COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

SUPERIOR COURT
CIVIL ACTION NO.
18-_____

MASSACHUSETTS PEACE ACTION and
MASSACHUSETTS PEACE ACTION EDUCATION FUND,

Plaintiffs,

v.

CITY OF CAMBRIDGE, MASSACHUSETTS and
LOUIS DEPASQUALE,
in his capacity as City Manager of the City of Cambridge,

Defendants.

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Introduction

Plaintiffs Massachusetts Peace Action ("MAPA") and Massachusetts Peace Action Education Fund ("MAPA EF"), two non-profit advocacy organizations, helped organize the "Women's March" (the "March") held on the Cambridge Common on January 20, 2018. Due to the vague, standardless policy of the City of Cambridge ("City") allowing for charging organizers for public safety services provided at events in the City's public parks, Plaintiffs have since been billed—by Cambridge and other entities invited by the City to participate—for public safety services at the March.

The City's policy impermissibly chills constitutionally protected free speech and assembly rights; indeed, it is an unconstitutional tax. Accordingly, as explained below, this Court should preliminarily enjoin the City from continuing to apply a

policy purporting to authorize City officials to levy public-safety charges against organizers of events in the City's public parks. The City should also be preliminarily enjoined to take all reasonable steps to relieve the Plaintiffs of charges already assessed for the January 2018 Women's March.

Factual Background[1]

Organizations concerned about women's rights and other political issues planned events around the country for January 20, 2018, referred to collectively as a Women's March.

Plaintiffs and other organizations began planning the eastern Massachusetts version of the Women's March in or about the fall of 2017 and began and completed the process of seeking necessary permits in the period between November 2017 and January 2018. They paid all requested fees for the cost of actually obtaining the needed permits and do not challenge those assessments in this action. Although designated the Women's March, the planned event in Cambridge was not for a march through City streets but a stationary event on the Cambridge Common.

Approximately 11 days before the March, the organizers were informed orally by members of the Cambridge Police Department ("CPD") that they might be charged for the provision of public services at the event, including police protection and the presence of Emergency Medical Technicians ("EMTs") from the City. The discussion of charging for these basic public protection services occurred just after the organizers told police that there was some risk of counter-protesters on the day of the event, and after police officials said they were worried the event could turn into another "Charlottesville"—referring to the violent "Unite the Right" rally in August 2017 in Charlottesville, Virginia. Plaintiffs never agreed to make any such

[1] These factual allegations are supported by the Verified Complaint, ¶¶ 5-9 and 11-36.

payments.

After hearing police officials say organizers may have to pay the cost of police protection, at least one group who was helping organize the event dropped out of the planning because of its opposition to funding police services.

A few days before the Women's March, the CPD gave MAPA a rough estimate of anticipated charges for police details. MAPA did not agree to pay such charges.

On the day of the March, CPD asked MAPA to sign a document agreeing to pay bills for public safety charges, which MAPA declined to do.

The Cambridge Women's March went forward on January 20, 2018. It was peaceful and well-attended, and occurred wholly on the Cambridge Common, where a series of speakers addressed the crowd, and members of the crowd carried signs expressing political views.

A few days after the event, representatives of the CPD began demanding payment of the bills for public safety services. The total amount the organizers were told they were being charged was $4,028.75, comprising $1,194.50 for the CPD; $385 each, or a total of $1,155, for police officers from Melrose, Everett and Chelsea; $1,240.25 for MBTA police services; and $440 for the Cambridge Fire Department for EMT services. To date, Plaintiffs have not received a bill from Chelsea and have been billed by the MBTA for $852.50, not $1,240.25.

Particularly concerned about the precedent that would be set, including for others with even less capacity to raise funds for such public safety expenses, organizers contacted the American Civil Liberties Union of Massachusetts ("ACLUM"). On January 24, 2018, ACLUM, on behalf of MAPA, sent a public records request to the City, seeking any and all City records of ordinances, by-laws, rules, regulations, policies, or other documents comprising the City's policy for

charging for these public safety services, or setting forth criteria for determining the amounts of such charges.

