

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

Suffolk, SS.

No. SJ-2019-_____

MASSACHUSETTS COALITION FOR THE HOMELESS, et al.,

Plaintiffs/Petitioners,

v.

CITY OF FALL RIVER, et al.,

Defendants/Petitioners

JOINT PETITION FOR TRANSFER, PURSUANT TO G.L. c. 211, § 4A, LAST
PARAGRAPH, OF COUNT 1 OF THE VERIFIED COMPLAINT IN BRISTOL
SUPERIOR COURT CIVIL ACTION 1973-CV-00299 CONCERNING THE FACIAL
CONSTITUTIONALITY OF G.L. c. 85, § 17A

Plaintiffs and Defendants City of Fall River and Albert Dupere, in his official capacity as Chief of the Fall River Police Department, (hereafter collectively referred to as "Fall River Defendants"), by and through their counsel, hereby respectfully and jointly request that this Honorable Court, or a Single Justice thereof,¹ exercise the discretionary authority conferred by the last paragraph of G.L. c. 211, § 4A, to transfer from the Superior Court of Bristol County to this Court the question raised by Count 1 of the Plaintiffs' Verified Complaint as to the constitutionality of G.L. c. 85, § 17A ("Section 17A"). As described more fully below, the parties request that the Supreme Judicial Court determine whether Section 17A

¹ This Court has made clear that the Single Justice has jurisdiction to decide this type of petition and that normally the question of a transfer will be decided by the Single Justice who may then reserve and report the matter to the full Court. *Borman v. Borman*, 378 Mass. 775, 784 (1979). See also *Blue Cross of Mass v. Commissioner of Ins.*, 397 Mass. 674, 676 n.5 (1986),

violates the First Amendment to the United States Constitution, made applicable to states and localities by the Fourteenth Amendment, and Article 16, as amended, of the Declaration of Rights.

Legal and Procedural Background

Plaintiffs have challenged the constitutionality of Section 17A as an impermissible restriction on the free speech guarantees of the First Amendment and Article 16.² Count 1 of the Verified Complaint seeks a declaration that Section 17A is unconstitutional on its face.

Section 17A, with emphases added, provides:

*Whoever, for the purpose of soliciting any alms, contribution or subscription or of selling any merchandise, except newspapers, or ticket of admission to any game, show, exhibition, fair, ball, entertainment or public gathering, signals a moving vehicle on any public way or causes the stopping of a vehicle thereon, or accosts any occupant of a vehicle stopped thereon at the direction of a police officer or signal man, or of a signal or device for regulating traffic, shall be punished by a fine of not more than fifty dollars. Whoever sells or offers for sale **any item except newspapers** within the limits of a state highway boundary **without a permit** issued by the department shall for the first offense be punished by a fine of fifty dollars and for each subsequent offense shall be punished by a fine of one hundred dollars. Notwithstanding the provisions of the first sentence of this section, on any city or town way which is not under jurisdiction of the department, **the chief of police of a city or town may issue a permit to nonprofit organizations to solicit on said ways** in conformity with the rules and regulations established by the police department of said city or town.*

² A copy of the Verified Complaint in Bristol Superior Court Civil Action No. 1973-CV-00299 is attached hereto as Exhibit A. Recently, Plaintiffs filed a Notice of Partial Voluntary Dismissal, dismissing Count 2, any claims against Mr. Dupere in his individual capacity, and all claims against Defendants Bernier, Gouveia, Smith, Pavao, and Amaral. Count 1 as stated against the City of Fall River, Mr. Dupere in his official capacity, and Mr. Quinn in his capacity as Bristol County District Attorney is therefore the remaining claim in the case.

Plaintiffs Massachusetts Coalition for the Homeless, John Correira, and Joseph Treeful filed the Verified Complaint with the Superior Court on March 29, 2019, including a request for preliminary injunctive relief to protect against further enforcement of Section 17A. After briefing, a hearing on that request was held on April 9, 2019. That same day, the District Attorney of Bristol County agreed not to enforce Section 17A during the pendency of this action and agreed to dismiss past and any future charges that might issue. As a result, Plaintiffs orally withdrew their request for a preliminary injunction against the District Attorney. The Superior Court (Yessayan, J.) granted preliminary injunctive relief against all defendants other than the District Attorney on April 17, 2019. A copy of the Memorandum of Decision is attached as Exhibit B.

Contemporaneous with the filing of the Verified Complaint, Plaintiffs notified the Office of the Attorney General of their challenge to the constitutionality of Section 17A. That Office declined to intervene in the case to defend the constitutionality of the Statute. On May 17, 2019, however, the Office of the Attorney General entered an appearance as counsel for the District Attorney for Bristol County. And on May 31, 2019, the Office of the Attorney General, acting as counsel for the District Attorney, filed the "Commonwealth's Notice of Consent to the Entry of Judgment on Count 1 of Complaint" in which the "Commonwealth acknowledge[d] that the statute at issue in this case, G.L. c. 85, § 17A is unconstitutional as a content-based regulation." A copy of the Notice is attached as Exhibit C.

On June 10, 2019, the Superior Court granted the joint motion of Plaintiffs and the Fall River Defendants to stay further proceedings in the Superior Court pending a decision on this Petition and any ruling on the merits by this Court.

Reasons for the Request for Transfer

This Court has discretionary authority to transfer Count 1 of the Verified Complaint to itself pursuant to G.L. c. 211, § 4A, last paragraph. G.L. c. 211, § 4A, last paragraph, provides: “The supreme judicial court may also direct any cause or matter to be transferred from a lower court to it in whole or in part for further action or directions, and in case of partial transfer may issue such orders or directions in regards to the part of such cause or matter not so transferred as justice may require.” A decision whether to transfer a case or part of a case to this Court is a discretionary one. *See Beres v. Board of Registration of Chiropractors*, 459 Mass. 1012, 1013 (2011); *Callahan v. Board of Bar Overseers*, 417 Mass. 516, 519 (1994). The parties to this Petition respectfully suggest that this is an appropriate case for the Court to exercise that discretion.

There is uncertainty throughout the Commonwealth concerning application and the constitutionality of Section 17A, and a ruling would give much-needed clarity concerning the fundamental constitutional rights at issue, namely the right to peacefully request charity from others. At oral argument on April 9, 2019, the parties and the Superior Court discussed the fact that, given that the constitutionality of a state statute is at issue and is potentially being enforced by municipalities other than Fall River, an early appellate ruling on the

constitutionality of Section 17A – which would apply statewide – may be appropriate. The wisdom of such an approach was highlighted by the fact that counsel for the defendants in this action have indicated, including to the Superior Court, that they would not be inclined to appeal a decision adverse to them with regard to the constitutionality of Section 17A. As a result, if the issue is decided in the first instance by the Superior Court and in the Plaintiffs’ favor, the constitutional issue in this case may never reach the appellate court—leaving residents of the Commonwealth with ongoing lack of clarity as to the law in this important area concerning fundamental constitutional rights.

Since issuance of the preliminary injunction motion, at least one other municipality has asserted that, in fact, it is enforcing the Statute and does not intend to desist unless and until a judicial ruling directly applicable to that particular municipality is issued. *See Exhibit D attached (“Mayor: Brockton will enforce panhandling laws unless judge says otherwise,” Brockton Enterprise (April 21, 2019)).*³

Due to the nature of the lives of persons most affected by the continued enforcement of this statute across the Commonwealth, it is unlikely that its constitutionality can timely be challenged in multiple lawsuits in multiple locations. Reliance on piecemeal litigation would leave an important constitutional right dependent on the ability of persons experiencing homelessness in multiple

³ Available at <https://www.enterpriseneews.com/news/20190421/mayor-brockton-will-enforce-panhandling-laws-unless-judge-says-otherwise>.

municipalities to have the time, resources, and legal acumen to find pro bono counsel willing to challenge this statute. In contrast, a prompt ruling with statewide effect from this Court would be more consistent with the well-established principle that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

Because Section 17A is applicable throughout the Commonwealth, all municipalities, state and local police departments, and prosecutors are in need of clarity with regard to their constitutional obligations. And all residents of the Commonwealth seeking to exercise their rights of expression near public ways, including but not limited to those seeking funds for their own support, are in need of clarity as to the scope of those rights. Pursuant to G.L. c. 231A, § 1, the Supreme Judicial Court has concurrent jurisdiction with the Superior Court over declaratory judgment actions.

The parties to this Petition therefore respectfully request that the Court exercise its discretion to transfer a decision on Count 1 to itself pursuant to G.L. c. 211, § 4A, last paragraph so as promptly to remove – on a statewide basis – uncertainty with regard to the fundamental constitutional rights and obligations that are at issue and which might otherwise continually evade appellate review. The parties respectfully suggest that such a transfer is more efficient than other potential alternatives for obtaining an appellate ruling in the first instance, including a Report by the Superior Court to the Appeals Court pursuant to Mass. R.

