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

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PRELIMINARY STATEMENT

In 1952, New York enacted Penal Law § 215.50(7), which prohibits shouting, calling aloud, or displaying signs or placards within 200 feet of a courthouse concerning a trial being held inside. Plaintiff Michael Picard brought this lawsuit against defendant Michael Magliano, Chief of Public Safety for the New York State Unified Court System, seeking to invalidate the statute after a court officer arrested Picard in the Bronx for violating it. The U.S. District Court for the Southern District of New York (Cote, J.) declared § 215.50(7) to be facially invalid under the First Amendment and permanently enjoined its further enforcement. This Court should either reverse the judgment below for lack of standing, or narrow the judgment and injunction to apply only to Picard's alleged advocacy, or certify the question of how to interpret this state statute to the New York Court of Appeals.

Picard lacks standing because his intended activities plainly do not violate § 215.50(7), and he therefore does not face a legitimate risk of conviction under that statute. Picard wishes to continue distributing flyers near a New York courthouse—flyers that urge readers to research jury nullification, without identifying any specific ongoing trial.

However, § 215.50(7) forbids (a) shouting, calling aloud, or displaying signs or placards, but not more intimate communications like leafletting; and (b) activity that targets a specific trial being held in the adjacent courthouse, but not general criminal-justice advocacy.

In the alternative, this Court should narrow the judgment and facial injunction to prohibit § 215.50(7)'s enforcement solely as to Picard's intended advocacy. The district court's wholesale invalidation of this subsection ignored well-established principles of judicial restraint that require remedies to be tailored to the parties and facts of a case and that disfavor facial First Amendment challenges. Restraint is particularly important here because—as the district court acknowledged, and as Picard does not dispute—the State has a compelling interest in regulating the activities to which § 215.50(7) extends. In particular, this provision aims to shield specific ongoing trials from disruptive actions that could actually impair, or lead the public to doubt, the fairness and impartiality of those proceedings.

Finally, if there were any doubt about the scope of § 215.50(7) or its applicability to Picard's advocacy, this Court should certify those state law questions to the New York Court of Appeals. That court is uniquely

situated to provide a definitive construction of § 215.50(7), which has never been judicially examined by a state court. Such a construction could eliminate the need to confront the constitutional issues that Picard raises in this case.

JURISDICTIONAL STATEMENT

The district court had original subject matter jurisdiction over this federal civil-rights action under 28 U.S.C. §§ 1331 and 1343. This Court has appellate jurisdiction under 28 U.S.C. § 1291. The district court entered judgment for Picard on August 14, 2020. (Joint Appendix (J.A.) 79-80.) The State of New York 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.)

QUESTIONS PRESENTED

Section 215.50(7) of New York's Penal Law prohibits (a) calling aloud, shouting, or displaying placards or signs within 200 feet of a courthouse (b) about a particular trial being held inside. The questions presented are:

1. Does Picard have standing to facially challenge the constitutionality of this provision when his intended activity—handing out flyers near a courthouse that generally inform passersby about jury nullification—plainly does not violate the statute?

2. Assuming Picard has standing, did the district court abuse its discretion by facially invalidating § 215.50(7), rather than invalidating and enjoining it only as applied to Picard's advocacy?

3. Should this Court certify to the New York Court of Appeals the question of whether § 215.50(7) actually prohibits Picard's advocacy, when no available state decision has construed or applied § 215.50(7) and a definitive interpretation could obviate the need for a constitutional ruling here?

STATEMENT OF THE CASE

A. Penal Law § 215.50(7)'s Bar on Certain Expressive Activity Within 200 Feet of a Courthouse Concerning a Trial Being Held Inside

In this action, plaintiff challenges the subsection of New York's criminal contempt statute forbidding certain types of expressive activity near state courthouses, concerning trials being held inside. Statutes regulating demonstrations near courthouses were enacted by Congress and by state legislatures in the 1950s in response to widespread demonstrations outside courthouses aimed at influencing the results of the specific judicial proceedings occurring therein.[1]

In particular, in 1950, Congress passed a law restricting picketing and parading near federal courthouses. *See* Ch. 1024, tit. I, § 31(a), 64 Stat. 987, 1018 (codified at 18 U.S.C. § 1507 ("Picketing or parading")). Two years later, New York's Legislature amended the State's misdemeanor criminal contempt statute to make someone guilty of that offense when

> [o]n 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

[1] This history is detailed more fully in Point II.A of this brief.

> 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).

Materials in the subsection's bill jacket shed light on the events that precipitated this law and the purposes that it serves. In the late 1940s, a yearlong trial was held in the Southern District of New York resulting in the conviction of a dozen defendants for conspiring to overthrow the federal government by force or violence. *See United States v. Dennis*, 183 F.2d 201, 215 (2d Cir. 1950) (upholding convictions under 18 U.S.C. § 2385), *aff'd*, 341 U.S. 494 (1951). During the entire trial, opponents of the prosecution formed a picketing line on the sidewalk "immediately in front of the Federal Courthouse, at Foley Square." 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. The picketers "carried signs demanding the dismissal of the indictment, the freeing of the defendants and other remedies," often addressing the presiding judge, Harold Medina, "by name." *Id.* As one reporter has recounted, "[a]mong the throngs of demonstrators who crowded into Foley Square were sign-waving provocateurs whose placards bore unnerving messages"

such as "'Adolf Hitler never died, he's sitting at Medina's side.'" Jeremy Duda, If This Be Treason 202 (2016).

The New York Attorney General had supported the amendment, calling it necessary to deter "irresponsible conduct" that was "contrary to the democratic process." Letter from Att'y Gen. Nathaniel L. Goldstein to Governor Dewey (Feb. 26, 1952), *in* Bill Jacket at 8. While the New York City Bar Association had objected that existing law barring disruption of court proceedings already dealt with the problem, *see* Mem. from N.Y.C. Bar Ass'n, *in* Bill Jacket at 3, the bill's sponsor in the State Assembly responded that existing law provided no remedy for the "inherent evil" of picketing "immediately in front of the Courthouse"—which, even if quiet and orderly, is aimed at attempting to influence judges or jurors "in the determination of the litigation taking place in the Court," Letter from Assemblyman Duffy, *in* Bill Jacket at 10.

B. Picard's Nonspecific Advocacy for Jury Nullification Outside the Bronx Hall of Justice

Since 2016, plaintiff Michael Picard, a Connecticut resident, has handed out flyers advocating for jury nullification on sidewalks near courthouses in the Northeastern United States. (J.A. 29.) Picard believes that jury nullification is an effective means to protest unjust laws and that the sidewalks outside courthouses are the "most relevant location to inform the public about jury nullification." (J.A. 29.)

Picard's advocacy is wholly unrelated to any specific proceeding taking place in the courthouses that he visits. He does not inform himself about the "particular case[s]" occurring in a courthouse and has "never attempted to influence a juror's vote." (J.A. 30.) Rather, without knowledge of any case in the courthouse, Picard stands outside and offers flyers to any interested passerby. (J.A. 30.) Picard's leafletting is his sole means of expressing his views; there is no indication that he shouts or otherwise calls out to people in proximity, and the only sign or placard that he displays is one stating "Jury Info," not mentioning anything about jury nullification or any pending case. (J.A. 30.)

