]

Picard intimates that the State forfeited this argument for an as-applied injunction (Opp. Br. at 48), but he is incorrect. The State conceded below that Picard's expressive activity was not forbidden (Dist. Ct. ECF No. 42, at 2, 12); urged the district court to respect "principles of

[3] In an effort to distinguish *American Booksellers*, Picard notes that the district court there "focused entirely" on the specific online speech in which the plaintiff had engaged. Opp. Br. at 48. Here, the district court's choice to eschew focus on Picard's alleged speech in favor of an abstract facial First Amendment analysis is precisely the problem. As in *American Booksellers*, this Court here "can simply determine whether the statute can be constitutionally applied" to the "discrete" expression giving rise to the lawsuit. 342 F.3d at 105.

judicial restraint and federalism" in evaluating § 215.50(7) (*id.* at 1); and asserted that facial relief—or wholesale invalidation—was unwarranted because Picard could not show that § 215.50(7) would be "applied unconstitutionally in a substantial number of cases compared to its valid scope" (*id.* at 13). These points together preserved the State's current request to limit any injunction to Picard's advocacy only—rather than countenance Picard's "gratuitous wholesale attack[]" on § 215.50(7). *See Board of Trustees v. Fox*, 492 U.S. 469, 484-85 (1989).

At any rate, this Court may entertain unpreserved arguments that require no additional fact-finding or that will avoid manifest injustice. *See United States v. Gomez*, 877 F.3d 76, 95 (2d Cir. 2017). Here, the application of First Amendment principles to § 215.50(7) on stipulated facts presents a legal question requiring no additional factfinding, and which this Court reviews de novo. *See Roganti v. Metropolitan Life Ins. Co.*, 786 F.3d 201, 210 (2d Cir. 2015). And it would be unjust to affirm a wholesale injunction on § 215.50(7) when it is undisputed that this statute serves a compelling state interest in at least some presumptively valid applications (*see* J.A. 68, 70), and Picard's activities fall outside the statute as construed by the district court.

As the district court emphasized, jurors are duty-bound 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. 74.) *See generally Wood v. Georgia*, 370 U.S. 375, 389 (1962) (reiterating that "trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper" (quotation marks omitted)). To protect the sanctity of jury trials, States are not limited to shielding trial participants from actual outside pressure, but "may also properly protect the judicial process from being misjudged in the minds of the public." *Cox v. Louisiana*, 379 U.S. 559, 565 (1965); *accord, e.g.*, *United States v. Grace*, 461 U.S. 171, 183 (1983). Picard's demands for evidence that § 215.50(7) serves this vital interest (Opp. Br. at 37, 45) overlook the Supreme Court's pronouncement that "public confidence in judicial integrity does not easily reduce to precise definition, nor does it lend itself to proof by documentary record." *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 447 (2015).

Moreover, the Supreme Court already has squarely held that States may regulate the actions of "demonstrators, situated immediately outside a courthouse, shouting to everyone approaching the courthouse fervent

opinions about the guilt or innocence of the defendant being tried inside." *Turney v. Pugh*, 400 F.3d 1197, 1204 (9th Cir. 2005) (discussing *Cox v. Louisiana*, 379 U.S. 559). In rejecting a First Amendment challenge to Louisiana's analogous courthouse-demonstration ban, the Supreme Court held that fair trials must "exclude influence or domination by either a hostile or friendly mob," for which "[t]here is no room at any stage of judicial proceedings." *Cox*, 379 U.S. at 562. Restrictions on that activity promote faith in the outcomes of trials, both by lessening the chance of outside influence brought to bear on judges, jurors, and witnesses, and also by diminishing the chance that observers will attribute the outcomes to outside influence, versus a fair assessment of the law and evidence. In turn, these results help to maintain public confidence in our trial system as an impartial means of dispute resolution. By contrast, demonstrators outside a courthouse shouting demands, for example, that a criminal defendant on trial be convicted, or that a star prosecution witness be believed, could improperly influence jurors or at minimum engender doubt about the fairness of a guilty verdict. As the Supreme Court has concluded, this kind of activity represents "the very antithesis of due process" and "inherently threatens the judicial process." *Id.* at 562, 566.

The government therefore has the ability to guard against it. *See generally People v. Nelson*, 27 N.Y.3d 361, 367 (2016).

