IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 15-cv-00281-WJM-KMT

ABBY LANDOW, *et al.*

Plaintiffs,

v.

CITY OF FORT COLLINS,

Defendant.

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND FOR PRELIMINARY INJUNCTION

Defendant's brief purports to respond to the motion for interim relief that Plaintiffs filed. Large portions, however, read as though Defendant responds to different plaintiffs who are challenging a different ordinance. Defendant dramatically mischaracterizes not only the nature of Plaintiffs' peaceful solicitations, but also the scope of the ordinance itself and the breadth of the enforcement campaign that Plaintiffs challenge.

Plaintiffs' motion documents a campaign of enforcement that is unfolding in real life in the real world—dozens and dozens of citations and countless additional oral orders to "move on"—that overwhelmingly targets persons who solicit by simply displaying a sign or by approaching passersby and nonaggressively asking for assistance. The City's brief completely ignores that presentation of real-world facts. Instead, Fort Collins defends a theoretical, nonexistent ordinance that "concerns only a small number of harassing tactics," Resp. at 23, "only addresses certain antagonistic

behaviors" and "aggressive tactics," *id.* at 22, 26, and focuses narrowly on "threatening and abusive encounters," *id.* at 11.

The Plaintiffs who filed this case do not solicit in an aggressive manner. They seek protection of their right to peacefully, politely, and nonaggressively ask for charity. Defendant's brief, however, groundlessly describes Plaintiffs as seeking to "resume . . . aggressive panhandling." *Id.* at 9. It erroneously characterizes Plaintiffs' "interests" as "to aggressively panhandle." *Id.* at 12. It suggests that Plaintiffs seek this Court's assistance in "impeding the movement of others, instilling fear, or preying on 'at risk' members of society." *Id.* at 10. The Plaintiffs that the City portrays in this manner are not the Plaintiffs who are actually appearing in this Court.

Untethered from the facts, Defendant imagines that "as long as Plaintiffs do not engage in aggressive panhandling," enforcement "does not cause them any harm." *Id.* Defendant goes so far as to suggest that Plaintiffs who solicit nonaggressively do not even have legal standing. *Id.* at 6 n.7. On the contrary, the Plaintiffs have standing to seek interim relief because the ordinance as written and as Fort Collins enforces it poses a direct threat to Plaintiffs' ability to carry out their nonaggressive solicitation.

Plaintiffs cited clear-cut authority holding that Defendant bears the burden of justifying a restriction of First Amendment rights. The City fails to acknowledge this critical point. Instead, it posits, erroneously, that its ordinance is entitled to a presumption of constitutionality. *Id.* at 10, 11. There is no such presumption in this case. *Doe v. City of Albuquerque*, 667 F.3d 1111, 1120 (10th Cir. 2012).

Defendant needlessly spends pages on the several factors that make up the legal standard for entering a preliminary injunction. The critical factor is likelihood of success. Courts recognize that in a First Amendment case, when plaintiffs show that they are likely to succeed on the merits, the remaining factors all favor granting the interim injunctive relief.[1] It is crystal clear that Plaintiffs make that showing in this case.

Plaintiffs' motion is grounded in courts' universal understanding that asking for charity, including soliciting alms for one's own needs, is expression protected by the First Amendment. Defendant muses as though it is an open question whether peaceful, nonaggressive beggars are engaging in speech that merits constitutional protection. Resp. at 14 n.13, 14. Eventually though, Defendant grudgingly agrees to accept the First Amendment premise, "for the purposes of argument." *Id.* at 23 n.17. Defendant's analysis of First Amendment cases and how they apply here, however, is severely flawed. To that discussion, Plaintiffs turn now.