Civ. P. 64, which might need to be coupled with a joint request for direct appellate review pursuant to Mass. R. App. P. 11. Prompt transfer will minimize legal expenses for all parties, preserve Superior Court resources, result in definitive clarification of this statewide law at the earliest opportunity, and determine the rights of the Commonwealth's most vulnerable citizens who face threats to their liberty for exercising a fundamental right, as well as the legal responsibilities of police and other government officials.

Count 1 of the Verified Complaint raises a pure question of law: is Section 17A of G.L. c. 85 facially unconstitutional? Hence, no fact-finding will be required by this Court. In fact, in order to expedite matters, the parties to this Petition have agreed to a succinct statement of facts that could be used as the basis for a ruling on the facial constitutionality of Section 17A. That agreed statement of facts is attached to this Motion as Exhibit E.

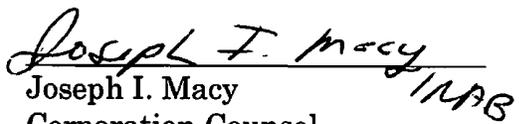
None of the defendants are appealing the preliminary injunction order and decision, so this Petition for Transfer is not an attempt to obtain interlocutory review of the preliminary injunction. Contrast *Albano v. Jordan Marsh*, 367 Mass. 651 (1975).

Conclusion

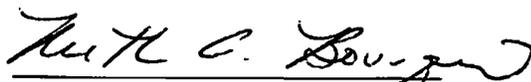
For the foregoing reasons, the Plaintiffs and the Fall River Defendants respectfully request that this Court grant the request for a transfer of the question of the constitutionality of Section 17A pursuant to G.L. c. 211, § 4A, last paragraph, and determine a briefing schedule for the question to be heard by the full Court.

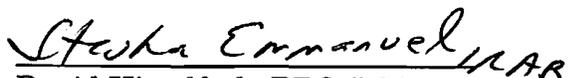
Respectfully submitted,

*On behalf of the City of Fall River and
Police Chief Albert Dupere, in his
official capacity,*


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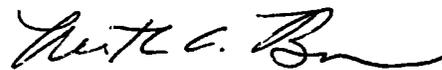

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CERTIFICATE OF SERVICE

I, Ruth A. Bourquin, hereby certify that on this 21st day of June, 2019, I caused a copy of Plaintiffs and Defendants City of Fall River and Albert Dupere's Joint Petition for Transfer and all accompanying exhibits to be served by email and U.S. mail service, first class postage prepaid, on Timothy J. Casey, Assistant Attorney General, One Ashburton Place, Boston, Massachusetts 02108.

DATED: June 21, 2019



Ruth A. Bourquin

Exhibit A

COMMONWEALTH OF MASSACHUSETTS

Bristol, SS.

Superior Court

MASSACHUSETTS COALITION FOR THE HOMELESS, JOHN CORREIRA, and JOSEPH TREEFUL,

Plaintiffs,

v.

THE CITY OF FALL RIVER, ALBERT F. DUPERE, in his individual capacity and in his official capacity as a Chief of the Fall River Police Department, PAUL BERNIER, in his individual capacity and in his official capacity as Lieutenant in the Fall River Police Department, DAVID GOUVEIA, in his individual capacity and in his official capacity as Lieutenant in the Fall River Police Department, JAMES SMITH, in his individual capacity and in his official capacity as Police Sergeant in the Fall River Police Department, MICHAEL PAVAO, in his individual capacity and in his official capacity as an officer within the Fall River Police Department, DEREK AMARAL, in his individual capacity and in his official capacity as an officer within the Fall River Police Department, and THOMAS QUINN, in his official capacity as the District Attorney for Bristol County, Massachusetts,

Defendants.

Civil Action No. 19-_____

VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Introduction

1. Plaintiffs the Massachusetts Coalition for the Homeless, John Correria, and Joseph Treeful bring this lawsuit to challenge the ongoing actions by the City of Fall River, the Fall River Police Department, and the Bristol County District Attorney’s Office of aggressively enforcing a facially unconstitutional state statute against some of Fall River’s most vulnerable residents. The Statute, M.G.L. c. 85, § 17A, purports to prohibit certain classes of people from soliciting funds

from operators of motor vehicles, and the defendants in this lawsuit are relying on the Statute to target for criminal charges people who solicit charity on behalf of themselves, an activity sometimes called “panhandling.” But these requests for charity are constitutionally-protected speech, the Statute is an unconstitutional content- and identity-based restriction of that speech, and the Defendants’ actions are therefore unlawful.

2. Plaintiff Massachusetts Coalition for the Homeless (“MCH”) is a statewide non-profit organization that represents the interests of persons experiencing homelessness and, among other initiatives, seeks to eradicate homelessness, foster financial independence, and organize and advocate for public policy matters that directly affect its members, including the preservation and expansion of adequate income maintenance programs. Its mission further seeks to advance the interests and views of its members, including those members who are directly affected by M.G.L. c. 85, § 17A (the “Statute”).

3. Plaintiff John Correia (“Mr. Correia”) is a low-income resident of Fall River who is experiencing homelessness. Mr. Correia is a member of MCH. He has in the past solicited and in the future intends to solicit funds for his own support from motorists within the City of Fall River.

4. Plaintiff Joseph Treeful (“Mr. Treeful”) is a low-income resident of Fall River who is experiencing homelessness. Mr. Treeful is a member of MCH. He has in the past solicited and in the future intends to solicit funds for his own support from motorists within the City of Fall River.

5. Mr. Correia and Mr. Treeful have been the subject of numerous criminal complaints in the Fall River District Court based on reports filed by members of the Fall River Police Department pursuant to the Statute. These complaints allege that these plaintiffs are

committing a crime by soliciting contributions for their own support from members of the public who are stopped in vehicles at intersections within the City of Fall River. Plaintiffs submit that these charges and the underlying police actions spurring those charges are unlawful because the Statute under which Mr. Correira and Mr. Treeful are repeatedly charged is a content-based restriction on speech not narrowly tailored to serve a compelling governmental interest. The Statute, therefore, violates Article 16 of the Declaration of Rights of the Commonwealth of Massachusetts, as amended, as well as the First and Fourteenth Amendments to the U.S. Constitution.

6. Upon information and belief, the Fall River Police Department and/or the City of Fall River have purposely targeted for criminal charges persons seeking contributions for their own support, possibly in order to deter low-income individuals, including individuals experiencing homelessness, from exercising their free speech right to solicit funds for their own support within the City of Fall River. See, e.g. <http://www.heraldnews.com/news/20181026/panhandlers-say-fall-river-police-are-cracking-down>.

7. Upon information and belief, the Fall River Police Department has requested that the Fall River District Attorney's Office prosecute and no longer dismiss criminal complaints that involve the Statute in order to further deter low-income individuals, including individuals experiencing homelessness, from exercising free speech rights. Upon information and belief, the District Attorney's Office has agreed to this request.

8. As a result of the criminal complaints filed pursuant to the Statute at the request of Fall River police against Mr. Correira, Mr. Treeful, and other individuals soliciting funds for their own support, Mr. Correira and Mr. Treeful are deterred from exercising their right to free speech guaranteed under both the state and federal constitutions, must defend themselves in a court of

law, are the subject of repeat criminal process, are at risk of arrest for not receiving or responding to such criminal process, and are at risk of significant penalty merely for exercising their speech rights.

9. Plaintiffs seek, among other things, an injunction and declaratory relief as follows: (a) a preliminary and permanent injunction that prohibits the Defendants from taking steps to enforce the Statute, including but not limited to by questioning individuals, forcing individuals to stop soliciting upon threat of criminal process, filing charges, and prosecuting complaints under the Statute; (b) a declaration that the Statute is unconstitutional; and (c) further declaratory and injunctive relief that the acts of the Individual Defendants targeting the speech rights of individuals experiencing homelessness under the Statute constitute “threats, intimidation and coercion” that attempt to interfere and have interfered with rights secured by Article 16 and the First Amendment in violation of M.G.L. c. 12, § 11I and should be enjoined.

Jurisdiction and Venue

10. This Court has jurisdiction over this action pursuant to M.G.L. c. 231A, M.G.L. c. 214, § 2, and M.G.L. c. 12, § 11I.

11. Bristol County Superior Court is a proper venue for this action since the unlawful restraint of free speech, threats of criminal complaints and resulting arrests, and the actual filing of criminal complaints and/or arrests under the Statute arose and are arising in Fall River, Massachusetts.

