IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 14-cv-00809-CMA-KLM

DEBRA BROWNE, *et al*., (Plaintiffs),

and

GREENPEACE, INC. and
ALEXIS GALLEGOS (Plaintiff-Intervenors),

v.

CITY OF GRAND JUNCTION, COLORADO (Defendant).

PLAINTIFFS' AND PLAINTIFF-INTERVENORS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' AND INTERVENORS' COMPLAINTS PURSUANT TO FED. R. CIV. P. 12(b)(1) AND 12(b)(6)

Plaintiffs and Plaintiff-Intervenors ("Plaintiffs"), through their attorneys, submit their Response to Defendant's Motion to Dismiss Plaintiffs' and Intervenors' Complaints Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6):

INTRODUCTION

The City of Grand Junction (the "City" or "Defendant") adopted, and then amended, an ordinance regulating panhandling that unnecessarily and unjustifiably suppresses First Amendment rights. City officials say they adopted these restrictions to address aggressive panhandling that intimidates and harasses pedestrians, as well as solicitation to motorists that poses a safety risk. Instead of focusing narrowly on dangerous, threatening or unduly coercive behaviors, Grand Junction banned a wide swath of solicitation speech that is courteous, polite, nonthreatening, nonaggressive, does not pose a risk to public safety, and is squarely protected by the First Amendment.

Plaintiffs mount a facial challenge to this overbroad ordinance.[1]

All but one of the Plaintiffs are solicitors who ask for donations in a polite, non-aggressive, non-threatening manner; but the ordinance as originally passed, as interpreted by the City, and/or as amended, prohibits them from engaging in their peaceful solicitation speech in a variety of different locations, manners and circumstances throughout the City. Plaintiffs filed this action shortly before the ordinance was slated to go into effect. In response, the City repealed or revised some of the challenged provisions, all the while vehemently defending the constitutionality of the original ordinance.

Unfortunately, the City failed to repeal several specific restrictions that plainly violate the Constitution, including, for instance, the prohibitions of nighttime panhandling anywhere in the City and panhandling near a bus stop. Defendant contends that its modest revision of the ordinance's definition of "panhandling," to include a consent provision, dramatically narrows the reach of the ordinance and ensures the challenged provisions pass constitutional muster. *Defendant's Motion to Dismiss* (hereinafter "*Motion*"), ECF Doc. 46, at 3, 18-20. Not so. As will be discussed below, the only reasonable reading of the consent provision is that it is *more* restrictive of speech, as it requires Plaintiffs to ask for and receive permission before approaching and requesting a donation. In public spaces, the First Amendment does not tolerate such an unprecedented "listener's veto" of protected expression before it is even uttered, particularly when that speech is peaceful, non-threatening and non-intimidating.

Perhaps even more central to this case, when the City amended the ordinance, it

[1] Plaintiffs do not take issue with the few restrictions that are narrowly drafted to target threatening, coercive, menacing, or dangerous behavior (although these provisions largely duplicate already-existing law).

failed to correct the most fatal constitutional flaw – that the law is a content-based regulation of protected speech. The ordinance restricts solicitation for money or employment, but it does not restrict solicitation for votes, for signatures on petitions, for religious conversion, or for moral support for a cause. Thus, on its face, the ordinance bans solicitation on certain topics but not others and, in that sense, is the archetypal example of a content-based restriction on speech.

Accordingly, the ordinance is subject to the highest level of judicial scrutiny, one that the ordinance will be patently unable to survive. Defendant has not and cannot provide evidence that its ordinance is the least restrictive means of advancing a compelling government interest. Nor can the ordinance, even if it were deemed content-neutral (and it is not), survive the more lenient narrow tailoring test of intermediate scrutiny. That is because, as discovery will show, Grand Junction does not have an aggressive panhandling problem of any consequence, just as it does not have a public safety problem related to panhandling.[2] Instead, the evidence will show that the "problem" that Grand Junction sought to address is public discomfort with the presence of visibly impoverished beggars within the city limits. By silencing their solicitation speech, Grand Junction hoped to decrease their presence in public places within the City. Such a censorial motive is anathema to First Amendment principles.

[2] In this Response, Plaintiffs assert facts that are consistent with the Complaints and that Plaintiffs can and will prove when this case proceeds. Plaintiffs have already alleged, and provided documentary evidence to support, most of the additional facts contained herein in previous filings in this case, particularly in connection with Plaintiffs' motion for interim injunctive relief. ECF Doc. 6. In defending against a motion to dismiss, Plaintiffs "may elaborate on [their] factual allegations so long as the new elaborations are consistent with the pleadings." *Geinosky v. City of Chicago*, 675 F.3d 743, 745 n.1 (7th Cir. 2012). Plaintiffs assert these additional facts solely to illustrate that their pleadings, viewed in the light most favorable to them, plausibly state a claim for relief. Plaintiffs do not seek, and their reliance on additional factual allegations does not warrant, conversion of Defendant's Motion into a Rule 56 motion for summary judgment. *See id.*

FACTUAL AND PROCEDURAL BACKGROUND

On February 19, 2014, Grand Junction adopted Ordinance No. 4618, "An Ordinance Prohibiting Activities Relating to Panhandling." Ex. 1, *Ordinance 4618*.[3]

Before the ordinance's effective date, six Plaintiffs filed a Complaint and Motion for Temporary Restraining Order and Preliminary Injunction. Five are solicitors (four of them needy individuals, one a non-profit organization) who have requested donations, and wish to continue to request donations, in a manner or situations that violate the ordinance as Grand Junction planned to enforce it. *See Complaint*, ECF Doc. 1, *passim*; *Complaint in Intervention Greenpeace*, ECF Doc. 36, *passim*; *Complaint in Intervention Gallegos*, ECF Doc. 41, *passim*; *Motion for Temporary Restraining Order*, ECF Doc. 6, *passim*. The sixth, Eric Niederkruger, wishes to receive communications that the ordinance prohibited. ECF Doc. 1 at ¶¶ 48-51; ECF Doc. 6, at 19-20. In moving for interim relief, Plaintiffs sought to enjoin Grand Junction from relying on the challenged provisions as authority for arrests, citations, or formal or informal "move on" orders." ECF Doc. 6, *passim*; *Motion to Clarify Relief*, ECF Doc. 17, at ¶ 3.

