COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

No. SJC-12914

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

Plaintiffs/Appellants,

v.

CITY OF FALL RIVER, DISTRICT ATTORNEY OF BRISTOL COUNTY, CHIEF OF POLICE OF FALL RIVER,

Defendants/Appellees.

ON RESERVATION AND REPORT FROM THE SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY PURSUANT TO G.L. C. 211, § 4

BRIEF OF PLAINTIFFS/APPELLANTS THE MASSACHUSETTS COALITION FOR THE HOMELESS, JOHN CORREIRA AND JOSEPH TREEFUL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to S.J.C. Rule 1:21, 437 Mass. 1303 (2002), the Massachusetts Coalition for the Homeless ("MCH") is a non-profit corporation that does not have a parent corporation and no publicly held corporation owns 10 percent or more of its stock.

INTRODUCTION

The statute at issue in this case, G.L. c. 85, § 17A ("the Statute" or "Section 17A"), is facially unconstitutional. It imposes content-based restrictions on constitutionally protected speech and violates the free speech rights of individuals with limited incomes who seek charity to help them make ends meet. In March 2019, after members of the Fall River Police Department filed more than 150 criminal complaints under the Statute, Plaintiffs the Massachusetts Coalition for the Homeless ("MCH") and John Correira and Joseph Treeful, two indigent persons experiencing homelessness in Fall River, brought this lawsuit. In April 2019, the Superior Court granted them a preliminary injunction, concluding that their challenge to Section 17A was substantially likely to succeed.

Since then, the need for individuals to seek charity from the public, and the need for this Court to clarify that they may do so, has sadly become more acute. Particularly in the face of the current economic downturn caused by the global pandemic, some Massachusetts residents will need to seek contributions from their neighbors in order to make it through. Yet, Section 17A stands in the way. It reads:

> 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. (emphases supplied).[1]

As this Court recognized in *Benefit v. City of Cambridge*, 424 Mass. 918, 922 (1997), peaceful solicitation of charity for personal use is constitutionally protected speech. And content-based restrictions on such speech are subject to strict scrutiny. *Id.* at 925.

The Statute is a content-based, and, indeed, viewpoint-based, restriction on protected speech. It criminalizes "signaling" a motorist on a public way,

[1] Although Section 17A has been referred to as the "Panhandling Statute," Appellants have chosen not to use that phrasing because the Statute covers some expressive conduct not encompassed by that term and because the term "panhandling" can have a pejorative connotation.

"causing the stopping" of a motor vehicle, or "accost[ing]" a driver in a stopped car but *only* when done "for the purpose of" soliciting donations or selling some, but not all, items. Indeed, Section 17A exempts: (1) selling newspapers; (2) selling other merchandise on state public ways with a permit; and (3) soliciting charity by a nonprofit on local ways with a permit. Further, the Statute does not address whole categories of speech or conduct along public ways that may be just as disruptive to traffic as the types of speech that are covered. And it penalizes completely harmless speech based on its viewpoint.

For example, one who simply stands by the side of the road holding a sign saying "Homeless – Please Help" can be subject to criminal charge, while someone standing by the side of the road, or indeed in the middle of the street, holding a sign saying "Do Not Help the Homeless" cannot.

These speech-infringing, content-based distinctions cannot survive strict scrutiny because they are not narrowly tailored to serve a compelling interest. While Section 17A presumably is based on a concern for traffic safety, interruption of traffic is not even an element of the crime established by the Statute. Section 17A is both under- and over-inclusive because it does not cover some conduct that might affect traffic safety and covers

other conduct that does not adversely impact traffic safety.

Because the Statute is a content-based restriction that infringes the free speech rights of low-income persons who depend on charity for their own support, and because it cannot satisfy strict scrutiny, it violates both the First Amendment and Article 16.

QUESTION PRESENTED

Is G.L. c. 85A, § 17A, an unconstitutional content-based restriction on free speech?

STATEMENT OF THE CASE

This case was originally filed in March 2019 in the Bristol County Superior Court through a Verified Complaint by Plaintiffs the Massachusetts Coalition for the Homeless and John Correira and Joseph Treeful, two indigent persons experiencing homelessness. (R.A. 20-37). The named defendants were the City of Fall River, the Fall River Police Chief, and certain police officers who had relied on Section 17A numerous times to instruct individuals to cease their free speech activities and who sought criminal complaints against Mr. Correira, Mr. Treeful and others. Also named as a defendant was the District Attorney of Bristol County, whose office handles the disposition of the criminal charges obtained by the Fall River police.