The Parties

12. Massachusetts Coalition for the Homeless (“MCH”) is a non-profit organization with its principal place of business at 73 Buffum Street, Lynn, Massachusetts.

13. John Correira is an adult individual and resident of Fall River, Massachusetts and a member of MCH.

14. Joseph Treeful is an adult individual and resident of Fall River, Massachusetts and a member of MCH.

15. The City of Fall River (the "City") is a City within Bristol County in the Commonwealth of Massachusetts. The City is a municipal corporation organized and existing under the laws of the Commonwealth of Massachusetts with the capacity to sue and be sued. It is empowered to exercise all of the powers and authority of a municipality, including police power, and it maintains, operates and controls the Fall River Police Department and employs Defendants Dupere, Bernier, Smith, Gouveia, Pavao and Amaral.

16. Chief Albert L. Dupere ("Dupere") is an adult individual and the Chief of the Fall River Police Department (the "Department") responsible for the operations and practices of the Department and the official conduct of the Individual Defendants. Upon information and belief, he, or persons operating under his direction, instructed members of the Department to target persons soliciting contributions for their own support for criminal charges under the Statute. Plaintiffs sue Dupere in his official and individual capacities.

17. Lieutenant Paul Bernier ("Bernier") is an adult individual and lieutenant in charge of the Traffic Enforcement Unit in the Special Operations Division of the Fall River Police Department. He has personally filed at least one police report that resulted in a complaint under the Statute against Mr. Treeful for soliciting funds for his own support. Upon information and belief, he has also encouraged officers to seek charges against Mr. Correira, Mr. Treeful and others experiencing homelessness under the Statute. He is sued in his official and individual capacities.

18. Lieutenant David Gouveia (“Gouveia”) is an adult individual and member of the Department who has filed multiple police reports that resulted in criminal complaints being issued under the Statute against Mr. Correira, Mr. Treeful and/or others soliciting funds for their own support. He is sued in his official and individual capacities.

19. Sergeant James Smith (“Smith”) is an adult individual and member of the Department who has filed multiple police reports that resulted in criminal complaints being issued under the Statute against Mr. Correira, Mr. Treeful and/or others soliciting funds for their own support. He is sued in his official and individual capacities.

20. Michael Pavao (“Pavao”) is an adult individual and member of the Department who has filed multiple police reports that resulted in criminal complaints being issued under the Statute against Mr. Correira, Mr. Treeful and/or others soliciting funds for their own support. He is sued in his official and individual capacities.

21. Derek Amaral (“Amaral”) is an adult individual and member of the Department who has filed multiple police reports that resulted in criminal complaints being issued under the Statute against Mr. Correira, Mr. Treeful and/or others soliciting funds for their own support. He is sued in his official and individual capacities.

22. Thomas Quinn (“Quinn”) is the District Attorney of Bristol County, Massachusetts. Upon information and belief, pursuant to his authority, staff within the Office of the District Attorney of Bristol County, including Assistant District Attorneys, were instructed no longer to dismiss charges initiated by members of the Fall River Police Department pursuant to the Statute prior to arraignment. This action placed—and continues to place—Plaintiffs Correira and Treeful and other individuals soliciting funds for their own support at risk of extended criminal process and penalty and at risk of having charges pursuant to the Statute added to their Criminal Offender

Record Information, which will have collateral consequences for them. He is sued in his official capacity.

23. Defendants Dupre, Bernier, Gouveia, Smith, Payao, and Amarol are named in their individual as well as their official capacities and are collectively referred to herein as the “Individual Defendants.”

Factual Background

24. Mr. Correira and Mr. Treeful have in the past solicited and in the future intend to solicit funds for their own support from motorists stopped at intersections within the City of Fall River.

25. Upon information and belief, during 2018 and into 2019 more than 150 criminal complaints were issued based on reports by members of the Department accusing those soliciting funds from motor vehicle operators for their own support of violating the Statute.

26. Plaintiff Correira has been the subject of no fewer than 30 criminal complaints under the Statute; complaints that are based on police reports filed by members of the Department since the summer of 2018.

27. Plaintiff Treeful has been the subject of no fewer than 13 criminal complaints under the Statute; complaints that are based on police reports by members of the Department since November 15, 2018.

28. In their police reports, which spur criminal action, officers of the Fall River Police Department allege that Mr. Correira and Mr. Treeful violate the Statute by standing by the side of roads with signs indicating that they are experiencing homelessness or in need and accepting proffered donations to assist in their financial support from operators of motor vehicles stopped at intersections within the City of Fall River.

29. At one point, when Mr. Correira failed to receive and therefore respond to a summons related to such a complaint, he was arrested and held in jail for a few days until ordered released by the court. In January 2019, Mr. Treeful was taken into custody for alleged probation violations, including an alleged violation of the challenged Statute, and was held in the Dartmouth House of Correction for several days. He was found in violation of probation based on a separate charge but released for time served.

30. Upon information and belief, and based on the language used in several of the police reports used to support the recommendation of charging Mr. Correira and Mr. Treeful, Individual Defendants are engaged in a targeted effort to apply the Statute to individuals experiencing homelessness.

31. Upon information and belief, representatives of the District Attorney's Office previously dismissed charges filed under the Statute prior to arraignment. But, since February 2019, these representatives have indicated that they are no longer authorized to agree to dismiss the charges based on a request from the Department to the office of Defendant Quinn.

32. Solicitation of funds for one's own support is speech protected by Article 16 and the First Amendment, and discrimination against those soliciting funds for their own support, as compared to solicitation for sale of newspapers or other merchandise or by non-profit organizations seeking funds for the benefit of others, is content-based and indeed viewpoint- and speaker-based discrimination. *Benefit v. City of Cambridge*, 424 Mass. 918, 922-925 (1997); *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177, 183-184 (D. Mass. 2015); *Thayer v. City of Worcester*, 144 F. Supp. 3d 218, 232-233 (D. Mass. 2015); *see also Norton v. City of Springfield, Ill.*, 806 F.3d 411 (7th Cir. 2015).

33. The Statute, which is entitled "Soliciting from vehicles on public ways," provides:

Whoever, for the purpose of soliciting any alms, contribution or subscription or of selling any merchandise, except newspapers, or ticket of admission to any game, show, exhibition, fair, ball, entertainment or public gathering, signals a moving vehicle on any public way or causes the stopping of a vehicle thereon, or accosts any occupant of a vehicle stopped thereon at the direction of a police officer or signal man, or of a signal or device for regulating traffic, shall be punished by a fine of not more than fifty dollars. Whoever sells or offers for sale any item except newspapers within the limits of a state highway boundary without a permit issued by the department shall for the first offense be punished by a fine of fifty dollars and for each subsequent offense shall be punished by a fine of one hundred dollars. Notwithstanding the provisions of the first sentence of this section, on any city or town way which is not under jurisdiction of the department, the chief of police of a city or town may issue a permit to nonprofit organizations to solicit on said ways in conformity with the rules and regulations established by the police department of said city or town.

M.G.L. c. 85, § 17A.

34. On its face, the Statute discriminates on the basis of the content of speech.

35. On its face, the Statute discriminates based on the identity of the speakers.

36. For example, the Statute's prohibition on "signal[ing]," "caus[ing] the stopping of," or "accost[ing]" vehicles depends on whether those forms of expression are undertaken for the expressive purpose of solicitation or instead for some other purpose. And even then, only some kinds of solicitation are prohibited. The Statute prohibits all solicitation that seeks money for the solicitor, while exempting soliciting that seeks money for a newspaper or, with a permit, other merchandise. And unlike individuals, who are strictly prohibited from seeking charity for themselves, nonprofit organizations are permitted to seek charity for others, but only if they secure a permit from a municipality's chief of police.

37. In other words, the Statute expressly exempts from the criminal offense of soliciting from a motor vehicle those persons who solicit for the purpose of selling newspapers or, with a permit, selling other items or collecting funds for nonprofit organizations; but it expressly criminalizes solicitation of funds for one's own financial needs.

38. Thus, if an individual holds up a sign next to a roadway and accepts donations from motorists, whether that individual has violated the Statute depends on what the sign says. If the sign says “Newspapers For Sale,” the solicitation is lawful. If a sign says “Save The Whales,” the solicitation’s legality depends on whether the person holding the sign seeks money for a whale-saving organization that has secured a permit from the chief of police. And if the sign says “Homeless – Anything Helps,” the solicitation is strictly illegal.

39. A law that discriminates on the basis of content cannot be justified as a reasonable time, place, or manner restriction. *See, e.g., Reed v. Town of Gilbert*, 576 U.S. ___, 135 S. Ct. 2218, 2226 (2015) (“Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992); *United States v. Grace*, 461 U.S. 171, 177 (1983). In addition, a law that discriminates based on the identity of the speaker and the viewpoints expressed is unlawful. *See R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992) (“The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects”).