On March 21, 2014, Judge Brimmer heard oral argument on Plaintiffs' request for a temporary restraining order and issued a written order granting, in part, Plaintiffs' request. ECF Doc.15. Plaintiffs' request for a preliminary injunction remained pending, and the temporary injunction was set to expire on April 4, 2014. ECF Doc.15, at 9. On March 28, 2014, Defendant filed a joint motion requesting that the Court not hold a hearing on Plaintiffs' motion for preliminary injunction. ECF Doc. 21. Defendant

[3] In its Motion, Defendant referenced Ordinance No. 4618 as Exhibit 1, but no Exhibit 1 was filed. *Motion*, at 2. Plaintiffs have attached Ordinance No. 4618 as Exhibit 1 to this brief.

explained that the Grand Junction Chief of Police had committed to suspend enforcement of the challenged ordinance until a ruling on the merits. ECF Doc. 21. The Court granted the joint motion, deeming Plaintiffs' motion for preliminary injunction withdrawn. ECF Doc. 22.

On April 2, 2014, the City Council unanimously passed Ordinance No. 4627, amending Ordinance 4618 on a "special emergency basis."[4] Ex. 2, *Ordinance 4627*. While the amended ordinance repeals or revises some of the prohibitions Plaintiffs challenge, other restrictions on communicative activity that Plaintiffs challenge remain. The emergency amended ordinance went into effect immediately upon publication, on April 5, 2014, at which point Plaintiffs became subject to enforcement of the challenged provisions.[5] *See Ordinance No. 4627, Sec 9.05.0303*.

Since the passage of the amended ordinance, the Court has accepted complaints in intervention by Greenpeace, Inc. and Alexis Gallegos.[6]

I. The Definition of "Panhandling"

Central to this case is the ordinance's definition of "panhandle/panhandling." City Council's amendment to the definition – which Defendant claims fundamentally altered its scope – added only four words (in bold, below) to the original definition:

> *Panhandle/panhandling* shall mean to knowingly approach, accost or stop another person in a public place and solicit that person **without that**

[4] In its Motion, Defendant referenced Ordinance 4627 as Exhibit 2, but no Exhibit 2 was filed. *Motion*, at 2. Plaintiffs have attached Ordinance No. 4627 as Exhibit 2 to this brief.
[5] Thus, just five days after Defendant had represented that the City would suspend enforcement during the litigation, the amended panhandling ordinance became effective and enforceable. *See Motion for Expedited Discovery*, ECF Doc. 25, at ¶¶ 18, 21
[6] Both intervenors wish to solicit donations in a manner and in situations that violate Grand Junction's restrictions. *See generally* ECF Docs. 36, 41. Greenpeace is a non-profit organization that solicits donations from passersby in public places. Ms. Gallegos is a needy individual who has solicited donations (and wishes to continue to do so).

> **person's consent**, whether by spoken words, bodily gestures, written signs or other means, for money, employment or other thing of value.

Ordinance 4627, Section 9.05.020, Definitions.

II. The Challenged Prohibitions on "Panhandling"

In the Complaints, Plaintiffs challenged the following specific prohibitions of the original ordinance (Ex. 1, *Ordinance 4618*):

- panhandling when it is dark, *Section 9.05.040* (a);
- panhandling directed at an elderly person or person with a disability, *Section 9.05.040* (f);[7]
- panhandling within 100 feet of an automatic teller machine, *Section 9.05.040* (h);
- panhandling within 100 feet of a bus stop, *id*.;
- panhandling within 100 feet of a school, *Section 9.05.040* (l);
- panhandling on a public bus, *Section 9.05.040* (i);
- panhandling in a parking facility, *Section 9.05.040* (j);
- panhandling directed at people waiting in line, *Section 9.05.040* (k);
- panhandling directed at people seated at an outdoor restaurant, *id*.;
- panhandling directed at a person who has refused the panhandler's initial request, *Section 9.05.040* (e); and
- panhandling directed at motorists traveling on particular roadways, *Section 9.05.050*[8].

The amended ordinance repeals the ban on soliciting from elderly or disabled persons, panhandling near schools, and soliciting from motorists traveling on particular roadways. *See Ordinance 4627, Sections 9.05.040 and 9.05.050*. It also reduces the no-panhandling "bubble" around ATMs and bus stops from 100 feet to 20 feet and limits the prohibition on panhandling in parking lots to those that are "public." *See Ordinance 4627, Sections 9.05.040 (g) and (i)*. All other challenged provisions remain unaltered,

[7] The ordinance banned panhandling directed to an "at-risk person," defined as anyone with mental or physical disabilities, and any person who is over seventy or under sixteen years of age. *Ordinance 4618, Section 9.05.020, Definitions*.

[8] This provision, contained in the final sentence of Section 9.05.050 of Ordinance 4618, was temporarily enjoined by Judge Brimmer. *Order*, ECF Doc. 15, at 6-9.

including the blanket ban on nighttime panhandling.[9]

ARGUMENT

I. Standard of Review

"[A] complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citations omitted). At this stage, the Court "must accept as true all well-pleaded factual allegations in a complaint and view these allegations in the light most favorable to the plaintiff." *Cressman v. Thompson*, 719 F.3d 1139, 1152 (10th Cir. 2013) (internal quotation marks omitted).

Because this is a facial challenge to restrictions of First Amendment rights, Plaintiffs are not limited to argument about the restrictions of their own communications. In this overbreadth claim, Plaintiffs may invoke – and this Court must consider – the First Amendment rights of persons who are not before the Court. *See United States v. Stevens*, 559 U.S. 460, 473 (2010); *Watchtower Bible and Tract Soc'y of New York v. Village of Stratton*, 536 U.S. 150, 166 n.14 (2002).[10]

[9] To be clear, Plaintiffs challenge the following provisions of the amended ordinance (Ex. 2, *Ordinance 4627*): Section 9.05.040 (a) (prohibiting panhandling one half hour after sunset to one half hour before sunrise); (e) (prohibiting repeated solicitations after refusal); (g) (prohibiting panhandling within twenty feet of an automatic teller machine or of a bus stop); (h) (prohibiting panhandling on a public bus); (i) (prohibiting panhandling in public parking facility); and (j) (prohibiting panhandling from people at outdoor cafes or waiting in line).

[10] "[T]he transcendent value to all society of constitutionally protected expression" justifies allowing litigants to argue the rights of persons not before the court. *Gooding v. Wilson*, 405 U.S. 518, 521 (1972). "This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression." *Id*.

