6

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. Superior Court Department
Case No. 1984-CV-01308

JOHN DOE 1, JOHN DOE 2, and JOHN DOE 3,
Plaintiffs,
v.

ROBERT J. MANNING, R. NORMAN PETERS, MARY L. BURNS, ROBERT EPSTEIN, DAVID G. FUBINI, MARIA D. FURMAN, STEPHEN R. KARAM, MICHAEL V. O'BRIEN, KERRIE E. OSTERHAUS-HOULE, IMARI K. PARIS JEFFRIES, JAMES A. PEYSER, ELIZABETH D. SCHEIBEL, HENRY M. THOMAS, STEVEN A. TOLMAN, VICTOR WOOLRIDGE, CHARLES F. WU, NOREEN C. OKWARA, SILAVONG PHIMMASONE, MARY L. BURNS, BRIAN J. MADIGAN, KATHERINE E. MALLETT, JIYA NAIR, SARA TARIQ, EACH IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE BOARD OF TRUSTEES OF THE UNIVERSITY OF MASSACHUSETTS; MARTY MEEHAN, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNIVERSITY OF MASSACHUSETTS; KUMBLE R. SUBBASWAMY, IN HIS OFFICIAL CAPACITY AS CHANCELLOR, UNIVERSITY OF MASSACHUSETTS AMHERST,
Defendants.

SUFFOLK, ss. SUPERIOR COURT DEPT
(date) 4/29/19
FILED
STEVEN J. MASSE
ASSISTANT CLERK

UNIVERSITY DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR INJUNCTIVE RELIEF

The University defendants respond to plaintiffs' April 25, 2019 motion seeking injunctive relief and, for the reasons that follow, state that the requested relief should be denied.

I. Introduction.

In response to inquiries and concerns regarding the May 4, 2019 event scheduled to take place on the University of Massachusetts Amherst ("University") campus, the University made the following statement:

> The event scheduled for May 4 on the UMass Amherst campus is being presented by a private foundation. The foundation has, as many non-UMass organizations regularly do, rented space on campus to host its panel discussion. No university or taxpayer funds are being used to support the event.
>
> UMass Amherst is committed to fostering a community of dignity and respect and rejects all forms of bigotry. The campus is also firmly committed to the principles of free speech and academic freedom. As such, and as is required of a public institution under the First Amendment, UMass Amherst applies a content-neutral standard when making facilities available to outside organizations for the purpose of holding events.
>
> The principle of academic freedom extends to both individual faculty members and to faculty-led academic departments. Departmental sponsorship of various types of events does not constitute an endorsement of the views expressed at those events, rather it is an endorsement of the exploration of complex and sometimes difficult topics. Promoting the free exchange of ideas is one of the most important functions of the university. Our faculty members draw upon their fields of study and expertise to engage in the issues of the day, distinct from a personal political agenda.
>
> The opinions expressed by participants at the May 4 event and other such events do not represent the views of the University. And, as has been stated repeatedly, the University remains firmly opposed to academic boycotts of any kind, including BDS.

The University, through its Chancellor, also made the following statement concerning the entwined issue of academic freedom.

> In addition to the opinions our faculty have shared with me related to the content of the event, which is being paid for and presented by a private

foundation, many of you have written to me in support of academic freedom, a principle that I have steadfastly defended. Some faculty members have also observed that with academic freedom comes "special obligations."

In today's hyper-polarized environment, we increasingly find ourselves living in our own echo chambers where our opinions are validated by like-minded individuals, and the meaningful exchange of ideas is exceedingly rare. Unless we allow audiences to hear differing points of view, the discussion, instead of being one that opens minds, will simply affirm preconceived notions. I encourage university professors to exercise that special obligation and find meaningful ways of bringing opposing sides together to have deeper dialogues among those who hold differing opinions on the issues of the day.