On the morning of December 4, 2017, Picard visited the Bronx County Hall of Justice, a criminal courthouse on East 161st Street in the

Bronx. (J.A. 30.) At around 8:00 a.m., he stood on the public sidewalk just outside the building's main entrance. (J.A. 30.) There, Picard held aloft a sign stating, in bolded letters, "Jury Info." (J.A. 30; *see* J.A. 35 (image of sign).) Also in his possession were flyers reading on one side, "No Victim? No Crime. Google Jury Nullification"; and on the other side, "One has a moral responsibility to disobey unjust laws—Martin Luther King Jr." (J.A. 30; *see* J.A. 37-38 (images of sides of flyer).)

Picard handed these flyers to about four passersby, without asking whether any of them was then a juror. (J.A. 30.) Picard was "not aware of any particular cases in which jurors were being impaneled or serving at the time" and "did not discuss any particular criminal proceeding with anyone." (J.A. 30.)

After a few minutes, a court officer told Picard that it was against the law "to distribute flyers about jury nullification" within 200 feet of the courthouse. (J.A. 31.) The officer several times asked Picard to move farther from the building, but he refused. (J.A. 31.) The officer then arrested Picard allegedly for violating Penal Law § 215.50(7). (J.A. 31.) But he was released hours later when the Bronx District Attorney's Office declined to prosecute the case, on the ground that since "the officer did

not measure the distance between [Picard] and the courthouse, the People have insufficient evidence to meet their burden of proof at trial." (J.A. 40 (Affidavit of Bronx Assistant District Attorney).[2])

Picard alleges that in light of this experience, he fears being arrested and prosecuted under § 215.50(7) if he were again to advocate for jury nullification within 200 feet of a courthouse in this State. (J.A. 32.) He seeks an injunction so that he may resume his advocacy, including in the Bronx, without fear of arrest or prosecution. (J.A. 32.)

C. This Preenforcement Challenge

In April 2019, Picard filed this action under 42 U.S.C. § 1983 against defendants Michael Magliano, Chief of Public Safety for the New York State Unified Court System, and Darcel Clark, Bronx District Attorney, in their official capacities.[3] The complaint sought a declaration that Penal Law § 215.50(7) violated the First Amendment and a

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[2] Although the district court at one point stated that a New York County Assistant District Attorney made the decision not to prosecute Picard (J.A. 63), it was instead a Bronx Assistant District Attorney who made that decision, as Picard avers and as the court correctly stated elsewhere (*see* J.A. 9, 20, 31).

[3] The Bronx District Attorney's Office has not appealed.

permanent injunction against the statute's enforcement, either facially or as applied to Picard's intended advocacy. (J.A. 8-16.)

1. The district court holds that Picard has standing to maintain a First Amendment challenge to Penal Law § 215.50(7)

Defendants moved to dismiss the case for lack of standing. In particular, the State asserted that Picard's jury-nullification advocacy did not violate § 215.50(7), which prohibits only certain types of expressive activity within 200 feet of a courthouse, not including handing out flyers; and only when that expression relates to a particular trial pending inside, rather than consisting of general advocacy. (*See* Dist. Ct. ECF No. 24, at 8-12.) In opposing dismissal, Picard asserted that although a narrower interpretation "may be plausible," § 215.50(7) arguably was broad enough to cover his jury-nullification advocacy, which was speech generally concerning the conduct of criminal trials being held in the nearby courthouse. (Dist. Ct. ECF No. 27, at 10-11.) And Picard cited his prior arrest outside the Bronx courthouse as evidence supporting a credible fear that § 215.50(7) would be enforced against him in the future. (*See id.*)

In a December 2019 decision, the district court denied the motion, holding that Picard had standing to raise a First Amendment challenge to § 215.50(7). (J.A. 17-28.) The court remarked that the State "may be correct" that § 215.50(7) restricts speech "only if directed at a specific trial." (J.A. 26.) But the court also concluded that Picard's competing interpretation appeared reasonable because, even if not directed at a particular trial, "advocacy of jury nullification arguably constitutes speech that concerns the conduct of a trial being held in the courthouse." (J.A. 24-25.) And the court held that, in any event, Picard's 2017 arrest made it "reasonable for him to fear" that § 215.50(7) prohibits his conduct and "that he will be arrested if he again distributes his fliers within two hundred feet of a New York courthouse." (J.A. 25.)

2. The district court concludes that § 215.50(7) facially violates the First Amendment and permanently enjoins its enforcement

The parties agreed to a bench trial on stipulated facts. In a July 2020 decision, the district court held that Penal Law § 215.50(7) facially violates the First Amendment and permanently enjoined the statute's enforcement. (J.A. 61-78.)

At the outset, the court rejected defendants' renewed claim that Picard lacked standing to maintain this First Amendment action. (J.A. 66 n.2.) The court concluded that Picard's actions "did not violate" § 215.50(7) "as construed here," but the court adhered to its determinations that Picard's conduct could be viewed as arguably violating the statute, and that his prior arrest gave him a reasonable basis to fear enforcement under the law. (J.A. 66 n.2.)

The court concluded that § 215.50(7) applies only to speech near a courthouse "that concerns trials being held in that very courthouse at that very moment." (J.A. 73-74.) It based that conclusion on the text of the statute; neighboring provisions in § 215.50, which are "directed towards the integrity of an ongoing court proceeding"; and the legislative history, which detailed concerns about the picketing of a federal courthouse to protest specific, ongoing prosecutions. (J.A. 70-73.)

The court then proceeded to subject the statute to strict scrutiny, and held that it facially violated the First Amendment. The court noted that, while viewpoint-neutral, § 215.50(7) restricts speech based on content—i.e., whether it "concerns the conduct of a trial that is ongoing

in an adjacent courthouse"—and that this restriction extends to public sidewalks, a traditional public forum. (J.A. 70.)

The district court acknowledged that it was undisputed that § 215.50(7) serves the compelling state interest of protecting "the integrity of the judicial process." (J.A. 68, 70.) And the court observed that the U.S. Supreme Court has labeled "'vital'" the state interest in "'safeguarding public confidence'" in judicial proceedings' fairness and integrity. (J.A. 68 (quoting *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 445 (2015)).) As the district court explained, § 215.50(7) fulfills this purpose "by shielding trial participants, including jurors and witnesses, from undue influence" during trials, thereby promoting "the rule of law and the legitimate functioning of the justice system." (J.A. 70.)

Moreover, the district court recognized that § 215.50(7) bore hallmarks of narrow tailoring. For example, the law "applies only to speech within the immediate vicinity of the courthouse," concerning trials ongoing therein. (J.A. 73-74.) It prohibits only "calling aloud, shouting and displaying placards," thus aiming to prevent jurors and witnesses from "being subjected at the courthouse entrances to shouting or signage concerning the trial." (J.A. 74.) And it leaves a person otherwise free to

"speak her mind to assembled journalists or others gathered near the courthouse." (J.A. 74-75.)

Nevertheless, the district court concluded that it was not necessary for the State to criminalize speech in this way in order to protect the integrity of ongoing trials. (J.A. 75.) According to the court, "content-neutral regulations" could prevent speakers from blocking sidewalks or engaging in unruly behavior, and other laws criminalized intentionally tampering with jurors and witnesses. (J.A. 74-75.) The court also posited that jurors or witnesses could be "escorted to and from the courthouse" past demonstrators, though the burden on the court system would be "not inconsiderable." (J.A. 75-76.)

