Jon O. Newman, *Circuit Judge*, concurring in part and dissenting in part:

New York Penal Law § 215.50(7) ("subsection (7)") punishes a person who "[o]n . . . a public street or sidewalk within . . . two hundred feet of . . . a courthouse . . . calls aloud . . . or displays . . . signs containing written . . . matter, concerning the conduct of a trial being held in such courthouse . . . ." I agree with the majority that the Plaintiff-Appellant Michael Picard has standing to challenge the constitutionality of subsection (7). I also agree that subsection (7) is unconstitutional as applied to Picard.

Unlike the majority, however, I would rule that subsection (7) is also unconstitutional on its face, as the District Court ruled, *Picard v. Clark*, 475 F. Supp. 3d 198, 201 (S.D.N.Y. 2020). Subsection (7) violates the First Amendment because it is overbroad in prohibiting speech entitled to First Amendment protection and overbroad in its geographic scope. Furthermore, even as to Picard's as-applied challenge, which the majority upholds, I believe that the majority has provided the District Court with insufficient guidance as to the appropriate remedy on remand.

I therefore concur in part, but respectfully dissent in part.

I. Standing

The State argues that Picard lacks standing "to maintain a First Amendment challenge to" subsection (7). Br. for Magliano at 19. This contention makes no distinction between standing to make an as-applied challenge and standing to make a facial challenge. However, the State subsequently makes clear that it is challenging Picard's standing to make not only an as-applied challenge but also a facial challenge: The State specifically asserts: "[T]he district court held that Picard had standing to facially challenge the law under the First Amendment . . . . That standing ruling was in error." *Id*. at 20.

The majority rules that Picard has standing "to challenge" subsection (7), Maj. Op. at 22, without distinguishing between standing to challenge the subsection as applied and standing to challenge it facially. I agree with the standing ruling, but would explicitly reject the State's specific claim that Picard lacks standing to make a facial challenge, rather than leave that rejection merely implicit in the majority opinion. I am unaware of any decision that has recognized a plaintiff's standing to make an as-applied challenge to a statute alleged to violate the First Amendment and then denied standing to make a facial challenge. Once a plaintiff has standing to make any First Amendment challenge to a statute, the

scope of the challenge is a merits issue. "[N]o general categorical line bars a court from making broader pronouncements of invalidity in properly as-applied cases." *Citizens United v. Federal Elections Commission*, 558 U.S. 310, 331 (2010) (internal quotation marks and citation omitted).

When the Supreme Court has rejected a facial challenge to a statute challenged on First Amendment grounds, it has done so on the merits, not for lack of standing. See, *e.g.*, *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008). And Justices who, in dissent, would have sustained a facial challenge to such a statute have not paused to consider whether the plaintiff, subject to the statute, had standing to facially challenge it. *See Brown v. Entertainment Merchants Assn.*, 564 U.S. 786, 821 (2011) (Thomas, J., dissenting); *id*. at 840 (Breyer, J., dissenting).

I also note that this is not a typical pre-enforcement challenge. In the leading pre-enforcement decisions of the Supreme Court, the plaintiff had not been arrested for violating the challenged statute. *See, e.g., Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014);[1] *Medimmune, Inc. v. Genentech, Inc*., 549 U.S. 118 (2007); *Steffel v. Thompson*, 415 U.S. 452 (1974). Picard, however, has been arrested.

[1] In *Susan B. Anthony*, where a state prohibition on certain campaign statements was challenged, an administrative complaint had to be filed before a prosecution could be brought, and an administrative body had voted to issue the required complaint. However, the matter never proceeded any further. *See* 573 U.S. at 154-55.

True, he wants protection against being arrested again in the future for continuing to violate § 215.50(7), but having been arrested, he is making a post-arrest challenge to that future arrest.[2]

In any event, because of his acknowledged standing to make an as-applied challenge and for the further reason that it is undisputed that he intends to repeat his conduct, Picard has standing to make a facial challenge whether that challenge is called "pre-" or "post-" enforcement.

II. The Merits

Picard wishes to advocate and distribute literature advocating jury nullification.[3] His message is not focused on any particular trial.

I agree with the majority that the challenged provision violates the First Amendment as applied to Picard. Whether his facial challenge (1) is available for

[2] The majority observes that "what makes Picard's case stand out from other pre-enforcement challenges is that he has *already* been arrested for his nullification advocacy prior to initiating this lawsuit." Maj. Op. at 21 (emphasis in original; dash omitted). That arrest does more than make his case "stand out" from other pre-enforcement challenges, it makes his case a post-enforcement challenge.