I. The legal standard applicable to a regulation of expression in a public forum

In a public forum, like the streets and sidewalks of Fort Collins, a content-based regulation of expression is presumptively unconstitutional and must satisfy strict scrutiny, which requires that it be the least restrictive means of achieving a compelling government interest. *McCullen v. Coakley*, 134 S. Ct. 2518, 2530 (2014). A content-

[1] *See Hamilton's Bogarts, Inc. v. Michigan*, 501 F.3d 644, 649 (6th Cir. 2007); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013).

neutral regulation must be narrowly tailored to advance a significant government interest. *Id.* at 2534.[2]

II. The challenged ordinance is a presumptively unconstitutional content-based regulation of speech

In *McCullen*, the Court considered a First Amendment challenge to a statute that categorically prohibited anyone from entering or remaining within a 35-foot radius of an abortion clinic (with exceptions for clinic visitors and employees, first responders, and passersby). *Id.* at 2526. The Court first concluded that the regulation was content-neutral, so the test of strict scrutiny did not apply. *Id.* at 2531-34. The Court then determined that the statute failed the test of intermediate scrutiny, because the statute was not narrowly tailored to advance a significant government interest. *Id.* at 2535-41.

Defendant's reliance on *McCullen* to support its argument that the City's ordinance is content-neutral is a red herring. The statute at issue in *McCullen* regulated entry or presence in the buffer zone, not speech, and it plainly drew no content-based distinctions on its face. In contrast, the Fort Collins ordinance draws a very clear content-based distinction on its face by discriminating on the basis of the subject of the

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[2] Fort Collins states, misleadingly, that "the Supreme Court has said that a regulation of solicitation need only be 'reasonable.'" Resp. at 22-23 (citing *United States v. Kokinda*, 497 U.S. 720, 736 (1990)). This assertion fundamentally misunderstands and misapplies the holding and analysis of the Supreme Court's decision in *Kokinda*. In that case, the Court evaluated a postal service regulation that prohibited solicitation on the interior sidewalks that were located entirely on postal service property, running between the parking lot and the building entrance. Because the Court found these interior sidewalks were a *non*public forum, the regulation was evaluated under a much more lenient standard. The Court said that a regulation of expression in a nonpublic forum is valid "unless it is unreasonable, or, as was said in *Lehman*, 'arbitrary, capricious, or invidious.'" *Id.* at 725-26 (quoting *Lehman v. City of Shaker Heights*, 418 U.S. 298, 393 (1974)). Similarly, the City mentions two additional cases in which the Supreme Court considered regulations of solicitation. In both cases, the location was a nonpublic forum, where the lenient standard of reasonableness applied. *See Heffron v. Int'l Soc'y for Krishna Consciousness Inc.*, 452 U.S. 640 (1981) (state fairgrounds); *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992) (airport).

solicitation. Soliciting for commercial sales, street directions, or signatures on petitions is permitted, but soliciting for donations is not. When solicitors approach someone in the evening or at a bus stop, or when they approach a 60-year-old any time or anywhere in the City, whether a violation occurs depends on *what the solicitors say*. As *McCullen* explained, such a regulation is "content based [because] it require[s] 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred." *Id.* (quoting *F.C.C. v. League of Women Voters*, 468 U.S. 364, 383 (1984)). The ordinance is content-based because whether solicitors violate it "depends on what they say." *Id.* (quoting *Holder v. Humanitarian Law Project* 561 U.S. 1, 27 (2010)). The City offers no response to Plaintiffs' argument that the City's prohibitions are content-based because they "draw content-based distinctions on [their] face."[3] *Id.* at 2531; *see* Mot. at 18-22.[4]

Similarly, as Plaintiffs discuss below, Fort Collins attempts to justify its ordinance on the ground that the regulated solicitations may make listeners uncomfortable. As *McCullen* explains, that is not a content-neutral justification.

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[3] In their Motion, Plaintiffs noted that commercial speech ordinarily receives equal or less constitutional protection than noncommercial speech, and that the City's discrimination *in favor of* commercial speech provided an independent ground for invaliding the content discrimination. Mot. at 21. Fort Collins did not respond to this argument that the ordinance unjustifiably favors commercial solicitation.

