

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 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 plaintiffs’ motion on April 9, 2019, and took the matter under advisement. After hearing, and

¹ John Correia 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, § 11I, 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

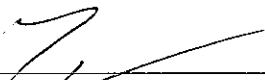
The court also finds, as the plaintiffs argue, that a preliminary injunction would promote the public interest by protecting First Amendment and article 16 freedom of speech rights. *Pan American v. Municipality of San Juan*, 2018 U.S. Dist. LEXIS 208014, at *72 (D. P.R. 2018), quoting *Texans for Free 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 N. Yessayan
Justice of the Superior Court

DATED: April 17, 2019