Indeed, Picard concedes that a "rash of concern about courthouse protests" in the late 1940s prompted numerous States and the federal government to restrict such activity. Opp. Br. at 42. And while he claims that the protested trials from back then are "now widely disparaged" (*id.* at 7 n.1), and were part of the "Second Red Scare" (*id.* at 42), the trials' content *inside* the courthouses matters less for this purpose than what occurred *outside* the courthouses: i.e., partisans of parties demanding specific outcomes, which bar associations, judges, and even United States Supreme Court Justices overwhelmingly condemned. *See* Report of Special Meeting of the Judicial Conference of the United States 9 (Mar. 1949); *see also* Letter from Att'y Gen. Nathaniel L. Goldstein to Governor Dewey (Feb. 26, 1952) (commenting that such "irresponsible conduct" was "contrary to the democratic process"), *in* Bill Jacket at 8.

These longstanding concerns about protecting the judicial process defeat any notion that Penal Law § 215.50(7) has "no plainly legitimate sweep" (Opp. Br. at 50), or that trial-specific demonstrations outside courthouses pose no "significant threat to the administration of justice"

(*id.* at 38).[4] Rather, there is a "core of easily identifiable and constitutionally proscribable conduct that the statute prohibits." *See Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 965-66 (1984) (cited in Opp. Br. at 39). A narrower injunction here would preserve the State's vital interest while fully protecting Picard's own intended advocacy.

It makes no difference that, unlike some analogous statutes, § 215.50(7) restricts speech based on content. *See* Opp. Br. at 44. Section 215.50(7)'s focus on certain types of speech narrows its application. The Supreme Court has regularly "upheld laws—even under strict scrutiny—that conceivably could have restricted even greater amounts of speech in service of their stated interests." *Williams-Yulee*, 575 U.S. at 449. And here, as the district court observed, § 215.50(7)'s content restriction furthers the State's compelling interest in preserving the integrity of

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[4] As support for the latter proposition, Picard cites a 1971 news article about student protests outside the courthouse where the Kent State trials were taking place. The relevance of this article is not immediately apparent. The article notes, however, that when a sheriff asked the students to disperse, "they obeyed," illustrating the kind of routine and informal enforcement of deterrents like § 215.50(7) that would not show up in arrest records. *See* Homer Bigart, *Tight Curbs Placed on Kent State Trial*, N.Y. Times (Nov. 23, 1971).

judicial proceedings: the statute "applies only to speech within the immediate vicinity of the courthouse," concerning "trials being held in that very courthouse at that very moment." (J.A. 73-74.)

These limitations distinguish this case from *United States v. Grace*, on which Picard relies. *See* Opp. Br. at 45-46. The federal statute challenged in *Grace* barred displaying any "flag, banner, or device," relating to any "party, organization, or movement," on Supreme Court grounds. *See* 40 U.S.C. § 6135. The statute thus imposed a "total ban" on such expressive activity "on the public sidewalks" around the Supreme Court, *Grace*, 461 U.S. at 182—unlike § 215.50(7)'s more targeted restriction on expression about pending trials. *See also id.* at 187 (Marshall, J., concurring in part) ("The application of the statute does not depend upon whether the flag, banner, or device in any way concerns a case before this Court."). The federal statute in *Grace* also arbitrarily distinguished between the "sidewalks on the perimeter" of the Supreme Court and those "across the street," *id.* at 183—as compared with § 215.50(7)'s radial 200-foot buffer zone around state courthouses. Despite these features, the Supreme Court in *Grace* did not wholly invalidate this federal statute, but rather enjoined its operation as applied to "the public sidewalks surrounding the

building." *Id.* At most, Picard is entitled as well to as-applied relief, rather than facial invalidation.

Moreover, as the district court noted, § 215.50(7) is "viewpoint neutral" because "[i]t does not single out the expression of any particular opinion." (J.A. 74.) For example, while § 215.50(7) restricts "calling for or demanding any specified action or determination" in an ongoing trial, the statute applies equally to calls for conviction or acquittal, or civil liability or dismissal, without any exceptions for particular messages or causes. Thus, much like the content-based judicial fundraising ban upheld in *Williams-Yulee*, the law here "aims squarely" at the activities "most likely to undermine public confidence" in judicial integrity, while applying to all such activities "regardless of their viewpoint," without being "riddled with exceptions." 575 U.S. at 449. These characteristics help to make § 215.50(7) "carefully tailored to the governmental interest in protecting the trial process." Opp. Br. at 44.

