

No. 09-2273

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

WATCHTOWER BIBLE & TRACT SOCIETY OF NEW YORK, INC.,
and CONGREGACIÓN CRISTIANA DE LOS TESTIGOS
DE JEHOVÁ DE PUERTO RICO, INC.,
Plaintiffs-Appellants,

v.

ANTONIO M. SEGARDIA DE JESUS,
in his official capacity as Secretary of Justice, *et al.*,
Defendants-Appellees.

**BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION;
THE ACLU OF PUERTO RICO NATIONAL CHAPTER;
THE MAINE CIVIL LIBERTIES UNION; THE
AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS;
THE NEW HAMPSHIRE CIVIL LIBERTIES UNION;
AND THE RHODE ISLAND AFFILIATE, AMERICAN CIVIL
LIBERTIES UNION AS *AMICI CURIAE* IN SUPPORT OF
PLAINTIFFS-APPELLANTS AND REVERSAL**

On Appeal from the United States District Court for the
District of Puerto Rico in Case No. 3:04-cv-01452-JP (Pieras, J.)

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FRAP 26.1 CORPORATE DISCLOSURE STATEMENT

Amici the American Civil Liberties Union; the ACLU of Puerto Rico National Chapter; the Maine Civil Liberties Union; the American Civil Liberties Union of Massachusetts; the New Hampshire Civil Liberties Union; and the Rhode Island Affiliate, ACLU have no parent corporations, and no publicly held corporation owns 10% or more of *amici's* stock.

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INTEREST OF THE *AMICI CURIAE*

The American Civil Liberties Union (ACLU) is a nationwide, non-profit, nonpartisan organization with over 500,000 members dedicated to protecting the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Puerto Rico is a national chapter of the ACLU, and the Maine Civil Liberties Union, the American Civil Liberties Union of Massachusetts, the New Hampshire Civil Liberties Union, and the Rhode Island Affiliate, ACLU are the statewide affiliates of the national organization representing all states and jurisdictions within the First Circuit.

Since its founding in 1920, the ACLU and its state affiliates have worked to preserve freedom of speech and religious exercise. The ACLU has appeared as a party or *amicus* in numerous courts—including the Supreme Court and this Court—in countless cases implicating these core First Amendment liberties, including, for example *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002), and *Sullivan v. City of Augusta*, 511 F.3d 16 (1st Cir. 2007).

The lower court's decision in this case critically undermines the First Amendment. But even if that decision were defensible on constitu-

tional grounds, the district court's award of attorneys' fees to the defendants in this case could have a deeply chilling effect on civil rights litigation nationwide. *Amici* thus have a profound interest in having this Court reverse the decision below.¹

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Puerto Rico's controlled-access laws are facially invalid under the First Amendment. They present an unprecedented intrusion upon the very core of the First Amendment, closing off all access to the public streets for outside speakers. This broad and indiscriminate exclusion extends far beyond any legitimate interests the government may have, and the laws fail to preserve adequate alternative channels for communication of outsiders' messages and ideas. Indeed, Puerto Rico's laws are far more restrictive than a permit requirement that the Supreme Court recently struck down as a facially unconstitutional restriction on free speech.

As recounted by plaintiffs-appellants (at 6-9) and by the district court (Add. 8-13, 45-48), the sheer amount of expressive and communic-

¹ This brief is being submitted pursuant to the accompanying motion under FRAP 29(b).

ative activity blocked by the controlled-access laws is staggering. They exclude a virtually limitless amount of protected activity. The laws, for example, prohibit political campaign volunteers from distributing information door-to-door about upcoming elections, and bar representatives of charitable organizations from soliciting donations. And as illustrated by this case, the controlled-access laws limit the ability of religious adherents to spread their message of faith, thereby abridging both free speech and religious liberty. The Puerto Rico laws are especially alarming because they impose this exclusion by limiting access to the public streets—the very archetype of a traditional public forum, and a place which has served for ages as a forum for unfettered public discussion and communication. *See* Part I.A.

Nor are the controlled-access laws narrowly tailored to any substantial state interest. Although the district court upheld the laws based on the government's interest in crime prevention, Puerto Rico has myriad other, less-intrusive measures available to address this problem, and the government has failed to put forth adequate evidence that the controlled-access laws are its only effective means of law enforcement. Indeed, the record shows that crime rates have in fact *increased*

since these laws went into effect. The controlled-access laws also cannot be justified by any government interest in facilitating the privacy of its residents because this need could be more effectively and less intrusively satisfied by, for example, allowing residents to refuse unwanted visitors by displaying simple “No Solicitation” signs. *See* Part I.B.