II. Subject Matter Jurisdiction

A. Defendant's Voluntary Cessation does not Moot Plaintiffs' Claims

Defendant's argument that Plaintiffs' challenge to the now-repealed provisions of the ordinance are now moot is unavailing. *Motion*, at 9-10. The City fails to even cite the legal standard that must govern this Court's mootness analysis when – as here – a defendant voluntarily ceases the allegedly wrongful conduct. "It is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (internal quotation marks omitted). "If it did, the courts would be compelled to leave the defendant . . . free to return to his old ways." *Id.* (internal quotation marks omitted). That is why the Supreme Court has imposed on the party asserting mootness a "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again." *Id*. (internal quotation marks omitted).

Defendant has failed to carry this "heavy burden." Defendant's only stated basis for asserting mootness is that City Council repealed certain challenged provisions. *Motion*, at 9-10. In this particular case, "the bare fact of repeal" while litigation is pending does not moot Plaintiffs' claims. *See Weigand v. Village of Tinley Park*, 129 F.Supp.2d 1170, 1172-73 (N.D. Ill. 2001) (finding "bare fact of repeal" of challenged ordinance during pendency of First Amendment facial challenge was insufficient to moot plaintiffs' claims). As the Supreme Court and the Tenth Circuit have found, repeal does not automatically meet the Defendant's burden of showing no reasonable probability the challenged conduct will recur. *See City of Mesquite v. Aladdin's Castle, Inc*., 455 U.S.

283, 288-89 (1982) (refusing to dismiss as moot the plaintiff's challenge to a city licensing ordinance even after the city had removed the challenged language, because the City could reenact "precisely the same provision if the District Court's judgment were vacated."); *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1159 (10th Cir. 2000) (court reviewed on the merits a dispute over a statutory regime that had been superseded by intervening policy changes during the litigation and rendered a declaratory judgment that the government's prior practice was unconstitutional, noting: "It is not fanciful to suggest that the government may retreat to prior practice.").[11]

Moreover, when amending the ordinance in this case, the City Council staunchly defended the constitutionality of the very provisions it was repealing, and it explained the decision to amend was solely a tactic to avoid the costs of the instant litigation. *See Ordinance 4627, Recitals (a)-(g)* (detailing seven reasons why the "City Council believes, based upon consideration of applicable case law, that Ordinance No. 4618 is constitutional on its face" and asserting that Ordinance 4627 is intended to "limit the time and resources of the City in needless litigation"). In 2007, the Supreme Court reaffirmed the longstanding principle that a defendant's vigorous defense of the allegedly wrongful conduct that it ceased only in response to litigation militates against a finding that defendant has met its burden to show there is no reasonable possibility of

[11] Defendant's reliance on *Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1122-28 (10th Cir. 2010), to show that the court automatically loses the power to hear a case when the challenged legislative act is repealed, is misleading at best. Nothing in that case suggests that this Court should forego the voluntary cessation analysis here. Although repeal of a challenged statue, without more, may often convince a court that there is no reasonable expectation that the alleged wrongful conduct may recur, *see, e.g.*, *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1182 (10th Cir. 2000), cases such as *Weigand* and *City of Mesquite* show that mere repeal is not always sufficient to meet the Defendant's heavy burden of persuasion. *See also Comm. for First Amendment v. Campbell*, 962 F.2d 1517, 1525 (10th Cir. 1992) ("[W]e recognize that repeal of an objectionable portion of an ordinance . . . does not necessarily render a case moot . . . .").

recurrence. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007); *see also Sheely v. MRI Radiology Network*, P.A., 505 F.3d 1173, 1187 (11th Cir. 2007) ("a defendant's failure to acknowledge wrongdoing . . . suggests that cessation is motivated merely by a desire to avoid liability, and furthermore ensures that a live dispute between the parties remains."); *Weigand*, 129 F.Supp.2d at 1172-73 (finding no mootness in challenge of repealed ordinance when defendant village did not "recognize[] their culpability," "admit that the ordinance was unconstitutional," or provide "assurance[s] against future violations").

Here, considering City Council's vigorous defense of the constitutionality of the repealed provisions along with its candid acknowledgement that repeal was a tactic solely to avoid the expenses of this litigation, Defendant has failed to meet its "heavy burden" of showing that there is no reasonable possibility of reenactment.[12]

B. Plaintiffs Have Standing to Challenge Sections (h) and (j)

Defendant asserts that Plaintiffs lack standing to challenge two particular provisions of the ordinance. Contrary to Defendant's assertion, Plaintiffs need not allege specifically that they wish to ask for contributions in each separately-proscribed situation. Plaintiffs alleged that they have solicited contributions in the past, that they

[12] The Court can and should also consider the strong public interest in having the entirety of this case decided on the merits. *See Comm. for the First Amendment*, 962 F.2d at1524 (a court must weigh any showing by defendant "against the possibility of recurrence *and the public interest in having the case decided*.") (internal citations omitted; emphasis added) (citing *United States v. W.T. Grant Co.*, 345 U.S. at 632-33). Multiple local jurisdictions in Colorado have adopted anti-panhandling ordinances that include provisions similar or identical to the challenged provisions that Grand Junction repealed after this litigation began. Those jurisdictions and others in Colorado will be looking to this case for much needed guidance on the constitutionality of their ordinances. *See, e.g.*, Commerce City Municipal Code Section 12-5005 (containing each repealed prohibition challenged by Plaintiffs in this case); Larimer County Code of Ordinances Section 38-154 and 38-155 (containing each repealed provision challenged by Plaintiffs in this case).

wish to continue, and that Grand Junction now forbids their constitutionally-protected activity. In a recent challenge to a similar ordinance, the Fourth Circuit declined to require specific allegations that the plaintiffs intended to panhandle in the specific location prohibited by the ordinance:

> Although the complaint does not allege that Appellants have begged or plan to beg specifically within the fifty-foot buffer zones, it does, more generally, allege that Appellants regularly beg on the Downtown Mall, and that they suffer harm by being prevented from fully exercising their First Amendment rights. These "general factual allegations . . . may suffice . . . on a motion to dismiss [to allow us to] presume that [they] embrace those specific facts that are necessary to support the claim."

Clatterbuck v. City of Charlottesville, 708 F.3d 549, 554 (4th Cir. 2013) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). The court concluded by saying "[w]e decline the City's invitation to rigidly impose such a precise level of specificity at the pleadings stage." *Id*. This Court should reject Defendant's argument.