[4] Plaintiffs cited nine cases holding that particular regulations of solicitation are content-based on their face. Mot. at 19-20. In a failed effort to distinguish them, Defendant groundlessly claims "the vast majority" of those cases criminalized *all* forms of solicitation. Resp. at 21. Not true. The overwhelming majority found content discrimination because the regulation, like the Fort Collins ordinance, criminalized certain solicitation speech while permitting other solicitation speech. *See, e.g., ACLU of Idaho v. City of Boise*, 998 F. Supp. 2d 908, 916 (D. Idaho 2014) (enjoining ordinance that "treats this speech content [soliciting charity] different than other solicitation speech").

A. The cases Fort Collins relies on are inconsistent with *McCullen's* analysis of content discrimination

To justify its ordinance, Fort Collins relies primarily on *Thayer v. City of Worcester*, 755 F.3d 60 (1st Cir. 2014) and *Norton v. City of Springfield*, 768 F.3d 713 (7th Cir. 2014). Neither decision is consistent with *McCullen*'s teachings about content discrimination. The principles articulated in *McCullen* show that the ordinances approved in *Thayer* and *Norton* should have been rejected as content-based.

First, *Thayer* and *Norton* are inconsistent with *McCullen* because they did not consider whether the ordinances at issue were content-discriminatory on their face. At least one obvious content-based distinction stands out: in each case, the ordinance regulated soliciting donations but did not regulate soliciting sales. *See Thayer*, 755 F.3d at 64 ("donation"); *Norton*, 768 F.3d at 713 ("immediate donation of money"); *id.* at 722 (criticizing panel for "fail[ing] to address the content-based distinction the ordinance draws between commercial speech and charitable speech") (Manion, J., dissenting).

Second, both decisions are inconsistent with *McCullen*'s reaffirmation of the principle that a law is not content neutral when it is "concerned with undesirable effects that arise from 'the direct impact of speech on its audience' or '[l]isteners' reactions to speech.'" *McCullen*, 134 S. Ct. at 2521-32 (quoting *Boos v. Barry*, 485 U.S. 213, 321 (1988)). As *McCullen* explained, the prospect that communications might "cause offense or make listeners uncomfortable" does not provide a content-neutral justification for regulating those communications. *Id.* at 2532.

In justifying the Worcester panhandling ordinance, *Thayer* relies repeatedly on the prospect that listeners may feel uncomfortable, apprehensive, or intimidated by

hearing a message of solicitation or even by merely observing someone sitting with a sign. *See, e.g., Thayer*, 755 F.3d at 74 (explaining that a solicitor holding a sign within twenty feet "would reasonably give rise to discomfort to someone stuck at a bus stop, and could definitely produce apprehensiveness in someone obviously possessing fresh cash").[5] As *McCullen* explained, the First Amendment requires strict scrutiny when the government prohibits communications on the public sidewalks simply because some listeners may react in the way that *Thayer* hypothesizes. Neither the regulations in *Thayer* nor the Fort Collins restrictions can withstand that scrutiny. This is particularly true when solicitations that are *not* regulated, like the solicitations of persistent high pressure salespersons, are likely to produce the same reactions in the same precise situations. This "[u]nderinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown v. Entm't Merchants Ass'n.*, 131 S. Ct. 2729, 2740 (2011) (citing *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994)).

The Seventh Circuit's decision in *Norton* also overlooks *McCullen*'s teaching that listeners' reaction to speech is not a content-neutral justification. The Springfield ordinance regulated "oral request[s] for an immediate donation of money." 768 F.3d at 714. Signs requesting money were permitted, as well as oral requests to send money at a later time. *Id.* The court inferred that Springfield "evidently views signs and requests for deferred donations as less impositional than oral requests for money

[5] *See also id.*at 73 ("[P]eople can feel intimidated or unduly coerced when they do not want to give to the solicitor standing close to a line they must wait in for a bus or a movie."); *id.* at 69 ("A person can reasonably feel intimidated or coerced by persistent solicitation after a refusal, and can reasonably feel trapped when sitting in a sidewalk café or standing in line waiting for some service or admittance.").

immediately, which some persons (especially at night or when no one else is nearby) may find threatening." *Id.* Thus, the Springfield ordinance was justified in terms of how listeners might react: feeling apprehensive or imposed upon. As *McCullen* teaches, that is not a content-neutral justification.

