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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2284CV01025

Notice sent
9/4/24
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MICHAEL PICARD and
HEIDI OLSON

vs.

MASSACHUSETTS DEPARTMENT OF
CONSERVATION AND RECREATION, & others[1]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION TO DISMISS

Plaintiffs, Michael Picard ("Picard") and Heidi Olson ("Olson") (collectively, "Plaintiffs"), brought this action against Defendants, the Massachusetts Department of Conservation and Recreation ("DCR"), the Massachusetts State Police ("MSP"), and MSP Trooper Devon Surian ("Trooper Surian") (collectively, "Defendants"), after Plaintiffs were cited and fined in connection with a protest in a DCR managed park. Plaintiffs allege violations of (1) their free speech rights under the United States and Massachusetts Constitutions; (2) procedural due process; (3) the Massachusetts Civil Rights Act, G.L. c. 12, §§ 11H, 11I; and (4) the Massachusetts Public Records Law, G.L. c. 66, §§ 10, 10A. Before the Court is Defendants' Motion to Dismiss Plaintiffs' Amended Complaint. After a hearing on the motion, and consideration of the pleadings and relevant law, Defendants' Motion is **DENIED**.

[1] Massachusetts State Police and Devon Surian, individually and in his capacity as a Massachusetts Police State Trooper.

FACTUAL ALLEGATIONS[2]

The DCR manages the Lynn Shore Reservation, a state property which includes a public beach, seawall, and sidewalk area abutting Lynn Shore Drive. The MSP provides law enforcement on DCR managed properties, including the Lynn Shore Reservation.

On November 11, 2021, a group of demonstrators gathered along the sidewalk area between the seawall and Lynn Shore Drive, voicing their support for former President Donald Trump and opposition to sitting President Joseph Biden. The demonstrators played music, displayed signs stating, "Fuck Biden" and "Woke is a Joke", and erected several flags along the seawall also displaying messages in support of former President Trump, the United States military, and gun rights. Several individuals in the group had previously demonstrated in the area, conveying similar messages, as well as opposition to gay rights and the display of an LGBTQ+ Pride flag at the Swampscott Town Hall.

Upon observing the demonstration, Plaintiffs and a few other individuals chose to engage in a satirical counter-protest. Plaintiffs were aware of the prior demonstrations and that the demonstrators had used slurs and other terms that Plaintiffs considered offensive and homophobic. Although Plaintiffs were equipped with bullhorns and a handmade sign which read "Let's Make Everybody Gay," they maintain that their counter-protest was spontaneous.

During the counter-protest, Picard solicited signatures from the pro-Trump demonstrators and other passersby for a petition to place LGBTQ+ Pride flags every 20 feet in Lynn and Swampscott. An organizer of the pro-Trump demonstration responded by threatening to pepper spray Picard. Olson asked the pro-Trump group if an LGBTQ+ Pride flag could be added to the other flags that the demonstrators had erected on the seawall.

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[2] This section is drawn from the factual allegations in Plaintiffs' Amended Complaint as well as exhibits attached thereto, matters of public record, and items appearing in the record of the case. See *Buffalo-Water 1, LLC* v. *Fidelity Real Estate Co.*, LLC, 481 Mass. 13, 17 (2018); *Schaer* v. *Brandeis Univ.*, 432 Mass. 474, 477 (2000).

Plaintiffs state that they maintained a distance from the Pro-Trump demonstrators and used their bullhorns only briefly and periodically to convey their messages over the traffic noise and the voices and music of the competing protest. They allege that one pro-Trump demonstrator also used a bullhorn to amplify the sound of a siren sound. Plaintiffs deny that they impeded road or pedestrian traffic in any manner.

MSP troopers, including Trooper Surian, eventually responded to the scene. Trooper Surian confronted Plaintiffs and promptly ordered them to stop using the bullhorns. He did not measure the decibel level of any sound from Plaintiffs before doing so. Plaintiffs immediately complied. Trooper Surian then informed Plaintiffs that they could not possess bullhorns or protest on DCR property without a permit. He told Plaintiffs that they could not leave until they provided their names and contact information, which they did.

Picard subsequently left the area for a period and, when he attempted to return, Trooper Surian threatened him with "further law enforcement action" if Picard did not remove himself from DCR property. See Pls.' Amend. Compl. at ¶ 29.

According to complaint, DCR and the MSP did not cite or take other action against the pro-Trump demonstrators although they used bullhorns, displayed profane signs, played music without a permit, shouted personal insults at the counter-protesters, falsely accused Picard of a crime, and threatened to mace / pepper spray Plaintiffs. Instead, the MSP troopers allowed those demonstrators to remain on the property and continue their protest for over an hour after the troopers arrived.

A few days after the incident, Plaintiffs each received, by mail, a $200 citation for violating the DCR's Disorderly Conduct regulation, 302 Code Mass. Regs. § 12.04(4), by using an amplified sound device without a permit. The citations indicated that an appeal could be taken

via a noncriminal hearing, upon request to the DCR Bureau of Ranger Services. Olson promptly submitted such a request but, on November 23, 2021, the DCR responded by directing her to seek relief in the Lynn District Court. Plaintiffs then petitioned the District Court to vacate the citations.

On December 11, 2011, Picard submitted a public records request to the MSP, seeking all records relating to the November 11, 2021 protest / counterprotest along Lynn Shore Drive, including dispatch call transcripts or recordings, body camera footage, and police reports and notes. The MSP did not immediately respond.

On March 14, 2022, a clerk magistrate of the Lynn District Court held a hearing on Plaintiffs' citations. Trooper Surian did not appear at the hearing, but an MSP employee read an incident report into the record. Plaintiffs responded that the citations were legally unsupported. The clerk magistrate sustained the citations.