On March 1, 2018, the City's public records officer—after extending the City's time to respond to the public records request from 10 to 25 business days because of the so-called complexity of the request—delivered to ACLUM only three documents:

(1) A "Park and Public Usage Policy" containing the statement: "Person(s) or Organization(s) permitted to use facilities ... shall be responsible for the behavior of person(s) attending and *shall furnish if necessary, at their own expense fire, police detail or other protection as the City of Cambridge may direct.*" Exhibit B (emphasis added);

(2) "Guidelines for Special Events in the City of Cambridge," containing the statement: "An estimate of costs for City support services *if applicable* will be discussed and noted under the 'Department Approval' portion of the Special Events Application Form during your attendance at the Special Events Committee Meeting." Exhibit C (emphasis added); and

(3) A "Parks and Public Areas" document containing the statement: "A public gathering of 200 or more people *may require* a Police Detail and/or DPW personnel in attendance at the expense of the applicant." Exhibit D (emphasis added).

MAPA never received any written estimate of costs on the "Department Approval" portion of the Special Events Application Form as described in Exhibit C.

In addition to the public records request, on January 31, and again on behalf of MAPA, ACLUM wrote to City officials expressing concerns that the assessment of public safety charges was in violation of the free speech and assembly protections of the federal and state constitutions. See Exhibit A. These concerns focused

particularly on the lack of clear policies to guide the discretion of City officials in deciding what costs would and would not be charged and when, contrary to the rationale of *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992). On February 21, and again on behalf of MAPA, ACLUM sent City officials copies of bills that had been served on MAPA and a chart showing other charges that MAPA had been told were being assessed. Copies of the bills and charges were sent because City officials had told at least one other official that they did not know to what charges ACLUM was referring.

On March 2, 2018, the City Solicitor emailed ACLUM, responding that the City believes it has a right to impose these charges; that the City previously had "waived" portions of the total costs of public safety services on January 20, 2018; and indicating that somehow the total amount being charged had declined to $2,788.50, perhaps because of failure to address the charges for MBTA police services. The response gave no rationale for which amounts were charged and which were "Waived/Not Charged." It cited no Ordinance or other actual law authorizing the charging of such costs or guiding the discretion of City officials as to how much to charge for what and when. In an attempt to show that the City has some uniform (if unwritten) policy, the response referred to "fees for parking meters which are charged by the Department of Traffic, Parking and Transportation to all users." Of course, belying this consistency, the letter went on to say that any costs for parking meters on January 20, 2018 were "waived/not charged." Exhibit E.

In spite of the implication in the City Solicitor's email that MAPA might not be billed for MBTA police services, MAPA has now received bills directly from the MBTA police for $852.50 for services performed on January 20, 2018, plus a 10% "administrative fee" supposedly for processing the bills. See Exhibits F1 and F2.

On March 22, 2018, ACLUM, on behalf of MAPA, wrote again to City officials to offer to meet on or before April 13, 2018 to resolve the dispute and to lay out with greater specificity the grounds on which the City's indefinite policy with regard to charges for public safety services is inconsistent with constitutional requirements. Exhibit G.

After receiving no response to the request to meet by April 13, MAPA and other individuals involved in organizing the Women's March began meeting with Cambridge City Councilors to inform them of the pending conflict and seek their intervention.

After one of those meetings, a City Councilor sent one of the March organizers an email saying that the City Manager had authorized her to inform MAPA that, after further consideration, the amounts being charged directly by the City would now be "waived," but that MAPA would still be liable to the Everett, Melrose, Chelsea and MBTA police departments, which the City had unilaterally arranged to provide services, because the City has no power to "waive" their charges. Bills from these entities now received by MAPA total $1,622, including $852.50 from the MBTA Transit police with two separate invoices (see Exhibits F1 and F2); $385 from the Everett police (see Exhibit H); and $385 from the Melrose police department (Exhibit I). MAPA has not received any bill from the Chelsea police department. Plaintiffs do not know if the MBTA plans to send additional bills increasing the total being claimed to the amount discussed with the organizers and referenced above.

Despite the hearsay promise that the City would waive its direct charges, the City declined to put that commitment in writing and made no promise that the City will adopt clearer policies going forward or that it will not continue to apply the

existing policy to MAPA and others in the future. Nor did the City provide any explanation for the decision to "waive" the bills from City departments.