Finally, even if the controlled-access laws were the only effective way for Puerto Rico to address some legitimate interest, these laws would still be unconstitutional because they fail to preserve adequate alternative channels for communication. Personal appeals made through door-to-door messaging have long been recognized as a uniquely powerful means of communication, and neither public preaching nor alternatives such as billboards and mailings can impart the full essence of certain messages in the same way. Door-to-door messaging is also the only means of communication that is affordable for many small and poorly financed groups, and a ban on door-to-door communication would effectively serve to silence these groups entirely. *See* Part I.C.

As troubling as the district court’s decision is for the freedom of speech, its further decision to order plaintiffs to pay defendants’ attorneys’ fees threatens to undermine the full array of civil rights litigation.

Whereas the fee-shifting statute that governs various civil rights laws was designed to encourage civil rights plaintiffs to make greater use of the judicial process and to promote the judicial enforcement of constitutional rights, the threat of substantial fee awards against unsuccessful plaintiffs would have a tremendous chilling effect and would undercut the vigorous enforcement of these laws. This threat would be particularly severe for the public interest groups that frequently bring these civil rights cases because just a few significant fee awards against these groups could deprive them of a significant portion of their operating budgets. In light of the important role that fee awards play in supporting vigorous enforcement of the nation's civil rights laws, this Court should reverse the district court's fee award and reaffirm the key principle that fee awards to defendants are inappropriate except in the most egregious cases. *See* Part II.²

² Because *amici* are broadly concerned with maintaining free and open access to the public streets for a wide variety of expressive and communicative activity, including religious exercise, our focus in this brief is limited to plaintiffs' facial First Amendment challenge and the issue of attorneys' fees.

ARGUMENT

The district court’s decision, rejecting plaintiffs’ facial First Amendment challenge and assessing attorneys’ fees against the plaintiffs, poses a grave threat to the freedom of expression in a quintessential public forum and imperils the financial viability of public interest groups pursuing civil rights litigation. Given the unprecedented breadth of Puerto Rico’s controlled-access laws, the Court should strike down these laws as facially invalid under the First Amendment and should reverse the district court’s assessment of attorneys’ fees.

I. Puerto Rico’s Controlled-Access Laws Are Facialy Unconstitutional Under *Village Of Stratton*.

In *Village of Stratton*, 536 U.S. 150, the Supreme Court invalidated an Ohio law requiring speakers to obtain a permit before delivering any message through door-to-door canvassing in residential neighborhoods. Despite the Supreme Court’s clear instruction in *Village of Stratton*, Puerto Rico seeks to defend—and the district court approved of—a law that goes even further than what *Village of Stratton* has already forbidden: The island’s controlled-access laws effectively close off the public streets and deny *all* access for outside speakers, without the slightest regard for “the important role that door-to-door canvassing

and pamphleteering has played in our constitutional tradition of free and open discussion.” *Id.* at 162.

Although *Village of Stratton* left unresolved the precise standard of review for plaintiffs’ facial First Amendment challenge, *see* 536 U.S. at 164, this court reviews content-neutral regulations of speech under intermediate scrutiny. *See Asociación de Educación Privada de Puerto Rico, Inc. v. García-Padilla*, 490 F.3d 1, 15 (1st Cir. 2007). Such restrictions must be “narrowly tailored to serve a significant governmental interest [and] leave open ample alternative channels for communication.” *Id.* at 15-16 (internal quotation marks omitted). The narrow tailoring requirement is satisfied only “so long as the regulation promotes a substantial government interest that would be achieved less effectively without it, or if the means chosen are not substantially broader than necessary to achieve the government’s interest.” *Id.* at 16 (internal citation and quotation marks omitted). This Court must therefore weigh the breadth of speech foreclosed by Puerto Rico’s controlled-access laws against the strength of the government’s interests and the necessity of these laws to further its interests. Even where the government’s interest may be significant, moreover, a regulation will still be invalid if it

fails to “leave open ample alternative channels for communication of the information.” *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

A. The controlled-access laws foreclose vast amounts of protected speech.

When weighing a regulation’s constitutionality under the First Amendment, courts must begin by assessing the amount of protected speech and expression affected by the law. The First Amendment demands that, at the very minimum, the government must permit “such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.” *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936) (internal quotation marks omitted). To this end, the First Amendment protects not just the freedom of speakers to act, but also the “rights of listeners ‘to receive suitable access to social, political, esthetic, moral, and other ideas and experiences.’” *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 603 (1981) (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969)).

In *Village of Stratton*, the Supreme Court began with the observation that “[t]he mere fact that the ordinance covers so much speech

raises constitutional concerns.” 536 U.S. at 165. The laws at issue here sweep even more broadly than in that case, applying not just to “canvassers” advocating for a “cause,” *id.* at 154, but to *all* outside speakers seeking to enter a restricted neighborhood. And as in *Village of Stratton*, the controlled-access laws effectively ban spontaneous speech and impose serious barriers to anonymous speech. These laws thus amount to an unprecedented and unconstitutional restriction upon the free and open communication of ideas.