The district court distinguished § 215.50(7) from laws barring electioneering near polling places, which benefited from a "'widespread and time-tested consensus'" of necessity. (J.A. 76 (quoting *Burson v. Freeman*, 504 U.S. 191, 206 (1992)).) In this regard, the court cited an absence of data showing that § 215.50(7) had been enforced more than sporadically in the past fifteen years—which, the court opined, could equally signify "success in deterring violations" or that there was "very little need" for the statute. (J.A. 76.) The district court also could identify

no "readily available alternative construction" that might avoid a constitutional question. (J.A. 77.)

In all, the district court held § 215.50(7) to be a content-based restriction on speech in a public forum that failed strict scrutiny. (J.A. 78.) The court thus declared the statute facially invalid and permanently enjoined its future enforcement. (J.A. 79-80.)

STANDARD OF REVIEW

This Court reviews de novo whether a plaintiff has constitutional standing to sue, *see W.R. Huff Asset Mgmt. v. Deloitte & Touche LLP*, 549 F.3d 100, 106 (2d Cir. 2008), as well as any state law interpretation on which the standing decision rests, *see In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 846 F.3d 58, 63 (2d Cir. 2017).

This Court also reviews de novo the district court's legal conclusions following a bench trial on stipulated facts. *See Roganti v. Metropolitan Life Ins. Co.*, 786 F.3d 201, 210 (2d Cir. 2015). And the Court reviews for abuse of discretion the ultimate decision to enter permanent injunctive relief. *See Knox v. Salinas*, 193 F.3d 123, 128-29 (2d Cir. 1999).

SUMMARY OF ARGUMENT

The district court erred in holding that Picard has Article III standing to mount this First Amendment attack on Penal Law § 215.50(7). Properly construed, this provision bars certain expressive activity within 200 feet of a courthouse relating to a specific, identifiable trial ongoing in that courthouse. And it extends solely to calling aloud, shouting, or holding placards or signs—activities that may project the speaker's views towards unwitting jurors, judges, or others entering or leaving the courthouse. Under any fair construction, the provision does not cover Picard's activity here, which involved handing out flyers urging people to research the concept of jury nullification, not shouting or calling out such a message; and which did not address any specific proceeding then happening in the nearby courthouse. Because his intended activity thus plainly falls outside § 215.50(7)'s scope, Picard lacks standing to challenge the statute or invalidate its application to other activity.

Even if § 215.50(7) arguably proscribed Picard's general jury-nullification advocacy, the district court abused its discretion by facially invalidating the statute, rather than enjoining its operation as applied to that advocacy. As the district court itself recognized, the

statute serves the undeniably compelling state interest of protecting the integrity of the judicial process, both by minimizing actual interference with trials and by promoting public confidence in their regularity. It does so by restricting certain modes of expression most likely to impair these interests, while leaving speakers free to express their views otherwise. Invalidating and enjoining the statute in all of its applications thus went too far. The district court needed to do no more here than to invalidate § 215.50(7) as applied to Picard's sign-and-leaflet method of messaging about jury nullification, leaving for another day the validity of other applications not presented by the facts of this case.

Finally, if there is any doubt about these points, the Court should certify this case to the New York Court of Appeals. The statute at issue here, § 215.50(7), has never been examined by a New York court. A conclusive interpretation from the State's highest court could confirm Picard's lack of standing or else, at minimum, aid this Court's review of the law under the First Amendment.

ARGUMENT

POINT I

PICARD LACKS STANDING TO MAINTAIN A FIRST AMENDMENT CHALLENGE TO PENAL LAW § 215.50(7)

A plaintiff has constitutional standing to attack a statute or regulation on free-speech grounds "only insofar as her own conduct falls within the ambit of the specific rule of law that she challenges." *United States v. Smith*, 945 F.3d 729, 737 (2d Cir. 2019). This prerequisite—essential to establishing injury in fact and redressability—applies to claims that a law is overbroad and that it "impose[s] content-based restrictions on speech without adequate governmental justifications." *Id.* at 739; *see also Hedges v. Obama*, 724 F.3d 170, 193 (2d Cir. 2013).

For a preenforcement First Amendment challenge to a state statute, the injury requirement is merely "relaxed," not eliminated. *National Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 689 (2d Cir. 2013). To establishing standing, a plaintiff must allege the intent to engage in expression "proscribed by a statute," such that the plaintiff suffers from a credible threat of prosecution thereunder. *Id.* (quotation marks omitted); *see Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158-59 (2014). Where the State asserts that "the statute does not reach" the

intended expression, the plaintiff must proffer a statutory interpretation that is objectively "reasonable enough" to support a legitimate fear of enforcement. *Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 382-83 (2d Cir. 2000).

Here, the district court recognized that, properly construed, Penal Law § 215.50(7) does not apply to Picard's jury-nullification advocacy. But the court held that Picard had standing to facially challenge the law under the First Amendment anyway, on a theory that the law arguably extended to his intended activities. That standing ruling was in error and should be reversed.

A. Section 215.50(7) Applies Only to Certain Speech Near Courthouses Concerning Specific Ongoing Trials, and Not to General Advocacy via Distributing Flyers.

Where, as here, a party's standing to sue turns on state law, this Court attempts to determine how the state courts would interpret that law. *See, e.g.*, *In re Word Trade Ctr.*, 864 F.3d at 63-68. No available New York judicial decision *ever* has construed or applied Penal Law § 215.50(7)—a fact that would strongly favor certification if the law's meaning were unclear. See *infra* Point III. But the usual interpretative tools used by New York courts confirm that this subsection applies

(a) only to certain forms of expressive activity within 200 feet of a courthouse—i.e., shouting, calling out, or displaying signs or placards; and (b) only when that expressive activity targets a specific trial or class of trials then occurring in the nearby courthouse. The statute does not extend to the type of activity in which Picard intends to engage here, which is general advocacy unconnected to any specific trial, effected through leafletting rather than more overt and disruptive forms of communication.

The plain language of § 215.50(7) compels this conclusion. *See Matter of Shannon*, 25 N.Y.3d 345, 351 (2015) (the clearest indicator of statutory meaning is the language itself). To begin, this provision reaches only expressive activity "concerning the conduct of a trial being held in [a] 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).

Read naturally, this language refers to speech concerning a particular, ongoing trial. It describes speech "concerning a trial *being held* in [the] courthouse," *id.* (emphasis added), a grammatical usage that invokes something happening "now," or at "the time mentioned," *Stack v.*

City of Brooklyn, 150 N.Y. 335, 341 (1896); *accord Farrey v. Sanderfoot*, 500 U.S. 291, 296 (1991) (present participle "refers to a temporal event"); *In re Deepwater Horizon*, 745 F.3d 157, 171-72 (5th Cir. 2014) (present participles "connote active conduct"); *United States v. Balint*, 201 F.3d 928, 933 (7th Cir. 2000) (present participle "indicates continuing action"). Thus, the district court recognized that § 215.50(7) applies "only" to speech near a courthouse "that concerns trials being held in that very courthouse at that very moment."[4] (J.A. 73-74.)