The City Manager and City Solicitor ultimately agreed to meet with representatives of the Plaintiffs, including their counsel, on Thursday, June 14, 2018. At that meeting, the City officials said that they were reviewing the City policies for revision, that such review could take at least two months, and that the City would not suspend its current policy of authorizing charges for public safety services pending that review. They also said that, in spite of what a City Councilor had conveyed, the City had not officially agreed to waive the City's own portion of the charges, although they said that Plaintiffs need not pay them *for now*. The officials also said that they thought that some or all of the third party entities who had sent bills to Plaintiffs had also sent bills to the City and that the City had paid those bills, but no further clarification has yet been received.

ARGUMENT

The requirements for a preliminary injunction are met in this case. Massachusetts courts consider the following factors in determining whether preliminary injunctive relief should issue: (1) the moving party's likelihood of success on the merits; (2) whether the moving party will suffer an irreparable injury if preliminary injunctive relief is not granted; (3) whether the balance of harms weighs in favor of the requested relief; and (4) whether the public interest would not be adversely affected if the injunction is granted. *See Tri-Nel Mgmt., Inc. v. Bd. of Health of Barnstable,* 433 Mass. 217, 219 (2001) (citing *Packaging Indus. Grp., Inc. v. Cheney,* 380 Mass. 609, 617 (1980)). As discussed below, with respect to irreparable harm, the impairment of a constitutional right constitutes irreparable harm warranting injunctive relief. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 373

(1976) (noting that the "loss of First Amendment freedoms . . . unquestionably constitutes irreparable injury"); *Whitney v. Ashburnham-Westminster Reg'l Sch. Dist.*, 1996 WL 1185116, at *2 (Mass. Sup. Ct. 1996) ("When an alleged deprivation of a constitutional right is involved, typically no further showing of irreparable injury is necessary.") Each of these factors weighs decidedly in favor of granting the preliminary injunctive relief Plaintiffs now seek.

I. Plaintiffs have a strong likelihood of success on the merits of their claim that the City is applying a facially unconstitutional policy of charging organizers for public safety services for expressive events in public fora.

The City's policy with regard to charging for public safety services is unconstitutional both on its face and as applied, under both the federal and state constitutions.[2] The City bears the burden to show that the policy is constitutional.

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[2] With regard to claims under the Massachusetts Constitution, including Articles 16 and 19 of the Declaration of Rights and the protection of free speech and related rights, Massachusetts courts look to federal courts' interpretation of the First Amendment as a floor of the protections Article 16 provides. This is because "[t]he Massachusetts Constitution protects matters of personal liberty against government incursion as zealously, and often more so, than does the Federal Constitution, even where both Constitutions employ essentially the same language." *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 328 (2003). *See also Lyons v. Globe Newspaper Co.*, 415 Mass. 258, 267 (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 *Colo v. Treasurer & Receiver Gen.*, 378 Mass. 550, 558 (1979)). Indeed, Massachusetts courts are not restricted by the federal analysis, and the Massachusetts Declaration of Rights often provides broader protection of personal liberties than the United States constitution. *See, e.g., 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).

Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640, 658 (1981) ("As our cases have long noted, once a governmental regulation is shown to impinge upon basic First Amendment rights, the burden falls on the government to show the validity of its asserted interest and the absence of less intrusive alternatives.").

A. Charges for public safety services related to events in traditional public fora are unconstitutional because the amount of protection needed cannot be calculated without regard to the reactions of listeners or counter-protestors.

It has been well-established since at least 1992 that content-based constraints, such as the charges assessed against MAPA for public safety protection at the Women's March, are unconstitutional.

Cambridge Common, like other public parks, is "'the archetype of a traditional public forum.'" *Forsyth County*, 505 U.S. at 130 (quoting *Frisby v. Schultz*, 487 U.S. 474, 480 (1988)).[3] Schemes purporting to allow for charges for permits and related services in such fora must meet certain constitutional requirements, including that any "time, place and manner" constraints "must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication." *Id.* (citing *United States v. Grace*, 461 U.S. 171, 177 (1983)).

A municipal scheme like the Cambridge policy, which purports to allow for charges for police details and similar public safety services, is not content-neutral and therefore is unconstitutional. This is because "[i]n order to assess accurately the cost of security" for those participating in an event:

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[3] The holding of *Forsyth County* with respect to what form of judicial review must be provided with regard to amounts charged for permits was refined somewhat in *City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C.*, 551 U.S. 774 (2004). The holdings for which *Forsyth County* is cited in this Memorandum continue in full force and effect.