1. Closing off access to public streets blocks a staggering amount of First Amendment activity.

The public streets “are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely.” *Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 315 (1968). Streets “have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939). They function both as a “conduit in the daily affairs of a locality’s citizens” and as “a place where people may enjoy

the open air or the company of friends and neighbors in a relaxed environment.” *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 651 (1981).

Against this backdrop, Puerto Rico’s laws barring access to its public streets effectively prohibit a vast range of First Amendment activity. All outside speakers are physically excluded from access to these vital avenues for communication and expression. Among other limitations, the barriers here prevent charitable organizations from collecting contributions and news reporters from conducting investigations. Moreover, they “not only . . . appl[y] to religious proselytizing, but also to anonymous political speech and the distribution of handbills,” *Village of Stratton*, 536 U.S. at 153, thereby undermining the very heart of democratic citizenship. *See, e.g., Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940) (“In the realm of religious faith, and in that of political belief, . . . [the liberty] [t]o persuade others to [one’s] own point of view . . . [is] in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.”).

These constitutional flaws are not cured simply by permitting entry for those speakers who are able to obtain specific, advance consent

from a resident they wish to visit. Even if this provision allows speakers to reach those listeners who actively seek out their ideas, those few proactive residents are dwarfed by the vast audience of passive listeners who may be just as open and receptive to these messages, but who tend to wait for such information to come to them. By foreclosing all direct access to those passive listeners, the controlled-access laws thereby threaten to “prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.” *Grosjean*, 297 U.S. at 250 (internal quotation marks omitted).

2. *The controlled-access laws prohibit any spontaneous speech outside one’s own neighborhood.*

As one “obvious example[]” of the “pernicious effect” of the regulation in *Village of Stratton*, 536 U.S. at 166, the Supreme Court pointed to “a significant amount of spontaneous speech that is effectively banned by the ordinance,” *id.* at 167. Applying this principle, the Third Circuit recently struck down an advance-registration requirement for door-to-door canvassing in a case where the record demonstrated that the plaintiffs, who included volunteer supporters of a political campaign, “did not have the time and resources to register each canvasser”

in advance. *Serv. Employees Int'l Union, Local 3 v. Municipality of Mt. Lebanon*, 446 F.3d 419, 422 (3d Cir. 2006) (internal quotation marks omitted).

Puerto Rico's controlled-access laws impose the same "effective[] ban[]" on spontaneous speech, 536 U.S. at 167, that was held unconstitutional in *SEIU* and *Village of Stratton*. Here, as in *Village of Stratton*, "[a] person who ma[kes] a decision on a holiday or a weekend to take an active part in a political campaign could not begin to pass out handbills" outside of their own urbanization. *Id.* Indeed, requiring speakers to arrange advance authorization and to "coordinate with a resident prior to their arrival," Add. 59, is the very antithesis of "spontaneous" speech.

The district court not only ignored this serious constitutional concern for the protection of spontaneous speech, but flatly contradicted it. The court asserted, without citing any authority, that "[t]he necessity of advanced planning does not negate the constitutionality of . . . the Controlled Access Laws." Add. 59-60. This holding simply cannot be reconciled with the Supreme Court's clear concern for the protection of spontaneous speech in *Village of Stratton*.

3. *The laws further chill any remaining speech by forcing speakers and listeners to surrender their anonymity and privacy.*

Even when outside speech remains possible in theory, the controlled-access laws will cause much of it to be impermissibly chilled by mandating that speakers and listeners “surrender [their] anonymity” and privacy. *Village of Stratton*, 536 U.S. at 166. The controlled-access laws unconstitutionally burden private and anonymous speech in at least three ways.

First, although the controlled-access laws do not require speakers to reveal their names, it requires them to surrender information that may prove even more private: the name of each resident they have come to see and the specific purpose of their visit. *See* Add. 12, 66. Just as it is unconstitutional for the government to compel a disfavored group to disclose its membership list, *see NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Bates v. City of Little Rock*, 361 U.S. 516 (1960), so too the government cannot take actions that threaten private associations by compelling individuals to reveal their associations piecemeal.

Second, even if the laws do not formally require speakers to identify themselves to community guards, as a practical matter it will gen-

erally be necessary for visitors to do so. Once a resident authorizes a visitor, there needs to be some way to confirm that the speaker is on that list of authorized visitors.