40. The Statute’s facial discrimination cannot be justified as being narrowly tailored to serve a compelling governmental interest, because *inter alia* it is “underinclusive.” *Reed*, 135 S.Ct. at 2231. Solicitation from motor vehicles for the purposes of selling newspapers or collecting funds for a nonprofit is no more and no less potentially disruptive to traffic safety than solicitation by those seeking funds for their own support. Yet, the law criminalizes solicitation by those seeking funds for their own support and not the others. In addition, the law criminalizes interference with

traffic only when such interference is combined with certain forms of speech, and does not penalize any other form of interactions that could potentially disrupt traffic.

41. The Massachusetts Civil Rights Act (MCRA), M.G.L. c. 12, § 111, provides a private cause of action against any person, whether or not acting under color of law, who, by means of “threats, intimidation or coercion,” attempts to interfere with or does interfere with a right secured by the constitution or laws of either the United States or the Commonwealth of Massachusetts.

42. An arrest or the threat of arrest of one engaging in an activity that is protected by state or federal law satisfies the “threats, intimidation or coercion” requirement. *Batchelder v. Allied Stores Corp.*, 393 Mass. 819, 823 (1985) (“A uniformed security officer ordered Batchelder to stop soliciting and distributing his political handbills. Though Batchelder objected, he complied. This was sufficient intimidation or coercion to satisfy the statute.”); *Sarvis v. Boston Safe Deposit & Tr. Co.*, 47 Mass. App. Ct. 86, 93 (1999) (“The arrests and detention of the plaintiffs by police were intrinsically coercive and, thus, sufficient to meet the plaintiffs’ burden on that prong.”); *Reproductive Rights Network v. President of the University of Mass.*, 45 Mass. App. Ct. (1998) (implicit threat of arrest constitutes “threats, intimidation or coercion”). Threatened or actual arrests and/or filings of criminal complaints against those who exercise their constitutional rights to solicit funds from motorists for their own support along the sides of public ways are “threats, intimidation or coercion” under the MCRA.

Causes of Action

Count 1 – Free Speech and Expressive Conduct

43. The Plaintiffs reallege and incorporate all of the preceding allegations.

44. M.G.L. c. 85, § 17A unconstitutionally impinges on the Plaintiffs Correia and Treeful's rights of free speech and expressive conduct guaranteed by Article 16 of the Massachusetts Declaration of Rights, as well as by the First Amendment to the U.S. Constitution, made applicable to the states by the Fourteenth Amendment to the U.S. Constitution.

45. Enforcement actions taken and/or criminal complaints filed pursuant to this unconstitutional statute, as well as efforts actually to arraign or prosecute based on alleged violations of the Statute, violate Article 16 and the First Amendment.

46. The Defendants have infringed, are infringing and, absent relief from this Court, will continue to infringe upon the constitutional rights of Mr. Correia and Mr. Treeful to engage in free speech.

Count 2 – Massachusetts Civil Rights Act

47. The Plaintiffs reallege and incorporate all of the preceding allegations.

48. The Massachusetts Civil Rights Act ("MCRA") provides a private cause of action to any person whose rights have been interfered with or who are subject to an attempt at infringement through "threats, coercion, or intimidation" by another. The MCRA must be liberally construed.

49. The Individual Defendants have interfered with the rights of Mr. Correia and Mr. Treeful guaranteed under Article 16 of the Massachusetts Declaration of Rights and the First and Fourteenth Amendments of the United States Constitution to engage in free speech and expressive conduct by, among other things, undertaking the following acts:

- a. Filing criminal complaints against or arresting Mr. Correia and Mr. Treeful and others for soliciting funds for their own support;

- b. Ordering or encouraging the filing of criminal complaints against or arrests of Mr. Correira and Mr. Treeful and others for soliciting funds for their own support;
- c. Threatening to file criminal complaints against or arrest Mr. Correira and Mr. Treeful and others for soliciting funds for their own support;
- d. Creating and implementing policies intended to and directed at deterring the exercise of the right to free speech and expression by Mr. Correira and Mr. Treeful and others for soliciting funds for their own support.

50. As a direct and proximate result of the MCRA violations, Mr. Correira and Mr. Treeful have suffered and are suffering actual harm, including, but not limited to deterrence of the exercise of free speech rights, loss of financial support, diminution of financial resources, and/or mental distress, emotional distress, and/or embarrassment.

Prayers for Relief

Wherefore, Plaintiffs respectfully ask this Honorable Court to:

- 1. Enter a temporary restraining order prohibiting all Defendants from arresting, filing criminal charges against, or prosecuting any charges brought pursuant to the Statute;
- 2. Issue a short order of notice and, after hearing, enter a preliminary injunction prohibiting all Defendants from arresting, filing criminal charges against, or prosecuting any charges brought pursuant to the Statute;
- 3. Issue a permanent injunction against all Defendants threatening or making arrests, filing criminal charges, or prosecuting charges brought pursuant to M.G.L. c. 85, § 17A;
- 4. Declare that the Statute is unconstitutional in that it violates Article 16 of the Massachusetts Declaration of Rights and the First and Fourteenth Amendments of the United States Constitution;

5. Find and declare that by filing criminal complaints, making arrests, threatening to file criminal complaints or make arrests, and/or pursuing prosecutions which deter the Plaintiffs' exercise of rights protected by Article 16 of the Massachusetts Declaration of Rights and the First and Fourteenth Amendments of the United States Constitution, the Individual Defendants have violated the MCRA;

6. Find and declare that all Defendants deprived the Plaintiffs of their right to free speech and expression under Article 16, as well as the First Amendment;

7. Award Plaintiffs' attorneys their reasonable attorneys' fees and costs; and

8. Award such other and further relief as the Court deems proper, just and equitable.

On behalf of Plaintiffs Massachusetts Coalition for the Homeless,
John Correira and Joseph Treeful,

Ruth A. Bourquin

Ruth A. Bourquin, BBO # 552985

Jessica Lewis, BBO pending

American Civil Liberties Union

Foundation of Massachusetts

211 Congress Street

Boston, MA 02110

rbourquin@aclum.org

617-482-3170 ext. 348

Stesha Emmanuel

David Himelfarb, BBO # 649596

Stesha Emmanuel, BBO # 682293

Rachel E.D. Churchill, BBO # 675673

Quincy Kayton, BBO # 696797

McCarter & English, LLP

265 Franklin Street

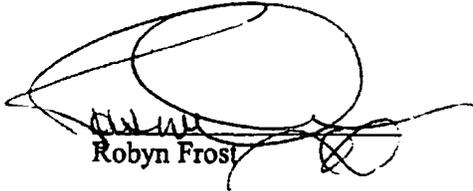
Boston, MA 02110

semmanuel@mccarter.com

617-449-6511

Verification of Complaint as to Massachusetts Coalition for the Homeless

I, Robyn Frost, Executive Director of the Massachusetts Coalition for the Homeless hereby affirmed under the pains and penalties of perjury that the allegations in the Complaint that relate to the Massachusetts Coalition for the Homeless are true and correct.

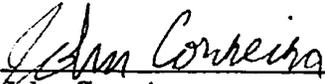


Robyn Frost

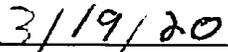
03.24.2019
Date

Verification of Complaint

I, John Correia, hereby affirm under the pains and penalties of perjury and based on my personal knowledge that the factual allegations in the Complaint that relate to me are true and correct.



John Correia



Date

Verification of Complaint

I, Joseph Treeful, hereby affirm under the pains and penalties of perjury and based on my personal knowledge that the factual allegations in the Complaint that relate to me are true and correct.

Joseph E. Treeful &c.
Joseph Treeful

3-15-19
Date

Exhibit B

APR 17 2019

MARC J SANTOS, ESQ.
CLERK/MAGISTRATE
BRISTOL, ss.

COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT
CIVIL ACTION
NO. 2019-00299

MASSACHUSETTS COALITION FOR THE HOMELESS, & others¹

vs.

