

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 DEFENDANTS/APPELLEES
CITY OF FALL RIVER, AND
CHIEF OF POLICE OF FALL RIVER**

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FACTS

Mass General Laws, Chapter 85, entitled "Regulations and By-Laws Relative to Ways and Bridges" provides a comprehensive regulatory scheme to ensure public safety as to the Commonwealth's Ways and Bridges. To that end, Chapter 85 contains a provision governing the manner which persons can permissibly approach and/or actively signal for the attention of motorists traveling on public ways for purposes of solicitation and/or sales.

M.G.L.A. 85 § 17A provides is as follows:

§ 17A. Soliciting from vehicles on public ways

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.¹

M.G.L.A. 85 § 17A (emphasis added).

Through City Ordinance §2-401, the City's Chief of Police is responsible for the management and operation of the police department. The City's police department's policy with regards to panhandlers in general, is to leave them alone. The police department's policy with regards to the enforcement of section 17A has been, and still is, to first warn the offending individual. If the warning is not heeded, then the policy is that police officers are to charge the offending individuals. The conduct that leads to being charged includes engaging in specific behavior of repeatedly walking out into the highway off-ramp to oncoming motorists, obstructing

¹ Section 17A appears to have been originally enacted in 1930 and modified over the years. In 1978 the second sentence was added and in 1990 the last sentence was added.

traffic flow resulting in increasing traffic congestion at a busy traffic area.

ARGUMENT

- I. SECTION 17A IS NOT A BLANKET PROHIBITION AGAINST PANHANDLING, WHICH, THE CITY ACKNOWLEDGES, IN AND OF ITSELF, IS PROTECTED SPEECH, BUT RATHER A REASONABLE RESTRICTION ON TIME, PLACE, AND MANNER OF PROTECTED SPEECH, NARROWLY TAILORED TO SERVE A SIGNIFICANT GOVERNMENTAL INTEREST.

The essence of the plaintiffs' argument is that the individual plaintiffs' requests for charity (panhandling) are constitutionally-protected speech protected by Article 16 of the First Amendment, and that G.L. c. 85, § 17A, ("Section 17A") on its face, is an unconstitutional content-based and identity-based restriction of that speech.

Section 17A can be distinguished from the string of precedent upon which the plaintiffs rely, in that it is not a blanket prohibition of panhandling, which courts have deemed to be a constitutionally protected form of speech.

Defendants acknowledge that solicitation constitutes protected expression under the First Amendment, however, "the government may impose reasonable restrictions on the time, place, or manner of

protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" Ward v. Rock Against Racism, 491 U.S. 781, 791(1989) (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984)). In public places such as streets and sidewalks, "the State [may] enforce a content-based exclusion" on speech if the "regulation is necessary to serve a compelling state interest that it is narrowly drawn to achieve that end." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (citations omitted).

The Benefit case, upon which plaintiffs' rely is readily distinguishable from the Section 17A. In Benefit v. City of Cambridge, 424 Mass. 918 (1997), the statute at issue, G.L. c. 272, § 66 provided 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. The court in Benefit noted that it had not been shown that

G.L. c. 272, § 66, is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." Benefit, at 925. As such, the court declared that G.L. c. 272, § 66, violated the First Amendment to the United States Constitution.

Unlike the broad prohibition against public begging as was the case in Benefit, Section 17A is a very specifically tailored measure to meet a legitimate and compelling governmental interest, namely vehicular and pedestrian safety, and prevention of traffic congestion. In the interest of preserving vehicular and pedestrian safety, Section 17A's prohibition against the solicitation of alms, contribution or subscription from motor vehicle occupants and/or the selling of any merchandise to occupants of motor vehicles is specifically limited to the *specific behavior* of actively signaling moving vehicles, and/or approaching vehicles stopped at traffic signals.

Even assuming that Section 17A is subject to strict scrutiny, its enforcement furthers a compelling governmental interest in vehicular/pedestrian safety, and is narrowly tailored to that end.

Plaintiffs' affidavits emphasize that the defendants have "suffered numerous arrests" simply for

panhandling. However, the defendant Police Chief has never interfered with the solicitation of motorists where the individual solicitors remain either on an adjacent sidewalk or traffic median and do not actively signal or otherwise occost a stopped or moving vehicle, thereby impeding and obstructing the flow of traffic. If the Plaintiffs remain on the median when they solicit motorists and only enter the road-way briefly when called upon by a motorist, the City's police department will not charge these individuals, or anyone else, under Section 17A, as the primary concern remains pedestrian/vehicular safety.

It is defendants' contention that in their enforcement of Section 17A, they did not infringe on the individual plaintiffs' rights to panhandle and thereby their right to free speech. The defendants only enforced Section 17A against the individual plaintiffs after they were observed to engage in the specific *behavior* of repeatedly walking out into the highway off-ramp to oncoming motorists, obstructing traffic flow and increasing traffic congestion at a busy traffic area despite numerous warnings to discontinue their illegal action.

In otherwords, the individual plaintiffs were not

cited pursuant to Section 17A simply for panhandling. They were cited for the specific behavior of repeatedly walking out into the highway off-ramp to oncoming motorists, obstructing traffic flow and increasing traffic congestion at a busy traffic area.

Defendants have a compelling interest to restrict this specific behavior, particularly when the individual plaintiffs can avoid further citations by simply remaining on the adjacent walkway or traffic median when panhandling.

CONCLUSION

For all the reasons stated herein, Defendants respectfully request that the statute be upheld.

Respectfully submitted,

Defendant/Appellee,
City of Fall River, and
Chief of Police of Fall River

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ADDENDUM

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G.L. C. 85 § 17A. Soliciting from vehicles on public ways.

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

² Section 17A was originally enacted in 1930 and modified over the years. In 1978 the second sentence was added and in 1990 the last sentence was added.

§ 2-401. Appointment; powers and duties; term.

The Chief of Police of the City shall be the head of the Police Department and shall be responsible for the management and operation of such department. The Chief of Police shall be appointed by the Mayor and confirmed by the City Council and shall be employed by contract for a period of not less than three years and not more than four years. The terms and conditions of the contract shall be determined by the Mayor and approved by the City Council. Park police officers shall be under the control and jurisdiction of the Chief of Police.

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 & others¹

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."


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 Barbet 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

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 (a)(13)(addendum); 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. 18 (appendix to the briefs); and Mass. R. App. P. 20 (form and length of briefs, appendices, and other papers, including use of the monospaced Courier New, size 12).

/s/Gary P. Howayeck

AFFIDAVIT OF SERVICE

I, Gary P. Howayeck do hereby certify under the penalties of perjury that on this 8th day of June 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 the paper copies will be sent to any non-registered participants:

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