Subsequent language in this provision—pertaining to speech about the "character of the court or jury engaged in *such trial* or calling for or demanding any specified action . . . in connection with *such trial*"—plainly refer to the same trial, i.e., the one "being held" in the courthouse in question. *See* Penal Law § 215.50(7) (emphasis added); *see also United States v. Edwards*, 834 F.3d 180, 193 (2d Cir. 2016) (using word "such" in

[4] Further, the statute's use of the indefinite article 'a' before trial—i.e., "a trial"—indicates that the expression in question may concern "one or more" ongoing trials. *See Clearview Ctr., Inc. v. New York State Off. of Medicaid Inspector Gen.*, 172 A.D.3d 1582, 1586 (3d Dep't 2019) (indefinite article admits plural); *Cook v. Carmen S. Pariso, Inc.*, 287 A.D.2d 208, 213 (4th Dep't 2001) (same); *Lewis v. Spies*, 43 A.D.2d 714, 715 (2d Dep't 1973) (same).

later clause "refer[s] back" to earlier clause, "to require equivalency"). Moreover, in common parlance, prohibiting someone from demanding that a judge or jury take "specified action" in "a trial being held in [a] courthouse," Penal Law § 215.50(7), presupposes a particular trial in which that specified action could be taken. Read as a whole, the statute thus evinces legislative intent to cover differing aspects of the same ongoing trial: from its conduct (including rulings, witness testimony, and other evidence), to the judge and jury presiding over it, to the speaker's desired outcome.

Reinforcing the point, nearly all of Penal Law § 215.50's other subsections target conduct that disrespects the integrity of specific, ongoing matters—whether misbehaving "during the sitting of a court," Penal Law § 215.50(1); creating a disturbance "tending to interrupt a court's proceedings," *id.* § 215.50(2); disobeying a court's lawful order, *id.* § 215.50(3); refusing to be sworn as a witness in a case, *id.* § 215.50(4); or knowingly publishing "a false or grossly inaccurate report of a court's proceeding," *id.* § 215.50(5). The choice to define the activity that § 215.50(7) forbids as criminal contempt, on par with these other transgressions, confirms a legislative focus on interference with

identifiable, ongoing trials. The district court reached the same conclusion after examining § 215.50(7)'s surrounding provisions. (J.A. 70-71.) *See Matter of Anonymous v. Molik*, 32 N.Y.3d 30, 37-38 (2018) (holding it "clear" that subsection related to abuse and neglect findings when located in broader statute on that subject).

The available legislative history further confirms § 215.50(7)'s focus on speech about particular, ongoing trials. Materials in the subsection's bill jacket discussed demonstrations in the late 1940s in Foley Square, when picketers demanded the dismissal of specific prosecutions and addressed the presiding judge by name. New York's Attorney General labeled this sort of targeting of trials and judges "irresponsible" and injurious to the democratic process. Letter from Att'y Gen. Goldstein, *in* Bill Jacket at 8. The bill's Assembly Sponsor agreed, endorsing a prohibition on such attempts to influence judges and jurors "in the determination of *the litigation taking place in the Court*." Letter from Assemblyman Duffy, *in* Bill Jacket at 10 (emphasis added). The district court likewise concluded that this legislative history "confirmed" § 215.50(7)'s intent to restrict speech regarding "ongoing court proceedings." (J.A. 71.)

In addition, and independently, § 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. The statute applies only to someone who "calls aloud, shouts, [or] holds or displays placards or signs" on the relevant subjects. Penal Law § 215.50(7). All of the items in this list involve expressive activities that project past the speaker's location, to a broad range of possibly unwitting viewers or listeners. By contrast, distributing flyers mimics private conversation—which § 215.50(7) does not prohibit, as the district court recognized. (J.A. 74-75.)

Although Picard argued below that his flyers could have been "placards" under § 215.50(7), this proffered reading is unsupportable. The dictionary definition of that term refers most commonly to public-facing displays that a broad audience can view, not to one-on-one communications. *See Black's Law Dictionary* (4th ed. 1951) (defining "placard" as "an advertisement or public notification"). And such an interpretation would cohere with the "adjacent words" in the statute, which refer to other expressive activities—e.g., shouting, calling out, and holding signs—sharing the same character. *See Matter of Kese Indus. v. Roslyn Torah Found.*, 15 N.Y.3d 485, 491-92 (2010).

Indeed, when § 215.50(7) was enacted in 1952, placards and leaflets were viewed as distinct items that occupied unequal strata in the hierarchy of expressive activity. "Billboards, street car signs, and placards" were "in a class by themselves," for they were "constantly before the eyes of observers" and could "be seen without the exercise of choice or volition on their part." *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932) (quotation marks omitted). Conversely, leaflets were described as "weapons in the defense of liberty," not as readily subject to "penalties for the[ir] distribution." *Schneider v. Town of Irvington*, 308 U.S. 147, 162 (1939); *see also Cox v. New Hampshire*, 312 U.S. 569, 573 (1941) (noting that petitioners "were not prosecuted" either "for distributing leaflets, or for conveying information by placards"). Decades after § 215.50(7)'s enactment, case law still "clearly establish[ed] that non-commercial leaflet distribution [wa]s an essential right," whereas "picketing, marches, placards and similar modes of communication" had yet to be "afforded comparable respect." *Wolin v. Port of N.Y. Auth.*, 392 F.2d 83, 92 (2d Cir. 1968). New York's Legislature is presumed to have understood this distinction when crafting § 215.50(7). *See generally Lincoln Bldg. Assocs. v. Barr*, 1 N.Y.2d 413, 417 (1956).

There is thus no support in the statute's text, structure, or history for Picard's contention that § 215.50(7) "arguably" bars distributing flyers at all—let alone those generally regarding "criminal trials being held in New York courthouses," but unconnected to a particular pending trial. (*See* Dist. Ct. ECF No, 27, at 10.) Among other things, that argument simply ignores the critical distinction between expressive activity that targets a specific proceeding, and expressive activity that addresses judicial proceedings in general. And § 215.50(7) is not alone in drawing this distinction: for example, the other provisions of § 215.50 (such as the prohibition on misbehavior in court) similarly would not make sense in the absence of an identifiable ongoing proceeding.

Even if § 215.50(7) remained ambiguous despite these ample sources of meaning, a New York court would be obligated to adopt the narrower interpretation under the rule of lenity. This rule provides that, "[i]f two constructions of a criminal statute are plausible, the one more favorable to the [criminal] defendant" controls. *People v. Roberts*, 31 N.Y.3d 406, 423-24 (2018) (quotation marks omitted). And this interpretative principle prevents Picard from inflating § 215.50(7)'s reach within this civil lawsuit solely to argue that the statute, so

expanded, ought to be struck down. So too does "the strong presumption of constitutionality" that New York's courts have long afforded state legislation. *E.g.*, *Lincoln Bldg.*, 1 N.Y.2d at 418. Nothing in either the text or the history of § 215.50(7) suggests that New York's Legislature, to remedy the perceived harm of picketing particular trials, enacted a sweeping ban on all speech outside of courthouses in any way relating to the trial process.

B. Because § 215.50(7) Does Not Plausibly Apply to His Sign-and-Flyer Mode of Expression, Picard Lacks Standing to Challenge the Statute.

In its posttrial decision, the district court correctly stated that Picard's jury-nullification advocacy outside the Bronx courthouse "did not violate" Penal Law § 215.50(7). (J.A. 66 n.2.) But the court adhered to its prior ruling that Picard had standing to maintain this First Amendment challenge, because his advocacy "arguably" constitutes speech that § 215.50(7) prohibits. (J.A. 24-25.) That conclusion is untenable.

The court below found, as Picard averred, that Picard had stood on the sidewalk outside the main entrance to the Bronx criminal courthouse; held up a sign reading, "Jury Info"; and handed to about four passersby flyers that said on one side, "No Victim? No Crime. Google Jury

Nullification," and on the other, "One has a moral responsibility to disobey unjust laws—Martin Luther King Jr." (J.A. 30, 35 (sign), 37-38 (flyer), 62-63.) None of this activity was barred by § 215.50(7).