The Verified Complaint included two counts: (1) a count for declaratory and injunctive relief, pursuant to G.L. c. 231A and G.L. c. 214, § 1, challenging the Statute's constitutionality; and 2) a count under the Massachusetts Civil Rights Act, G.L. c. 12, § 11I ("MCRA"), against the Police Chief and the individual officers seeking declaratory and injunctive relief and attorneys' fees and costs.

In the Verified Complaint, the Plaintiffs moved for a preliminary injunction to prevent continued enforcement of Section 17A by the Fall River police and the District Attorney for Bristol County. A hearing was held on that motion on April 9, 2019. On that date, the District Attorney voluntarily agreed not to prosecute any more cases under the Statute and to dismiss pending prosecutions until a final ruling on its constitutionality. The City of Fall River, however, defended its use of and the constitutionality of the Statute on behalf of itself and the individually-named police officers. The Attorney General declined to appear and defend the Statute.[2]

On April 17, 2019, the Superior Court (Yessayan, J.) issued a preliminary injunction against continued enforcement of Section 17A, concluding that the

[2] On March 28, 2019, Plaintiffs notified the Attorney General of their challenge to the state statute pursuant to Rule 24 of the Massachusetts Rules of Civil Procedure.

standards for preliminary injunction were met. The Superior Court ruled that Plaintiffs had a likelihood of success on their claim that Section 17A is a content-based restriction on free speech that cannot satisfy strict scrutiny, pursuant to both the First Amendment and Article 16. (R.A. 39-47).

On May 17, 2019, the Attorney General entered an appearance on behalf of the District Attorney. On May 31, 2019, the Attorney General as counsel for the District Attorney submitted a document entitled "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. (R.A. 50–53).

Each of the defendants indicated to the Superior Court at the preliminary injunction hearing that they would not appeal a ruling on the merits in Plaintiffs' favor. Because this would have left law enforcement officers throughout the Commonwealth and the public at large without an appellate ruling as to the constitutionality of Section 17A to guide future reliance on it, the Superior Court suggested in open

court that it might be prudent to pursue steps to get the case to an appellate court in the first instance.

On June 3, 2019, Plaintiffs voluntarily and without prejudice dismissed the MCRA claim and the claims against the individual officers. On June 10, 2019, the Superior Court granted a motion by Plaintiffs and the remaining Fall River defendants to stay the lower court action pending the parties' efforts to have the case heard by this Court.

On June 21, 2019, Plaintiffs and the remaining Fall River defendants jointly petitioned the Supreme Judicial Court for Suffolk County, pursuant to G.L. c. 211, § 4 ("the Petition"), asking that the question of the constitutionality of the Statute be decided in the first instance by this Court, pursuant to a reservation and report by the Single Justice. (R.A. 10-63). A hearing on the Petition was held on July 31, 2019. (R.A. 8). The Attorney General on behalf of the District Attorney opposed the Petition on the grounds that, notwithstanding participation of the Fall River defendants, because the Attorney General agrees the Statute is unconstitutional and will decline to defend it, this Court should not get involved because of the risk that arguments that Section 17A may be constitutional would not be adequately represented. (R.A. 69-75).

On June 24, 2019, the Massachusetts Law Reform Institute, which engages in advocacy on behalf of persons experiencing homelessness, submitted a letter in support of allowance of the Petition. (R.A. 64-68). On December 23, 2019, the Massachusetts Municipal Lawyers Association filed a letter declining to defend the constitutionality of Section 17A and urging that the Petition be granted to provide clarity on the constitutional question presented. (R.A. 143-144).

