COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY
NO. SJ-2019-0259

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

v.

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

OPPOSITION OF DEFENDANT, BRISTOL COUNTY DISTRICT ATTORNEY THOMAS QUINN, TO THE PETITION BY PLAINTIFFS AND THE FALL RIVER DEFENDANTS FOR A TRANSFER OF A CASE PENDING IN BRISTOL COUNTY SUPERIOR COURT TO THIS COURT PURSUANT TO G.L. c. 211, § 4A

Defendant, Thomas M. Quinn, III, named in his official capacity as the District Attorney for Bristol County ("District Attorney"), hereby opposes the petition ("Petition") filed by the Plaintiffs and the other defendants to the underlying action, the City of Fall River and Albert Dupere, in his official capacity as Chief of the Fall River Police Department (together, the "Fall River Defendants"). In their Petition, Plaintiffs and the Fall River Defendants have jointly requested that this Court transfer a case currently pending in Bristol County Superior Court (Docket No. 1973CV00299), concerning the constitutionality of G.L. c. 85, § 17A, to this Court in accordance with the procedure set forth in G.L. c. 211, § 4A, in order for the case to be reserved and reported to the full Supreme Judicial Court.

In this action, the Plaintiffs are individuals who solicit funds for themselves from operators of motor vehicles stopped at intersections in Fall River. They seek to enjoin enforcement of G.L. c. 85, § 17A, which forbids the Plaintiffs' solicitation (often called "panhandling"), even though the law permits the same conduct if undertaken for other purposes. As Plaintiffs have acknowledged (*see* Petition at 3 & Exhibit C), the Commonwealth has filed a

Notice of Consent to Entry of Judgment in the Bristol Superior Court conceding that the statute is unconstitutional insofar as it imposes a fine on those who signal or stop a moving a car on a public way, or accost occupants of a stopped car on a public way, for the purpose of "soliciting alms" (*i.e.*, panhandling), while simultaneously permitting persons to engage in the same conduct for the purpose of engaging in other forms of expression—such as selling newspapers or soliciting funds for a nonprofit organization with a permit provided by the city or town.[1] The Commonwealth has therefore conceded that the statute violates the Free Speech Clause of the First Amendment as it relates to the Plaintiffs' conduct at issue in this case, and has consented to the entry of a declaration to this effect by the Superior Court. Petition, Exhibit C.[2]

Should this Court decide to transfer the case here and to reserve and report the case to the full Supreme Judicial Court, the Commonwealth does not intend to defend the constitutionality of the statute. Instead, the Commonwealth concedes here, as it did in the Superior Court, that the

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[1] Section 17A states, in relevant 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 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."

[2] The complaint originally included other claims under the Massachusetts Civil Rights Act against the Fall River Defendants and certain police officers of the Fall River Police Department. But shortly after the Commonwealth filed its Notice of Consent to Entry of Judgment on Count I, Plaintiffs voluntarily dismissed those other claims and defendants, and, the same day, moved jointly with the Fall River Defendants to stay proceedings in the Superior Court. The Superior Court granted the requested stay days later. *See* Petition at 4. The purpose of the stay is to allow the Plaintiffs and Fall River Defendants to file the instant Petition to transfer what remains of this case to this Court under G.L. c. 211, § 4A, in order that it may be reserved and reported to the full Supreme Judicial Court.

statute is unconstitutional as a content-based restriction on speech that fails to survive the applicable strict scrutiny. Although the statute is intended to further a compelling governmental interest in public safety, the statute is not narrowly tailored to further that interest, since it forbids or permits the same public-safety-threatening conduct—signaling or stopping a motor vehicle on a public way or accosting the occupants of a stopped motor vehicle on a public way—depending on the content of the speech that accompanies the conduct. Under the statute, panhandling is forbidden but selling newspapers or fundraising for a nonprofit with a permit are permitted. *See* Petition, Exhibit C (Commonwealth's explanation of why it has conceded that the statute is unconstitutional as it relates to Plaintiffs' panhandling activity).

Under these circumstances, if the case is transferred, there is a serious question about whether there would be an adequate adversarial presentation of the issues to the full Supreme Judicial Court, an essential aspect of any appeal. *Cf.*, *e.g.*, *Massachusetts v. E.P.A.*, 549 U.S. 497, 517 (2007) (the "concrete adverseness [of the parties] … sharpens the presentation of issues upon which the court so largely depends for illumination") (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). Indeed, were this case to proceed to a judgment for the Plaintiffs in Superior Court,[3] Plaintiffs would not have standing to appeal. *See Town of Somerset v. Dighton Water Dist.*, 347 Mass. 738, 739 n.1 (1964) (defendant "lacks standing to appeal" from final decree dismissing suit against it); *accord Camreta v. Greene*, 563 U.S. 692, 703-04 (2011) ("We have generally declined to consider cases at the request of a prevailing party …."); *Ward v. Santa Fe Independent Sch. Dist.*, 393 F.3d 599, 603 (5th Cir. 2004) ("It is a central tenet of appellate jurisdiction that a party who is not aggrieved by a judgment of the [lower] court has no standing

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[3] The Superior Court entered a preliminary injunction against enforcement of the statute on April 17, 2019. None of the parties sought to appeal the preliminary injunction under G.L. c. 231, § 118, ¶¶ 1 or 2.