First, nothing that Picard conveyed concerned any specific ongoing trial. Rather, the sign stating "Jury Info" promised information to jurors, and the leaflets merely advocated in general for jury nullification. By his admission, Picard was "not aware of any particular cases in which jurors were being impaneled or serving at the time" and "did not discuss any particular criminal proceeding with anyone." (J.A. 30.) Indeed, Picard's flyers did not even call for his audience to engage in jury nullification: instead, the flyers urged readers to perform internet research on that topic, endorsed disobedience of "unjust" laws, and suggested that no crime could occur without a "victim." (J.A. 37-38.) Taken together, the flyer's request and bromides do not reasonably relate to any identifiable case or type of case then occurring in the Bronx courthouse, or suggest any concrete action in such a case.

At most, Picard's sign and flyers raised questions about the fairness of certain unspecified laws and suggested that jurors (or others) should disobey those unspecified laws in an unspecified manner. Thus, these

materials did not plausibly concern "the conduct of" any specific, ongoing "trial being held" in the nearby courthouse, let alone demand "specified action" by the court or jury in that trial. *See* Penal Law § 215.50(7). This conclusion accords with decisions holding that jury-nullification advocacy more detailed than Picard's could not constitute jury tampering, because it did not concern any specific pending case. *See United States v. Heicklen*, 858 F. Supp. 2d 256, 270, 275 (S.D.N.Y. 2012) (defendant with "no inkling" of cases pending in courthouse distributed pamphlets "urg[ing] jurors to follow their consciences regardless of instructions on the law"); *People v. Iannicelli*, 449 P.3d 387, 389 (Colo. 2019) (defendant handed to jurors reporting for duty brochures about jury nullification, defined "as the process by which a jury in a criminal case acquits the defendant regardless of whether he or she has broken the law").

Second, Picard plainly was not engaged in shouting, calling out, or displaying a sign or placard that in any manner would transgress § 215.50(7). As established, the act of leafletting is more akin to private conversation than to the broad-based, indiscriminate communications the statute covers. And the only sign that Picard publicly displayed contained a two-word solicitation—"Jury Info"—that did not plausibly

concern "the conduct of a trial being held in [the] courthouse." *See* Penal Law § 215.50(7). Picard thus conformed his actions to § 215.50(7) in this respect as well. *See generally Wolin*, 392 F.2d at 93 (describing form of street oration where individuals "stand with placards and converse with persons who accept their handbills").

Contrary to the district court's conclusion, Picard's 2017 arrest in the Bronx did not make it objectively "reasonable" for him to fear that § 215.50(7) prohibits his conduct. (*See* J.A. 24-25.) In arguing otherwise below, Picard analogized this case to *Susan B. Anthony List v. Driehaus*, 573 U.S. 149. There, a candidate for office complained to the Ohio Election Commission that an organization's advertisement had libeled the candidate. After a hearing, the Commission found "probable cause that a violation had been committed," but the candidate lost the election and withdrew the complaint. *Id.* at 154-55. The Supreme Court held that the administrative probable cause finding supported a reasonable belief that the organization could face sanctions for publishing "the same sort of statement" against someone else in the future. *Id.* at 162. The Court thus held that the entity had standing to challenge the law. *See id.*

This case features no similar probable cause finding. To the contrary, the only judgment made by the Bronx District Attorney's Office was its decision not to prosecute, on the stated ground that "the officer did not measure the distance between [Picard] and the courthouse," precluding the People from meeting their "burden of proof."[5] (J.A. 40.) And even if the officer who made the arrest had found probable cause that Picard violated § 215.50(7), that would not be sufficient to confirm Picard's expansive interpretation of the statute or otherwise to confer standing on him.

Under well-established law, an officer's subjective belief that an individual has violated a law is "irrelevant" to the objective question of whether there was probable cause for the arrest.[6] *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004); *United States v. Gagnon*, 373 F.3d 230, 239 (2d

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[5] Contrary to Picard's argument below, the assigned Bronx ADA never "concluded" that § 215.50(7) applied to Picard. (*See* Dist. Ct. ECF No. 27, at 10-11.) There was no need to reach that question, given the ADA's hesitation over the lack of evidence about where Picard had stood.

[6] Picard has relied on this very principle in arguing that a separate arrest in 2015 was unsupported by probable cause, despite the fact that the officers charged him with violating two Connecticut criminal statutes for possessing "a firearm in plain view while standing in a congested area at the bottom of an on-ramp" to Interstate-84. *Picard v. Torneo*, 2019 WL 4933146, at *3 (D. Conn. 2019).

Cir. 2004). And the subjective belief of one officer here does not carry the same weight, or create the same risk of future enforcement actions, as the probable cause finding made by the Ohio Election Commission in *Susan B. Anthony List*.

To be sure, a record of past enforcement can help to show that a threat of future enforcement for similar conduct is "sufficiently imminent" to support standing. *Susan B. Anthony List*, 573 U.S. at 158-59 (citing *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)). But that conclusion mainly regards the relaxed ripeness component of preenforcement standing, enabling someone to challenge a law without needing to take further action that may violate it. *See National Org. for Marriage*, 714 F.3d at 689. To demonstrate actual First Amendment injury, a plaintiff still must tender a statutory interpretation that is "reasonable enough" to establish a credible fear of prosecution under "the definition proffered." *Vermont Right to Life*, 221 F.3d at 383. Where a plaintiff cannot do so, redress-ability also is lacking because the statute in question "neither adds to nor subtracts from" whatever actual speech restrictions would exist "in its absence." *Hedges*, 724 F.3d at 193; *accord Smith*, 945 F.3d at 737.

Here, Picard relies on the mere fact of his prior arrest, which did not lead to prosecution, as proof that § 215.50(7) actually applied to his activity. But on this point, a single officer's purely subjective belief does not control. *See Devenpeck*, 543 U.S. at 153; *Gagnon*, 373 F.3d at 239. Indeed, Picard alleges only an isolated arrest, in derogation of the statute's language and far outside its heartland, without any history of remotely similar enforcement as against him or anyone else. Thus, unlike the formal adjudication of probable cause at issue in *Susan B. Anthony List*, an officer's reliance on a plainly inapplicable state statute as a basis for arrest does not permit the arrestee to challenge that law under the First Amendment in a preenforcement civil suit.

POINT II

IF ANY INJUNCTION IS WARRANTED, THE DISTRICT COURT ABUSED ITS DISCRETION BY ENJOINING § 215.50(7) FACIALLY INSTEAD OF AS APPLIED

Even if some plausible reading of § 215.50(7) extended to Picard's intended activity, or he otherwise had a reasonable fear of imminent enforcement, the appropriate remedy would have been a judgment and injunction prohibiting the statute's application to that activity. Instead, the district court declared § 215.50(7) facially invalid and altogether enjoined the provision's future enforcement.

Two related principles underscore the error in the relief ordered here. *First*, "when confronting a constitutional flaw in a statute, [courts] try to limit the solution to the problem." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328-29 (2006). A primary means of doing so is "to enjoin only the unconstitutional applications of a statute," while leaving other applications in force. *Id.* at 329. *Second*, facial challenges are "disfavored," even under the First Amendment. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008). Claims of facial invalidity often anticipate unnecessary constitutional issues and "threaten to short circuit the democratic process," by striking

down state laws that state courts may "have had no occasion to construe." *Id.* at 450-51; *see Ayotte*, 546 U.S. at 331 (labeling facial injunctions a "most blunt remedy"). There is little reason to facially invalidate a law that, as here, possesses applications that are likely valid, *Washington State Grange*, 552 U.S. at 451, especially "when a narrower remedy will fully protect the litigants," *United States v. National Treasury Emps. Union*, 513 U.S. 454, 478 (1995).