[3] Picard held a sign stating "Jury Info" and distributed pamphlets stating 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." *Picard*, 475 F. Supp. 3d at 201. The phrase "Jury Info" appears in pamphlets advocating jury nullification distributed by the Fully Informed Jury Association. *See United States v. Heicklen*, 858 F. Supp. 2d 256, 260 (S.D.N.Y. 2012). The Association favors jury nullification. *See* "Fully Informed Jury Association," en.wikipedia.org/wiki/Fully_Informed_Jury_Association.

decision on the record in this case and, if so, (2) should succeed on the merits both require further consideration.

The majority's basis for its resolution of these two issues is not entirely clear. Initially, the majority makes a merits rejection of Picard's facial challenge:

> "Because we conclude that NYPL § 215.50(7) can likely be found to further a compelling state interest in at least some circumstances, we vacate the district court's facial injunction and remand to the district court to issue a narrower injunction that bars enforcement of NYPL § 215.50(7) only as applied to conduct such as Picard's."

Maj. op. at 25.

Later, however, the majority says that Picard's facial challenge is not properly before us for lack of an adequate record:

> "We do not have the benefit of a detailed factual record to help us determine the needs of a courthouse . . . for a buffer zone of a particular size."

Id. at 34. This point is then made more forcefully:

> "[T[he lack of factual development here makes clear that the district court erred by striking down the entire statute."

Id. at 35.

Of course, a court can rule that a record is insufficient to make a merits ruling and then express, in apparent dicta, that the claim fails on the merits, although it is odd to see these two points made in reverse order, as the majority

does. In my view, the record does not lack information needed for a merits ruling on Picard's facial challenge and subdivision (7) is facially invalid.

What is clear on this record is that subsection (7) punishes anyone who "[o]n . . . a public street or sidewalk within . . . two hundred feet of . . . a courthouse . . . calls aloud . . . or displays . . . signs containing written . . . matter, concerning the conduct of a trial being held in such courthouse . . . ." It is also clear, indeed undisputed, that Picard was arrested for violating subsection (7) and detained in police custody for ten hours. It is also clear that subsection (7) prohibits speech occurring on a sidewalk within 200 feet of a courthouse if the speech concerns an ongoing trial in that courthouse. These circumstances suffice for me to uphold Picard's facial challenge because subsection (7) is overbroad.[4]

[4] The majority declines to consider whether subsection (7) is overbroad in the respects I point out below because, it asserts, Picard did not defend on appeal the District Court's judgment by arguing overbreadth. Maj. Op. at 34 ("Questions of that nature have not been litigated before us."). However, he contended that the statute "is substantially overbroad," Br. for Picard at 10, and "is not limited to expression that is likely to *disrupt* ongoing trial proceedings," *id*. at 37 (emphasis added). My first overbreadth argument is that subsection (7) is not limited to expression likely to unduly *influence* trial proceedings. Although Picard's argument is not precisely the overbreadth argument I am making, it is so close to my argument that it would be ignoring reality not to consider the issue of overbreadth. In any event, "[o]nce a federal claim is properly presented, . . . parties are not limited to the precise arguments in support of that claim," *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 379 (1995) (internal quotation marks omitted), especially in First Amendment cases, *see Citizens United*, 558 U.S. at 330.

The linguistic scope of subsection (7) is overbroad. I start with several well recognized principles: restrictions of speech based on content are subject to the most exacting scrutiny, *see Boos v. Barry*, 485 U.S. 312, 321 (1988); a content-based restriction, which subsection (7) undisputedly is, must be narrowly tailored to serve a compelling interest, *see Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 171 (2015); "it is the rare case in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest," *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 444 (2015) (internal quotation marks omitted); such a restriction must be "the least restrictive means among available, effective alternatives," *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004); "[s]peech in public areas is at its most protected on public sidewalks," *Schenck v. Pro-Choice Network*, 519 U.S. 357, 377 (1997); public sidewalks, including those surrounding a court, are public fora, *United States v. Grace,* 461 U.S. 171, 183 (1983). It is also well recognized that the State has a compelling interest in "assur[ing] that the administration of justice at all stages is free from outside control and influences," *Cox v. Louisiana*, 379 U.S. 559, 562 (1965), and "protecting the integrity of the judiciary," *Williams-Yulee*, 575 U.S. at 445.