CITY OF FALL RIVER, & others²

**MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS'
EMERGENCY MOTION FOR A PRELIMINARY INJUNCTION**

Massachusetts Coalition for the Homeless (“MCH”), John Correira (“Correira”), and Joseph Treeful (“Treeful”) (collectively, the “plaintiffs”), move for a preliminary injunction against the City of Fall River, and several police officers, in their individual and official capacities as employees of the Fall River Police Department (collectively, the “defendants”), in relation to the enforcement of G. L. c. 85, §17A.³ The plaintiffs argue that enforcement of G. L. c. 85, § 17A violates their rights under the First Amendment of the United States Constitution and art. 16 of the Massachusetts Declaration of Rights. The court held a hearing on the plaintiffs’ motion on April 9, 2019, and took the matter under advisement. After hearing, and

¹ John Correira and Joseph Treeful

² Albert F. Dupere, in his individual capacity, and in his official capacity as Chief of Police of the Fall River Police Department; Paul Bernier, in his individual capacity, and in his official capacity as Lieutenant of the Fall River Police Department; David Gouveia, in his individual capacity, and in his official capacity as Lieutenant in the Fall River Police Department; James Smith, in his individual capacity, and in his official capacity as Police Sergeant in the Fall River Police Department; Michael Pavao, in his individual capacity, and in his official capacity as an officer within the Fall River Police Department; Derek Amaral, in his individual capacity, and in his official capacity as an officer within the Fall River Police Department; and Thomas Quinn, in his official capacity as the district attorney for Bristol County, Massachusetts

³ No preliminary injunction is being sought against the defendant Thomas Quinn. The Bristol County District Attorney’s Office agreed to dismiss all pending and new complaints brought under G. L. c. 85, § 17A, during the pendency of this litigation, as per an agreement with the American Civil Liberties Union Foundation of Massachusetts, filed with the court on April 9, 2019.

review of the parties' submissions, the plaintiffs' motion for a preliminary injunction is

ALLOWED.

BACKGROUND

Pursuant to G. L. c. 85, § 17A, soliciting from vehicles on public ways is a crime, requiring violators to pay a fine. The statute provides:

Whoever, for the purpose of soliciting any alms, contribution or subscription or of selling any merchandise, *except newspapers*, or ticket of admission to any game, show, exhibition, fair, ball, entertainment or public gathering, signals a moving vehicle on any public way or causes the stopping of a vehicle thereon, or accosts any occupant of a vehicle stopped thereon at the direction of a police officer or signal man, or of a signal or device for regulating traffic, shall be punished by a fine of not more than fifty dollars. Whoever sells or offers for sale any item *except newspapers* within the limits of a state highway boundary without a permit issued by the department shall for the first offense be punished by a fine of fifty dollars and for each subsequent offense shall be punished by a fine of one hundred dollars. *Notwithstanding the provisions of the first sentence of this section, on any city or town way which is not under jurisdiction of the department, the chief of police of a city or town may issue a permit to nonprofit organizations to solicit on said ways in conformity with the rules and regulations established by the police department of said city or town.*

G. L. c. 85, § 17A (emphasis added).

MCH is a statewide non-profit organization that represents individuals facing homelessness. Correira and Treeful are low-income residents of the City of Fall River and are currently homeless. Correira and Treeful have received numerous criminal complaints in the Fall River District Court based on reports filed by members of the Fall River Police Department pursuant to § 17A. Generally, the complaints allege Correira and Treeful committed a crime by soliciting contributions for their own support from members of the public who are stopped in motor vehicles at intersections within the City of Fall River. At one point, Correira failed to receive and respond to a summons related to such a complaint, was subsequently arrested, and held in prison for a few days until a court ordered his release. In January 2019, Treeful was taken into custody for alleged probation violations, including an alleged violation of § 17A.

From January 1, 2018 to February 27, 2019, the Fall River Police Department filed 169 reports recommending criminal action, including prosecution, against individuals alleged to have violated G. L. c. 85, § 17A.

The City of Fall River Police Department's policy regarding panhandlers⁴ is to leave them alone. Albert Dupere, the Chief of Police of the Fall River Police Department, estimates there are six to eight individuals panhandling on a given day in Fall River. With respect to the enforcement of G. L. c. 85, § 17A, an officer will first warn an individual, and if the individual fails to heed the warning, an officer would then issue a citation. Conduct leading to charges include repeatedly walking out into the highway off-ramp to oncoming motorists, and obstructing traffic flow resulting in increased traffic congestion at a busy traffic area.

DISCUSSION

I. Standard of Review

A party seeking a preliminary injunction must demonstrate “(1) a likelihood of success on the merits; (2) that irreparable harm will result from denial of the injunction; and (3) that, in light of the [moving party’s] likelihood of success on the merits, the risk of irreparable harm to the [moving party] outweighs the potential harm to the [nonmoving party] in granting the injunction.” *Garcia v. Department of Housing and Community Development*, 480 Mass. 736, 747 (2018) (citations omitted). See *Packaging Indus. Group, Inc. v. Cheney*, 380 Mass. 609, 617 (1980). “Where a party seeks to enjoin government action, the judge also must determine that the requested order promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the public.” *Garcia*, 480 Mass. at 747 (internal quotations and citations omitted).

⁴ While a panhandler is the noun form of panhandle and considered slang, to panhandle is “[t]o beg, esp[ecially] on the streets;” “to beg from.” Webster’s II New College Dictionary 793 (2001).

II. Analysis

“The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws ‘abridging the freedom of speech.’” *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015), quoting U.S. Const. amend. I. Similarly, art. 16 of the Massachusetts Declaration of Rights provides “[t]he right to free speech shall not be abridged.” *Doe v. Sex Offender Reg. Bd.*, 459 Mass. 603, 623 n.21 (2011), quoting art. 16 of the Massachusetts Declaration of Rights. As the state freedom of speech analysis is generally guided by its federal counterpart, see *Hosford v. School Comm.*, 421 Mass. 708, 712 n.5 (1996), the court does not distinguish between them. But see *Mendoza v. Licensing Bd.*, 444 Mass. 188, 201 (2005) (article 16 provides greater protection for nude dancing than First Amendment).

The plaintiffs argue G. L. c. 85, § 17A violates the First Amendment of the United States Constitution and article 16 of the Massachusetts Declaration of Rights by violating their free speech rights. At this stage of the proceedings, the court agrees that the plaintiffs are likely to show that § 17A unconstitutionally violates the plaintiffs’ federal and state free speech rights.

a. Likelihood of Success on the Merits.⁵

To determine the plaintiffs’ likelihood of success on the merits, the court must first determine whether G. L. c. 85, § 17A is content-based or content-neutral. See *Reed*, 135 S. Ct. at 2222 (“A court must evaluate each question — whether a law is content based on its face and whether the purpose and justification for the law are content based — before concluding that a law is content neutral.”); *T & D Video, Inc. v. City of Revere*, 423 Mass. 577, 580 (1996) (“The

⁵ The plaintiffs’ memorandum also invites the court to make a ruling on the likelihood of success of the merits of the plaintiffs’ claim under G. L. c. 12, § 111, the Massachusetts Civil Rights Act (“MCRA”), by showing that arrests under G. L. c. 85, § 17A constitute “threats, intimidation or coercion.” However, the court declines to do so as the plaintiffs’ argument at the hearing, and the majority of their memorandum argument, concerned the constitutionality of G. L. c. 85, § 17A, as opposed to any alleged violation under the MCRA.

threshold inquiry regarding a First Amendment challenge . . . is whether the ordinance in question is content based or content neutral.”).

“Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message conveyed.” *Reed*, 135 S. Ct. at 2227.

“This stringent standard reflects the fundamental principle that governments have no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *National Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (internal quotations and citations omitted). Content-neutral speech regulation “is invoked when the government has imposed restrictions on speech related to an entire subject area.” *Perry Educ. Ass’n v. Perry Local Educators Ass’n*, 460 U.S. 37, 59 (1983). While the defendants argue the statute is content-neutral, the court finds that the plaintiffs are likely to prevail on their argument that G. L. c 85, § 17A is a content-based regulation.

The statute prohibits the “signal[ing],” “stopping,” or “accost[ing]” of a moving vehicle on a public way for the solicitation of “alms, contribution or subscription of any merchandise.” G. L. c. 85, § 17A. However, G. L. c. 85, § 17A provides an exception for the sale of newspapers, as well as for solicitation by a non-profit organization that obtains a permit from a city or town’s chief of police. See *id.* Thus, the determination of criminality ultimately turns on the identity of the speaker and the content of the speaker’s message. For example, a panhandler stopping or accosting a motor vehicle on a public way for a contribution would be subject to punishment under the statute, while an individual selling a newspaper who similarly stops or accosts a motor vehicle would not receive punishment. See *Reed*, 135 S. Ct. at 2230 (“[L]aws favoring some speakers over others demand strict scrutiny where the legislature’s speaker preference reflects a content preference.”).