to appeal it. Thus, a prevailing party generally may not appeal a judgment in its favor.") (citations omitted). *Contrast*, *e.g.*, *United States v. Windsor*, 570 U.S. 744, 759 (2015) (even where government conceded in court that statute at issue was unconstitutional, its decision to continue enforcing the statute meant that a live dispute remained on appeal: "the refusal of the Executive to provide the relief sought suffices to preserve a justiciable dispute … even where the Government … agree[s] with the opposing party on the merits of the controversy, there is sufficient adverseness and an adequate basis for jurisdiction in the fact that the Government intended to enforce the challenged law against that party.") (quoting *INS v. Chadha*, 462 U.S. 919, 939-40 & n.12 (1983)). Here, unlike in *Windsor* or *INS v. Chadha*, the Commonwealth is both conceding that the statute is unconstitutional *and* declining to enforce it—the District Attorney has not prosecuted, and will not prosecute, the Plaintiffs or others under G.L. c. 85, § 17A—a fact which, had it been true in those cases, would have meant that no justiciable controversy remained for the courts to adjudicate on appeal. *See Windsor*, 570 U.S. at 755-63; *Chadha*, 462 U.S. at 939-40 & n.12.

The only other remaining defendants, *i.e.*, the Fall River Defendants, have joined in the Plaintiffs' request that this Court transfer the case but, importantly, do not state in the Petition that they will defend the validity of the statute. Their silence begs the question whether the Plaintiffs and Fall River Defendants will provide an adequate adversarial presentation of the issues to the Supreme Judicial Court, a requirement upon which courts ordinarily insist, especially in constitutional cases. *See Windsor*, 570 U.S. at 759-60 (the requirements of standing are concerned in part with "the risk that instead of a real, earnest and vital controversy, the Court faces a friendly, non-adversary, proceeding" in which parties "[seek to] transfer [from legislatures] to the courts an inquiry as to the constitutionality of the legislative act.")

(quoting *Ashwander v. TVA,* 297 U.S. 288, 346 (1936) (Brandeis, J., concurring)); *Baker v. Carr*, 369 U.S. at 204 (noting the critical nature of standing in constitutional cases, "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions[.]").

The Commonwealth has affirmatively requested that the Superior Court enter final judgment in favor of the Plaintiffs on the sole count of the Complaint that remains, *i.e.*, a request for a declaration that G.L. c. 85, § 17A, is unconstitutional. Assuming the Superior Court enters this judgment, the Plaintiffs' rights will be protected. *Cf. McCabe v. Commissioner of Correction*, 465 Mass. 1001, 1001 (2013) (no error or abuse of discretion in Single Justice transferring case to Superior Court under G.L. c. 211, § 4A, where plaintiff's "rights are fully protected by his ability to litigate his claim in the Superior Court"). The Plaintiffs, however, seek relief not only for themselves but for others in the form of a ruling from the full Supreme Judicial Court, applicable statewide, that the statute is unconstitutional. Their desire for a statewide ruling is understandable: they (or more accurately, their attorneys) wish not to have to file similar lawsuits in other courts in the event that other cities and towns enforce the law. But the efficiency Plaintiffs hope to achieve is not an adequate basis for transfer where there may not be an adequate adversarial presentation among the parties in the SJC. *Cf. Callahan v. Bd. of Bar Overseers*, 417 Mass. 516, 519-20 (1994) (no abuse of discretion by the Single Justice in declining to transfer Housing Court action to the Supreme Judicial Court under G.L. c. 211, § 4A, even though plaintiff asserted transfer was warranted as "a matter of judicial economy and to aid in the due administration of justice").

If the Superior Court enters final judgment declaring that the law is unconstitutional as it relates to Plaintiffs' conduct, as the Commonwealth has requested, the Plaintiffs will receive all

of the relief they seek in this lawsuit.[4] In the event the ACLU or others wanted to challenge enforcement of the statute by another city or town, any similarly situated plaintiffs in such a hypothetical future lawsuit would be able to avail themselves of the Superior Court's judgment in the present case, and the Commonwealth's concession regarding the statute, in seeking the same relief in a future lawsuit.

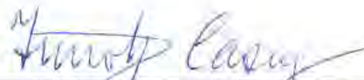
The District Attorney accordingly opposes the Petition to transfer the case from the Bristol County Superior Court to this Court.

Respectfully submitted,

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

By his attorney,

MAURA HEALEY
ATTORNEY GENERAL



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July 11, 2019

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[4] Although Plaintiffs' complaint also seeks a permanent injunction against enforcement of the statute, *see* Compl. at 13, ¶ 3, the only remaining count of the Complaint is for a declaratory judgment that the statute is unconstitutional, which is the relief Plaintiffs will obtain after final judgment in the Superior Court. In any event, a permanent injunction is unnecessary and unwarranted here, where the District Attorney has not attempted to enforce the statute against Plaintiffs or others similarly situated, much less demonstrated "intransigence" in enforcing the statute. *Benefit v. City of Cambridge*, 424 Mass. 918, 27 (1997) (courts "assume that public officials will comply with the law once a court has defined it [through a declaratory judgment], and injunctions usually are not needed in the absence of intransigence on the part of such public officials.").

CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2019, I caused a copy of this Opposition to be served on the following counsel of record for the other parties to the action by e-mail and first-class mail:

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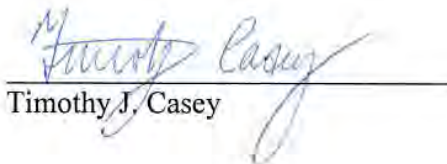

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