Subsection (7) prohibits within the vicinity of a courthouse speech "concerning the conduct of a trial being held in such courthouse." In the District

Court, the State, perhaps recognizing the broad sweep of subsection (7), sought to conform it to First Amendment limitations by offering a narrowing interpretation of the entire statute containing subsection (7): "Properly understood, the Act was crafted to restrict certain protest activity in the immediate vicinity of a State courthouse that the Legislature deemed *likely to disrupt or unduly influence a pending trial or proceeding*." Pretrial Memorandum of Defendant Magliano at 2 (emphasis added). Judge Cote succinctly rejected the State's claim. "The defendants, however, are mistaken insofar as they argue that the Act only criminalizes expression that is likely to disrupt ongoing proceedings. The statute contains no such limitation. Unlike other provisions of § 215.50, § 50(7) does not state that the prohibited expression must directly tend to interrupt court proceedings. *See* N.Y. Penal Law §§ 50(1), 50(2)." *Picard*, 475 F. Supp. 3d at 206.

The State's attempted narrowing interpretation not only mischaracterized the Act, it ironically identified an alternative that would serve the State's compelling interest and meet First Amendment limitations. A statute prohibiting oral or written expressions likely to come to the attention of jurors, because made in close proximity to a courthouse, and likely to unduly influence jurors or at least

risking such undue influence, because of the message communicated, is an available alternative to subsection (7).

Subsection (7), however, broadly prohibits expressions far beyond such a limited alternative. Critical statements such as "the trials in this courthouse are generally unfair" and favorable statements such as "the trials in this courthouse are generally fair" would both be statements "*concerning* the conduct of a trial being held in such courthouse." But prohibiting them, as subsection (7) does, would not serve the State's compelling interest in avoiding influencing jurors. The wording of subsection (7) demonstrates that it is overbroad.[5]

The majority enlists *Cox* to reject a facial challenge to subsection (7).[6] "*Cox* itself strongly suggests that a statute of this kind is not facially unconstitutional and may have legitimate applications in particular circumstances." Maj. Op. at 30.

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[5] The majority says that I am "incorrect," Maj. Op. at 37, in contending that the majority has ignored the second of the two branches of First Amendment jurisprudence for invalidating a statute: overbreadth, in addition to lack of any valid application. The majority endeavors to offer two reasons in an attempt to show that it has reckoned with overbreadth. First, they say that Picard has "failed to establish that NYPL § 215.50(7) is facially unconstitutional." Maj. Op. at 38. But Picard has done all he needs to do: he has quoted the terms of the statute, and those terms are overbroad because they prohibit a considerable amount of protected speech. Second, they say that we lack a factual record sufficient to determine whether subsection (7) "might be constitutional or unconstitutional in factual circumstances different from those posed by Picard's conduct." *Id*. But that is just another way of stating the first branch of First Amendment invalidity.

[6] *Cox* ultimately upheld an as-applied challenge because local officials had given permission for the sidewalk protest. *See* 379 U.S. at 568-72.

First, the majority is relying on the branch of the facial invalidity doctrine that rejects such a challenge only if "no set of circumstances exists under which the Act would be valid." *See United States v. Salerno*, 481 U.S. 739, 745 (1987). But that reliance ignores the branch of the facial invalidity doctrine that upholds such a challenge where a statute is overbroad on First Amendment grounds. "According to our First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech." *United States v. Williams*, 553 U.S. 285, 292 (2008). "There are two quite different ways in which a statute or ordinance may be considered invalid 'on its face'—either because it is unconstitutional in every conceivable application, or because it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally 'overbroad.'" *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 796 (1984). *See generally* Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321 (2000).

Second, the statute upheld in *Cox* against a facial challenge was not of the "kind" exemplified by subsection (7), as the majority contends. The obvious distinction is that the statute in *Cox* prohibited parading and picketing near a courthouse "with the intent of . . . influencing any judge, juror, witness, or court

officer, in the discharge of his duty." *Cox*, 379 U.S. at 560. Subsection (7) has no element of intentionally influencing court personnel.

A less obvious distinction turns on the way the Supreme Court characterized the activity prohibited by the statute challenged in *Cox*. That statute prohibited "picketing and parading" at specific locations, including near courthouses. 379 U.S. at 562. The Supreme Court's opinion in *Cox* called such activity "conduct," *id*. at 564, and distinguished such conduct from speech. "We deal in this case not with free speech alone, but with expression mixed with particular conduct." *Id*. "[I]t has never been deemed an abridgement of freedom of speech . . . to make a course of conduct illegal merely because the conduct was in part . . . carried out by means of language, either spoken, written, or printed." *Id.* at 563. *Cox* is not authority for rejecting a First Amendment facial challenge to a statute prohibiting speech alone, that is, speech that is not "mixed with particular conduct" such as picketing and parading. Subsection (7) prohibits speech "concerning the conduct of a trial," and it is overbroad because it is not limited to prohibiting speech intended to or at least likely to unduly influence jurors or court personnel or proceedings.