Third, the controlled-access laws unconstitutionally require all interested *listeners*—that is, residents—to surrender their anonymity by registering in advance to allow certain visitors. As the Supreme Court has recognized, the First Amendment protects not only the anonymity of speakers, but also the “rights of listeners ‘to receive suitable access to social, political, esthetic, moral, and other ideas and experiences.’” *WNCN Listeners Guild*, 450 U.S. at 603 (quoting *Red Lion*, 395 U.S. at 390). The free flow of speech and ideas can be just as thoroughly chilled by demanding that a speaker’s audience reveal their names and associations as it is by requiring this of the speaker alone.

B. This unprecedented intrusion upon First Amendment rights is not narrowly tailored to the government’s interests.

To satisfy the First Amendment’s narrow tailoring requirement, the government must show that “the means chosen are not substantially broader than necessary to achieve the government’s interest.” *García-Padilla*, 490 F.3d at 16 (citing *Ward v. Rock Against Racism*, 491 U.S.

781, 800 (1989)). As in *Village of Stratton*, the unprecedented breadth of the restrictions on speech here and the many less-intrusive alternatives available to serve any government interests mean that the controlled-access laws ultimately are “not tailored to the [government’s] stated interests.” 536 U.S. at 168.

When considering whether a law is narrowly tailored, “the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved.” *Heffron*, 452 U.S. at 650-51. The government bears a heavy burden here, where it seeks to regulate expressive activity in a traditional public forum. See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983). Such restrictions violate the First Amendment unless the government shows them to be “no greater than is essential” to the furtherance of an important government interest, *United States v. O’Brien*, 391 U.S. 367, 377 (1968)—a standard that is not met here.

Although the controlled-access laws were ostensibly enacted to combat high crime rates, Add. 8-9, the record shows that crime rates in Puerto Rico have in fact *increased* substantially since these laws were enacted. See Add. 8, 55. While correlation may only be a crude measure

of the laws' effectiveness, it is the *government's* burden to prove "that the regulation will in fact alleviate these harms in a direct and material way," *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994), and it has not met that burden here. The Supreme Court "ha[s] never accepted mere conjecture as adequate to carry a First Amendment burden," *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000), and the government "must do more than simply posit the existence of the disease sought to be cured," *Turner*, 512 U.S. at 664 (internal quotation marks omitted).

Yet even if the controlled-access laws had been an effective law enforcement tool, high crime rates alone would not authorize the government to disregard all constitutional limits. Just as the Supreme Court has rejected "Puerto Rico's position . . . that its law enforcement problems are so pressing that it should be granted an exemption from the usual requirements of the Fourth Amendment," *Torres v. Puerto Rico*, 442 U.S. 465, 473 (1979), so too those law enforcement concerns cannot override the First Amendment.

Furthermore, Puerto Rico's efforts to close off public streets in the interest of crime prevention are all the more problematic in light of the

many less-intrusive alternatives available to address high crime rates. As the Supreme Court admonished in *Torres*, “Puerto Rico’s law enforcement needs are indistinguishable from those of many states.” 442 U.S. at 474. For example, residents are free to safeguard their homes with locks and alarm systems, just as citizens do in other high-crime neighborhoods. And even if private measures proved inadequate, Puerto Rico still has many narrower alternative measures at its disposal.

One such alternative would be to restrict open access only during certain hours of the day. Another option would be for Puerto Rico to hire additional law enforcement officers to monitor any suspicious activity. Either one of these alternatives would serve as a far more narrow alternative to the draconian measures that Puerto Rico now seeks to enforce.

As an alternative to the law enforcement rationale put forth by the government, the district court also identified a vague and nebulous interest “in allowing residents . . . to be free from undue annoyance and intrusion upon their homes.” Add. 56. But the controlled-access laws are not properly tailored to the state’s authority to regulate “breaches of the peace” or expression which is “obscene, abusive, or which incites retaliation.” *Murdock v. Pennsylvania*, 319 U.S. 105, 116 (1943). Rather, the

laws sweep so broadly as to encompass many speakers who, like the Jehovah's Witnesses, "are pursuing their solicitations peacefully and quietly." *Id.*

The district court's suggestion that routine privacy interests can support such draconian restrictions neglects the principle that "[w]hen we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, . . . we remain mindful of the fact that the latter occupy a preferred position." *Marsh v. Alabama*, 326 U.S. 501, 510 (1946). And to the extent Puerto Rico has some remaining interest in providing extra protection for any unwilling listeners, the Supreme Court has repeatedly held that this privacy interest can be satisfied through a far less intrusive alternative: Unwilling listeners may be permitted to refuse unwanted visitors with a simple "No Solicitation" sign placed conspicuously on their property. *See, e.g., Village of Stratton*, 536 U.S. at 156, 165; *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 639 (1980). Given the availability of this "less intrusive and more effective measure[]," 444 U.S. at 639, the controlled-access laws are not narrowly tailored to any privacy interest that the government might assert.