> The administrator "must necessarily examine the content of the message that is conveyed," estimate the response of others to that content, and judge the number of police necessary to meet that response. The fee assessed will depend on the administrator's measure of the amount of hostility likely to be created by the speech based on its content. Those wishing to express views unpopular with bottle throwers, for example, may have to pay more for their permit.

505 U.S. at 134 (quoting *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987)). In other words, schemes allowing for charges for public safety protection are inherently content-based.

It does not matter whether the City in fact charged more for this event based on the anticipated reaction of listeners.[4] "'Regulations which *permit* the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.'" *Id.* at 135 (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 648–649 (1984)) (emphasis added). Such a scheme is subject to a facial challenge "and invalidation, even though its application in the case under consideration may be constitutionally unobjectionable." *Id.* at 129. This is because "'the danger of censorship and of abridgment of our precious First Amendment freedoms is too great' to be permitted." *Id.* at 131 (quoting *Se. Promotions, Ltd. v. Conrad,* 420 U.S. 546, 553 (1975)). And the stated objective of the City to raise revenue to pay for needed police protection cannot justify this inherently content-based scheme. *See id.* at 135–36.

Relying on the above-quoted language from *Forsyth County*, the First Circuit emphasized in *Sullivan v. City of Augusta* that "the 'cost of police protection for public safety,' the item the Supreme Court found to be improperly included in the

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[4] The Women's March occurred within six months of the events in Charlottesville, Virginia, where numerous attendees were armed and a counter-protestor was killed. At initial meetings on the permits requested for the Women's March, police officials expressed concern that counter-protestors might also appear at the Women's March. Verified Complaint, ¶14.

Forsyth County ordinance, is expressly excluded by the parade ordinance from the costs passed on to permit applicants." 511 F.3d 16, 36 (1st Cir. 2007). *See also Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1026 (9th Cir. 2009) (ordinance excluded from departmental services for which organizers could be charged "costs incurred by the city to provide police protection to those engaged in 'expressive activity'").

Hence, the City's policy, which purports to allow it to pass along the cost of police details and other public safety services, is unconstitutional under both the First Amendment and Article 16 of the Declaration of Rights[5] and must be enjoined.

B. The Cambridge policy is unconstitutional due to the lack of definite standards to control the exercise of discretion.

The City's policy is also invalid because it lacks narrow, objective and definite standards to control the exercise of discretion in determining whether, when, and in what amount any charges will be imposed. *Forsyth County*, 505 U.S. at 131, 133.

The sum total of the Cambridge policy purporting to authorize charging for public safety services is set forth in full at page 4 above. For any event expecting 200 or more participants, the policy allows an executive official to assess charges "if necessary" for "fire, police detail or other protection as the City of Cambridge *may* direct." These vague references suggest that the costs of police details will not be charged to groups projected to be smaller than 200, but, other than that, there are *no* objective standards. When and whether and by whom charges will be deemed "necessary" is completely undefined and left to the discretion of the charging entity.

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[5] Article 16 is interpreted with reference to First Amendment principles, but has been found to provide even more protection for speech than the First Amendment. *See supra* note 2. Hence, where a policy violates the First Amendment, it also violates Article 16. But, on the other hand, a policy that may comply with the First Amendment may still be unconstitutional under Article 16.

No provision is made to preclude charging more because of a fear of a hostile reaction or counter-protests.

The lack of detail in the Cambridge policy stands in sharp contrast to the ordinance in *City of Augusta*. The Augusta ordinance *mandated* charging for traffic control and clean-up; the Cambridge policy leaves it totally to individual discretion whether charges for public safety will be assessed, thereby allowing for differential treatment based on the content of the speech in question. The Augusta ordinance said only costs for traffic control and clean-up could be charged and precluded charges for public safety; the Cambridge policy allows unfettered discretion to charge or not for public safety services. 511 F.3d at 35. *See also Transp. Alts. Inc. v. City of New York,* 340 F.3d 72 (2d Cir. 2003) (holding invalid a New York City ordinance that gave the parks commissioner discretion whether to impose a special events fee and if so, how much to charge).[6]

Recently, the United States Supreme Court reinforced the importance of definite criteria to control discretion and invalidated vague speech restrictions in the non-public forum of a polling place. The Court re-affirmed that even in a non-public forum, let alone a traditional public forum, "discretion must be guided by