The geographic scope of subsection (7) is overbroad. Subsection (7) is overbroad in that it creates a 200-foot zone around a courthouse in which verbal or written speech concerning the conduct of trials may not be expressed. A distance of 200 feet is 67 yards, two-thirds the length of a football field. The subsection forces a person delivering a message about ongoing court proceedings to stand away from potential listeners and readers at a location equivalent to that of a person standing on a 33-yard line whose spoken words could not be heard in the far endzone or whose writings displayed at that location could not be read in that endzone. Keeping speakers that far away from potential listeners and readers renders the provision overbroad.

I recognize the state's compelling interest in protecting the integrity of court proceedings. I would not deem invalid a narrowly tailored prohibition of speech close enough to a courthouse to risk unduly influencing a proceeding occurring there. But 200 feet is farther than needed to serve the State's legitimate interest. Those expressing views about court proceedings are entitled to have their views heard and read in the vicinity of a courthouse, even though the State can bar

speech unduly influencing such proceedings expressed so close to the courthouse that their views can be easily heard or read.[7]

The majority rejects a facial challenge because "the statute plainly addresses conduct—demonstrations in *close* proximity to a courthouse, featuring *loud* or intrusive behavior addressed to particular trials taking place there—that can easily be seen as likely to affect the administration of justice." Maj. Op. at 29 (emphases added). I disagree with the emphasized characterizations. As for "close," the State had made no attempt to show or even claim that no distance less than 200 feet would fail to suffice to serve its compelling interest. As for "loud," the challenged subsection's punishment of a person who calls "aloud" is properly understood to mean no more than speaking in a normal voice, since another word in the same subsection already punishes a person who "shouts" about court proceedings within the 200-foot zone and another provision of the statute prohibits "noise or other disturbance, directly tending to interrupt a court's proceedings," § 215.50(2).

[7] The Supreme Court, in upholding, against a First Amendment challenge, a state statute prohibiting political activity within 100 feet of polling places, noted that "the campaign-free zone included sidewalks." *Burson v. Freeman*, 504 U.S. 191, 196 n.2 (1992). However, an important part of the Court's rationale for upholding the campaign-free zone around polling places, even including sidewalks, was that "because law enforcement officers generally are barred from the vicinity of the polls to avoid any appearance of coercion in the electoral process . . . many acts of interference would go undetected." *Id*. at 207. There is no similar absence of law enforcement or court security officers from the vicinity of courthouses.

Moreover, subsection (7) is unnecessary. Subsection (2) of section 215.50 and several other statutes[8] provide abundant protection for the State's compelling interest in protecting the judicial process. Perhaps that is why, as the Defendants informed the District Court, the entire section 215.50 has resulted in only four arrests in the past 14 years, including Picard's. *Picard*, 475 F. Supp. 3d at 207.[9]

III. The Remedy

The majority remands the case with an instruction to the District Court "to craft a narrower injunction prohibiting the application of NYPL § 215.50(7) only in the circumstances of Picard's conduct in this case." Maj. Op. at 37. I think further guidance is needed to enable the District Court to satisfy the requirements of Rule 65 of the Federal Rules of Civil Procedure. An order granting an injunction must "state its terms specifically," Fed. R. Civ. P. 65(d)(1)(B), and must "describe in reasonable detail . . . the act or acts restrained," *id*. 65(d)(1)(C).

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[8] *See* N.Y. Penal Law § 215.25 ("A person is guilty of tampering with a juror in the first degree when, with intent to influence the outcome of an action or proceeding, he communicates with a juror in such action or proceeding, except as authorized by law."); N.Y. Penal Law § 215.23 (tampering with a juror in the second degree); N.Y. Penal Law § 215.13 (tampering with a witness in the first degree); N.Y. Penal Law § 195.05 (obstructing governmental administration in the second degree).

[9] Of the three arrests, prior to Picard's, for violating the statute, one was for refusing to be seated and remain quiet in a courtroom. Br. for Picard at 41 n.5. There is no claim that subsection 215.50(7) itself has ever resulted in an arrest prior to Picard's.

Although it is not our task to draft an injunction, the majority's language leaves it unclear what constitutes "Picard's conduct in this case." Is the conduct exactly what Picard was doing when arrested—holding the same sign and distributing the same literature, or is it uttering any words or distributing any literature advocating jury nullification, or is it uttering any words or distributing any literature outside a courthouse? As for location, is the conduct standing exactly where Picard stood when arrested, or any location within 200 feet of the courthouse near which he was arrested, or any location within 200 feet of any courthouse in New York State?

Perhaps the parties will assist the District Court by agreeing to the terms of an injunction. If not, there is a distinct risk that we will encounter these questions on a subsequent appeal.

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For all the reasons stated above, I concur in part and respectfully dissent in part.