C. The controlled-access laws fail to leave open adequate alternative channels of communication.

Even if Puerto Rico's restrictions on speech were the most effective way to achieve some important interest, the laws would still be invalid because they fail to "leave open ample alternative channels for communication." *Clark*, 468 U.S. at 293; *García-Padilla*, 490 F.3d at 16 (internal quotation marks omitted). Door-to-door canvassing is a distinctively potent and effective means of communication, and neither preaching in public gathering places nor resorting to mail or broadcast media is an adequate substitute.

1. *Personal appeals made through door-to-door messaging are a uniquely powerful means of communication.*

The Supreme Court has long emphasized "the important role that door-to-door canvassing and pamphleteering has played in our constitutional tradition of free and open discussion," *Village of Stratton*, 536 U.S. at 162, and warned that any restrictions on this speech "constitutes a dramatic departure from our national heritage and constitutional tradition," *id.* at 166. The storied history of door-to-door messaging is particularly significant here, as "[t]he widespread use of this method of communication by many groups espousing various causes attests its

major importance.” *Martin v. City of Struthers*, 319 U.S. 141, 145 (1943). Indeed, door-to-door canvassing proves unique and irreplaceable in two key ways.

First, door-to-door canvassing is a singularly powerful means of communicating. The right of free speech “is guaranteed every citizen that he may reach the minds of willing listeners,” *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949), and “perhaps the most effective way of bringing [such messages] to the notice of individuals is their distribution at the homes of the people,” *Schneider v. State*, 308 U.S. 147, 164 (1939). History shows that door-to-door messaging has proven an exceptionally effective means of communication for matters of conscience, especially as “a potent force in various religious movements down through the years.” *Murdock*, 319 U.S. at 108. No other means of communication can replicate the power and effectiveness of door-to-door messaging.

Second, door-to-door canvassing is uniquely affordable. The Supreme Court has recognized for decades that “[d]oor to door distribution of circulars is essential to the poorly financed causes of little people.” *Martin*, 319 U.S. at 146. The Court recently reaffirmed this principle in *Village of Stratton*, stressing that “because they lack significant finan-

cial resources, the ability of the [Jehovah's] Witnesses to proselytize is seriously diminished by regulations that burden their efforts to canvas door-to-door.” 536 U.S. at 161. Because even seemingly small obstacles may be prohibitive for individual or poorly financed speakers, the Court reiterated that any measure “which makes impossible the *free and unhampered* distribution of pamphlets strikes at the very heart of the constitutional guarantees.” *Id.* at 162 (quoting *Schneider*, 308 U.S. at 164).

Groups like the plaintiffs in this case do not have the resources to send out mass mailings or to seek advance authorization from each individual household they wish to visit. Requiring the Witnesses to print and mail their religious tracts to every resident, including many residents who may not wish to receive them, is unfairly burdensome and costly. Rather than redirect such messages to some other channel of communication, the controlled-access laws are far more likely to silence these views altogether and, consequently, to deprive the Jehovah's Witnesses of the ability to practice a key requirement of their faith—on-one evangelism.

2. *Communicating only in public gathering places is no substitute for door-to-door messaging.*

Requiring outside speakers to communicate only by preaching in

public gathering places is not an adequate alternative for direct, personal communication. While some speakers may desire to broadcast their message in front of large crowds, mass communication does not have the same effect as delivering a personalized message to a small group of listeners. Likewise, many people are unwilling to listen to preachers or protesters when interrupted in the course of their daily travels, but may be more receptive to a speaker's message when they are within the comfort of their own homes.

As modern advances have made it less necessary for citizens to venture outside of their homes frequently, local streets play an increasingly important role as loci for communicative activity. "As society becomes more insular in character," Justice Kennedy has explained, "it becomes essential to protect public places where traditional modes of speech and forms of expression can take place." *United States v. Kokinda*, 497 U.S. 720, 737 (1990) (Kennedy, J., concurring in the judgment). Given these circumstances, the district court's suggestion that speakers instead simply wait to communicate "outside the urbanization gates," Add. 61, cannot serve as an adequate alternative for those speakers who have long relied on door-to-door visitation to spread their ideas.

