NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
No. 2019-01308-H

JOHN DOE 1, JOHN DOE 2, AND JOHN DOE 3,
Plaintiffs,

vs.

ROBERT J. MANNING, as Trustee, UNIVERSITY OF MASSACHUSETTS, et al.,
Defendants.

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

The plaintiffs, three students of the University of Massachusetts (the "University") who are attending the University at its Amherst campus ("UMass Amherst"), and who wish to remain anonymous,[1] moved for a preliminary injunction to enjoin a panel discussion. The panel discussion, titled "Not Backing Down: Israel, Free Speech, & The Battle for Palestinian Rights," is scheduled to be held on the UMass Amherst campus at the Fine Arts Center this Saturday evening, May 4, 2019. The forum is cosponsored by UMass departments and other organizations. This Court held a hearing on April 29, 2019 and May 2, 2019. For the below reasons, plaintiffs' motion is **DENIED**.

DISCUSSION

A. The Legal Standard

Under the well-established test of Packaging Industries Group v. Cheney, 380 Mass. 609, 617 (1980), a preliminary injunction is warranted only when the moving party establishes both a likelihood of success on the merits of the claim, and a substantial risk of irreparable harm in the absence of an injunction. Once these factors are established, the Court must balance them

[1] Plaintiffs' request for anonymity will be addressed in a different Opinion.

against the harm that an injunction will inflict on the opposing party, and must also consider the impact on the public interest. See T & D Video, Inc., v. City of Revere, 423 Mass. 577, 580 (1996); Bank of New England, N.A. v. Mortgage Corp. of New England, 30 Mass. App. Ct. 238, 246 (1991) (where public entity is a party, judge may weigh risk of harm to public interest when deciding preliminary injunction motion). In the context of a motion for preliminary injunction, the "only rights which may be irreparably lost are those not capable of vindication by a final judgment, rendered either at law or in equity." Packaging Industries, 380 Mass. at 617, n. 11 (additional citation omitted).

B. Application of the Legal Standard

Plaintiffs are seeking a "prior restraint" on speech, *i.e.*, a court order that would forbid certain speech activities on the UMass Amherst campus. The Supreme Judicial Court has made clear the extraordinary showing that must be made for a court to order such relief:

> "The term 'prior restraint' is used 'to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.'" *Alexander v. United States*, 509 U.S. 544, 550 (1993), quoting M. Nimmer, Nimmer on Freedom of Speech § 4.03, at 4-14 (1984). "Temporary restraining orders and permanent injunctions -- i.e., court orders that actually forbid speech activities -- are classic examples of prior restraints." *Alexander v. United States, supra.*
>
> From the beginning, the liberty of the press guaranteed by the First Amendment and art. 16 was understood as primarily a guarantee of freedom from prior restraints, such as the licensing system employed by the British government in the Sixteenth and Seventeenth Centuries to prevent the publication of material it deemed unsuitable.... Reflecting this history, the Supreme Court has been clear that prior restraints "require an unusually heavy justification under the First Amendment." *New York Times Co. v. United States*, 403 U.S. 713 (1971) (Pentagon Papers) (White, J., concurring). Put another way, there is a "heavy presumption" against the constitutionality of prior restraints. *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 558 (1976), quoting *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). A prior restraint cannot be upheld unless "justified by a compelling State interest to protect against a serious and identified threat of harm." *George W. Prescott Publ. Co. v. Stoughton Div. of the Dist. Court Dep't of the Trial Court,* 428 Mass. 309, 311 (1998). (*Prescott*)

> "[A]ny order seeking to enjoin speech must be based on detailed findings of fact that (a) identify a compelling interest that the restraint will serve and (b) demonstrate that no reasonable, less restrictive alternative to the order is available." *Id.*, quoting *Care & Protection of Edith,* 421 Mass. 703, 705 (1996).

Commonwealth v. Barnes, 461 Mass. 644, 651-652 (2012). State universities such as UMass are considered state actors for purposes of this analysis. Cf. National Collegiate Ath. Ass'n v. Tarkanian, 488 U.S. 179, 192 (1988).

The Verified Complaint and supporting legal papers reflect a genuine concern by the plaintiff students who filed this motion that the panel discussion will engender anti-Semitism. The University, and the courts, must be vigilant in protecting against all forms of discrimination. However, this Court has reviewed all of the allegations in the 57-paragraph Verified Complaint and finds nothing that would justify a prior restraint on speech. There is no allegation that any expected speaker has personally threatened any of the plaintiffs with physical harm or any other type of harm. Nor is there any allegation that the forum will include any other form of speech that is unprotected by the First Amendment. The "incitement" exception to First Amendment protection applies to speech which advocates "the use of force or of law violation . . . where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). The allegations of the Verified Complaint fall markedly short of satisfying this exception.

Absent a compelling interest that would be served by an injunction, the Court need not reach the issue of whether some reasonable, less restrictive alternative to an injunction is available. See Care & Protection of Edith, 421 Mass. at 705.

Plaintiffs correctly note that courts have upheld reasonable restrictions on the time, place and manner of speech imposed by the government and by public institutions. However, this doctrine has no applicability to plaintiffs' challenge. If the University had decided that the panel

discussion must be held at some time and location, or in a format, other than what the sponsoring organizations had requested, and the organizations had challenged this decision, the University would have been required to demonstrate that its restrictions on time, place and manner were reasonable. Cf. Boston v. Back Bay Cultural Ass'n, Inc., 418 Mass. 175, 178-179 (1994) (quotations and citations omitted) (in public forum, government may impose reasonable restrictions on time, place, or manner of protected speech, provided restrictions are justified without reference to content of regulated speech, narrowly tailored to serve significant governmental interest, and leave open ample alternative channels for communication of the information). Here, however, the University has approved the organizations' request for a panel discussion at the UMass Amherst Fine Arts Center on Saturday evening, May 4, 2019. It is not for this Court to reject the time, place and manner approved in this case by the University.

CONCLUSION AND ORDER

For the above reasons, plaintiffs' motion for a preliminary injunction is **DENIED**.

Robert L. Ullmann
Justice of the Superior Court

Date: May 3, 2019