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[6] The court found the ordinance unconstitutional even though it included a list of factors to be considered in determining the amount of special permit fees. In the words of the court, the ordinance: "vests exactly [the] sort of impermissible discretion in the Parks Commissioner [found unlawful in *Forsyth County*]. As an initial matter, the Commissioner has unrestricted discretion in deciding whether to impose a 'special events' fee at all. And, once the Commissioner has decided to impose a 'special events' fee, the regulations allow the Commissioner uncontrolled discretion in deciding the amount of the fee, limited only by the prescribed maximums. It is true, the ordinance prescribes a list of 'factors' to be considered, but it assigns no weight to any of the factors. And, especially in view of the fact that the 11th prescribed factor is 'such other information as the Commissioner shall deem relevant,' the statutory scheme effectively gives the Commissioner absolute, unregulated discretion as to the amount of the fee for any reason she deems pertinent, within the prescribed maximum limits." 340 F.3d at 78.

objective, workable standards." *Minn. Voters All. v. Mansky*, 138 S.Ct. 1876 (2018) (striking down as "unreasonable" a vague standard banning "political" attire in polling places). The demand for clear standards is even greater with respect to a traditional public forum like the Cambridge Common and other public parks, and cannot be met in this case.

As is well-established: "The First Amendment prohibits the vesting of such unbridled discretion in a government official." *Forsyth County*, 505 U.S. at 133. For this reason too, the Cambridge policy allowing for charging of public safety services is likely unconstitutional and should be preliminarily enjoined.

C. The Cambridge policy is not narrowly tailored because it does not distinguish between public parks and events requiring street closures.

The City's policy applies the same vague requirements to expressive events in public parks as it does to events that require closure of public streets, such as actual marches or parades. Courts have recognized that different governmental interests are raised by the two distinct kinds of events. For instance, in *Santa Monica Food Not Bombs v. City of Santa Monica*, the court reviewed the city's policy under which marches, processions and other assemblies in the streets, which necessarily impede traffic flow, and assemblies in public parks, which do not, were treated equally. The court found that the policy was not narrowly tailored because it did not take into account the uniqueness of the park setting. 450 F.3d 1022, 1041-42 (9th Cir. 2006). *See also Long Beach Area Peace Network,* 574 F.3d at 1038 (finding that a similar policy was not narrowly tailored); *United States v. Doe*, 968 F.2d 86, 90–91 (D.C. Cir. 1992) (policy that applied same noise level rules to all parks and streets, regardless of individualized circumstances, was not narrowly tailored).

D. The Cambridge policy does not leave adequate alternatives for communication for large stationary assemblies.

Another requirement of a purported "time, place and manner" restriction is that it leaves open adequate alternatives for communication. *Forsyth County*, 503 U.S. at 130. Here, the Cambridge policy applies to every public park in Cambridge, leaving nowhere for those who are denied a permit to go to gather in large numbers with their fellow residents. It simply does not leave ample alternatives for assembly and communication of the type at issue in this case. *Cf. Long Beach Area Peace Network*, 574 F.3d at 1038 (ordinance did not leave ample room for spontaneous assemblies).[7]

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[7] In *Frisby v. Shultz*, the court concluded that an ordinance prohibiting "picketing" in residential neighborhoods allowed for ample alternatives because people were free still to go into those neighborhoods, knock on doors, hand out leaflets, and engage in other forms of communication not involving picketing and thus had adequate alternatives. 487 U.S. at 484. In *City of Renton v. Playtime Theaters, Inc.*, an ordinance that precluded nude dancing establishments in some areas of the municipality but allowed them to be sited in a significant part of the community, was found to allow ample alternatives. 475 U.S. 41, 53 (1986). And in *Ward v. Rock Against Racism,* in which the original desired forum itself was available but subject to sound-level restrictions, the ample alternative requirement was met. 791 U.S. 781, 802–03 (1989). Each of these cases is distinguishable here, where the City's "policy" of charging these fees applies and imposes the same restraint in each and every place within the City appropriate for the gathering of so many people to listen to designated speakers. It not only leaves no "ample alternatives;" it leaves no alternatives at all. *See Bay Area Peace Navy v. United States,* 914 F.2d 1224, 1229 (9th Cir. 1990) (restriction that left organizers without any access to its intended audience did not leave ample alternatives); *Students Against Apartheid Coalition v. O'Neil*, 660 F. Supp. 333, 339–40 (W.D. Va.1987) (university regulation prohibiting erection of protest shanties on lawn of building where Board of Visitors meets is not rendered valid by permission to erect shanties elsewhere on campus, in place not visible to members of Board, the intended audience), aff'd, 838 F.2d 735 (4th Cir. 1988); *Dr. Martin Luther King, Jr. Movement, Inc. v. City of Chicago*, 419 F. Supp. 667, 674 (N.D. Ill. 1976) (parade route through black neighborhood not constitutional alternative to route through white neighborhood when intended audience was white).