3. *Direct, person-to-person communication cannot be replicated adequately by means such as billboards and flyers.*

The First Amendment requires not just that speakers be able to state a message, but also that “there must be opportunity to win the[] attention” of willing listeners. *Kovacs*, 336 U.S. at 87. Yet the district court demonstrated little respect for this fundamental principle, instead deeming the controlled-access laws constitutional because speakers who find themselves locked out of the public streets may still make use of “mail or electronic mail, telephone, television, radio, [or] billboards.” Add. 60. In so holding, the court disregarded the simple fact that letters and billboards do not draw the same notice or attention as messages that are personally delivered. While these more removed means of communication may be useful on occasion, “the streets are natural and proper places for the dissemination of information and opinion,” and “one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.” *Schneider*, 308 U.S. at 163.

Moreover, when it comes to matters as personal as one’s political views or religious beliefs, written letters and handbills may frequently

fail to convey the essence of the message or the depth of one's convictions. For such matters of conscience, personal visits and intimate discussion are vital for communicating the full content of the message, and this crucial information is lost when the law relegates such speech to a lesser medium of expression. Even if these other media were adequate for some messages, the controlled-access laws sweep far beyond anything that may be constitutionally permissible.³

Puerto Rico's unprecedented intrusion upon the rights of outside speakers thus reaches far beyond the bounds of permissible regulation under the First Amendment. By closing off the public streets from any outside expression, the controlled-access laws block a staggering amount of communicative activity, and this broad exclusion is not adequately tailored to any legitimate governmental interests. But even if

³ In addition, as the Jehovah's Witnesses demonstrate, personal delivery frequently has a special intrinsic value that other forms of communication do not possess. For the Witnesses, only door-to-door canvassing can fulfill their religious obligation to "[g]o ye into all the world, and preach the gospel to every creature," and to do so "publicly, and from house to house." *Murdock*, 319 U.S. at 108 (quoting MARK 16:15 and ACTS 20:20).

this broad ban on outside ideas were the only effective means to serve some interest, it would still prove unconstitutional because it fails to leave open ample alternative channels for communication. Thus, the controlled-access laws are facially invalid under the First Amendment.

II. Attorneys' Fee Awards Against Civil Rights Plaintiffs In Cases Such As This Are Wholly Improper And Set A Dangerous Precedent.

The district court's decision to award attorneys' fees to the defendants is equally troubling. Not only was the decision improper under prevailing Supreme Court and First Circuit law, which do not allow attorneys' fees to be assessed against civil rights plaintiffs unless their claims are completely frivolous and unreasonable, but the assessment of attorneys' fees in this case threatens to undermine the entire structure of civil rights litigation. The fee-shifting statute that governs numerous civil rights laws, 42 U.S.C. § 1988, was designed to enable private litigants to bring lawsuits to enforce civil rights statutes. Imposing large fee awards on unsuccessful plaintiffs, however, would have a dramatic chilling effect on many individuals who might possess viable civil rights claims. This burden is especially great for the many public interest groups that frequently bring such litigation, as these groups operate on

small budgets that could easily be wiped out by just a few large fee awards. A proper interpretation of the fee-shifting statute, understood in light of its clear congressional purpose to encourage vigorous enforcement of the nation's civil rights laws, should protect civil rights plaintiffs against large fee awards except in the rarest of cases.

The district court's assessment of fees against the plaintiffs in this case—an assessment not even requested by the defendants themselves—thus flouts not only the fee-shifting statute and the many cases construing it, but also the important policy judgment that underlies these decisions. Indeed, the award of attorneys' fees was particularly inappropriate here because this case raises unresolved legal issues that present the courts with an opportunity to bring greater clarity to the law. But even putting aside these broad policy concerns, the district court's stated reasons for assessing fees in this case were plagued by numerous factual and legal errors. Because the district court's fee award fundamentally misconstrued and misapplied this crucial part of the nation's civil rights laws, it is incumbent upon this Court to reverse that decision and to reaffirm that fee awards to defendants are inappropriate except in the most egregious cases.

A. Attorneys' fees may not be awarded to defendants in civil rights cases unless the plaintiffs' suit is totally unfounded, frivolous, or unreasonable.

The Supreme Court has expressly held that fee awards against civil rights plaintiffs are not permitted except in the most extreme cases: “[A] plaintiff should not be assessed his opponent’s attorney’s fees unless a court finds that his claim was frivolous, unreasonable, or groundless.” *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978). Although *Christiansburg* addressed a fee-shifting provision specific to Title VII, the Court has held that the same demanding standard applies under Section 1988, the fee-shifting statute that governs civil rights actions. *See Hughes v. Rowe*, 449 U.S. 5, 14 (1980). Following the Supreme Court’s guidance, this Court has repeatedly reiterated that “a prevailing defendant is entitled to s[uch] largesse only if she can establish that the plaintiffs’ suit was totally unfounded, frivolous, or otherwise unreasonable.” *Casa Marie Hogar Geriatrico, Inc. v. Rivera-Santos*, 38 F.3d 615, 618 (1st Cir. 1994); *see, e.g., Maymó-Meléndez v. Álvarez-Ramírez*, 364 F.3d 27 (1st Cir. 2004); *Crawford v. City of Quincy*, 215 F.3d 1311 (1st Cir. 2000); *Bercovitch v. Baldwin Sch., Inc.*, 191 F.3d 8, 10 (1st Cir. 1999); *Vargas v. Kenney*, 76 F.3d 370 (1st Cir. 1996).