Just last week, a federal district court in Virginia awarded summary judgment to plaintiffs who challenged a Charlottesville ordinance that prohibits soliciting immediate donations near two streets running through the downtown mall. *Clatterbuck v. City of Charlottesville*, No. 3:11-cv-00043, 2015 U.S. Dist. LEXIS 20097 (W.D. Va. Feb. 19, 2015). After the court explained its reasons for enjoining the ordinance, it added an additional section to its opinion, based on supplemental briefs the parties filed after the *McCullen* decision. *Id.* at *35. The court invoked *McCullen*'s admonition that the government does not provide a content-neutral justification for a regulation if its rationale relies on listeners' reaction to the regulated speech. Charlottesville justified its regulation as a traffic safety measure, in part on the ground that pedestrians trying to evade panhandlers might stray into traffic. The court held that this was not a content-neutral justification "given that it is based on an expected listener's expected reaction." *Id.* at *36. The court added that "the content-based nature of the ordinance is even clearer when one considers the many forms of communication that are not prohibited by the ordinance, but which a reasonable pedestrian fervently may wish to avoid, such as obnoxious wolf-whistles and catcalls, earnest political entreaties, and the like." *Id.* at *36-*37. The same reasoning applies to the rationales that *Thayer* and *Norton* advanced for the Worcester and Springfield ordinances they upheld.

In an effort to justify the restrictions Plaintiffs challenge, Fort Collins has adopted the reasoning of the *Thayer* decision, Resp. at 22, 26, 28, as well as a similar rationale articulated in an earlier case, *Gresham v. Peterson*, 225 F.3d 899 (7th Cir. 2000),[6] Resp. at 28 (noting that *Gresham* "found that the city chose to restrict panhandling in situations where people would most likely feel a heightened sense of fear or alarm, or might wish especially to be left alone"). The reasoning of *Thayer* and *Gresham*, however, does not survive *McCullen*. By relying on the adverse effects of the regulated expression on listeners, these decisions fail to justify the restrictions "without reference to content." *McCullen*, 134 S. Ct. at 2531-32. On the contrary, these rationales are "concerned with undesirable effects that arise from 'the direct impact of speech on its audience' or '[l]isteners' reactions to speech.'" *Id.* Because Fort Collins regulates on the basis of content, its prohibitions are presumed unconstitutional. *Id.* at 2530.

B. Under Justice Kennedy's analysis, Fort Collins enforces a content-based regulation subject to strict scrutiny

Defendant touts the *Norton* court's discussion of Justice Kennedy's views as a supposed harbinger of how the Supreme Court would analyze a regulation of panhandling that applies in a public forum. Resp. at 19-20. Justice Kennedy's views, however, do not help Fort Collins. On the contrary, Justice Kennedy's analysis would hold that the City is enforcing a content-based regulation that is subject to strict scrutiny.

In *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992) ("ISKCON"), the Court upheld a ban on soliciting in an airport terminal and rejected a ban on

[6] The *Gresham* court was uncertain whether the Indianapolis panhandling ordinance should be regarded as content based or content neutral, but because the parties had stipulated to content-neutrality, the only issue was whether the ordinance was narrowly tailored. *See Gresham*, 225 F.3d at 905-06.

leafleting. The majority held that the airport terminal was not a public forum, so it did not analyze whether the ban on solicitation was content-neutral. In his separate concurrence, Justice Kennedy found the ban on solicitation to be content-neutral, because he believed it prohibited only "personal solicitations for immediate payment of money." *Id.* at 704 (Kennedy, J., concurring). It was "directed only at the physical exchange of money." *Id.* at 705.[7] According to Justice Kennedy, because the regulation allowed distribution of literature requesting that a donation be mailed, it limited only the manner of expression, not its content. If the regulation had prohibited all speech that requested contributions, Justice Kennedy said he would have concluded that it was "a direct, content-based restriction of speech in clear violation of the First Amendment." *Id.* at 704.