On May 11, 2022, Plaintiffs commenced the present action. On July 21, 2022, the MSP responded to Picard's public records request for the first time by producing a single document – Trooper Surian's administrative journal entry concerning the protest. Plaintiffs contend the journal entry contains numerous factual inaccuracies.[3] Between August 2nd and August 4th, 2024, the MSP produced body camera footage from certain MSP troopers at the scene of the protest, including Trooper Surian, and the administrative journal entry of an MSP lieutenant who was also present. On September 9th and 12th, 2022, the MSP produced footage from 7 cruiser-mounted cameras and the body camera worn by Sergeant Edward Troy (Trooper Surian's supervisor). The MSP avers that it has now produced all records responsive to Picard's request.

[3] Specifically, Plaintiffs deny Trooper Surian's assertions that that Plaintiffs were "BLM" (Black Lives Matter), that they resisted and displayed hostility after being directed to stop using the bullhorns, or that their actions incited an "immense amount of resistance and hostility [from] a growing crowd." It is not clear from the Amended Complaint whether Trooper Surian's journal entry is the same as the report presented in the District Court proceeding.

DCR REGULATIONS

Pursuant to its authority under G.L. c. 21A, §§ 7 and 8, the DCR has enacted "Parks and Recreation" regulations governing activities on the properties under its care and control. See 302 Code Mass. Regs. § 12.01. The regulations, *inter alia*, prohibit disorderly conduct as follows:

> No person may engage in disorderly conduct including, without limitation, drunkenness, rough play, pushing, shoving, breach of the peace or unnecessary noise offensive to the general public, use of profanity, vulgar or obscene language, or other language that may incite fighting or harm to DCR Personnel or to the public.

302 Code Mass. Regs. § 12.04(4) ("Disorderly Conduct regulation"). The regulations further provide that "[u]nless authorized by a special use permit … , no person may … [o]perate or use any audio device, including radio, television, musical instruments, or other noise producing devices, such as electrical generators, or equipment driven by motor or engine, in a manner or at such times that may disturb others," 302 Code Mass. Regs. § 12.04(28)(e) ("Audio Device regulation"), or "[o]perate or use any public address system, whether fixed, portable or vehicle mounted[.]" 302 Code Mass. Regs. § 12.04(28)(f) ("Public Address System regulation"). An individual (or entity) must apply for a special use permit "at least 45 days prior to the event or activity for which [it] is sought" and "name DCR as an additional insured for the date and location of the event, [on a liability insurance policy] with a minimum [coverage] of $1,000,000." 302 Code Mass. Regs. § 12.17(2)(b),(c). "Special use permit[s] are issued at the sole discretion of [the DCR]." 302 Code Mass. Regs. § 12.17(2)(f).

DISCUSSION

In considering a Rule 12(b)(6) motion to dismiss, the court must accept the factual allegations in the complaint as true and "draw all reasonable inferences in the plaintiff's favor." *Buffalo-Water 1, LLC* v. *Fidelity Real Estate Co., LLC*, 481 Mass. 13, 17 (2018). In addition to the complaint, the court may consider "matters of public record, orders, items appearing in the

record of the case, and exhibits attached to the complaint." *Schaer* v. *Brandeis Univ.*, 432 Mass. 474, 477 (2000). To survive the motion to dismiss, the plaintiff's complaint must contain "factual 'allegations plausibly suggesting (not merely consistent with)' an entitlement to relief[.]" *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 636 (2008), quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 557 (2007). The allegations must offer "more than 'mere labels and conclusions,' and must 'raise a right to relief above the speculative level.'" *Buffalo-Water*, 481 Mass. at 17, quoting *Galiastro* v. *Mortgage Elec. Registration Sys., Inc.*, 467 Mass. 160, 165 (2014).

I. Free Speech Claim (Count I)

Plaintiffs allege that the Disorderly Conduct, Audio Device, and Public Address System regulations violate First Amendment of the United States Constitution and art. 16 of the Massachusetts Declaration of Rights, both on their face and as applied to Plaintiffs. Defendants argue that these claims should be dismissed because the Disorderly Conduct regulation does not restrict constitutionally protected speech, and the Audio Device and Public Address System regulations are valid time, place, and manner restrictions. The Court does not agree.[4]

A. Facial Challenge to Disorderly Conduct Regulation

"While most speech is protected from government regulation by the First Amendment ... and art. 16 ..., there are 'certain well-defined and narrowly limited classes of speech' that are

[4] Defendants seek dismissal the Amended Complaint in its entirety, but did not address Plaintiffs' as-applied challenges to the DCR regulations. "The substantive rule of law is the same for both [facial and as-applied] challenges" and "the distinction ... goes to the breadth of the remedy ... not what must be pleaded in a complaint." *Edwards* v. *District of Columbia*, 755 F.3d 996, 1001 (D.C. Cir. 2014) (internal quotations and citations omitted). Here, Plaintiffs allege that Defendants cited them for disorderly conduct, fined them each $200, and ordered them to leave DCR property although they used their bullhorn only briefly, immediately complied with his order, and did not otherwise cause a disturbance in a noisy area. See *Doe*, 968 F.2d at 89 (D.C. Cir. 1992) (holding "excessive noise" ordinance was unconstitutional as applied to Doe's drum beating which did not exceed noises associated with the appropriate and customary use of park). Plaintiffs further allege that Defendants cited them based on the content or perceived content of their message, contrasting their actions with the uncited activities of the pro-Trump demonstrators, including competing use of bullhorns / sirens, loud music, profane language, and personal insults, false criminal accusations, and a threat of assault directed at Plaintiffs. These allegations are sufficient to support Plaintiffs' "as applied" challenges. See *Thomas* v. *Chicago Park Dist.*, 534 U.S. 316, 325 (2002) (plaintiff may sustain as-applied challenge showing that he/she "was prevented from speaking while someone espousing another viewpoint was permitted to do so").