III. Plaintiffs Have Adequately Stated a Claim Alleging Violation of the First Amendment

Because this is a First Amendment case, Grand Junction bears the burden of proof. *ACORN v. Municipality of Golden*, 744 F.2d 739, 746 (10th Cir. 1984) ("[W]hen a law infringes on the exercise of First Amendment rights, its proponent bears the burden of establishing its constitutionality.").

A. The Ordinance is a Content-Based Regulation Subject to Strict Scrutiny

i. Numerous Recent Decisions Have Analyzed Regulations of Solicitation and Panhandling as Content-Based

In attempting to persuade this Court that its ordinance is content-neutral, the City has failed to cite a single case holding that a similar regulation of panhandling is content-neutral. *Motion*, at 11-17. Moreover, the City has largely ignored the multiple

recent decisions from around the country that have held various restrictions on panhandling or solicitation to be content-based regulations of expression that must be analyzed under the demanding standard of strict scrutiny. *See, e.g.*, *Speet v. Schuette*, 726 F.3d 867, 870 (6th Cir. 2013) (invalidating anti-begging statute that "prohibits a substantial amount of solicitation . . . but allows other solicitation based on content"); *Clatterbuck*, 708 F.3d at 560 (reversing 12(b)(6) and analyzing anti-panhandling ordinance as content-based restriction); *Berger v. City of Seattle*, 569 F.3d 1029, 1051-53 (9th Cir. 2009) (en banc); *accord Valle del Sol Inc., v. Whiting*, 709 F.3d 808, 819 (9th Cir. 2013); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 951-55 (9th Cir. 2011) (en banc) (Smith, J., joined by Thomas, J., specially concurring); *ACLU of Nevada v. City of Las Vegas*, 466 F.3d 784,794 (9th Cir. 2006); *ACLU of Idaho v. City of Boise*, 2014 U.S. Dist. Lexis 291, at *12-13 (D. Idaho Jan. 2, 2014) (attached hereto as Ex. 3); *Kelly v. City of Parkersburg*, 2013 U.S. Dist. Lexis 152346, at *9 (S.D. W. VA. Oct. 16, 2013) (attached hereto as Ex. 4); *Lopez v. Town of Cave Creek*, 559 F. Supp. 2d 1030, 1032-33 (D. Ariz. 2008).[13]

ii. By Discriminating on the Basis of Subject Matter, the Ordinance Discriminates on the Basis of Content

Instead of relying on cases regulating panhandling, the City's argument for content-neutrality is based almost entirely on *Hill v. Colorado*, 530 U.S. 703 (2000), but that case does not validate the City's content-discriminatory ordinance. In a portion of the opinion that Defendant overlooks, the Court in *Hill* reaffirmed the longstanding First Amendment principle that "[r]egulation of the subject matter of messages, though not as

[13] In a footnote, the City acknowledges only two of the foregoing cases but cursorily dismisses them, merely asserting, without support, that they "are at odds with established Supreme Court and Tenth Circuit authority." *Motion*, at 17 n.3.

obnoxious as viewpoint-based regulations, is also an objectionable form of content-based regulation." *Hill*, 530 U.S. at 723.

One reason Grand Junction's ordinance is content-based is because it regulates solicitation on the basis of the particular subject matter of the solicitation. After the TRO hearing in this case, Judge Brimmer found as much when he analyzed Section 9.05.050 of the original ordinance, which regulated soliciting directed at motorists on certain streets. He concluded the provision was content-based and subject to strict scrutiny:

> The provision applies to "attempt[s] to solicit employment, business, or contributions of any kind." Grand Junction, Colo. Mun. Code § 9.05.050 (2014). It does not prohibit people from offering motorists political or religious literature, asking for directions, or engaging in speech on any topic other than requests for money, employment, or other "contributions." This provision, "by its very terms, singles out particular content for differential treatment" and thus constitutes a content-based restriction on speech.

ECF Doc. 15, at 6-7 (quoting *Berger*, 569 F.3d at 1051). In its Motion, the City fails to mention Judge Brimmer's ruling in this very case.

Judge Brimmer's analysis applies with equal force to the definition of "panhandling" in Section 9.05.020, the definition which applies to all the remaining challenged provisions of the original and amended ordinance. As "panhandling" is defined, the ordinance regulates requests for "money" or "employment," but it does not regulate solicitation for votes, to join an organization, for signatures on petitions, for religious conversion, or for moral support for a cause. Thus, the ordinance regulates solicitation speech on the basis of its subject matter.

This conclusion is consistent with the host of relatively recent judicial opinions cited above – which Defendant largely ignores – that have held that regulations of panhandling or solicitation are content-based regulations of expression. For example,

in *ACLU of Idaho*, the court preliminarily enjoined, as content-based, a Boise ordinance that is remarkably similar to Grand Junction's, explaining that the ordinance treats expression seeking contributions differently from other solicitation speech. 2014 U.S. Dist. Lexis 291 at *13 ("The ordinance does not restrict solicitation of signatures for petition . . ., political support solicitation, religious solicitation, etc."). Similarly, in *Valle del Sol*, the court concluded that Arizona statutes regulating day labor solicitations were a "classic example[] of content-based restrictions" because they "target one type of speech – day labor solicitation that impedes traffic – but say nothing about other types of roadside solicitation and nonsolicitation speech." 709 F.3d at 819. As an additional example, in *Kelly,* the court held that an ordinance in West Virginia was content-based because it regulated solicitations for money but not "solicitations for votes, solicitations to enter free raffles, or solicitations to register for a church mailing list." 2013 U.S. Dist. Lexis at *9.

iii. Discovery will Show a Censorial Motive Behind the Challenged Ordinance

As an en banc decision of the Ninth Circuit explained, a regulation of expression is subject to strict scrutiny not only when it subjects particular content to differential treatment, but also when "the underlying purpose of the regulation is to suppress particular ideas." *Berger*, 569 F.3d at 1051. In a similar vein, the Fourth Circuit explained that strict scrutiny is required when government distinguishes content "with a censorial intent to value some forms of speech over others . . . ." *Clatterbuck*, 708 F.3d at 556 (internal quotations omitted). The court concluded plaintiffs had plausibly alleged a "censorial motive" behind the challenged panhandling restrictions. *Id*. at 559-60 ("Appellants have specifically alleged that the City intended to prevent their undesired

presence on the Mall – in other words, that the regulation exists to prevent Appellants from conveying their unwanted message."). After discovery, Plaintiffs will make a similar showing here.