In the situations where the Fort Collins ordinance applies, it regulates *all* requests for a gift of money or thing of value. In contrast to the ordinances upheld in *Thayer* and *Norton*, the Fort Collins ordinance does not distinguish between requests for an immediate donation and requests for a donation that can be made at a later time. The prohibitions are not limited to the immediate "physical exchange of money." Thus, contrary to Defendant's suggestion, Justice Kennedy's analysis would hold that Fort Collins has imposed "a direct, content-based restriction of speech in clear violation of the First Amendment." *Id.* at 704.[8]

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[7] Unlike the Fort Collins ordinance, the regulation in *ISKCON v. Lee* barred solicitations for commercial sales as well as solicitations for contributions.

[8] Neither the *Thayer* decision nor the *Norton* decision discussed Justice Kennedy's analysis of the content-neutrality issue in *ISKCON*.

III. Even if the challenged prohibitions were content neutral (and they are not), Fort Collins fails the test of narrow tailoring

In *McCullen*, the Court found that the government had failed to demonstrate that the 35-foot buffer zones were narrowly tailored, for two principal reasons. First, they "burden substantially more speech than necessary" to achieve the state's asserted interests. *McCullen*, 134 S.Ct. at 2537. Second, the government failed to meet its burden to "demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests." *Id.* at 2540. The Fort Collins ordinance fails for the same reasons.

McCullen shows that courts must closely scrutinize the government's restrictions to ensure they are narrowly tailored to their objectives. For example, the Court noted that the state's evidence of congestion outside abortion clinics pertained mainly to one Boston clinic on Saturday mornings. The state presented no evidence to show that persons regularly gathered at other clinics in groups large enough to obstruct access. The Court explained that creating a 35-foot buffer zone at every clinic in the state "is hardly a narrowly tailored solution" for a problem shown to arise only once a week in one city at one clinic. *Id.* at 3539.[9]

[9] Just yesterday, the Fourth Circuit relied on *McCullen* to hold that a Virginia county had not demonstrated that an ordinance banning roadway solicitation was narrowly tailored to the asserted interest in safety. The evidence established, at the most, a problem with roadway solicitation at certain busy intersections in one portion of the county. The ordinance, however, banned solicitation on all roadways, regardless of location or traffic volume, and it applied on all medians, even wide ones located next to stop signs and traffic lights. Since the county had not established a county-wide problem, the court, citing *McCullen*, explained that "the county-wide sweep of the [ordinance] burdens more speech than necessary." Reynolds v. Middleton, No. 13-2389, 2015 U.S. App. LEXIS 2704, at **21-22 (4th Cir. Feb. 24, 2015). Similar close scrutiny of the City's absence of tailoring leads to the same conclusion.

Fort Collins says that its goal was to enhance public safety, so it outlawed panhandling that threatens public safety, and therefore the law is narrowly tailored. First Amendment case law requires courts to take a closer look.[10] The ordinance as written, and as Fort Collins interprets and enforces it, prohibits a substantial amount of speech, including Plaintiffs' nonaggressive solicitations, that plainly poses no threat to public safety.

A. The City fails to discuss less restrictive alternatives

Plaintiffs do not challenge the provision of the City's ordinance prohibiting solicitors from engaging in conduct that is "intimidating, threatening, coercive or obscene and that causes the person solicited to reasonably fear for his or her safety." Fort Collins Municipal Code, Sec. 17-127(b)(2). Defendant fails to explain why enforcement of this provision, along with other unchallenged provisions and other existing laws, is not adequate to address the public safety concerns the City articulates. Indeed, the City fails entirely to address Plaintiffs' argument regarding less restrictive alternatives. *See* Mot. at 25-26.