On February 27, 2020, the Single Justice issued an order reserving and reporting the question of the constitutionality of the Statute and designating the Plaintiffs below as the appellants before this Court.[3] (R.A. 145-146)

[3] Mr. Dupere, who is named as a defendant in his official capacity as Chief of Police, resigned as police chief as of March 6, 2020, but may still be overseeing the Department as Deputy Chief until a successor is named. See Jo C. Goode, *Last Week He Stepped Down. Now He is on Unpaid Leave* (Fall River Herald News, March 10, 2020), available at https://www.heraldnews.com/news/20200310/last-week-he-stepped-down-now-fall-rivers-police-chief-is-on-unpaid-leave. As of this filing, Plaintiffs/Appellants are unaware of a successor Chief being appointed.

STATEMENT OF THE FACTS[4]

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.

Plaintiffs John Correira and Joseph Treeful are low-income residents of Fall River, Massachusetts who are experiencing homelessness. Both are members of MCH. Both solicit funds on their own behalves from members of the public. They sometimes stand by the sides of public ways in Fall River with signs indicating they are homeless and accept donations from motorists stopped at stop lights or stop signs. They have engaged in this conduct in the past and intend to do so in the future.

During 2018 and 2019, Mr. Correira and Mr. Treeful, based on their requests for monetary assistance from motorists, were 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 Section 17A. Both have been

[4] Per the order in the reservation and report that the record should include all submissions to the county court. (R.A. 146), this Statement of the Facts is from the Stipulation of Facts submitted as Exhibit E to the Petition, as supplemented by additional submissions to the county court while the Petition was pending.

incarcerated at least once in connection with such complaints: Mr. Correira for failing to respond to a summons he did not receive due to his homelessness and Mr. Treeful in connection with an allegation of probation violations that included an alleged violation of Section 17A.

Based on responses to public records requests, the issuing of criminal complaints under the Statute is not limited to Fall River. The Massachusetts State Police ("MSP") have applied Section 17A numerous times in the recent past. (R.A. 107-142). The City of Brockton has also claimed to be applying the Statute. (R.A. 55-57, 86-87). In addition, several municipalities have ordinances that either mirror Section 17A almost exactly or similarly target personal solicitation of charity. (R.A. 89-106).

SUMMARY OF ARGUMENT

The First Amendment and Article 16 protect the solicitation of charity for one's own support as a form of free speech. They also create a strong presumption that a law making a content-based or speaker-based distinction is unconstitutional. Such laws are invalid unless they satisfy strict scrutiny. (pages 16-20).

Section 17A is unconstitutional because it restricts the solicitation of charity for one's own support, makes content-based and speaker-based

distinctions, and is not narrowly tailored to achieve a compelling governmental interest. (pages 20-31).

ARGUMENT

The Statute is unconstitutional because, on its face, it interferes with constitutionally protected free speech and expressive conduct, discriminates on the basis of content and viewpoint, and is not narrowly tailored to support any compelling state interest.

I. Both the First Amendment and Article 16 protect the right to seek charity, and content-based restrictions on that right are subject to strict scrutiny.

The First Amendment, made applicable to the States by the Fourteenth Amendment, prohibits the enactment and enforcement of laws "abridging the freedom of speech." U.S. Const. amends. 1 and 14. Similarly, Article 16 of the Declaration of Rights, as amended by Amendment Article 77, provides: "The right of free speech shall not be abridged." This Court has ruled that Article 16 protects at least as much speech as, and sometimes more speech than, the First Amendment.[5]

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[5] *See, e.g., Lyons v. Globe Newspaper Co.,* 415 Mass. 258, 266–67 (1993) (explaining that Article 16 generally extends at least the same level of protection to speech as the First Amendment); *Opinion of the Justices to the House of Representatives*, 387 Mass. 1201, 1202 (1982) (explaining that the criteria which have been established by the United States Supreme Court for judging claims arising under the First Amendment . . . are equally appropriate to claims brought under cognate provisions of the Massachusetts Constitution") (quoting

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Courts have long held that the First Amendment protects speech that takes the form of a solicitation for money. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 363 (1977). "This protection extends to those soliciting funds on their own behalf." *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177, 184 (D. Mass. 2015) (citations omitted). Indeed, this Court has recognized that "[i]t is beyond question that soliciting contributions [, including peaceful begging,] is expressive activity that is protected by the First Amendment." *Benefit*, 424 Mass. at 922.