When seeking interim injunctive relief, Plaintiffs were prepared to demonstrate that in enacting the challenged ordinance, the City's unstated, but quite clear goal, was to decrease the presence of visibly impoverished beggars within the city limits by restricting their solicitation-related speech, while preserving the speech of favored solicitors. ECF Doc. 6, at 4-8, 13-14, 27-28. To make the case, Plaintiffs were prepared to rely on the record of City Council meetings, statements of the City Attorney, statements of the Chief of Police, and the City's written plan for enforcement of the ordinance to show that the City intended to rely on the ordinance to tell impoverished panhandlers, and no other solicitors, to "move on" whenever they ask for money under circumstances that violate the ordinance as the City interpreted it. *Id*. When it revised the ordinance in response to this litigation, the City expressly relied on the deliberations that preceded the original ordinance to justify the restrictions on panhandling it retained. *Ordinance 4627, Section 9.05.010 (g)*. Plaintiffs fully expect that discovery will further confirm that the City was motivated by "a censorial intent to value some forms of speech over others." *Clatterbuck*, 708 F.3d at 556 (internal quotation marks omitted).

iv. By Regulating Requests for Future Contributions, the Ordinance Regulates Speech on the Basis of Content

In the final pages of its argument on content-neutrality, the City cites three cases that regarded panhandling ordinances as content-neutral. *Motion*, at 16-17. The ordinances in those cases, however, differ from Grand Junction's in a critical and material way. The City states that its definition of "panhandling" applies not only to

requests for an immediate transfer of money, but also to requests for a donation that can be made at a later time. *Motion*, at 16 ("The Ordinance also does not distinguish between solicitations for an immediate donation or for a donation at a later time."). In contrast, the three cases the City cites each analyzed ordinances that regulate only a request for an immediate face-to-face and hand-to-hand transfer of money.[14] The distinction is critical: ordinances like Grand Junction's have not passed the test of content-neutrality.

In some cases, courts have concluded that a regulation of solicitation can be content-neutral when it applies only to face-to-face requests for an immediate transfer of money. For example, after an extensive discussion, the California Supreme Court concluded that "a restriction on solicitation for immediate donation or exchange of funds may be found to be content neutral . . . ." *Los Angeles Alliance for Survival v. City of Los Angeles*, 993 P.2d 334, 367-73 (Cal. 2000). The California Supreme Court's decision, and others with similar conclusions, are informed by Justice Kennedy's concurring opinion in *Int'l Soc'y for Krishna Consciousness v. Lee,* 505 U.S. 672 (1992) ("ISKCON"). In that case, the Supreme Court upheld a ban on soliciting in an airport terminal and rejected a ban on 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

[14] The City acknowledges that the first two cases analyzed regulations that applied only to requests for immediate donations. *Motion*, at 16. The ordinance at issue in the third case, *Thayer v. City of Worcester*, 2013 U.S. Dist. Lexis 152910 (D. Mass. Oct. 24, 2013), *appeal pending* (attached hereto as Ex. 5), also applied only to "asking for money or objects of value, with the intention that the money or object be transferred at that time, and at that place." 2013 U.S. Dist. Lexis 152910 at *42.

immediate payment of money." *ISKCON*, 505 U.S. 672, 704 (Kennedy, J., concurring). It was "directed only at the physical exchange of money." *Id*. at 705. 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. *Id* .at 704-05. 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.

Thus, Justice Kennedy's analysis would hold that the Grand Junction ordinance, which regulates *all* requests for money or employment, not just requests for immediate exchange of money, is "a direct content-based restriction of speech." *Id*. In arguing that its ordinance is content-neutral, Grand Junction has failed to cite a single case that has held that a similar restriction on panhandling – one that applied to requests for future contributions – is content-neutral.

The Ninth Circuit regards Justice Kennedy's analysis as distinguishing between regulations that ban the *act* of solicitation, which can be content-neutral, and regulations that ban *messages* of solicitation, which are content-based. *ACLU v. City of Las Vegas*, 466 F.3d at 794-96. The court concluded that a Las Vegas ordinance impermissibly regulated *messages* of solicitation, because "[i]t prohibits even the peaceful, unobstructive distribution of handbills requesting future support of a charitable organization." *Id*. at 797. Similarly, the prohibitions of the Grand Junction ordinance are not limited to face-to-face requests for the immediate transfer of funds. Like the impermissibly content-based Las Vegas ordinance, the Grand Junction ordinance regulates *messages* of solicitation. As the City acknowledges, "the Ordinance does not

distinguish between solicitations for an immediate donation or for a donation at a later time." [15] *Motion*, at 16.

v. The City has Failed to Justify the Ordinance "Without Reference to Content"

The City argues that laws can be considered content-neutral if they are justified without reference to the content of the regulated speech. The City then quotes the lawyer-prepared declaration in the ordinance stating that it "makes no distinctions based upon . . . content." *Motion*, at 13. The City cannot establish that its ordinance is content-neutral by simply stating so in the ordinance itself. "[T]he mere assertion of a content-neutral purpose [is not] enough to save a law which, on its face, discriminates based on content." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642-43 (1994).

The City says its ordinance regulates expression "that, by its very nature, is more likely to cause fear, apprehension, discomfort or annoyance in the person solicited." *Motion*, at 19. Yet the City fails to explain why a request for money or employment is more likely to cause fear, apprehension, discomfort or annoyance then a solicitation for religious conversion, a solicitation to join an organization, a solicitation for votes, signatures, or support for a cause. Moreover, by justifying its regulation on the basis of listener's potential reactions to speech, the City invokes an impermissible content-based justification. As the Supreme Court has repeatedly explained, "Listeners' reaction to speech is not a content-neutral basis for regulation." *Forsyth County v. Nationalist*

[15] The City cannot contend that its regulation should be construed to apply only to requests for immediate transfers of money, as the definition of panhandling also includes requests for employment. Solicitors cannot ask for employment that will be delivered immediately. Indeed, the inclusion of "employment" in the definition of panhandling is further evidence that the true targets of the ordinance are the homeless and the impoverished, who solicit employment (and sometimes alms) directly from persons passing by in cars or on the sidewalk.