Section 1988 thus imposes a far more demanding standard for awarding attorneys' fees to defendants than it does for fee awards to plaintiffs. Although prevailing plaintiffs are generally entitled to have defendants pay their fees, "fee-shifting in favor of a prevailing defendant is the exception" rather than the rule. *Casa Marie*, 38 F.3d at 618. As a result, "decisions to grant defendants their fees are, and should be, rare." *Tang v. Rhode Island*, 163 F.3d 7, 13 (1st Cir. 1998).

B. The fundamental policy rationale underlying Section 1988 cannot support fee awards to defendants except in the most egregious of cases.

The fundamental purpose of Section 1988 "is to ensure 'effective access to the judicial process' for persons with civil rights grievances." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (quoting H.R. REP. No. 94-1558, at 1 (1976)). Courts interpreting this statute have thus been guided by the recognition that "Congress enacted § 1988 specifically because it found that the private market for legal services failed to provide many victims of civil rights violations with effective access to the [courts]." *City of Riverside v. Rivera*, 477 U.S. 561, 576 (1986) (plurality

opinion).⁴ These victims include plaintiffs alleging constitutional violations in actions brought under 42 U.S.C. § 1983. *See* 42 U.S.C. § 1988(b).

Ensuring that civil rights plaintiffs have effective access to judicial process is important not only to redress civil rights violations in individual cases, but also “to advance the public interest by invoking the injunctive powers of the federal courts.” *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968). Civil rights cases afford courts an opportunity to take affirmative steps to prevent continuing or future illegality, as well as to elaborate upon the substance of constitutional rights. A civil rights plaintiff thus serves “as a ‘private attorney general,’ vindicating a policy that Congress considered of the highest priority.” *Id.* Many civil rights statutes were designed with the understanding “that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law,” *id.* at 401—a goal aided by fee awards designed to

⁴ Accordingly, even though “the text of the [statute] does not draw a distinction between prevailing plaintiffs and prevailing defendants[,] . . . courts have interpreted various attorney’s fees statutes in light of their congressional purposes.” *Bercovitch*, 191 F.3d at 10.

facilitate the filing of civil rights lawsuits. *See generally Riverside*, 477 U.S. at 574-75.

This important role of civil rights litigation will be critically undermined if courts award attorneys' fees to defendants in any but the most egregious cases. The threat of large fee awards would deter many plaintiffs from bringing viable civil rights claims, and the public interest organizations that frequently bring such litigation could quickly be bankrupted if faced with even a few large awards. The Supreme Court therefore established a demanding standard in *Christiansburg* because "assessing attorney's fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote . . . vigorous enforcement." 434 U.S. at 422. As this Court has succinctly explained, the fundamental congressional purpose underlying fee-shifting statutes like Section 1988 requires that "[t]he standard for a civil rights defendant to receive fees [be] high to encourage legitimate civil rights claims." *Ward v. Hickey*, 996 F.2d 448, 455 (1st Cir. 1993).⁵

⁵ The Supreme Court has held that this high standard is necessary and makes sense because when a civil rights plaintiff prevails, the de-

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C. The claims in this suit are not frivolous.

As explained above, the claims asserted here not only are not frivolous, but are in fact meritorious. But even if the plaintiffs in this case do not prevail on the merits, any assessment of attorneys' fees against them would be inappropriate for two fundamental reasons.

First, because this Court has never before addressed a case involving a complete prohibition on outside access to public residential streets, "several of the issues raised by the plaintiffs' complaint [a]re of first impression." *Bercovitch*, 191 F.3d at 12. Given the unresolved legal questions at the heart of this case, "[n]o serious argument can be made that [plaintiffs'] action was frivolous, unreasonable, or without foundation." *Id.* at 11-12; *see also Ward v. Hickey*, 996 F.2d at 456. This limitation on fee awards against plaintiffs bringing plausible claims of first impression is especially important to protect a variety of public interest groups, which regularly bring such claims; such organizations seek not only to recover for a particular grievance, but also to help define the

(... cont'd)

defendant has been adjudged "a violator of federal law." *Christiansburg*, 434 U.S. at 418-19. By contrast, when a defendant prevails, the unsuccessful plaintiff ordinarily has not committed any legal wrong. *Id.*

outer bounds of the civil rights laws and bring about greater judicial elaboration and clarification of constitutional rights.