E. Charges for public safety services in city parks also constitute taxes that the City is not constitutionally authorized to assess.

Charges for public safety services at events in public parks are also unconstitutional under the Massachusetts Constitution because they qualify as "taxes," not "fees," and the City does not have the authority to impose taxes without explicit authorization of the state Legislature. The Supreme Judicial Court uses a three-prong test to evaluate whether a municipal exaction is a legal fee or an impermissible tax. *See Emerson Coll. v. City of Boston*, 391 Mass. 415 (1984). In contrast with taxes, fees

> are charged in exchange for a particular governmental service which benefits the party paying the fee in a manner "not shared by other members of society," they are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge, and the charges are collected not to raise revenues but to compensate the governmental entity providing the services for its expenses.

Id. at 424–425 (quoting *Nat'l Cable Television Ass'n v. United States*, 415 U.S. 336, 341 (1974)) (citation omitted). *See also Murphy v. Mass. Turnpike Auth.*, 462 Mass. 701, 705 (2012) (reaffirming this three part test).

First, a fee can be charged only where the benefit is specific to the payer. *Emerson Coll.*, 391 Mass. at 425 ("Fees are legitimate to the extent that the services for which they are imposed are sufficiently particularized as to justify distribution of the costs among a limited group (the 'users,' or beneficiaries, of the services), rather than the general public."). Public safety services in a public forum, however, are not sufficiently particularized to justify a fee, even where particular circumstances necessitate additional services. For example, in *Emerson*, the City of Boston sought to levy a fee for "augmented" fire protection on building owners whose buildings were deemed to require additional capacity in firefighting services. In holding that this exaction was a tax and not a fee, however, the Supreme Judicial

Court noted that the "capacity to extinguish a fire in any particular building safeguards not only the private property interests of the owner, but also the safety of the building's occupants as well as that of surrounding buildings and their occupants." *Id.* at 425–426. The benefit provided was therefore insufficiently particularized to permit the city to charge a fee. *See also Phone Recovery Servs., LLC v. Verizon of New England, Inc.*, 2015 WL 8331983, at *4 (Mass. Sup. Ct. 2015) (holding that a charge on phone users to fund the 911 system was a tax because "all members of society experience benefits from a swift and efficient 911 emergency dispatch service" whether or not they call themselves).

Similarly, a charge by the City of Cambridge for public safety services at public demonstrations is a tax, which requires legislative authorization the City has not obtained. The public safety services at public demonstrations benefit anyone in the area, not just those who have organized the event. Bystanders, passersby, and counter-protestors all benefit from these public safety services without having paid for them. Thus, the benefits of emergency services accrue to the public at large, not only to specific beneficiaries, and therefore cannot be funded through the imposition of a fee on a particular group.

Additionally, a user fee is permissible only where the party may avoid the fee by declining the services for which the fee is levied. The City does not permit organizers to opt out of engaging public safety services; those services are instead a prerequisite for accessing the public forum. The organizers' only "choice," then, is either to pay the charges or not exercise their constitutional rights to free speech and assembly. This requirement constitutes a "prior restraint on speech," which faces a "heavy presumption" against its validity. *Forsyth County*, 503 U.S. at 130. As discussed throughout this motion, the City's policy does not meet the constitutional requirements for such a speech restriction. The forced "choice" is

actually an unconstitutional limitation on participants' freedoms of speech and assembly and is therefore impermissible.