The phrase "special obligations" originates in the *1940 Statement of Principles on Academic Freedom and Tenure*, which, given the lively discussion on campus regarding next week's event, is worth revisiting. The *Principles* state that "College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution." The *Principles* can be viewed in full at: https://www.umass.edu/senate/sites/default/files/Principles%20on%20Academic%20Freedom.pdf

The First Amendment provides, in pertinent part, that state actors like the University "shall make no law ... abridging the freedom of speech." U.S. Const. amend. I; amend. XIV. Non-violent political speech is almost always protected by the First Amendment, even when it is "hurtful," "offensive," or "disagreeable." Snyder v. Phelps, 562 U.S. 443, 458 (2011) citing Texas v. Johnson, 491 U.S. 397, 414 (1989). Because the University is a creature of state government, the First Amendment's

dictates unquestionably apply on the University's campus. See Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995). The Supreme Court has noted that the "danger" of "chilling individual thought and expression" is "especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." Rosenberger, 515 U.S. at 835.

The delicate balance between the First Amendment rights of individual speakers and the property rights of universities[1] has caused the Supreme Court to repeatedly hold that university property is a limited public forum. See Christian Legal Soc. v. Martinez, 561 U.S. 661, 679 (2010). In a limited public forum, restrictions on First Amendment-protected speech must be "reasonable in light of the purpose served by the forum," and cannot "discriminate against speech on the basis of its viewpoint." Rosenberger, 515 U.S. at 829; Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 470 (2009). When reviewing university decisions in this context, the Supreme Court has "cautioned courts . . . to resist substitut[ing] their own notions of sound educational policy for those of the school authorities which they review" and to afford "decent respect" to university officials' decisions about how best to manage their programs.

[1] A public university, like any governmental entity, "may legally preserve the property under its control for the use to which it is dedicated." Rosenberger, 515 U.S. at 829. Because "[a] university's mission is education," courts generally have "never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities," nor required that a university either "make all of its facilities equally available to students and nonstudents alike," or "grant free access to all of its grounds or buildings." Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981).

Martinez, 561 U.S. at 686-687.

II. Plaintiffs Seek an Unconstitutional Prior Restraint.

Plaintiffs seek an order barring the University, an arm of the Commonwealth (see, e.g., Wong v. Univ. of Mass., 438 Mass. 29, 30 n.3 (2002)), from allowing a third party to speak on its property on May 4, 2019. At bottom, plaintiffs have asked this court to issue a prior restraint. See, e.g., Alexander v. U.S., 509 U.S. 544, 550 (1993).

"Any attempt to restrain speech must be justified by a compelling State interest to protect against a serious threat of harm." Care and Protection of Edith, 421 Mass. 703, 705 (1996). "There is a strong presumption that prior restraints on speech are unconstitutional." Sindi v. El-Moslimany, 896 F. 3d 1 (1st Cir. 2018) (citation omitted). "A prior restraint on speech must survive the most exacting scrutiny demanded by our First Amendment jurisprudence." Id. (emphasis added).

> Such intensive scrutiny is warranted because an animating purpose of the First Amendment was to create a bulwark against previous restraints on speech. See Near v. Minnesota ex rel. Olson, 283 U.S 697, 713 (1931). Since 'the line between legitimate and illegitimate speech is so often so finely drawn,' we prefer[] to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand." See Promotions, Ltd v. Conrad, 420 U.S. 546, 559 (1975) (emphasis in original). Thus, prior restraints are regarded as 'the most serious and the least tolerable infringement on First Amendment rights.' Stuart, 427 U.S. at 559.

Sindi, 896 F. 3d at 32; see also Boston Firefighters Union, IAFF, Local 718 v. WHDH TV, Channel 7, 2007 WL 4259762 at *1-2 (Mass. App., Oct. 5, 2007) (not reported). "[T]he Court must tread cautiously where the relief sought constitutes a prior restraint on

another's right to free speech because 'our law thinks it is better to let the [] plaintiff take his damages for what they are worth than to entrust a single judge (or even a jury) with the power to put a sharp check on the spread of the possible truth.'" Haddad, Jr. v. Nordgren Mem. Chapel, Inc., 2005 WL 3605475 at *2 (Worc. Super., Nov. 9, 2005) (not reported) quoting Krebiozen Research Found. v. Beacon Press, 334 Mass. 86, 93 (1956).

III. The Required Rule 65 Showing.

The prior restraint bar aside, arguendo,[2] a preliminary injunction should only issue where plaintiffs are likely to prevail on their claims and likely to suffer an irreparable injury, absent the imposition of an injunction, while their claims are litigated in the ordinary course.

