# Commonwealth *of* Massachusetts

SUFFOLK, *SS.*

TRIAL COURT DEPARTMENT
SUPERIOR COURT
DOCKET NO. 2384 CV 0 2779

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff,

v.

NATIONALIST SOCIAL CLUB et al.,
Defendants.

**DEFENDANT LIAM MCNEIL'S REPLY TO THE COMMONWEALTH'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

**NOW COMES** defendant, Liam McNeil, ("McNeil"), by and through his undersigned counsel, and respectfully submits this reply to the Commonwealth's Opposition to the Motion to Dismiss as filed jointly by defendants, Christopher Hood ("Hood") and McNeil (collectively, "defendants"). For the reasons that follow, defendants' motion to dismiss must be allowed.

## ARGUMENT

McNeil hereby incorporates by reference as if fully stated herein the entirety of Hood's Reply to the Commonwealth's Opposition to defendants' motion to dismiss.

### I. The Attorney General Serially Misapprehends and Misconstrues Defendants' Motion to Dismiss, Which Adequately and Clearly Demonstrated that the Commonwealth Failed to State a Claim for Relief Under the MCRA

This reply, having incorporated Hood's dispositive brief on the Massachusetts Civil Rights Act's ("MCRA") restrictive venue provision, exclusively addresses the sufficiency of the Complaint with respect to the MCRA Count alleged in Suffolk County. In her Opposition, the Attorney General ("AG") attempts to clarify the manner in which defendants are alleged to have violated the MCRA. "To be perfectly clear, the Commonwealth alleges that Defendants violated

the MCRA by carrying out a coordinated physical attack on a pedestrian who was attempting to cross a public bridge." Opposition ("Opp.") at 14.

However, the allegations in the Complaint belie this description. The Complaint discloses that the pedestrian in question was not simply "attempting to cross a public bridge" as the AG represents. Rather, as specifically alleged in the Complaint, this unnamed pedestrian was (1) "object[ing] to the NSC members' conduct"; (2) "recording their activities using a cell phone"; (3) "grabb[ing] the section of [the group's] banner"; and (4) "attempting to pull [the banner] loose from the railing." Complaint ("Compl.") at 20, ¶¶ 146, 148.

In other words, the pedestrian was engaged in violent counterprotesting of the NSC members' protected First Amendment activities on the public bridge. According to the Complaint, this violent counterprotestor was attempting to destroy, deface, or steal the NSC members' banner, which then caused "[t]hree more NSC members [to] charge[] at the pedestrian and beg[i]n shouting in her face, surrounding her and forcing her up against the railing of the bridge." *Id.*, ¶ 149 (cleaned up for clarity).

Again, the Complaint belies the AG's description in her Opposition of what actually allegedly transpired. This was clearly not a "coordinated physical attack"—it was, at worst, a defensive and spontaneous reaction to an unprovoked use of force. See *Longval v. Commissioner of Correction*, 404 Mass. 325, 333 (1989) ("Not every violation of law is a violation of the [MCRA]. A direct violation of a person's rights does not by itself involve threats, intimidation, or coercion and thus does not implicate the Act.") Moreover, by attempting to destroy or steal the banner, this pedestrian was evidently engaged in the act of interfering with the exercise or

enjoyment of the NSC members' rights to freedom of speech and freedom of assembly in violation of the MCRA. See M.G.L. c. 12, § 11H(a).

As the Complaint describes, albeit in dramatic prose, "[p]edestrians…were forced to walk a single file gauntlet through the groups of NSC members congregating on each side of the bridge." *Id.*, ¶ 145. The Commonwealth alleges no attempt by NSC members to interfere by threat, intimidation, or coercion with the entirely lawful activities of any pedestrian simply attempting to cross the public bridge. See *Planned Parenthood League of Mass. v. Blake*, 417 Mass. 467, 474 (1994) (a threat involves intentional exertion of pressure to make another fearful or apprehensive of injury; intimidation involves putting in fear for the purpose of compelling or deterring conduct; and coercion involves the application to another of such force as to constrain her to do against her will something she would not otherwise have done).