It is likewise immaterial that § 215.50(7) lacks an element of intent to interfere with the administration of justice.[5] Section 215.50(7)'s content and distance requirements fulfill a similar function to the intent element of some other jurisdictions' statutes because "demonstrators parading and picketing before a courthouse" regarding a pending case "may be presumed to intend to influence judges, jurors, witnesses or court officials." *Cox*, 379 U.S. at 567; *see United States v. Carter*, 717 F.2d 1216, 1220 (8th Cir. 1983) (holding that a demonstration occurring "at the very time and place" of a pending trial "is most naturally understood as being addressed to [the] judge and jury"). Under Supreme Court precedent, States have "considerable latitude" to use "speech-restrictive measures" to promote neutral judicial proceedings in appearance and fact. *Hodge v. Talkin*, 799 F.3d 1145, 1150 (D.C. Cir. 2015). That New York chose a content restriction and distance limit over an intent element is thus of no moment, when these options further the same compelling interest in related ways.

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[5] *See, e.g.*, La. Stat. Ann. § 14:401(A) (prohibiting, "with the intent of interfering with, obstructing, or impeding the administration of justice, . . . picket[ing] or parad[ing] in or near a building housing a court of the state"); 18 U.S.C. § 1507 (same for "a court of the United States").

Finally, Picard gains no traction by invoking a hypothetical "lone protestor with a posterboard sign" advocating about a specific trial outside a New York courthouse. *See* Opp. Br. at 44. The State arguably has a compelling interest in restricting even that activity. *See Grace*, 461 U.S. at 183 (noting governmental interest in shielding judges from accusations of influence by picketers, "singly or in groups"). Either way, "[w]hen the heartland of a law's applications furthers the government's interests," as here, conjuring hypothetical applications at the law's outskirts will not justify facial invalidation. *Hodge*, 799 F.3d at 1167; *see also United States v. Raines*, 362 U.S. 17, 22 (1960). Moreover, differing justifications and weighing of free-speech interests may attend different applications of § 215.50(7). *See National Treasury Emps. Union*, 513 U.S. at 478. Exploring the nuances of any other application can await a future controversy with a concrete set of facts.

In sum, if this Court were to conclude that § 215.50(7) plausibly applies to Picard's advocacy, and were to decline to certify the case to the New York Court of Appeals (see *infra*), then the district court's facial injunction should be narrowed to extend to Picard's advocacy only.

POINT III

IN THE ALTERNATIVE, CERTIFICATION TO THE NEW YORK COURT OF APPEALS COULD AVOID A NEEDLESS CONSTITUTIONAL RULING

In the alternative, if Picard's reading of Penal Law § 215.50(7) were plausible, this Court should certify the question of the statute's proper interpretation to the New York Court of Appeals, for the reasons given in the State's opening brief (at 50-54). In response, Picard either concedes or does not dispute that this case satisfies each of the three elements for certification.

First, as Picard concedes, "there do not appear to be any New York State judicial decisions construing § 215.50(7)." Opp. Br. at 51. The absence of state authority supports certification. *See, e.g.*, *Expressions Hair Design v. Schneiderman*, 877 F.3d 99, 106 (2d Cir. 2017); *Barenboim v. Starbucks Corp.*, 698 F.3d 104, 113 (2d Cir. 2012).

Second, as Picard recognizes, a ruling from the New York Court of Appeals that § 215.50(7) does not apply to his general jury-nullification advocacy would "moot this case." Opp. Br. at 52-53. That conclusion flows from the settled principle that a litigant to whom a statute does not apply does not have standing to challenge that provision under the First

Amendment. *See Smith*, 945 F.3d at 737; *Hedges*, 724 F.3d at 193. If the New York Court of Appeals were to agree with the district court that § 215.50(7) excludes general jury-nullification advocacy unrelated to a particular pending trial, then Picard would not face any credible threat of successful enforcement under § 215.50(7). See *supra* Point I.

Third, Picard does not address, much less counter, the conclusion that § 215.50(7)'s proper scope "is of importance to the [S]tate and may require value judgments and public policy choices." *Expressions Hair Design*, 877 F.3d at 105-06 (quotation marks omitted); *see Cox*, 379 U.S. at 562 (describing a State's "interest in protecting its judicial system from the pressures which picketing near a courthouse might create" as being "of the utmost importance"). Especially of late, demonstrations near government buildings about happenings inside have become a flashpoint of public concern. Concomitantly important is the extent of a State's choice to limit those demonstrations, in order to ensure the "untrammeled functioning" of the public's business. *See Cox*, 379 U.S. at 562. This topic was important enough for a prominent civil-rights organization to agree to represent Picard in this case, and for an outside entity to weigh in as amicus curiae—stressing that the permissibility of "speech about jury

nullification is important." Br. of Amicus Curiae in Support of Pl.-Appellee at 4.