Movement, 505 U.S. 123, 134 (1992); *see also Reno v. ACLU*, 521 U.S. 844, 868 (1997). The City has failed to justify its ordinance "without reference to content."

B. Neither the 'Captive Audience' Doctrine nor the Decision in *Hill v. Colorado* Justifies the City's Regulation of Expression

Grand Junction justifies its restrictions on expression as protection of vulnerable persons who are "part of a captive audience," and for legal authority, the City relies extensively on *Hill v. Colorado*, 530 U.S. 703 (2000). The City's reliance on *Hill* is seriously misplaced, and the very limited "captive audience" doctrine cannot be stretched to justify Grand Junction's regulation of peaceful, polite, and nonthreatening requests for contributions made on a public sidewalk or in a public place. The City also relies erroneously on *Hill* in arguing an irrational and unreasonable interpretation of the "consent" provision in the amended ordinance.

i. The Ruling in *Hill*, Which Protected the Health and Safety of Medical Patients, does not Justify Shielding Grand Junction Residents from Peaceful Panhandlers

To ensure access to medical clinics, and to protect pre-surgery patients from the health-endangering gauntlet of emotional confrontations that had become standard at abortion facilities, Colorado adopted, and the *Hill* Court approved, a statute that applied within 100 feet of medical facilities. It prohibited approaching people within eight feet, without consent, for the purpose of protesting, counseling or educating.

Contrary to the City's suggestion, *Hill* did not extend the "captive audience" doctrine, nor did it hold that the government may restrict expression in public spaces for the purpose of shielding unwilling listeners from communications they do not wish to hear. Indeed, the Court expressly disavowed such a reading of its decision. *See Hill*, 530 U.S. at 718 n.25 ("whether there is a 'right' to avoid unwelcome expression is not

before us in this case"). In identifying the legitimate government interest that justified a limitation on expression, the Court specified that it was upholding a statute enacted "to protect those who seek medical treatment from . . . potential physical and emotional harm . . . ." *Id*.

The circumstances justifying the restrictions upheld in *Hill* are vastly different from the perceived problems that prompted Grand Junction's ordinance. The Colorado statute was drafted to address a serious national and statewide problem: patients seeking counseling and treatment at medical facilities that provided abortion services were openly and systematically subjected to intense face-to-face verbal abuse, threatening behavior, and even physical assault. *See, e.g.*, *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 758 (1994); *Schenck v. Pro-Choice Network*, 519 U.S. 357, 363 (1997). In passing the statute at issue in *Hill*, the Colorado legislature heard testimony detailing the disturbing behavior occurring in this state. For example, one nurse practitioner

> testified that . . . anti-abortion protesters yell, thrust signs in faces, and generally try to upset the patient as much as possible, which makes it much more difficult for us to provide care in a scary situation anyway.

Hill, 530 U.S. at 710 n.7 (internal quotations marks omitted). One volunteer who escorts patients at clinics

> testified that the protestors "are flashing their bloody fetus signs. They are yelling, "you are killing your baby." They are talking about fetuses and babies being dismembered, arms and legs torn off . . . a mother and her daughter . . . were immediately surrounded and yelled at and screamed at . . . ."

Id. (ellipses in original). As the Supreme Court noted, the often confrontational demonstrations at abortion clinics impeded access to the point that it became "a

common practice to provide escorts for persons entering and leaving the clinics both to ensure their access and to provide protection from aggressive counselors who sometimes used strong and abusive language in face-to-face encounters." *Id*. at 709-10. The Court noted that these emotional confrontations "may adversely affect a patient's medical care." *Id*. at 710.

The potential annoyance of fending off an unwanted panhandler on the streets of Grand Junction is simply not comparable to the intolerable situation that prompted the *Hill* ruling. Grand Junction will be unable to show that panhandlers systematically subject citizens to a gauntlet of emotionally threatening confrontations. Grand Junction will be unable to show that panhandlers subject citizens to a risk to their health, or adverse outcomes in medical procedures, or that panhandlers impede access to medical counseling or treatment. To the contrary, Plaintiffs will present evidence that panhandlers by and large pose no threat to the safety or security of Grand Junction residents.

ii. *Hill* did not Invoke the "Captive Audience" Doctrine, and the "Captive Audience" Doctrine does not Justify Suppressing Speech in Public Places in Grand Junction

Relying (erroneously) on *Hill*, Grand Junction attempts to invoke the so-called "captive audience" doctrine, which cannot be extended to justify the City's restrictions on panhandling. The Supreme Court's recent decision in *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), explains why. In *Snyder*, a litigant argued that he was a member of a "captive audience" while he was attending his son's funeral and that he therefore had a right to be insulated from the offensive expression of funeral-protester Fred Phelps. The Court squarely rejected that argument, explaining that "[t]he ability of government,

consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Snyder*, 131 S. Ct. at 1220 (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)). In this case, Grand Junction will be unable to show that panhandling in public spaces "invades privacy interests." Nor will Grand Junction be able to show that panhandling is inevitably carried out "in an essentially intolerable manner." *Id*.; *see Berger*, 569 F.3d at 1053-57 (rejecting application of "captive audience" doctrine and holding that Seattle violated the First Amendment by restricting expression directed at persons standing in line or seated at areas serving food or beverages).

The *Snyder* Court emphasized that the "captive audience" doctrine is extremely limited: "we have applied the captive audience doctrine only sparingly to protect unwilling listeners from protected speech." 131 S. Ct. at 1220. The Court offered only two examples, from 1970 and 1988, of its appropriate application of the doctrine: upholding a statute allowing a homeowner to restrict delivery of offensive mail; and upholding an ordinance regulating targeted residential picketing. *Id*. (citing *Rowan v. Post Office Dept*., 397 U.S. 728, 736-38 (1970); *Frisby v. Schultz*, 487 U.S.474, 484-85 (1988)). It is telling that the Court in *Snyder* did *not* mention its more-recently-decided case of *Hill v. Colorado* as an example of its application of the "captive audience" doctrine. Contrary to Grand Junction's suggestion, the Supreme Court does not regard *Hill* as a "captive audience" case, nor does it regard *Hill* as a case that upheld a restriction of expression on the ground that it protected a purported right to be shielded from unwanted communications in public spaces.

iii. The City also Relies Improperly on *Hill* in Advancing an Unreasonable Interpretation of the Consent Provision