not." *O'Brien* v. *Borowski*, 461 Mass. 415, 422 (2012), abrogated on other grounds by *Seney* v. *Morhy*, 467 Mass. 58 (2014), quoting *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 571 (1942). Among them, "fighting words, that is, 'face-to-face personal insults that are so personally abusive that they are plainly likely to provoke a violent reaction and cause a breach of the peace,' … are not protected[.]" *Barron* v. *Kolenda*, 491 Mass. 408, 423 n.15 (2023), quoting *O'Brien*, 461 Mass. at 423. Accord *Cohen* v. *California*, 403 U.S. 15, 20 (1971) (holding "personally abusive epithets which, when addressed to the ordinary citizen, are … inherently likely to provoke violent reaction" are not protected). The "fighting words exception to free speech is[, however,] an extremely narrow one." *Barron*, 491 Mass. at 423, n.15.

In contrast, "[v]ulgar, profane, offensive or abusive speech … , *without more*," cannot be subject to sanction. *Commonwealth* v. *A Juvenile*, 368 Mass. 580, 589-590 (1975) (emphasis added), quoting *Cohen*, 403 U.S. at 23. "[O]ne man's vulgarity is another's lyric," and the constitutional right to free speech prevents "the State from punishing public utterance of … unseemly expletive(s) in order to maintain what [it] regard[s] as a suitable level of discourse within the body politic." *A Juvenile*, 368 Mass. at 590, quoting *Cohen*, 403 U.S. at 25, 26. Thus, any prohibition on offensive speech must be "limited to 'fighting words.'" *A Juvenile*, 368 Mass. at 590, quoting *Chaplinsky*, 315 U.S. at 571-572. See *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 774 (1994) ("Absent evidence that the protesters' speech is independently proscribable (i.e., 'fighting words' or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm, ... th[e] provision cannot stand." (internal citation omitted)).

As noted, the relevant DCR regulation prohibits,

> [D]isorderly conduct including, without limitation, drunkenness, rough play, pushing, shoving, breach of the peace or unnecessary noise offensive to the general public, use of profanity, vulgar or obscene language, or other language that may incite fighting or harm to DCR Personnel or to the public.

302 Code Mass. Regs. § 12.04(4).

The parties' central dispute is whether, as Plaintiffs contend, the regulation improperly prohibits "profanity, vulgar or obscene language," in general, and therefore violates the First Amendment; or, as Defendants contend, the modifying clause ("may incite fighting or harm to DCR Personnel or to the public") limits the regulation's reach to unprotected fighting words. Defendants argue that their interpretation is correct as a matter of law and therefore, they are entitled to dismissal of Plaintiffs' claim. The Court cannot agree.[5]

As with a statute, the Court interprets the regulation according to the "traditional rules of construction." *Commonwealth* v. *Hourican*, 85 Mass. App. Ct. 408, 410 (2014), quoting *Warcewicz* v. *Department of Env't Prot.,* 410 Mass. 548, 550 (1991). The text is "the principal source of insight into regulatory purpose" and when it "is plain it must be given its ordinary meaning[.]" *Hourican*, 85 Mass. App. Ct. at 410 (quotations omitted). The language "must be considered in light of the other words surrounding it, and its scope and meaning must be determined by reference to context." *Id.* at 410-411, quoting *Knapp Shoes, Inc.* v. *Sylvania Shoe Mfg. Corp.*, 418 Mass. 737, 744 (1994). "Where reasonably possible, no portion of the language of [the] regulation should be treated as surplusage." *Hourican,* 85 Mass. App. Ct. at 410, quoting *Warcewicz*, 410 Mass. at 551. Lastly, the Court does not apply these canons mechanically, but inspects the results for rationality and practicality. *Hourican*, 85 Mass. App. Ct. at 411. See *Commonwealth* v. *Buccella*, 434 Mass. 473, 481 (2001) (refusing to interpret regulation in manner that "would be utterly absurd and ... clearly not what the [agency] intended").

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[5] The Court considers the facial challenge to the Disorderly Conduct regulation even though Plaintiffs were not specifically cited for violated the profanity, vulgarity or obscene language portion of provision because of the "overriding interest in preventing any 'chill' on the exercise of First Amendment rights." *Commonwealth* v. *Abramms*, 66 Mass. App. Ct. 576, 579-580 (2006), quoting *Commonwealth* v. *Bohmer*, 374 Mass. 368, 373 (1978). Accord *United States* v. *Stevens*, 559 U.S. 460, 473 (2010).

Pursuant to the "last antecedent rule," a "general rule of statutory as well as grammatical construction[,] … a modifying clause is confined to the last antecedent unless there is something in the subject matter or dominant purpose [of the statute or regulation] which requires a different interpretation." *Taylor* v. *Burke*, 69 Mass. App. Ct. 77, 81 (2007), quoting *Hopkins* v. *Hopkins,* 287 Mass. 542, 547 (1934).