Content-based laws restricting free speech are "presumptively invalid." *Reed v. Town of Gilbert,* 135 S.Ct. 2218, 2226 (2015); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992). And laws that criminalize solicitation of funds but not other forms of speech are content-based. *Benefit*, 424 Mass. at 923-925; *McLaughlin*, 140 F. Supp. 3d at 185. A law is necessarily content-based if, "on its face," it draws "distinctions based on the message a speaker conveys." *Reed*, 135 S. Ct. at 2227. "Some facial distinctions based on a message

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Colo v. Treasurer & Receiver Gen., 378 Mass. 550, 558 (1979)); *Mendoza v. Licensing Bd. of Fall River*, 444 Mass. 188, 196 (2005) (explaining that Article 16 provides greater protection to certain forms of protected speech, such as nude dancing, than the First Amendment); *Commonwealth v. Sees*, 374 Mass. 532 (1978) (finding a violation of Article 16 where First Amendment not violated).

are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose." *Id.*[6]

Laws that criminalize solicitation of funds by some speakers but not others are viewpoint-based restrictions on speech, a particularly egregious form of content discrimination. See *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995). "In the realm of private speech or expression, government regulation may not favor one speaker over another." *Id.* at 828. "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale

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[6] Content-based laws also include "laws that cannot be 'justified without reference to the content of the regulated speech,' or that were adopted by the government 'because of disagreement with the message [the speech] conveys.'" *Reed*, 135 S.Ct. at 2227 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Hence, facially neutral laws limiting pedestrian access to median strips and other public fora that are found to in fact be targeted at those seeking funds for their own support are also subjected to strict scrutiny. See *Martin v. City of Albuquerque,* 396 F. Supp. 3d 1008, 1025-1027 (D. N.M. 2019) (appeal pending). And even laws that are in fact content-neutral but restrict free speech in public fora are invalid unless they satisfy intermediate scrutiny. See *Cutting v. City of Portland, Me.,* 802 F.3d 79 (1st Cir. 2015) (declaring unconstitutional a content-neutral law preventing access to median strips because not narrowly tailored); *Martin,* 396 F. Supp. 3d at 1028-1037 (concluding law had a content-neutral justification and thus was subject to intermediate scrutiny but was not sufficiently narrowly tailored to serve a significant government interest).

for the restriction." *Id.* at 829. See also *R.A.V.*, 505 U.S. at 391.

As the Court held in *Benefit*, laws that specifically target individuals seeking funds for their own support for criminal sanction may be "fairly characterized as viewpoint based because [they] favor[] the view that poor people should be helped by organized groups and should not be making public requests for their necessities." 424 Mass. at 924.

When a law is content-based on its face, it cannot survive unless it passes the rigorous standards of strict scrutiny. See *Reed*, 135 S. Ct. at 2228. "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech." *Id.* To survive strict scrutiny, "the government must establish that the statute is both necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end." *Commonwealth v. Lucas*, 472 Mass. 387, 398 (2015) (internal citations and marks omitted).

Governments defending regulations subject to strict scrutiny "face[] a heavy burden," *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987), as it is the "rare case[] in which a speech restriction withstands strict scrutiny," *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1666 (2015). "[W]hen a lawmaking body threatens an

individual's rudimentary fundamental right, it should do so only out of absolute necessity and by the least-restrictive means possible." *Champion v. Commonwealth of Ky.*, 520 S.W.3d 331, 339 (Ky. 2017).

II. The Statute, on its face, regulates the protected speech of those seeking donations for themselves in a content-based manner, and is not narrowly tailored to serve any compelling state interest.

Section 17A is clearly unconstitutional under the principles discussed above. Indeed, a holding that the Statute is an unconstitutional, content-based restriction on free speech is consistent with a long line of court decisions striking down "anti-panhandling" laws, including those singling out persons experiencing homelessness, as unconstitutional. See, e.g., *Benefit*, 424 Mass. at 924 (holding challenged statute is content-based and viewpoint based and unconstitutional because it applies only to the protected communicative activity of requesting funds for one's self); *Thayer v. City of Worcester*, 144 F. Supp. 3d 218, 234 (D. Mass. 2015) (ruling without need for "protracted discussion" that a city ordinance which severely restricted "begging, panhandling, or soliciting" was content-based and ultimately unconstitutional); *McLaughlin*, 140 F. Supp. 3d at 186 (holding that a law which "targets a particular form of expressive speech — the solicitation of immediate charitable donations – is content-based and unconstitutional); *Clatterbuck v. City of*

Charlottesville, 92 F.Supp.3d 478, 487 (W.D. Va. 2015) (striking down a law that prohibited persons from soliciting from motorists but only if said person is requesting immediate donations); *Homeless Helping Homeless, Inc. v. City of Tampa, Fla,* 2016 WL 4162882 *4-5 (M.D. Fla. 2016) (invalidating ordinance that treated solicitation of donations differently than other forms of speech).