Grand Junction suggests an unreasonable interpretation of the "consent" portion of the amended definition of "panhandling." According to Defendant, for a Plaintiff to meet the definition of panhandling, "the solicitor must know she lacks the other person's consent to the encounter." *Motion*, at 19. Thus, Defendant apparently suggests that solicitors may *assume* that they have the necessary consent to lawfully approach and ask for contributions, unless and until the person approached makes it known that she does not consent to the encounter.[16]

Defendant's suggested interpretation is an unreasonable reading of the text: "Panhandle/panhandling shall mean to knowingly approach, accost or stop another person in a public place and solicit that person **without that person's consent** . . . ." *Ordinance 4627, Section 9.05.020 Definitions* (emphasis added). The plain text suggests that, before asking a person for money in the situations and locations regulated by the ordinance, a panhandler must first gain advance consent from the person to be solicited. For Plaintiff-solicitors, this means that, in order to comply with the law, they must receive consent to solicit a person before they can actually ask for a donation from that person. Otherwise, the solicitation occurs "without that person's consent."[17]

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[16] Defendant also asserts, incorrectly, that "[n]one of the Plaintiffs allege that they solicit others *knowing* they lack the person's consent." *Motion*, at 20 (emphasis in original). Plaintiff Gallegos – the only Plaintiff who moved to intervene after the consent provision was added to the ordinance – specifically alleges that she solicits people without obtaining consent. ECF Doc. 41, ¶ 17. The other solicitor Plaintiffs will testify that, like Ms. Gallegos, they ask for contributions without first obtaining consent.

[17] Indeed, in a different part of its Motion, Defendant appears to confirm that solicitation is prohibited unless the person to be solicited first grants consent. Defendant says that to

In proffering its unreasonable interpretation, Defendant relies on the consent provision in the statute approved in *Hill*, but that case does not support Defendant's view. The statute in *Hill* prohibited "knowingly approach[ing] another person within eight feet of such person, **unless such other person consents**. . . ." *Hill*, 530 U.S. at 766 (2000) (emphasis added). The text itself, as well as the confrontational context that the statute addressed, assumes a default status: a woman entering a clinic for medical care has not consented to be "counseled," and that status endures unless the woman affirmatively grants consent. This understanding is consistent with an earlier case that considered limits imposed on protesters outside an abortion clinic. In *Madsen*, the Court considered an injunction that prohibited "physically approaching any person seeking services of the clinic 'unless such person indicates a desire to communicate.'" 512 U.S. at 773. The Court understood this provision as barring "*all* uninvited approaches" within the area covered by the injunction. *Id*. at 774 (emphasis in original).

Similarly, courts interpreting legislation modeled on the *Hill* statute recognize that protesters are forbidden to approach unless they first obtain consent. *See Hoye v. City of Oakland*, 653 F.3d 835, 839, 841 (9th Cir. 2011) (finding that an ordinance "largely modeled after the Colorado statute" required that a "speaker wishing to engage in conversation with . . . a person entering the clinic must first obtain that person's consent before approaching within eight feet of that person"); *see also Brown v. City of Pittsburgh*, 586 F.3d 263, 271 (3d Cir. 2009); Kathleen M. Sullivan, *Sex, Money, and Groups: Free Speech and Association Decisions in the October 1999 Term*, 28 Pepp. L.

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continue receiving the now-prohibited communications of solicitation, "all Mr. Niederkruger need do is consent." *Motion*, at 24.

Rev. 723, 737 (2001) (characterizing *Hill* as upholding a law "permitting a listener preclearance requirement on speech in the public forum").

The City's suggested interpretation also produces absurd results that conflict with the City's stated goals and justifications for the ordinance. A "first one's free" interpretation allows solicitors to approach persons at night or in any of the situations that the City characterizes as "inherently coercive," *Motion,* at 19, at least as long as the person to be approached does not interrupt, saying "do not solicit me." In most cases, of course, the person solicited may not even be aware of the approach or the solicitation until it has already occurred. Thus, the City's suggested interpretation allows an initial solicitation in the precise circumstances that it regards as most problematic.[18] Surely the City did not intend to adopt an ordinance that is nearly meaningless.

As Plaintiffs reasonably understand the text of the amended ordinance, they are forbidden to approach someone at night or in the proscribed locations unless they first obtain consent to the encounter. Thus, Grand Junction errs when it asserts that the "consent" provision demonstrates that the ordinance is narrowly tailored. On the contrary, the consent provision is *more* restrictive of speech than the original ordinance. As the Supreme Court explained in *Madsen*, "it is difficult . . . to justify a prohibition on *all* uninvited approaches . . . , regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic." 512 U.S. at 774 (emphasis in original). The *Madsen* Court held that "the 'consent' requirement alone invalidates this provision." *Id*.

[18] Moreover, if a request for funds becomes "panhandling" only after the person has refused consent to the encounter, then subsection (e) merely duplicates the definition of "panhandling." Subsection (e) applies "if the person panhandling knowingly continues to request the person solicited for money . . . after the person solicited has refused the panhandler's initial request." Section 9.05.040 (e).

C. The Ordinance does not Meet the "Narrow Tailoring" Standard

In moving to dismiss, the City asks this Court to conclude not only that the ordinance is content-neutral (and it is not), but also that the ordinance satisfies the "narrow tailoring" portion of the intermediate scrutiny standard. This Court cannot conclude, solely on the basis of the initial pleadings, that the ordinance is narrowly tailored to advance a substantial government interest.

The harm that that the ordinance seeks to address is aggressive solicitation that intimidates and poses a risk or fear of physical harm. *Ordinance 4627, Recitals, p. 1*. The Supreme Court has explained:

> When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply "posit the existence of the disease sought to be cured." It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.

Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 664 (1994). At this pleading stage, Grand Junction has not met its burden. It has not documented the harms it seeks to address, nor has it shown that the ordinance directly and materially alleviates those harms. *See Clatterbuck*, 708 F.3d at 559 (reversing 12(b)(6) dismissal of challenge to panhandling ordinance when there was no evidence allowing the Court "to assess the strength of [the City's] underlying concerns" or to determine whether there was a "reasonable fit" between the stated concerns and the challenged prohibitions).