While the statute does not specifically state that solicitation by a panhandler is prohibited, the statute “on its face draws distinctions based on the message a speaker conveys.” *Reed*, 135 S. Ct. at 2227 (internal quotations omitted). Cf. *Benefit v. City of Cambridge*, 424 Mass. 918, 919 (1997) (providing G. L. c. 272, § 66 violated First Amendment where statute imprisoned individuals who, among other things, were “wandering abroad and begging” in “areas to which the general public is invited”). The statute imposes fines upon panhandlers who stop, signal, or accost motor vehicles for contributions, but individuals selling newspapers or nonprofit organizations obtaining a permit, conducting the exact same activity, receive no penalty. “Panhandling is an expressive act regardless of what words, if any, a panhandler speaks. Even the presence of an unkempt and disheveled person holding out his or her hand or a cup to receive a donation itself conveys a message of need for support and assistance.” *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177, 184 (D. Mass. 2015) (internal quotations and citations omitted). See *Benefit*, 424 Mass. at 922 (“It is beyond question that soliciting contributions is expressive activity that is protected by the First Amendment.”).

As such, the court finds that the plaintiffs have a substantial likelihood of proving that § 17A is a content-based regulation, which would require the court to analyze the statute under strict scrutiny. See *Reed*, 135 S. Ct. at 2227 (distinctions between speech “based on the message a speaker conveys . . . are subject to strict scrutiny.”); *Benefit*, 424 Mass. at 925 (“Since we are concerned with a content-based prohibition on communicative activity occurring in what have historically been considered public forums, the statute must be subject to strict scrutiny.”).

“Content-based laws — those that target speech based on its communicative content — are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” *Reed*, 135 S. Ct. at 2226. See

Commonwealth v. Carter, 474 Mass. 624, 636 n.17 (2016). Here, the defendants do not have a substantial likelihood of demonstrating that § 17A is narrowly tailored to serve a compelling state interest. The only state interest the defendant proffers for the statute is that the stopping of motor vehicles by panhandlers interrupts the flow of traffic. However, the defendants' argument does not take into consideration that individuals selling newspapers, as well as non-profit organizers soliciting funds, also interrupt the flow of traffic by stopping vehicles, but are not penalized under G. L. c. 85, § 17A. See *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546-547 (1993) ("Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling."). Where the statute only applies to the interruption of motor vehicle traffic by certain individuals or groups of people, i.e., panhandlers, the defendants are unlikely to be able to prove the purpose of the statute is to prevent interruption of motor vehicle traffic. Instead, the plaintiffs' have a substantial likelihood of prevailing on their argument that § 17A's selective application of speech makes the statute underinclusive and not narrowly tailored.

As such, the plaintiffs have thus shown a likelihood of success on the merits that G. L. c. 85 § 17A is unconstitutional and violates their First Amendment and article 16 free speech rights.

b. Irreparable Harm

As the plaintiffs correctly argue, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Temple Emanuel of Newton v. Massachusetts Comm'n Against Discrim.*, 463 Mass. 472, 481 (2012), quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion). Additionally, the plaintiffs' continued conduct would subject them to additional fines, and potential imprisonment, if the preliminary

injunction were not issued.⁶ Therefore, the court finds the plaintiffs met their burden of showing that irreparable harm would result from a denial of the injunction.

c. Balance of Harm

The plaintiffs have demonstrated that their risk of harm outweighs that of the defendants' risk of harm. By not granting a preliminary injunction, the plaintiffs will be continually subjected to violations of G. L. c. 85, § 17A by the City of Fall River Police Department. On the other hand, as the court indicated at the hearing on the plaintiffs' motion, the defendants still have the ability to charge panhandlers and solicitors who violate other laws of the Commonwealth. See G. L. c. 272, § 53(b) ("Disorderly persons and disturbers of the peace, . . . shall be punished"); G. L. c. 90, § 18A (rules, regulations, and violations concerning pedestrians and the use of ways). As such, the balance of harm weighs in favor of allowing the preliminary injunction.

d. Public Interest

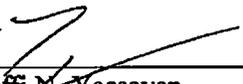
The court also finds, as the plaintiffs argue, that a preliminary injunction would promote the public interest by protecting First Amendment and article 16 freedom of speech rights. *Pan American v. Municipality of San Juan*, 2018 U.S. Dist. LEXIS 208014, at *72 (D. P.R. 2018), quoting *Texans for Free Enterprise v. Texas Ethics Comm'n*, 732 F.3d 535, 539 (5th Cir. 2013) ("Injunctions protecting First Amendment Freedoms 'are always in the public interest.'"). The defendants argue that issuing an injunction would thwart the public interest, indirectly promote an unsafe and unsound result, and permit panhandlers and other soliciting individuals to signal, stop, or accost motor vehicles. However, the defendants' concerns are unpersuasive and

⁶ If the plaintiffs failed to respond to a summons relating to G. L. c. 85, § 17A, as did Correia, they would face imprisonment. However, their failure to appear would not be subject to their ambivalence towards the proceedings, but instead attributed to their homelessness as they would not have an address for the summons to be directed.

exaggerated. First, as provided *supra*, the defendants would not be powerless to stop panhandlers and other solicitors from interrupting the flow of motor vehicle traffic. The Fall River Police Department can charge panhandlers or solicitors with violations of other offenses. Additionally, the number of panhandlers in the City of Fall River is minimal: the Fall River Police Department estimates there are only approximately six to eight people panhandling on any given day in Fall River. Therefore, the plaintiffs have also demonstrated that the issuance of a preliminary injunction serves the public interest.

ORDER

For the aforementioned reasons, it is **ORDERED** that the Plaintiffs' Motion for a Preliminary Injunction is **ALLOWED**. The City of Fall River and the City of Fall River Police Department are hereby **ORDERED** to refrain from any enforcement of G. L. c. 85, § 17A during the pendency of this litigation.



Raffi M. Yessayan
Justice of the Superior Court

DATED: April 17, 2019

Exhibit C



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

MAURA HEALEY
ATTORNEY GENERAL

(617) 727-2200
www.mass.gov/ago

May 31, 2019

BY HAND DELIVERY

Mark J. Santos, Clerk
Bristol Superior Court
441 County Street, 1st floor
New Bedford, MA 02740

Re: Massachusetts Coalition for the Homeless, et al. v. City of Fall River, et al.,
Bristol Superior Court, No. 1973CV00299

Dear Mr. Santos:

Enclosed for filing in the above-referenced case please find the Commonwealth's Notice of Consent to Entry of Judgment on Count I of the Complaint.

Thank you for your assistance in this matter.

Very truly yours,

A handwritten signature in cursive script that reads "Timothy Casey".

Timothy J. Casey
Assistant Attorney General
(617) 963-2043
timothy.casey@mass.gov

Enclosure

cc: Ruth A. Bourquin, Esq. (by e-mail and regular mail)
David Himelfarb, Esq. (by e-mail and regular mail)
Gary Howayeck, Esq. (by e-mail and regular mail)
Patrick A. Bomberg, Esq. (by e-mail and regular mail)



COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

SUPERIOR COURT
NO. 1973CV00299

MASSACHUSETTS COALITION FOR THE
HOMELESS, *et al.*,

Plaintiffs,

v.

THE CITY OF FALL RIVER, *et al.*,

Defendants.

**COMMONWEALTH'S NOTICE OF CONSENT
TO ENTRY OF JUDGMENT ON COUNT I OF COMPLAINT**

Defendant, Thomas M. Quinn, III, named in his official capacity as the District Attorney for Bristol County (the "District Attorney"), hereby gives notice that the Commonwealth consents to entry of a declaratory judgment in favor of the plaintiffs on Count I of the Complaint.¹ This notice is filed in accordance with Mass. R. Civ. P. 65(b)(2), which permits a trial court to consolidate the hearing of a motion for preliminary injunction with its determination of the merits of an action.

The Commonwealth acknowledges that the statute at issue in this case, G.L. c. 85, § 17A, is unconstitutional as a content-based regulation in prohibiting the "soliciting [of] any alms, contribution or subscription" from occupants of vehicles on public ways.² The statute imposes a

¹ Count I is the only count of the Complaint against the District Attorney. The other count of the complaint concerns only the other defendants to the action. *See* Compl. ¶¶ 23, 49. Insofar as Count I is also against the other defendants to the action, *see id.* ¶¶ 43-46, the District Attorney does not speak for them, nor can he consent to entry of judgment on their behalf.

² Section 17A states, in part: "Whoever, for the purpose of soliciting any alms, contribution or subscription or of selling any merchandise, except newspapers, or ticket of admission to any game, show, exhibition, fair, ball, entertainment or public gathering, signals a moving vehicle on any public way or causes the stopping of a vehicle thereon, or accosts any occupant of a vehicle

fine on individuals who signal, stop, or accost a motor vehicle or its occupants on a public street for the purpose of panhandling or selling merchandise or tickets or subscriptions, but exempts those who engage in the exact same conduct for the purpose of selling newspapers or soliciting funds for a nonprofit organization (provided those raising funds for a nonprofit first obtain a permit). "It is beyond question that soliciting contributions is expressive activity that is protected by the First Amendment." *Benefit v. City of Cambridge*, 424 Mass. 918, 922 (1997) (citing *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980)). In particular, the Supreme Judicial Court has held that "peaceful begging" constitutes protected "communicative activity." *Id.* at 923. While such activity may be subject to reasonable time, place, and manner regulations—a question that is not presented by this case—here, section 17A regulates communicative activity based on its content; it prohibits individual requests for personal financial aid (*i.e.*, the "soliciting [of] any alms [or] contribution") but allows "nonprofit organizations" that obtain a local permit "to solicit on [public] ways," and further allows speech promoting the sale of newspapers. The statute therefore discriminates, on its face, against those who convey certain messages or speak on certain subjects.