Here, the last antecedent of the modifying clause ("may incite fighting or harm to DCR Personnel or to the public") is "other language." Thus, it appears that the regulation impermissibly restricts "profanity, vulgar or obscene language", without regard to whether such language "may incite fighting or harm[.]" This interpretation is consistent with a natural reading of the regulation, which suggests that the prohibition on the use of (1) "profanity", (2) "vulgar or obscene language", and (3) "other language that may incite fighting or harm …," refers to three distinct speech-related categories of disorderly conduct, not a single umbrella category of "language that may incite fighting or harm … ." Indeed, to conclude otherwise, would render the terms "profanity" and "vulgar or obscene language" mere surplusage, in violation of another rule of statutory/regulatory construction.[6]

Nothing in the record suggests that the "dominant purpose" of the regulation requires a different interpretation. See *Taylor*, *supra* at 81. The regulation does not define "disorderly conduct," apart from providing an illustrative list of prohibited actions, both related and unrelated to speech. 302 Code Mass. Regs. § 12.04(4). Based on the actions listed – e.g., drunkenness, rough play, breach of peace, unnecessary and offensive noise, profanity, etc. – the

[6] For example, the DCR could have simply prohibited "disorderly conduct including, without limitation, … unnecessary noise offensive to the general public, *or use of language that may incite fighting or harm …* " if that was the intended scope. Alternatively, DCR could have identified the offensive language as a single category by prohibiting "… unnecessary noise offensive to the general public, *or use of profane, vulgar, obscene or other language that may incite fighting or harm …* ." Rather than a series of adjectives (profane, vulgar, obscene or other) modifying a single category (language), the regulation instead refers to each action separately in noun form – i.e., "profanity," and "vulgar or obscene *language*," separate from "other language," indicating an intent to treat them as distinct categories of disorderly conduct.

regulation appears focused on maintaining the peace, tranquility, and natural condition and ambience of DCR parks. Although this undoubtedly includes the safety of the public and DCR personnel, it potentially encompasses broader concerns as well. If preventing fighting and harm was DCR's dominant purpose, then the regulation presumably would have stated such by defining "disorderly conduct" as conduct "which may incite fighting or harm to DCR Personnel or to the public," perhaps with the illustrative list following thereafter.[7] Accordingly, the Defendants are not entitled to dismissal based on their proposed interpretation of the regulation.

Significantly, even if the Disorderly Conduct regulation clearly prohibited only profane, vulgar, obscene or other language that "may incite fighting or harm," the provision still appears to exceed a permissible restriction limited to "fighting words." See *A Juvenile, supra* at 591. "[U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id.*, quoting *Tinker* v. *Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969). See *Commonwealth* v. *Cristino*, No. 16-P-761, 2017 WL 2989723, at *2 (Mass. App. Ct. July 14, 2017) (Rule 1:28), quoting *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964) (discussion of public issues must remain "uninhibited, robust, and wide-open" even if "vehement, caustic, and [at] times unpleasantly sharp"). To constitute fighting words, the speech must be "directed to the person of the hearer," meaning a face-to-face, personal insult, *A Juvenile*, at 591, quoting *Cantwell* v. *Connecticut*, 310 U.S. 296, 309 (1940), and must be "plainly likely to provoke a violent reaction and cause a breach of the peace." *Barron*, 491 Mass. at 423 n.15. The plain language of the modifying clause, prohibiting speech that *might* incite a belligerent response from any bystander, regardless of whether that individual is the target of the speech, sweeps more broadly.

[7] Likewise, the fact that the category "unnecessary noise *offensive to the general public*") contains its own modifying/limiting terms, suggests that the modifying clause ("may incite fighting or harm …") is not the dominant purpose of the regulation or intended to apply more broadly than the natural reading would suggest.

In certain instances, courts have imposed limiting constructions to narrow and save a statute from concerns of facial overbreadth. *See A Juvenile*, 368 Mass. at 594 (citing cases). However, "without more" evidence as to the DCR's intent, purpose and practice, the Court cannot "simply to construe the [speech restriction] ... as limited to fighting words, since such terms plainly have a broader sweep." *Id.* (internal quotations omitted).[8] Thus, at this stage of litigation, the Court neither imposes a limiting construction nor declares that the regulation unconstitutional as a matter of law. Plaintiff's facial challenge to the "profanity, vulgar or obscene language" restriction remains a live controversy.

Plaintiffs also assert a facial challenge the Disorderly Conduct regulation's prohibition on "unnecessary noise offensive to the general public." Defendant's Motion does not specifically address this claim, and numerous courts have held that similar restrictions, absent sufficiently identified standards and context, are unconstitutionally vague.[9]

As such, Plaintiffs have thus alleged plausible claims the Disorderly Conduct regulation is unconstitutional on its face.

B. Facial Challenge to Audio Device and Public Address System Regulations

Government "ha[s] a substantial interest in protecting its citizens from unwelcome noise." *Boston* v. *Back Bay Cultural Ass'n*, 418 Mass. 175, 179 (1994), quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 796 (1989). "However, [a provision] restricting protected speech

[8] Defendants argue that the Disorderly Conduct regulation is congruent with the criminal statute, G.L. c. 272, § 53. However, the Supreme Judicial Court (SJC) held that even that statute, as judicially interpreted, is unconstitutionally overboard where it would criminalize offensive language beyond mere fighting words. *A Juvenile*, 368 Mass. at 587 (citation omitted). In so holding, the SJC declined to apply a limiting construction and thereby impose "an entirely new scheme for proscribing certain kinds of words" because "more" was required to determine "under what circumstances and precisely how and subject to what penalties the Legislature would seek to regulate" such speech. *Id.* at 594-595. The Court follows the SJC's model of judicial restraint.