To prevail on their Mass. R. Civ. P. 65 motion, plaintiffs must demonstrate: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury to them if injunction is not granted; and, if the court determines that the first two factors weigh in plaintiffs' favor, the court must then determine plaintiffs have demonstrated that (3) the threatened injury to them without an injunction outweighs the risk of harm if the injunction is entered. Packaging Indus. Group, Inc. v. Cheney, 380 Mass. 609, 616 and 621-22 (1980). Plaintiffs bear the burden of proof on each factor. Id.; see also GTE Products Corp. v. Stewart, 414 Mass. 721, 722-3 (1993).

[2] See Boston Firefighters, 2007 WL 4259762 at n 4.

A. Factor One: Likelihood of Success.[3]

1. The Contract Claim is Unlikely to Succeed on Its Merits.

The unripe breach of contract claims are not likely to succeed. See Restatement (Second) of Contracts, § 1 (1979); Singarella v. City of Boston, 342 Mass. 385, 387 (1961). To prove that the University breached a contract with them, plaintiffs must evidence that: (1) they and one or more of the defendants had an agreement supported by valid consideration; (2) they were ready, willing, and able to perform; (3) one or more defendants' breach prevented them from performing; and (4) they suffered damage. Singarella v. City of Boston, 342 Mass. 385, 387 (1961). There is little likelihood that the factors in this well-established framework will be supported by evidence and, as such, it is appropriate to determine, at this stage, that plaintiffs are unlikely to succeed on the

[3] Depending on the claims that proceed in this case, some or all may be barred by sovereign immunity. "As a general matter, 'the Commonwealth or any of its instrumentalities cannot be impleaded in its own courts except with its consent....'" Lopez v. Commonwealth, 463 Mass. 696, 701 (2012) (citation omitted). In the absence of the Commonwealth's abrogation of its own immunity, a court lacks jurisdiction over a claim against the Commonwealth. Vining v. Commonwealth, 63 Mass. App. Ct. 690, 696 (2005) (citation omitted); Cameron Painting, Inc. v. Univ. of Massachusetts, 83 Mass. App. Ct. 345, 347 (2013). Decisions of Massachusetts federal and state courts consistently treat the University as an arm of the Commonwealth. See, e.g., Wong v. Univ. of Mass., 438 Mass. 29, 30 n.3 (2002) ("For purposes of the Commonwealth's consent to be sued, the University of Massachusetts and the Commonwealth are 'one and the same party, namely the Commonwealth of Massachusetts.'"); Hannigan v. New Gamma-Delta Chapter of Kappa Sigma Fraternity, Inc., 367 Mass. 658, 659 (1975) (University of Massachusetts trustees are the same as the Commonwealth); and U.S. ex. rel. Willette v. University of Massachusetts, Worcester, 812 F.3d 35, 39-43 (1st Cir. 2016). Moreover, suits against state officials are treated as suits against the state because "[a] suit against an official in his or her official capacity is not a suit against the official but rather against the official's office.... As such, it is no different from a suit against the State itself." Whalen v. Com., 2006 WL 1727990, at *4 (Mass. Super. June 26, 2006), quoting Will v. Michigan Dept. of State Police, 491 U.S. 58, 71 (1989); see also Pennhurst, 465 U.S. at 100. Absent waiver or consent by the Commonwealth, the University and its employees acting in their official capacities are not subject to suit in state court for money damages. See O'Malley v. Sheriff of Worcester Cnty., 415 Mass. 132, 141 (1993).

merits of their contract claims. See, e.g., Sullivan v. Boston Architectural Center, Inc., 57 Mass. App. Ct. 771, 774-775 (2003).[4]

2. **The Discrimination Claim is Not Likely to Succeed on its Merits.**

The University defendants are not discriminating against plaintiffs by making a public space available to a third party for an event which plaintiffs can voluntary choose to attend, or ignore. "The fact that a school or other public entity operates a voluntary program or offers an activity that offends the religious beliefs of one or more individuals, and leaves them feeling 'stigmatized' or 'excluded' as a result, does not mean that the program or activity necessarily violates equal protection principles. If we were to accept the plaintiffs' theory, numerous programs and activities that are otherwise constitutional would be scuttled under the rubric of equal protection." Doe v. Acton-Boxborough Regional School Dist., 468 Mass. 64, 80-81 (2014) (citations omitted).