Picard nonetheless opposes certification because, he asserts, Penal Law § 215.50(7) violates the First Amendment no matter how construed. *See* Opp. Br. at 50-51. He is simply incorrect on that front. See *supra* Point II. At minimum, however, the New York Court of Appeals' ruling would provide the definitive interpretation of § 215.50(7) that is critical when so much of First Amendment analysis depends on the specifics of a law's operation. Particularly where, as here, the plaintiff asserts (and the district court agreed) that a statute burdens more speech than is necessary to serve a vital government interest, the "first step" in reviewing that claim "is to construe the challenged statute," for "it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States v. Williams*, 553 U.S. 285, 293 (2008); *accord Adams v. Zenas Zelotes, Esq.*, 606 F.3d 34, 38 (2d Cir. 2010). It is undisputed that only the New York Court of Appeals may definitively interpret Penal Law § 215.50(7), and nothing would prevent that court from adopting an interpretation that differs to some degree from the parties' suggestions. Thus, certification "will materially assist" this

Court's evaluation of Picard's First Amendment claim. *See Expressions Hair Design*, 877 F.3d at 105.

Moreover, as established, a narrower construction of § 215.50(7) could dispose of this case by demonstrating that Picard lacks standing altogether. By contrast, invalidating a state statute based on a federal court's own interpretation would ignore the Supreme Court's instruction not to issue "gratuitous" and possibly "friction-generating" decisions about the validity of state statutes "not yet reviewed by the State's highest court." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997) (quotation marks omitted); *see also City of Houston v. Hill*, 482 U.S. 451, 470-71 (1987) (commenting that certification is appropriate "[w]here there is an uncertain question of state law that would affect the resolution of the federal claim"). And where, as here, a state law implicates "a delicate balance between individual rights and the public interest," the "federal courts should avoid interfering with *or evaluating* that balance until it has been definitively struck." *Osterweil v. Bartlett*, 706 F.3d 139, 143 (2d Cir. 2013).

Accordingly, in *Osterweil*, this Court asked the New York Court of Appeals to decide whether a New York Penal Law provision actually

restricted the plaintiff's eligibility for a handgun license, before deciding whether such a restriction would violate the Second Amendment.[6] *Id.* at 143. Similarly, in *In re World Trade Center Lower Manhattan Disaster Site Litigation*, this Court asked the New York Court of Appeals to resolve an open state law question that would inform whether a litigant had standing to pursue a constitutional claim, before passing on the claim's merits.[7] 846 F.3d 58, 69 (2d Cir. 2017).

Nor would certification prejudice anyone's asserted constitutional rights, when § 215.50(7) would remain enjoined in the meantime. And although Picard speculates that § 215.50(7) may face future challenges if this lawsuit eventually were dismissed (Opp. Br. at 52-53), Picard has never claimed that he personally intends to engage in any activity that would transgress § 215.50(7) if construed to extend solely to speech concerning particular ongoing trials.

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[6] After the New York Court of Appeals rejected the plaintiff's "flawed reading of the licensing statute," which did not impede his eligibility for a license, this Court "decline[d] to reach the constitutional question." *Osterweil v. Bartlett*, 738 F.3d 520, 521 (2d Cir. 2013).

[7] After the New York Court of Appeals obliged, this Court rejected the constitutional claim for lack of standing without reaching the merits. *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 892 F.3d 108, 112 (2d Cir. 2018).

Finally, contrary to Picard's contention (*id.* at 53-54), this Court's decision in *Vermont Right to Life Committee v. Sorrell* supports, rather than undermines, certification here. The Court there did not "decline[] certification." *See id.* at 53. Nor did any party request that relief when Vermont "lack[ed] a certification procedure" until "long after the district court entered its judgment and the parties briefed and argued the matter" on appeal. *Vermont Right to Life Comm.*, 221 F.3d at 385, 391 n.7. Nonetheless, at the end of its decision, this Court sua sponte advised the district court to consider whether to certify questions regarding "the meaning of the statutory provisions in issue" to the Vermont Supreme Court, under that State's newly promulgated certification law. *Id.* at 392. Although the parties agreed on remand to entry of judgment, *see* Stipulated Judgment, No. 97-cv-286 (D. Vt. Sept. 21, 2000), ECF No. 117, this Court's unilateral suggestion regarding certification reinforces the propriety of that remedy in preenforcement First Amendment challenges to allegedly ambiguous state statutes.

CONCLUSION

This Court should reverse the judgment below for lack of standing, or modify the permanent injunction to apply only to Picard's advocacy, or certify the question of Penal Law § 215.50(7)'s proper interpretation to the New York Court of Appeals.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, William P. Ford, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 5,476 words and complies with the typeface requirements and length limits of Rule 32(a)(5)-(7) and Local Rule 32.1.

/s/ *William P. Ford*