A. The District Court's Facial Ruling Improperly Bars the State from Enforcing § 215.50(7) in Circumstances Where Doing So Advances a Compelling State Interest.

Here, 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." (J.A. 68, 70.) The Supreme Court recognized this interest more than half a century ago in *Cox v. Louisiana*, which upheld a state statute barring picketing or parading near a courthouse with the intent to obstruct justice. 379 U.S. 559, 560-64 (1965). The Court viewed of "utmost importance" a State's interest "protecting its judicial system from the pressures which picketing near a courthouse might create." *Id.* at 562. And the Court

reasoned that fair trials needed to "exclude influence or domination by either a hostile or friendly mob," which was "the very antithesis of due process." *Id.*

Decades later, the Supreme Court reiterated the "importance" of the notion that "[c]ourts are not subject to lobbying" and that "they do not and should not respond to parades, picketing or pressure groups." *United States v. Grace*, 461 U.S. 171, 183 (1983). And just a few years ago, the Supreme Court "strongly reinforced" the importance of "a judiciary uninfluenced by public opinion and pressure," while reaffirming the latitude that States possess to advance that interest "even through speech-restrictive measures." *Hodge v. Talkin*, 799 F.3d 1145, 1150 (D.C. Cir. 2015) (discussing *Williams-Yulee v. Florida Bar*, 575 U.S. 433).

As the district court aptly observed, § 215.50(7) bears numerous indicia of narrow tailoring to serve this compelling state interest. In general, whether a regulation is narrowly tailored turns on "the scope of its application relative to the government objectives being pursued." *Mastrovincenzo v. City of New York*, 435 F.3d 78, 102 (2d Cir. 2006). Here, the court below observed that § 215.50(7)'s content restriction directly connects to its goal of preserving judicial integrity: the statute applies

"only" to speech right outside a courthouse concerning "trials being held in that very courthouse at that very moment." (J.A. 73-74.) And a State may regulate "expressive activity, even in a quintessential public forum," that "interfere[s] with other important activities for which the property is used."[7] *Burson v. Freeman*, 504 U.S. 191, 197 (1992) (plurality op.); *cf. Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n*, 447 U.S. 530, 538 (1980) (government may restrict categories of speech that disrupt public facilities' dedicated functions).

Further, as the district court emphasized, § 215.50(7) restricts only "calling aloud, shouting and displaying placards"—all of which project past the speaker's location—to help shield witnesses or jurors from "being subjected at the courthouse entrances to shouting or signage concerning the trial." (J.A. 74.) In doing so, the statute leaves other modes of communication unimpeded: for example, a person may talk at normal volume to "journalists or others gathered near the courthouse." (J.A.

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[7] Accordingly, in *Grace*, the Supreme Court enjoined "a total ban" on displaying expressive signs as applied to the sidewalks surrounding the Supreme Court, in part because the prohibition was *overinclusive*. 461 U.S. at 182; *see id.* at 187 (Marshall, J. concurring) ("The application of the statute does not depend upon whether the flag, banner, or device in any way concerns a case before this Court.").

74-75.) And a person may shout or hold a sign about a pending case, if more than 200 feet from the courthouse. *See Marcavage v. City of New York*, 689 F.3d 98, 107 (2d Cir. 2012) (existence of other meaningful channels of communication evinces narrow tailoring).

Despite correctly recognizing both the compelling state interests at stake and § 215.50(7)'s narrow tailoring to serve those interests, the district court relied on several incorrect premises in concluding that § 215.50(7) burdens more speech than is necessary. These errors undermine the case for facial invalidation rather than more limited, as-applied relief.

First, the district court suggested that other New York statutes may render § 215.50(7) superfluous, including laws that "make it a crime to tamper intentionally with jurors and witnesses." (J.A. 75.) But those laws apply to communications knowingly targeting a specific person. *See* Penal Law § 215.10 (witness tampering); *id.* § 215.25 (jury tampering). Section 215.50(7) proscribes distinct activity that is directed at a specific ongoing trial, even if targeted at no particular person.

The district court also proposed that "content-neutral regulations" might suffice to combat disorderly demonstrators, such as those who

physically block courthouse access. (J.A. 75-76.) *See* Penal Law § 240.20 (defining disorderly conduct to include threatening behavior, unreasonable noise, abusive language, and obstruction of foot traffic); *see also id.* § 195.05 (barring obstruction of governmental action through intimidation or physical interference). But laws aimed at intimidation or physical obstruction cover "only the most blatant" types of undue influence, which may take many forms. *Burson*, 504 U.S. at 206-07 (quotation marks omitted). Further, prior to § 215.50(7)'s enactment, a similar objection was made that existing law barring disruption of court proceedings rendered this additional provision inconsequential. Mem. of N.Y.C Bar Ass'n, *in* Bill Jacket at 3. That objection did not prevail, however, because these other laws offered "no remedy" for picketing immediately outside the courthouse that, even if orderly, nonetheless interfered with, or created the appearance of interfering with, specific trials. Letter from Assemblyman Duffy, *in* Bill Jacket at 10. The same is true now. Indeed, defendant Magliano, Chief of Public Safety for the New York court system, testified that § 215.50(7) remains a "valuable adjunct" to laws barring jury and witness tampering, disorderly conduct, and obstructing governmental administration. (J.A. 44.)

Second, the district court faulted the State for presenting evidence of "only four" arrests under § 215.50(7) since 2005. (J.A. 76.) Those results reflected solely arrests by state court officers (J.A. 44), and would not have included any additional arrests by local police. In any event, the district court unjustifiably suggested that a lack of documented arrests precluded a showing that § 215.50(7) remains "necessary." (J.A. 76.) As the legislative history confirms (see *supra* at 6-7), deterring the picketing of specific trials was a dominant purpose of § 215.50(7). And deterrence "by definition results in an absence of data."[8] *MacWade v. Kelly*, 460 F.3d 260, 275 (2d Cir. 2006); *see National Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 675 n.3 (1989) (stating that lack of violations may show program's effectiveness in deterring misconduct). Moreover, whereas the district court questioned § 215.50(7)'s continued necessity, a committee of New York State judges took the opposite view in 2007, calling the statute "important" to "protect the fair and impartial administration of

[8] The arrest records on file also reflect that officers regularly direct potential violators to move away from the courthouse and thereby to comply with the law. (*See* J.A. 47-48, 50.) Although Picard refused, presumably many people do as requested.

justice," and proposing that it be extended to cover motions and special proceedings in addition to trials. Report of N.Y. State Advisory Committee on Local Courts 7 (Jan. 2007).[9]

Third, the district court incorrectly distinguished this case from those upholding bans on electioneering within a set distance of polling places. (J.A. 76.) In fact, those decisions support § 215.50(7)'s validity. The State's compelling interest in protecting the integrity of the judicial process is similar to the State's indisputable "'compelling interest in preserving the integrity of its election process.'" *Burson*, 504 U.S. at 199 (quoting *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989)). The Supreme Court expressly has likened the "weighty civic act" of voting "to a jury's return of a verdict." *Minnesota Voters All. v.*

[9] The record and legislative history further demonstrate that, while times may have changed, some people's basic desire to exert external pressure on the judiciary has not. Back in 1952, one citizen bemoaned that § 215.50(7)'s enactment would prevent him from standing outside the Appellate Division on Madison Avenue, as he previously had done, and "display[ing] a large 'placard' denouncing certain named judges for falsehoods." Comments of Nathaniel I. Becker, *in* Bill Jacket at 13. Half a century later, in 2006, a kindred spirit was arrested for violating § 215.50(7) after standing outside a Queens courthouse, "displaying printed matter concerning the character" of the judge overseeing his case, and refusing officers' requests to move. (J.A. 46, 48.)