[9] See, e.g., *Jim Crockett Promotion, Inc.* v. *Charlotte*, 706 F.2d 486, 489-490 (4th Cir. 1983) (portion of ordinance prohibiting "unnecessary noise" impermissibly vague); *Tanner* v. *Virginia Beach*, 674 S.E.2d 848, 853 (Va. 2009) ("unreasonably loud, disturbing and unnecessary noise" unconstitutionally vague); *Asquith* v. *Beaufort*, 911 F. Supp. 974, 987 (D.S.C. 1995) (ban on "loud and unseemly noises, or [ ] profanely cursing and swearing, or using obscene language" impermissibly vague); *Dae Woo Kim* v. *New York*, 774 F. Supp. 164, 170 (S.D.N.Y. 1991) (invalidating prohibition on "unnecessary" noise); *Fratiello* v. *Mancuso*, 653 F. Supp. 775, 790 (D.R.I. 1987) (same).

in the interests of eliminating unwelcome noise must be narrowly tailored," *Back Bay Cultural Ass'n*, 418 Mass. at 179, citing *Ward*, 491 U.S. at 798, meaning that it cannot "burden substantially more speech than is necessary to further the government's legitimate interests." *McCullen* v. *Coakley*, 573 U.S. 464, 486 (2014) (citation omitted). In other words, the provision must "focus[ ] on the source of the evils the [government] seeks to eliminate ... without ... banning or significantly restricting a substantial quantity of speech that does not create the same evils." *Back Bay Cultural Ass'n*, 418 Mass. at 179, quoting *Ward,* 491 U.S. at 799 n.7. Although Defendants argue otherwise, Plaintiffs have stated a claim that the Audio Device and Public Address System regulations are not narrowly tailored to a substantial government interest.

Turning first to the Audio Device regulation, which prohibits the unpermitted use of "any audio device... in a manner or at such times that may disturb others," 302 Code Mass. Regs. § 12.04(28)(e), courts have recognized that certain spaces, although public, are nonetheless "reserved for quiet pursuits," *Miller v. Excelsior, Minn.*, 618 F. Supp. 3d 820, 835 (D. Minn. 2022), and that the government has "significant [ ] interests in maintaining a tranquil atmosphere stemming from the essential nature of the[se] locations." *United States* v. *Doe*, 968 F.2d 86, 89 (D.C. Cir. 1992). Such places may include public schools or libraries, see *Grayned* v. *Rockford,* 408 U.S. 104 (1972), cemeteries or memorials, see *Henderson* v. *Lujan,* 964 F.2d 1179 (D.C. Cir. 1992), or a sidewalk in front of an individual's private residence. See *Frisby* v. *Schultz*, 487 U.S. 474 (1988). "Nothing in these cases, however, remotely suggests the existence of any generalized government interest in maintaining the same level of quiet in all public spaces." *Doe*, 968 F.2d at 89. "Generally, because of their historical association with the exercise of free speech, streets, parks, and sidewalks are often viewed as quintessential [public forum]." *Henderson*, 964 F.2d at 1182, citing *United States* v. *Grace*, 461 U.S. 171, 176 (1983). Accord

McCullen v. *Coakley*, 573 U.S. 464, 476 (2014); *Pleasant Grove City* v. *Summum*, 555 U.S. 460, 469 (2009). See *Doe*, 968 F.2d at 89, quoting *Hague* v. *CIO*, 307 U.S. 496, 515-516 (1939) (recognizing traditional use of such sites "for purposes of assembly, communicating thoughts between citizens[,] and discussing public questions").

DCR's Audio Device regulation apparently applies to all of the approximately 150 state parks – except campgrounds, see 302 Code Mass. Regs. § 12.04(28)(e) – and 50 state parkways under DCR's control. See "Visit Massachusetts State Parks," https://www.mass.gov/visit-massachusetts-state-parks. These include forests, wildlife reservations, beaches, shorelines, lakes, ponds, reservoirs, historic sites, recreational complexes, and harbor islands, as well as urban parks and state thoroughfares. See *id.* While DCR may impose some noise volume caps upon all such properties, it cannot adopt a blanket approach that fails to "take[ ] into account the nature and traditional uses of the particular park[s] involved." *Doe*, 968 F.2d at 89. Additionally, while specific decibel limits are not required, DCR's noise restrictions (1) must provide sufficiently objective and identifiable standards for individuals to determine what conduct is prohibited, and (2) may not prohibit noise that (regardless of its source) does not exceed the noise from appropriate and customary uses of the location. *Id.* at 90. See *Hampsmire* v. *Santa Cruz*, 899 F. Supp. 2d 922, 938 (N.D. Cal. 2012) (ordinance prohibiting "unreasonably disturbing" noises impermissibly vague and lacking "identifiable criteria"); *Dupres* v. *Newport, R.I.*, 978 F. Supp. 429, 434 (D.R.I. 1997) ("Although we cannot expect mathematical certainty from our language, it cannot be so ambiguous as to allow the determination of whether a law has been broken to depend upon the subjective opinions of complaining citizens and police officials." (internal quotations omitted)).

Common sense suggests that amplified sound which may disturb individuals who

deliberately seek the tranquility of Walden Pond, may not concern sunbathers on Nahant Beach, and may be of little consequence to individuals of ordinary sensibilities traveling along the Southwest Corridor, the Arborway, or Lynn Shore Drive. See *Doe*, 968 F.2d at 90 ("Lafayette Park is not Okefenokee National Wildlife Refuge, even if both are under the [National] Park Service's supervision.").

Whether DCR's Audio Device regulation recognizes such distinctions is unclear. The term "use in a manner ... that may disturb others" is undefined. Meanwhile, the list of prohibited audio devices broadly includes "radio[s], television[s], musical instruments, or other noise producing devices, such as electrical generators, or equipment driven by motor or engine[.]" 302 Code Mass. Regs. § 12.04(28)(e). Likewise, whether DCR requires attendees of traditional free speech fora to obtain a permit before, for example, singing "We Shall Overcome" and marching to the beat of a drum, playing "Taps" on a bugle, playing the "Star Spangled Banner" on a Bluetooth speaker, or watching a YouTube video or videochatting on a cellphone is, at least, an open question. See *Back Bay Cultural Ass'n*, 418 Mass. at 183 (restriction on after hours entertainment that could prohibit a television in hotel, a piano player or harpist in function room, poetry readings, or even lectures was not narrowly tailored to excessive noise); *Doe*, 968 F.2d at 87, 90 (regulation intended for "wilderness areas ... where even a modest noise from a radio or musical instrument might disturb the wildlife or detract from other visitors' ability to enjoy ... silence" was overbroad in prohibiting "beating a drum as part of a political protest" in "a recognized 'public forum'"); *Miller*, 618 F. Supp. 3d at 835 (holding ordinance likely overboard where it might forbid person from using cellphone speaker on a sidewalk).