B. Subsection (b)(1) - Nighttime Solicitation

According to the City, its ban targets only "certain antagonistic behaviors" in conjunction with solicitation at night. Resp. at 26. What Fort Collins labels an "antagonistic behavior," however, is a simple approach before making a request. The City claims that a solicitor violates the nighttime ban only if she first approaches or stops

[10] Fort Collins says that its restrictions are triggered only "when the panhandler approaches, accosts or stops someone and *employs more aggressive tactics.*" Resp. at 25 (emphasis added). On the contrary, the prohibitions in the written ordinance are triggered when the solicitor approaches *and merely solicits*. Defendant evidently contends that merely asking for charity constitutes a "more aggressive tactic," an assertion that common sense and this Court must reject.

an individual "or does so in a very narrow set of circumstances that are reasonable for public safety." *Id.* The text of the ordinance, however, does not specify any "narrow set of circumstances" that further confines the breadth of the blanket ban on nighttime solicitation. On the contrary, by the letter of the ordinance, simply approaching someone at night and politely asking for charity, as Plaintiff Larry Beall has done, is a crime. Moreover, in actual practice, Fort Collins has *broadened* the scope of the ordinance's blanket ban, by targeting passive solicitors such as Plaintiff Susan Wymer, who merely sits in the evening and displays a sign that invites charity from persons passing by.

C. Subsection (b)(5) - Second Request

The City bans polite and respectful requests for reconsideration that pose no threat to public safety. The City has provided no explanation why its legitimate interests could not be addressed by enforcing subsection (b)(2) or by enacting a ban on repeated solicitations that are combined with intimidating, threatening, or coercive conduct that would cause a reasonable person to fear for her safety.

D. Subsection (b)6) - At-Risk Persons

The City claims that its ban on soliciting "at risk" persons is narrowly tailored "to protect those who may be least able to avoid solicitation." *Id.* at 27. On the contrary, the City's erroneous broad-brush stereotype is the antithesis of narrow tailoring. This Court cannot accept the doubtful premise that shielding persons "least able to avoid solicitation" is a legitimate interest that could justify suppressing speech in a public forum. Even if the goal were legitimate, the City must produce evidence, not paternalistic stereotypes, to show that its suppression of expression advances a

legitimate interest in a "direct and effective way." *Doe*, 667 F.3d at 1133. The City cannot meet its evidentiary burden.

E. **Subsections (b)(8), (9), (10), and (11)**

The City has failed to justify its 100-foot bubbles around bus stops and ATMs. Fort Collins cannot cite a single case that upheld a speech-restrictive bubble as large as 100 feet. Indeed, the *Thayer* decision, which upheld a regulation of solicitation (on the basis of flawed reasoning),[11] indicated its likely disapproval of no-solicitation bubbles any larger than the 20-foot bubbles at issue there. *See Thayer*, 755 F.3d at 73.[12]

The City justifies portions of the challenged provisions on the ground that they protect "captive audiences." Echoing *Thayer*, the City asserts that a person could feel "trapped" and "fearful" when approached by a solicitor in situations where she does not feel free to move about. Resp. at 28. The City is unable to justify its content-based distinction. It prohibits requests for charity but allows high-pressure salesmen, religious evangelists, and petition circulators to approach and cause persons in the same

[11] As noted earlier, *Thayer* concluded erroneously that the Worcester ordinance was content neutral. In addition, *Thayer* declined to hold the government to its burden of justifying the challenged restrictions of expression. 755 F.3d at 71-72. Thus, the court did not require the government to demonstrate that the restrictions met the test of narrow tailoring. Instead, in a ruling without precedent, the court said that plaintiffs seeking interim relief "must show a probability of their ultimate success in demonstrating substantial overbreadth." *Id.* at 72. After concluding (erroneously) that the ordinance was content-neutral, the court disposed of the narrow tailoring inquiry in a single conclusory sentence. 768 F.3d at 717-18.