A. The Statute restricts constitutionally-protected peaceful begging.

By its plain terms, and without regard to whether any harmful traffic disruption occurs, Section 17A criminalizes simply "signal[ing]," "caus[ing] the stopping" of or "accost[ing]" a moving vehicle on a public way "for the purpose of soliciting any alms." Based on such constitutionally protected "peaceful begging," *Benefit,* 424 Mass. at 922, Mr. Correira and Mr. Treeful together have been criminally charged under Section 17A at least 43 times. The Statute thus clearly restricts constitutionally protected free speech.

B. The Statute imposes content-based restrictions on protected speech.

Section 17A is clearly content-based because it prohibits only *certain* solicitation by *certain* people for *certain* purposes and facially discriminates on the

basis of the content of speech and identity of the speaker.

First, it prohibits certain persons, including those seeking "alms," from soliciting funds from or selling items to motorists, but it exempts from its scope those who are selling newspapers, selling other merchandise with a permit, or, with a permit, soliciting charitable donations on behalf of a nonprofit organization (but not on one's own behalf). Second, it allows for the signaling, stopping or accosting of motor vehicles for the purpose of distributing commercial, political or religious literature for free – regardless of the amount of traffic disruption that conduct might cause. Third, it does not prohibit wandering into or stopping traffic for reasons unrelated to speech or expressive conduct. Fourth, it imposes no sanction on drivers of motor vehicles who engage in their own free speech by providing contributions and who actually stop or cause the disruption of traffic by not moving on a green light.

As a result, Section 17A is functionally equivalent to the statute at issue in *Benefit*,[7] which this Court held unconstitutional because "[b]y prohibiting peaceful

[7] See G.L., c. 272, § 66 (providing that "[p]ersons wandering abroad and begging, or who go about from door to door or in public or private ways, areas to which the general public is invited, or in other places for the purpose of begging or to receive alms, and who are not licensed" may be imprisoned for up to six months).

requests by poor people for personal financial aid, the statute directly targets the content of their communications, punishing requests by an individual for help with his or her basic human needs while shielding from government chastisement requests for help made by better-dressed people for other, less critical needs." 424 Mass. at 924.

Indeed, by allowing solicitation of charity by nonprofits with a permit but not individuals seeking personal support, "[t]he statute may also be fairly characterized as viewpoint based because it favors the view that poor people should be helped by organized groups and should not be making public requests for their necessities." *Id.* Given the exceptions and permitting options built into Section 17A, the only category of speech subject to a total prohibition is the solicitation of charity for one's own benefit. "[T]he regulation of speech based on 'the specific motivating ideology or the opinion or perspective of the speaker' . . . is a 'more blatant' and 'egregious form of content discrimination.'" *Reed*, 135 S. Ct. at 2230 (quoting *Rosenberger*, 515 U.S. at 829).

The Statute has become more obviously unconstitutional over time, as content-based exceptions have been tacked onto it. Originally passed in 1930 and entitled "An Act Prohibiting the Interruption of Traffic upon State Highways," it was apparently intended to

flatly *prohibit* "the interruption of traffic upon state highways" by banning all persons from engaging in solicitation of "alms, contribution, or subscription" and the selling of "any merchandise or ticket of admission" directed at vehicles lawfully stopped on any state highway. 1930 Mass. Legis. Serv. 139.[8] The Legislature amended the Statute just a year later and retitled it, "An Act *relative* to the interruption of traffic upon public ways." 1931 Mass. Legis. Serv. 273 (emphasis added). This 1931 amendment created an exemption for the sale of newspapers and broadened the law to include all public ways. *Id.* In 1978, the Statute was further amended to allow speakers wishing to sell non-newspaper items to obtain permits so that the law would not apply to them. 1978 Mass. Legis. Serv. 021. And in 1990, the Statute was amended again to allow nonprofit organizations to obtain a permit from local police departments in order so they might request charity on local ways. 1990 Mass. Legis. Serv. 117. The 1990 exemption was established by emergency declaration intended to "immediately authorize charitable organizations to solicit donations on public ways." *Id.*

[8] Of course, even the original version did not in fact prohibit *all* potential interruption of traffic, as traffic interruption was not an element of the crime even then and it applied only to certain forms of solicitation and sales.