Mansky, 138 S. Ct. 1876, 1887 (2018). In both cases, ordinary citizens come to participate in fundamental acts of self-governance. The place where verdicts are returned, no less than the place where votes are cast, necessitates "*some* restricted zone" to secure the State's compelling interest. *Burson*, 504 U.S. at 208.

The district court also misinterpreted the historical record in finding no "'widespread and time-tested consensus'" favoring bans on courthouse picketing comparable to that favoring bans on poll-site electioneering. (J.A. 76 (quoting *Burson*, 504 U.S. at 206).) As the Supreme Court has recounted, the "picketing of federal courthouses by partisans" with respect to specific judicial proceedings in the late 1940s "prompted an adverse reaction from both the bar and the general public." *Cox*, 379 U.S. at 561. "A number of groups urged legislation to prohibit it." *Id.*

The Senate Judiciary Committee held hearings on proposed legislation and issued a report stressing "the compelling need" for it. S. Rep. No. 81-732, at 4 (1949). The Committee's report cited recent events in which hundreds of people had "paraded around and picketed" the federal district court in Los Angeles, then the Ninth Circuit courthouse in San Francisco, denouncing ongoing contempt proceedings against

alleged subversives. *Id.* at 2. The House Judiciary Committee concurred that demonstrations targeting specific court proceedings would "inexorably" lead to disrespect for law and denigration of judicial independence—the latter of which was "fundamental and necessary" to a democratic form of government. H. Rep. No. 81-1281, at 2-3 (1949).

In 1949, the Judicial Conference of the United States cited this proposed legislation, "condemn[ed] the practice" that prompted it, declared that "effective means" were needed to deter this activity, and directed that a committee be convened to make recommendations.[10] Report of Special Meeting of the Judicial Conference of the United States 9 (Mar. 1949). The special committee reported that "bar associations and individual lawyers" were "practically unanimous" in favor of the proposed legislation. Report of Annual Meeting of the Judicial Conference of the United States 18 (Sept. 1949). For example, the American Bar Association passed a resolution "condemn[ing] picketing of courts as an interference with the orderly administration of justice," and "many local and State bar

[10] The Judicial Conference of the United States comprises the Chief Justice of the U.S. Supreme Court, the Chief Judges of every federal Court of Appeals, the Chief Judge of the Court of International Trade, and a federal district judge from each circuit. *See* 28 U.S.C. § 331.

associations" did the same. *Id.* A "great preponderance" of the judges and lawyers who weighed in expressed a similar sentiment. *Id.*; *see also Cox*, 379 U.S. at 561-62 (citing testimony and reports). Soon afterward, Congress enacted a statute forbidding picketing or parading outside courthouses, codified at 18 U.S.C. § 1507, and a number of States passed similar laws, *see Cox*, 379 U.S. at 561.

Thus, at the relevant historical moment, bans on protests targeting specific judicial proceedings were viewed as nothing short of imperative by legions of affected parties.[11] Just as with poll-site electioneering bans, this "broadly shared judgment is entitled to respect." *Minnesota Voters*, 138 S. Ct. at 1888.

Fourth, the district court took too restricted a view of the state interest against which § 215.50(7) must be assessed. This and similar laws aim to preserve both "the appearance *and* actuality of a judiciary unswayed by public opinion and pressure." *Hodge*, 799 F.3d at 1157 (emphasis added). In enacting the federal ban at issue in *Hodge*, the

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[11] Even the New York Times' editorial board in the late 1940s reportedly called for laws banning the picketing of trials occurring in courthouses. *See* Duda, If This Be Treason, *supra*, at 202.

Senate Judiciary Committee acknowledged that any individual judge, juror, or witness might be able "to shut himself off and steel himself from outside influence or intimidation," but concluded that "the real problem" was "protect[ing] the administration of justice from being misjudged and prejudiced in the mind of the public." S. Rep. No. 81-732, at 4. The Committee observed that if a large crowd were demonstrating outside a courthouse, carrying banners stating, "'Dismiss the prosecutions against these defendants,'" and the judge were then to dismiss the indictments, members of the public would "likely" conclude that "it was the fear of force and intimidation that led to the decision"—even if the judge were "utterly uninfluenced by these demonstrations."[12] *Id.* Similarly, in *Grace*, the Supreme Court emphasized that it should not "appear to the public" that judges are amenable to "picketing or marching, singly or in groups." 461 U.S. at 183. More recently, in *Williams-Yulee*, the Court upheld a bar

[12] The viewpoint-neutral § 215.50(7) equally bars demonstrations outside courthouses *against* criminal defendants then on trial. And it can hardly promote faith in due process for the public to wonder whether a jury bowed to outside pressure in convicting a defendant. *See People v. Nelson*, 27 N.Y.3d 361, 367 (2016) (noting "affirmative obligation" of courts "to protect the defendant's right to a fair trial, and to ensure that spectator conduct does not impair that right").

on judges' personal solicitation of campaign funds, to protect judicial integrity in "the eyes of the public." 575 U.S. at 447.

The district court cited *Williams-Yulee* as confirming the State's similarly "vital" interest here. (J.A. 68.) But the court gave too short shrift to § 215.50(7)'s prophylactic purpose of ensuring confidence that trials in New York are resolved neutrally, based on the law and evidence, rather than according to the exogenous demands of parties or their proponents. In other words, the district court focused solely on *actual* disruption of trials, to the exclusion of their *apparent* integrity. And it overlooked *Williams-Yulee*'s teaching that "public confidence in judicial integrity" does not "lend itself to proof by documentary record," making "perfect tailoring" impossible. 575 U.S. at 447, 454. That lesson further diminishes the relevance of an absence of arrests under § 215.50(7) or the presence of complementary statutes. And it does the same to the district court's supposition that jurors or witnesses may "be escorted to and from the courthouse" past demonstrators (J.A. 75-76)—a solution that may lessen actual influence on these trial participants, but that does not lessen the public perception that such activities are distorting the fairness and impartiality of ongoing judicial proceedings.

B. The District Court's Invalidation of and Injunction Against § 215.50(7) Should Be Limited to Picard's Intended Advocacy.

In light of the circumstances under which § 215.50(7)'s enforcement would serve compelling state interests, the record at most warrants an injunction on enforcing the statute against Picard's intended advocacy, and not facial invalidation. Accordingly, if this Court concludes that Picard has standing and that an injunction is warranted, then the Court should modify the injunction and limit its effect to Picard's intended activities.