[12] Echoing *Thayer*, the City says that persons can "reasonably fear assault when requests for money are made near an ATM." Resp. at 28. The City conjures an image of a scary panhandler approaching an outdoor ATM where a citizen stands with freshly-withdrawn cash still in hand. The City's prohibition, however, is not tailored to apply to this scenario. The ordinance prohibits soliciting persons who are simply walking within 100 feet of an ATM, without regard to whether they have used or are planning to use the facility. Indeed, Fort Collins police apply the ordinance even when the ATMs are located inside a restaurant or a store. *See* Ex. 25 (ATM citations). Patrons of indoor ATMS put their cash away before heading outside, and solicitors outside do not know who patronized the ATM inside and who did not. Persons walking within 100 feet may be completely unaware that there is an ATM inside a nearby business. The ordinance is not narrowly tailored to the fear-of-assault scenario.

"captive audience" situations to feel uncomfortable or coerced. Nor has Fort Collins rebutted Plaintiffs' citation of *Berger v. City of Seattle*, 569 F.3d 1029, 1053-57 (9th Cir. 2009) (en banc), which rejected a similar regulation justified as protecting so-called "captive audiences."

Fort Collins describes subsections (10) and a portion of subsection (11) as regulating "solicitation that is distracting activity on the roadways including parking areas." Resp. at 29. Presumably, Defendant is positing that drivers will be distracted by the presence of solicitors, creating a risk of accidents. The City of Charlottesville advanced a similar rationale when defending a ban on panhandling near certain streets. In a cogently-reasoned decision, the court rejected the City's rationale, granted summary judgment to the plaintiffs, and enjoined the ordinance. *Clatterbuck*, 2015 U.S. Dist. LEXIS at * 35.

IV. This Court must enjoin the City from enforcing the challenged provisions of the ordinance as written and as they are interpreted and enforced by Fort Collins police

The first twenty-nine and one-half pages of Defendant's brief pretends that the only issue in this case is the text of the panhandling ordinance as it appears on our computer screens. Meanwhile, out in the real world, the Fort Collins police are relentlessly targeting sign-holders, street musicians and other passive solicitors who quietly invite charity without violating any terms of the written ordinance whatsoever. The ordinance that Fort Collins defends in its brief is not the ordinance that the City's police, with approval from the city prosecutors and the municipal court, are actually applying on the streets.

Finally, on page 30, the City obliquely acknowledges that Plaintiffs raise an issue that goes beyond the text of its ordinance: "The City agrees not to violate its Ordinance."[13] This Court must reject Defendant's implied suggestion that the City's "agreement" is sufficient and that an injunction is unnecessary. As city council minutes show, police knew when the ordinance was enacted that it "did not affect people who sit with signs."[14] Given the widespread multi-year pattern of enforcing the ordinance against persons who were not violating it, as well as the City's failure to openly acknowledge its targeting of passive solicitors, the City's mere assurance is plainly insufficient to ensure that sign holders are not chilled from exercising their constitutional rights. An injunction is required.

Thus, while this Court should enjoin all enforcement of challenged provisions, at minimum this Court should enjoin the City from relying on the ordinance as grounds for arresting, issuing citations, or issuing orders to "move on" to persons who solicit passively by displaying a sign or other means, without approaching, stopping, or accosting the person solicited.

[13] Plaintiffs assume that the City's attorneys mean to say that the City is willing to instruct its employees to stop invoking the panhandling ordinance against passive panhandlers.

[14] Excerpts from the council minutes are attached as Ex. 26.

Respectfully submitted this 25th day of February, 2015.

s/ Mark Silverstein

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CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2015 I electronically filed the foregoing **PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND FOR PRELIMINARY INJUNCTION** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following recipients:

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