For all these reasons, Section 17A, on its face, is a content-based government regulation of speech.

C. The Statute cannot survive strict scrutiny.

As discussed above, courts must apply strict scrutiny to laws that restrict free speech on the basis of content, meaning that Section 17A must be declared invalid unless it is narrowly tailored to serve a compelling government interest. The Statute fails that rigorous standard.

1. The Statute is not narrowly tailored.

The Court need not reach the issue of whether there is a compelling government interest justifying Section 17A because, no matter the compelling interest put forth by the government, the government will not be able to show that the Statute is narrowly tailored.

First, the Statute cherry picks speech for regulation even though the speech and conduct it leaves unregulated presents similar (or even greater) risks to traffic or personal safety. For instance:

- It applies only to those wishing to engage in certain expressive conduct (*i.e.*, soliciting or selling) and not to those interrupting traffic for non-expressive reasons. Signaling a car to ask for spare change violates Section 17A; signaling a car to try to determine if it is your Uber driver does not.

- It allows signaling, causing the stopping of, and accosting motorists by those engaged in expressive conduct other than soliciting or selling, including those who are handing out leaflets for the purpose of proselytizing, campaigning, or expressing other views about the state of the world.
- It explicitly exempts newspaper sellers from any of its regulations.
- It allows sellers of other items to sell on or near public ways with a permit.
- It allows nonprofits, but not individuals, to obtain a permit to solicit on public ways.
- It does not apply to those engaged in the expressive conduct of giving donations, while criminalizing the conduct of those persons reaching out to take the offered donations.

Thus, even assuming a compelling government interest in regulating traffic or pedestrian safety, Section 17A is not remotely tailored to that interest. It is "hopelessly underinclusive," and, therefore, not narrowly tailored to address the issue of traffic or pedestrian safety. *Reed*, 135 S.Ct. at 2231. By allowing newspaper sellers, representatives of nonprofits, preachers, campaigners, girl scouts, and more to interrupt traffic and to allegedly be put in harm's way without criminal penalty, Section 17A is quite obviously

tailored instead to a desire to stamp out requests for charity by individuals.

Second, the Statute over-includes speech that does *not* interfere with traffic. Section 17A criminalizes the simple gesture of signaling to a moving vehicle on any public way, regardless of any effect on traffic flow. Indeed, the actual interruption of traffic is not even an element of the statutory crime. There is no requirement that a person do more than hold up a sign reading, "Homeless: Please Help" near a public way in order to be charged. To be narrowly tailored, a law may not burden substantially more speech than is necessary to further the government's purported interest. See *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 122 (1991); *Ward*, 491 U.S. at 799.

The Statute thus cannot be narrowly tailored because it is both under- and over-inclusive. *See Reed*, 135 S.Ct. at 2231-32 (holding that the law at issue was not narrowly tailored because it failed to regulate speech of the same type which produced the same harm as the regulated speech); *Simon & Schuster, Inc.*, 502 U.S. at 122 (holding that where a substantial portion of a law's burden on speech does not serve to advance state's interests, it is not narrowly tailored and is "too overinclusive to satisfy the requirements of the First Amendment").

The lack of narrow tailoring dooms Section 17A regardless of the Legislature's motivation in enacting it. "The tailoring requirement does not simply guard against an impermissible desire to censor. The government may attempt to suppress speech not only because it disagrees with the message being expressed, but also for mere convenience." *McCullen v. Coakley*, 573 U.S. 464, 486 (2014). "Where certain speech is associated with particular problems, silencing the speech is sometimes the path of least resistance. But by demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily 'sacrific[ing] speech for efficiency.'" *Id.* (quoting *Riley v. National Federation of Blind of N. C., Inc.*, 487 U.S. 781, 795 (1988)).