Rather, once attacked, NSC members responded in defense of their property. Accepting as true the allegations in the Complaint, there is no support for a finding of MCRA violation in Suffolk County. Consequently, the Complaint fails to state a claim for relief under the MCRA in this jurisdiction, and the motion to dismiss must be allowed.[1]

Finally, before disposing of the AG's misapprehension of defendants' overbreadth argument, this reply will briefly address her reclassification of the overbreadth argument as a failed attempt to make out the affirmative defense of selective enforcement. "Defendants contend that the AG is selectively enforcing the MCRA against them because of their political beliefs."

[1] As described in defendants' motion, the Complaint's deficiencies with respect to stating MCRA claims against Hood and McNeil are compounded by the utter lack of any allegation that either were present on the Fairfield Street Bridge.

Opp. at 14. "The challenge is procedurally improper, ***as well as factually and legally baseless***." *Id.* (emphasis added).

If carrying out a "coordinated physical attack on a pedestrian attempting to cross a public bridge" is a violation of the MCRA, then carrying out a spontaneous destruction of free speech material displayed on the same public bridge is also a violation of the MCRA. Prosecuting the former while failing to charge the latter is selective enforcement of the MCRA, and it exists on the face of the Complaint. See *McCoy v. Town of Pittsfield*, 59 F.4th 497, 506 (1st Cir. 2023) (enforcing statute selectively in a content or viewpoint discriminatory way violates the First Amendment). The Court should find the affirmative defense of selective enforcement alive and well within the four corners of the Commonwealth's Complaint.

## II. The Attorney General Misapprehends Defendants' Overbreadth Arguments

The AG chides defendants for "not actually mak[ing] an overbreadth argument — which is, by definition, a facial and not an as-applied challenge." Opposition ("Opp.") at 13. However, "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect" on a case, and it does not "control the pleadings and disposition in every case involving a constitutional challenge." *Citizens United v. F.E.C.*, 558 U.S. 310, 331 (2010). It is not the defendants' contention that the MCRA is facially overbroad, rather, the defendants' position is that the MCRA, ***as interpreted by the AG, is overbroad as-applied*** to the conduct alleged in this action.

Defendants do not seek to invalidate lawful applications of the MCRA's plainly legitimate sweep pursuant to the prototypical overbreadth challenge. Defendants' motion does not require the court to "entertain a facial challenge" and invalidate the MCRA "in order to

vindicate [defendants'] right[s] not to be bound by" the AG's unconstitutional application thereof "when a narrower remedy will fully protect the litigants." *United States v. Nat'l Treasury Emples. Union*, 513, U.S. 454, citing *Bd. of Trs. v. Fox*, 492 U.S. 469, 484-85 (1989).

Defendants' references to far more egregious interferences with secured rights through the use of threats, intimidation, or coercion in other contexts have merit precisely because the complained-of acts that are the subject of this litigation fall outside the MCRA as properly and appropriately applied. See *Fox*, 492 U.S. at 484-85. As recited in defendants' motion, a statute—or more precisely, an overly broad interpretation of a perfectly valid statute—becomes overbroad if in addition to restricting activities which may be constitutionally prohibited it also encompasses within its coverage speech or conduct that is protected by the guarantees of free speech or association. *Thornhill v. Alabama*, 310 U.S. 88 (1940).

NSC members' innocent activity that partially and only incidentally impeded public access is not expressly covered by the MCRA. If it were, then that would represent a severe and unprecedented encroachment on a host of First Amendment rights, particularly, freedom of assembly and speech. "Narrow tailoring is crucial where First Amendment activity is chilled—even if indirectly—'[b]ecause First Amendment freedoms need breathing space to survive.'" *Ams. for Prosperity Fund v. Bonta*, 141 S. Ct. 2373, 2384 (2021), quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963). The AG's construction of the MCRA is thus overbroad as-applied in light of its selective enforcement potential when contextualized with the AG's lack of enforcement in other protest contexts where the express intent of protestors ***was*** to impede public access.

## CONCLUSION

For the foregoing reasons, defendants' motion to dismiss must be allowed.

Respectfully Submitted:

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By his Attorney,

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**DATED: MAR. 29, 2024**

**CERTIFICATE OF SERVICE**

I, Patrick K. Daubert, hereby certify that on this 29th day of March, 2024, a true copy of the foregoing document was served via e-mail upon counsel of record for all other parties to this action, as enumerated below.

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