By its plain language, the Audio Device regulation appears to prohibit – or potentially prohibit – any unpermitted use of amplified sound that a sensitive listener might find subjectively

disturbing, regardless of whether the sound appreciably exceeds unamplified noise of customary activities at the location. Such ambiguity and potential overbreadth are inconsistent with the narrow tailoring requirement.[10]

For similar reasons, Plaintiffs' facial challenge to DCR's Public Address System regulation also survives. The regulation prohibits all unpermitted use of "any public address system, whether fixed, portable or vehicle mounted[.]" 302 Code Mass. Regs. § 12.04(28)(f). The regulation does not otherwise define "public address system" and, most significantly, provides for an outright ban without limitation to specific times, places, or volume levels. As such, Plaintiffs have raised a colorable claim that the regulation is not sufficiently tailored to its ill-defined ends. See *Cuviello* v. *Vallejo*, 944 F.3d 816, 830 (9th Cir. 2019) (ordinance requiring "a permit for *any* use of a sound-amplifying device at *any* volume by *any* person at *any* location … covers substantially more speech than necessary[.]").

Finally, DCR's permitting requirements further indicate the potential overbreadth of the Audio Device and Public Address System regulations. To obtain a permit, an individual must apply at least 45 days in advance and secure liability insurance of at least $1 million, covering the DCR. Defendants argue that these requirements serve "DCR's interests in having advance notice so as to ensure the public's safe enjoyment of the parks." Defs.' Memo. at p. 8. However, the permitting scheme does not distinguish large events from small gatherings or individual demonstrations that do not raise comparable concerns of public safety, crowd management,

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[10] See *Grayned*, 408 U.S. at 116 ("The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."); *Coates* v. *Cincinnati*, 402 U.S. 611, 615 (1971) ("The First and Fourteenth Amendments do not permit a State to make criminal the exercise of the right of assembly [or speech] simply because its exercise may be 'annoying' to some people. … And such a prohibition … contains an obvious invitation to discriminatory enforcement against those whose … ideas … [are] resented by the majority of their fellow citizens."); *U. S. Lab. Party* v. *Pomerleau*, 557 F.2d 410, 412 (4th Cir. 1977) ("Because a violation depends on the subjective opinion of the investigator, the speaker has no protection against arbitrary enforcement of the ordinance.").

liability exposure, cleanup, etc.[11] Moreover, DCR's purported interests do not justify the 45-day notice requirement. See *Sullivan* v. *Augusta*, 511 F.3d 16, 38-39 (1st Cir. 2007) (enjoining 30-day requirement and noting that "[a]dvance notice requirements that have been upheld ... have most generally been of less than a week" (collecting cases)). Lastly, the present record does not indicate what, if any, standards guide DCR officials in issuing a permit. See *Lakewood* v. *Plain Dealer Publ'g Co.*, 486 U.S. 750, 760 (1988) ("Constitution requires that the [government] establish neutral criteria to [e]nsure that the licensing decision is not based on the content or viewpoint of the speech being considered.").

For the foregoing reasons, Defendants' Motion shall be Denied as to Count I.

II. Due Process Claim (Count II)

Plaintiffs also allege that Defendants violated their due process rights by directing their appeal to the District Court, and denying them an administrative hearing before the DCR. See 301 Code Mass. Regs. § 12.21 (providing that "[a] party ... aggrieved by a DCR decision" is entitled to an appeal "in accordance with [ ]G.L. c. 30A"). Defendants respond that the citations Trooper Surian issued to Plaintiffs were not "DCR decisions" and thus, the District Court was the proper venue for Plaintiffs to challenge their citations pursuant to G.L. c. 132A, § 7A.

However, G.L. c. 132A, § 7A, provides,

> A *park ranger* who has been appointed as a deputy environmental police officer who observes any violation of [the DCR] regulations ... may request the offender to state his name and address. Whoever upon such request *refuses to state his name and address* may be arrested without a warrant and shall be punished *by a fine of not less than fifty dollars and not more than one hundred dollars*. Said ranger may, as alternative to instituting criminal proceedings, give to the offender a written notice to appear before the clerk of

[11] See *Cuviello*, 944 F.3d at 830 (permitting scheme not narrowly tailored where it "applies with the same force to an individual a[s] to a rally of one-hundred people; to the use of a device in an empty parking lot and at the busiest intersection; to the use of a device at a child's weekend birthday party in an already noisy park and to the use of a device by demonstrators next to a hospital at 2 a.m."). Cf. *Thomas* v. *Chicago Park Dist.*, 534 U.S. 316, 322 (2002) (permit requirement permissible where limited to events of more than 50 people); *Miller*, 618 F. Supp. 3d at 837 (content-neutral permit requirement permissible where limited to events that "will generate or invite considerable public or private participation and/or spectators, for a particular and limited purpose and time").

the district court having jurisdiction ... .

(emphasis added). There is no allegation that Trooper Surian is a DCR park ranger or deputy environmental police officer, or that Plaintiffs refused to provide their identifying information. Additionally, their fines ($200 each), exceed the maximum permissible amount under G.L. c. 132A, § 7A. As such, G.L. c. 132A, § 7A does not justify the proceedings in the District Court.[12]

Drawing another arrow from their quiver, Defendants argues that Plaintiffs have failed to allege that the District Court hearing was constitutionally inadequate, even if the forum was improper.[13] This argument is also unavailing.