This Court took a similar approach in *American Booksellers Foundation v. Dean*, 342 F.3d 96 (2d Cir. 2003). The plaintiffs there raised a First Amendment challenge to a Vermont statute restricting the distribution of sexually explicit material to minors. The district court facially enjoined the law as a content-based speech restriction that was not narrowly tailored, in part because other Vermont statutes also served the State's compelling interest of protecting youth from online exploitation. *See American Booksellers Found. v. Dean*, 202 F. Supp. 2d 300, 316-19 (D. Vt. 2002). Equating that ruling with an overbreadth holding, this Court on appeal opted to "follow 'the normal rule that partial, rather

than facial, invalidation is the required course.'" *American Booksellers*, 342 F.3d at 105 (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985)). And rather than hold the statute "invalid in all applications," this Court modified the injunction to apply solely to the "discrete" speech on which the plaintiffs had based their suit. *Id.* at 104-05. Likewise, here, the Court "can simply determine whether the statute can be constitutionally applied to the [particular] speech" at issue, and enjoin § 215.50(7) to that extent, if necessary. *See id.* at 105.

Nor would the result be different for an actual overbreadth claim, which Picard's complaint also raises. Such a claim "by its nature assumes that the measure is constitutional as applied to the party before the court," but alleges that "it would violate the First Amendment rights of hypothetical third parties." *Farrell v. Burke*, 449 F.3d 470, 498–99 (2d Cir. 2006). Here, the State agrees that the First Amendment protects Picard's generalized, nondisruptive jury-nullification advocacy. Thus, at most, the statute may be "declared invalid to the extent that it reaches too far, but otherwise left intact." *Brockett*, 472 U.S. at 504. Indeed, that modest approach is fitting when the court below appeared to agree that, properly construed, § 215.50(7) does not even prohibit Picard's advocacy.

In all, these circumstances offer no justification for transforming the relaxed rules of preenforcement standing "into a means of mounting [a] gratuitous wholesale attack[]" on applications of a state statute not presented in the case. *See Board of Trustees v. Fox*, 492 U.S. 469, 484-85 (1989).

POINT III

IN THE ALTERNATIVE, THIS COURT SHOULD CERTIFY TO THE NEW YORK COURT OF APPEALS THE QUESTION OF WHETHER § 215.50(7) APPLIES TO PICARD'S ADVOCACY

As demonstrated above, Penal Law § 215.50(7) plainly does not proscribe Picard's sign-plus-flyer method of messaging about jury nullification near New York courthouses. See *supra* Point I.B. But if there were any doubt about that point of statutory interpretation, then the Court should certify this question of state law to the New York Court of Appeals.

Three criteria inform whether to certify a state law issue to New York's highest court. They are (1) whether that court has addressed the issue or whether other New York decisions provide sufficient guidance on how the Court of Appeals would rule, (2) the importance of the state law question and whether its resolution depends on "value judgments and

public policy choices," and (3) whether the question is "determinative" of the appeal. *E.g.*, *In re World Trade Ctr.*, 846 F.3d at 69 (quotation marks omitted); *see also* 2d Cir. R. 27.2(a); 22 N.Y.C.R.R. § 500.27(a). The state law question here satisfies all three criteria.

First, we have been unable to find a single New York State judicial decision construing or applying § 215.50(7), and plaintiff has likewise not identified such a decision. That dearth of authority is unsurprising when nonviolent misdemeanor charges like this one are routinely dismissed or otherwise resolved by negotiated plea. Where, as here, the New York Court of Appeals "has never addressed the sweep" of the statute, and "there are no decisions of New York appellate courts" to offer guidance, the first certification factor is met. *Expressions Hair Design v. Schneiderman*, 877 F.3d 99, 106 (2d Cir. 2017); *see also, e.g.*, *Barenboim v. Starbucks Corp.*, 698 F.3d 104, 113 (2d Cir. 2012) (certifying interpretative question where "no court—state or federal—appear[ed] yet to have construed or applied" governing state regulation).

Second, the scope and validity of § 215.50(7)'s bar on trial-related demonstrations near courthouses are of undeniable importance. Indeed, a statewide committee of judges has called the statute "important" to

"protect the fair and impartial administration of justice." Report of N.Y. State Advisory Committee on Local Courts, *supra*, at 7. Likewise, appellant Magliano, head of public safety for New York's courts, testified that the law is "valuable." (J.A. 44.) And the U.S. Supreme Court has called the States' interest in preserving judicial integrity "of the utmost importance," *Cox*, 379 U.S. at 562, and a "vital" concern "of the highest order," *Williams-Yulee*, 575 U.S. at 445-46 (quotation marks omitted). This interest is no less important to New York than its hospitality industry, which this Court deemed "vital" enough to warrant certification in *Barenboim*. *See* 698 F.3d at 117; *see also Schoenefeld v. New York*, 748 F.3d 464, 470 (2d Cir. 2014) (certifying state law question that would "have a serious impact on both lawyers and litigants").

Third, a definitive interpretation of § 215.50(7) will either resolve or significantly narrow this controversy. If the New York Court of Appeals holds that § 215.50(7) does not reach Picard's advocacy, then as a result it will be clear Picard lacks standing to maintain this First Amendment action. *See Smith*, 945 F.3d at 737 (holding that plaintiff has standing to mount First Amendment attack "only insofar as her own conduct falls within the ambit of the specific rule of law that she

challenges"); *Hedges*, 724 F.3d at 193 (holding that statutory interpretation arrived at on appeal deprived plaintiffs of standing to pursue First Amendment claims). And if, instead, the New York court were to hold that § 215.50(7) reaches Picard's advocacy, then that definitive interpretation would help "lay the groundwork for [a] careful analysis of the First Amendment issues in this case." *Expressions*, 877 F.3d at 107; *see United States v. Williams*, 553 U.S. 285, 293 (2008) ("[I]t is impossible to determine whether a statute reaches too far without first knowing what the statute covers.").

This Court routinely certifies state law questions to the New York Court of Appeals where, as here, their resolution has the capacity "either to resolve the litigation or to frame the constitutional question." *Tunick v. Safir*, 209 F.3d 67, 85 (2d Cir. 2000); *see also, e.g.*, *In re World Trade Ctr.*, 846 F.3d at 70 (noting that answer to certified question would determine whether plaintiff's constitutional claim could proceed under clarified legal analysis, or alternatively would have to be dismissed for lack of standing); *Expressions*, 877 F.3d at 106-07.

Certification would also honor principles of federalism. The Supreme Court has explicitly endorsed certification where, as here, a

state law has "not yet [been] reviewed by the State's highest court," and a "federal tribunal risks friction-generating error" by invalidating the law on a blank slate. *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 79 (1997). "[A]llowing the state tribunal to make what, under the applicable state canons, is a plausible interpretation to avoid serious constitutional issues, weighs heavily in favor of certification."[13] *Tunick*, 209 F.3d at 84. Thus, if this Court were to harbor any doubt about § 215.50(7)'s scope, then certification would be proper.

[13] Neither of the decisions on which Picard relied for standing below—in which this Court reached the merits of challenges to facially ambiguous state laws, without certification—presented a suitable vehicle for that procedure. *Pacific Capital Bank v. Connecticut* was a federal preemption case, in which the defendant did not seek certification. 542 F.3d 341, 351 (2d Cir. 2008). And while *Vermont Right to Life Committee v. Sorrell* involved a First Amendment challenge to a Vermont statute, that State lacks a certification procedure. *See* 221 F.3d at 385.

CONCLUSION

This Court should vacate the judgment for lack of standing, or narrow the permanent injunction against enforcement of Penal Law § 215.50(7) to apply solely to Picard's intended advocacy, or certify to the New York Court of Appeals the question of whether the statute applies to that advocacy.

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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 10,747 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*