Second, even the proper standard of review for plaintiffs' First Amendment challenges remains unsettled, and *Village of Stratton* expressly declined to decide what standard of review applies to such claims. *See* 536 U.S. at 164. Indeed, even the district court recognized that "[t]he precise formulation of the test . . . has come into some question following [*Village of Stratton*]." Add. 51 n.5. Once again, because civil rights litigation serves not only to remedy individual claims but also to help bring greater clarity to the law and encourage future compliance, even unsuccessful plaintiffs should be protected against large fee awards when they bring a plausible legal claim in an area where the law's precise boundaries remain unclear.

"Even if [d]efendants can show that . . . [p]laintiffs' claims could be construed as unmeritorious"—and they cannot do so here—the Court should still find that “the complaint as a whole was not frivolous.” *Roselló-González v. Acevedo-Vilá*, 483 F.3d 1, 6 (1st Cir. 2007). This Court has previously vacated other fee awards to prevailing defendants in cases where the “[p]laintiff’s complaint, though unsuccessful, was not so

frivolous, unreasonable, or without foundation as to warrant an award of attorney's fees to defendants." *Alberto San, Inc. v. Consejo De Titulares Del Condominio San Alberto*, 522 F.3d 1, 5 (1st Cir. 2008) (internal quotation marks omitted); accord *Hughes*, 449 U.S. at 14-15. This case thus profoundly illustrates the Supreme Court's observation that "even if the law or the facts are somewhat questionable or unfavorable at the outset of litigation, a party may have an entirely reasonable ground for bringing suit." *Hughes*, 449 U.S. at 15.

D. The district court's stated reasons for awarding attorneys' fees were improper.

The reasons given by the district court for assessing fees against the plaintiffs here are plagued with both legal and factual errors. As an initial matter, although the district court made passing reference to the legal standard governing fee awards, *see* Add. 75 (citing *Tang*, 163 F.3d at 13), it never appears to have made the requisite factual findings. To be sure, the district court did express its disfavor—and even contempt—for the constitutional rights that plaintiffs sought to enforce. *See* Add. 56 ("Forcing proselytization upon the residents of these communities is counterproductive to the[ir] rights."); Add. 75 (lamenting "[p]laintiffs' interference with the lives of families living in controlled access com-

munities”). But for all its presumptions about plaintiffs’ “motives,” *id.*, the district court never appears to have made any express finding that their *legal claims* were so groundless as to be frivolous. Nor can plaintiffs properly be punished for seeking elaboration or vindication of their constitutional rights; even where there may not be a clear constitutional entitlement under current law, plaintiffs are permitted to bring a novel claim so long as they have “a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law.” *Cf.* Fed. R. Civ. P. 11. Likewise, plaintiffs cannot be faulted for “litigat[ing] in the hopes of reaching the U.S. Supreme Court,” *Add.* 75, so long as they have plausible arguments for their positions.

The district court also abused its discretion by engaging in an improper (and factually flawed) consideration of the parties’ relative financial resources. Because the purpose of the fee-shifting statute is not to force wealthy parties to subsidize their adversaries, but rather to give civil rights plaintiffs an incentive to file suit, the parties’ financial resources are irrelevant and should not have been considered. But even if financial resources did have some marginal relevance, the lower court’s representations on this issue were manifestly incorrect. *First*, the

court's claim that the plaintiffs "have the financial resources to spend on a large team of attorneys and on other costs," Add. 75, cannot be reconciled with the Supreme Court's observation in *Village of Stratton* that "[Jehovah's Witnesses] lack significant financial resources," 536 U.S. at 161. Indeed, this inconsistency is particularly striking because both of these cases were brought by the *same lead plaintiff*. *Second*, the defendants in this action are not mere "simple citizens," Add. 75, engaged in purely private matters, as the district court asserted. Rather, they are public officials and other policymakers who have volunteered "to represent the community" by serving on an "elect[ed] council, board, or residential association." Add. 9. And even if there were something improper about naming urbanization councils as defendants to this suit, plaintiffs added these defendants only after being *expressly instructed to do so by the district court*. Add. 92.

Finally, it should be noted that plaintiffs have already prevailed against many of the urbanizations initially named in this suit. Many of these defendants agreed to an order permitting unfettered access for Jehovah's Witnesses, Add. 39; JA-II 546-49, 560-63, 573-78, and others had a default judgment entered against them, Add. 39-40; JA-II 570-72.

As a result, the Jehovah's Witnesses have now regained access to a great number of the urbanizations where they had previously been excluded, and this success should preclude the court from dismissing plaintiffs' claims as totally frivolous or groundless.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

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