A procedural due process claim requires the Court to weigh the private interest at stake, the risk of an erroneous deprivation through the procedure used, the probable value, if any, of additional procedural safeguards, and the government's interest, including the burden of additional procedures. *Gillespie* v. *Northampton*, 460 Mass. 148, 156 (2011), citing *Mathews* v. *Eldridge*, 424 Mass. 319, 335 (1976). Thus, such claims typically concern whether the statutorily prescribed scheme provides adequate procedural protections, see, e.g., *Gillespie*, 460 Mass. at 148, and not the threshold issue presented here of whether the government even followed the prescribed statutory and/or regulatory procedure. Indeed, the parties have devoted little argument to the *Mathews* balancing test.

Nonetheless, Plaintiffs have identified liberty and property interests entitled to some level of due process protection – namely, their rights to free speech and assembly, to access public property, and to be free from erroneous fines (albeit of relatively small amount). See *Gillespie*,

[12] The District Court itself cited G.L. c. 40, § 21D as the basis for its jurisdiction but, as Defendants admit, this statute only grants the District Court jurisdiction over citations for violations of municipal bylaws, not DCR regulations. See Defs.' Memo. at p. 16. Defendants dismiss the District Court's reference to G.L. c. 40, § 21D as a mere scrivener's error and maintain that, because the proceeding before the clerk magistrate was equivalent to proceeding pursuant to G.L. c. 132A, § 7A, Plaintiffs did not suffer any cognizable harm. However, as noted, G.L. c. 132A, § 7A simply does not apply to the circumstances alleged.

[13] Defendants do not expressly concede that the District Court was an improper forum, but they have not cited any additional bases for the District Court's jurisdiction over Plaintiffs' citations.

460 Mass. at 156. The record before the Court does not include a transcript of the District Court proceedings nor does the Amended Complaint describe the hearing in detail. However, Plaintiffs have alleged that they did not have an opportunity to cross-examine Trooper Surian or other MSP personnel who witnessed the protest, and that the Commonwealth's evidence consisted of reading an MSP report into the record. By all indications, the Commonwealth did not disclose this report to Plaintiffs before the hearing, despite Picard's records request.

At this stage, the Court cannot conclude that the District Court hearing afforded Plaintiffs sufficient safeguards given the interests at stake, see *Brangan* v. *Commonwealth*, 477 Mass. 691, 703 (2017) (deprivation "must [ ] be implemented in a fair manner"), or that the hearing was an adequate alternative to a hearing before a DCR administrator with specialized knowledge of the agency's regulations. See *Walpole* v. *Secretary of the Exec. Off. Of Env't Affs.*, 405 Mass. 67, 72 (1989) ("Allowing the completion of the administrative process before permitting judicial review gives the [agency] a full and fair opportunity to apply [its] expertise to the statutory scheme which, by law, [it] has the primary responsibility of enforcing.").

Defendants' Motion shall be Denied as to Count II.

III. Massachusetts Civil Rights Act Claim (Count III)

As to Count III, Defendants argue that Plaintiffs have not sufficiently alleged that Trooper Surian violated the Massachusetts Civil Rights Act (MCRA). In the alternative, they argue that Trooper Surian is entitled to qualified immunity. The Court does not agree.

To state a claim under the MCRA, a plaintiff must allege that the defendant (1) interfered with, or attempted to be interfered with; (2) plaintiff's exercise or enjoyment of some constitutional or statutory right; (3) by threats, intimidation, or coercion. *Barron*, 491 Mass. at 423. Plaintiffs have alleged facts indicating that they sought to exercise their protected rights to

assemble, protest, and access a public park, and that Trooper Surian interfered with those rights by erroneously telling Plaintiffs that they were not allowed to *possess* a bullhorn or demonstrate on DCR property, ordering them to leave, and threatening Picard with arrest and/or other criminal sanction if he did not leave. These allegations state a claim under the MCRA. See *Batchelder* v. *Allied Stores Corp.*, 393 Mass. 819, 823 (1985) ("sufficient intimidation or coercion" where "security officer ordered [plaintiff] to stop soliciting and distributing his political handbills"); *Sarvis* v. *Boston Safe Deposit & Trust Co.*, 47 Mass. App. Ct. 86, 93 (1999) (coercion element of MCRA satisfied where "defendants attempted to interfere with the plaintiffs' right to a summary process hearing by threatening them with arrest and then bringing about their arrests").

Additionally, Trooper Surian is not entitled to qualified immunity because Plaintiffs' Count III seeks only declaratory and injunctive relief, not damages. See *Longval* v. *Commissioner of Corr.*, 404 Mass. 325, 332 (1989).

Defendants' Motion shall be Denied as to Count III.

IV. Public Records Request (Count IV)

The purpose of the Public Records Law is to promote government accountability by granting the public broad and prompt access to government records. *Worcester Telegram & Gazette Corp.* v. *Chief of Police of Worcester*, 436 Mass. 378, 382-383 (2002); G.L. c. 66, § 10(a),(c); 950 Code Mass. Regs. § 32.01. It mandates that an agency permit inspection of public records "without unreasonable delay," no later than 10 business days after receipt of a proper request. G.L. c. 66, § 10(a). This tight timeline for an agency to respond is subject a modest extension for good cause (up to 20 business days), see G.L. c. 66, § 10(c), as well as a rule of reasonableness governing the conduct of the requestor and the agency's obligation to respond.

Friedman v. *Division of Admin. L. Appeals*, 103 Mass. App. Ct. 806, 807 (2024).