Even after discovery, Grand Junction will be unable to meet its burden. In explaining the perceived need for the new restrictions on panhandling, the introductory recitals of the initial and the amended ordinance cite increased complaints of aggressive panhandling. *See Ordinances 4618 and 4627, Recitals, p. 1*. The original ordinance

refers to 377 such complaints in 2013. *Ordinances 4618, Recitals, p. 1.* Plaintiffs, who have already obtained some pre-discovery documents through the Colorado open records laws, expect to show that the vast majority of the 377 complaints concerned the mere presence of *homeless persons*, not any aggressive, unsafe, or illegal conduct related to solicitation. Discovery will show that none of the 377 complaints involved solicitation of an at-risk person or a person standing in line, nor did any involve solicitation on a bus, at a bus stop, near an ATM, or near a school. Plaintiffs will show that none of the 377 complaints identified a specific problem with panhandling at night. These specifics are just one example of how, as this case proceeds after discovery, Defendant will be unable to demonstrate "that the recited harms are real . . . and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys,* 512 U.S. at 664.

i. The Ban on Nighttime Panhandling is not Tailored at all

The least tailored of the City's restrictions is the blanket ban on any panhandling in the evening. The City relies on *Gresham v. Peterson*, 225 F.3d 899 (7th Cir. 2000), which upheld, with minimal analysis, restrictions that included a blanket ban on nighttime panhandling. The *Gresham* court simply accepted, at face value, the City's finding that the ordinance restricted panhandling in circumstances "where it is considered especially unwanted or bothersome" or "where citizens naturally would feel most insecure in their surroundings."[19] *Id.* at 906.

The City fails to cite the more recent decision in *State v. Boehler*, 262 P.3d 637 (Ariz. App. 2011), which disagreed with *Gresham* and subjected a ban on nighttime

[19] The City does not cite *Gresham* to support its argument that its ordinance is content-neutral, and for good reason. The *Gresham* court expressly noted it was not deciding that issue, as the parties had agreed that the ordinance was content-neutral. *Gresham*, 225 F.3d at 906.

panhandling to a more careful and critical analysis. In reasoning that applies fully to this case, the court held that the prohibition failed the test of narrow tailoring. *Id*. at 643-44. In response to the assertion that solicitations at night are more likely to prompt fear and intimidation, the court noted that the ordinance "does not distinguish between solicitations that occur in dark alleyways and solicitations that take place in lighted buildings and well-lit street corners." *Id*. at 644. The ordinance also failed to distinguish between harmless nonthreatening requests and those made in an abusive, aggressive, or intimidating manner. *Id*. at 643-44 (The ordinance prohibits "both a cheery shout by a Salvation Army volunteer asking for holiday change and a quiet offer of a box of Girl Scout cookies by a shy pre-teen."). The court further noted that other (unchallenged) ordinances adequately protected residents from truly aggressive panhandling conduct likely to cause fear of bodily harm. *Id*. at 643. Similarly, provisions of the Grand Junction ordinance that Plaintiffs do not challenge adequately protect against truly aggressive panhandling that causes persons to fear for their safety. *See*, *e.g*., Section 9.05.040 (b), (c), and (d).

The City also relies on *Thayer v. City of Worcester*, 2013 U.S. Dist. LEXIS 152910 (D. Mass. Oct. 24, 2013), which also upheld a blanket ban on panhandling at night. Although the City notes that an appeal in *Thayer* is pending, it neglects to point out that the First Circuit issued an injunction pending appeal forbidding enforcement of the nighttime panhandling ban. *See Thayer v. City of Worcester*, Case No. 13-2355 (1st Cir. Nov. 22, 2013) (attached hereto as Ex. 6).

ii. The City has not Justified the Remaining Restrictions on Expression

Even if the remaining restrictions on expression were content-neutral (and they are not), the City must nevertheless bear the burden of justification. On this record, the City has not done so. Defendant's motion must be denied.

IV. Equal Protection

By forbidding solicitation for money or employment while allowing solicitation on other topics, Grand Junction violates the Equal Protection Clause. *See Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 94-96 (1972); *Speet v. Schuette*, 889 F. Supp. 2d 969, 978-79 (W.D. Mich. 2012) (anti-begging statute violates equal protection as well as First Amendment), *aff'd on other grounds*, 726 F.3d 867 (6th Cir. 2013). Plaintiffs have stated an equal protection claim.

V. Due Process

To survive a vagueness challenge, a regulation must satisfy two concerns. "[F]irst, [] regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *FCC v. Fox TV Stations, Inc*., 132 S. Ct. 2307, 2317 (2012). When, as here, "speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech." *Id.* The ordinance, as the City interpreted it and planned to enforce it, is impermissibly vague as to "passive" panhandling. At first blush, the definition of "panhandling" appears to apply only to "active" solicitors – individuals who take an affirmative step to approach another in order to solicit funds. *See Ordinance, Section 9.05.020* ("panhandling shall mean to knowingly approach, accost or stop another

person in a public place and solicit that person . . . ."). Yet, the definition also applies to solicitation carried out by "written signs or other means." *Id.* Plaintiffs will present evidence that when this suit was filed, the City interpreted its ordinance to apply to passive beggars who sit with a sign, like Ms. Browne and Ms. Sanchez, and the police planned to target them for enforcement and "move on" orders. *See* ECF Doc. 6, at 11, 13-14; *see also FCC*, 132 S. Ct at 2318 (finding due process violation when FCC's regulation, "as interpreted and enforced by the agency failed to provide a person of ordinary intelligence fair notice of what is prohibited") (internal quotation marks omitted).[20] Plaintiffs have stated a due process claim.

CONCLUSION

WHEREFORE, Plaintiffs and Plaintiff-Intervenors respectfully request that this Court DENY Defendant's Motion to Dismiss Plaintiffs' and Intervenors' Complaints Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

Respectfully submitted this 9th day of June, 2014.

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[20] Vagueness concerns are also raised by the amended ordinance's consent provision. Plaintiffs understand the amended definition of "panhandling" to forbid them to ask for a donation in the proscribed situations unless they first obtain the person's consent. As a result, plaintiffs are chilled from soliciting donations in those situations. Defendant, however, suggests that the "consent" provision does not forbid an initial request for a donation. Either Defendant has advanced an unreasonable view of the statute, or Plaintiffs have stated a claim that its chilling effect on First Amendment rights renders it unconstitutionally vague.

CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2014, I electronically filed the foregoing **PLAINTIFFS' AND PLAINTIFF-INTERVENORS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' AND INTERVENORS' COMPLAINTS PURSUANT TO FED. R. CIV. P. 12(b)(1) AND 12(b)(6)** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following recipients:

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