Under the controlling decisions from the U.S. Supreme Court and the Supreme Judicial Court including, for example, *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226-27, 2231-32 (2015), and *Benefit v. City of Cambridge*, 424 Mass. 918, 922-27 (1997), section 17A is a content-based restriction on plaintiffs' free-speech rights and, for that reason, is subject to strict

stopped thereon . . . , shall be punished by a fine of not more than fifty dollars. Whoever sells or offers for sale any item except newspapers within the limits of a state highway boundary without a permit issued by the department shall . . . be punished by a fine Notwithstanding the provisions of the first sentence of this section, on any city or town way which is not under jurisdiction of the department, the chief of police of a city or town may issue a permit to nonprofit organizations to solicit on said ways in conformity with the rules and regulations established by the police department of said city or town."

judicial scrutiny. Under that demanding test, the Commonwealth would have to prove that the statute's distinction between permissible and impermissible solicitation "furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed*, 135 S. Ct. at 2231 (citations and internal quotations omitted).

While the Commonwealth submits that the statute is intended to further compelling governmental interests in public safety, *see, e.g., McCullen v. Coakley*, 573 U.S. 464, 486 (2014), it acknowledges that the statute is not narrowly tailored to serve those interests, since it both forbids and permits the same public-safety-threatening conduct—*i.e.*, signaling or stopping a moving automobile or accosting the occupants of a stopped car on a public street—depending on the content of the message conveyed by the individual engaging in the conduct (*e.g.*, panhandling vs. selling newspapers). *See Reed*, 135 S. Ct. at 2231-32 (holding that city ordinance failed narrow-tailoring requirement of strict scrutiny based on its "underinclusiveness," since it closely regulated signs with certain messages in the interest of traffic safety, while imposing lesser restrictions on signs with other messages even though such signs posed the same threat to traffic safety).

The Commonwealth therefore consents to the entry of a judgment declaring that the portion of G.L. c. 85, § 17A, challenged by plaintiffs is unconstitutional as contrary to the Free Speech Clause of the First Amendment in prohibiting the "soliciting [of] any alms, contribution or subscription" from occupants of vehicles on public ways.³

³ The Commonwealth respectfully suggests that a permanent injunction is unnecessary in this case. Courts "assume that public officials will comply with the law once a court has defined it, and injunctions usually are not needed in the absence of intransigence on the part of such public officials." *Benefit*, 424 Mass. at 927 (stating that, on remand, the trial court may decline to enter a permanent injunction on this basis). Here, there is no intransigence on the part of the District Attorney. To the contrary, the District Attorney acknowledges that the portion of section 17A challenged by the plaintiffs is unconstitutional, and consents to the entry of a final judgment on

WHEREFORE, the Commonwealth requests that this Court enter judgment in favor of the plaintiffs on Count I of the Complaint, and declare that the portion of G.L. c. 85, § 17A, challenged by plaintiffs is unconstitutional as contrary to the Free Speech Clause of the First Amendment in prohibiting the "soliciting [of] any alms, contribution or subscription" from occupants of vehicles on public ways.

Respectfully submitted,

THOMAS QUINN, in his official capacity as the
District Attorney for Bristol County,

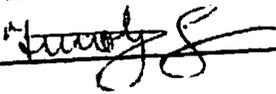
By his attorney,



Timothy J. Casey (BBO No. 650913)
Assistant Attorney General
One Ashburton Place
Boston, Massachusetts 02108
(617) 963-2043
timothy.casey@mass.gov

May 31, 2019

CERTIFICATE OF SERVICE
I hereby certify that a true copy of the above
document was served upon the attorney of
record for each other party by mail ~~(by hand)~~ & e-mail
on 5/31/19



Count I declaring that the statute's prohibition on the "soliciting [of] any alms, contribution or subscription" from occupants of vehicles on public ways violates the Free Speech Clause of the First Amendment. Accordingly, a permanent injunction is unwarranted here.

Exhibit D

The Enterprise

Mayor: Brockton will enforce panhandling laws unless judge says otherwise

By **Marc Larocque**

Enterprise Staff Writer

Posted Apr 21, 2019 at 11:31 AM

Mayor Bill Carpenter said that, despite the efforts of the American Civil Liberties Union to get the city to reconsider its use of panhandling laws, Brockton will continue to crack down on beggars who harass people and damage businesses.

BROCKTON – The enforcement of a new ordinance regarding panhandling, and a state law that’s been on the books prohibiting soliciting from moving cars, may now have the city of Brockton in the crosshairs of the American Civil Liberties Union.

But the mayor said he’s not backing down from efforts to deter panhandling in the city, unless a judge tells him otherwise.

“What we’re doing is cleaning up the city,” said Carpenter, reached on Friday. “We’ll continue to do so until we get a court order.”

On Wednesday, the ACLU of Massachusetts obtained a preliminary injunction from a Superior Court judge blocking the city of Fall River from enforcing a state statute that prohibits people from soliciting donations from someone in a moving vehicle, which typically takes place at busy intersections around the state. While the injunction only applies to Fall River and police there, the ACLU said the reasoning behind the ruling could also apply to Brockton’s enforcement of the same law, and a lawyer for the civil liberties group warned Brockton and other cities to stop cracking down on panhandlers by using the law.

“We’re encouraging all cities and towns in Massachusetts to carefully review the court’s decision,” said Ruth Bourquin, senior attorney at the ACLU of Massachusetts, who helped file for an injunction in Fall River. “The decision sets forth very clearly why this statute is very likely unconstitutional. We would hope that other cities and towns would heed the court’s warning, and refrain from using it, as to avoid any need for litigation.”

Informed that Carpenter said the city of Brockton would continue enforcing the statute, Bourquin said she hopes he changes his mind.

“We would hope they reconsider,” said Bourquin, giving an interview to The Enterprise on Thursday. “They stated in the media that they are using the statute, and we call upon them and any others who are doing the same thing, to reconsider in light of the court’s clear ruling.”

The ACLU of Massachusetts has also been looking into a local anti-panhandling ordinance that was passed by City Council in a unanimous decision on March 25, and the civil liberties group is now calling on city officials to do a quick U-turn and repeal the ordinance. On March 28, it was signed into law by the mayor, who previously expressed concerns to The Enterprise about the constitutionality of the ordinance.

Bourquin argued that the Brockton anti-panhandling ordinance is anti-free speech and discriminatory against the homeless, banning people from asking for donations on all city-owned properties, which she said would include all public sidewalks throughout the 21.6-square-mile community. The ordinance also prohibits panhandling at bus stops, in public parks, near ATM machines, in city parking lots, and outside of church or other houses of worship.

"We have learned that the mayor of Brockton recently signed a new ordinance specifically banning 'panhandling' throughout much of the city," said Bourquin, in an email to The Enterprise, subsequent to an interview with the newspaper on Thursday. "We believe that this ordinance is clearly unconstitutional as an assault on the free speech rights of low-income individuals. As a result, any enforcement of it will likely expose the city to legal liability. We urge city officials not to enforce it and, indeed, repeal it, particularly in light of the recent ruling in the Fall River case."

Although he previously expressed reservations in an interview with The Enterprise about the constitutionality of the ordinance, Carpenter later told the newspaper that he already pledged to City Council to support the anti-panhandling ordinance and decided against a veto. Carpenter said the anti-panhandling ordinance is now on the books, and will be used in addition to the state statute, along with enforcing no trespass orders, as a way to crack down on panhandlers who disturb members of the public and discourage business activity.

"I'm more than happy to add this recent ordinance to our arsenal," said Carpenter, who also explained that he consulted with his Small Business Advisory Council on the problems caused by panhandling. "It gives us another tool in the tool box. Unless a judge tells me we can't enforce the ordinance, we will continue to enforce the ordinance. ... This is a public safety and an economic development issue."

Same goes for the state statute, Carpenter said, which the mayor contends is more about public safety, than free speech. Carpenter said the state law restricts panhandling and soliciting money from people in moving cars, which he argues has been a big problem at busy intersections in Brockton, although it's an issue that has been "dramatically reduced" in the past year and a half by police enforcing the statute and no trespass orders in the city. Carpenter claims that there are now only two prominent panhandlers in Brockton, after implementing the "two-pronged strategy" involving no trespass orders and the state statute.