An aggrieved requestor may – in addition or alternative to seeking administrative remedy – file an action in this Court, and the Court may award reasonable attorneys' fees and costs in any case in which the requester obtains relief through a judicial order, consent decree, or the provision of requested documents after the filing of a complaint. G.L. c. 66, § 10A(d)(2). "If a requestor has obtained judgment in [this] [C]ourt … and has demonstrated that the defendant agency …, in withholding or failing to timely furnish … any portion of the record or in assessing an unreasonable fee, did not act in good faith, the [ ] [C]ourt may assess punitive damages against the defendant agency … in an amount not less than $1,000 nor more than $5,000." G.L. c. 66, § 10A(d)(4).

Here, there is no dispute that Picard submitted a public records request to MSP in December 2021, and that MSP did not produce responsive materials until after the District Court hearing and after Plaintiffs initiated this action. Ultimately, the MSP produced a single report on July 21, 2022 – seven months after the statutory due date – and an additional report and video camera footage in August and September 2022. The present record does not explain the delay.

Defendants argue that the MSP has now provided all documents responsive to Picard's public records request, and thus his claim must be dismissed as moot. The Court is not persuaded.

Under Defendants' reading of the Public Records Law, an agency may disregard a records request for months without explanation, objection or defense; wait and see if the requestor files suit; and then, moot the case and move to dismiss by finally producing responsive documents during the pending litigation. In the interim, according to Defendants, the agency may even use the records against the requestor in a judicial or quasi-judicial proceeding – as allegedly

occurred here, where the MSP apparently presented a report to the clerk magistrate before it was ever produced to Picard.

Defendant's interpretation cannot be squared with the language or purpose of the Public Records Law. The statute itself provides for recovery of costs and attorney's fees if an agency's intransigence compels a requestor to file suit to obtain responsive records, regardless of whether that relief is ultimately obtained via judicial order, consent decree, or the agency's acquiescence. G.L. c. 66, § 10A(d)(2). Thus, the MSP's production of records during the pendency of this suit plainly does not defeat Picard's claim or request for fees and costs.[14]

Furthermore, Picard's claim is not moot because he has plausibly alleged that the MSP has not produced all responsive materials. Picard assets that Sergeant Troy's body camera footage depicts him holding a notepad, conducting dispatch calls, and recounting off-camera discussions with DCR personnel regarding Plaintiffs' counterprotest. See Aff. of Picard, at ¶ 10. The MSP has not produced any records generated by Sergeant Troy or documenting his communications. Picard has thus alleged, beyond mere speculation, that the MSP has not produced or accounted for all public records responsive to his request.

Defendants alternatively argue that Plaintiffs cannot obtain punitive damages because the MSP's production means that Plaintiffs will not "obtain[ ] a judgment in [this] court." See G.L. c. 66, § 10A(d)(4). This argument fails for two reasons. First, as noted above, Picard has plausibly alleged that the MSP has not produced all responsive materials. Second, the punitive damages provision merely references obtaining "a judgment," as opposed to obtaining "relief

[14] The cases Defendants cite in support of their mootness argument do not concern the Public Records Law, see *Ott* v. *Boston Edison Co.*, 413 Mass. 680 (1992); *Brookline Citizens to Protect the Parks Taxpayer Grp.* v. *Board of Selectmen of Brookline*, 27 Mass. App. Ct. 1191 (1989), or do not address costs and attorney's fees, see *Lawyers' Comm. for C.R. & Econ. Just.* v. *Court Adm'r of Trial Ct.*, 478 Mass. 1010 (2017). Moreover, unlike those matters, the present action raises an appreciable concern of disputes "capable of repetition, yet evading review," *Lockhart* v. *Attorney Gen.*, 390 Mass. 780, 783 (1984) (quotation omitted). Cf. *Lawyer's Comm.*, 478 Mass. at 1011 ("There is no reason to suppose, if and when that happens, that appellate review could not be obtained before the recurring question would again be moot." (quotation omitted)).

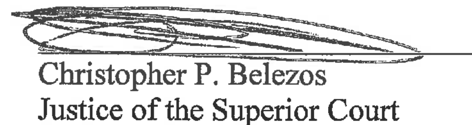
[i.e., production] through a judicial order," cf. G.L. c. 66, § 10A(d)(2), thus implying that the requisite judgment need not be a judgment leading to the provision of the records. See *Commonwealth* v. *Williamson*, 462 Mass. 676, 682 (2012) ("[D]ifferent language in different paragraphs of the same statute, [indicates] different meanings."). Also, an agency's eventual production of responsive records plainly does not defeat a request for punitive damages since the Court may award such damages based on the agency "withholding or [simply] *failing to timely furnish* the requested record" without acting in good faith. G.L. c. 66, § 10A(d)(4) (emphasis added).[15]

Defendants' Motion fails as to Count IV.

CONCLUSION AND ORDER

For the foregoing reasons, Defendants Motion to Dismiss Plaintiffs' Amended Complaint is **DENIED**.

SO ORDERED.



Date: August 30, 2024

Christopher P. Belezos
Justice of the Superior Court

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[15] Defendants also argue for dismissal of Picard's request for punitive damages on the grounds that the Amended Complaint does not allege active bad faith. However, the statute merely requires the absence of good faith, which does not require proof of active bad faith. See *T.W. Nickerson, Inc.* v. *Fleet Nat'l Bank*, 456 Mass. 562, 570 (2010) (noting that "the burden of proving a lack of good faith" does not require "that bad faith be shown"; "The lack of good faith can be inferred from the totality of the circumstances."). The MSP's unexplained delay of 9 months to produce the requested records, including using one previously unproduced record against Picard in a judicial proceeding, plausibly suggests a lack of good faith.