Finally, the money generated by a fee must be used to compensate the municipality for its expenses and not simply to raise revenue. *See, e.g.*, *SDCO St. Martin, Inc. v. City of Marlborough*, 5 F. Supp. 3d 139, 144 (D. Mass. 2014) ("The funds received [through the user fee] are not designated to the maintenance or operation of the [service] but rather are deposited in the City's general fund, just like tax revenues. This is a strong indicator that the payment is meant to raise revenue."); *Silva v. City of Fall River*, 798 N.E.2d 297, 304 (Mass. App. Ct. 2003) ("[W]ith uncontradicted evidence that the funds are deposited to [City's] general account and nothing in the record to indicate the basis on which the charge was calculated or how the funds are used to defray expenses, we cannot conclude that the money collected is not used to subsidize general governmental operations."). While there has not yet been discovery to know exactly how the supposed fee is calculated or used, the City of Cambridge's seemingly arbitrary decision to waive some charges while declining to waive others calls into question whether the charges are fees that have a meaningful relationship to the amount exacted. Similarly, the ten percent "administrative fee" charged by the MBTA suggests that the amount does not only cover actual costs. Furthermore, as discussed above, it is difficult to imagine that the City could effectively separate the cost of providing public safety services to the event from the baseline cost of providing these protections generally.

For all these reasons, the charges the City seeks to levy against the Plaintiffs are in fact an impermissible tax.

II. A preliminary injunction is needed to prevent ongoing irreparable harm and protect the public interest.

The impairment of a constitutional right constitutes irreparable harm warranting injunctive relief. *See, e.g., Elrod*, 427 U.S. at 373 (noting that a First Amendment violation imposes irreparable harm on the silenced speaker); *Whitney*, 1996 WL 1185116, at *2 ("When an alleged deprivation of a constitutional right is involved, typically no further showing of irreparable injury is necessary."). "Even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief." *Chabad of S. Ohio & Congregational Lubavitch v. City of Cincinnati*, 363 F.3d 427, 436 (6th Cir. 2004) (quoting *Newsome v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989)).

Plaintiffs are reluctant to plan future events because of their experience with the City's application of the City's policy to them and to others. Their activities and voices are being chilled. In addition, they experience uncertainty as to whether they are legally liable to pay the public safety charges, which impinges on their ability to plan ahead for other social justice activities. As a result, they are suffering and will continue to suffer irreparable harm if the City's policy is not enjoined.

Defendants, on the other hand, will suffer no cognizable injury. The City as an institution has no interest in having free speech rights squelched. Residents pay taxes to fund public safety services, including for expressive events in the City's parks. The Supreme Judicial Court has held that expenditures of public funds to comply with a statutory mandate is not irreparable harm. *Healey v. Comm'r of Pub. Welfare*, 414 Mass. 18, 27 (1992). It naturally follows that expenditure of funds to comply with the Constitutions of the United States and Massachusetts is not irreparable harm.

The public interest clearly favors the injunction. Preservation of free speech and assembly rights is one of the most vaunted of constitutional priorities, as it is

"essential to our democratic form of government." *Janus v. Am. Fed. of State, Cty. & Mun. Emps.*, 2018 WL 3129785, at *9 (2018) (citing *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964)). The City is at no risk of running out of funds to be able to pay for needed public safety services in the future. It has had no problem telling Plaintiffs they do not have to pay "for now" – while not yet agreeing to relieve them of the burden of the debt. The public interest and the balance of harms clearly favor Plaintiffs.

Conclusion

For the foregoing reasons, Plaintiffs respectfully request that the Court issue a preliminary injunction against the City of Cambridge imposing – or holding out that it might impose – charges for public safety services as a condition of permits for special events. Plaintiffs also respectfully request that the City be enjoined immediately to take all reasonable steps to lift from Plaintiffs' shoulders the burden of the outstanding charges for the January 2018 Women's March.

Respectfully submitted on behalf of Plaintiffs,

Massachusetts Peace Action and
Massachusetts Peace Action Education Fund

Ruth A. Bourquin (BBO No. 5552985)*
American Civil Liberties Union
Foundation of Massachusetts
211 Congress Street
Boston, MA 02110
617-482-3170
rbourquin@aclum.org

Joshua L. Solomon (BBO No. 657761)
Pollack Solomon Duffy LLP
101 Huntington Avenue, Suite 530
Boston, MA 02199
617-439-9800
jsolomon@psdfirm.com

*With the assistance of ACLUM Legal Intern Emma Goold, Harvard Law School Class of 2019.