"We're going to continue to do so until a court tells me otherwise," Carpenter said. "There's no lack of compassion. But we're not going to tolerate people in the street, at business intersections, blocking and stopping traffic."

While the ACLU has won a preliminary injunction in relation to the enforcement of the state statute prohibiting solicitation from moving vehicles, Bourquin said she hopes that it could be applied statewide, and that ultimately the law would then struck down as unconstitutional. Bourquin said it's unfair that the state statute is clearly targeted at the poor, with exceptions carved out into the law for people selling newspapers and nonprofit fundraisers held by organizations with local permits.

There is no date set for the next court action in connection to the Fall River case, Bourquin said, but the ACLU and its partners in the litigation are now planning to potentially file an additional motion in Superior Court, or seek further action at the Appeals Court in Massachusetts. (Bourquin said there is precedent for state courts tossing out state laws that target low-income people asking for support, pointing to the 1997 Supreme Judicial Court ruling in *Craig Benefit v. the city of Cambridge*. The ruling against a state statute in the 1997 case is now applicable to all communities in Massachusetts, not just the defendant city of Cambridge, she said.)

"We anticipate moving pretty quickly to get a ruling on a final declaration that the statute is unconstitutional," Bourquin said. "We're still discussing among ourselves and opposing counsel the various mechanism for making that happen, whether it's a further motion to Superior Court, or whether we seek to get the issue to one of the appellate courts in Massachusetts. We're hoping, whichever route we decide to go, it will happen in fairly short order. ... We're just very pleased with the court's careful analysis. We urge all communities in Massachusetts to read the decision, and refrain from enforcing the statute, so there's not a need for litigation with others."

Look below to view a copy of the Superior Court decision issued Wednesday, April 17, siding with the ACLU request for a preliminary injunction against the city of Fall River from enforcing a state statute that prohibits soliciting from people in vehicles on a public way.

BRISTOL SS SUPERIOR COURT FILED	
APR 17 2019	
MARC J SANTOS, ESQ. CLERK/MAGISTRATE BRISTOL, ss.	COMMONWEALTH OF MASSACHUSETTS
	SUPERIOR COURT CIVIL ACTION NO. 2019-00299
MASSACHUSETTS COALITION FOR THE HOMELESS, & others¹	
-	
CITY OF FALL RIVER, & others²	
<u>MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' EMERGENCY MOTION FOR A PRELIMINARY INJUNCTION</u>	
<p>Massachusetts Coalition for the Homeless ("MCH"), John Correia ("Correia"), and Joseph Treeful ("Treeful") (collectively, the "plaintiffs"), move for a preliminary injunction against the City of Fall River, and several police officers, in their individual and official capacities as employees of the Fall River Police Department (collectively, the "defendants"), in relation to the enforcement of G. L. c. 85, §17A.³ The plaintiffs argue that enforcement of G. L. c. 85, § 17A violates their rights under the First Amendment of the United States Constitution and art. 16 of the Massachusetts Declaration of Rights. The court held a hearing on the</p>	

Exhibit E

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

Suffolk, SS.

No. SJ-2019-_____

MASSACHUSETTS COALITION FOR THE HOMELESS, et al.,

Plaintiffs/Petitioners,

v.

CITY OF FALL RIVER, et al.,

Defendants/Petitioners

STATEMENT OF AGREED-UPON MATERIAL FACTS IN CONNECTION WITH
THE PARTIES' JOINT PETITION FOR TRANSFER, PURSUANT TO G.L. c. 211, §
4A, LAST PARAGRAPH, OF COUNT 1 OF THE VERIFIED COMPLAINT IN
BRISTOL SUPERIOR COURT CIVIL ACTION 1973-CV-00299 CONCERNING
THE FACIAL CONSTITUTIONALITY OF G.L. c. 85, § 17A

STATEMENT OF AGREED-UPON MATERIAL FACTS

1. Plaintiffs John Correira and Joseph Treeful are low-income residents of Fall River, Massachusetts who are experiencing homelessness. Both are members of the Massachusetts Coalition for the Homeless ("MCH").

2. MCH is a membership organization that provides social services and engages in policy and legal advocacy on behalf of individuals experiencing homelessness. Its mission includes the eradication of homelessness in the Commonwealth, including through initiatives that increase income for low-income individuals experiencing or at risk of homelessness.

3. Plaintiffs Correira and Treeful solicit funds on their own behalves from members of the public. They both sometimes stand by the sides of public ways in Fall River with signs indicating they are homeless and accept donations from

motorists. They have engaged in this conduct in the past and intend to do so in the future.

4. During 2018 and 2019, Plaintiffs Correira and Treeful have been subject to at least a combined total of 43 criminal complaints filed by members of the Fall River Police Department acting pursuant to and based on alleged violations of G.L. c. 85, § 17A (also cited herein as “Section 17A”) resulting from Plaintiffs’ requesting monetary assistance from motorists. Each of them have been incarcerated at least once in connection with such complaints: Correira for failing to respond to a summons he did not receive due to his homelessness and Treeful in connection with an allegation of probation violations that included an alleged violation of Section 17A.

5. The City of Fall River (the “City”) is a municipality within Bristol County in the Commonwealth of Massachusetts. The City is a municipal corporation organized and existing under the laws of the Commonwealth of Massachusetts with the capacity to sue and be sued. It is empowered to exercise all of the powers and authority of a municipality, including police power, and it maintains, operates, and controls the Fall River Police Department.

6. Defendant Albert L. Dupere is an adult individual and the Chief of the Fall River Police Department (the “Department”) responsible for the operations and practices of the Department and the official conduct of the members of the Fall River Police Department. With regard to Count 1 of the Verified Complaint, he is sued in his official capacity.

7. The City of Fall River and Mr. Dupere in his official capacity are jointly referred to herein as the “Fall River Defendants.”

8. Thomas Quinn III is the District Attorney for Bristol County. The Bristol County District Attorney’s Office is responsible for prosecuting criminal matters in Bristol County, including criminal complaints issued by the District Court pursuant to Section 17A. He is sued in his official capacity.

9. In Count 1 of their Verified Complaint, Plaintiffs allege that G.L. c. 85, § 17A is facially unconstitutional as a content-based restraint on free speech in violation of the First Amendment to the Constitution of the United States of America and Article 16, as amended, of the Declarations of Rights. Count 2 alleged violations of the Massachusetts Civil Rights Act, G.L. c. 12, § 11H, by certain defendants, but those claims were dismissed without prejudice pursuant to a Notice of Partial Voluntary Dismissal without Prejudice.

10. A copy of the Verified Complaint was served on the Office of the Attorney General (“AGO”) as required by G.L. c. 231A, § 8 and Mass. R. Civ. P. 24(d). The AGO originally declined to enter an appearance on behalf of the Commonwealth to defend the constitutionality of the Section 17A, but has now entered an appearance as counsel for the Bristol District Attorney.

11. In their Verified Complaint, Plaintiffs requested a preliminary injunction against enforcement of the statute during the pendency of the litigation.

12. On April 9, 2019, the Superior Court (Yessayan, J.) held a hearing on Plaintiffs’ request for a preliminary injunction.

13. On the same day, the Bristol County District Attorney's Office agreed to dismiss all pending and new complaints brought under Section 17A until a final determination on the validity of the statute was rendered.

14. On April 17, 2019, the Superior Court allowed Plaintiffs' request for preliminary injunction pursuant to Count 1 of the Verified Complaint and enjoined the Fall River Defendants from any enforcement of Section 17A.

15. On May 31, 2019, the District Attorney, through the Attorney General as its counsel, submitted "Commonwealth's Notice of Consent to Entry of Judgment on Count 1 of Complaint" to the Superior Court consenting to declaratory judgment in favor of Plaintiffs on Count 1 of the Verified Complaint. Through the Notice, "[t]he Commonwealth acknowledge[d] that the statute at issue in this case, G.L. c. 85, § 17A is unconstitutional as a content-based regulation" and is facially invalid.

16. On June 10, 2019, the Superior Court granted a joint motion by Plaintiffs and the Fall River Defendants to stay proceedings in the lower court pending this Court's ruling on the Petition to Transfer and any ruling on the merits of the issue for which transfer is sought.

17. Each of these parties agree that a determination of the constitutionality of Section 17A is necessary and will greatly impact not only the parties to this matter but the rights of persons engaging in speech and expressive conduct in municipalities throughout Commonwealth. A determination will also clarify the responsibilities of public officials.

Respectfully submitted,

*On behalf of the City of Fall River and
Police Chief Albert Dupere, in his
official capacity,*

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