Accordingly, defendants cannot meet their burden to show that Section 17A is narrowly tailored to serve a compelling governmental interest.

2. The Government cannot show that the Statute is justified by any compelling interest.

It is the government's burden to demonstrate that the Statute's differentiation among speakers and content furthers a compelling governmental interest. *Reed*, 135 S. Ct. at 2231. *See also Champion*, 520 S.W.3d at 339 (ruling that for the challenged law to survive strict scrutiny, "the government must satisfactorily prove to [the Court] that criminalizing begging and solicitation

alone on public streets and intersections furthers a compelling interest"). That burden cannot be met with respect to Section 17A.

The only government interest purportedly served by the Statute is traffic and pedestrian safety. This is consistent with the fact that it appears in Title XIV of Part I of the General Laws, which governs public ways and works, and in Chapter 85 thereof, which covers regulations and by-laws relative to ways and bridges and contains statutes governing excessive speed, traffic signs, snow deposits on state highways, and other laws relative to traffic safety. And the Statute is entitled "Soliciting from vehicles on public ways." Therefore, it can be properly surmised that the interest which the government purports to promote through this law is traffic safety.

It is not clear that traffic safety can ever constitute a compelling government interest for the purposes of strict scrutiny review. In *Reed,* the Supreme Court assumed but did not agree that traffic safety was a compelling interest, thereby creating some doubt that it ever can be. 135 S. Ct. at 2231. But even assuming traffic safety can be a compelling interest in some instances, it is not here for a variety of reasons.

For the interest in traffic safety to be compelling, there must be some indication that the specifically targeted form of expression "has actually

served to make city streets less safe." *Champion*, 520 S.W.3d at 339. "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." *Clatterbuck*, 92 F. Supp. 3d at 488-89 (quoting *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 546-47 (1993)). "A listener's annoyance or offense at a particular type of communicative activity does not provide a basis for a law burdening that activity." *Benefit*, 424 Mass. at 926. See also *McLaughlin,* 140 F. Supp. 3d at 189 ("The First Amendment does not permit a city to cater to the preference of one group, in this case tourists or downtown shoppers, to avoid the expressive acts of other, in this case panhandlers, simply on the basis that the privileged group does not like what is being expressed.").

Here, there is no basis for finding that solicitation for the purpose of receiving charity for one's own benefit interferes with traffic any more than solicitation of charity for the benefit of others, the distribution of leaflets to motorists, wandering into traffic for a purpose unrelated to expression, or motorists' own decisions not to proceed at a green light for whatever reasons. In fact, to the extent that some people prefer not to give charity to individuals and

instead give to nonprofit organizations like the American Red Cross or the Salvation Army — a preference promoted by Section 17A itself — nonprofit solicitors would cause *more* traffic interruption in the form of motorists stopping to give money.

In the words of the Supreme Court, "a law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction on truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited." *Reed,* 135 S. Ct. at 2232 (quoting *Republican Party of Minn. v. White,* 536 U.S. 765, 780 (2002)). See also *Williams-Yulee*, 135 S. Ct. at 1668 (noting that "underinclusiveness can raise doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint"); *Ridley v. Mass. Bay Transportation Authority,* 390 F.3d 65, 87 (1st Cir. 2004) ("[W]here the government states that it rejects something because of a certain characteristic, but other things accepting the same characteristic are accepted, this sort of underinclusiveness raises a suspicion that the stated neutral ground for action is to shield an impermissible motive.").

For all these reasons, the purported governmental interest in protecting traffic safety is not compelling and does not justify the restrictions mandated by Section 17A.

CONCLUSION

The Statute is an unconstitutional content-based restriction on free speech, particularly the speech of low-income individuals seeking charity for their own support, including Mr. Correira and Mr. Treeful, and it should be declared invalid pursuant to both the First Amendment and Article 16.

Respectfully submitted,

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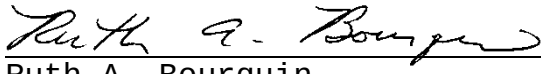
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ORDER OF TRANSFER AND RESERVATION AND REPORT

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK,ss

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

Bristol Superior Court
No. 1973CV00299

MASSACHUSETTS COALITION FOR THE HOMELESS & others[1]

vs.