Where, as here, "plaintiffs do not claim that a school program or activity violates anyone's First Amendment religious rights (or cognate rights under the Massachusetts Constitution)" they will likely not be able to claim that their "exposure to it unlawfully discriminates against them on the basis of religion." Id. citing Harris v. McRae, 448 U.S.

[4] Plaintiffs have not pleaded that they had a contract with any of the human beings they named as defendants in this case. The only arguable contracts referenced are University policies and, if deemed a contract, no individual University employee is party to them.

297, 322 (1980). "Public schools are not obliged to shield individual students from ideas which potentially are religiously offensive, particularly when the school imposes no requirement that the student agree with or affirm those ideas or even participate in discussions about them." Parker v Hurley, 514 F.3d 87, 106, cert. denied, 555 U.S. 815 (2008) (concerning Massachusetts public elementary school-age children); see also Curtis v. School Comm. of Falmouth, 420 Mass. 749, 763 (1995) cert. denied 516 U.S. 1067 (1996) (a public high school program that is religiously offensive to plaintiffs does not rise to the level of a constitutional infringement).

B. Factor Two: There is No Substantial Threat of Irreparable Injury.

Plaintiffs have not demonstrated that they will suffer irreparable harm in the absence of injunctive relief. In essence, plaintiffs claim that they will be "irreparably harmed" by the content of the words that will be spoken by third parties on University property on May 4 and sequela they predict will follow.[5] Ross–Simons of Warwick, Inc. v. Baccarat, Inc., 102 F.3d 12, 19 (1st Cir. 1996); see also 11A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice & Procedure § 2948.1, at 153–54 (2d ed.1995). Plaintiffs are not entitled to injunctive relief on the facts of record here and the law that applies. As plaintiffs have not made the requisite showing that they

[5] Mass. R. Civ. P. 65 derives from Fed. R. Civ. P. 65. Packaging Indus. Group, Inc. v. Cheney, 380 Mass. at n. 10.; see also Reporter's Notes to Mass R. Civ. P. 65 (1973).

will suffer irreparable harm without the requested injunctive relief, such relief should be denied.

C. Factor Three: The Balance of Hardships Favors Permitting Free Speech.

If this inquiry is even reached, it is clear that the balance of hardships weighs in favor of permitting third party free speech in this limited public forum.

> [W]hen asked to grant a preliminary injunction, the judge initially evaluates in combination the moving party's claim of injury and chance of success on the merits. *If* the judge is convinced that failure to issue the injunction would subject the moving party to substantial risk of irreparable harm, the judge must then balance this risk against any similar risk of irreparable harm which granting the injunction would create for the opposing party. . .. ***Only*** where the balance between these risks cuts in favor of the moving party may a preliminary injunction properly issue. . .. In an appropriate case, the risk of harm to the public interest also may be considered.

GTE Products v. Stewart, 414 Mass. 721, 722-23 (1993) (emphasis added) (internal citations omitted). The court need not reach this inquiry, because it is not likely that plaintiffs will succeed on the merits of their claims nor evidence that they will suffer a substantial threat of irreparable injury if the requested injunctive relief is denied. Nonetheless, this factor – like the first two – weighs in favor of denying plaintiffs their requested relief. For the foregoing reasons, the public interest prong of the Rule 65 analysis argues strongly in favor of permitting the University, a public educational institution and an arm of the Commonwealth, to permit this speech on its campus.

IV. CONCLUSION:

The University defendants respectfully request that the court deny plaintiffs' requested injunctive relief.

Dated: April 29, 2019

UNIVERSITY DEFENDANTS
By their attorney,

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CERTIFICATE OF SERVICE

I certify that, in view of the time constraints, I personally emailed a copy of the above document to plaintiffs' counsel at HurvitzLaw@comcast.net and, additionally, will try my best to hand-deliver a copy to her ~~prior to~~ the April 29, 2019 hearing in this matter.

Denise Barton