CITY OF FALL RIVER & others.[2]

ORDER OF TRANSFER and RESERVATION AND REPORT

This is a petition under G. L. c. 211, § 4A, seeking exercise of the court's supervisory power to transfer one count of a complaint filed in Bristol Superior Court, Civil Action No. 1973-CV-00299, to the full court. That count presents a single issue of law concerning the constitutionality of G. L. c. 85, § 17A, known as the "Panhandling Statute." The Superior Court judge has issued a preliminary injunction enjoining the respondents from enforcing the statute. The Attorney General, acting as counsel for the District Attorney for Bristol County, concedes that "the statute is unconstitutional insofar as it imposes a fine on those who signal or stop a moving [] 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." The Attorney General also has stated that, if the case is transferred, the "Commonwealth does not intend to defend the constitutionality of the statute."

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[1] John Correira and Joseph Treeful.

[2] District Attorney for Bristol County; Chief, Fall River Police Department.

General Laws c. 211, § 4A, permits "a single justice of this court, in the sound exercise of his or her discretion, to transfer a case timely filed in another court to this court." Beres v. Board of Registration of Chiropractors, 459 Mass. 1012, 1013 (2011). I consider this to be an appropriate case to exercise the court's extraordinary power of supervision under G. L. c. 211, § 4A, and transfer the case to the Supreme Judicial Court for Suffolk County. See Barber v. Commonwealth, 353 Mass. 236, 238-239 (1967). See also Gurry v. Board of Public Accountancy, 394 Mass. 118, 119 (1985). The petitioners have represented that the statute is "potentially being enforced by municipalities other than Fall River;" that the State Police have filed complaints under the statute; that the respondents have indicated that they would not be inclined to appeal a decision adverse to them with regard to the constitutionality of the statute; and that, if the issue is decided by the Superior Court in the first instance, the constitutionality of the statute might otherwise not reach the appellate courts.

Because the case raises important issues with statewide significance concerning the applicability, constitutionality, and enforceability of the Panhandling Statute, and notwithstanding issues concerning adversarial presentation of the appeal, I reserve decision and report the case to the full court. See Borman v. Borman, 378 Mass. 775, 784 (1979); Dow Jones & Co., Inc. v. Superior Court, 364 Mass. 317, 318 (1973). The record before the full court shall consist of the pleadings and supporting materials filed in the county court. The petitioners are designated as the appellants.

By the Court,

Elspeth Cypher
Associate Justice

Entered: February 26, 2020

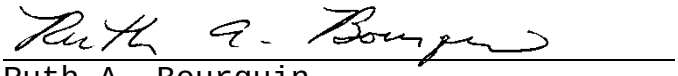
STATUTORY ADDENDUM

G.L. c. 85, § 17A

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.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the rules of court pertaining to the filing of briefs, including, but not limited to: Mass. R. App. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. App. P. 16(e) (references to the record); Mass. R. App. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. App. P. 16(h) (length of briefs); Mass. R. App. P. 18 (appendix to the briefs); and Mass. R. App. P. 20 (form of briefs, appendices, and other papers).



Ruth A. Bourquin

AFFIDAVIT OF SERVICE

I, Ruth A. Bourquin do hereby certify under the penalties of perjury that on this 7th day of April, 2020, I caused a true copy of the foregoing document to be served by electronic filing through the CM/ECF system on the following counsel and that paper copies will be sent to any non registered participants:

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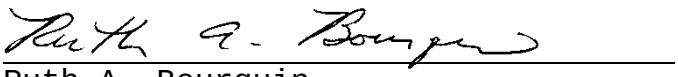

Ruth A. Bourquin

No. SJC-12914

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

Plaintiffs/Appellants

v.

CITY OF FALL RIVER, DISTRICT ATTORNEY OF BRISTOL COUNTY, CHIEF OF POLICE OF FALL RIVER,

Defendants/Appellees

ON RESERVATION AND REPORT FROM
THE SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY PURSUANT TO G.L. c. 211, § 4

BRIEF OF PLAINTIFFS/APPELLANTS THE MASSACHUSETTS COALITION FOR THE HOMELESS, JOHN CORREIRA AND JOSEPH TREEFUL